

IN THE SUPREME COURT OF MISSOURI

JOSEPH SZRAMKOWSKI,)

)

Appellant/Cross-Respondent,)

)

vs.)

Supreme Court No. SC91108

)

DOROTHY SZRAMKOWSKI,)

)

Respondent/Cross-Appellant.)

APPELLANT/CROSS-RESPONDENT’S SUBSTITUTE BRIEF

Submitted By:

Brian H. May, #39694

Yates & May, L.C.

Attorneys for Appellant/Cross-Respondent

7710 Carondelet, Suite 101

Clayton, MO 63105

TABLE OF CONTENTS

Table of Authorities	pgs. 3-4
Rules of Court	pg. 5
Constitutional Provisions.	pg. 5
Statutory Provisions.	pg. 5
Jurisdictional Statement	pg. 6
Statement of Facts	pgs. 7-26
Points Relied On	pgs. 26-29
Argument	pgs. 30-60
Conclusion	pg. 61-62
Certification	pg. 63-64

TABLE OF AUTHORITIES

<i>8000 Maryland, LLC v. Huntleigh Financial Services, Inc.</i> , 292 S.W.3d 439, 444 (Mo.App.E.D. 2009).	pg. 30
<i>Bauer v. Bauer</i> , 38 S.W.3d 449, 455 (Mo.App.E.D. 2001).	pg. 30
<i>City of Wellston v. SBC Communications, Inc.</i> , 203 S.W.3d 189 (Mo. banc 2006)	pg 45,46
<i>Clark v. Reeves</i> , 854 S.W.2d 28, 30 (Mo.App.W.D. 1993).	pg. 39
<i>Groenings v. Groenings</i> , 277 S.W.3d 270, 274 (Mo.App.E.D. 2009).	pg. 35
<i>In re Estate of Scott</i> , 932 S.W.2d 413, 414 (Mo.App.E.D. 1996).	pg. 60
<i>In re Marriage of Thompson</i> , 894 S.W.2d 255, 256 (Mo.App.S.D. 1995). . . .	pg. 49
<i>In re Marriage of Uhls</i> , 549 S.W.2d 107, 110 (Mo.App.E.D. 1977).	pg. 51
<i>Johnson by Burns v. Johnson</i> , 811 S.W.2d 822, 825 (Mo.App.S.D. 1991). . .	pg. 45
<i>Koon v. Koon</i> , 969 S.W.2d 828 (Mo.App.S.D. 1998).	pg. 50
<i>Lawrence v. Lawrence</i> , 938 S.W.2d 333,336 (Mo.App.W.D. 1997).	pg. 49
<i>Lee v. Hiler</i> , 141 S.W.3d 517, 523 (Mo.App.S.D. 2004	pg. 33
<i>McAllister v. McAllister</i> , 101 S.W.3d 287, 291 (Mo.App.E.D. 2003).	pg. 30
<i>Morse v. Volz</i> , 808 S.W.2d 424, 430 (Mo.App.W.D. 1991)	pg. 33
<i>Murphy v Carron</i> , 536 S.W.2d. 30, 32 (Mo.banc 1976).	pg. 30
<i>Nieters v. Nieters</i> , 815 S.W.2d 124 (Mo.App.E.D. 1991).	pg. 50
<i>Nixon v. Kinder</i> , 129 S.W.3d 5, 8 (Mo.App.W.D. 2003)	pg. 37
<i>Novak v. Akers</i> , 669 S.W.2d 644, 647 (Mo.App.S.D. 1984).	pg. 32
<i>Preston v. State of Missouri</i> , 33 S.W. 3d 574 (MO. App. W.D. 2000).	pg. 44

