IN THE
SUPREME COURT OF MISSOURI

J.C.W.,	)	
T.D.W.,	)	
by and through their Next Friend,	)	
	)	
KELLY K. WEBB,	)	
as Next Friend and Individually,)		
	)	
Petitioners-Appellants,	)	
	)	
v.	)	**No. 89404**
	)	
JASON L. WYCISKALLA,	)	
	)	
Respondent-Respondent.	)	

Appeal from the Circuit Court of the
Jefferson County, State of Missouri
The Honorable Lisa K. Page, Judge

SUBSTITUTE BRIEF OF RESPONDENT-RESPONDENT JASON L. WYCISKALLA

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JURISDICTIONAL STATEMENT

Respondent-Respondent, JASON L. WYCISKALLA, concurs with and otherwise adopts the jurisdictional statement of Petitioners-Appellants, J.C.W. and T.D.W., by and through their next friend, KELLY K. WEBB.

IN THE
SUPREME COURT OF MISSOURI

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T.D.W.,	)	
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STATEMENT OF FACTS

The following is set forth to supplement certain points included in the Statement of Facts of Petitioners-Appellants.

On July 11, 2005, Respondent-Respondent, JASON L. WYCISKALLA (hereinafter "Father") received the Second Relocation Notice of Petitioners-Appellants, KELLY K. WEBB (hereinafter "Mother") (she had sent a notice the previous year which she had withdrawn), requesting to relocate to California. [Tr. pp. 32-33, L.F. p.3]. On August 2, 2005, Father filed his Motion to Prevent Relocation and Supporting Affidavit, [L.F. p.102], to which Mother responded on September 2, 2005. [L.F. p. 122].

On September 6, 2005, Father received Mother's Third relocation notice, indicating a move to another Missouri residence. [Tr. pp. 32-33]. On September 16, 2005, Father filed his Motion to Modify. [L.F. p. 12]. On September 27, 2005 Father filed another Motion to Prevent Relocation and Supporting Affidavit, [L.F. p. 150], to which Mother replied on October 19, 2005. [L.F. p. 161].

On April 28, 2006, Father received Mother's Fourth relocation notice, again requesting to relocate to California. [Tr. pp. 32-33]. On May 20, 2006, Father filed a renewal of his prior objections to relocation. On June 1, 2006, Father filed his Fourth Motion to Prevent Relocation and Supporting Affidavit. [L.F. p. 171]. Mother never responded.

Mother testified that her request to relocate to California was still an issue. [Tr. pp. 4, 625, 742]. Mother proposed a new custody schedule in her relocation letter sent to Father, in which she suggested that Father only receive one weekend every other month with the children, which Mother agreed was "a lot less" visitation than what Father had been receiving. [Tr. pp. 625-626, 646]. Mother also requested that she maintain sole legal custody. Mother stated that she has "a fear of joint decision" and believes joint legal custody is "unrealistic." [Tr. pp. 648, 652-653].

Mother resided in Festus, Missouri at the time of trial. [Tr. p. 3]. Mother and Father went to college at Southern Illinois University, [Tr. p. 173], both have master's degrees in Geology, [Tr. p. 173], and both work in the mining industry. [Tr. p. 171]. Mother's income on the Default Judgment Form 14 was $0 per month. [Tr. p. 10]. Mother was offered a salary of Sixty-Four Thousand Dollars ($64,000.00) per year in California. [Tr. p. 15]. On January 24, 2007, Mother filed an updated Statement of Income and Expenses for new employment in

the Saint Louis, Missouri area, listing her income as Sixty-Five Thousand Dollars ($65,000.00) per year. [Tr. pp. 618-620].

At the time of trial, Father also lived in Festus, Missouri. [Tr. p. 165]. Father had recently moved to Festus from Illinois to be closer to his twin sons. [Tr. pp. 166-167]. This was a permanent move. [Tr. p. 167]. Previously, the parties had disagreements regarding transportation of the children. At the time of trial, this was no longer an issue, as Father's home was less then two miles from Mother's residence. [Tr. p. 196].

Father called Larry Flowers ("Flowers"), a private investigator hired by Father. [Tr. pp. 94-95]. Flowers witnessed a custody exchange on September 22, 2004, during which Mother "nudged" Father and then stated "You done it now. That's assault. I'm going to file charges." [Tr. pp. 98-99]. Mother then went into the Festus police station to make a report and later followed Father around town in her car. [Tr. p. 100]. Flowers also witnessed that Mother followed Father around town in her vehicle after custody exchanges on March 22, 2006, May 31, 2006, and July 7, 2006. [Tr. pp. 105, 112, 114-115]. On August 31, 2005 and November 18, 2005, Flowers witnessed custody exchanges where the children cried and did not want to leave Father. [Tr. pp. 101-102].

Annie Alexander ("Alexander") testified that she is a dispatcher at the Festus Police Station and had witnessed custody exchanges between Mother and Father multiple times per month for more than two years. [Tr. pp. 123-125]. Typically, Father would arrive early for the exchange and then Mother would arrive and keep the children in her vehicle for fifteen (15) to twenty (20) minutes. [Tr. p. 125]. Alexander saw Mother crying during exchanges, stating to the children "I don't want to do this, the Court's making me do this." [Tr. p. 131].

