

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF:)	
)	
J.C.W.,)	
T.D.W.,)	
by and through their Next Friend,)	
)	
KELLY K. WEBB,)	Case No. SC89404
as Next Friend and Individually,)	
)	
Petitioners-Appellants,)	
)	
v.)	
)	
JASON L. WYCISKALLA,)	
)	
Respondent-Respondent.)	

On Appeal from the Circuit Court of Jefferson County
Cause No. CV302-4541-DR-J5
Hon. Lisa K. Page, Circuit Judge

SUBSTITUTE REPLY BRIEF OF APPELLANT

JONATHAN D. MARKS MBN 47886
Attorney for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
Creve Coeur, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)

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POINT RELIED ON

I. None of the four arguments advanced by Father against interpreting the bond requirement of Section 452.455.5 as one of subject matter jurisdiction have any merit. First, the “pragmatic” argument that reversing this case after two years wastes valuable judicial resources is an argument not against subject matter jurisdiction, but the state constitutional right to appeal, and convenience must yield to that constitutional right. Second, the one case relied upon by Father for a special type of jurisdictional competence that may be waived – *State v. Thomas*, 182 S.W.2d 534 (Mo. 1944) – actually is a case involving personal jurisdiction. Third, nothing in Section 452.377 suggests that one opposing relocation has a derivative right to file a motion to modify. Finally, the bond requirement does not deny Father access to the courts – nothing in Section 452.377 prevents him from opposing relocation even when he fails to post a bond.

State v. Thomas, 182 S.W.2d 534 (Mo. 1944)

Butler v. Butler, 922 S.W.2d 18 (Mo. App. 1996)

Leahy v. Leahy, 858 S.W.2d 221 (Mo. banc 1993)

Mo. Rev. Stat. § 452.377

ARGUMENT

I. None of the four arguments advanced by Father against interpreting the bond requirement of Section 452.455.5 as one of subject matter jurisdiction have any merit. First, the “pragmatic” argument that reversing this case after two years wastes valuable judicial resources is an argument not against subject matter jurisdiction, but the state constitutional right to appeal, and convenience must yield to that constitutional right. Second, the one case relied upon by Father for a special type of jurisdictional competence that may be waived – *State v. Thomas*, 182 S.W.2d 534 (Mo. 1944) – actually is a case involving personal jurisdiction. Third, nothing in Section 452.377 suggests that one opposing relocation has a derivative right to file a motion to modify. Finally, the bond requirement does not deny Father access to the courts – nothing in Section 452.377 prevents him from opposing relocation even when he fails to post a bond.

Respondent Jason Wyciskalla (“Father”) makes four arguments against subject matter jurisdiction: (1) subject matter jurisdiction in this case is inconvenient and wastes valuable judicial resources; (2) the bond requirement of Section 452.455.5 involves personal jurisdiction which may be waived, or a special type of jurisdictional competence which may be waived; (3) Petitioner Kelly Webb (“Mother”) initiated this litigation by filing a notice of intent to relocate, thereby

“opening the door” for Father to file a motion to modify; and (4) interpreting the requirement as subject matter jurisdiction would somehow violate the Missouri Constitution and its guarantee of open access to the courts. Mother will address each of these arguments in turn.

First, Father suggests “practical reasons” and “a strictly pragmatic perspective” should guide the Court on the issue of subject matter jurisdiction, arguing that the pendency of this case for two years before correcting the issue of lack of subject matter jurisdiction is “an elaborate game of ‘gotcha’” and “technicalities.” (Resp. Br. 14-15). Any case reversed on appeal involves a lengthy time from initiating litigation to receiving a mandate from the court of appeals. Under Father’s argument, it would be pragmatic and in the best interests of the children to forego these technicalities, like the constitutional right to an appeal, *see* Mo. Const. Art V, § 3, and rely solely on the judgment of the circuit courts. Mother feels confident that those who drafted the state constitution and created the intermediate appellate courts fully understood the consequences of reversing a judgment, and wisely decided that justice trumps convenience. The circuit courts, despite their apparent breadth in courts of first resort, have circumscribed and limited jurisdiction, a jurisdiction delineated by the state constitution and the state statutes. Without authority granted by these sources, the circuit courts cannot entertain the parties, no matter how willing the parties may be

to have the court decide their case. Father should direct his expediency anger toward the trial court below, who failed to realize it lacked subject matter jurisdiction to hear Father's motion to modify.

