IN THE
SUPREME COURT OF MISSOURI

PAUL L. PASTERNAK,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	**No. SC94488**
	)	
DENISE M. PASTERNAK,	)	
	)	
Respondent-Respondent.	)	

Appeal from the Circuit Court of
Saint Francois County, State of Missouri
The Honorable Shawn Ragan McCarver, Judge

SUBSTITUTE BRIEF
OF RESPONDENT-RESPONDENT, DENISE M. PASTERNAK

GILLESPIE, HETLAGE & COUGHLIN, L.L.C.
LAWRENCE G. GILLESPIE, #29734
lgillespie@ghc-law.com
120 South Central Avenue
Suite 650
Clayton, Missouri 63105-1705
(314) 863-5444
(314) 863-7720 Facsimile
Attorneys for Respondent-Respondent

TABLE OF CONTENTS

Page(s)

TABLE OF CASES, STATUTES, AND AUTHORITIES

CASES ***Page(s)***

Page(s)

Page(s)

Page(s)

RULES

STATUTES

JURISDICTIONAL STATEMENT

Respondent-Respondent, DENISE M. PASTERNAK, concurs with and otherwise adopts the Jurisdictional Statement of Petitioner-Appellant, PAUL L. PASTERNAK.

STATEMENT OF FACTS

In the interest of judicial economy, Respondent-Respondent shall set forth such additional facts as may be necessary in the argument portions of this Substitute Brief pertaining to the points raised by Petitioner-Appellant.

POINTS RELIED ON

I.

THE TRIAL COURT PROPERLY DETERMINED THAT MOTHER'S REQUEST TO RELOCATE THE RESIDENCE OF THE MINOR CHILDREN AS BEING MADE IN GOOD FAITH AS SUCH COMPONENT OF ITS JUDGMENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE IN THAT MOTHER PRESENTED EVIDENCE THAT SHE LOST HER TEACHING JOB AND OBTAINED ANOTHER JOB IN A DIFFERENT DISTRICT AT A LOWER SALARY AND PROPOSED A PARENTING PLAN THAT HAD FATHER DRIVING EIGHTEEN (18) MILES RATHER THAN TEN (10) MILES TO EXCHANGE CUSTODY AND THE TRIAL COURT FOUND HER TESTIMONY TO BE CREDIBLE, SPECIFICALLY THAT IT DID NOT BELIEVE FATHER'S VERSION THAT MOTHER INTENTIONALLY LOST HER EMPLOYMENT IN ORDER TO MOVE AWAY FROM FATHER.

Ratteree v. Will, 258 S.W.3d 864 (Mo. App. 2008)

Henry v. Henry, 353 S.W.3d 368 (Mo. App. 2011)

State ex rel. Department of Social Services, Division of Child Support Enforcement v. Miller, 218 S.W.3d 2 (Mo. App. 2007)

Ivie v. Smith, 439 S.W.3d 189 (Mo. banc 2014)

II.

THE TRIAL COURT CORRECTLY CHARACTERIZED RELOCATION AS BEING IN THE BEST INTEREST OF THE CHILDREN BECAUSE THIS ASPECT OF THE TRIAL COURT'S JUDGMENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE TRIAL COURT'S FINDINGS UNDER SECTION 452.375 R.S.MO. FULLY DETAILED ITS ASSESSMENT AND REASONING, AND SPECIFICALLY THAT ALLOWING THE RELOCATION WOULD ALLOW EACH PARTY TO CONTINUE IN THEIR LONG-STANDING PARENTING ROLES.

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

Smith v. Great American Assurance Company, 436 S.W.3d 700 (Mo. App. 2014)

Matter of Custody of D.M.G., 951 P.2d 1377 (Mont. 1998)

Ivie v. Smith, 439 S.W.3d 189 (Mo. banc 2014)

III.

THE TRIAL COURT APPROPRIATELY ELIMINATED JOINT LEGAL CUSTODY AND VESTED SOLE LEGAL CUSTODY IN MOTHER BECAUSE THIS ELEMENT OF THE JUDGMENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THE PARTIES ARE NOT ABLE TO PARTICIPATE IN JOINT PARENTING, CANNOT DEAL WITH EACH OTHER FOR THE

BENEFIT OF THE CHILDREN, AND THEIR DISTRUST OF EACH OTHER INTERFERES WITH BASIC CONSIDERATIONS OF CO-PARENTING; FURTHER, FATHER'S CLAIM THAT THERE WAS NO CHANGE IN CIRCUMSTANCES TO JUSTIFY MODIFICATION WAS WAIVED AS IT WAS NOT SUPPORTED BY ARGUMENT AND, ADDITIONALLY, INSOFAR AS FATHER FILED HIS OWN MOTION TO MODIFY ALLEGING A CHANGE IN CIRCUMSTANCES, HE IS BARRED FROM COMPLAINING ON APPEAL THAT NO CHANGE IN CIRCUMSTANCES EXISTED.

Mehler v. Martin, 440 S.W.3d 529 (Mo. App. 2014)

Clayton v. Sarratt, 387 S.W.3d 439 (Mo. App. 2013)

Ivie v. Smith, 439 S.W.3d 189 (Mo. banc 2014)

Keel v. Keel, 439 S.W.3d 866 (Mo. App. 2014)

IV.