Alexander never heard Father state anything to the children to upset them, but has instead heard Father state "[w]ave to your mom. Wave goodbye." [Tr. p. 132].

At one exchange, three to four months prior to the trial. [Tr. pp. 159], Mother called Dispatcher Alexander a "bitch" in front of the children. [Tr. p. 126]. On this day, Mother went into the Festus Police Station "in a fit of rage," and, according to Alexander, Mother had acted like this on "several occasions." [Tr. p. 127]. Alexander witnessed Mother acting aggressively toward Father "on numerous occasions." [Tr. p. 128]. Alexander never witnessed Father strike or come into physical contact with Mother. [Tr. p. 131].

Father's income on the Default Judgment Form 14 was $5,000.00 per month. [Tr. p. 10]. These same figures were used for the Consent Judgment. [Tr. p. 7]. Father testified that per his July 7, 2006, Statement of Income and Expenses, his income was $3,000.00 per month. [Tr. pp. 167-168]. Father had been injured and was unable to work from June 2004 until June 2006. [Tr. p. 171].

Mother deleted messages Father left for the children. [Tr. p. 174]. Mother interfered with and did not allow telephone contact between Father and the children [Tr. p. 178]. Mother interfered extensively with Father's custody. [Tr. p. 177].

Mother did not confer with Father on the children's health issues, [Tr. p. 181], and did not confer with Father regarding surgeries the children had. [Tr. pp. 181-182]. Mother did not confer with Father regarding the children's doctor visits, and Mother would often inform Father weeks after doctor visits had occurred, if at all. [Tr. 183].

In June 2006, Mother signed the children up for T-Ball without conferring with Father. [Tr. p. 193]. The children then made statements to Father such as, "Daddy wouldn't

let us play." [Tr. p. 195]. During summer 2005, Mother made comments to the children that "I guess Daddy just doesn't want to see you," and also "Daddy doesn't love you, and Mommy loves you. I love you so much." [Tr. p. 197].

Upon questioning by the Court, Father testified that if the trial court were to change legal custody he would be willing to work with Mother, would notify her of doctor's appointments and school events and would do everything possible to get Mother's consent before making decisions regarding the children. [Tr. pp. 343-344]. Father stated "I believe the children need both parents, and two heads are better than one, and I would make every effort to work with Kelly." [Tr. p. 344].

The Guardian ad Litem (GAL) recommended the parties be granted joint legal custody and joint physical custody, and that the parties exchange legal custody items by a loose-leaf binder method. [Tr. pp. 753-755]. The GAL stated that although the parties have "a lot of trouble discussing things between each other . . . a lot of parents do." [Tr. p. 754].

In the interest of judicial economy, Respondent-Respondent shall set forth additional facts as may be necessary in the argument portions of this Brief pertaining to the six points raised by Petitioners-Appellants.

POINTS RELIED ON

I.

THE TRIAL COURT PROPERLY PROCEEDED TO MODIFY CUSTODY BECAUSE IT POSSESSED SUBJECT MATTER JURISDICTION AS WELL AS JURISDICTIONAL COMPETENCE AND MOTHER WAIVED ANY LACK OF PERSONAL JURISDICTION IN THAT SECTION 452.455 R.S. Mo. MERELY DEPRIVES A TRIAL COURT FROM PROCEEDING WITH A PARTICULAR CASE WHERE THE REQUISITE ARREARAGE EXISTS UNLESS THE BOND REQUIREMENT IS MET OR THE PAYEE-PARENT WAIVES THE REQUIREMENT, WHICH CAN BE ACCOMPLISHED BY FAILING TO ALERT THE TRIAL COURT TO THE ARREARAGE AND WISH FOR THE BOND, WHETHER BY INITIAL PLEADING OR OTHERWISE, OR, ALTERNATIVELY, BY INVOKING THE POWERS OF THE COURT, WHETHER BY ISSUING A NOTICE OF INTENT TO RELOCATE UNDER SECTION 452.377 R.S. Mo. OR FILING A MOTION TO MODIFY UNDER SECTION 452.410 R.S. Mo.

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

Brown v. Shannahan, 141 S.W.3d 77 (Mo. App. 2004)

Missourian for Tax Justice Education Project v. Holden, 959 S.W.2d 100 (Mo. banc 1997)

Miller v. Miller, 210 S.W.3d 439 (Mo. App. 2007)

II.

THE TRIAL COURT PROPERLY MODIFIED THE CUSTODY COMPONENT OF THE UNDERLYING DECREE BECAUSE SUCH JUDGMENT WAS BASED UPON SUBSTANTIAL EVIDENCE IN THAT THERE WAS SIGNIFICANT EVIDENCE OF MOTHER'S FAILURE TO COMPLY WITH SECTION 452.377 R.S. Mo. WITH REGARD TO HER MOVE TO FARMINGTON, AS WELL AS MOTHER'S CONTINUED FAILURE TO ABIDE BY THE TERMS OF THE CUSTODY DECREE WITH REGARD TO EXCHANGES, COMMUNICATION BETWEEN THE PARTIES, AND CONTACT WITH THE CHILDREN

In re Marriage of Edwards, 256 S.W.3d 586 (Mo. App. 2008)

Section 452.377 R.S. Mo.

