

THE SUPREME COURT OF MISSOURI

No. SC 96545

JASON BOWERS

Respondent

v.

JESSICA BOWERS

Appellant

Appeal from the Circuit Court of the City of St. Louis
The Honorable Elizabeth Hogan, Circuit Judge

**APPELLANT'S BRIEF
IN THE COURT OF APPEALS
(Redacted)**

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STATEMENT OF JURISDICTION

This is an appeal from the final judgment of the Circuit Court of the City of St. Louis in joined actions seeking dissolution of marriage, a determination of paternity, the resolution of child custody issues including the custody demands of a third party who was neither the biological nor adoptive parent of the child, and awards of child support.

The Circuit Court entered its judgment dissolving the marriage of Jason Scott Bowers and Jessica Layne Bowers on February 3, 2015. Legal File at 166-181. In its decree the trial court awarded sole legal and physical custody of Mrs. Bowers' six-year-old daughter J.B. to Mr. Bowers, who was not the child's biological father and had not formally adopted her. Id. at 170-74. Mrs. Bowers filed a motion requesting amendment of the judgment or a new trial on March 3, 2015. Id. at 182-85. The court entered its amended judgment on May 26, 2015. Id. at 191-94. Mrs. Bowers filed her notice of appeal from the original and amended judgments on July 6, 2015. Id. at 195-97.

A judgment becomes final for purposes of appeal at the expiration of 30 days after its entry, assuming that not timely authorized after-trial motion is filed. Mo. R. Civ. P. 81.05. No such motion was filed after the entry of the amended judgment in this case. A notice of appeal in a civil case is timely if filed within 10 days after the judgment to be reviewed became final. Mo. R. Civ. P. 81.04(a).

This appeal does not involve any matter within the exclusive jurisdiction of the Missouri Supreme Court. As provided in Mo. Const. Art. 5, §§ 3 and 15, the Missouri Court of Appeals for the Eastern District has jurisdiction of this appeal.

STATEMENT OF FACTS

A. Parties and Pleadings

Jason Scott Bowers filed a petition seeking the dissolution of his marriage to Jessica Layne Bowers, a determination of physical and legal custody of a child borne by Mrs. Bowers approximately two years prior to their marriage, and an award of child support. Legal File at 21-26. The petition was filed on May 10, 2013. Id. at 26.

Mr. Bowers alleged that he and Mrs. Bowers had been married on April 3, 2010. Id. at 22. In the count seeking dissolution of that marriage Mr. Bowers stated that J.B., who was five years old when the petition was filed, had been born of the marriage. Id. Mr. Bowers requested that the Circuit Court award the parties joint legal and physical custody of the child. Id. He sought the latter relief also in a separate count of his petition, entitled "Physical and Legal Custody" and premised on the provisions of Mo. Rev. Stat. § 210.823. Id. at 24-25. In a third count Mr. Bowers claimed entitlement to receive child support from Mrs. Bowers. Id. at 25.

Mrs. Bowers filed an answer and cross-petition seeking dissolution of her marriage to Mr. Bowers. Id. at 31-36. She asked that she be awarded legal and physical custody of J.B., that Mr. Bowers be granted "reasonable rights to visitation and temporary custody," and that he be ordered to pay child support. Id. at 34-35. Mrs. Bowers alleged:

Petitioner has been controlling and demeaning to the Respondent, and refuses to engage in constructive dialog with Respondent regarding the child, or any other issue, threatening the Respondent with withholding money, divorce, taking money out of an account of the Respondent's.

Id. Mrs. Bowers acknowledged repeatedly that Mr. Bowers was the legal father of J.B. Id. at 31-32, 35. She requested an award of child support. Id. at 34-35.

Mr. Bowers filed an answer to the cross-petition on September 20, 2013. Id. at 38-41. He attested that he and Mrs. Bowers "have been following a 2-2-3 parenting plan," that on one or more occasions Mrs. Bowers had interfered with his custodial time, and that no interference had occurred since the inception of court proceedings several months earlier. Id. at 40. In a motion seeking a temporary award of joint physical and legal custody approximately three months later, Mr. Bowers alleged that Mrs. Bowers had interfered with his access to the child during her winter break from school. Id. at 42-45.

Steven Andrew Nugent filed a motion alleging that he was J.B.'s biological father and seeking leave to intervene in the custody proceeding in order to assert his parental rights. Id. at 46-50. Mr. Nugent invoked the provisions of Mo. Rev. Stat. § 210.841.2 and requested that the child's birth certificate be amended to reflect his paternity and to remove Mr. Bower's name as the biological father. Id. at 48. Mr. Nugent sought a judgment awarding joint legal custody of J.B. to Mrs. Bowers and himself. Id. at 49.

The Circuit Court appointed Joan Coulter to serve as J.B.'s guardian ad litem. Id. at 29-30. The court also granted Mr. Nugent leave to intervene in the action between Mr. Bowers and Mrs. Bowers. Id. at 56. On January 14, 2014, the court entered an order appointing Ann Dell Duncan-Hively, Ph.D., to serve as J.B.'s therapist. Id. at 58,

Mr. Bowers subsequently filed a motion in which he alleged that Ms Bowers was an unfit parent and that the best interests of J.B. would be served by awarding sole legal and physical custody of the child to him as a third party within the contemplation of Mo. Rev. Stat. § 452.375.5. *Id.* at 73-78. Mr. Bowers prayed that the custody award be subject to "such rights of visitation as the Court deems appropriate" for Ms Bowers. *Id.* at 77. The motion also alleged that Mr. Nugent was unfit and requested that he be granted "no visitation and custody rights." *Id.* at 78.

Mrs. Bowers filed a motion seeking the dismissal of Mr. Bowers' request for an award of third-party custody. *Id.* at 129-30. The motion noted that Mr. Nugent had since alleged that he was J.B.'s biological father, that his allegation had been confirmed by DNA testing, and that he had been granted leave to intervene in the proceeding. *Id.* at 129. Mrs. Bowers contended that Mr. Bowers should be precluded from both alleging that he was J.B.'s legal father and seeking an award of third-party custody. *Id.* at 130.

B. Evidence Presented at Trial

1. Ann Duncan-Hively, Ph.D., J.D.

Dr. Duncan-Hively testified first at trial. *Tr.* at 14. Both Mr. Bowers and Ms Coulter, the guardian ad litem, had had subpoenas served upon her. *Id.* at 13. Ms Coulter claimed the witness and questioned Dr. Duncan-Hively first. *Id.* at 14.

Dr. Duncan-Hively stated her credentials: "I have a bachelor's degree. I have a Master's Degree in School Psychology, Ph.D., clinical. I also have a Juris Doctor Degree and I'm a certified mediator." *Id.* at 14-15. She said that most of her work consists of "working with young children who have been traumatized or [are] dealing with

transitions." Id. at 15. Dr. Duncan-Hively testified that she has been appointed to perform family court evaluations in Phelps County, Dent County, Jefferson County, St. Francois County, St. Louis County, and a "couple more." Id. at 33-34.

Dr. Duncan-Hively stated that she had been designated by the trial court in this case to "perform individual therapy" with J.B.. Id. at 15-16. She had seen J.B. in therapy 10 times since the entry of that order, on an every other week schedule, and also had met with Mr. Bowers alone once and Mrs. Bowers alone twice. Id. at 18, 36. Mr. Bowers and Mrs. Bowers were separated and living in different households before the therapy began. Id. at 24, 36.

Dr. Duncan-Hively testified that J.B. had been five years old when they met for the first time. Id. at 16. She said that J.B.'s verbal IQ was 134, which placed her "in the 99th percentile," and that her vocabulary was "significantly above average" for a five-year-old. Id. at 18-19. J.B. was reading at a second grade level prior to entering first grade. Id. at 19. Dr. Duncan-Hively stated her opinion that J.B. "will need to be in therapy for a minimum of two years." Id. at 27. She explained: [J.B.] needs work on anxiety. She needs work on self-calming techniques. She needs to have her life stabilized." Id. Dr. Duncan-Hively stated her opinion that J.B. does not know "the difference between the truth and not the truth." Id. at 28-29.

Dr. Duncan-Hively testified that J.B. had shown "quite a bit of difficulty" with anxiety. Id. at 21. She said that the conflict between Mr. Bowers and Mrs. Bowers "has been a large part of the theme." Id. at 23. Dr. Duncan-Hively testified that "[o]ne of the places [J.B.'s anxiety came from] was the manner in which mom and dad handled

themselves in getting ready to get divorced." Id. at 24. When she was asked what J.B. feared most, Dr. Duncan-Hively answered: "[I]t's sudden unpredictable change, as you well might expect." Id. at 75. Dr. Duncan-Hively said that J.B. experienced sudden unpredictable change "every place," including Mr. Bowers' household. Id. at 75.

Dr. Duncan-Hively testified that her work with J.B. was "still dealing with . . . basic things like trust, reliability, predictability, logic." Id. at 25. She said that there had been "a complicating factor" when J.B. had two seizures, which had "stirred the pot." Id. at 25. Dr. Duncan-Hively recalled that the first seizure had occurred while J.B. was in school and the second had followed at a hospital. Id. When she was asked how she had found out about the seizures, Dr. Duncan-Hively answered: "Mom called." Id. She recalled that both Mr. Bowers and Mrs. Bowers had gone to the hospital when the seizures occurred. Id. at 54.

Dr. Duncan-Hively testified that J.B.'s seizures appeared to have been "developmental" or "physiological," rather than "psychological," but that there was "stress on top of that." Id. at 26. She explained the stress:

Well, she goes back and forth between two households, and she has two parents that she grew up with that are getting divorced and she has a pending biological father that has another child that she would like to have a relationship with, and then she's got a live-in father with two other kids that she has a relationship with. It's a little confusing when you are five.