<u>Preston v. State</u> , 33 S.W.3d 574, 580 (Mo.App.W.D. 2000).	pgs. 39
<u>Simpson v. Strong</u> , 234 S.W3d 567 (Mo.App.S.D. 2007).	pg. 53
<u>State v. Beine</u> , 730 S.W2d 304, 307 (Mo.App.E.D. 1987).	pg. 39
<u>Walters v. Walters</u> , 113 S.W.3d 214, 216 (Mo.App.S.D. 2003).	pg. 42
<u>Waddell v. Dir. of Revenue</u> , 856 S.W.2d 94, 95 (Mo.App.S.D.1993).	pg. 30
<u>Webb v. St. Louis County National Bank</u> , 551 S.W.2d 869, 874 (Mo.App. 1974) pg.	33

RULES OF COURT

Rule 52.01.	pg. 42
Rule 52.02(k).	pg. 8, 37, 58, 59
Rule 52.04(a).	pg. 42
Rule 52.13(b).	pg. 42, 43, 45
Rule 129.09	pg. 7

CONSTITUTIONAL PROVISIONS

Article V, Section 3, of the Missouri Constitution..	pg. 6
---	-------

STATUTORY PROVISIONS

Section 452.310.1 RSMo 2009..	pg. 35
Section 452.314 RSMo.	pg. 37, 45
Section 452.320.2(1)(a)-(e) RSMo 2009..	pg. 47,48, 49, 50, 51, 53,61
Section 475.078.2 RSMo..	pg. 38,39
Section 475.091(2) RSMo	pg. 44
Section 475.097.1 RSMo	pg. 59
Section 475.120.3 RSMo	pg. 42
Section 475.078.3 RSMo..	pg. 38
Section 491.060(1) RSMo	pg. 39

JURISDICTIONAL STATEMENT

Appellant/Cross-Respondent, Joseph Szramkowski, appeals the Judgment of Dissolution of Marriage issued by the St. Louis County Circuit Court, Honorable Mary B. Schroeder, on April 17, 2009, dissolving the marriage of Appellant/Cross-Respondent and Respondent/Cross-Appellant, Dorothy Szramkowski.

Appellant/Cross-Respondent timely filed his Notice of Appeal with the St. Louis County Circuit Court on June 2, 2009. Respondent/Cross-Appellant filed her Notice of Appeal on or about June 8, 2009.

The Eastern District Court of Appeals' Opinion affirming the Circuit Court's Judgment of Dissolution of Marriage was filed on June 8, 2010. Appellant/Cross-Respondent filed his Motion for Rehearing, Rehearing En Banc and/or Transfer to Supreme Court pursuant to Rule 84.17 and Rule 83.02 of the Rules of Civil Procedure on June 23, 2010. The Eastern District Court of Appeals denied this Motion on July 28, 2010.

Appellant/Cross-Respondent filed his Application for Transfer to Supreme Court on August 12, 2010. The Order sustaining the Application was issued on October 26, 2010.

This Court has jurisdiction for this Appeal pursuant to Article V, Section 3, of the Missouri Constitution.

STATEMENT OF FACTS

On or about April 17, 2009, Commissioner Phillip Jones of the St. Louis County Circuit Court issued his Findings and Recommendations of Commissioner that the marriage of Appellant/Cross-Respondent and Respondent/Cross-Appellant be dissolved. Later on April 17, 2009, the Honorable Mary B. Schroeder, pursuant to Rule 129.09 of the Rules of Civil Procedure, adopted the Findings and Recommendations of Commissioner and entered a Judgment of Dissolution of Marriage (“Judgment”) dissolving the parties’ marriage. *Legal File, pp.138-148, Appendix, pp. A1-A9.*

Appellant/Cross-Respondent and Respondent/Cross-Appellant were married on December 26, 1974. *Transcript, p. 134.* Respondent/Cross-Appellant’s Petition for Dissolution of Marriage was filed on or about November 14, 2006, and it was alleged that the parties’ marriage could not be preserved and therefore was irretrievably broken. *Legal File, pp. 11-13.* In his timely-filed Answer Appellant/Cross-Respondent specifically denied that the marriage was irretrievably broken. *Legal File, pp. 27-28.*