THE TRIAL COURT JUSTIFIABLY REFUSED TO AWARD FATHER LEGAL CUSTODY BECAUSE ITS JUDGMENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE IN THAT FATHER'S ARGUMENT IGNORES THE EVIDENCE RELIED UPON BY THE TRIAL COURT IN ASSESSMENT OF THE BEST INTERESTS OF THE CHILDREN AND ONLY RELIES ON EVIDENCE WHICH HE VIEWS AS BEING HELPFUL TO HIM; FURTHER, FATHER ASKED THE TRIAL COURT TO CONTINUE JOINT LEGAL CUSTODY AND CANNOT NOW BE HEARD

TO ASK FOR RELIEF WHICH HE DID NOT REQUEST OF THE TRIAL COURT.

Public Water Supply District No. 2 of Johnson County v. Davis, 607 S.W.2d 835 (Mo. App. 1980)

Ivie v. Smith, 439 S.W.3d 189 (Mo. banc 2014)

Seaman v. Seaman, 41 S.W.2d 889 (Mo. App. 2001)

Hall v. Utley, 443 S.W.3d 696 (Mo. App. 2014)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DETERMINED THAT MOTHER'S REQUEST TO RELOCATE THE RESIDENCE OF THE MINOR CHILDREN AS BEING MADE IN GOOD FAITH AS SUCH COMPONENT OF ITS JUDGMENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE IN THAT MOTHER PRESENTED EVIDENCE THAT SHE LOST HER TEACHING JOB AND OBTAINED ANOTHER JOB IN A DIFFERENT DISTRICT AT A LOWER SALARY AND PROPOSED A PARENTING PLAN THAT HAD FATHER DRIVING EIGHTEEN (18) MILES RATHER THAN TEN (10) MILES TO EXCHANGE CUSTODY AND THE TRIAL COURT FOUND HER TESTIMONY TO BE CREDIBLE, SPECIFICALLY THAT IT DID NOT BELIEVE FATHER'S VERSION THAT MOTHER INTENTIONALLY LOST HER EMPLOYMENT IN ORDER TO MOVE AWAY FROM FATHER.

The trial court's Judgment of August 7, 2013 granted Mother's request to relocate with the minor children from Farmington, Missouri to Silva, Missouri. As part of its ruling, the trial court found, in accordance with Section 452.377 R.S.Mo., that Mother's request to relocate was made in good faith. [L.F. p. 59]. In his first Point, Father challenges the determination that Mother's request was made in good faith as not being

based upon substantial evidence **and** as against the weight of the evidence. Father's argument highlights the problem with challenging the lack of substantial evidence to support a judgment while simultaneously claiming it is against the weight of the evidence. Father does not dispute the existence of the evidence upon which the trial court based its decision, but highlights **other** evidence to support his position instead. Rightly so, because his argument that the Judgment is against the weight of the evidence presupposes that there is sufficient evidence to support the Judgment. *In the Interest of J.A.R.*, 426 S.W.3d 624, 630 (Mo. banc 2014). These are distinct claims. As such, they should appear in separate points to be preserved for review. Rule 84.04, *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014), *J.A.R.*, *supra*, *Estate of L.G.T.*, 442 S.W.3d 96, 109 (Mo. App. 2014). In any event, by referring to other evidence that he claims buttresses his point of view, Father reveals that the trial court's Judgment was supported by substantial evidence. This Court has rarely reversed a trial court's judgment because it is against the weight of the evidence. *Pearson v. Koster*, 367 S.W.3d 36, 52 (Mo. banc 2012). Insofar as "[t]his case does not present the rare circumstance when the trial court's judgment should be reversed," *id.*, the Judgment should be affirmed.

In court-tried cases, this Court will affirm the circuit court's judgment unless it is against the weight of the evidence, there is no substantial evidence to support it, or it erroneously declares or applies the law. *Ivie, supra*, pp. 198-199. It is the appellant's burden to demonstrate that the circuit court's judgment is erroneous. *Hall v. Fox*, 426 S.W.3d 23, 25 (Mo. App. 2014). This Court must view the evidence and all reasonable

inferences drawn therefrom in the light most favorable to the Judgment and disregard all evidence and inferences to the contrary. *Ivie*, *supra*, p. 200. *Blair v. Blair*, 147 S.W.3d 882, 885 (Mo. App. 2004). Because the trial court is in the best position to weigh the evidence and render a judgment based upon that evidence, the judgment is to be affirmed under any reasonable theory supported by the evidence. *Robinson v. Robinson*, 338 S.W.3d 868, 871 (Mo. App. 2011). An appellate court defers to the trial court when there is conflicting evidence, even if there is evidence which would support a different conclusion. *Landwersiek v. Dunivan*, 147 S.W.3d 141, 146 (Mo. App. 2004).

Father's Brief asks this Court to overrule the trial court's assessment of Mother's credibility. However, issues about the credibility of witnesses are for the trial court to resolve and are not matters that appellate courts can review. *State ex rel. Department of Social Services, Division of Child Support Enforcement v. Miller*, 218 S.W.3d 2, 4 (Mo. App. 2007), *Ellis v. Hehner*, October 7, 2014 (Missouri Court of Appeals, Eastern District No. 100836). As a result, considerable deference is given to the evidentiary and factual evaluations of the trial court. *McAllister v. McAllister*, 101 S.W.3d 287, 290 (Mo. App. 2003). In making credibility determinations, the trial court may believe none, part, or all of a witness's testimony. *Just Enterprises, Inc. v. Spruce*, 243 S.W.3d 549, 550 (Mo. App. 2008). *Ellis*, *supra*. The trial court may disbelieve testimony even when it is uncontradicted. *McAllister*, *supra* at 291, *Ellis*, *supra*.

