IN THE
MISSOURI SUPREME COURT

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

SECOND BRIEF OF RESPONDENT/APPELLANT/CROSS-RESPONDENT, T.B.

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I.

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.

Father argues for affirmance of the trial court's judgment requiring Mother to relocate from Ohio to a three-county area in East Central Missouri. He supports this position primarily by asserting that the trial court merely ordered what Mother requested of it. Father's claim, as far as it goes, is clever, but does not present the full picture.

Father's Brief quotes a section of Mother's testimony and implies that Mother asked that she be given custody in Missouri by way of Exhibit J. However, the quoted material cuts off at the bottom of Page 206. What follows at the beginning of Page 207 is a bit more enlightening:

> Q. It's not what you are wanting?
>
> A. No, I don't want that.
>
> Q. But you want to be with your daughter?
>
> A. Yes.
>
> Q. You believe it's in your best interest for your daughter to be with you on a primary basis?
>
> A. Yes.

Father distinguishes *Matter of Custody of D.M.G.*, 951 P.2d 1377 (Mont. 1998), on the basis that the Montana Supreme Court narrowly based its decision on the right to travel. Father's argument misses the bigger picture, *i.e.*, that the difficulty faced by Mother herein is exactly that which was encountered by the mother in *D.M.G.* The Montana Supreme Court accurately described Mother's predicament:

> In this respect, the court has given [the mother] a true Hobson's choice – either she gives up her home, career, life and residence in [Oregon] and moves where she has chosen not to live, [Montana], or she forfeits … her status as the children's primary

> residential custodian, and the children move to [Montana], with the devastating impact attendant to their being removed from their mother. This, obviously, is not only a lose-lose situation for [the mother] but also is an unacceptable alternative for the children as well.

Id. at 1384.

It is clear from the record as a whole that Mother was imploring the trial court that she be awarded custody of her daughter and that further, she wanted to continue to reside in Ohio with her daughter. As recognized by the Montana Supreme Court, she was presented with a Hobson's choice, *i.e.*, move or lose custody, and proffered a very unsatisfactory backup.

Moreover, Father's discussion of *In Re Marriage of Robison*, 53 P.3d 1279 (Mont. 2002), which focuses on the Montana Supreme Court's approval of a restriction on the mother's residence, ignores the fact that the mother in *Robison* was not *required* to relocate, as in the instant case. Instead, Ms. Robison was commanded to stay put. The impact of *Robison*, therefore, in Missouri, where our legislature has implemented Section 452.377 R.S.Mo., which requires, in essence, an assessment of custody every time a parent with custody rights moves, even if just next door, is negligible.

Mother's position is explicit that the trial court does not have the authority to require a parent to move from one state to another or to restrict that parent's residence to

a particular set of counties. A party cannot confer authority upon a court which it does not have. *See State ex rel. Dept. of Social Services, Div. of Child Support Enforcement v. Hudson*, 158 S.W.3d 319, 323 (Mo. App. 2005). In any event, not only is the requirement that Mother move from Ohio to Missouri unauthorized, but the limitation on her residence to three counties is void as against public policy, even if agreed to. *See In re Marriage of Greene*, 711 S.W.2d 557, 564 (Mo. App. 1986).

Father attempts to distinguish the cases prohibiting restrictions on a parent's residence by pointing out that they involved either enforcement, or interpretation, of an existing order. This argument must fail for two reasons. First, if a trial court does not have the authority to enforce such a restriction, it would likewise not have the power to order such a limitation in the first place. It is a distinction without a difference.

Second, his argument ignores *In re Marriage of Dusing*, 654 S.W.2d 938 (Mo. App. 1983), which eliminated such a constraint on appeal from an initial dissolution judgment. Likewise, *Fuchs v. Fuchs*, 887 S.W.2d 414 (Mo. App. 1994), concerned an original custody determination.

