IN THE
SUPREME COURT OF MISSOURI

A.E.B., a minor by next friend, L.D., and L.D., Individually,	)	
Petitioner/Respondent/ Cross-Appellant,	)	**No. 91716**
v.	)	
T.B.,	)	
Respondent/Appellant/ Cross-Respondent.	)	

Appeal from the Circuit Court of
Saint Charles County, State of Missouri
Honorable Nancy L. Schneider, Judge

SUBSTITUTE BRIEF OF L.D., PETITIONER/RESPONDENT/CROSS-APPELLANT

KNIGHT & TOMICH
By: Joshua G. Knight, #52672
118 North Main Street
St. Charles, MO 63301
joshknight@charter.net
(636) 947-0550
(636) 947-2493 Facsimile
Attorney for Petitioner/Respondent/ Cross-Appellant

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JURISDICTIONAL STATEMENT

Petitioner/Respondent/Cross-Appellant, L.D. (hereinafter referred to as "Father") agrees with Respondent/Appellant/Cross-Respondent, T.B.'s (hereinafter referred to as "Mother") Jurisdictional Statement other than to supplement the fact that on July 16, 2008, Mother was served with the Father's petition *in the State of Missouri.* (emphasis added).

Further, in addition to the foregoing, Father cross-appealed from the trial court's judgment on the basis that the trial court's award of sole physical custody with Mother was based upon a misapplication of the law, was unsupported by substantial evidence and constituted an abuse of the trial court's discretion.

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STATEMENT OF FACTS

On February 11, 2010, the trial court entered its Judgment and Decree of Paternity and Order for Child Support, Visitation and Temporary Custody. [L.F. p. 91]. The Judgment granted Respondent/Appellant/Cross-Respondent, T.B. ("Mother"), sole physical custody of the minor child, A.E.B., born March 3, 2006, and designated the parties as joint legal custodians. [L.F. pp. 8, 93]. The Judgment specifically ordered Mother to relocate her residence from Ohio to Saint Charles County, Saint Louis County or Lincoln County in Missouri. [L.F. p. 93]. The physical custody plan entered by the trial court granted Father custody every other weekend from Friday until Monday

morning, one overnight each week from Wednesday until Thursday, one-half of the summer period and the standard Holiday schedule. [L.F. p. 97-101].

A.E.B. was born March 3, 2006 at Saint John's Mercy Hospital in Saint Louis County, Missouri. [Tr. pp. 171-172]. Mother and Father were dating at the time Mother became pregnant with A.E.B., but were not living together. [Tr. p. 174].

Subsequent to A.E.B.'S birth, Father made various attempts to have Mother submit to a paternity test both verbally, between five and ten times, and through an attorney. [Tr. pp. 6-7]. Father hired an attorney to prepare and send a letter to Mother, which was mailed March 15, 2006. [Tr. p. 24]. Father also attempted to submit the issues of paternity, custody and child support through MARCH Mediation, which provided correspondence to Mother in regard to these issues and which went unanswered by her. [Tr. pp. 25-26, 244-245]. Mother deemed the requests for paternity testing insulting and, during that period, would not agree to such a test. [Tr. pp. 7, 245-247]. Father also attempted to have custody time with A.E.B. and requested the same of Mother on at least ten occasions. [Tr. pp. 16-17]. Mother's responses to Father's requests were generally that she wanted money, though she did allow Father to see the child a few times. [Tr. p. 17]. In fact, after one of Father's requests to see his child, Mother sent a text in response to Father stating, in part, "I am sorry. Visitation don't buy diapers…You are obligated to four to five hundred dollars of support a month. Then you can visit her, done deal." [Tr. pp. 21-22]. Further, Mother would allow Father's family

members visitation with A.E.B. under the condition that Father was not present when the same took place. [Tr. p. 166].

Father lives in Saint Charles County with his parents. [Tr. p. 3]. Father had previously been employed at National Dealer Warranties, but was laid off due to a fire at the main office in April 2007. [Tr. p. 8]. After such lay off, he secured employment at another warranty company, but because of a non-compete with National Dealer was barred from that employment for a period of time. Because of the non-compete issue, Father became employed through Pundmann Ford, and subsequently gained employment at Extended Warranty Corporation after said issue was resolved. [Tr. pp. 73-74]. At the time of trial, Father was unemployed due to a closure and lockout by the company in October of 2009. [Tr. p. 77].

Prior to and after service of Father's Petition upon Mother in the State of Missouri on July 16, 2008, at her place of work, Mother was employed by Ameristar Casino as a waitress in the VIP lounge through the date of August 24, 2008. [Tr. pp. 178-179, 247-249]. Though Mother took a leave of absence from work, she was scheduled to return on August 23, 2008, which she failed to do. [Tr. pp. 248-249]. Among other reasons, Mother stated that she moved to the State of Ohio because she was struggling financially. [Tr. pp. 258-259]. Regardless of her assertions, Mother admitted that she was earning approximately $30,000.00 through her employment at Ameristar Casino [Tr. p. 259], as well as had received $3,774.43 as and for child support through July of 2008. [Tr. p. 260-261]. Mother further admitted that after being served, she did not seek cheaper

residential arrangements and decided to move to Ohio. [Tr. p. 262]. At the time of her move to Ohio, Mother admitted that she did not have employment in that state, though she continued to be employed in the State of Missouri. [Tr. pp. 316-317]. The trial court found the timing of Mother's move to the State of Ohio "incredibly coincidental." [Tr. pp. 295-296]. The court further heard testimony that the parties had several mutual friends and acquaintances through which Father's preparations to file a paternity action could have become known to Mother. [Tr. 28 and 315]. As stated above, at the time prior to Mother's move, she had been served in the State of Missouri, retained employment in the State of Missouri, had not secured a residence in Ohio nor secured employment there.

Mother cited another reason for her move to Ohio was to go back to school and that her mother could help watch A.E.B. while she was in class. [Tr. p. 270]. During her testimony, Mother stated that she was seeking her GED and admitted that she could have sought and received that degree in the State of Missouri. [Tr. p. 271]. Mother further admitted that she only vaguely looked into getting her GED in Missouri before moving, and made little, if any, inquiries into having someone watch A.E.B. if she were to attend such classes in this state. [Tr. p. 271].

