

**IN THE
MISSOURI SUPREME COURT**

A.E.B., a minor, by next friend,)	
L.D., and L.D., Individually,)	
)	
Petitioner/Respondent/Cross-)	
Appellant,)	
)	No. SC91716
v.)	
)	
T.B.,)	
)	
Respondent/Appellant/Cross-)	
Respondent.)	

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

**SECOND SUBTITUTE REPLY BRIEF OF PETITIONER/
RESPONDENT/CROSS-APPELLANT, L.D.**

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TABLE OF CONTENTS

	<i>Page(s)</i>
TABLE OF AUTHORITIES	ii
POINT RELIED ON	1
ARGUMENT	3
CONCLUSION.....	10
APPENDIX	13

TABLE OF CASES, STATUTES, AND AUTHORITIES

CASES	Page(s)
<i>D.A.B. v. J.L.B.</i> , 902 S.W.2d 348, 350 (Mo.App. W.D.1995)	5
<i>Finnern v. Day</i> , 256 S.W.3d 600, 603 (Mo.App. E.D.2008)	5
<i>House v. House</i> , 292 S.W.3d 478, 487-88 (Mo. App. 2009)	7
<i>LaRocca v. LaRocca</i> , 135 S.W.3d 522, (Mo. App. 2004)	7
<i>Malawey v. Malawey</i> , 137 S.W.3d 518, 524 (Mo. App. 2004)	7
<i>Porter v. Division of Employment Sec.</i> , 310 S.W.3d 295 (Mo. App. 2010)	4
 STATUTES	
Section 452.375 R.S.Mo.	7, 10
Section 452.377 R.S.Mo.	10

POINTS RELIED ON

II.

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 AND IN THE SOLE PHYSICAL CUSTODY OF FATHER UNLESS MOTHER RELOCATED TO THE STATE OF MISSOURI WITH THE MINOR CHILD.

REPLYING TO: THE TRIAL COURT PROPERLY PLACED SOLE PHYSICAL CUSTODY OF THE MINOR CHILD WITH MOTHER BECAUSE SUCH JUDGMENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE, WAS NOT THE RESULT OF A MISAPPLICATION OF LAW AND WAS NOT THE RESULT OF AN ABUSE OF DISCRETION IN THAT THE “INTENTION TO RELOCATE” LANGUAGE OF SECTION 452.375 R.S.MO IS INAPPLICABLE WHERE MOTHER HAS ALREADY MOVED TO OHIO, THERE IS NO SPECIFIC FORMULA FOR HOW THE STATUTORY FACTORS ARE TO BE WEIGHED BY THE TRIAL COURT, THE VERY FACT OF MOTHER’S OWN APPEAL CANNOT BE

CONSIDERED AS A REASON TO AWARD SOLE PHYSICAL CUSTODY TO FATHER; ADDITIONALLY, THE TRIAL COURT'S OBSERVATION DURING ITS QUESTIONING OF MOTHER CANNOT BE A FACTOR IN THIS COURT'S REVIEW AND, FURTHER, WAS TAKEN OUT OF CONTEXT.

Porter v. Division of Employment Sec., 310 S.W.3d 295, 297 (Mo.App. E.D.2010)

D.A.B. v. J.L.B., 902 S.W.2d 348, 350 (Mo.App. W.D.1995)

Finnern v. Day, 256 S.W.3d 600, 603 (Mo.App. E.D.2008)

House v. House, 292 S.W.3d 478, 487-88 (Mo. App. 2009)

RSMo. 452.375

ARGUMENT

II.

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CONSIDERED AS A REASON TO AWARD SOLE PHYSICAL CUSTODY TO FATHER; ADDITIONALLY, THE TRIAL COURT'S OBSERVATION DURING ITS QUESTIONING OF MOTHER CANNOT BE A FACTOR IN THIS COURT'S REVIEW AND, FURTHER, WAS TAKEN OUT OF CONTEXT.

Mother begins her Second Substitute Brief as Respondent under Point II with the premise that, "Father apparently seeks reversal of the trial court's award of sole physical custody of the minor child to Mother on the basis that Mother initiated her own appeal." [Mother's Second Brief, p. 9]. Mother goes on to cite provisions of Rule 84.04(d) arguing that Father's Point Relied On does not comply with the same.

