IN THE SUPREME COURT OF MISSOURI

In re the Marriage of: Susan Marie Randall and James Randall Cannon **SUSAN MARIE RANDALL**, *Petitioner*, *vs.* **JAMES RANDALL CANNON**, *Respondent.*	**№ SC89118**

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
THE HONORABLE ROBERT SCHOLLMEYER, JUDGE

APPELLANT'S REPLY BRIEF

Respectfully submitted,

HANRAHAN TRAPP, P.C.

by: WILLIAM P. NACY, MBE #52576
GEORGIA A. MATHERS, MBE #58025
522 E. Capitol Ave.
Jefferson City, MO 65101
Telephone (573) 635-0282
Facsimile (573) 556-6340
pete.nacy@hanrahantrapp.com
georgia.mathers@hanrahantrapp.com

Attorneys for Appellant

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REPLY ARGUMENT

I. As to Respondent's Point I.

A. *Sections 452.375.3(1) and 452.400.2(2) do not operate retrospectively as applied to Respondent.*

Respondent's assertion that he now suffers a disability that did not exist at the time he pled guilty to raping and sodomizing S.S. — *i.e.*, he is precluded from an award of custody or unsupervised visitation — is belied by the fact that, since the parties' divorce, he has never had custody or unsupervised visitation. To distinguish "vested right" from "new disability" evinces a distinction without a difference.

For this point, Respondent relies on this Court's decisions in cases involving sex offender registration. *See R.L. vs. Mo. Dep't of Corrections*, 245 S.W.3d 236 (Mo. 2008); *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006). Both cases are wholly inapposite as to the urged point. In *R.L.*, the complainant had already lived within 1,000 feet of a school before the statute at issue became effective. *See R.L.* at 237. Requiring him to move would clearly have imposed a new, proscribed obligation. *See State ex rel. Schottel v. Harman*, 208 S.W.3d 889, 892 (Mo. 2006). In *Phillips*, sex offenders who had been convicted prior to the passage of legislation requiring their registration likewise had imposed on

them a new, proscribed obligation to register where they did not have such an obligation before. *See Phillips* at 852.

Here, Respondent did not have either custody or unsupervised visitation rights at any time since the parties' divorce and before Mo. Rev. Stat. § 452.375 was amended to preclude custody or unsupervised visitation rights to persons such as Respondent. He had no vested rights to custody or unsupervised visitation prior to the amendment of § 452.375. It is true that the version of § 452.375 (and § 452.400) in effect at the time he pled guilty only spoke to offenses committed against "the child" at issue in custody/visitation proceedings, and that sex offenders such as Respondent would not have been precluded from awards of custody or unsupervised visitation with other children, it cannot be said that the amendment to § 452.375 imposes a new "disability" where the statute speaks to offenses committed against "a child." Such an interpretation would plainly lead to an absurd result in this case, and undoubtedly other cases, where the sex offender perpetrated rape and sodomy on a step-child who was living with the sex offender and his other children under the same roof at the same time.

The kinds of "disability" this Court has ruled to be impermissibly ordained by statute include, for instance, the availability of punitive damages to a

claimant where none existed prior to passage of the statute. *See Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 771-72 (Mo. 2007). In *Hess*, the Missouri Merchandising Practices Act was amended to allow for the recovery for punitive damages, but the claimant's cause of action had accrued before the applicable amendment. *Id.* at 771. "In light of Missouri's constitutional prohibition on retrospective laws, 'laws providing for penalties and forfeitures are always given only prospective application.'" *Id.* (*quoting Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rts.*, 791 S.W.2d 382, 387 (Mo. 1990)). Precluding Respondent from an award of custody or unsupervised visitation is not for punishing Respondent, as he wants this Court to believe, but is for protecting children. Respondent presents himself to this Court as he presented to the circuit court and to S.S.: he believes he should get what he wants if only because he wants it. Anything less is punishment, as far as he is concerned. The children's concerns are secondary to him, and they always will be.

In any event, Respondent had his chance to seek the relief erroneously granted by the circuit court during such time as § 452.375 would not have precluded such relief. Respondent's brief omits any discussion of this issue; however, it is wholly dispositive of this case. It bears repeating that the most that can be said in this case is that Respondent had a "mere expectation" that he

could seek unsupervised visitation and custody based upon his anticipated continuance of the law existing at the time he pled guilty to repeatedly raping and sodomizing S.S. His "mere expectation" is not a vested right, and the denial thereof is not a disability that he did not already have. *See Hoskins v. Box*, 54 S.W.3d 736, 740-41 (Mo. App. W.D. 2001). He does, however, have an acknowledged, vested right of supervised visitation, and the statutes — already in effect at the time he file his motion — plainly does not deprive him of that right.