Upon discovering that Mother had moved with the child to the State of Ohio, and subsequent to his filing of the Petition and service of the same on Mother, Father contacted the St. Charles County Sheriff's Department and St. Peters Police Department to file a complaint regarding the move. [Tr. 32]. Father also testified that he had this

attorney prepare and send two letters regarding Mother's move with the minor child to the St. Charles County Prosecuting Attorney's Office. [Tr. 33]. Father stated that his intent in undertaking such steps was not to get Mother in criminal trouble, but merely to have his child returned to the State of Missouri. [Tr. 33].

On October 6, 2008, a temporary visitation schedule was entered, which essentially allowed Father seven (7) days per month. [L.F. pp. 69-74; Tr. p. 34]. Father missed one visit during February 2009, but testified that he had attempted to make arrangements to move the same to a later date. [Tr. p. 36]. Mother refused to work with Father in order for him to exercise this time. [Tr. pp. 35-36]. Father further testified that he had entered into the temporary custody arrangement in order to reestablish contact with his daughter, but that it was not intended to be final. [Tr. p. 34].

During the pendency of this cause, the case was set for trial on February 23, 2009, some seven (7) months after Mother had been served with process in the State of Missouri. [Tr. p. 271]. However, Mother admitted that on February 11, 2009, being twelve (12) days prior to that trial, she filed pleadings in the State of Ohio requesting that state to take jurisdiction over the matter. [Tr. p. 272]. Mother further admitted that in undertaking such action she had been attempting to thwart the jurisdiction of the Missouri court. [Tr. p. 273].

In regard to a final custody determination in this matter, and pursuant to his Exhibit 12 which was received into evidence by the court, Father requested that he be granted sole physical custody of A.E.B. in the State of Missouri, assuming Mother

remained in the State of Ohio. [Tr. pp. 48-50]. Father further requested joint legal custody. [Tr. pp. 49-50]. Mother provided two alternative Parenting Plans for consideration by the court. Mother first requested sole physical and legal custody of A.E.B. wherein Mother would remain in the State of Ohio. [Tr. pp. 199-200]. Utilizing Exhibit J, Mother requested sole physical and sole legal custody in the State of Missouri if the Court deemed it in the best interests of the child. [Tr. p. 206]. Mother further testified that if the court deemed it in the child's best interests to reside in Missouri, she would, "Go with my daughter," as A.E.B. needs to be with her mom. [Tr. p. 206].

Father testified that he had built a strong bond with A.E.B. [Tr. p. 41-42]. A.E.B. and her Father spent quality time together undertaking such activities as reading books, going to the park, playing, going to the zoo, watching movies and the like. [Tr. p. 41]. A.E.B.'S paternal grandfather further testified to the bond between her and Father. [Tr. p. 155]. He testified that Father exercised all aspects of parenthood including, but not limited to, helping A.E.B. brush her teeth, having breakfast together, taking her swimming, making lunch for her and putting her to bed. [Tr. pp. 155-156]. Father's sister, C.L., testified to the same strong bond. C.L. stated that, "He's very loving. He plays with her. He holds her and wants to kiss on her, you know, just spends as much time as he can with her." [Tr. p. 165]. The testimony further included that prior to this action, Mother was very willing to allow C.L. to be a part of A.E.B.'S life and would often meet her for lunch. [Tr. p. 166].

Father testified in regard to his ability to care and provide for A.E.B. This testimony included that A.E.B. had her own room at his residence next to his bedroom. [Tr. p. 61]. Father had also researched various daycares that would be available for A.E.B. during his hours at work. [Tr. p. 62]. Father's parents would also be available to help with childcare in relation to their granddaughter. [Tr. p. 63].

Testimony was adduced by both parties in regard to the problems that would result from a long distance custody arrangement. Father stated that if A.E.B. were placed in her Mother's custody in the State of Ohio, the extent and nature of his relationship with her would be diminished. Specifically he stated, "Well, I mean, we only get to see each other a week at a time right now. When she flies in, takes her a little bit to adjust for her not seeing me for the last three weeks, you know, last few weeks, that T.B. had her. Plus when she starts school I am not going to be a part of anything school related, not going to be there with help for her homework, when she is sick…." [Tr. p. 42]. During her testimony, Mother also admitted that such a long distance relationship would make it difficult for Father to be a part of A.E.B.'S life. [Tr. pp. 275-276].

Subsequent to trial and the entry of the trial court's Judgment, a ruling was made pursuant to the parties' motions related to an Appeal Bond (the same being offered to the Appellate Court for review by consent of the attorneys of record and which was made a part of this Court's file). Such Judgment was entered by the trial court on April 30, 2010, and remains in effect to this date. [Judgment for Appeal Bond and Appeal Order dated April 30, 2010]. The same granted specific times of custody to the parties pending the

appeal. Specifically, Father was granted the first fourteen (14) consecutive overnight periods with the minor child each month. [Judgment for Appeal Bond dated April 30, 2010].

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN REQUIRING MOTHER TO MOVE FROM OHIO TO A THREE-COUNTY AREA IN MISSOURI BECAUSE THE SAME WAS NOT A MISAPPLICATION OF THE LAW IN THAT THE ORDER WAS MADE PURSUANT TO A PRAYER FOR RELIEF BY MOTHER, GRANTED GREATER LENIENCY REGARDING RELOCATION THAN THAT FOR WHICH MOTHER HAD PRAYED AND WAS BASED UPON THE BEST INTERESTS OF THE MINOR CHILD.

RESPONDING TO: THE TRIAL COURT ERRED IN REQUIRING MOTHER TO MOVE FROM OHIO TO A THREE-COUNTY AREA IN MISSOURI BECAUSE SUCH PORTION OF ITS JUDGMENT MISAPPLIED THE LAW AND CONSTITUTED AN ABUSE OF ITS DISCRETION IN THAT NO AUTHORITY EXISTS IN CHAPTER 452 TO REQUIRE A PARENT AT THE TIME OF AN INITIAL CUSTODY DETERMINATION TO MOVE FROM ONE STATE TO ANOTHER, OR TO RESTRICT A PARENT'S RESIDENCE TO A PARTICULAR SET OF COUNTIES; FURTHER, INSOFAR AS AN INITIAL CUSTODY DETERMINATION TAKES INTO ACCOUNT THE "INTENTION" OF EITHER PARENT TO RELOCATE, THE PROCEDURES OF SECTION 452.377 DO NOT COME INTO PLAY, THE TRIAL COURT DOES NOT HAVE THE ABILITY TO UNDERTAKE TO CREATE AN IDEAL

ENVIRONMENT FOR THE CHILD BY REQUIRING MOTHER TO MOVE, AND ITS ORDER TO REQUIRE MOTHER TO MOVE CREATES A GREATER BURDEN UPON MOTHER AS THE CUSTODIAL PARENT THAN UPON FATHER AS THE UNFETTERED NON-CUSTODIAL PARENT.