At any rate, Mother's testimony in this regard is little different from that of the recipients of maintenance in *Craig-Garner v. Garner*, 77 S.W.3d 34 (Mo. App. 2002), *Souci v. Souci*, 284 S.W.3d 749 (Mo. App. 2009), and *Hall v. Hall*, 336 S.W.3d 188 (Mo. App. 2011). In each case, the wife was awarded modifiable statutory maintenance. Also, in each case, the husband appealed, claiming that the wife, by her testimony, waived such a maintenance order. In *Garner*, the wife's testimony that she would want maintenance "at least through the end" of a commercial lease was not considered to be a waiver of

maintenance. *Garner*, *supra* at 39. Similarly, in *Souci*, the wife testified that she wanted maintenance until she remarried, but then remarked that if that was not possible, she wanted maintenance for at least two (2) years. *Souci*, *supra*, at 759. Just as in *Garner*, the Southern District of the Court of Appeals affirmed the statutory, modifiable maintenance award. Correspondingly, the Western District in *Hall* rejected the husband's argument that the wife had waived maintenance beyond one year because she stated "I don't know if I need [it] for a year or farther." *Hall*, *supra*, at 200.

Mother herein plainly testified that she desired that A.E.B.'s custody be placed with her and that she wanted to exercise that custody in Ohio. Faced with the Hobson's choice recognized in *D.M.G.*, she suggested a back-up plan that she clearly despised, but in no way conferred authority upon the trial court to implement such a parenting plan.

Father, in an effort to lessen the significance of *D.M.G.*, as well as *In re Marriage of Littlefield*, 940 P.2d 1362 (Wash. 1997), points to all the efforts he took when he discovered Mother's move to force her to come back. Father's activities in this regard are irrelevant. The trial court simply does not have the authority to require that Mother move from Ohio to Missouri, even if Father complains until he is blue in the face. He also stresses that Mother was served with his summons before she left. In so doing, Father implies that Mother crossed some sort of bright line laid down by the very act of service. It is beyond any accepted notion of due process that the filing of a petition, issuance of a summons, and its eventual service could conceivably restrict a parent's residence. Again, not only does Father's argument attempt to confer authority on the trial court which it plainly does not have, it also brushes aside inconvenient facts. Mother was

planning her move for a significant period prior to being served. She purchased one-way plane tickets on July 6, 2008, [Tr. p. 190] (before the filing of this case on July 8, 2008, [C.F. p. 1]), she took her leave of absence from her employer on July 11, 2008 [Tr. p. 182], and she hired her mover on July 13, 2008, [Tr. pp. 193-194]. Mother was not served until July 16, 2008. [Tr. p. 195].

As noted by the Southern District in *In re Marriage of Johanson*, 169 S.W.3d 897 (Mo. App. 2005), "the court takes parties where it finds them." *Id.* at 900. The parties were in Ohio and Missouri. The trial court was without authority and abused its discretion in attempting to rearrange the parties like pieces on a chessboard. The trial court's judgment requiring Mother to relocate to a three-county area in Missouri should be reversed.

II.

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.

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.

Rule 84.04(d) states, in pertinent part, as follows:

> (d) Points Relied On.
>
> (1) Where the appellate court reviews the decision of a trial court, each point shall:

(A) identify the trial court ruling or action that the appellant challenges;

(B) state concisely the legal reasons for the appellant's claim of reversible error; and

(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

Father's point does not comply with the above requirements. *See Porter v. Division of Employment Sec.*, 310 S.W.3d 295, 296 (Mo. App. 2010). It is insufficient notice to both Mother and this Court of the issue which Father seeks to have resolved. Although the following is an attempt to respond, Mother urges this Court decline to speculate how Father wishes this Court to interpret the thrust of his contention. *See Amparan v. Martinez*, 862 S.W.2d 497, 499 (Mo. App. 1993).

This Court will affirm a trial court's child custody determination if it is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. This Court views the evidence and all reasonable inferences drawn therefrom in the light most favorable to the judgment. *In re Marriage of Richards*, 188 S.W.3d 478, 479-480 (Mo. App. 2006). Father, as the party challenging

the trial court's determination in this regard, bears the burden to demonstrate trial court error. *Vangundy v. Vangundy*, 937 S.W.2d 228, 230 (Mo. App. 1996).

Father seems to assert that Mother's residence in Ohio requires an award of A.E.B.'s physical custody to him. In this regard, he emphasizes Section 452.375.2(7) R.S.Mo., which references "[t]he intention of either parent to relocate the principal residence of the child." However, as noted in Mother's original brief herein, the issue of Mother's move to Ohio is moot, *i.e.*, it has already occurred.