Besancenez v. Rogers, 100 S.W.3d 118 (Mo. App. 2003)

III.

THE TRIAL COURT CORRECTLY MODIFIED THE CUSTODY ASPECT OF THE PATERNITY JUDGMENT BECAUSE SUCH MODIFICATION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THERE WAS ABUNDANT EVIDENCE PRESENTED DURING THE FOUR DAYS OF TRIAL OF MOTHER'S FAILURE TO ABIDE BY THE DICTATES OF SECTION 452.377 R.S. Mo., AS WELL AS HER REFUSAL TO FOLLOW THE CUSTODY PLAN AS TO

CUSTODY EXCHANGES, VISITATION AND COMMUNICATION WITH THE CHILDREN SO AS TO SUPPORT SUCH A MODIFICATION.

Jones v. Jones, 10 S.W.3d 528 (Mo. App. 1999)

Ashton v. Ashton, 772 S.W.2d 730 (Mo. App. 1989)

Besancenez v. Rogers, 100 S.W.3d 118 (Mo. App. 2003)

IV.

THE TRIAL COURT PROPERLY IMPLEMENTED A JOINT LEGAL CUSTODY PLAN BECAUSE SUCH WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT MOTHER HAD FAILED TO ABIDE BY THE REQUIREMENTS OF THE PRESENT PLAN BY NOT CONFERRING WITH FATHER, BUT THE TRIAL COURT ALSO HAD CONCERNS ABOUT THE LIKELIHOOD THAT FATHER WOULD ABIDE BY SUCH PROVISIONS IF HE WERE AWARDED SOLE LEGAL CUSTODY; CONSEQUENTLY, GIVEN THE UNIQUE CIRCUMSTANCES OF THE CASE, THE TRIAL COURT IMPOSED A PLAN WHICH IT CONSIDERED TO BE IN THE BEST INTEREST OF THE CHILDREN.

Luther v. Vogel, 863 S.W.2d 901 (Mo. App. 1993)

Gulley v. Gulley, 852 S.W.2d 874 (Mo. App. 1993)

Form 14

Besancenez v. Rogers, 100 S.W.3d 118 (Mo. App. 2003)

V.

THE TRIAL COURT APPROPRIATELY ENTERED A JOINT PHYSICAL CUSTODY PLAN BECAUSE IT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT MOTHER MOVED TO FARMINGTON WITHOUT COMPLYING WITH THE TERMS OF SECTION 452.337 R.S. Mo., INTEREFERED WITH FATHER'S CUSTODY AND VISITATION AS WELL AS HIS TELEPHONE COMMUNICATION WITH THE BOYS; FURTHER, A JOINT PHYSICAL CUSTODY SCHEDULE WAS APPROPRIATE GIVEN THEIR PROXIMITY TO EACH OTHER IN FESTUS.

In re Marriage of Edwards, 256 S.W.3d 586 (Mo. App. 2008)

Besancenez v. Rogers, 100 S.W.3d 118 (Mo. App. 2003)

Section 452.377 R.S. Mo.

VI.

THE TRIAL COURT APPROPRIATELY DETERMINED THAT FATHER HAD OVERPAID CHILD SUPPORT DURING THE PENDENCY OF THE PROCEEDINGS SO AS TO OFFSET HIS CHILD SUPPORT ARREARAGE BECAUSE SUCH A DETERMINATION WAS NOT BASED UPON A MISAPPLICATION OF LAW, IN THAT THE TRIAL COURT'S FORM 14 CALCULATION, WITH THE CORRECT VISITATION CREDIT OF TEN PERCENT (10%) RESULTED IN A MONTHLY DIFFERENCE BETWEEN THE PRIOR

DECREE AMOUNT OF ONE THOUSAND NINETY DOLLARS ($1,090.00) PER MONTH AND THE CORRECT AMOUNT OF FIVE HUNDRED SEVENTY-TWO DOLLARS ($572.00) PER MONTH OF FIVE HUNDRED EIGHTEEN DOLLARS ($518.00) MONTHLY; CONSEQUENTLY, THIS ASPECT OF THE MATTER SHOULD BE REMANDED TO THE TRIAL COURT FOR CALCULATION OF THIS OFFSET AGAINST FATHER'S PREEXISTING CHILD SUPPORT ARREARAGE

Grams v. Grams, 789 S.W.2d 846 (Mo. App. 1990)

Form 14

I.

THE TRIAL COURT PROPERLY PROCEEDED TO MODIFY CUSTODY BECAUSE IT POSSESSED SUBJECT MATTER JURISDICTION AS WELL AS JURISDICTIONAL COMPETENCE AND MOTHER WAIVED ANY LACK OF PERSONAL JURISDICTION IN THAT SECTION 452.455 R.S. Mo. MERELY DEPRIVES A TRIAL COURT FROM PROCEEDING WITH A PARTICULAR CASE WHERE THE REQUISITE ARREARAGE EXISTS UNLESS THE BOND REQUIREMENT IS MET OR THE PAYEE-PARENT WAIVES THE REQUIREMENT, WHICH CAN BE ACCOMPLISHED BY FAILING TO ALERT THE TRIAL COURT TO THE ARREARAGE AND WISH FOR THE BOND, WHETHER BY INITIAL PLEADING OR OTHERWISE, OR, ALTERNATIVELY, BY INVOKING THE POWERS OF THE COURT, WHETHER BY ISSUING A NOTICE OF INTENT TO RELOCATE UNDER SECTION 452.377 R.S. Mo. OR FILING A MOTION TO MODIFY UNDER SECTION 452.410 R.S. Mo.