As noted above, Father's challenge, in part, claims that the trial court's assessment is against the weight of the evidence. An appellate court should not set aside a judgment

as being against the weight of the evidence unless it firmly believes that the judgment is wrong or that the judgment is clearly against the logic of the circumstances. *Henry v. Henry*, 353 S.W.3d 368, 371 (Mo. App. 2011). Moreover, by invoking the phrase "weight of the evidence," Father does not thereby get another bite of the apple. This is not an opportunity to receive a new factual determination from a different court. It is merely a review of whether the facts as found by the trial court are simply insufficient to induce belief in its determination that Mother's request to relocate was made in good faith. *L.G.T.*, *supra* at 116.

The trial court had before it a situation where Mother and Father lived approximately ten (10) miles apart. [Tr. p. 60]. Mother was faced with termination from her teaching position because of poor performance. Under these circumstances, Mother tendered her resignation. [Tr. p. 183]. She then was offered and accepted a job teaching in the Greenville School District. Mother's new position resulted in a decrease of more than $14,000.00 in annual income. [Tr. pp. 362 to 363]. Mother arranged for housing in the area of her new employment. Her proposed Parenting Plan, which in this and many other respects was adopted by the trial court, had Father driving eighteen (18) miles as opposed to ten (10) in order to exchange the children and Mother driving thirty-three (33) miles. [Tr. p. 251 and L.F. p. 83].

The trial court determined that Mother's testimony as to the issue of good faith was credible. The trial court did not believe, despite Father's argument to that effect, that Mother intentionally lost her job and took a substantial pay cut merely to move. The trial

court specifically found that her request was not made for any bad motive. [L.F. p. 59].

The decision of the Eastern District in *Ratteree v. Will*, 258 S.W.3d 864 (Mo. App. 2008) is instructive. In *Ratteree*, the mother sought permission to move to San Francisco. The father challenged the trial court's belief that the mother's request was made in good faith. The mother's employer transferred her position from Missouri. However, the father argued that the mother could have found another job in Missouri. The father also claimed that since the mother's proposed Parenting Plan resulted in him having less custody time, she was acting in bad faith. Moreover, the father asserted that the mother was moving merely to be with her fiancé. The Court of Appeals, after reviewing the father's farrago, deferred to the trial court's assessment of the mother's credibility. *Id.* 869.

Likewise here, the trial judge did not believe that Mother "intentionally" lost her job. He also accepted the results of her job search. He did not believe that Mother's motive was to interfere with Father's relationship with the children.

Despite the evidence supporting the trial court's position, Father attempts to reargue the evidence to justify a different result. Father posits that Mother intentionally lost her job and zeroed in on the Greenville School District in order to get away from Father. That was certainly his position at trial. However, Father's argument that there is evidence to support his view of the situation does not eliminate the substantial evidence upon which the trial court based its assessment. Quite simply, the trial court's determination that Mother's request to relocate was made in good faith is supported by

substantial evidence and is not against the weight of the evidence. It should be affirmed.

II.

THE TRIAL COURT CORRECTLY CHARACTERIZED RELOCATION AS BEING IN THE BEST INTEREST OF THE CHILDREN BECAUSE THIS ASPECT OF THE TRIAL COURT'S JUDGMENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE TRIAL COURT'S FINDINGS UNDER SECTION 452.375 R.S.MO. FULLY DETAILED ITS ASSESSMENT AND REASONING, AND SPECIFICALLY THAT ALLOWING THE RELOCATION WOULD ALLOW EACH PARTY TO CONTINUE IN THEIR LONG-STANDING PARENTING ROLES.

Father's second Point challenges the trial court's ruling that Mother's relocation with the minor children was in their best interests. He characterizes this declaration as not being supported by substantial evidence and against the weight of the evidence. The gist of his complaint amounts to a reevaluation of the factors to determine best interests under Section 452.375.2 R.S.Mo. and asks this Court to accept his version of the evidence in setting aside the trial court's Judgment. As with the trial court's ruling that Mother's request to relocate was made in good faith, the trial court's declaration that relocation is in the best interests of the children is likewise supported by substantial evidence, is not against the weight of the evidence and should be affirmed.

Just as with Point I, Father's Point II presents two distinct arguments, *i.e.*, that the trial court's Judgment is not supported by substantial evidence **and** that it is against the

weight of the evidence. These assertions should be presented in separate points. Rule 84.04, *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014), *In the Interest of J.A.R.*, 426 S.W.3d 624, 630 (Mo. banc 2014), *Estate of L.G.T.*, 442 S.W.2d 96, 109 (Mo. App. 2014). Moreover, despite Father's lengthy review of the facts and rearrangement into his own Section 452.375 analysis, presentation of his weight of the evidence argument presupposes that there is sufficient evidence to support the Judgment. *J.A.R.*, *supra*.