On November 7, 2006, Appellant/Cross-Respondent filed a Petition for Appointment of Guardian and Conservator in the Probate Division of the St. Louis County Circuit Court on behalf of Respondent/Cross-Appellant, alleging that she was suffering from dementia and Alzheimer’s disease. *Appendix, pp. A24 – A27.*¹

On December 11, 2006, Appellant/Cross-Respondent filed with the trial court his Motion to Dismiss for Lack of Capacity. *Legal File, pp. 14-15.*

¹ The trial court took judicial notice of the entire contents of the file *In the Matter of Dorothy E. Szramkowski*, Cause No. 06PR03033. *Transcript, pp. 2-3.*

On May 31, 2007, the trial court appointed Brian D. Dunlop, Esq., pursuant to Rule 52.02(k) of the Rules of Civil Procedure to serve as the guardian ad litem (“GAL”) for Respondent in the dissolution of marriage proceeding. *Legal File, p. 2.*

On July 9, 2007, the Probate Division entered its Judgment, finding Respondent/Cross-Appellant incapacitated and authorizing the appointment of Margaret Fowler to serve as guardian and James R. Wright, Jr., to serve as conservator. *Appendix, pp. A28 – A29.*

Appellant/Cross-Respondent filed his Amended Motion to Dismiss for Lack of Capacity on October 30, 2007, alleging that Respondent/Cross-Appellant was incompetent prior to the date she filed her verified Petition for Dissolution of Marriage and therefore the Petition should be dismissed. *Legal File, p. 6-19.* The trial court denied Appellant/Cross-Respondent’s dismissal motions. *Legal File, p. 144, Appendix, p. A7.*

On November 29, 2007, Appellant/Cross-Respondent filed his Motion to Dismiss Guardian Ad Litem, arguing that a GAL was no longer appropriate pursuant to Rule 52.02(k) of the Rules of Civil Procedure since the Probate Division had appointed a guardian for Respondent. *Legal File, pp. 23-26.* The trial court denied this Motion the same day. *Legal File, p. 4.*

On December 5, 2008, Respondent/Cross-Appellant’s counsel filed a Motion for Leave to File Amended Petition and an Amended Petition for Dissolution of Marriage. *Legal File, pp. 40-45.* The caption of this unverified Amended Petition included the names of Mr. Dunlop, Respondent’s guardian, Ms. Fowler, and Respondent’s

conservator, Mr. Wright. *Legal File*, p. 40. The reason stated in support of the Leave request was Mr. Dunlop's May 31, 2007, appointment as GAL for Respondent. *Legal File*, p. 44.

In response to Appellant/Cross-Respondent's counsel's argument at trial, Respondent/Cross-Appellant's counsel made an oral motion to substitute the guardian, Ms. Fowler, for the GAL. *Transcript*, p. 12. After the trial, on February 5, 2009, Respondent/Cross-Appellant filed a Motion for Substitution of Parties, seeking to have Ms. Fowler substituted as the petitioner. *Legal File*, pp. 95-96. The trial court denied these motions and no substitution was effected. *Legal File*, p. 144.

This matter was heard by the trial court on December 12, 2008. At the outset of the proceedings that day Appellant/Cross-Respondent's counsel presented to the trial court his written Request for Findings of Fact and Conclusions of Law. *Transcript*, p. 4.

The following individuals testified at trial:

Joseph Szramkowski

Appellant/Cross-Respondent testified that he did not believe that the parties' marriage was irretrievably broken and that there was likelihood that it could be preserved. *Transcript*, pp. 134-135. He is a devout Catholic who does not believe in divorce and thinks marriage is a Sacrament. *Transcript*, p. 166. He did not believe that his wife was competent to sign or file the Petition for Dissolution of Marriage in November, 2006. *Transcript*, pp. 135-136.

Appellant/Cross-Respondent testified that the parties continuously resided together from the date of the marriage in 1974 until September 21, 2006. *Transcript*, pp.