B. *Sections 452.375.3(1) and 452.400.2(2) do not violate Respondent's rights to due process or equal protection.*

Respondent's argument regarding due process is unavailing. As this Court recently said

> Because the ultimate fact determining whether a person had to register was conviction of sex crime, the [U.S. Supreme] Court found that the criminal procedures leading to conviction provided the registrant with a sufficient procedurally safeguarded opportunity to challenge the conviction that triggered the registration requirement. The analysis in Connecticut v. Doe controls this case. R.W. was charged with a sex offense and pled guilty. He was notified of his legal obligation to

> register at the time of his plea and received all procedural safeguards attending a guilty plea. No further process was necessary.

R.W. v. Sanders, 168 S.W.3d 65, 71 (Mo. 2005) (*citing Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1, 7 (2003)). If Respondent wanted to avoid all of the complications of sex-offender status, he could either have not raped and sodomized S.S. or he could have mounted an all-out defense at a trial, rather than plead guilty. Either way, he was afforded sufficient procedural due process. Furthermore, at the time of the parties' divorce, Respondent was provided sufficient procedural safeguards to enable him to protect his interests in seeking custody and visitation. As in *Hoskins*, Respondent complains that the legislature changed the law without his consent. *See Hoskins v. Box*, *supra*, 54 S.W.3d at 740. His consent was not needed. The amendment to § 452.375 was narrowly tailored to protect children. *See Doe v. Phillips*, *supra*, 194 S.W.3d at 842. Procedural due process is not implicated herein where Respondent has never before had custody or rights of unsupervised visitation.

Respondent's argument regarding substantive due process is even less availing than that regarding procedural due process. While it is conceded that association with one's own children amounts to a substantive right deserving of due process, *see Hoskins v. Box*, *supra*, 54 S.W.3d at 740, it has been held that,

in determining custody based on the children's best interest, "[t]he method implementing this objective, by an award of either sole or joint custody to the parents, reflects a procedural change by the legislature and not a substantive change." *Goldberg v. Goldberg*, 691 S.W.2d 312, 315 (Mo. App. E.D. 1985). Accordingly, the amendments to §§ 452.375 and 452.400 are not impermissibly retrospective. It must again be pointed out that Respondent had the same right of association post-amendment that he did pre-amendment. *See Hoskins* at 740. Respondent's position would have hope only if he had had custody or unsupervised visitation rights before §§ 452.375 and 452.400 were amended. He did not. Substantive due process is not implicated.

Respondent's reliance on, and analysis of, the U.S. Supreme Court's decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), is misplaced. The broad, wide-ranging proscription in *Stanley* was as to unmarried persons, whereas the narrow, limited proscription here is as to persons, like Respondent, who have admitted to, and been convicted of, raping and sodomizing little girls. *See Stanley* at 646. Certainly, Respondent's status as an incurable pedophile or incurable child molester forecloses any inquiry into his fitness as a parent. (Tr. IV 563:12-23; Tr. V 684:11-13; 691:2-6, 697:16-19). "'A statutory classification does not offend the Fourteenth Amendment unless it rests on

grounds 'wholly irrelevant' to the achievement of the state's objective.'" *Doe v. Phillips*, *supra*, 194 S.W.d at 846. "Missouri, like other states, has chosen to classify those who will be subject to registration based on whether they committed a crime that Missouri classifies as a sex crime or a crime against children. It does so in an effort to 'protect children from violence at the hands of sex offenders.'" *Id.*

Unlike the lack of information to predict re-offending referred to in *Doe v. Phillips*, Respondent was predicted to have a 1-in-8 chance of again being caught, arrested, and convicted of sex offenses against children. (Tr. IV 552:21-553:1; Tr. V 687:7). *See Doe v. Phillips* at 847. This prediction was not that he would merely offend again, but that he would be caught, arrested, and convicted. The amended §§ 452.375 and 452.400 have even more support with this statistic in mind. The only absurdity which can reasonably be contemplated is where the Court would affirm the circuit court, and a child thereafter succumbs to Respondent's proven proclivities to molest, rape, and sodomize children. *See* Resp. br. 43-44.

The Court should reverse the trial court's judgment and enter a judgment denying Respondent's motion to modify.

II. <u>As to Respondent's Point II</u>.

A. *Respondent abandoned his claims for custody.*

Respondent argues that he never abandoned his claims for custody; however, he did just that during the guardian *ad litem*'s cross examination, to wit:

> Q. So the issue here really isn't custody, the issue here is visitation; is that right?
>
> A. That's right.
>
> Q. And the options are supervised, or unsupervised, completely restricted, and those are the three options on the table; is that right?
>
> A. That's correct.

(Tr. III 361:25-362:6). The logic of Ms. Randall's argument that he abandoned any claim for custody is self-evident in the foregoing. Resp. br. 49.