Father challenges the trial court's judgment of January 25, 2007, which modified the custody arrangement with regard to the two minor children of the parties, on the basis that the trial court lacked subject matter jurisdiction to modify custody due to Father's child support arrearage and failure to post a bond. To the contrary, this case presents a question of personal jurisdiction which was waived, not only by Mother's serial notices of intent to

relocate, but also by her failure to raise the question of the arrearage at the time of the filing of Father's motions to prevent relocation and motions to modify.

The Court will affirm the judgment in a judge tried case unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Jefferson v. Jefferson*, 137 S.W.3d 510, 572 (Mo. App. 2004).

The genesis of this case involved numerous notices sent by Mother to Father pursuant to Section 452.377 R.S. Mo. which requires any party with custody or visitation rights with respect to a child to provide notice to the other such party of intent to relocate. Mother provided numerous such notices. By the time of trial, Mother's request focused upon California. Father responded to these notices with motions to prevent relocation pursuant to Section 452.377 R.S. Mo., as well as motions to modify under Section 452.410 R.S. Mo. During the course of trial, evidence was presented that Father was in arrears with regard to his child support obligation in an amount in excess of Ten Thousand Dollars ($10,000) . At no time in the trial court, whether by motion filed in response to Father's pleadings, by oral request to the trial court during the four days of hearing, or by post-trial or post-judgment submission to the trial court, did Mother raise the arrearage as part of a challenge based upon Father's failure to post a bond. The question then, becomes whether Section 452.455 presents an issue of personal jurisdiction, as determined by the Western District of the Court of Appeals in *Miller v. Miller*, 210 S.W.3d 439 (2007) or whether the statute pertains to subject matter jurisdiction of the court, as held by the Eastern District below.

Miller was the first appellate decision dealing with Section 452.455 R.S. Mo. In *Miller*, father therein failed to file the required bond. Consequently, the trial court dismissed

his motion to modify in response to mother's assertion that without the bond having been filed, the trial court lacked personal jurisdiction over her. The Western District agreed with this analysis. Further, *Roach v. Hart*, 249 S.W.3d 224 (2008), where the Western District held that personal jurisdiction is waived if not raised in a party's responsive pleading, accepted the *Miller* analysis.

Shortly thereafter, the Eastern District rendered its opinion in the instant case. The lower court, with no discussion of the various notices of intent to relocate or Father's motions to prevent such relocation, focused exclusively on Father's attendant motions to modify. Judge Crane, writing for the Eastern District, not quite holding that the trial court lacked subject matter jurisdiction, concluded that it lacked jurisdictional competence because of Father's failure to post a bond, which could not be waived by Mother.

Policy and practical reasons require adherence to the analysis of the Western District. The question of a trial court's ability to proceed when dealing with an issue of custody modification when such a child support arrearage exists should be one of personal jurisdiction rather than either subject matter jurisdiction or jurisdictional competence.

From a strictly pragmatic perspective, this case illustrates exactly why the arrearage issue should be one of personal jurisdiction. This case was pending before the trial court from August 2005 until April 2007. At no time, in any of the pleadings before the trial court, in any of the argument, before the trial court, or in any of the post-trial or post-judgment submission did Mother raise the issue of the trial court's jurisdiction to address custody. Viewed from the perspective of the utilization of judicial resources, allowing a case to be tried for four days and to be pending before the trial court for nearly two years without so

much as hinting that there is a question of the trial court's ability to proceed allows a parent who is a recipient of child support to engage in an elaborate game of "gotcha," seeking judgment not on the merits of the case, but upon technicalities to the detriment of the children at issue.

This Court's opinion in *State v. Thomas*, 182 S.W.2d 534 (1944) presents the appropriate analysis for why the bond requirement of Section 452.455 should be viewed as a question of personal jurisdiction rather than subject matter jurisdiction. In *Thomas*, the question was whether the circuit court had jurisdiction over the subject matter of the case. Under the statute in question at the time, where the defendant was charged by information with a felony, a valid preliminary examination in what was then magistrate's court was required. Such an examination was a prerequisite to the circuit court proceeding with the case. In holding that the circuit court did in fact have subject matter jurisdiction, Judge Ellison wrote:

> Now while it is true that [the statute] provides no prosecuting attorney shall file an information charging any person with a felony until such person shall first have been accorded the right of a preliminary examination, yet that does not mean the circuit court has no jurisdiction over the subject matter of the cause in the broad and commonly accepted sense. It rather means the court in those circumstances cannot exercise its jurisdiction, or, stated another way, the court conditionally lacks jurisdiction to try the particular case because of the prohibition in the statute, the condition being whether or not the defendant has waived

> preliminary examination--for the statute also contains the aforesaid proviso that such examination shall not be required if he does waive it.