136-137. During the course of the marriage the parties were active members of the St. Stanislaus parish in the City of St. Louis. Appellant/Cross-Respondent testified that from conversations with his wife he knew that Respondent/Cross-Appellant “frowned” on divorce and did not believe in it. *Transcript, p. 167*. Nothing had changed during the marriage as to the parties’ activities and interests. *Transcript, pp. 167-168*.

Appellant/Cross-Respondent testified that he loves his wife and is hopeful of a reunification. He is willing to do whatever is necessary to care for his wife. *Transcript, p. 196*.

In August, 2006, Respondent/Cross-Appellant was experiencing eyesight problems attributable to cataracts. *Transcript, p. 144*. Appellant/Cross-Respondent encouraged and attempted to assist Respondent/Cross-Appellant to have her eyesight problems corrected. *Transcript, pp. 144-145, p. 194*. In fact, on August 28, 2006, Appellant/Cross-Respondent accompanied his wife to her visit with P. Kumar Rao, M.D., of the Barnes Retina Institute. *Transcript, pp. 145-146; Appendix, pp. A7 – A14*.

John C. Galanis, M.D., performed surgery on one (1) of Respondent/Cross-Appellant’s eyes in September, 2006. *Transcript, p. 146; Appendix, pp. A15 - A27*. Respondent/Cross-Appellant convalesced at the home of her sister, Margaret Fowler, for approximately four (4) days. *Transcript, p. 146*. Appellant/Cross-Respondent spoke with his wife on the telephone during her convalescence period and picked her up at Ms. Fowler’s residence on September 15, 2006. *Transcript, p. 147*.

Respondent/Cross-Appellant stayed with her husband at the marital residence until September 21, 2006, during which Appellant/Cross-Respondent prepared meals for her and made sure she was properly clothed. *Transcript, p. 148.*

Appellant/Cross-Respondent testified that on September 20, 2006, he returned home from running an errand to find Respondent/Cross-Appellant's brother-in-law, Vincent Behan, in the home with Respondent/Cross-Appellant. Mr. Behan indicated that he was going to take Respondent/Cross-Appellant to his home to eat. *Transcript, p. 149.*

Appellant/Cross-Respondent testified that he showed Mr. Behan the chicken and beef dishes he had already prepared for Respondent/Cross-Appellant and himself. Mr. Behan became "rather boisterous" and expressed his intention to take Respondent/Cross-Appellant. Appellant/Cross-Respondent was afraid something might happen if he permitted Mr. Behan to remove Respondent/Cross-Appellant from the marital home. *Transcript, p. 149.*

Appellant/Cross-Respondent learned that Vincent had been making frequent visits to the parties' residence when Appellant/Cross-Respondent was gone. *Transcript, p. 149.*

On September 21, 2006, Respondent/Cross-Appellant left the marital residence with her sister, Jeanette Behan, and Mr. Behan and was taken to Ms. Fowler's residence where she remained. *Transcript, pp. 149-150.* The Behans were accompanied at that time by an officer with the Creve Coeur Police Department. *Transcript, p. 194.*

Appellant/Cross-Respondent testified that at the time of his removal from the home she had been eating, was properly clothed and being well cared for. *Transcript, p. 148.*

Appellant/Cross-Respondent subsequently spoke with his wife by telephone on just one (1) occasion. Respondent/Cross-Appellant stated that she loved her home, her pets and her husband. His other attempts to reach his wife were stymied by Ms. Fowler. *Transcript, pp. 150-151.*

Appellant/Cross-Respondent reported to Dr. Wilson and Family Services that his wife had been taken to Ms. Fowler's residence. *Transcript, p. 152.*

Respondent/Cross-Appellant underwent surgery on her other eye on September 29, 2006. Appellant/Cross-Respondent attempted to obtain information from Dr. Galanis' office about Respondent/Cross-Appellant condition but was told that the doctor's office was not permitted to speak with him. *Transcript, pp. 152-15; Appendix, pp. A38 – A50.* Appellant/Cross-Respondent attempted to reach his wife on several occasions post-surgery but was unsuccessful and was told by Ms. Fowler that his presence was not needed. *Transcript, pp. 154-155.*