Id. at 26-27. She said that there had been no further seizures: "[J.B.] is on medication and it looks like it's under control. There has been some good positive changes." Id. at 25-26.

Dr. Duncan-Hively noted that J.B.'s present school is the only one that she has attended. Id. at 46. She said that J.B. was "doing well" in that school, characterized the child as "sturdy," and stated her opinion that "If mom decided or the Court decided or somebody decided she had to go to a new school, she would be all right." Id. at 47.

Dr. Duncan-Hively testified that she had observed J.B. interacting with both Mr. Bowers and Mrs. Bowers. Id. at 30. She said that the child is "bonded" to both parents. Id. at 32. When she was asked to "describe or compare and contrast" J.B.'s relationships with Mr. Bowers and Mrs. Bowers, Dr. Duncan-Hively answered:

Basically she loves her mom. She watches her mom's emotions. She wants to take care of her mom when her mom is sad. She wants to make sure her mom is okay. She adores her father, Jason. She teases him and is playful with him in a completely appropriate manner. She is a little bossy with her mom, but that's who she is as a child.

Id. at 39. She explained that J.B. "takes care of" both Mr. Bowers and Mrs. Bowers, "but when mom is upset she is very tuned in to her mother." Id. at 40. And:

It's my opinion that this is a child who is going to be a caretaker of the universe. Right now, when mom is unhappy, mom gets the caretaking ... It's just built into this child. She will caretake a puppy. She will caretake anything.

Id. at 60.

Dr. Duncan-Hively testified: "[I]f we use attachment theory as the analysis, then [Mr. Bowers] would be the primary parent." Id. at 44. When counsel for Mr. Bowers asked what made him the primary parent, Dr. Duncan-Hively answered: "It's one of those mysterious processes. I think it comes from very early attachment when he was the

care provider and spent a lot of time with her, still does." Id. She was unable to say whether Mr. Bowers had spent as much time as Mrs. Bowers with J.B. as a baby. Id. at 69.

Dr. Duncan-Hively stated her understanding from "the context of therapy" that Mrs. Bowers had told J.B. "she doesn't get to have [Mr. Bowers] any more." Id. at 43. According to Dr. Duncan-Hively's interpretation of J.B.'s reporting, Mrs. Bowers had indicated to the child that Mr. Bowers "is going to go away and that she is not going to love him any more because she is going to have another dad that's her real dad and that she could love that real dad instead." Id. at 43. When she was asked whether she was "certain" that Mrs. Bowers had made that statement to J.B., Dr. Duncan-Hively answered:

Again, you have to put everything in context of the language system of a five-year-old whose parents are going through a divorce. So the language that she uses may not be as precise as one would wish, but it's what I have to work with.

Id. at 43-44. She stated her opinion that removing Mr. Bowers from J.B.'s life would be devastating to the child and would interfere with her "emotional development and path to maturity." Id. at 45, 51.

Dr. Duncan-Hively said that J.B. is not bonded to Mr. Nugent: "He's a figment ... Steve is the guy that has a really cute kid named [E.N.]" Id. at 32. She stated her opinion that if Mrs. Bowers had gotten professional advice earlier "she would not have told the child in the context of the divorce about the biological father," which would have avoided "the conflict that that generated." Id. at 41. Dr. Duncan-Hively added: "But it's water over the dam. It's done." Id. When counsel for Mr. Bowers suggested that "this event

was emotionally traumatic for the child and continues to be," she responded: "I don't know about trauma. I just know it had a major impact on her sense of herself and her sense of who her family was." Id. at 41-42.

Dr. Duncan-Hively noted that Mr. Nugent had fathered other children and then "not necessarily ha[d] relationships with them." Id. at 49. She stated that she "would work with Mr. Nugent to try to stabilize the consistency so that J.B. would be able to count on him in the same way that she counts on [Mr. Bowers]," subject to the trial court's ruling. Id. at 49-50. Dr. Duncan-Hively stated her opinion that Mr. Nugent should have a place in J.B.'s life, "[d]epending on what the Court decides" and Mr. Nugent's own choice about having such a relationship. Id. at 50.

When Mr. Bowers' attorney asked "which of these two parents . . . puts J.B.'s interests first," Dr. Duncan-Hively answered: "[T]hey both love her and they both put her interests first." Id. at 54. When counsel asked again whether it was her opinion that Mrs. Bowers was prone to making choices that put her own interests first, Dr. Duncan-Hively answered: "I don't get the sense that it's ego based. I think it's just impulsive. I think she just wants to do something and opens her mouth and there it is." Id. at 53. She noted that Mr. Bowers and Mrs. Bowers had scheduled custody times and exchanged custody during the litigation and "both went to the hospital together when the child had the seizure," and stated her opinion that Mr. Bowers and Mrs. Bowers had demonstrated the ability to co-parent. Id. at 54-55.

Dr. Duncan-Hively testified that she would expect Mr. Bowers to respect Mrs. Bowers' parental rights if the trial court decided to award him primary custody of J.B. Id.

at 56-57. She allowed that "a parenting plan that is perhaps more detailed" would be advisable if the court awarded primary custody to Mrs. Bowers. *Id.* at 57.

Counsel for Mrs. Bowers sought to question Dr. Duncan-Hively about the effect that Mr. Bowers' displays of anger might have had upon J.B. *Id.* at 60-61. Counsel inquired about the psychological effect of hearing Mr. Bowers call Mrs. Bowers "a name like a whore." *Id.* at 60. Counsel for Mr. Bowers objected that the question called "for facts facts not in evidence and speculation." *Id.* The trial court sustained the objection: "We are not going to go through ... every horrible thing someone may or may not have said ... There is no evidence of that right now." *Id.*

2. Jason Bowers

Mr. Bowers recalled that he and Mrs. Bowers had begun dating each other during October, 2007. *Id.* at 96. Mrs. Bowers told him at that time that she was pregnant and that Mr. Nugent was the biological father of her child. *Id.* at 96, 165. Mr. Bowers acknowledged in testimony that he is not J.B.'s biological or adoptive father. *Id.* at 161.

Mr. Bowers went to medical appointments with Mrs. Bowers during her pregnancy. *Id.* at 96-97. He testified that he was present for J.B.'s birth and described his active participation as father in her childhood. *Id.* at 97-99, 102-05; Ex. 9. He and Mrs. Bowers signed an affidavit of paternity shortly after J.B.'s birth that resulted in the issuance of a birth certificate naming Mr. Bowers as the child's father. *Id.* at 99-100; Ex. 4. When he was asked why he had signed the affidavit of paternity, Mr. Bowers responded: "Because in my eyes she was my child." *Id.* at 164.

Mr. Bowers testified that J.B. had lived with Mrs. Bowers and with him since her birth and through their separation. Id. at 90. He said that he and Mrs. Bowers had shared the costs of J.B.'s school tuition and work-related child care costs and followed the "2-2-3 schedule" to share custody of J.B. since separating. Id. at 91, 108. Mr. Bowers explained: "I would have her for two days, Jessica would have her for two days, and alternate between weekends." Id. at 91.

Mr. Bowers stated his opinion that the custody arrangement did not work well for the child: "Well, it seemed that the plans got changed sometimes when Jessica would feel like she didn't want to follow the rules." Id. at 91. Mr. Bowers explained:

There have been [six or seven] instances where she would call me and ask if I could switch a day, she had something going on with the family. And I would say, sure, and we would agree upon she would get her this day and I would receive her this following day. Then when it came time to honor that agreement it wouldn't happen.

Id. at 91-92. Mr. Bowers also complained of limited access to J.B. during December, 2013, while the child was out of school for five days:

I was supposed to have her at least two or three of those days. And I was not allowed to communicate with her. I didn't get to pick her up from school like was previously agreed upon ... I was supposed to have her Christmas Eve and Christmas. I know that Jessica's family does a big ordeal for Christmas Eve. I said why don't you keep her Christmas Eve, I will keep her Christmas. We agreed we would meet about 9:30, 10:00 o'clock on Christmas. Noon, one o'clock rolls around and I have to call her repeatedly to get ahold of her to be able to pick up J.B, and I had a very limited time on Christmas day.

Id. at 93-94, 208.¹ Elsewhere Mr. Bowers estimated that Mrs. Bowers had deprived him of "[a]t least three or four days" with [J.B.] over that holiday. Id. at 208.

Mr. Bowers characterized his communications with Mrs. Bowers since their separation as "absolutely poor," complaining that Mrs. Bowers "answers the phone 12 percent of the time" when he calls, "rarely responds to any of my emails [and] text messages." Id. at 113-16. Mr. Bowers acknowledged having called Mrs. Bowers "a dirtbag race mixer" or "something along those lines," having asked her if she was "pregnant by her boss," having sent Mrs. Bowers text messages in which he referred to her as "a scumbag mother" and "a two-bit whore who isn't smart enough to know you are too fat and lazy to raise your own children," and having "made comments about her weight, telling her that you seem to be getting fatter." Id. at 165-66, 284-90; Ex. A. When he was asked whether he had sent a text to Mrs. Bowers "indicating her mother is fake as hookers' tits," Mr. Bowers allowed that he might have. Id. at 188. He testified that communications had improved of late and "we seem to make some strides." Id. at 189. When Mr. Bowers was asked if he remembered "tearing the head off a doll one time when [he was] mad at [Mrs. Bowers' older daughter]," Mr. Bowers answered: "I do not recall." Id. at 168.