Id. at 538.

Here, Mother waived the bond requirement in two ways. First, she failed to request dismissal of the case, that the bond be posted, or in any other way alert the trial court to the bond requirement of Section 452.455. Such failure to request the bond constitutes a waiver under the *Thomas* analysis.

Second, and possibly more importantly under the circumstances of this case, Mother in effect initiated this action. By sending the various notices of intent to relocate under Section 452.377, Mother put the question of the custody of the children before the trial court. Granted, she did not file the documentation before the trial court. However, pursuant to the procedures set forth in the statute, Mother notified Father of her intent to leave the State of Missouri. Prior to the adoption of this relocation procedure, Mother would have been required to come to court, absent Father's consent, and request permission to relocate to California and to change the custody arrangement. The adoption of this relocation procedure under Section 452.377 in essence allowed for the parties to both document their sharing of information and possibly, resolve the situation without litigation by placing the onus on the non-relocating parent, if he or she would find the relocation objectionable, to come to court to challenge it. While from a pleading perspective Father was in the position of being the movant, he was in actuality the responding party. Under the statute, Mother had "the burden of proving that the proposed relocation is made in good faith and is in the best interest of the child." Therefore, for all practical purposes, she was the movant and Father's various

motions to prevent relocation and motions to modify amounted to mere counter-motions to modify.

There is nothing in the verbiage of Section 452.455 which would indicate that a party in arrears with regard to child support cannot challenge and/or counter a proposed custody modification by the other party. Of course, the arrearage itself could be a factor for the trial court to consider in its determination, *see Nichols v. Becam*, 980 S.W.2d 342, 350 (Mo. App. 1998), but, once the issue of custody has been put forth by the party sending the notice of intent to relocate, the issue of custody is therefore then before the trial court.

The Eastern District of the Court of Appeals, in *Brown v. Shannahan*, 141 S.W.3d 77 (2004) clarified this point. Section 452.377 not only governs relocation, but provides for modification of existing custody or visitation arrangements. *Id.* at 79. Therefore, by initiating the process for modifying the custody arrangement as a result of her notice to relocate, Mother waived any claim that the trial court does not have the ability to proceed because of the lack of a bond.

Were the jurisdictional competence analysis of the Eastern District in this case followed, trial courts would be placed in untenable situations. Once the notice of relocation is sent and a motion to prevent such relocation is filed, as stated above, the sending party has the burden to prove good faith and that the move would be in the best interest of the children. As recognized by *Brown*, the issue of custody is then before the court. Further, the Western District of the Court of Appeals noted in *Vangundy v. Vangundy*, 937 S.W.2d 228 (1996):

> When a child is properly before any court for any purpose and its welfare is involved, it becomes the ward of that court with respect to the issues of that

> case and that court has inherent jurisdiction to adjudicate custody as it deems will best preserve and protect the child's welfare. This is the public policy of the state.

Id. at 231.

Vangundy dealt with a situation where legal custody was modified without any request by either party to do so. Here, given "the public policy of the state," the trial court cannot, nor should it, be prevented from determining what is in the best interests of the children before it.

This Court has a duty to interpret Section 452.455 in a manner that conforms to the demands of the Constitution. *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100 (Mo. banc 1997). An interpretation of Section 452.455 depriving a trial court of subject matter jurisdiction unless a bond is posted would result in an unconstitutional application. *Id*. By sending notices of intent to relocate, Mother, in essence, raised the issue of custody of the children. *Brown*, *supra*, *Vangundy*, *supra*. *See also Ashton v. Ashton*, 772 S.W.2d 730, 732 (Mo. App. 1989). By preventing Father from challenging her relocation requests because of the lack of a bond, Father would be deprived of access to the courts. Simply put, in any judicial proceeding, the due process clause means a party shall have his or her day in court. *State ex rel. Chicago Great Western Railway Company v. Public Service Commission of Missouri*, 51 S.W.2d 73, 76 (Mo. 1932). The application of Section 452.455.4 R.S. Mo. as espoused by the Eastern District of the Court of Appeals, prevents the trial court from proceeding on Father's motion, despite having the issue of custody placed before it and, effectively, deprives Father of his day in court.

On the other hand, if Section 452.455.4 is viewed through the prism of personal jurisdiction, the bond requirement of the statute can easily pass constitutional muster. The trial court would have no power to proceed unless the party to whom the support is owed waives the bond requirement. The bond requirement can, as noted above, be waived by the sending of the notice to relocate, thus initiating the entire Section 452.377 procedure, or alternatively, by filing any motion to modify under Section 452.410. 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. The filing of the motion to modify by the parent to whom the support is owed effectively waives the bond requirement.

Finally, failing to raise the issue at the pleading stage, as noted in *Roach, supra*, Rule 55.27(g), would also constitute waiver.

The trial court herein clearly had jurisdiction to proceed with its determination of custody. Mother waived any questions with regard to personal jurisdiction over her so as to allow the trial court to proceed by sending the notices to relocate, as well as failing to raise the question of personal jurisdiction in her pleadings. As such, the trial court's judgment with regard to the custody of the minor children herein should be affirmed.

II.