In fact, he was never presented with an opportunity to have contact with his wife from October, 2006, and July, 2007. *Transcript, p. 165.* Appellant/Cross-Respondent did not ignore and forget about his wife. *Transcript, p. 153.*

He did not have an opportunity to speak with his wife during the time period of October, 2006, through July, 2007. Appellant/Cross-Respondent testified that he "couldn't get past" Ms. Fowler. *Transcript, p. 165.* Ms. Fowler or anyone else with Respondent/Cross-Respondent provided any information to Appellant/Cross-Respondent about his wife. *Transcript, p. 166.* Appellant/Cross-Respondent did not attempt to reach

his wife after the adjudication because his prior attempts were rebuffed and he was afraid of being charged with a crime if he continued to seek contact. *Transcript, p. 165.*

Appellant/Cross-Respondent was not actually served with the Petition for Dissolution of Marriage. Instead, a copy was provided by the guardian ad litem in the probate matter. This is how Appellant/Cross-Respondent first learned of the dissolution matter. *Transcript, pp. 161-162.*

Appellant/Cross-Respondent testified that Respondent/Cross-Appellant and he never discussed divorce during their nearly 34 years of marriage. He denied ever telling his wife, Ms. Fowler or anyone else that he wanted a divorce. *Transcript, pp. 162-163.*

Appellant/Cross-Respondent enlisted the help of his nephew during this time period to try to reach Respondent/Cross-Appellant. *Transcript, p. 151.* The nephew, Arnold Heidbreder, spoke with Ms. Fowler but his intervention did not provide access to Respondent/Cross-Appellant. *Transcript, p. 157.*

Appellant/Cross-Respondent testified that for most of the marriage he got along very well with Ms. Fowler. Prior to September, 2006, Appellant/Cross-Respondent had last seen Ms. Fowler in August, 2004. The relationship rapidly deteriorated after September, 2006. *Transcript, p. 163.*

Appellant/Cross-Respondent described his relationship with his wife's fraternal twin sister, Jeanette Behan, as "very remote" based on problems at the beginning of the marriage. Respondent/Cross-Appellant would visit Ms. Behan on occasion, maybe every six (6) months. The parties did not socialize with Ms. Behan or her husband, Vincent. Ms. Behan did not have an opportunity to observe Appellant/Cross-Respondent's

relationship with his wife or witness any interaction between them at the marital home. *Transcript, p. 168.* Ms. Behan did nothing for Respondent/Cross-Appellant from 2004 until September, 2006. *Transcript, pp. 169-170.*

Appellant/Cross-Respondent testified that prior to June, 2006, he noticed that his wife was frequently misplacing things, such as household items, keys and clothing. He had to accompany his wife to the grocery store and assist her with the shopping. *Transcript, p. 139.* Appellant/Cross-Respondent noticed in the months leading up to her removal from the home that Respondent/Cross-Appellant had become more reliant on him and her condition had progressed. *Transcript, p. 151.*

Appellant/Cross-Respondent testified that two (2) incidents particularly caused him concern about his wife's mental condition. Respondent/Cross-Appellant was stopped by an officer with the St. Louis County Police Department in November, 2005, for driving in the wrong direction on Manchester Road at Barrett Station Road in St. Louis County. *Transcript, p. 137.*

Respondent/Cross-Appellant was stopped by an officer with the City of Frontenac Police Department in the summer of 2006 for driving in the wrong direction on Lindbergh in the vicinity of Highway 40-64. *Transcript, p. 138.*

Appellant/Cross-Respondent, worried about his wife's welfare and care, filed a petition for the appointment of a guardian and conservator in October, 2006. He did not believe at that time that Respondent/Cross-Appellant was able to make decisions or exercise her own judgment.