In any event, upon review of a court-tried action, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Winters Excavating, Inc. v. Wildwood Development, LLC*, 341 S.W.3d 785, 789 (Mo. App. 2011). This Court reviews the evidence, along with all reasonable inferences, in the light most favorable to the trial court's Judgment and disregards all contrary evidence and inferences. *Walker v. Rogers*, 182 S.W.3d 761, 765-766 (Mo. App. 2006). The trial court's decision is presumed correct and the appellant has the burden of showing error. *McAllister v. McAllister*, 101 S.W.3d 287, 291 (Mo. App. 2003). This Court will set aside the trial court's decision only when firmly convinced that the Judgment is wrong. *Landwersiek v. Dunivan*, 147 S.W.3d 141, 146 (Mo. App. 2004).

Because the trial court is in the best position to weigh the evidence and render a judgment based on that evidence, the Judgment is to be affirmed under any reasonable theory supported by the evidence. *Robinson v. Robinson*, 338 S.W.3d 868, 871 (Mo. App. 2011). An appellate court defers to the trial court when there is conflicting

evidence, even if there is evidence which would support a different conclusion. *Landwersiek*, *supra*. Insofar as Father challenges the trial court's determination as being against the weight of the evidence, it should be remembered that this Court should not set aside a judgment as being against the weight of the evidence unless it firmly believes that the judgment is wrong or the judgment is clearly against the logic of the circumstances. *Henry v. Henry*, 353 S.W.3d 368, 371 (Mo. App. 2011).

Prior to the revision of Section 452.377 R.S.Mo. in 1998, Missouri courts had used a four factor test set out in *Michel v. Michel*, 834 S.W.2d 773 (Mo. App. 1992) to determine whether relocation should be allowed. After the 1998 amendment, this Court, in *Stowe v. Spence*, 41 S.W.3d 468 (Mo. banc 2001), held that the four factor test was no longer appropriate, but that a court was to determine whether the proposed move was in the child's best interests. This Court did not specifically advise how that determination should be accomplished. Shortly thereafter, the Eastern District, in *Abernathy v. Meier*, 45 S.W.3d 917 (Mo. App. 2001), had before it a relocation and modification case tried before the *Stowe* decision. The *Abernathy* trial court not only employed the four factor test to the relocation but also applied the factors of Section 452.375 R.S.Mo. to determine whether modification was in the child's best interests. The Eastern District treated the four factor assessment as mere surplusage because the Section 452.375 best interest factors had been addressed.

Judge McCarver's decision dutifully followed *Abernathy* in its detailed assessment of the factors under Section 452.375 R.S.Mo. to determine the best interests of the child.

The decision clearly took into account "such factors as sincerity, character, and other intangibles that are not apparent in a trial transcript." *Blair v. Blair*, 147 S.W.3d 882, 886 (Mo. App. 2004). There should be no doubt that the trial court was in a better position to judge those elements. *McAllister*, *supra* at 291. The trial court, in its Judgment, assessed credibility of witnesses. Which witnesses were more worthy of belief is not a question for any appellate court. *Just Enterprises, Inc. v. Spruce*, 243 S.W.3d 549, 550 (Mo. App. 2008). The trial court is free to believe or disbelieve all, part, or none of the testimony given by any witness and may disbelieve testimony even when it is uncontradicted. *Transcontinental Holding, Ltd. v. First Bank, Inc.*, 299 S.W.3d 629, 643 (Mo. App. 2009).

The trial court's Judgment went through the factors listed in Section 452.375.2 one by one. Father's argument mirrors the trial court's Judgment, but concentrates on different evidence and reevaluates these factors from his perspective. This approach presents a problem for Father on the "substantial evidence" side of his argument. As explained by the Southern District in *Smith v. Great American Assurance* Company, 436 S.W.3d 700 (Mo. App. 2014):

> We are one-sided when we check the record for sufficiency of evidence. We ignore everything that could help the appellant, seeing only what might help the respondent. The resulting slant can be so severe that we rarely follow this particular rule (even when we cite it) strictly when we write our statement of facts.

> Outside readers require more context to understand a case, so our opinions often cite facts that we cannot consider in deciding if any evidence supports the judgment.
>
> Our tunnel vision is driven, not by credibility *per se*, but relevance. Consider a shopping analogy. If we need a red shirt, we ignore other colors. Nothing is wrong with other shirts, but they do not fit our need. They are not relevant to our search. Salespersons who show us other shirts, not appreciating our specific need, waste their time and ours.
>
> Likewise, in seeing if any evidence supports a judgment, contrary proof is irrelevant. And if evidence *does* support the judgment, no amount of counter-proof erases it. This is why a "no substantial evidence" argument focused on proof and inferences that favor the appellant, while minimizing those favorable to the judgment, disregards our standard of review and is "of no analytical or persuasive value." *J.A.R.*, 426 S.W.3d at 632.

Smith, *supra* at 705.

Father's argument is premised upon his retelling the evidence and how he thinks it should be viewed through the prism of each of the Section 452.375 factors. This is not the appropriate analysis. There is no specific formula for how a trial court must weigh these factors, *Dunkle v. Dunkle*, 158 S.W.3d 823, 836 (Mo. App. 2005). This is not the

appropriate analysis. Instead, since the trial court determined that relocation was in the best interests of the children, it is now up to this Court to determine whether the record as a whole contains sufficient evidence to support the trial court's assessment. *Puisis v. Puisis,* 90 S.W.3d 169, 173 (Mo. App. 2002). Therefore, Father's attempt to recompute the Section 452.375 best interest factors to show that he has more factors on his side is in vain. A best interest determination is not made on a tote board.