D.A.B. v. J.L.B., 902 S.W.2d 348 (Mo. App. 1995)

Higher Education Assistance Foundation v. Hensley,

841 S.W.2d 660, 663 (Mo. 1992)

Marriage of Jill D. Robinson, 53 P.3d 1279 (Mont. 2002)

Murray v. Rockwell, 952 S.W.2d 350 (Mo. App. 1997)

R.S.Mo. sec. 452.375

ARGUMENT

THE TRIAL COURT DID NOT ERR IN REQUIRING MOTHER TO MOVE FROM OHIO TO A THREE-COUNTY AREA IN MISSOURI BECAUSE THE SAME WAS NOT A MISAPPLICATION OF THE LAW IN THAT THE ORDER WAS MADE PURSUANT TO A PRAYER FOR RELIEF BY MOTHER, GRANTED GREATER LENIENCY REGARDING RELOCATION THAN THAT FOR WHICH MOTHER HAD PRAYED AND WAS BASED UPON THE BEST INTERESTS OF THE MINOR CHILD.

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The trial court's Judgment of February 11, 2010, awarded sole physical custody of the minor child to Mother and joint legal custody between the parties. [L.F. p. 93]. The Judgment further required that Mother relocate with the minor child and reside in a three-county area of Saint Charles County, Saint Louis County or Lincoln County, Missouri. [L.F. p. 93]. Based upon the evidence which included Mother's Parenting Plan Exhibit J and her testimony indicating that if the court deemed it in the best interests of the minor child to be in Missouri, Mother would come with her, the court was within its discretion and its Judgment must be upheld.

This Court must affirm the trial court's custody determination unless it is not supported by substantial evidence, it is against the weight of the evidence, it erroneously declares the law or erroneously applies the law. *Dunkle v. Dunkle*, 158 S.W.3d 823, 832 (Mo. App. 2005). In making provision for child custody, the trial court has broad discretion. *Jobe v. Jobe*, 708 S.W.2d 322, 328 (Mo. App. 1986). *See L.J.B. v. L.W.B.*, 921 S.W.2d 23, 26 (Mo. App. 1996); *and D.A.B. v. J.L.B.*, 902 S.W.2d 348, 350 (Mo. App. 1995) (paternity action filed prior to mother's move to the State of California and wherein father was granted custody of 16 month old child, the Court citing in part that

mother's move was disputed and may not have been mandatory pursuant to military orders and where mother and her parents interfered with father's custody and preferred for visitation issues to be handled by their lawyers). A trial court deciding a custody dispute between residents of different jurisdictions can consider the fact that it may lose jurisdiction to enforce visitation orders. *See In re S.M. and A.M.*, 938 S.W.2d 910, 921 (Mo. App. 1997).

The trial court had before it a question of custody as related to with whom the minor child should be placed physically and legally. Mother cites *DeFreece v. DeFreece*, 69 S.W.3d 109, 113 (Mo. App. 2002) for the proposition that, "Having come to the conclusion that the child's best interest was served by being in the sole physical custody of Mother in its application of section 452.375 R.S.Mo., the trial court was not then to treat this case as a relocation case under section 452.377. The question of whether Mother should be allowed to continue to reside in Ohio was no more before the court than the mother's relocation to South Carolina was in *Baxley v. Jarred*, 91S.W.3d 192, 206 (Mo. App. 2002)." [Respondent's Substitute Brief p. 11].

RSMo. 452.375 states, in part, as follows:

1. As used in this chapter, unless the context clearly indicates otherwise:

…(3) "Joint physical custody" means an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents;….

A schedule which grants a father alternating weekends, major holidays and one week in the summer constitutes significant parenting time for a joint physical custody designation. *See House v. House*, 292 S.W.3d 478, 487-88 (Mo. App. 2009). A court looks to the amount of time for which each parent has the care and supervision of the child to determine the proper designation of the physical custody arrangement as "joint" or "sole." *Malawey v. Malawey*, 137 S.W.3d 518, 524 (Mo. App. 2004) (reviewing court finding that father had "sole" physical custody where the trial court specifically found that it was not in the best interests of the minor children that joint physical custody be granted and where mother's time was designated as visitation); *and LaRocca v. LaRocca*, 135 S.W.3d 522, (Mo. App. 2004).

In this cause pursuant to the trial court's Parenting Plan, Father was granted five (5) overnights with the minor child during a regular fourteen (14) day period. Mathematically, for a regular fourteen (14) day (ie. two week) period, Father essentially has 36% of the custody time. This does not take into account that the trial court also granted Father one-half of the summertime and one-half of the standard holidays. Further, in the Parenting Plan entered as part of the Judgment of the trial court, Father's time is designated as "custody and visitation." It appears clear, that though the trial court designated Mother as the sole physical custodian, based upon the amount of custody time allotted to Father, the same should have been designated as "joint physical" between the parties.

Mother further states that, "Consequently, if the trial court is to have any authority to require that a parent move his or her residence at the time of an initial determination, the basis for such power must be found elsewhere." [Respondent's Substitute Brief p. 11-12]. Even if, arguably, the issue of relocation was not before the court as proffered by Mother, the power "to require that a parent move his or her residence at the time of an initial determination" was granted by Mother.

At trial, Mother testified in specificity as follows:

> Q: T.B., if you could go to Exhibit J. You understand that the court, the judge here is charged with the duty or responsibility to determine what's in the best interest of your daughter, you understand that?
>
> A: Yes.
>
> Q: If she deems the best interest of your daughter is to be back here in St. Louis living here full time, what are you going to do?
>
> A: Go with my daughter.
>
> Q: So it's not an option that you stay in Ohio, if your daughter lives here full time?
>
> A: No.
>
> Q: Why not?
>
> A: Because I need to be with my daughter. She needs to be with her mom.

Q: Exhibit J, are you offering this parenting plan as a back-up plan if the Court believes that it's appropriate for your daughter to stay here in St. Charles?

A: Yes, sir. [Tr. p. 206].