THE TRIAL COURT PROPERLY MODIFIED THE CUSTODY COMPONENT OF THE UNDERLYING DECREE BECAUSE SUCH JUDGMENT WAS BASED UPON SUBSTANTIAL EVIDENCE IN THAT THERE WAS SIGNIFICANT EVIDENCE OF MOTHER'S FAILURE TO COMPLY WITH SECTION 452.377 R.S. Mo. WITH REGARD TO HER MOVE TO FARMINGTON, AS WELL AS MOTHER'S CONTINUED FAILURE TO ABIDE BY THE TERMS OF THE CUSTODY DECREE WITH REGARD TO EXCHANGES, COMMUNICATION BETWEEN THE PARTIES, AND CONTACT WITH THE CHILDREN

Mother complains that the doctrine of res judicata prohibited the trial court from considering matters upon which it relied in entering its judgment of modification, seemingly, that there was insufficient evidence to support the modification. To the contrary, the trial court had before it numerous motions to prevent relocation as well as Father's motions to modify alleging specific occurrences subsequent to entry of the most recent judgment by the trial court in 2005. Further, that evidence was laid before the trial court during the four days of the trial.

This court will affirm the trial court's custody determination unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Besancenez v. Rogers*, 100 S.W.3d 118, 122 (Mo. App. 2003).

The trial court had before it substantial evidence regarding significant difficulties with

the custody arrangement which was then in force for the parties. There was no doubt but that Mother moved from Jefferson County to Farmington during the pendency of the proceedings without complying with Section 452.377. She failed to communicate with Father and to discuss educational options for the boys. She admitted that she would at times procure medical treatment for the children without consultation with Father or subsequently informing Father. There is evidence that Mother on many occasions would not allow the children to communicate by telephone with Father. Likewise, there was evidence before the trial court that Mother on numerous occasions did not appear for custody or visitation exchanges. All of these actions occurred subsequent to entry of the most recent decree. Clearly, the allegations contained within the pleadings and the proof at trial constituted substantial evidence to support a change in circumstances so as to allow the trial court to enter its decree. *See In re Marriage of Edwards*, 256 S.W.3d 586, 588-589 (Mo. App. 2008).

In making her argument, Mother seeks to have her cake and eat it too. She points out that Father sought to file an amended motion to modify in March 2005, after she had moved for summary judgment on his original motion to modify in January 2005. In April 2005, at the same time the trial court sustained the motion for summary judgment, it denied Father leave to file his amended motion to modify. [L.F. p. 101]. However, now, more than three years later, Mother seeks to compare the amended motion to modify with the subsequent motions before the trial court in this proceeding, in essence claiming that the matters raised in the amended motion to modify, which the trial court did not allow to be filed, be considered in determining whether these issues were before the trial court in 2005.

Insofar as, the trial court did not allow Father to file the amended motion to modify,

the motion, by definition, could not be considered by the trial court nor was it before the trial court for purposes of determining whether res judicata applies in this case. Moreover, since there are significant additional instances of Mother's inability and/or unwillingness to abide by the custody components of the decree, Mother's argument that the same issues were before the court in 2005 does not hold water.

The trial court's modification of the custody components of the decree is based upon substantial evidence and does not involve an erroneous application of the law. Consequently, the trial court's judgment with regard to custody should be affirmed.

III.

THE TRIAL COURT CORRECTLY MODIFIED THE CUSTODY ASPECT OF THE PATERNITY JUDGMENT BECAUSE SUCH MODIFICATION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THERE WAS ABUNDANT EVIDENCE PRESENTED DURING THE FOUR DAYS OF TRIAL OF MOTHER'S FAILURE TO ABIDE BY THE DICTATES OF SECTION 452.377 R.S. Mo., AS WELL AS HER REFUSAL TO FOLLOW THE CUSTODY PLAN AS TO CUSTODY EXCHANGES, VISITATION AND COMMUNICATION WITH THE CHILDREN SO AS TO SUPPORT SUCH A MODIFICATION.

Mother asserts that the trial court's judgment modifying the custody arrangement with regard to the children of the parties is unsupported by substantial evidence in that, according to Mother, the evidence presented to the trial court concerned matters prior to the 2005 judgment. Such is not the case. As noted in Respondent-Respondent's Point II herein, there was substantial evidence presented to the trial court regarding Mother's relocation from Festus to Farmington without complying with the dictates of Section 452.377 R.S. Mo., difficulties with regard to visitation and exchanges of custody, as well as telephone communication. Moreover, Mother's own request for changes in the custody arrangement justify actions taken by the trial court.

Again, this Court will affirm the trial court's custody determination unless there is no

substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Besancenez v. Rogers*, 100 S.W.3d 118, 122 (Mo. App. 2003).

Mother sent numerous notices of intent to relocate to Father. The final notice, about which Mother presented evidence, was to move to California. She was suggesting a change in the custody arrangement as a result of that request to relocate. Father had before the court a motion to prevent the relocation, as well as an attendant motion to modify. Both parties were seeking changes. *Jones v. Jones*, 10 S.W.3d 528, 533 (Mo. App. 1999). Mother, having sought a change in the custody arrangement with regard to the children, cannot now say there is no substantial evidence to support such a change. The trial court was not limited to the relief prayed for by the parties, but was obligated to award custody in the manner that served the best interests of the children. *See Ashton v. Ashton*, 772 S.W.2d 730, 732 (Mo. App. 1989).