Be that as it may, one of the trial court's findings yields insight into its reasoning that the children's best interests are furthered by the relocation. The trial court found that Mother's proposed Parenting Plan more accurately preserved the division of parental labor which the parties had long employed. The trial court observed that if Father's position were to be accepted, the roles of the parties would be reversed. The trial court believed that such a turnabout would work to the detriment of the children insofar as each parent exhibited strengths in their present roles, Mother during the school year and Father during the summer.

Each request for relocation must be determined based on its own unique and particular facts. *Robinson*, *supra* at 875. The best interests of the children are the paramount concern in a relocation case. *Kell v. Kell*, 53 S.W.3d 203, 206 (Mo. App. 2001). That is exactly the standard which the trial court employed, and it was supported by substantial evidence. Father's attempt to reargue the decision based upon his view of the evidence does not change the result.

In our highly mobile society, it is unrealistic to inflexibly confine a custodial

parent to a fixed geographical area if another area is consistent with the best interests of the minor child. *Henry*, *supra* at 374. Consequently, few contested relocation cases involve intrastate moves of a mere forty (40) miles. It is not surprising that reported relocation cases generally concern moves to distant locations, such as San Francisco, *Ratteree v. Will*, 258 S.W.3d 864 (Mo. App. 2008), Florida, *Kell*, *supra*, Georgia, *Henry*, *supra*, New Hampshire, *Abernathy v. Meier*, 45 S.W.3d 917 (Mo. App. 2001), Ohio, *Romanetto v. Weirich*, 48 S.W.3d 642 (Mo. App. 2001) and *Cullison v. Thiessen*, 51 S.W.3d 508 (Mo. App. 2001), and Iowa, *DeFreece v. DeFreece*, 69 S.W.3d 109 (Mo. App. 2002).

The difficulties associated with relocation cases were recognized by the Montana Supreme Court in *Matter of Custody of D.M.G.*, 951 P.2d 1377 (Mont. 1998).

> While as a general proposition, it may be preferable that… parents both live in the same community and that their children have frequent and consistent contact with each parent, realistically that ideal cannot always be met.
>
> [T]he custodial parent who bears the burdens and responsibilities of raising the child is entitled, to the greatest possible extent, to the same freedom to seek a better life for herself or himself and the children as enjoyed by the non-custodial parent.

Id at 385. In a similar vein, *see, D'onofrio v. D'onofrio*, 365 A.2d 27, 30 (N.J. Super. 1976), one of the first cases to recognize the different treatment accorded custodial and non-custodial parents in the relocation context.

Resolution of questions concerning the location of a minor child's residence, as recognized by *D.M.G.* and *D'onoforio*, results in a greater burden upon the custodial parent in choice of residence than upon the non-custodial parent. This is likely the consequence of the failure, at times, to recognize that after a dissolution, children become members of two separate families. Under such circumstances, the original family unit is irretrievably lost. There is no benefit to be gained by judicial insistence on maintaining the illusion of unity. *Helentjaris v. Sudano*, 476 A.2d 828, 832 (N.J. Super. 1984). *See, also, Holder v. Polanski*, 544 A.2d 852, 854 (N.J. 1988). In many instances, undue attention, almost amounting to micromanagement, is paid to a custodial parent's residential situation, without similar contemplation of the non-custodial parent's domicile. By their terms, the provisions of Chapter 452 are both gender-neutral and impartial as to their application to custodial and non-custodial parents. However, to say that the obligations imposed by this chapter apply equally to men and women, custodial and non-custodial parents alike, is merely a truism. The more relevant truth is that, more often than not, the custodial parent is the one asserting the right to live where he, or, more accurately, she desires. It is a right that non-custodial parents, such as Father here, take for granted. *See Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 874 (Ark. App. 2002) (J. Griffin, concurring).

Again, there is no question but that determinations with regard to children should be made with an eye toward their best interest. As is often stated, it is the pole-star guiding the resolution of such disputes. *Walters v. Walters*, 113 S.W.3d 214, 217 (Mo. App. 2003). However, the rights of custodial parents are intertwined with the interests of the children. *Baures v. Lewis,* 770 A.2d 214, 229 (N.J. 2001). Seemingly, it should be possible to determine the best interest of a minor child while still allowing custodial parents to enjoy the same freedom of movement as non-custodial parents. It is more than coincidental that all of the relocation cases discussed above involve a singular focus on the mother's place of residence. Clearly, there are gender-specific consequences resulting from the assessment of where a custodial parent may live. On the other hand, non-custodial parents are not burdened by the same difficulties. Here, Father would likely be allowed to live wherever he desired. *Holder, supra* at 855. Hence, the "disquieting inconsistency [that] disproportionately affects women more than men." *Hollandsworth*, *supra* at 873.

The trial court's Judgment that the best interests of the children were served by allowing the relocation to Silva, Missouri, was supported by substantial evidence and is not against the weight of the evidence. Consequently, the trial court's Judgment allowing relocation should be affirmed.

III.