In essence, Mother "hedged her bets" at trial. In fear that, based on the circumstances and evidence at trial, the court would be inclined to place sole physical custody with Father in the State of Missouri while she resided in Ohio, Mother provided the Court with another option: For her to move with her daughter back to the State of Missouri. The court determined this issue pursuant to Mother's request. Further, in her testimony, the area wherein the child would reside if in the State of Missouri is referred to as St. Louis and St. Charles. In fact, pursuant to this testimony, the Court provided an additional county whereby Mother could reside.

Mother cites to various Missouri cases for the general proposition that a court does not have authority with which to limit the area of residence of a party or children. *See Haden v. Riou*, 90 S.W.3d 538, 541 (Mo. App. 2002) (court in modification proceedings refusing to enforce a provision in prior judgment which prospectively restricted the parties' capability to relocate); *Kline v. Kline*, 686 S.W.2d 13, 17 (Mo. App. 1985) (court in initial divorce proceeding denying father's request to have placed in the decree a provision which would restrict both parties' ability to relocate from a two county area); *In re the Marriage of Greene*, 711 S.W.2d 557, 564 (Mo. App. 1986) (court in motion to modify action wherein father attempted to enforce provision in settlement agreement

restricting the abode of the children to two counties *without consideration of factors which might justify or prohibit a move* finding the same void against public policy) (emphasis added).

Though these at first glance appear to be an impressive line of cases for Mother's position, they are not on point with the matter at bar. This case is not one of a modification in which a court is asked to enforce a currently existing relocation restriction in a judgment as existed in *Haden v. Riou*. This case is also unlike the facts in *Kline v. Kline*, as Father in this matter was not requesting a residence restriction, but the same was placed within the Judgment based upon Mother's own exhibits and testimony. Unlike in *Greene*, Father is not attempting to enforce a restriction under a previous order, and there are clearly factors *which might justify or prohibit a move.* In this matter, Mother proposed a parenting plan and indicated she was willing to move back to the State of Missouri.

It is clear from the Judgment, though not specified with particularity, that the court deemed it in the best interests of the minor child to reside in the State of Missouri with Father having significant periods of custody. The issue was confused by Mother's request that if the court found as such, she wished for the child to be placed in her sole custody in the State of Missouri. This is what the court ordered. Mother now complains about this result, and wishes for this Court to, "…eliminate the requirement that Mother move with the minor child from Ohio to either Saint Louis County, Saint Charles County or Lincoln County, Missouri, and implement the physical custody component of her

proposed Parenting Plan." [Respondent's Substitute Brief p. 20]. In making her argument, Mother fails to *consider factors which might justify or prohibit a move* as stated in *Greene,* such as Mother's testimony and proposal of Exhibit J, as well as the actions she took in attempting to thwart the jurisdiction of the Missouri court, deny custody and visitation and other facts and circumstances as described herein which the court adduced during trial. For Mother to be granted her request of striking the residency provisions would not be in the best interests of the minor child as evinced by the court's Judgment. It would be more appropriate for the Court to grant Father sole physical custody in Missouri pursuant to the parenting plan admitted into evidence and based on Mother remaining in the State of Ohio.

Mother places emphasis on *Matter of Custody of D.M.G.*, 951 P.2d 1377 (Mont. 1998). Unlike the case at bar, the *D.M.G.* court couched its reasoning on a person's constitutional right to travel, as well as Montana's statute which provided a presumption that custody be granted to the parent who has provided most of the primary care during the child's life. *See id.* at 1385-86. Further, in *D.M.G.*, the father of the minor child filed the paternity action three months after mother had moved out of state and did not object to the move. *See id.* at 1379. Such was not the case in this matter.

In a case subsequent to *D.M.G.*, the Montana Supreme Court ruled that a residency requirement as related to custody could be upheld. *See Marriage of Jill D. Robinson*, 53 P.3d 1279 (Mont. 2002). In *Robinson*, the lower court entered a judgment, upon a modification request by father, that mother's residence would be the children's primary

residence if she remained in Butte, Montana, but that if she moved to the State of Idaho, the children would remain in Butte, Montana, with their father. *See Robinson*, 53 P.3d 1279 at 1282. The Supreme Court of Montana in *Robinson* distinguished the *D.M.G.* Court on various grounds. Though again, under one count, mother's appeal was couched in terms of a right to travel, the Court found in favor of father as based upon the best interests of the children. *See id.* at 1284. The Court further noted that the statutory presumption that existed at the time of *D.M.G.* was no longer in effect at the time of this matter. *See id.* at 1283.

Mother further places emphasis on *In re Marriage of Littlefield*, 940 P.2d 1362 (1997) which was decided by the Washington Supreme Court. Said case related to a marital dissolution action wherein the trial court placed a geographical, residential restriction on mother after she had relocated to the state of California without any objection being made by father. *See id.* at 1364. The Supreme Court in this matter reversed the geographical restriction. *See id.* at 1372.

Both *D.M.G.* and *Littlefield* are substantially different in their facts as compared to the case at bar. Unlike these cases, in this matter, Mother proposed the parenting plan, being Exhibit J, which in essence was ordered by the trial court. There is no mention in the underlying facts of these two cases that relate to patterns of a party attempting to diminish custody time with the other parent, or to thwart the jurisdiction of a court as existed here, by the admission under oath of Mother. Further, in both stated cases, the respective courts pointed out that the father had made no immediate objection to the

relocation of mother with the children. *See Matter of Custody of D.M.G.*, 951 P.2d 1377, 1379 (Mont. 1998) (Court opinion stating, in part, "Michael was not happy about the move, but did not try to stop Tammy from leaving."); *and In re Marriage of Littlefield*, 940 P.2d 1362 (1997) (Court opinion stating, in part, "In the spring of 1995, Charissa decided to move to California….Edmund had no objection to the move during May, June or July…").

Unlike both *D.M.G.* and *Littlefield*, Father did everything in his power to keep the relocation from occurring. As stated, Father filed this action being unaware at the time that Mother was actually planning to move to Ohio. Upon discovering that Mother had relocated with the child to Ohio, and without the intent of causing Mother criminal liability, Father contacted the St. Peters Police as well as the St. Charles County Sheriff's Department. [Tr. 33]. Father also had this attorney send two letters to the St. Charles County, Missouri, Prosecuting Attorney's Office, related to the relocation issue. [Tr. 33]. Further, in relation to Mother's move to Ohio, after having been served with process in this matter, Mother testified that she was not obligated to ask Father about said move. [Tr. p. 254]. During this questioning, the trial court took judicial notice of RSMo. sec. 565.149, 565.153, and 565.156. The relevant portions of these statutes are as follows:

> RSMo. 565.149. Definitions
>
> As used in sections 565.149 to 565.169, the following words and phrases mean:
>
> …(3) "Parent", either a biological parent or a parent by adoption;
>
> (4) "Person having a right of custody", a parent or legal guardian of the child.