Mr. Bowers said J.B. calls him "Dad" or "Daddio" when they are together. Id. at 119-20. He testified that for several months preceding trial J.B. had not been allowed to refer to him as Dad in the home that Mrs. Bowers shares with Mr. Harrington, and that he

¹ Mr. Bowers said he learned later that this was the time during which Mrs. Bowers introduced J.B. to Mr. Nugent. Tr. at 92-94, 121-22.

is referred to as a "little bitch" by Mrs. Bowers, Mr. Harrington, Mr. Harrington's two children, and J.B.'s half-sister. *Id.* at 117-18, 122. He attributed that information to J.B. *Id.* at 117-18.

Mr. Bowers testified that he was requesting sole legal custody of J.B., explaining:

I believe I act in J.B.'s best interest and I don't believe that Jessica respects J.B.'s feelings on me being her father and repeatedly has shown [that] by not allowing me to see her at certain times, circumventing court orders, that she feels that she can do what she wants.

Id. at 96, 134. When he was asked, "In your heart and mind who are you to J.B.," Mr. Bowers answered: "I'm her father, best friend, cuddle factory, support pillar. I listen to her. She trusts me. Only one she's ever known." *Id.* at 122. Mr. Bowers said it was his belief that Mr. Nugent was not fit "to have contact with [his] daughter" and that he considered contact with Mr. Nugent "detrimental to [J.B.'s] welfare." *Id.* at 130, 140. Mr. Bowers said these opinions were based on "lack of stable employment," "mak[ing] children and not support[ing] them," and "[l]ack of work ethic, so to speak." *Id.* at 136-37.

Mr. Bowers testified regarding his belief that Mrs. Bowers had engaged in "numerous" affairs during their marriage. *Id.* at 81-82, 169. He stated that she had stayed away from home extensively during the last two months to one year that they resided together, and had left J.B. and her daughter from a previous relationship with him during those absences. *Id.* at 81-82, 85-87. Mr. Bowers said Mrs. Bowers worked for the St. Louis City Fire Department and that he had received information about her purported affairs from firefighters and paramedics with whom she worked. *Id.* at 84-85. When his

attorney asked whether this conduct had imposed a burden upon the marriage, Mr.

Bowers answered affirmatively:

My wife who was supposed to be my partner has disappeared. She comes home long enough to change her clothes, take a shower, and out the door again. It creates a lot of responsibility on my part. I had to find day care because she wouldn't come home. I have to leave for work at 6:00 o'clock in the morning, she doesn't show up. I have to find somebody to come watch the children ... [T]hen there is a financial burden of trying to cover all the bar tabs and hotel rooms she was racking up on our credit cards. It was a pretty frustrating time.

Id. at 86-87.

Mr. Bowers testified that he and Mrs. Bowers separated on August 1, 2012. Id. at 80. He stated his belief that Mrs. Bowers had begun a relationship with Doug Harrington, the man with whom she was residing at the time of trial, during January, 2012. Id. at 87-88.

3. Jessica Bowers

Mrs. Bowers identified herself as the mother of J.B. and [an older daughter] from a prior relationship. Id. at 218. At the time of trial she resided with her daughters, her boyfriend Doug Harrington, and Mr. Harrington's two sons, C.H. and G.H. Id. at 218-19, 250. Mrs. Bowers testified that she is a licensed paramedic and had been employed by the St. Louis City Fire Department as an emergency medical services provider since May, 2010. Id. at 219, 378. Mrs. Bowers said that Mr. Nugent was J.B.'s biological father and that she had begun seeing Mr. Bowers early in her pregnancy. Id. at 223, 233-34. During trial the parties entered into a stipulation that Mr. Nugent was J.B.'s biological father. Id. at 232.

Mrs. Bowers testified that her older daughter attended Murphy Elementary School in High Ridge, and that J.B. had attended Tower Grove Christian School in St. Louis for pre-school and kindergarten. Id. at 234-35. She said J.B. was doing very well in school and that her behavior at home was very good. Id. at 289-90. Mrs. Bowers stated that Mr. Bowers' mother works at Tower Grove Christian School and that the child's tuition was discounted on account of that relationship. Id. at 235, 386. She said that she and Mr. Bowers split J.B.'s tuition expense, which amounts to "a little over \$2,000 altogether for the year." Id. at 386.

Mrs. Bowers said that if the court decided that Mr. Bowers should have no custody or visitation it was her intention to keep J.B. in Tower Grove Christian School through the end of the year, and to return the child to that school in future years "[i]f she wanted to go back." Id. at 387. When she was questioned about taking J.B.'s preferences into account in determining where she would attend school, Mrs. Bowers stated: "I want her to go somewhere where she's comfortable because if she's not comfortable she's not going to learn as well." Id. at 387. She testified that J.B. was "comfortable" and "doing well" at her present school. Id. at 387.

Mrs. Bowers said that J.B. had expressed interest in attending school with her sister, and that she would send J.B. to Murphy Elementary School if she "had to have an alternative place." Id. at 235-36, 386-87. Mrs. Bowers acknowledged that both she and Mr. Bowers live in the City of St. Louis. Id. at 237. She stated her understanding that "there was a ruling made that the kids in the city could attend county schools until the St. Louis City Schools ... become accredited." Id. at 236. When she was asked whether J.B.

would still be accorded a family tuition discount if the trial court decided that Mr. Bowers had no custodial rights, Mrs. Bowers answered: "That I don't know." Id. at 235. She said she "would figure out a way" to get the tuition paid if J.B. was to remain at Tower Grove Christian School. Id. at 387.

Mrs. Bowers testified that she and Mr. Bowers were using a 2-2-3 custody arrangement with respect to J.B. during the school year:

It's a two-week time frame. One week I will have her from Monday evening when she gets out of school and I keep her until Wednesday morning when I drop her off at school. And then Jason will have her until Friday morning when he drops her off at school. And then I will get her Friday evening until ... Monday morning when I drop her off at school.

Id. at 247. When she was asked whether there had been any problem with that schedule, Mrs. Bowers described two incidents:

A. . . . Jason wanted me to meet him at Target. And I also have [my older daughter] that I take care of and I couldn't leave to take [J.B.] because [the older child] was sick. And that resulted in an argument about where the drop off and pick up location is . . .

Q. Jason wouldn't pick up J.B. from your house. Is that correct?

A. Right.

Q. So there was a little bit of a conflict at that point, correct?

A. Correct.

Q. And is that how we came to the agreement that the meeting place would be at Target?

A. Yes.

Q. Has there been any kind of conflict in that regard since then?

A. Yes.

Q. What were the other incidents with conflict?

A. . . . Jason did not want me to bring [my boyfriend] with me. He wanted me to come by myself . . . I ended up coming by myself.

Tr. at 247-50.

Mrs. Bowers acknowledged that Mr. Bowers "has been involved in J.B.'s life since she was born." Id. at 330. She testified that she and Mr. Bowers had agreed at the time of J.B.'s birth that Mr. Bowers "would be in the role of her father." Id. at 251, 253, 315-17; Ex. 4. She explained: "I wanted her to have a father in her life, and I wanted her to have . . . a stable home with a mom and dad there." Id. at 252. She recalled that she and Mr. Bowers had been together "[a]bout six months" at that time. Id. When she was asked whether she still believed that Jason was a good father for J.B., Mrs. Bowers said that she did not. Id. at 254. She explained: "Jason [for] about the last three years has exhibited some extreme anger issues and violence that is not appropriate for a child." Id. At that point counsel for Mr. Bowers objected: "She is not pleading misconduct. That is what she is pleading. That's what she is testifying to, and there is no pleading about misconduct in this case. It is beyond the scope . . . [T]his has never been raised." Id. at 255. Mrs. Bowers' attorney responded that evidence of Mr. Bowers' anger and conduct was relevant to the issue of whether "he would be a good custodian." Id. at 255-57.

Counsel argued that Mrs. Bowers' testimony was relevant on additional grounds:

Mr. Bowers testified about alleged misconduct of Jessica during the course of the marriage. She can testify about his misconduct during the course of the marriage. The marriage is allegedly irretrievably broken and there is no likelihood of reconciliation. Certainly [Mrs. Bowers] could offer evidence of the reason why that is.

Id. at 257-59. The Court sustained Mr. Bowers' objection, explaining: "There is nothing in the pleadings regarding domestic violence. I don't know where you are going, but you are not going there." Id. at 257.

Mrs. Bowers' attorney then made an offer of proof through the testimony of Mrs. Bowers:

There were several episodes with a girl named Elizabeth and there was an episode with a girl named Natalie. And there were multiple anger problems and some inappropriate behavior in front of the kids . . . One episode that was witnessed by both of the girls. He got very mad and he was yelling and calling me very inappropriate names in front of the children and [at] one point he pushed me up against the wall and [my older daughter] and J. B. were both yelling at him telling him to stop it, stop it . . . Before he moved out [during 2012] I had an antique cupboard in the living room that was used as an entertainment center. He was very, very made at me and he broke [the cupboard] . . . I don't remember if [he] punched it or he kicked it . . . He got very upset with [my older daughter] [on another occasion] because she was supposed to go with her father's family to a cousin's birthday party . . . [Mr. Bowers] yelled and punched a door . . . It left a hold in the door . . . There was an instance where one of my glass vases got broken when he was upset. I believe it was thrown, if I remember correctly. And multiple episodes of yelling and cursing and name-calling in front of the girls.

Id. at 257-67; Ex. B. Near the end of the offer of proof, after Mrs. Bowers had described an incident in which Mr. Bowers stood outside her car "yelling at Doug through the window," counsel asked whether she was afraid of Mr. Bowers. Id. at 266-67. Mrs. Bowers answered: "Sometimes." Id. at 267. The trial court rejected the offer of proof in its entirety and sustained Mr. Bowers' objection to evidence regarding incidents reflecting angry and violent conduct. Id. at 257, 267. The court subsequently reversed that ruling. Id. at 367.