THE TRIAL COURT APPROPRIATELY ELIMINATED JOINT LEGAL CUSTODY AND VESTED SOLE LEGAL CUSTODY IN MOTHER BECAUSE THIS ELEMENT OF THE JUDGMENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THE PARTIES ARE NOT ABLE TO PARTICIPATE IN JOINT PARENTING, CANNOT DEAL WITH EACH OTHER FOR THE BENEFIT OF THE CHILDREN, AND THEIR DISTRUST OF EACH OTHER INTERFERES WITH BASIC CONSIDERATIONS OF CO-PARENTING; FURTHER, FATHER'S CLAIM THAT THERE WAS NO CHANGE IN CIRCUMSTANCES TO JUSTIFY MODIFICATION WAS WAIVED AS IT WAS NOT SUPPORTED BY ARGUMENT AND, ADDITIONALLY, INSOFAR AS FATHER FILED HIS OWN MOTION TO MODIFY ALLEGING A CHANGE IN CIRCUMSTANCES, HE IS BARRED FROM COMPLAINING ON APPEAL THAT NO CHANGE IN CIRCUMSTANCES EXISTED.

Father's third Point on his appeal objects to the trial court's elimination of joint legal custody and vesting of sole legal custody in Mother. He claims that there is no substantial evidence to support a finding that there had been a change in circumstances, or that such a custody arrangement was in the best interests of the children. To the contrary, the hundreds of pages of transcript of these proceedings and the detailed findings by the trial court clearly demonstrate that the parties could not function as a decision-making unit. Placing sole legal custody with Mother was in their best interests.

As a preliminary issue, while Father's Point claims that there was no substantial evidence to support a finding that there had been a change in circumstances, he does not develop that claim in his Argument. Errors raised in a Point Relied On, which are not supported by argument, are deemed abandoned and present nothing for appellate review. *In re Marriage of Michel*, 142 S.W.3d 912, 930 (Mo. App. 2004). In any event, Father filed his own Motion alleging that there had been a change in circumstances sufficient to justify modification. Both parties presented evidence to that effect. Father cannot now be heard to complain that there was no change in circumstances. *Clayton v. Sarratt*, 387 S.W.3d 439, 448 (Mo. App. 2013), *Beshers v. Beshers*, 433 S.W.3d 498, 506 (Mo. App. 2014).

The decision of the trial court will be affirmed unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *In re Marriage of Powell*, 948 S.W.2d 153, 156 (Mo. App. 1997). This is the same standard of review that applies in all types of court-tried cases. *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014). After this case was argued before the Court of Appeals, this Court used *Ivie* as a vehicle to recalibrate its approach to, among other things, review of family law cases:

> 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. Those prior statements should not be read to mean anything more than

> that such cases often require the trial court to weigh a great deal of conflicting evidence before finding the highly subjective facts required by the applicable statutory factors.

Id.

Consequently, it is precisely because of this "great deal of conflicting evidence" that Father faces such a heavy burden in seeking to overturn the trial court's custody determination. *Keel v. Keel*, 439 S.W.3d 866 (Mo. App. 2014). Further, the trial court may believe or disbelieve all, part, or none of the testimony of any witness. The trial court may even disregard uncontradicted testimony. *Leone v. Leone*, 917 S.W.2d 608, 614 (Mo. App. 1996).

There is no absolute rule to follow when determining what the outcome of a custody case should be; each case must be examined in light of its unique set of facts. The trial court has broad discretion in making provisions for child custody. *Schwartzkopf v. Schwartzkopf*, 9 S.W.3d 17, 21 (Mo. App. 1999); *Lavalle v. Lavalle*, 11 S.W.3d 640, 646 (Mo. App. 1999). The trial court is presumed to have considered all of the evidence and awarded custody in the best interests of the child. This Court will not disturb the trial court's determination of custody unless it is manifestly erroneous and the welfare of the children requires a different disposition. *Leone*, *supra*, pp. 613-614.

Here, the trial court, as part of its relocation determination, and in response to the dueling Motions to Modify, abolished the joint legal custody arrangement then in force and awarded sole legal custody to Mother. Judge McCarver found "specifically that the

parents have proven that they are not able to participate in joint parenting as that concept is set forth in the statutes and contemplated by our legislature and the courts." [L.F. p. 73]. Under joint legal custody, the parents share the decision-making regarding the health, education, and welfare of the children. An important factor for the trial court to consider when determining legal custody is the ability of the parents to cooperate and function as a parental unit. Where the parents are unable to communicate or cooperate and cannot make shared decisions regarding the welfare of their children, joint legal custody is improper. *Schwartzkopf, supra*. *See also H.S.H. by R.A.H. v. C.M.M.*, 60 S.W.3d 656, 661 (Mo. App. 2001).

Despite Father's claim that there was no change in circumstances sufficient to justify a modification of legal custody, breakdown in communication and cooperation **alone** is sufficient to constitute a change of circumstances warranting the modification of legal custody. *Mehler v. Martin*, 440 S.W.3d 529, 536 (Mo. App. 2014). The disintegration of the ability of the parents to communicate was amply demonstrated at trial and detailed by the trial court in its findings.

The trial court's findings with regard to the best interests of the children are replete with indicia of why continued joint legal custody would be an unmitigated disaster. "An atmosphere of distrust permeates nearly every dealing, whether it relates to visitation times, exchange times, picking up the children from the daycare provider, and even the simple filling out of forms at a physician's office." [L.F. p. 62].