Appellant/Cross-Respondent thought Ms. Fowler was controlling his wife's affairs. *Transcript, pp. 160-161.* He sought be named as Respondent/Cross-Appellant's guardian ad litem in the probate matter. *Transcript, p. 164.*

At Appellant/Cross-Respondent's request Margaret M. Wilson, M.D., completed Interrogatories in regard to the Probate Division matter in October, 2006. Dr. Wilson was a geriatric physician at St. Louis University and had examined Respondent/Cross-Appellant as to her cognitive reasoning. *Transcript, p. 143.*

Appellant/Cross-Respondent first met Dr. Wilson when Respondent/Cross-Appellant and he attended a lecture on Alzheimer's disease in March, 2006. *Transcript, pp. 143-144.* He thought the lecture would make him more aware and help him in dealing with his wife. *Transcript, p. 144.* Dr. Wilson was the speaker and Appellant/Cross-Respondent thought her credentials were "outstanding." *Transcript, pp. 143-144.*

Based on her examination of Respondent/Cross-Appellant during the time period of August 10, 2006, through August 31, 2006, Dr. Wilson opined that Respondent/Cross-Appellant was disabled and incapacitated because of dementia, specifically Alzheimer's disease, and the appointment of a guardian was necessary to protect Respondent/Cross-Appellant's best interest. *Appendix, pp. A51-A54.* Dr. Wilson last had access to Respondent/Cross-Appellant in September, 2006. *Transcript, p. 160.*

Appellant/Cross-Respondent also took his wife to see Mary Ellen Bowman who prescribed Aricept for Respondent/Cross-Appellant's condition. *Transcript, p. 144.* Ms. Bowman attested to the fact that Appellant/Cross-Respondent accompanied his wife at

the appointments on most occasions over a fifteen (15) year period and that he exhibited love and care for Respondent/Cross-Appellant. *Appendix, pp. A28 –A29.*

Appellant/Cross-Respondent specifically denied ever pushing his wife down stairs, forcing her to sleep on the floor or engaging in any physical displays of anger. *Transcript, pp. 171-172.*

Dorothy Szramkowski

Respondent/Cross-Appellant testified at trial over the objection of Appellant/Cross-Respondent's counsel that she was not competent to testify. *Transcript, pp. 51-53.*

On direct examination Respondent/Cross-Appellant initially made four (4) separate unsolicited references to buying an automobile, being proud of it and having an accident. *Transcript, pp 55-57; p. 58.* In fact, her counsel acknowledged that Respondent/Cross-Appellant gets "fixated on one thing and [Respondent/Cross-Appellant] say[s] it over and over." *Transcript, p. 55.*

Respondent/Cross-Appellant first testified that at one point she was having problems with her eyes and that she was "legally blind." She then contradicted herself and in response to a question about her ability to see prior to her surgery stated "[y]es, I could see." *Transcript, p. 58; p. 63.*

Respondent/Cross-Appellant could not remember whether Appellant/Cross-Respondent was at home before her eye surgery. *Transcript, p. 59.* Respondent/Cross-Appellant testified that her husband never took her to the eye doctor and refused to do so. *Transcript, p. 80.*

Appellant/Cross-Respondent would call her “stupid and dumb.” *Transcript, p. 60.* Respondent/Cross-Appellant alleged that Appellant/Cross-Respondent and his brother would “have fun” pushing her down the basement steps. *Transcript, p. 60; p. 68; p. 75.* She had marks from the falls that were observed by others. *Transcript, p. 68; p. 75.* She never contacted the police. *Transcript, p. 76.* Respondent/Cross-Appellant was unable to recall the number of times she was pushed down the stairs, but testified that Appellant/Cross-Respondent and his brother would push her down the stairs whenever “they’d get in the mood.” *Transcript, p. 76.* When pressed on cross-examination for the number of times she was pushed down the stairs Respondent/Cross-Appellant testified “[t]hat was funny.” *Transcript, p. 77.*