When counsel sought to question Mrs. Bowers about text messages she had received from Mr. Bowers, Mr. Bowers' attorney objected: "[C]onduct was never raised in their pleadings . . . [S]he admitted that the marriage was broken which, unless she amended the pleading to raise conduct, which she is too late for, it's closed. It's a matter of law." Id. at 281-83. Mrs. Bowers' attorney responded in part that the evidence she intended to introduce was relevant to custody issues before the court. The trial court overruled the objection: "It's closed as it relates to conduct versus misconduct, but their ability to communicate effectively with each other in regards to joint custody is relevant. So she can answer." Id. at 283. Mrs. Bowers proceeded to identify and read text messages in which Mr. Bowers referred to her as a "scum bag mother" and "some dirtbag race mixer." Id. at 285-86; Ex. A. She was asked whether those messages accurately represented "the messages you generally receive from Jason," and responded that they did. Id. at 289.

The following colloquy occurred when Mrs. Bowers was being questioned by counsel for Mr. Nugent:

Q. Was there a period around Thanksgiving of 2011 that you caught Jason in a lie and he got very angry with you?

A. Yes.

Q. Did he call you a bitch and if I may use the word cunt in front of your daughters?

A. Yes.

Q. Did you tell him you were going to leave?

A. No. I told him I was going to leave the house.

Q. Did he say fuck you are?

A. Yes.

Q. And did he grab and hold you against the door frame of your bedroom?

A. Yes . . .

Q. Was his hand around your neck?

A. It was right here (indicating).

Id. at 367-69. Mrs. Bowers stated that her daughters were present for the physical as well as the verbal parts of that incident. Id. at 368-69.

Counsel for Mr. Nugent questioned Mrs. Bowers about other incidents.

- Mrs. Bowers acknowledged that Mr. Bowers had become angry with her after he returned home late on night in June or July, 2011, that she had found it necessary to call [her older daughter's] aunt to remove [that child] and J.B. from the home, and that Mr. Bowers had told her that if she left he would "trash the whole motherfucking house." Id. at 369.

- Mrs. Bowers recalled a telephone conversation with J.B. one night in December, 2013, while the child was staying at Mr. Bowers' home:

Q. When you spoke to her on the phone did she tell you to please be careful?

A. Yes . . .

Q. Did you ask her why she told you to be careful?

A. Yes.

Q. What was her response?

A. She said dad, and then didn't say anything else.

Id. at 370.

• Mrs. Bowers also testified about an incident that occurred in 2010 or 2011 after she had come home with [her older daughter] and J.B. after doing laundry at a laundromat:

Q. . . . [D]id he ask you where you were the whole time?

A. Yes.

Q. And when you told him that you were at the laundromat, did he tell you, in front of the girls, did you let the girls watch you fuck whatever asshole it is this week?

A. Yes.

A. Okay. And when [your older daughter] told Jason you were at the laundromat the whole time, what did he do?

Q. He proceeded to yell and was very upset and he threw a [glass] vase.

Id. at 370-71.

• Mrs. Bowers recalled an episode during 2010 "where [my older daughter] was not going to bed when she was supposed to." Id. at 371. She said Mr. Bowers told her that he would "handle it." Id. Mrs. Bowers said she heard the "very distinct sound" of a slap and that then [the child] was crying and had a mark on her face: "Initially it was a red mark and then later . . . you could see the little lines where his hand was and little purple spots." Id. at 372. The bruise lasted "[a]bout a week." Id. Mrs. Bowers testified

that she and Mr. Bowers attended counseling after that incident, "[i]nitially as a couple and then it was one-on-one." Id. at 373.

Mrs. Bowers stated her opinion that J.B. should not have a continuing relationship with Mr. Bowers after this litigation was concluded. Id. at 388. She said her opinion was "[b]ased on what I've seen as far as the abuse and stuff." Id. She added: "[S]he should not grow up thinking it's okay for a man to treat her like that at all. That's not right." Id. Mrs. Bowers acknowledged Dr. Duncan-Hively's opinion about the adverse consequences that would attend the termination of J.B.'s relationship with Mr. Bowers. Id. at 388-89. She testified: "I just know what [J.B.] tells me, and what she tells me is not what Dr. Hively said at all." Id. at 389.

Mrs. Bowers testified that she had told J.B. that Mr. Nugent was her biological father after speaking with the guardian ad litem and with a child psychologist. Id. at 238-39. She said that J.B. reported having told Mr. Bowers "that she kind of considered C.N. and G.N. to be her brothers," and that Mr. Bowers then "apparently told her that the only sibling that she had was [Mrs. Bowers' older daughter]." Id. at 240. Mrs. Bowers recalled: "And she was upset about that, and ... she asked if she was ever going to have any more siblings." And I told her you actually do have other siblings." Id. at 240-41. When she was asked what other siblings she had been referring to, Mrs. Bowers identified Mr. Nugent's three children from other relationships. Id. at 241.

Mrs. Bowers said that Mr. Nugent resides in Illinois but that his mother lives "about six houses up" from the home where she and Mr. Harrington and their children resided. Id. at 242. She testified that J.B. had had "[t]en or more" visits and telephone

conversations with Mr. Nugent, that Mr. Nugent "acted appropriately," and that their personalities were similar "and they got along very well." Id. at 237-38, 374. Mrs. Bowers said that J.B. was confused and upset when she was told that she could no longer see Mr. Nugent, and that the child had expressed a desire to meet Mr. Nugent's other children. Id. at 375. She testified that she believed that J.B.'s best interests would be served by "hav[ing] Mr. Nugent be a part of her life." Id. at 376.

Mrs. Bowers described two unplanned encounters between J.B. and Mr. Nugent after the Circuit Court entered an order prohibiting contact between them. Id. at 237-38, 242-43, 347-48. The first incident occurred during February, 2012. Mrs. Bowers testified that Mr. Nugent had been at his mother's home doing research on this litigation, "and he brought copies of the information to me and we stood outside on the porch and discussed the case." Id. at 243. The children had been placed in bed at 8:00 p.m. but J.B. got out of bed, looked out a picture window in the front of the house and saw Mrs. Bowers and Mr. Nugent, "and opened the door and wanted to see him." Id. at 243. Mrs. Bowers testified: "I explained to her that she wasn't able to see him and she did give him a hug and then I took her back inside and put her to bed and he left." Id.

The second encounter occurred at a birthday party that Mrs. Bowers had for J.B. Id. at 243-44, 349-50. Mr. Nugent's girlfriend Brittany, who owned a sandwich shop, brought food and helped Mrs. Bowers set up and conduct the party. Id. Mrs. Bowers testified that Mr. Nugent had dropped Brittany off before the party and came to pick her up that evening. Id. at 245, 349. She said that J.B. saw Mr. Nugent's automobile arrive and ran outside. Id. at 245-46, 349. When she was asked how long the encounter lasted,

Mrs. Bowers answered: "Seconds." Id. at 246. She explained: "As soon as J.B. ran outside, [my older daughter] came and got me and I went outside." Id. at 246-47.²

During cross-examination Mr. Bowers' attorney asked whether it was fair to say that "you've worked very hard since you and [Mr. Bowers] separated to see to it that he has no rights to J.B. and is cut out of her life." Id. at 335. Mrs. Bowers answered: "I've worked to do what I've had to do for the best interest of my child." Id. Counsel continued: "You've completely ignored J.B.'s feelings about loving Jason, haven't you?" Id. Mrs. Bowers responded: "No, that is not true . . . Because what J.B. tells me is totally different." Id. She testified that she had considered "the emotional impact and trauma" that could attend the custody arrangement that she was requesting, and believed that her daughter would recover from that loss. Id. at 336. When counsel for Mr. Bowers asked whether she could "follow a court order that says you and Jason have to co-parent J.B.," Mrs. Bowers answered: "Yes. If it's a court order, yeah." Id. at 363.

4. Joan Coulter

Joan Coulter, the court-appointed guardian ad litem, identified herself as the "advocate for the best interest of the child." Id. at 500. Ms Coulter testified that on a number of occasions she had met with J.B. and the adult parties and spoken with Dr. Duncan-Hively. Id. at 503-04. She stated her belief that the termination of J.B.'s

² Mrs. Bowers' attorney asked why she had not reported this encounter between J.B. and Mr. Nugent promptly. Tr. at 246. Mrs. Bowers responded: "It wasn't like a planned visit. It was accidental, and I didn't realize it would be a big deal. I mean, I should have, but I didn't." Id. Mrs. Bowers acknowledged that her failure to report the encounter to her own attorney or Mr. Nugent's attorney had resulted in their erroneous denials that it had occurred. Id.

relationship with Mr. Bowers would be "very detrimental" to J.B. Id. at 493. She based that opinion on the fact that "basically he's the father this child knows." Id. Ms Coulter told the court she intended to recommend "that Jessica and Jason have joint legal custody and basically a 50/50, what they are doing right now as far as physical custody." Id. at 493-94.

Counsel for Mr. Bowers challenged Ms Coulter's recommendation, asking whether she had considered "the issue that we have four documents and pleadings in front of the Court whereby Jessica would cut Jason out," "the fact that throughout the entire proceeding she's been trying to cut Jason out," and "the mandate of 452.375 . . . which says which parent is more likely to allow the child frequent continuing and meaningful contact with the other parent." Id. at 497-98. Ms Coulter responded that she had taken those matters into consideration: "Jessica did say she would follow a court order. And if a court order gives Jason time with the child, I believe she will do it." Id. at 498. When counsel for Mr. Bowers suggested in a question that Mrs. Bowers "has really not been able to follow the court orders," Ms Coulter responded: "[T]here is kind of a gray area of whether she was following court orders or not. According to her lawyer and according to her understanding she was following court orders. According to you and your client she was not." Id. at 507.