The behavior by the parties "includes, but is not necessarily limited to:

1. Disparagement of the other parent in the presence of the children, more attributable to Father than to Mother;

2. Disparagement of Mother's significant other, Mr. Barbour, which resulted in the children making inappropriate remarks to Mr. Barbour, attributable to Father;

3. Petty arguments and communications over minor violations of the exchange times, attributable to both parents;

4. Conflicting instructions to the daycare provider, more attributable to Father;

5. Refusal to allow Father's relatives, with whom the children have a good relationship, to pick up the children for lunch, attributable to Mother;

6. Refusal to permit Father's relatives to pick up on the children on occasions when Father might be late due to work commitments, attributable to Mother;

7. The creation of embarrassing situations in public places, such as waiting rooms, baseball fields, and other places in the presence of the children, more attributable to Father;

8. The involvement of police in exchanges that should not require such if two parents were cooperative, attributable to both;

9. Refusal by Father to administer prescribed medicine to Austin and Father's apparent state of 'denial' regarding Austin's ADHD;

10. Arranging and setting appointments with experts without consulting the other parent, attributable to Mother, but somewhat necessitated by Father's failure to cooperate or make suggestions of choices;

11. Frightening Austin concerning adverse effects of prescribed medicines, attributable to Father;

12. Discussion of alleged inappropriate behavior of the other parent in front of the children, attributable to Father;

13. Engaging in manipulative behavior in an attempt to assert possible sexual abuse, attributable to Mother, although Mother took no further action after the counselor said no abuse had occurred;

14. Disagreements over whether the children should continue in Father's religion or Mother's new church, attributable to both;

15. Failure to send the children to summer school for all of the scheduled days, attributable to Mother;

16. Failure to include the other parent in selection of a doctor for evaluation of Austin, as well as the selection of counselor,

attributable to Mother, but because of Father's refusal to engage in the process initially;

17. Changes child care providers without consultation with the other parent, attributable to Mother;

and, most every other conceivable issue." [L.F. pp. 63-64].

"The Court is firmly convinced that both parents have engaged in near continual episodes of inappropriate behavior in the presence of the children. Neither parent is capable of actively performing their functions as mother and father *for the needs of the children,* if those functions involve any dealings whatsoever with the other parent." [L.F. p. 65].

"Both parents have been so consumed with animus, spite, distrust, and ill-will that they have allowed those feelings to interfere with basic considerations of co-parenting. Both have attempted at times to be controlling regarding times the other parent could have exercised, and even exchanges are fraught with simple issues leading to argument or spite." [L.F. p. 66].

It is clear from the Court's recitation of the interaction between the parties that joint legal custody is inappropriate under the circumstances. In his Motion to Modify, Father claimed a change in circumstances, so he cannot now maintain that no such change in circumstances existed to justify the elimination of joint legal custody. Clearly, there was substantial evidence to support the trial court's determination that it was in the

best interests of the children that joint legal custody be abrogated and that legal custody be placed solely with Mother. The trial court's Judgment should be affirmed.

IV.

THE TRIAL COURT JUSTIFIABLY REFUSED TO AWARD FATHER LEGAL CUSTODY BECAUSE ITS JUDGMENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE IN THAT FATHER'S ARGUMENT IGNORES THE EVIDENCE RELIED UPON BY THE TRIAL COURT IN ASSESSMENT OF THE BEST INTERESTS OF THE CHILDREN AND ONLY RELIES ON EVIDENCE WHICH HE VIEWS AS BEING HELPFUL TO HIM; FURTHER, FATHER ASKED THE TRIAL COURT TO CONTINUE JOINT LEGAL CUSTODY AND CANNOT NOW BE HEARD TO ASK FOR RELIEF WHICH HE DID NOT REQUEST OF THE TRIAL COURT.

Father's final Point asserts that he, not Mother, should have been granted sole legal custody. The trial court's Judgment with regard to legal custody, Father's contention notwithstanding, was clearly supported by substantial evidence and was not against the weight of the evidence and should be affirmed.

As an initial matter, Father's fourth Point, as do Points I and II, violates Rule 84.04 in that it challenges both the purported lack of substantial evidence to support the trial court's ruling and claims that the ruling is against the weight of the evidence. These are distinct claims and should appear in separate points. *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014), *In the Interest of J.A.R.*, 426 S.W.3d 624, 630 (Mo. banc 2014), *Estate of L.G.T.*, 442 S.W.3d 96, 109 (Mo. App. 2014).

Moreover, it must be pointed out that Father did not request sole legal custody, but instead, asked the trial court to maintain joint legal custody. No claim was made by Father at trial that the trial court should consider alternative proposals with regard to legal custody. It is well-settled that he cannot now change his theory and attempt to convict the trial court of error with respect to a contention which was never raised below. *Public Water Supply District No. 2 of Johnson County v. Davis*, 607 S.W.2d 835, 837 (Mo. App. 1980).