B. *There was no evidence to support an award of joint legal custody.*

Notwithstanding that Ms. Randall's Point I is dispositive herein, that Respondent may have wanted to work together with Ms. Randall and to "overcome whatever hurdles existed between himself and Susan," Resp. br. 49-50, does not in any way show '[t]he commonality of beliefs concerning parental decisions and the ability of parents to cooperate and function as a parental unit.'" *L.J.S. v. F.R.S.*, 247 S.W.3d 921, 925 (Mo. App. S.D. 2008) (*quoting*

Mehra v. Mehra, 819 S.W.2d 351, 353 (Mo. 1991)). There is no evidence thereof in this case. Without *any* evidence of a commonality of beliefs concerning parental decisions and the ability of the parties to cooperate and function as a parental unit, no award of joint legal custody can ever be appropriate. *In re Marriage of M.A.*, 149 S.W.3d 562, 570 (Mo. App. E.D. 2004). Because the circuit court's judgment is without substantial evidence, it must be reversed.

On this point, Respondent again demonstrates his proven track record of looking out for Respondent best interest, rather than the children's. Ms. Randall has had sole legal and physical custody since the parties' divorce almost eight years ago. To wrest legal custody from her now and force her to "work with" Respondent would be absolutely outrageous, not to mention impractical and impossible. Naturally, Ms. Randall wants nothing to do with Respondent, but she has always been supportive of supervised visitation for the children's sake. The only self-serving arguments rendered in this case are those made by Respondent, who has the temerity to assert a willingness to "work with" Ms. Randall after having committed the ultimate betrayal of trust she reposed in him: raping and sodomizing her child in their own home while the subject children were present.

C. *Respondent is a danger to children.*

Again, notwithstanding that Ms. Randall's Point I is dispositive herein, any period of unsupervised contact between Respondent and the children would pose an unreasonable danger, particularly where Respondent is highly likely to be caught, arrested, and convicted of committing sex offenses against children. He poses an absolute danger because of his status as either an incurable pedophile or an incurable child molester. (Tr. IV 563:12-23; Tr. V 684:11-13; 691:2-6, 697:16-19). Make no mistake: the parties' two expert witnesses made these statements, not Ms. Randall. *See* Resp. br. 52. While a trial court is free to believe or disbelieve any or all of a witness' testimony, *see In re K.A.W.*, 133 S.W.3d 1, 23 (Mo. 2004), the trial court below apparently believed Respondent's expert witness' testimony that he posed no danger to the children, but also apparently disbelieved the same witness' assertion that Respondent was an incurable child molester. This is plainly against the weight of the evidence and is plainly prejudicial to the children's best interest. If Respondent gets his way, he will once again be tempted to isolate, control, and sexually exploit children, which temptations he has already demonstrated he cannot resist. The judgment granting him unsupervised contact must be reversed.

CONCLUSION

As a matter of law, §§ 452.375.3 and 452.400.2 are constitutional as applied to Respondent because Respondent was only ever entitled to nothing more than supervised visitation with his children, and the policy of precluding custody or unsupervised visitation to those convicted of sex crimes against children evinces a compelling state interest in protecting children from harm. Furthermore, notwithstanding Respondent having expressly abandoned his claim for any custody rights, the judgment awarding him joint legal and physical custody with unsupervised visitation rights is without substantial evidence and is against the weight of the evidence in that the parties cannot jointly make parental decisions and Respondent presents an incurable threat to children being free from sexual exploitation. The trial court's judgment in its entirety must be reversed, and the Court should direct the trial court to enter an order denying Respondent's motion to modify.

Respectfully submitted,

HANRAHAN TRAPP, P.C.

by: WILLIAM P. NACY, MBE #52576
GEORGIA A. MATHERS, MBE #58025
522 E. Capitol Ave.
Jefferson City, MO 65101
Telephone (573) 635-0282
Facsimile (573) 556-6340
pete.nacy@hanrahantrapp.com
georgia.mathers@hanrahantrapp.com

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Mo. Ct. R. 84.06(c) in that:

(A) It contains 2,442 words, as calculated by the undersigned's word-processing program;

(B) A copy of this brief is on the attached 3½-inch diskette; and that

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WILLIAM P. NACY

CERTIFICATE OF SERVICE

I hereby certify that I did, on November 10, 2008, forward true copies of the foregoing brief, as required, by 1st class U.S. mail and/or electronic service to:

Sara C. Michael, Esq.
Hendren & Andraw, L.L.C.
221 Bolivar St.
Jefferson City, MO 65101
Telephone (573) 635-8135
Facsimile (573) 636-5226
saramichael@hendrendandrae.com

Attorney for Respondent

Clifford W. Cornell, Esq.
Brown Cornell Farrow, L.L.C.
308 Monroe St.
Jefferson City, MO 65101
Telephone (573) 556-6606
Facsimile (573) 761-5261
cliffordcornell@aol.com

Attorney for Respondent

Thomas B. Snider, Esq.
Bandre Hunt Snider, L.L.C.
227 Madison St.
Jefferson City, MO 65101
Telephone (573) 635-2424
Facsimile (573) 635-2010
tom@bandrehuntsnider.com

Guardian *ad litem*

WILLIAM P. NACY