RSMo. 565.153. Parental kidnapping – penalty

1. In the absence of a court order determining rights of custody or visitation to a child, a person having a right of custody of the child commits the crime of parental kidnapping if he removes, takes, detains, conceals, or entices away that child within or without the state, without good cause, and with the intent to deprive the custody right of another person….

…3. A subsequently obtained court order for custody or visitation shall not affect the application of this section.

RSMo. 565.156. Child abduction

1. A person commits the crime of child abduction if he or she:

(1) Intentionally takes, detains, entices, conceals or removes from a parent after being served with process in an action affecting marriage or paternity but prior to the issuance of a temporary or final order determining custody….

As based on citation to the statutes above, as well as the efforts made by Father, Father made all attempts to "object" and "oppose" the move of Mother with the child to the State of Ohio. Though the matter at bar pertains only to the statutes relative to a paternity action, the criminal statutes cited above are relevant to Father's position at trial, that Mother's move to Ohio was conducted in an effort to abrogate or limit his custody with the minor child. It is clear from these citations that Father, under such statutes, was a "Parent" as evinced by the paternity testing and support order implemented by the Division of Child Support Enforcement prior to the filing of this

matter. It is further clear that Mother removed the child from the state of Missouri after having been properly served at her place of employment in this state.

An initial determination of custody is made based upon consideration of the eight factors set out in Section 452.375, and not based on who happens to have the actual custody of the child from the time of separation until the judge makes the custody determination. *See Defreece v. Defreece*, 69 S.W.3d 109, 113 (Mo. App. 2002). In establishing a custody plan, a case by case approach should be utilized to determine the best interest of the child and to tailor the plan to that interest. *See Murray v. Rockwell*, 952 S.W.2d 350, 353 (Mo. App. 1997). Section 452.375 R.S.Mo. sets forth the factors which the trial court is to consider in making a custody determination. These factors are stated below with analysis as based upon the facts and circumstances of this matter. These are as follows:

…2. The court shall determine custody in accordance with the best interests of the child. The court shall consider the relevant factors *including*:

(1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;

The court in effect ordered a modified Exhibit J as proposed by Mother during her testimony.

(2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of

parents to actively perform their functions as mother and father for the needs of the child;

The testimony was clear that frequent and meaningful contact had been had with both parents during the pendency of the matter and, as based on Father's and various witnesses' testimony as cited within the Statement of Facts above, it was clear that Father actively performed his function as a father for the needs of the child.

(3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;

As based on the testimony of D.D. (the minor child's paternal grandfather) as well as that of C.L. (Father's sister), it was clear that there was strong affection, care and love between the minor child and members of Father's family and that the same positively affected the best interests and welfare of the child.

(4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;

Testimony was adduced that, for various periods of time, Mother failed to allow Father to see the minor child and though making arrangements for Father's family to have contact with the child, premised the same on Father not being present. The court certainly could have taken this testimony into account. Further, the

court noted that it found the timing of Mother's move to Ohio to be incredibly coincidental, [Tr. pp. 295-296], as well as heard Mother's admission that she had attempted to thwart the jurisdiction of Missouri courts by filing pleadings in the State of Ohio directly prior to the scheduled trial in Missouri, as cited under the Statement of Facts above.

(5) The child's adjustment to the child's home, school, and community;

Evidence was adduced that the child was adjusted to Father's community as well as Mother's and the child is not yet in school.

(6) Not applicable in this matter;

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

It is clear, as based upon the facts and circumstances of this matter, that regardless of the fact that Mother continued to hold employment in the State of Missouri for a month after her purported move, did not have employment waiting for her in the State of Ohio, and was served at her place of work in the State of Missouri prior to her and the child's move, Mother's intention was to relocate the child out of state and far away from Father.

(8) Not applicable in this matter.

Though A.E.B. and Mother were living in Missouri at the time Mother was served at work in Missouri, Mother attempts to claim that because she moved to Ohio prior to final judgment in this matter, "…the issue of Mother's move to Ohio is moot; i.e., it already occurred." [Respondent's Substitute Brief p. 12]. Such was not the case in *Seaman v. Seaman*, 41 S.W.3d 889, 892-96 (Mo. App. 2001) (court reviewing initial custody determination under RSMo. 452.375 and 452.377 where mother wished to relocate out of state and approximately 80 miles from father's residence). RSMo. 452.375 governs the initial award of custody in paternity cases, as well as dissolution cases. *See Finnern v. Day*, 256 S.W.3d 600, 602 (Mo. App. 2008). In making an initial custody determination the court considers the mother's intention to relocate. *See id.* at 603. (in a paternity matter during which mother relocated to the State of Texas pending a trial on the merits, reviewing Court noted that in the trial court's findings it is stated, "Mother is unwilling to move back to Missouri, and Father has no intention of going to Texas"). When a court considers whether a parent's desire to relocate a child is in "good faith," the question is whether the relocating parent's motive or purpose for relocating is something other than to disrupt or deprive the non-relocating parent contact with the children and provided in RSMo. 452.375(2). *See Mantonya v. Mantonya*, 311 S.W.3d 392, 399-401 (Mo. App. 2010).

In *Murray v. Rockwell*, 952 S.W.2d 350, 352-353 (Mo. App. 1997), the court addressed a modification request which included a proposed relocation to the State of Nevada. In denying mother's request for relocation out of state, the Court stated that the

trial court could have found certain evidence persuasive, such as mother ignoring a court order to return to Missouri, that mother's job prospects in Nevada as a casino cocktail waitress were just as good in Missouri, and there was no evidence that the child would not do well in Missouri. *Id.* at 352-353. *See also Koenig v. Koenig*, 782 S.W.2d 86, 87 (Mo. App. 1989) (court denying relocation of mother from Missouri to New Hampshire where in part mother testified that she thought it would be best for the child to be with her no matter where she resided, but also stated that she would prefer staying in St. Louis with her son instead of moving to New Hampshire without him).

Such is precisely the situation which is presented to this Court. A.E.B., at the time of trial, had lived in Ohio for not even a year, and this cause was delayed by Mother's attempt to thwart the jurisdiction of Missouri. During the pendency of this matter, Father was receiving custody at the rate of one full week per month, seeking full custody in the State of Missouri and, subsequent to trial, has had custody of the child for the first two (2) weeks of each month. Though Mother now claims that the effect of the trial court's order that she move to Missouri only serves to disrupt the stability and continuity of her home, not preserve it, the opposite is true.