Respondent/Cross-Appellant also testified that the parties purchased a home for the brother and that she was happy about this. She liked the brother and said “[h]e’s a very nice person.” *Transcript, p. 64.* Respondent/Cross-Appellant then testified that she was unhappy when Appellant/Cross-Respondent moved the brother into the lake home. *Transcript, p. 66.*

Respondent/Cross-Appellant denied that her husband ever had temper tantrums or threw a “fit.” *Transcript, pp. 60-61.* She then promptly contradicted her testimony and stated that he did throw a fit and scream and hollered “like a kid.” *Transcript, p. 61.* Appellant/Cross-Respondent threw things at Respondent/Cross-Appellant. *Transcript, p. 61.*

Respondent/Cross-Appellant testified that Appellant/Cross-Respondent forced her to sleep on the floor. *Transcript, p. 62.* She indicated that it was difficult to get

Appellant/Cross-Respondent to attend family events. She would on occasion attend family events alone. Appellant/Cross-Respondent did attend some events. *Transcript, pp. 66-67.*

Respondent/Cross-Appellant indicated that she was asking the trial court for a divorce or a legal separation. *Transcript, pp. 72-73.*

Respondent/Cross-Appellant was unable to testify as to the date or to recall her doctor's name. *Transcript, p. 72.* She had no recollection of testifying at the Probate Division proceeding in July, 2007. *Transcript, p. 78.*

Respondent/Cross-Appellant testified that Margaret Fowler's residence was close to the marital home and that in September, 2006, she walked to the home to live with her sister. *Transcript, pp. 78-79.* Appellant/Cross-Respondent never took her to the eye doctor. *Transcript, p. 80.*

Respondent/Cross-Appellant testified that she was not being properly fed while living with her husband. However, she also testified that she prepared supper for Appellant/Cross-Respondent but he would not eat the meals. *Transcript, p. 69.*

Sergeant Craig Picha

Craig Picha, a sergeant with the City of Frontenac Police Department with over fourteen (14) years of experience, testified in detail at trial about an incident in 2006 involving Respondent.

Specifically, Sergeant Picha testified that on July 11, 2006, at approximately 2:30 a.m. he observed a vehicle, later determined to be operated by Respondent/Cross-Appellant, traveling northbound on Lindbergh Boulevard. The vehicle stopped in the

turn lane and the driver appeared to intend to make a left turn onto Conway Road. However, the vehicle “made a jog” to the left and traveled northbound on Lindbergh Boulevard in the southbound traffic lanes. *Transcript, pp.41- 43; Appendix, pp. A83.*

Sergeant Picha activated his patrol car’s emergency lights and was able to stop the vehicle in the area of Lindbergh and German and Lindbergh and Conway North and make contact with Respondent/Cross-Appellant, the operator. The sergeant testified that he could tell Respondent/Cross-Appellant was confused as to where she was, how she got to be there and her way home. *Transcript, p. 43.*

Sergeant Picha obtained the telephone number for Respondent/Cross-Appellant’s residence and made contact with Appellant/Cross-Respondent, who expressed that he was aware of the confusion that Respondent/Cross-Appellant had been experiencing. Appellant/Cross-Respondent responded to the scene, parked Respondent/Cross-Appellant’s vehicle and transported his wife to the marital residence. *Transcript, p. 44.*

Based on his interaction with Respondent/Cross-Appellant that evening Sergeant Picha completed and filed with the Missouri Department of Revenue a Driver Condition Report. *Transcript, p. 44; Appendix, p. A83.*

Sergeant Picha testified that it was his understanding that a Driver Condition Report is to be completed at the discretion of a law enforcement officer when the officer has contact with a person with poor driving skills or makes dangerous driving actions. The Department of Revenue will then take steps to determine whether the individual should continue to have the privilege to operate a motor vehicle. *Transcript, p. 44.*

In this instance Respondent/Cross-Appellant's driving in the wrong direction and her level of general confusion caused Sergeant Picha to exercise his discretion and complete and file the Driver Condition Report. *Transcript, p. 45.*