Counsel then asked how Ms Coulter's recommendation of joint legal custody "jive[d]" with his own notion that "these parties can't agree on anything and they have no common nexus of belief whatsoever." Id. at 498-99. Ms Coulter answered that if the court decided Mr. Bowers and Mrs. Bowers could not share legal custody "my only

option would be to give sole legal custody to Jessica because in any scenario she's still the mom." Id. at 499. She stated her opinion that awarding sole legal custody to Mr. Bowers would not be consistent with the child's best interests. Id. at 505.

**C. Original Judgment of the Trial Court:
February 3, 2015**

The trial court entered its Findings of Fact, Conclusions of Law, and Judgment on February 3, 2015. Legal File at 166. The court found Dr. Duncan-Hively and Mr. Bowers to have been credible witnesses. Legal File at 168-69. It found Ms Coulter credible but concluded that "her [custody] recommendation was based in part on a lack of knowledge of law." Id. at 169. The court found that Mrs. Bowers' testimony "lacked credibility except as to her admission that she violated the orders of this Court." Id. It noted in particular that "the minimal testimony adduced that might support . . . a finding [of domestic violence] lacks credibility." Id. at 169.

The trial court found that "[t]he parties are not in agreement as to custody arrangements for the minor child," that they "cannot co-parent," and that "[j]oint custody is not possible in this matter." Id. at 170-71. The court concluded that Mrs. Bowers was "unfit . . . to be the custodian" of her daughter J.B.. Id. at 171. The court explained: "Jessica Layne Bowers' actions, in particular her disregard of the minor child's medical needs after she began having seizures, show that she is unfit, unsuitable and unable to be the custodian of the minor child." Id. It also found that Mrs. Bowers was "unlikely to allow the minor child frequent, continuing and meaningful contact with Jason Bowers without a court order." Id. at 170.

The trial court observed that "[i]f this case was solely a dissolution proceeding, this Court would lack the authority to determine the custody of the minor child because she was not born of the marriage or adopted by the parties." *Id.* at 171 (citing *In re D.SK.*, 428 S.W.3d 655m 659 (Mo.App. W.D. 2013)). But the court noted that it was "also considering a custody proceeding in which all interested parties are present" and in which "both . . . biological parents have asked this Court to determine her custody." *Id.* at 170-71. It held that it had authority to determine the custody of the child "[i]n the interest of judicial efficiency." *Id.* at 171.

The trial court noted that Mr. Bowers had asked to be treated as a third party in the custody proceeding and that his interests "are the type of interests that the legislature sought to protect in Section 452.275.5(5) RSMo." *Id.* at 172 (citing *In re Matter of T.O.L. v. L.L.*, 386 S.W.3d 135, 139 (Mo. 2012)). Based on that determination the court found that Mr. Bowers "should be treated as a third party in the custody proceeding." *Id.*

The court stated that it had "considered all relevant factors under Section 452.375 RSMo" and announced its finding "that it is in the best interests of the minor child that sole legal and physical custody be awarded to Jason Bowers." *Id.* It ordered Mrs. Bowers to pay Mr. Bowers child support in the amount of \$584 per month. *Id.* at 173. The trial court noted the parties' stipulation that Mr. Nugent is J.B.'s biological father, ordered that her birth certificate be amended to reflect that fact, found that he was unfit to be the child's custodian, and excluded him from custody of or visitation with her. *Id.* at 172-74.

**D. Post-Judgment Contempt Proceeding:
January 20-March 3, 2015**

Mr. Bowers filed a motion on January 20, 2015, seeking to have Mrs. Bowers held in contempt of court. *Id.* at 160-62. The motion alleged that Mrs. Bowers had allowed Mr. Harrington to accompany her when she dropped J.B. off for a weekend stay on January 16, 2015, and again when she picked the child up on January 18, 2015 seeking to have Mrs. Bowers held in contempt of court. *Id.* The trial court conducted a hearing on that motion on March 3, 2015. *H'r'g Tr.* at 2-3.

1. Testimony Presented at Motion Hearing

a. Jason Bowers

Mr. Bowers said that J.B. had been scheduled to spend the weekend of January 16 through 18, 2015, with Mrs. Bowers. *Id.* at 11. Mrs. Bowers called to ask whether he would keep their child "so she can attend the funeral of her grandfather." *Id.* at 11, 14. Mr. Bowers testified that Mrs. Bowers was to bring J.B. to a gas station at 9:15 p.m. on Friday evening before driving to the funeral. *Id.* at 12. He acknowledged that the gas station that was not their usual drop-off location and allowed that "this wasn't a normal . . . pickup and drop-off situation." *Id.* He testified that Mrs. Bowers was to pick J.B. up at his parents' home when she returned to St. Louis at 2:30 p.m. on Sunday. *Id.* at 14.

Mr. Bowers testified that his motion was based on violations of an order entered on September 19, 2014, which had stated "that Jessica's boyfriend, Doug Harrington, was not to be present for drop-offs, pickup, at school or exchanges." *Id.* at 4-5; Legal File at 165. Mr. Bowers stated his motivation for seeking that order: "We had previous stressful

exchanges with him being involved. He has been rude and verbally aggressive on social media, on the telephone . . . [H]e is married to a woman that is a felon, a drug dealer." Id. at 7. He testified that his purpose was to protect J.B.: "I don't think that she should be in a stressful situation like this. I don't think it's in her best interest." Id. at 7-8.

Mr. Bowers testified that Mr. Harrington was present when Mrs. Bowers dropped J.B. off at the gas station on Friday night: "[W]e had previously talked about meeting . . . for me to pick up the child, and when I did he was in the car." Id. at 5. When Mrs. Bowers' attorney asked whether there had been any conversation between him and Mr. Harrington at that time, Mr. Bowers answered: "No. He just gave me one of those friendly little waves . . . [W]e didn't speak. He didn't get out of the car." Id. at 15. Mrs. Bowers' counsel asked whether he had experienced "any difficulty" with Mr. Harrington at that time. Id. Mr. Bowers' attorney objected on the basis of relevance. Id. The trial court sustained the objection. Id. When counsel for Mrs. Bowers asked whether J.B. had become upset or experienced any difficulty at that time, counsel made the same objection and the trial court made the same ruling. Id. Mr. Bowers testified that Mr. Harrington was in Mrs. Bowers' car when she picked J.B. up at his parents' home on Sunday afternoon. Id. at 6. He acknowledged that he had been at work at that time and that his parents and brother had been home with J.B. when Mrs. Bowers arrived. Id. at 15.

b. Arthur Ricks

Mr. Bowers' father, Arthur Ricks, confirmed that Mr. Harrington had been present when Mrs. Bowers picked J.B. up at his home on Sunday afternoon: "[W]e were having dinner at the dinner table. The front windows were open. I got up, we all did, and looked

outside and [Mr. Harrington] was sitting in the car." Id. at 17. Mrs. Bowers' attorney asked whether Mr. Harrington had caused any disruption. Id. at 18. Counsel for Mr. Bowers objected on the basis of relevance and the trial court sustained the objection. Id.

c. Jessica Bowers

Mrs. Bowers testified that her grandfather had died in West Plains during January, 2015, and that she and her mother and siblings "had been in southern Missouri most of the week handling that." Id. at 20. She said that her grandfather's funeral was to be held on a Saturday, January 17. Id. Mrs. Bowers asked Mr. Bowers to care for J.B. that weekend: "[D]ue to [several family issues] down in West Plains where my grandpa was I made the decision that it was not a good situation to bring either one of my girls into. I didn't want to take them to the funeral." Id. at 20-22. She said:

Generally . . . if I need a baby sitter, if it's going to be an extended period of time, I usually ask [Mr. Bowers] to avoid any confrontation about why he didn't get the opportunity to keep her. So I called him and asked him if he would be interested to do the weekend switch, and he said yes.

Id. at 20-21.

Mrs. Bowers testified that Mr. Harrington accompanied her to the funeral. Id. at 22. She agreed with Mr. Bowers' testimony that the gas station at which they agreed to meet was not their usual drop-off location, and explained that it had been chosen--and that Mr. Harrington had been with her-- because "we were on our way out of town and it was 10:30 at night." Id. at 21. Mrs. Bowers testified that Mr. Harrington was with her when she picked J.B. up at Mr. Bowers' parents' home on Sunday because she had run late getting back to St. Louis:

There was three phone calls from Jason yelling about why I was not there and what was taking so long and stuff like that . . . Instead of taking the additional 45 minutes to take [Mr. Harrington] to my house and get to [Mr. Bowers'] parents house . . . , I just went straight there to get her. I didn't even think about . . . doing anything else.

Id. at 22. During cross-examination by Mr. Bowers' attorney Mrs. Bowers denied having purposefully disregarded the trial court's order: "Unfortunately I was not thinking about any court thing. I had just lost my grandfather." Id. at 24. When counsel suggested that she "believe[s] the Court's orders are mere suggestions, Mrs. Bowers answered: "No, I do not." Id. at 24-25.

2. Circuit Court's Order

The trial court found that Mrs. Bowers "allow[ed] Doug Harrington to accompany her on exchanges of [J.B.] on January 16th and again on January 18th, 2015", and declared Mrs. Bowers to be in contempt for that violation of its prior order. Id. at 186. The court ordered Mrs. Bowers to pay attorney fees and costs incurred by Mr. Bowers in the prosecution of his motion to have her cited for contempt and provided for her incarceration if she failed to make that payment within a specified time. Id. at 187. The order was drafted with a provision requiring Mrs. Bowers "to attend therapy for her failure to abide by Court orders," commencing promptly and continuing until "said therapist shall determine that said treatment is no longer necessary." Id. at 187. That provision was lined out of the signed order. Id.