In a matter such as this, and those like paternity actions, public policy considerations come into play. If under the facts and circumstances of this case, as aforesaid, this honorable Court orders remand with directions to name Mother as sole physical custodian with an out of state visitation plan for Father, a legally enforceable blueprint will have been created for every other parent who wishes to thwart and/or limit

the other parent's custodial time and involvement with a minor child. In the best interests of all minor children, such should not be the policy of this state.

In this matter it is clear that the court believed in entering its Judgment that it was in the minor child's best interests to reside in Missouri, and in doing so, granted Mother's request to have physical custody in this state. If this Court deems remand to the trial court to be the appropriate action, a determination will need to be made therein based on whether it is in A.E.B.'S best interest to reside in the sole physical custody of her Father in Missouri, or with Mother in the State of Ohio. Mother, after having proposed a Parenting Plan with residency in Missouri to the trial court which was granted, now comes to this Court and wishes to utilize that provision to "back door" her alleged truly desired result, which is to reside in Ohio with the minor child. The same is not in the best interests of the child, is unfair and inequitable. These facts and information were at best not presented by Mother and, at worst, misrepresented to the court at the time of trial.

Rule permitting an appellate court to give such judgment as trial court ought to give does not support such an order where the court can only speculate as to what the trial court intended. *See Higher Education Assistance Foundation v. Hensley*, 841 S.W.2d 660, 663 (Mo. 1992). An appropriate case for an appellate court to render the judgment that should have been rendered by the trial court is one where there is no dispute of facts and that gives the Court confidence as to the reasonableness, fairness and accuracy of the conclusion reached. *See LaRocca v. LaRocca*, 135 S.W.3d 522, 526 (Mo. App. 2004); *and Lavalle v. Lavalle*, 11 S.W.3d 640, 652 (Mo. App. 2000) (*dissenting opinion*).

CONCLUSION

For all the foregoing reasons, Petitioner/Respondent/Cross-Appellant, L.D., respectfully requests this Court to affirm the trial court's judgment as to the physical custody plan for the minor child, including the requirements related to the child's residence being set forth in Missouri, or to grant Father full custody in the State of Missouri with temporary visitation and custody with Mother in the State of Ohio, or in the alternative to remand this cause to the trial court to adduce further evidence and testimony and make further findings pursuant to RSMo. 452.375 and 452.377 regarding the best interests of the child and as to the sole physical custody of the child being placed with Father in Missouri or with Mother in Ohio.

Respectfully submitted,

KNIGHT & TOMICH

By: _____

Joshua G. Knight, #52672
118 North Main St.
St. Charles, MO 63301
joshknight@charter.net
(636) 947-0550
(636) 947-2493 Facsimile
Attorney for Petitioner/Respondent/ Cross-Appellant

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 84.06

Joshua G. Knight, Attorney for Petitioner/Respondent/Cross-Appellant, and pursuant to Supreme Court Rule 84.06, certifies that:

1. The Petitioner/Respondent/Cross-Appellant's RESPONDENT'S SUBSTITUTE BRIEF submitted in the above styled cause includes the information required by Rule 55.03;
2. The brief submitted complies with the limitations contained in Supreme Court Rule 84.06(b);
3. As reported by the undersigned's copy of Word, the word count is 7,489 and the line count is 763; and
4. The diskettes submitted to the Court and to counsel of record have been scanned for viruses and they are virus free.

_____

Joshua G. Knight, #52672
Attorney for Petitioner/
Respondent/Cross-Appellant

IN THE
SUPREME COURT OF MISSOURI

A.E.B., a minor by next friend,	)	
L.D., and L.D., Individually,	)	
	)	
	)	
Petitioner/Respondent/	)	**No. 91716**
Cross-Appellant,	)	
	)	
v.	)	
	)	
T.B.,	)	
Respondent/Appellant/	)	
Cross-Respondent.	)	

Appeal from the Circuit Court of
Saint Charles County, State of Missouri
Honorable Nancy L. Schneider, Judge

BRIEF OF PETITIONER/RESPONDENT/CROSS-APPELLANT, L.D., AS CROSS-APPELLANT

KNIGHT & TOMICH
By: Joshua G. Knight, #52672
118 North Main Street
St. Charles, MO 63301
joshknight@charter.net
(636) 947-0550
(636) 947-2493 Facsimile
Attorney for Petitioner/
Respondent/Cross-Appellant

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IN THE
SUPREME COURT OF MISSOURI

A.E.B., a minor by next friend, L.D., and L.D., Individually,	)	
Petitioner/Respondent/ Cross-Appellant,	)	**No. 91716**
v.	)	
T.B., Respondent/Appellant/ Cross-Respondent.	)	

Appeal from the Circuit Court of
Saint Charles County, State of Missouri
Honorable Nancy L. Schneider, Judge

JURISDICTIONAL STATEMENT

This is an action for Declaration of Paternity, Order of Support and Custody and Change of Name under Section 210.817 et.seq. RSMo. and Section 452.300 et.seq. RSMo. On July 8, 2008, Petitioner/Respondent/Cross-Appellant, L.D. (hereinafter "Father"), filed his Petition for the aforesaid causes of action. On July 16, 2008, Respondent/Appellant/Cross-Respondent, T.B. (hereinafter "Mother"), was served in the State of Missouri with Father's Petition. On August 27, 2008, Mother filed her Answer to Father's Petition as well as her Petition for Declaration of Paternity and Order of Custody, Support, Medical Insurance, Necessaries and Past Support.

Trial was held on November 12, 2009, and November 13, 2009. On February 11, 2010, the trial court issued its Judgment and Decree of Paternity and Order for Child Support, Visitation and Temporary Custody, which granted Mother sole physical custody of the minor child, A.E.B., born March 3, 2006, and designated the parties as joint legal custodians. The Judgment specifically ordered that Mother, "…shall return to the State of Missouri with the minor child….The Court orders that the minor child reside in the tri-county area of St. Charles, St. Louis, or Lincoln County, Missouri." The court ordered a custody plan whereby Father would receive custody of the minor child every other weekend from 6:00 p.m. on Friday through and ending at 8:00 a.m. on Monday. This custody order also granted Father one overnight each week, one-half of summer vacation time and the standard holiday schedule.