Appellate review is not undertaken with unfettered discretion. *Jerman v. Jerman*, 135 S.W.3d 536, 537 (Mo. App. 2004). As this is a bench-tried case, this Court will overturn the circuit court's ruling only if there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *In the Matter of Schnieders*, 178 S.W.3d 632, 633 (Mo. App. 2005). The trial court is free to believe or disbelieve all, part, or none of the testimony given by any of the witnesses. *Klockow v. Klockow*, 979 S.W.2d 482, 491 (Mo. App. 1998). An appellate court defers to the trial court's credibility determination. *Seaman v. Seaman*, 41 S.W.2d 889, 892 (Mo. App. 2001). This Court, upon review, takes the evidence in a light favorable to the Judgment. *Young v. Young*, 59 S.W.3d 23, 30 (Mo. App. 2001).

The basis for determining child custody is the best interest and welfare of the child. *Hankins v. Hankins*, 920 S.W.2d 182, 186 (Mo. App. 1996). This "best interests" standard applies to an adjudication of legal custody. *Hall v. Utley*, 443 S.W.2d 696, 703 (Mo. App. 2014). There is no one rule that can be applied to determine the outcome of a

custody case. Each case has its own distinctive features and must be reviewed in light of its own unique set of facts. *Klockow*, *supra*. The trial court has broad discretion in child custody matters. *Chapin v. Chapin*, 985 S.W.2d 897, 900 (Mo. App. 1999).

Father would ask this Court to cherry-pick. The essence of Father's argument is that if you look at the trial court's findings, isolate the findings that are favorable to him and eliminate the ones that are favorable to Mother, he should be awarded sole legal custody of the children. Mother will not unduly lengthen this Substitute Brief by reiteration of the trial court's exhaustive recitation of why it was in the best interests of the children to place legal custody with her. Instead, Mother directs this Court to the observations made by Judge Smith in *Flathers v. Flathers*, 948 S.W.2d 463 (Mo. App. 1997):

> This case once again demonstrates the extreme difficulty the courts have in dealing with child custody matters. . . . To say custody to one is right and to the other is wrong, defies logic, reason, or evidentiary support. In determining the best interests of children in the present, trial courts are forced, in many respects, to predict how present conditions will play out in the future, when, ultimately . . . the only sure way to determine the best interests of children is by the passage of time.

Id. pp. 471-472.

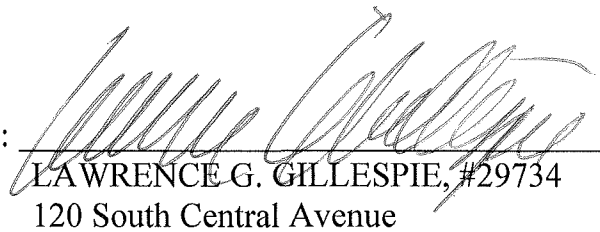
The trial court heard days of testimony. It had the opportunity to be in the same courtroom with these parties for an extended period of time. It observed their demeanor, as well as the deportment of other witnesses who were also presenting evidence about the behavior of the parties. It carefully explained its reasoning in both allowing relocation and in its transfer of legal custody. It is the rare case indeed in which an appealing party cannot point to some evidence which would support his or her view of what should have happened. The issue is not, however, whether some evidence buttresses a different outcome, but whether the trial court had substantial evidence to support the determination it in fact made, *i.e.*, to award legal custody to Mother. The answer is unquestionably yes. The Judgment should be affirmed.

CONCLUSION

For all the foregoing reasons, Respondent-Respondent, DENISE M. PASTERNAK, respectfully requests that this Court affirm the trial court's Judgment in all respects.

Respectfully submitted,

GILLESPIE, HETLAGE & COUGHLIN, L.L.C.

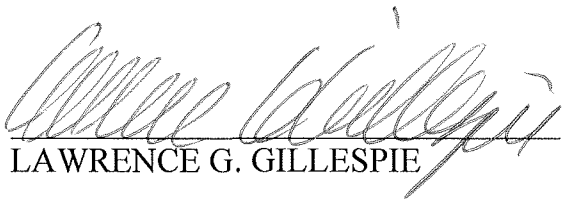
By: 

LAWRENCE G. GILLESPIE, #29734
120 South Central Avenue
Suite 650
Clayton, Missouri 63105-1705
lgillespie@ghc-law.com
(314) 863-5444
(314) 863-7720 Facsimile
Attorneys for Respondent-Respondent
Denise M. Pasternak

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Substitute Brief was served via the Court's Missouri eFiling System and by United States mail, first class, postage prepaid, to Ms. Christina L. Kime, Attorney for Petitioner-Appellant, 119 South Main Street, P.O. Box 337, Piedmont, Missouri 63957 this 2nd day of January, 2015.

Further, the undersigned states that said Substitute Brief contains Six Thousand Seven Hundred Sixty-Three (6,763) words.



LAWRENCE G. GILLESPIE

STATE OF MISSOURI)
) **SS.**
COUNTY OF SAINT LOUIS)

Comes now, LAWRENCE G. GILLESPIE, and being duly sworn upon his oath, deposes and states that the facts stated in the foregoing are true and correct to the best of his knowledge, information and belief.

LAWRENCE G. GILLESPIE

Subscribed and sworn to before me, a Notary Public, this the 2nd day of January, 2015.

Laurie A. Robinson
Notary Public

My Commission Expires:

LAURIE A. ROBINSON
Notary Public, Notary Seal
State of Missouri
Saint Louis County
Commission # 12516823
My Commission Expires October 17, 2016