Second, Father argues that the bond requirement involves a special form of jurisdictional competence that may be waived, and in support cites *State v. Thomas*, 182 S.W.2d 534 (Mo. 1944). *Thomas* involved a challenge to a criminal conviction wherein the defendant argued the circuit court lacked subject matter jurisdiction because the case came to the circuit court through a defective preliminary hearing. The defendant argued the preliminary hearing process was an issue of subject matter jurisdiction which could not be waived. However, the Supreme Court explicitly ruled otherwise: "Since Sec. 3893 expressly says he may waive it [the preliminary hearing], he cannot complain on that ground after he has waived it. It is a matter of personal privilege with him." *Id.* at 539. The language "a matter of personal privilege with him" is synonymous with personal jurisdiction, and in this case, the very statute authorizing a preliminary hearing also explicitly provided that the defendant may waive that process. The ruling in *Thomas* was not an exception to the inability to waive subject matter jurisdiction, but rather a straightforward application of a case of personal jurisdiction which may be waived. By contrast, in the present case, Section 452.455 provides no statutory waiver of the bond requirement. *Thomas* has no relevance to this case.

Just as one cannot be a little bit pregnant, one cannot have an issue of jurisdictional competence that can be waived – if the issue is a jurisdictional requisite, unless and until the party meets the requisite condition, the trial court has no authority to proceed. This would be true even in the extreme case that the other party agreed to waive the statutory condition, because parties cannot consent to a court hearing their dispute when the court itself lacks jurisdiction over the subject matter.

Third, Father argues Mother initiated the process by filing a notice of intent to relocate, thereby opening the door for Father to bootstrap his motion to modify into the relocation question. However, nothing in the statute governing relocation authorizes such a procedure. When a parent with the principal residence of the child intends to relocate, that parent must provide the other parent with statutory notice. *See*, Mo. Rev. Stat. § 452.377.2. Once the non-relocating parent receives notice in compliance with the statute, that parent has only two options – accede to the relocation or file an objection to the relocation. *See*, Mo. Rev. Stat. § 452.377.7. If the parent objects, the trial court will decide whether to allow the relocation or prevent the relocation. *Nothing in Section 452.377 authorizes the objecting parent to challenge the existing custody plan, let alone the legal custody rights of the parties, only the relocation itself and/or the proposed custody plan submitted by the relocating parent.* In this case, Father objected to relocation and filed his objections with the trial court. If that was all Father had done, the trial

court would either have maintained the status quo by preventing relocation, or authorized relocation and modified the parenting plan to accommodate for the distance between residences. *Fern v. Brewer*, 30 S.W.3d 915, 918 (Mo. App. 2000)(only “changes in physical custody and revisions of the parenting plan may be a necessary consequence of relocation of the child”). When a court considers relocation, it determines whether the relocating parent acted in good faith and if the move would be in the best interests of the child. The parent opposing relocation seeks to maintain the status quo and so is in a defensive posture, in contrast to a motion to modify, where the movant is in an offensive posture seeking to alter the status quo. Father tried to turn from defense to offense by amending his pleadings to include a motion to modify. However, Section 452.377 does not authorize the filing of such an amended pleading; the basis for a motion to modify remains solely with Section 452.410. Nothing in the language of Section 452.377 sanctions the “bootstrap” argument advanced by Father; rather, the explicit and unambiguous language gives the trial court limited authority to prevent relocation or allow relocation, and if the latter option is deemed appropriate, the trial court may also modify the parenting plan to enter a revised schedule of physical custody. The only statute that authorizes modification of custody – the only statute in which subject matter jurisdiction exists with regard to modification of custody decrees – is Mo. Rev. Stat. § 452.410. *Butler v. Butler*, 922 S.W.2d 18, 20 (Mo. App. 1996).

Consequently, the “bootstrap” basis for jurisdiction advanced by Father has no merit.