On March 2, 2010, Mother filed her Motion for New Trial and/or in the Alternative, Motion to Amend. On March 17, 2010, Father filed his Motion to Re-Open the Evidence, Amend the Judgment and Order dated February 11, 2010, or in the Alternative for a New Trial. On March 18, 2010, the trial court overruled both motions. Mother properly filed her Notice of Appeal with this Court on March 23, 2010. On March 31, 2010, Father properly filed his Notice of Appeal with this Court.

Father cross-appealed from the trial court's Judgment on the basis that the trial court's award of sole physical custody with Mother was based upon a misapplication of the law, was unsupported by substantial evidence and constituted an abuse of the trial court's discretion.

On April 26, 2011, the Missouri Court of Appeals, Eastern District, filed its opinion reversing the trial court's judgment as to the physical custody plan pursuant to Mother's appeal and, with regard to Father's cross-appeal, affirmed the placement of sole physical custody of the minor child with Mother. The Court of Appeals simultaneously transferred this matter to this Court pursuant to Rule 83.02. Consequently, the Missouri Supreme Court has jurisdiction herein pursuant to Article V, Section 10 of the Missouri Constitution.

IN THE
SUPREME COURT OF MISSOURI

A.E.B., a minor by next friend, L.D., and L.D., Individually,	)	
Petitioner/Respondent/ Cross-Appellant,	)	**No. 91716**
v.	)	
T.B.,	)	
Respondent/Appellant/ Cross-Respondent.	)	

Appeal from the Circuit Court of
Saint Charles County, State of Missouri
Honorable Nancy L. Schneider, Judge

STATEMENT OF FACTS

Petitioner/Respondent/Cross-Appellant, L.D. (hereinafter referred to as "Father"), incorporates by reference herein his Statement of Facts as stated above in his Brief as Petitioner/Respondent.

POINT RELIED ON

THE TRIAL COURT ERRED IN AWARDING MOTHER SOLE PHYSICAL CUSTODY OF THE MINOR CHILD BECAUSE THE SAME WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE, IS A MISAPPLICATION OF THE LAW AND AN ABUSE OF DISCRETION AND, AS BASED ON THE JUDGMENT, IT IS APPARENT THAT THE COURT BELIEVED THAT THE BEST INTERESTS OF THE CHILD WOULD BE SERVED BY RESIDING IN THE STATE OF MISSOURI.

House v. House, 292 S.W.3d 478 (Mo. App. 2009)

In re the Paternity of D.A.B. v. J.L.B., 902 S.W.2d 348 (Mo. App. 1995)

In re S.M. and A.M., 938 S.W.2d 910 (Mo. App. 1997)

Mildred v. Darryl, 743 S.W.2d 111 (Mo. App. 1988)

R.S.Mo. sec. 452.375

ARGUMENT

THE TRIAL COURT ERRED IN AWARDING MOTHER SOLE PHYSICAL CUSTODY OF THE MINOR CHILD BECAUSE THE SAME WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE, IS A MISAPPLICATION OF THE LAW AND AN ABUSE OF DISCRETION AND, AS BASED ON THE JUDGMENT, IT IS APPARENT THAT THE COURT BELIEVED THAT THE BEST INTERESTS OF THE CHILD WOULD BE SERVED BY RESIDING IN THE STATE OF MISSOURI.

The trial court has broad discretion in making provision for child custody and the Court will not interfere with the trial court's decree unless the welfare of the child compels such interference. *See Schwartzkopf v. Schwartzkopf*, 9 S.W.3d 17, 21 (Mo. App. 1999) *citing L.J.B. v. L.W.B.*, 921 S.W.2d 23, 26 (Mo. App. 1996). A determination of child custody is given greater deference than that given to a trial court in any other type of case. *See L.J.B.*, 921 S.W.2d 23 at 26; *and D.A.B. v. J.L.B.*, 902 S.W.2d 348, 350 (Mo. App. 1995) (paternity action filed prior to mother's move to the State of California and wherein father was granted custody of 16 month old child, the Court citing in part that mother's move was disputed and may not have been mandatory pursuant to military orders and where mother and her parents interfered with father's custody and preferred for visitation issues to be handled by their lawyers).

A trial court deciding a custody dispute between residents of different jurisdictions can consider the fact that it may lose jurisdiction to enforce visitation orders. *See In re*

S.M. and A.M., 938 S.W.2d 910, 921 (Mo.App. W.D.1997). As between parents, the best interest of the child controls. *Mildred v. Darryl*, 743 S.W.2d 111, 112 (Mo.App. W.D.1988) (court affirming grant of custody to father, who prior to the birth of child had moved to Nevada and regardless of the fact that father had shown little initial interest in acknowledging the child as his, where trial court's judgment was based upon father's present home and his having later provided support and his interaction with the child after substantial visitation).

In this matter, it was clear that the court was concerned about the issue of jurisdiction. The court not only cited that the timing of Mother's move was suspicious but appeared to take interest in the fact that Mother had filed another action in the State of Ohio immediately prior to the trial in Missouri. Further, the court heard evidence as based on Father's concern that if custody was granted to Mother in the State of Ohio, Missouri would lose jurisdiction over custody matters.

RSMo. 452.375 governs the initial award of custody in paternity cases, as well as dissolution cases. *See Finnern v. Day*, 256 S.W.3d 600, 602 (Mo. App. 2008). In making an initial custody determination the court considers the mother's intention to relocate. *See id.* at 603. (in a paternity action during which mother relocated to the State of Texas pending a trial on the merits, reviewing Court noting that in the trial court's findings it is stated, "Mother is unwilling to move back to Missouri, and Father has no intention of going to Texas"). When a court considers whether a parent's desire to relocate a child is in "good faith," the question is whether the relocating parent's motive

or purpose for relocating is something other than to disrupt or deprive the non-relocating parent contact with the child and provided in RSMo. 452.375(2). *See Mantonya v. Mantonya*, 311 S.W.3d 392, 399-401 (Mo. App. 2010).

In this matter it is clear that the trial court found the timing of Mother's move to the State of Ohio "incredibly coincidental." [Tr. pp. 295-296]. The court further heard testimony that the parties had several mutual friends and acquaintances through which Father's preparations to file a paternity action could have become known to Mother. [Tr. pp. 28, 315]. As stated above, prior to Mother's move with A.E.B. after service, they were living in Missouri, Mother had been served at work in Missouri, continued to retain employment in Missouri, had not secured a residence in Ohio nor secured employment in Ohio. Coupled with the fact that prior to a temporary custody order being entered by the court, Mother engaged in a course of conduct whereby she denied on several occasions Father's attempts to spend time with the child, it is clear that the court could easily have determined that Mother's move was an effort to thwart Father's potential custody and relationship with the child.