Still, to the extent that Father believes that Mother's residence in Ohio mandates an award of custody to him, it must be kept in mind that the trial court need not give greater weight to certain factors than to others under Section 452.375. In other words, there is no specific formula for how a trial court must weigh the nonexclusive list of best interest factors under the statute when making its custody determination. Instead, after properly considering those factors, the trial court has broad discretion to determine in whose custody the child should be placed so as to serve the child's best interest. *Dunkle v. Dunkle*, 158 S.W.3d 823, 836 (Mo. App. 2005).

Moreover, to the extent that Father's point relies upon Mother's own appeal as justification for reversal, it must be rejected. First, insofar as Mother's appeal occurred subsequent to the trial court's judgment in this matter, it is clearly a matter outside the record before the trial court and may not be considered by this Court as a reason in and of itself to reverse custody. *See Robinson v. Board of Trustees of Policeman's Retirement Fund of Raytown*, 768 S.W.2d 100, 102 (Mo. App. 1988). Second, since appeals are favored in the law, *see Adkins v. Hontz*, 280 S.W.3d 672, 675 (Mo. App. 2009), it is

incomprehensible that a parent's appeal of a custody decision should be used against that parent as a reason to grant custody to the non-appealing parent.

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. Judge Schneider made the comment during her questioning of Mother as follows:

> THE COURT: Did you or anyone on your behalf keep track of lawsuits being filed by [L.D.] in St. Charles about [A.E.B.]?
>
> A. Like before this, I don't understand.
>
> THE COURT: Yeah, I will tell you what, I am finding this somewhat suspicious, the timing of all of this. So there is something called case net, you can look up lawsuits, you can see –
>
> MR. PORZENSKI: Sorry to interrupt, so the Court knows, attorney [sic] filings are not listed in case net.
>
> THE COURT: That's right.
>
> MR. PORZENSKI: Only and after a full judgment of paternity has been entered like this case. Once he entered the judgment, then it will be on case net, but right now if you put in either name, nothing will come up.
>
> THE COURT: That's answered that question for me, because like I said, I am finding the timing of this to be incredibly coincidental.
>
> A. I have [sic] no idea that he was filing this.

[Tr. p. 296].

As noted by the trial court, the confidential nature of paternity cases on Casenet answered the question for it. In any event, it is well-known that this Court reviews not comments, but judgments. As the Court of Appeals recognized in *Browder v. Milla*, 296 S.W.2d 502 (Mo. App. 1956):

> [o]f necessity, . . . a trial judge must consider and possibly formulate tentative opinions concerning such matters as . . . what law should govern particular issues inherent in the trial, and . . . must decide who . . . is entitled to prevail therein on the law and the facts. In doing so he is exercising his judicial trial function . . ..

Id. at 507.

Moreover, to the extent such a comment could be regarded as a finding of fact, it is gratuitous only. *Kidd v. Wilson*, 50 S.W.3d 858, 864 (Mo. App. 2001).

The trial court's award of sole physical custody of the minor child to Mother is supported by substantial evidence and appropriately applies the law. Therefore, the trial court's award of sole physical custody to Mother should be affirmed.

CONCLUSION

For all the foregoing reasons and those set forth in the original brief, Respondent/Appellant/Cross-Respondent, T.B. ("Mother"), respectfully requests that this Court herein:

(a) reverse the trial court's judgment as to the physical custody plan for the minor child and remand to the trial court with directions 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; and

(b) affirm the trial court's award of sole physical custody of the minor child to Mother.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the foregoing Second Brief of Respondent/Appellant/Cross-Respondent, T.B., 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 July, 2011 to: Mr. Joshua Knight, 118 North Main Street, P.O. Box 953, Saint Charles, Missouri 63302, *Attorney for Petitioner/Respondent/Cross-Appellant*. Further, the undersigned states that said Second Brief contains Two Thousand Nine Hundred Seventy-Nine (2,979) 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.

_____
LAWRENCE G. GILLESPIE

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

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

_____
LAWRENCE G. GILLESPIE

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

_____
Notary Public

My Commission Expires:

_____