Finally, Father argues that “depriving a court of subject matter jurisdiction unless a bond is posted would result in an unconstitutional condition.” (Resp. Br. 18). “By preventing Father from challenging [Mother’s] relocation requests because of the lack of a bond, Father would be deprived of access to the courts.” (Resp. Br. 18-19). “Clearly, a parent to whom support is owed should not be able to prevent a counter motion from being filed in response as a result of the bond requirement.” (Resp. Br. 19). Yet, Father misrepresents the process under Section 452.377. No bond requirement attaches to his filing an objection to prevent relocation, nor precludes his having a hearing on that issue. As previously noted, he is in a defensive posture seeking to preserve the status quo, and he has full ability to do that under the statute. Should he decide to go on offense and file a motion to modify, he has entered new terrain and must play by those rules. As to the broader constitutional issue Father intimates, Father made no challenge to the constitutionality of the statute below, and cannot raise it for the first time in this manner. *See, Leahy v. Leahy*, 858 S.W.2d 221, 229 (Mo. banc 1993).¹ Further,

¹ In all likelihood, the General Assembly deemed those parents with a child support arrearage in excess of \$10,000 could not seek modification of child custody without posting a bond likely because of the doctrine of unclean hands,

Father has not cited to the Court a single case where an injunction bond or similar bond requirement has been deemed unconstitutional as depriving a party from his day in court. Parties seeking a temporary injunction must file a bond before triggering jurisdiction of the court. *See*, Mo. R. Civ. P. 92.02(d). Supersedeas bonds are required in many tort cases in order to appeal. *See*, Mo. R. Civ. P. 81.09(a). In this case, Father could have his day in court to challenge relocation regardless of his child support delinquency. This final counterargument also lacks merit.

In sum, none of the counterarguments advanced by Father in his brief undermine the fundamental reality in this case: the bond requirement of Section 452.455.5 is an issue of subject matter jurisdiction and, because Father failed to post the requisite bond, the trial court lacked subject matter jurisdiction to proceed on the motion to modify custody filed by Father, and those parts of the judgment modifying custody must vacated.

which “requires that a party coming into a court of equity must have acted in good faith as to the subject matter of the lawsuit.” *Nelson v. Emmert*, 105 S.W.3d 563, 568 (Mo. App. 2003). It seems entirely reasonable to ask one who could be convicted of felony nonsupport, *see* Mo. Rev. Stat. § 568.040.4, to show good faith and concern for the child at issue by posting the arrearage before asking for a change in custody.

CONCLUSION

For the foregoing reasons, and the reasons set forth in her Opening Brief, Petitioner-Appellant Kelly Webb requests this Court vacate the Judgment of Modification entered by the trial court as void for want of subject matter jurisdiction, or in the alternative, reverse the Judgment of Modification entered by the trial court for the reasons stated in Points II-VI, and for such further relief this Court deems just and proper.

Respectfully submitted,

JONATHAN D. MARKS MBN 47886
Attorney for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
St. Louis, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)

RULE 84.06 CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Opening Brief complies with Rule 84.06(b) of the Missouri Rules of Civil Procedure, and was prepared using Microsoft Word in 14 point Times New Roman font, and has a word count of 1,892 words, exclusive of the cover page, table of contents, table of authorities, this page, and the certificate of service. The undersigned further certifies that the floppy disk provided to counsel for Respondent has been scanned for viruses and is virus-free.

Respectfully submitted,

JONATHAN D. MARKS MBN 47886
Attorney for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
St. Louis, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)

CERTIFICATE OF SERVICE

The undersigned certifies that the original and nine copies of this Substitute Opening Brief of Appellant were filed this ____ day of October, 2008, with the Supreme Court of Missouri; and that two copies and an electronic version of this Opening Brief were sent via first class mail this _____ day of October, 2008, to Lawrence G. Gillespie, Attorney for Respondent, 7701 Forsyth Boulevard, Suite 300, Clayton, Missouri 63105, and Julie K. Huffman, Attorney for Respondent, 4629 Yeager Road, Hillsboro, Missouri 63050.

Respectfully submitted,

JONATHAN D. MARKS MBN 47886
Attorney for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
St. Louis, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)