RSMo. 452.375 states, in part, as follows:

2. As used in this chapter, unless the context clearly indicates otherwise:

…(3) "Joint physical custody" means an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents;….

A schedule which grants a father alternating weekends, major holidays and one week in the summer constitutes significant parenting time for a joint physical custody designation. *See House v. House*, 292 S.W.3d 478, 487-88 (Mo. App. 2009). A court looks to the amount of time for which each parent has the care and supervision of the child to determine the proper designation of the physical custody arrangement as "joint" or "sole." *Malawey v. Malawey*, 137 S.W.3d 518, 524 (Mo. App. 2004) (reviewing court finding that father had "sole" physical custody where the trial court specifically found that it was not in the best interests of the minor children that joint physical custody be granted and where mother's time was designated as visitation); *and LaRocca v. LaRocca*, 135 S.W.3d 522 (Mo. App. 2004).

In this cause pursuant to the trial court's Parenting Plan, Father was granted five (5) overnights with the minor child during a regular fourteen (14) day period. Mathematically, for a regular fourteen (14) day (ie. two week) period, Father essentially has 36% of the custody time. This does not take into account that the trial court also granted Father one-half of the summertime and one-half of the standard holidays. In the Parenting Plan entered as part of the Judgment of the trial court, Father's time is designated as "custody and visitation." It appears clear that though the trial court designated Mother as the sole physical custodian, based upon the amount of custody time allotted to Father, the same should have been designated as "joint physical" between the parties. Further, the same is evinced by the fact that Father was granted the first fourteen

(14) consecutive overnight periods with the minor child each month pursuant to the Judgment for Appeal Bond and Appeal Order entered by the trial court on April 30, 2010.

An initial determination of custody is made based upon consideration of the eight factors set out in Section 452.375, and not based on who happens to have the actual custody of the child from the time of separation until the judge makes the custody determination. *See Defreece v. Defreece*, 69 S.W.3d 109, 113 (Mo. App. 2002). An appellate court may dispense with a remand and render the judgment that should have be rendered by the trial court, and an appropriate case for such judgment is one where there is no dispute as to the facts, but only a dispute as to their legal significance. *See LaRocca v. LaRocca,* 135 S.W.3d 522, 526 (Mo. App. 2004). Said court can render such a judgment when the record and evidence give the court confidence in the reasonableness, fairness and accuracy of the conclusion reached. *Id.* Rule permitting an appellate court to give such judgment as trial court ought to give does not support such an order where the court can only speculate as to what the trial court intended. *See Higher Education Assistance Foundation v. Hensley*, 841 S.W.2d 660, 663 (Mo. 1992); *and Lavalle v. Lavalle*, 11 S.W.3d 640, 652 (Mo. App. 2000) (*dissenting opinion*).

The trial court obviously believed in entering its Judgment that it was in the minor child's best interests to reside in Missouri and have significant and substantial custody time with Father. It seems clear that the court's Judgment was designed in order to ensure the best interests of the child and that she reside in the State of Missouri with both parents and based the same, at least in part, on Mother's Exhibit J and her testimony. The

court obviously based its Judgment, in part, on Mother's proffered evidence and testimony that she was willing to move back to Missouri. Mother is unwilling to move with the minor child to Missouri notwithstanding her position and testimony under oath at trial. These facts and information were at best not presented by Mother and, at worst, misrepresented to the court at the time of trial. Because it is apparent from the evidence and testimony adduced at trial as well as the trial court's willingness to allow such substantial custody with Father, it would be within this Court's discretion, supported by the facts, circumstances and evidence, and the best interests of the child to award sole physical custody to Father under his Exhibit 12 with reasonable custody and visitation with Mother in the State of Ohio.

CONCLUSION

For all the foregoing reasons, Petitioner/Respondent/Cross-Appellant, L.D., respectfully requests this Court to modify the trial court's Judgment by granting Father the sole physical custody of the minor child in the State of Missouri with reasonable custody and visitation with Mother in the State of Ohio pursuant to Father's Parenting Plan, Exhibit 12, or in the alternative to remand this cause to the trial court to adduce further evidence and testimony and make further findings pursuant to RSMo. 452.375 and 452.377 regarding the best interests of the child and as to the sole physical custody of the child being placed with Father in Missouri or with Mother in Ohio.

Respectfully submitted,

KNIGHT & TOMICH

By: _____

Joshua G. Knight, #52672
118 North Main St.
St. Charles, MO 63301
joshknight@charter.net
(636) 947-0550
(636) 947-2493 Facsimile
Attorney for Cross-Appellant

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 84.06

Joshua G. Knight, Attorney for Petitioner/Respondent/Cross-Appellant, and pursuant to Supreme Court Rule 84.06, certifies that:

1. The Petitioner/Respondent/Cross-Appellant's CROSS APPELLANT'S SUBSTITUTE BRIEF submitted in the above styled cause includes the information required by Rule 55.03;
2. The brief submitted complies with the limitations contained in Supreme Court Rule 84.06(b);
3. As reported by the undersigned's copy of Word, the word count is 2,709 and the line count is 348; and
4. The diskettes submitted to the Court and to counsel of record have been scanned for viruses and they are virus free.

_____

Joshua G. Knight, #52672
Attorney for Petitioner/
Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the foregoing Substitute Briefs of Petitioner/Respondent/Cross-Appellant, L.D., as specified in Rule 84.06(a), one (1) copy of the disk as specified in Rule 84.06(a) were sent via U.S. Mail, postage prepaid, this _____ day June, 2011, to: Mr. Lawrence G. Gillespie, 7701 Forsyth Boulevard, Suite 300, Clayton, MO 63105, *Attorney for Respondent/Appellant/Cross-Respondent*.

_____
JOSHUA G. KNIGHT, #52672

STATE OF MISSOURI)
) ss
COUNTY OF ST. CHARLES)

Comes now, JOSHUA G. KNIGHT, 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.

_____
JOSHUA G. KNIGHT

Subscribed and sworn to before me, a Notary Public, this the _____ day of _____, 2011.

_____
Notary Public

My Commission Expires:

APPENDIX

No. 91716

INDEX TO APPENDIX

No. 91716