**E. "Addendum" to Judgment:
May 26, 2015**

Mrs. Bowers filed a motion requesting a new trial or amendment of the judgment on March 3, 2015. *Id.* at 182. The relief requested in that motion included findings in support of the court's custody order pursuant to Mo. Rev. Stat. § 452.375. The trial court filed its Addendum to Findings of Fact, Conclusions of Law and Judgment on May 26, 2015. *Id.* at 176.

In support of a finding that Mr. Bowers was "more likely to allow the child frequent, continuing and meaningful contact with the other parent," the court cited Mr. Bowers' testimony that Mrs. Bowers had kept J.B. from him "on a number of occasions"; Mrs. Bowers' "allegations in the various versions of her pleadings"; unspecified "testimony of Dr. Hively" and of Mrs. Bowers; Mrs. Bowers' "consciously disregarding the best interest of [J.B.], evidencing [her] intent to keep [J.B.] away from and to alienate the child from her father, Jason Bowers." *Id.* The court stated a belief that Mrs. Bowers could not or would not co-parent with Mr. Bowers and would "refus[e] to follow any such Court order." *Id.* at 177.³ It stated findings that Mrs. Bowers "has shown she neither respects the rights of Jason Bowers, nor the wishes of the child." *Id.*

In support of a finding that the child's "needs . . . for a frequent, continuing and meaningful relationship with both parents" and the that "the ability and willingness of

³ This finding appears to be at odds with the trial court's previous finding that Mrs. Bowers was "unlikely to allow the minor child frequent, continuing and meaningful contact with Jason Bowers without a court order." Legal File at 170. In fact the court proceeded to repeat that prior finding in its addendum of new findings. *Id.* at 177.

parents to actively perform their functions as mother and father for the needs of the child" would be served best by awarding sole legal and physical custody to Mr. Bowers, the court cited "evidence that [Mrs. Bowers] would require a specific Court order to allow the minor child frequent, continuing and meaningful contact with [Mr. Bowers]," and found without further specification that Mrs. Bowers "violated a number of Court orders during the pendency of this action." Id. at 177. The court also made reference without further specification to "the testimony of Dr. Hively, Jason Bowers and Jessica Layne Bowers" that Mrs. Bowers was "trying to cut [Mr. Bowers] out of the life of the child" and that she "has consistently placed her own wishes and needs before those of the child. Id. The court concluded that this evidence "calls into question" Mrs. Bowers' "willing[ness] to actively perform her function as mother of the child." Id. at 177-78.

In support of a finding that awarding sole legal and physical custody of the child to Mr. Bowers was consistent with "[t]he wishes of [the] child," the court noted only its conclusion that Mrs. Bowers "has shown she neither respects the rights of Jason Bowers, nor the wishes of the child," and made reference to the testimony of Dr. Duncan-Hively that "[J.B.] trusts [Mr. Bowers], she's bonded to him, she loves him, and [J.B.] views [him] as her primary parent since birth." Id. at 178.

In support of a finding that awarding sole legal and physical custody of the child to Mr. Bowers would best serve "[t]he interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests," the court noted the same testimony by Dr. Duncan-Hively as well as evidence that Mr. Bowers is stable, that his relationship with the child is "loving and appropriate,"

and that "it would be profoundly detrimental to her emotional growth and development if he were no longer an intricate part of her life." Id. at 178.

Finally, in support of a finding that "[t]he child's adjustment to the child's home, school, and community" would be served best by awarding sole legal and physical custody to Mr. Bowers, the court noted testimony by Dr. Duncan-Hively and Mr. Bowers that "the minor child is doing well at and loves her school" and purportedly by Mrs. Bowers that "she would remove J.B. from Tower Grove and place her elsewhere." Id.

POINTS RELIED ON

I.

The Circuit Court erred in excluding Mrs. Bowers from its award of legal and physical custody and awarding sole legal and physical custody to Mr. Bowers because (A) the court's finding that Mrs. Bowers was unfit was not supported by substantial evidence and was against the weight of the evidence and (B) the court made no alternative finding that the welfare of the child necessitated such a custody award, and the award of sole legal and physical custody to a third party thus violates the requirements of Mo. Rev. Stat. § 452.375.5(5), which governs such awards, in that (1) the statute conditions any award of custody to a third party upon a sustainable finding that each natural parent is "unfit, unsuitable, or unable to be a custodian" or that "the welfare of the child requires" such an award in order to serve the best interests of the child; (2) the evidence relied on by the trial court to find Mrs. Bowers unfit was insubstantial, incapable of overcoming the presumption of fitness, and outweighed by evidence that Mrs. Bowers is the child's biological parent and that a loving, caring, and attentive relationship always has existed between mother and child; (3) the court did not make an alternative finding that the child's welfare required that full legal and physical custody be awarded to Mr. Bowers, who is neither the biological nor the adoptive parent of the child, and such a finding would have had no substantial support in the evidence and would have been against the weight of the evidence; and (4) under the evidence the exclusion of Mrs. Bowers from control of and a substantial presence in the child's upbringing

violates the public policy expressed in § 452.375.5 and disserves the best interests of the child.

In the Interest of K.K.M., 647S.W.2d 886 (Mo.App. E.D. 1983)

White v. White, 293 S.W.3d 1 (Mo.App. W.D. 2009)

Scott v. Scott, 147 S.W.3d 887 (Mo.App. W.D. 2004)

Flynn v. Flynn, 34 S.W.3d 209 (Mo.App. E.D. 2000)

II.

The Circuit Court erred in designating Mr. Bowers as a third party in this dissolution of marriage proceeding and making an award of custody to him in that third party capacity because such a designation is impermissible under Mo. Rev. Stat. § 452.375.5, the statute governing awards of custody to third parties, in that (1) the statute requires that a court make the third party seeking custody a party to the custody action, (2) a husband and wife always are parties to an action to dissolve their marriage, and (3) the legislature thus did not intend that the statutory term "third person" include a husband or wife in a dissolution action.

In re Marriage of Said, 26 S.W.3d 839 (Mo.App. S.D. 2000)

In re D.S.K., 428 S.W.3d 655 (Mo.App. W.D. 2013)

In re T.Q.L., 386 S.W.3d 135 (Mo. 2012)

Mo. Rev. Stat. § 452.375.5

ARGUMENT

I.

The Circuit Court erred in excluding Mrs. Bowers from its award of legal and physical custody and awarding sole legal and physical custody to Mr. Bowers because (A) the court's finding that Mrs. Bowers was unfit was not supported by substantial evidence and was against the weight of the evidence and (B) the court made no alternative finding that the welfare of the child necessitated such a custody award, and the award of sole legal and physical custody to a third party thus violates the requirements of Mo. Rev. Stat. § 452.375.5(5), which governs such awards, in that (1) the statute conditions any award of custody to a third party upon a sustainable finding that each natural parent is "unfit, unsuitable, or unable to be a custodian" or that "the welfare of the child requires" such an award in order to serve the best interests of the child; (2) the evidence relied on by the trial court to find Mrs. Bowers unfit was insubstantial, incapable of overcoming the presumption of fitness, and outweighed by evidence that Mrs. Bowers is the child's biological parent and that a loving, caring, and attentive relationship always has existed between mother and child; (3) the court did not make an alternative finding that the child's welfare required that full legal and physical custody be awarded to Mr. Bowers, who is neither the biological nor the adoptive parent of the child, and such a finding would have had no substantial support in the evidence and would have been against the weight of the evidence; and (4) under the evidence the exclusion of Mrs. Bowers from control of and a substantial presence in the child's upbringing

violates the public policy expressed in § 452.375.5 and disserves the best interests of the child.

Standard of Review

The judgment in a court tried case will be reversed if it is not supported by substantial evidence, if it is against the weight of the evidence, or if it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). The paramount concern in all proceedings involving the custody of a minor child is the welfare of the child. *In re B.M.P.*, 612 S.W.2d 843, 846 (Mo.App. E.D. 1981). There are rebuttable presumptions in such proceedings that natural parents are fit, suitable, and able custodians of their children, and that the welfare of children is best served by awarding custody to their natural parent. *White v. White*, 293 S.W.3d 1, 17-18 (Mo.App. W.D. 2009). That presumption is only overcome by proof that the natural parent actually is unfit to raise her child or that there is some other "special or extraordinary circumstance" making an award of custody to the third party necessary to assure the child's welfare. *Id.* (citing *Flathers v. Flathers*, 948 S.W.2d 463, 469 (Mo.App. W.D. 1997)). Trial courts are vested with broad discretion in the determination of child custody matters. *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 283 (Mo.App. E.D. 1989). But a child custody decision should be reversed when the appellate court "is firmly convinced that the welfare of the child requires some other disposition." *Id.*

Argument

Mr. Bowers is neither the biological nor the adoptive father of J.B. Tr. at 161. At best there is a dearth of evidence to support the trial court's findings that Mrs. Bowers is

unfit to have any legal or physical custody of J.B. The trial court did not find that J.B.’s welfare required the exclusion of her biological mother from any authority in her upbringing— the alternative predicate for considering an award of custody to a third party in preference to a natural parent—and the record would not have supported such a finding of “special or extraordinary circumstance” in any event.