Mother sought a change in the custodial arrangement with regard to the children. The trial court, based upon all the evidence that was presented during the four days of testimony, as well as documentary evidence supporting Father's claims with regard to interference with custody, visitation, and communication with the children, modified the custody arrangement. Mother is not now in a position to complain that the court did not follow her guideline as to how the custody arrangement should be altered. The trial court's judgment should therefore be affirmed.

IV.

THE TRIAL COURT PROPERLY IMPLEMENTED A JOINT LEGAL CUSTODY PLAN BECAUSE SUCH WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT MOTHER HAD FAILED TO ABIDE BY THE REQUIREMENTS OF THE PRESENT PLAN BY NOT CONFERRING WITH FATHER, BUT THE TRIAL COURT ALSO HAD CONCERNS ABOUT THE LIKELIHOOD THAT FATHER WOULD ABIDE BY SUCH PROVISIONS IF HE WERE AWARDED SOLE LEGAL CUSTODY; CONSEQUENTLY, GIVEN THE UNIQUE CIRCUMSTANCES OF THE CASE, THE TRIAL COURT IMPOSED A PLAN WHICH IT CONSIDERED TO BE IN THE BEST INTEREST OF THE CHILDREN.

Mother assails the trial court's modification of legal custody so as to implement a joint legal custody arrangement. The gist of Mother's position is that the parties cannot communicate and that there is no substantial evidence to support such an arrangement. However, under the unique circumstances of this case, the trial court's custody arrangement is appropriate and should be affirmed.

This court will affirm the trial court's custody determination unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Besancenez v. Rogers*, 100 S.W.3d 118, 122 (Mo. App. 2003).

It should be clear from a reading of the voluminous transcript as well as the trial court's judgment that Judge Page's focus was on the best interest of these two young boys,

not upon the desires of the parents. As recognized by Mother, the trial court found itself in a position where Mother refused to abide by the few requirements of the present plan mandating conferral with Father. The trial court was also concerned that vesting legal custody solely in Father could result in a mere reversal of fortunes, i.e. that Father would behave just as Mother had with the old plan. Consequently, the trial court was faced with a Hobson's Choice.

It is important to remember that in a child custody proceeding it is the **affirmative** duty of the trial court to enter a decree that is in the best interest of the children; the best interest of the parents are secondary. *Luther v. Vogel,* 863 S.W.2d 902, 904 (Mo. App. 1993).

There is no doubt but that in a perfect world, the parties should be able to set aside their acrimony and focus exclusively on their two young boys. Neither party seems ready to achieve such perfection. However, Mother's mere opposition to joint legal custody, especially where Father testified he was willing to attempt such an arrangement, does not prevent the implementation of joint legal custody. *Id.* Disagreements between the parties are not insurmountable obstacles to joint legal custody. *See generally, Gulley v. Gulley*, 852 S.W.2d 874 (Mo. App. 1993) and *In re Marriage of Spence*, 943 S.W.2d 373 (Mo. App. 1997).

There was substantial evidence to support the trial court's determination that joint legal custody was appropriate under the circumstances. Consequently, this aspect of the custody arrangement should be affirmed. In the alternative, should this Court determine that there was insufficient evidence to support such a legal custody arrangement, Respondent-

Respondent urges that this matter be remanded to the trial court for determination as to which party, as between the two parents, should be accorded sole legal custody.

V.

THE TRIAL COURT APPROPRIATELY ENTERED A JOINT PHYSICAL CUSTODY PLAN BECAUSE IT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT MOTHER MOVED TO FARMINGTON WITHOUT COMPLYING WITH THE TERMS OF SECTION 452.377 R.S. Mo., INTEREFERED WITH FATHER'S CUSTODY AND VISITATION AS WELL AS HIS TELEPHONE COMMUNICATION WITH THE BOYS; FURTHER, A JOINT PHYSICAL CUSTODY SCHEDULE WAS APPROPRIATE GIVEN THEIR PROXIMITY TO EACH OTHER IN FESTUS.

Mother's final assault on the custody order entered by Judge Page appears to be that the trial court's modification of the physical custody arrangement so as to implement joint physical custody between the parties is unsupported by substantial evidence. For many of the same reasons to which Respondent-Respondent has alluded in Points II, III, and IV hereof, the trial court's judgment should be affirmed.

This Court will affirm the trial court's custody determination unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Besancenez v. Rogers*, 100 S.W.3d 118, 122 (Mo. App. 2003).

Review of the trial court's judgment, as well as a mere perusal of the transcript, would indicate that the trial court had before it a parent who obstinately ignored the terms of a paternity decree by moving from Festus to Farmington without complying with the terms of Section 452.377, who chose not to communicate with Father concerning the upbringing of

the boys, who sabotaged Father's attempts to communicate with the boys when in Mother's custody, and who interfered with custody exchanges in periods of visitation. Given that background, the trial court was presented with the advantage of Mother and Father living in relatively close proximity, as Father had moved to Festus from Southern Illinois. Consequently, given the difficulties associated with the present custody plan, providing that each party would have half of the time with the children was clearly in their best interest.