Father's point does comply with this Court's requirements. The Point as asserted by Father in his Cross-Appeal certainly provides notice as to the issue he wishes to have resolved, mainly that the trial court erred in not granting him sole physical custody of the minor child in the State of Missouri as requested at trial. Further, it is clearly not *based* on the fact that Mother initiated her own appeal. For her basis in stating that Father's Point and Brief are deficient, Mother cites to *Porter v. Division of Employment Sec.*, 310 S.W.3d 295, 297 (Mo. App. 2010) (appellate court dismissing claimant's appeal where claimant failed to substantially comply with rule 84.04 by having a "Table of Contents" which did not include a table of case law and other authority, where the jurisdictional statement contained no information to confer jurisdiction upon the court, the Statement of Facts was argumentative and failed to cite the legal file, and where claimant failed to

include a “Point Relied On”). Upon review of Father’s Brief, it is clear that this citation is not analogous to this matter.

In Mother’s first Substitute Brief and Second Substitute Brief, she continues to argue that the issue of her move to Ohio, “...is moot, i.e., it has already occurred.” However, what Mother continually fails to recognize is that this action was initiated prior to this move, as it had not yet occurred. 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 while working at her place of employment in the State of Missouri prior to her and the child’s move. Further, regardless of Mother’s contention, the case law of Missouri is clear that this type of move is a factor in an initial determination of custody. *See D.A.B. v. J.L.B.*, 902 S.W.2d 348, 350 (Mo.App. W.D.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); *See Finnern v. Day*, 256 S.W.3d 600, 603 (Mo.App. E.D.2008) (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”). Mother also fails to recognize the manner in which she confused the custody issue and misled the Court when indicating that she would “go

with” her daughter and by proposing Exhibit J as an optional Parenting Plan. [Tr. p. 206].

Mother, in her Second Substitute Brief, states in part, “Father also suggests that an isolated phrase uttered by Judge Schneider, that the timing of Mother’s move was ‘coincidental’ [Tr. p. 296], supports his position.” [Mother’s Second Brief, p. 12]. Upon close reading of the excerpt as cited by Mother, it is clear that Judge Schneider was not merely basing her analysis of Mother’s move upon what information would have been available on Casenet. The Judge stated in this regard, “That’s answered *that* question for me, because like I said, I am finding the timing of this to be incredibly coincidental.” [Tr. p. 296 (emphasis added)]. Further, Father cited other factors in relation to this issue and to the source of Mother’s possible knowledge of the pending Paternity action, as was stated in his first Substitute Brief. Therein, reference is made to page 315 of the Trial Transcript which states in part:

RECROSS-EXAMINATION (OF T.B.)

Q. Now, you and L.D. have known a lot of the same people, correct?

A. Yeah.

Q. Friends, boyfriend, girl friends, B.W. is one of them?

A. Yes.

Q. S.M. is one of them?

A. S.M.

Q. So the two of you knew a lot of the same people, correct?

A. Yes, we had mutual friends.

Clearly, all of the evidence surrounding this, and all other facts and circumstances, were considered by the court in entering its Judgment in the manner it was written and wherein, the minor child would reside in the State of Missouri.

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. Further, Mother proposed a Parenting Plan with residency in Missouri, indicating that if the trial court so required it, she would move back to Missouri. Obviously, this has not occurred and the facts and information related to Mother's intentions were at best not presented by Mother and, at worst, misrepresented to the court at the time of trial.

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]. The trial court obviously believed in entering its Judgment of Paternity and subsequent Judgment for Appeal Bond that it was in the minor child's best interests to reside in Missouri and have significant and substantial custody time with Father.

Based on the foregoing, the trial court's award of sole physical custody of the minor child to Mother is not supported by substantial evidence and does not appropriately apply the law. Therefore, the trial court's award of sole physical custody to Mother should be reversed.

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,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the foregoing Second Reply Brief 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 of _____, _____ to: Lawrence G. Gillespie, 7701 Forsyth Boulevard, Suite 300, Clayton, MO 63105-1877, *Attorney for Respondent/Appellant/Cross-Respondent*. Further, the undersigned states that said Second Reply Brief contains 2,361 words and that the disk filed with this Court, as well as the disks provided to counsel, have been scanned for viruses and are virus free.

JOSHUA G. KNIGHT

STATE OF MISSOURI)
) ss
COUNTY OF SAINT 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

L.D.'S TRIAL EXHIBIT 12.....	A-1
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