The trial court’s award of sole legal and physical custody to Mr. Bowers thus cannot be squared with the criteria established by the legislature in Mo. Rev. Stat. § 452.375.5 for an award of custody to a non-parent. Given the record in this case, that award contravenes the public policy favoring the rearing of children by their natural parents and the longstanding judicial presumption that natural parents are fit for that responsibility. This Court should reverse the award of sole legal and physical custody to Mr. Bowers.

“‘The law presumes that the best interests of the minor children are best served by the vesting of custody in the parent.’” *In the Interest of K.K.M.*, 647S.W.2d 886, 889 (Mo.App. E.D. 1983) (quoting *M.P.M. v. Williams*, 611 S.W.2d 274, 277 (Mo.App. E.D. 1980)). Whatever entitlement Mr. Bowers has on account of his role in J.B.’s life, under Missouri law it is inferior to that of Mrs. Bowers to parent her own child: “‘The natural parent has a superior right to custody of the child as opposed to the interests of third parties.’” *White v. White*, 293 S.W.3d 1, 17 (Mo.App. W.D. 2009) (quoting *M.M.M.*, *supra*)); *see also Ex parte McCarter*, 434 S.W.2d 14, 17 (Mo.App. W.D. 1968) (stating that “our courts have always considered that a natural parent’s custody best serves the

child's interest unless it appears that the parent is unfit, incompetent or unable to care for the child, or unless the welfare of the child manifestly calls for a different disposition").

In the context of dissolution of marriage proceedings § 452.375.5, which governs the custody claims asserted by third parties, ““has been interpreted as establishing a rebuttable presumption that parents are fit, suitable, and able custodians of their children and that their welfare is best served by awarding their custody to their parents.”” *White*, 293 S.W.3d at 17-18 (quoting *Scott v. Scott*, 147 S.W.3d 887, 894 (Mo.App. W.D. 2004) (internal quotes omitted)). This Court has recognized that evidentiary burdens imposed by § 452.375.5 on would-be third party custodians are meant to be substantial and that carrying those burdens is a precondition of taking away or limiting the right of a natural parent to parent and of a child to have the benefit of being raised by his or her natural parent: "The legislature has developed standards by which Missouri courts may abrogate or abridge the rights and prerogatives of natural parents, and we must observe these standards." *Flynn v. Flynn*, 34 S.W.3d 209, 212 (Mo.App. E.D. 2000) (citing *Cotton v. Wise*, 977 S.W.2d 263, 265 (Mo. 1998)).⁴ Elsewhere the Court has made it clear that unless she actually is proven unfit a natural parent should not be excluded from custody of her child absent proof of other “special and extraordinary reasons” that could justify such a rendering. *In the Interest of K.K.M.*, 647S.W.2d 886, 892 (Mo.App. E.D. 1983).

⁴ In *Cotton*, which arose under Mo. Rev. Stat. § 475.030.4, the guardianship statute, the Supreme Court specified that the determinative findings can only be made after "giving due regard to the presumption in favor of the natural parent" and must be "based not only on present circumstances, but on the natural parent's history of dealing with the children." 977 S.W.2d at 264-65.

A. The trial court's finding that Mrs. Bowers was unfit was not supported by substantial evidence and against the weight of the evidence

The trial court's findings that Mrs. Bowers is unfit for any role in the legal custody of her daughter and that she properly could be limited to a secondary presence in the child's physical custody were at best against the weight of the evidence, and in at least some respects supported by no substantial evidence at all:

• **Finding that Mrs. Bowers was unfit because she disregarded her child's medical needs after she had seizures.** In its original judgment the trial court made only one finding in support of its conclusion that Mrs. Bowers was "unfit, unsuitable and unable to be" a legal or physical custodian of her daughter. Legal File at 171. The court based that conclusion on the proposition that Mrs. Bowers had "disregard[ed] . . . the minor child's medical needs after she began having seizures." Id. That finding was not supported by substantial evidence and was against the weight of the evidence.

Dr. Duncan-Hively testified that J.B. had suffered her first seizure at school and that her second had followed at a hospital. Tr. at 25. It was Mrs. Bowers who called to notify Dr. Duncan-Hively that the child had experienced seizures and been taken to a hospital. Tr. at 25. The court-appointed child therapist recalled that both Mr. Bowers and Mrs. Bowers had gone to the hospital when the seizures occurred. Id. at 54. And she testified that J.B. had suffered no further seizures. Id. at 25-26. Dr. Duncan-Hively stated her opinion that "[t]here has been some good positive changes." Id. at 25-26. She noted the fact that Mr. Bowers and Mrs. Bowers had gone to the hospital together when

this illness occurred as one consideration supporting her opinion that they had demonstrated the ability to co-parent. *Id.* at 54-55.

• **Finding that Mrs. Bowers kept J.B. from Mr. Bowers "on a number of occasions."** With due regard for the significance of any failure to comply with custody sharing arrangements during the pendency of a dissolution of marriage proceeding, the trial court's addendum finding that Mrs. Bowers had interfered significantly with Mr. Bowers' access to the child is not supported by substantial evidence and is against the weight of the evidence. Legal File at 176. Dr. Duncan-Hively testified that the fact that Mr. Bowers and Mrs. Bowers had scheduled custody times and exchanged custody during the litigation as another basis for her opinion that they had demonstrated their ability to co-parent. Tr. at 54-55. And Mr. Bowers' testimony surely fell short of proving a pattern of non-compliance that could prove Mrs. Bowers unfit for custody of the daughter whom she also had raised since birth or justify the natural mother's exclusion from any legal control over and from a substantial presence in her child's life.

Mr. Bowers testified that he and Mrs. Bowers had adhered to the "2-2-3 schedule" to share custody of J.B. during the two years of their separation prior to trial. *Id.* at 80, 91, 108. His complaints of interference with his custodial time during that time fell into two categories. *First* Mr. Bowers identified "several instances" in which Mrs. Bowers had kept Jessica for a day after having agreed that he should have the child on that day:

There have been [six or seven] instances where she would call me and ask if I could switch a day, she had something going on with the family. And I would say, sure, and we would agree upon she would get her this day and I would receive her this following day. Then when it came time to honor that agreement it wouldn't happen.

Id. at 91-92. *Second* he testified that Mrs. Bowers had deprived him of between two and four days with J.B. over the Christmas holiday in 2013. Id. at 93-94, 208.

Compliance with custody orders or arrangements is a necessity. The non-compliance in this case was not capable of satisfying the criterion of § 452.375.5 or supporting the trial court's decision to award sole legal and physical custody of Mrs. Bowers' daughter to Mr. Bowers.

• **Finding that Mrs. Bowers would require "a specific court order" to allow Mr. Bowers meaningful and frequent contact with J.B.** It is implicit in this finding that Mrs. Bowers could be expected to comply with a court order that provided for shared custody. Both the court-appointed therapist and the court-appointed guardian ad litem stated and justified their opinions that Mrs. Bowers would comply with such an order. Tr. at 57, 498. The non-compliance complained of by Mr. Bowers over the two years' of his separation from Mrs. Bowers was sporadic rather than routine or methodical. Id. at 80, 91-94, 208. The trial court did not begin to explain why the need for or utility of a "specific" court order would be burdensome for the court or anyone else, or how such a need could begin to justify excluding Mrs. Bowers from legal custody and at least equal physical custody of the daughter that she had borne and raised.

• **Finding or concern that Mrs. Bowers intended to "remove J.B. from [her school] and place her elsewhere."** This finding was not supported by substantial evidence and was against the weight of the evidence. Mrs. Bowers testified that J.B. was comfortable and doing very well at Tower Grove Christian School and that her behavior

at home was very good. *Id.* at 289-90, 387. She said that even if the trial court excluded Mr. Bowers from its custody order she intended to keep the child at that school through the end of the year and to take her back to the school "[i]f she wanted to go back." *Id.* at 387. When she was questioned about taking J.B.'s preferences into account in determining where she would attend school, Mrs. Bowers stated: "I want her to go somewhere where she's comfortable because if she's not comfortable she's not going to learn as well." *Id.* at 387. She said that J.B. had expressed interest in attending school with her older sister, and that she would send J.B. to her sister's school if she "had to have an alternative place." *Id.* at 235-36, 386-87.

It is one thing to find that a litigant's testimony was not credible. It is quite another--with quite different significance--to rely on testimony that cannot be reconciled with what the litigant actually said.

• **Finding that Mrs. Bowers had sought in her pleadings and testimony to exclude Mr. Bowers from custody of J.B. and eliminate or diminish his role in the child's life.** Mrs. Bowers offered detailed and unambiguous testimony in support of her interest in removing his presence from her daughters' lives and her life. She described numerous instances of verbal abuse and temper outbursts, often in the presence of one or both of her daughters, some of which Mr. Bowers acknowledged, some of which he denied, and some of which he could not remember one way or the other. *Id.* at 257-67, 281-89, 367-73. And she explained why she felt that it was in her child's best interest not

to have a continuing relationship with Mr. Bowers: "[S]he should not grow up thinking it's okay for a man to treat her like that at all. That's not right." Id. at 335, 388.⁵

When counsel for Mr. Bowers asked whether she could comply with court-ordered co-parenting, Mrs. Bowers said without equivocation that she could. Id. at 363. Her testimony was supported by the opinion testimony of Dr. Duncan-Hively, the court-appointed child therapist, and Ms Coulter, the court-appointed guardian ad litem. Id. at 57, 498. Mrs. Bowers thus made it clear that if the trial court disagreed with her position she would proceed in accordance the court's ruling.

In the custody order that eventuated the trial court punished her for her wishes and their rationales. Ideation and beliefs, at least in the present context, ought not to be found sufficient to warrant depriving a natural parent of her right to custody of her child or the child of the meaningful presence, guidance, and nurturing of her mother.