In *In re Marriage of Edwards*, 256 S.W.3d 586 (Mo. App. 2008) the Southern District had before it a not dissimilar situation. The mother moved without complying with Section 452.377. She made unilateral decisions regarding education of the children, failed to consult with the father regarding medical care, interfered with his periods of visitation, and failed to provide him reasonable telephone access. All of these difficulties led the trial court to implement joint physical custody.

The evidence presented by Father herein, and accepted by the trial court, echoes the above recitations. Clearly such difficulties with regard to interference with custody and visitation, as well as telephone communication, even apart from Mother's move from Farmington to Festus, justify a readjustment of the physical custody schedule and it should be affirmed.

VI.

THE TRIAL COURT APPROPRIATELY DETERMINED THAT FATHER HAD OVERPAID CHILD SUPPORT DURING THE PENDENCY OF THE PROCEEDINGS SO AS TO OFFSET HIS CHILD SUPPORT ARREARAGE BECAUSE SUCH A DETERMINATION WAS NOT BASED UPON A MISAPPLICATION OF LAW, IN THAT THE TRIAL COURT'S FORM 14 CALCULATION, WITH THE CORRECT VISITATION CREDIT OF TEN PERCENT (10%) RESULTED IN A MONTHLY DIFFERENCE BETWEEN THE PRIOR DECREE AMOUNT OF ONE THOUSAND NINETY DOLLARS ($1,090.00) PER MONTH AND THE CORRECT AMOUNT OF FIVE HUNDRED SEVENTY-TWO DOLLARS ($572.00) PER MONTH OF FIVE HUNDRED EIGHTEEN DOLLARS ($518.00) MONTHLY; CONSEQUENTLY, THIS ASPECT OF THE MATTER SHOULD BE REMANDED TO THE TRIAL COURT FOR CALCULATION OF THIS OFFSET AGAINST FATHER'S PREEXISTING CHILD SUPPORT ARREARAGE

Mother's final point is that the trial court erred in determining that the amount of child support paid by Father during the pendency of the proceedings eliminated his child support arrearage. Father concedes that the trial court's approach may have been less than attentive to detail. Examination of the evidence before the trial court, however, and review of the Judgment indicates that the trial court was attempting to offset Father's overpayment during

the pendency of his motion against the arrearage. Consequently, Father requests this Court to determine the effect of a retroactive child support modification back to commencement of the action in August 2005 and to assess the effect upon the arrearage.

This Court is to sustain the trial court's judgment unless there is no substantial evidence afforded, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Grams v. Grams,* 789 S.W.2d 846, 849 (Mo. App. 1990). The trial court has considerable discretion and a decision on child support will remain undisturbed absent a manifest abuse of discretion. *Grams*, *supra.*

Father's child support obligation at the commencement of these proceedings was One Thousand Ninety Dollars per month ($1,090.00). [L.F. p. 23]. The trial court calculated a Form 14, which yielded a child support obligation of One Hundred Ninety-Seven Dollars ($197.00) per month. [L.F. p. 214]. However, that child support calculation was based upon a 34% visitation credit as a result of the custody schedule contained with the Judgment. If a 10% visitation credit is utilized, Father's obligation on a monthly basis while the case was pending would be Five Hundred Seventy-Two Dollars ($572.00) per month. [Eight Hundred Thirty-Six Dollars ($836.00) minus credit for additional childrearing costs of One Hundred Eight Dollars ($108.00) minus ten percent (10%) visitation credit of One Hundred Fifty-Six Dollars ($156.00)]. The difference, then, each month is Five Hundred Eighteen Dollars ($518.00). (This case was pending from the time of filing until rendition of the modification judgment, a period of 18 months). This results in an amount of minimum overpayment of Nine Thousand Three Hundred Twenty-Four Dollars ($9,324.00). [Five Hundred Eighteen Dollars ($518.00) times 18 months].

Given the determination of the trial court with regard to the appropriate Form 14 amount, Father urges that this Court remand this issue to the trial court for a determination of the exact amount of the arrearage up through, to and including the entry of the judgment, as well as a further determination upon remand based upon the trial court's finding that no child support should be paid by either party to either party subsequent to that date.

CONCLUSION

For all the foregoing reasons, Respondent-Respondent, JASON L. WYCISKALLA, prays that this Court affirm the child custody determination of the trial court in all respects and remand the question of the amount of child support arrearage, if any, in accordance with his request set forth herein.

Respectfully submitted,

GILLESPIE, HETLAGE & COUGHLIN, L.L.C.

BY:_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the foregoing *Respondent-Respondent's Appeal*, 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, first class, postage prepaid this 9th day of October, 2008 to: Jonathan D. Marks, The Marks Law Firm, LLC, Four CityPlace Drive, Suite 497, Creve Coeur, Missouri 63141 and Joan Bryan, 212 South Main Street, Desoto, Missouri 63020. Further, the undersigned states that said Brief contains Seven Thousand One Hundred Eighty-Nine (7,189) 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.

_____

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, the undersigned Notary Public, this 9th day of October 2008.

_____
Notary Public

My Commission Expires:_____