• Finding that Mrs. Bowers' interest in excluding Mr. Bowers amounted to "consistently plac[ing] her own wishes and needs before those of the minor child" and thus "calls into question whether or not she is willing to actively perform her function as mother of the child." Mrs. Bowers explained the basis of her belief that J.B.'s best interests would be served by excluding Mr. Bowers from her life. She testified that she had taken Dr. Duncan-Hively's opinion about the deleterious consequences that would attend that exclusion into account and that she felt the harm of ongoing exposure

⁵ The trial court made a finding that no domestic violence within the contemplation of Mo. Rev. Stat. § 455.010 occurred in this case. Legal File at 172. The court did not find that Mr. Bowers had engaged in no verbal abuse or displays of anger as described by Mrs. Bowers and sometimes acknowledged by Mr. Bowers.

to verbal and emotional abuse would be a greater burden for her child than the lost relationship. *Id.* at 335-36, 388.

However wrong a given court might judge her position, that position cannot reasonably be parlayed into proof that Mrs. Bowers was unwilling to perform her function as J.B.'s mother. The trial court's addendum finding to the latter effect was against the weight of the evidence.

• **Finding that Mrs. Bowers was incapable of co-parenting J.B. with Mr. Bowers.** This finding is against the weight of the evidence. Despite her belief that the decree of dissolution ought to deny Mr. Bowers legal or physical custody of the child, Mrs. Bowers had been co-parenting with him since day one--and sharing custody and other responsibilities with him throughout their two-year estrangement. To be sure Mrs. Bowers made clear her strongly held preference for moving ahead without Mr. Bowers in the picture. Certainly there were bumps in the road. But the trial court's finding that Mrs. Bowers was incapable of co-parenting with Mr. Bowers cannot be squared with the record or offer support for excluding her from legal and physical custody of her daughter.

This Court has recognized the legislature's declaration in Mo. Rev. Stat. § 452.375.4 of a public policy favoring joint legal custody. *Dunkle v. Dunkle*, 158 S.W.3d 823, 839 (Mo.App. E.D. 2005). *Dunkle* identified the two key factors in determining whether joint legal custody will serve the best interests of children in a particular case: whether there is a commonality of beliefs concerning parental decisions and whether the parents in question have the ability to share parenting decisions. *Id.* The fact that Mrs. Bowers and Mr. Bowers had been co-parenting J.B. since her birth was ample proof of

their ability to continue that practice. The opinion testimony of the court-appointed child therapist and the court-appointed guardian ad litem supported ongoing shared custody. Tr. at 57, 498. That Mrs. Bowers would rather secure sole legal and physical custody and see Mr. Bowers excluded from the process was neither proof that joint custody would fail nor justification for rejecting the public policy preference and excluding her from custody and control altogether.

• **Finding that J.B. loves and trusts Mr. Bowers, is bonded to him, and has viewed him as her primary parent since birth.** The trial court offered no explanation of how J.B.'s relationship with Mr. Bowers could justify excluding the child's natural mother altogether from her legal and physical custody.

B. The trial court did not find that J.B.'s welfare required an award of sole legal and physical custody to Mr. Bowers as a third party

Mr. Bowers' request for an award of custody to him as a third party alleged that Mrs. Bowers and Mr. Nugent were unfit to have custody, that the welfare of the child required that her custody be awarded to him as a third party, and that such an award would be in the child's best interests. Legal File at 76-78. The trial court found that Mrs. Bowers and Mr. Nugent were unfit and that its award of sole legal and physical custody to Mr. Bowers was in the child's best interest. Id. at 170-71, 174. The court made no finding that the child's welfare required that custody be awarded to a third party to the exclusion of her natural mother. The evidence would not have supported such a finding if it had been made, for the reasons discussed in this Point I, *supra*.

Because the trial court's finding that Mrs. Bowers was unfit to have either legal or physical custody of her child lacks substantial evidentiary support and is against the weight of the evidence, and because the court did not and could not make a finding of the "special and extraordinary circumstances" that could justify the award of custody to a third party when the third party has failed to establish the unfitness of both natural parents, the court was required to end its inquiry without further consideration of the child's best interests. *Jones v. Jones*, 10 S.W.3d 528 535-38 (Mo.App. W.D. 1999).⁶

C. Conclusion

The trial court's determination that Mrs. Bowers was unfit, unsuitable and unable to be the custodian" of her daughter J. B., and the findings upon which that determination was based, were not supported by substantial evidence and were against the weight of the evidence. The evidence would not have supported a finding of the "special and extraordinary circumstances" that could support an award of third party custody even

⁶ The Court of Appeals analyzed § 452.375.5(5) in *Jones*. 10 S.W.3d at 535-38. The Court noted that the statute does not define the term "welfare" in the context of rebutting the presumption favoring custody awards to natural parents. *Id.* at 536. It reasoned that "welfare" in this statute refers to something distinct from the "best interests" of the child, explaining:

We know this to be true from the language of the statute which requires the trial court, in order to award third-party custody, to find that a "parent is unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires, *and* it is in the best interest of the child."

Id. (emphasis in opinion). The Court of Appeals concluded that an award of third party custody based on the welfare prong of § 452.375.5 depends upon proof of "special or extraordinary circumstances" justify an award of custody that overrides the preference for and custody interests of the natural parent. *Id.* at 537.

when at least one natural parent is fit, and the trial court did not purport to make such a finding.

This Court should reverse the trial court's award of sole legal and physical custody to Mr. Bowers as a third party, as well as the associated award of child support. The case should be remanded to the trial court with instructions to award legal and physical custody to Mrs. Bowers or to make an award of joint custody, and to make any other orders including an award of child support in accordance with that custody ruling.

II.

The Circuit Court erred in designating Mr. Bowers as a third party in this dissolution of marriage proceeding and making an award of custody to him in that third party capacity because such a designation is impermissible under Mo. Rev. Stat. § 452.375.5, the statute governing awards of custody to third parties, in that (1) the statute requires that a court make the third party seeking custody a party to the custody action, (2) a husband and wife always are parties to an action to dissolve their marriage, and (3) the legislature thus did not intend that the statutory term "third person" include a husband or wife in a dissolution action.

Standard of Review

Statutory interpretation is a matter of law that appellate courts review de novo. *Blakely v. Blakely*, 83 S.W.3d 537, 540 (Mo. 2002).

Argument

The trial court recognized that it had no authority to make a custody award in a dissolution of marriage proceeding with respect to a minor child who was not born of the marriage. Legal file at 171 (citing *In re D.S.K.*, 428 S.W.3d 655, 659 (Mo.App. W.D. 2013)). The court assumed jurisdiction to designate Mr. Bowers a third party custody applicant pursuant to § 452.375.5 and make an award of custody "[i]n the interest of judicial efficiency." Legal File at 172. That assumption of authority and party designation were inconsistent with the language and intent of the statute. The award of third party custody thus must be reversed.

In re Marriage of Said, 26 S.W.3d 839 (Mo.App. S.D. 2000), arose in circumstances similar to those of the present case. Invoking § 452.375.5, Mr. Said sought third party custody of children born to his wife during their marriage but subsequently proven to have been fathered by another man. 26 S.W.3d at 839. The trial court concluded that no children had been born of the marriage. *Id.* at 842. Its decree of dissolution said nothing about child custody or support. *Id.* at 842-43.

The Court of Appeals rejected Mr. Said's contention that he was a third party within the contemplation of § 452.375.5. *Id.* at 844. The Court explained:

The second sentence of § 452.375.5(5)(a) specifically provides that before a court awards custody, temporary custody or visitation to a third person, the court shall make that person a party to the action. Because a husband and wife are always parties to an action to dissolve their marriage, the statutory requirement that the court make the third person a party to the action indicates the General Assembly did not intend that the term "third person" include a husband or wife in a dissolution action. As [Mrs. Said] tersely points out: "Logic dictates that [Mr. Said] cannot be both the Petitioner and a third person in the same case."

Id.

In this case the trial court found authority in *In re T.Q.L.*, 386 S.W.3d 135 (Mo. 2012), to name Mr. Bowers a third party custody applicant in his dissolution of marriage case. Legal File at 172. *T.Q.L.* was not a dissolution of marriage proceeding, nor was it a case in which the third party custody applicant already was a party to the action. *Id.* at 137-39. The rationale for barring the consideration of a third party custody claim in *Said* was not addressed in *T.Q.L.*

Because Mr. Bowers was a party to his own dissolution of marriage proceeding from its inception, he was incapable of being named a third party in that case. The logic

and authority of *Said* require that the judgment of the trial court be reversed and, in view of that court's lack of jurisdiction to adjudicate the custody of a child not born of the marriage, amended to exclude any reference to the custody of J.B.

CONCLUSION

This Court should reverse the judgment of the Circuit Court. If reversal is based on Point I of this brief, the case should be remanded with instructions to award legal and physical custody to Mrs. Bowers or to make an award of joint custody, and to make any other orders including an award of child support in accordance with that custody ruling. If reversal is based on Point II of this brief, this Court should amend the judgment to exclude any reference to the custody of J.B. or remand the case to the Circuit Court for such amendment and for the consideration of any other relief that may be appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for the appellant certifies that this redacted brief contains all of the information required by Mo. R. Civ. P. 55.03 and complies with the limitations provided by Mo. R. Civ. P. 84.06(b) in that the brief contains 15,406 words. Counsel has relied on the word-counting utility of Microsoft Word for Macintosh v. 15.39 in making this certification.

/s/ Michael Gross

CERTIFICATE OF FILING AND SERVICE

Counsel for the appellant certifies that this redacted document was submitted to the Court through its electronic filing system on October 25, 2017, to be served by that system on all counsel of record in this appeal.

/s/ Michael Gross