On August 1, 2006, Respondent/Cross-Appellant underwent testing at Forest Park Hospital in St. Louis after the filing of the Driver Condition Report. *Transcript, p. 142.* The Driving Evaluation document reflects the occupational therapist's observations that Respondent/Cross-Appellant "presented significant difficulty in cognitive and motor processing." It was determined that a road test "would not be prudent." *Appendix, pp. A84 – A94.*

On or about April 13, 2007, the Missouri Department of Revenue revoked Respondent/Cross-Appellant's privilege to drive a motor vehicle. *Transcript, p. 143; Appendix, pp. A95 – A101.*

Margaret Fowler

Margaret Fowler is Respondent/Cross-Appellant's older sister and since July 9, 2007, has served as her guardian. *Transcript, pp. 82-83.* Ms. Fowler testified that Appellant/Cross-Respondent was verbally abusive "most of the time" and she had witnessed him have a temper tantrum. *Transcript, p. 85.* Ms. Fowler indicated that in August, 2006, she phoned Appellant/Cross-Respondent and he told her that he felt like he was going to "pack up and get a divorce." *Transcript, p. 86.*

Ms. Fowler testified that since September, 2006, Appellant/Cross-Respondent has not come to visit Respondent/Cross-Appellant, telephoned his wife, sent any correspondence or given her any gifts. *Transcript, p. 92.* She had no knowledge of any

contact of any form over the last two (2) years between the parties. *Transcript, p. 93.*

Appellant/Cross-Respondent never prevented his wife from seeing her mother when she was dying. *Transcript, p. 95.*

Ms. Fowler testified that on September 15, 2006, she gave Appellant/Cross-Respondent a birthday card with some money in it as a gift. He never thanked her for the gift. *Transcript, pp. 96-97.*

Ms. Fowler admitted that in the years during the time period between 2000 and 2006 she did not attend family functions because she had to care for her ill mother. *Transcript, p. 99.*

She also acknowledged that she had never witness any physical abuse of her sister by Appellant/Cross-Respondent and anything she had heard about this came from Respondent/Cross-Appellant. *Transcript, p. 99.* Ms. Fowler never saw any signs of physical abuse on Respondent/Cross-Appellant. *Transcript, pp. 101-102; p. 117.*

Ms. Fowler acknowledged that she spoke with Arnold Heidbreder at or near the time that Respondent/Cross-Appellant began to live with her. *Transcript, p. 102.*

She testified that the Behans went to the parties' marital residence in September, 2006, in West St. Louis County and picked up Respondent/Cross-Appellant. They transported her by automobile to Ms. Fowler's residence in South St. Louis County. *Transcript, pp. 104-105.*

Ms. Fowler acknowledged that Respondent/Cross-Appellant has trouble remembering things because of her Alzheimer's disease and that this had become worse over the last few years. *Transcript, pp. 105-106.*

She testified that Appellant/Cross-Respondent did contact his wife at Ms. Fowler's home after the first cataract surgery. *Transcript, p. 109.* Respondent/Cross-Appellant left voluntarily with her husband to return to the marital home after the first surgery. *Transcript, p. 106.* Appellant/Cross-Respondent contacted Ms. Fowler after September 21, 2006, to inquire when his wife was coming home. *Transcript, p. 110; p. 113.*

Ms. Fowler admitted that Respondent/Cross-Appellant never brought up the subject of divorce while recuperating after the first surgery. *Transcript, p. 114.* Respondent/Cross-Appellant only indicated after the second surgery that she did not want to go home. Ms. Fowler did not inquire with her sister as to why she was unwilling to return to the marital residence. *Transcript, p. 115.* She did not contact Appellant/Cross-Respondent to inform him of this new development or take Respondent/Cross-Appellant to see her husband. *Transcript, pp. 115-116; p. 117.*

James R. Wright, Jr.

On May 17, 2007, the Probate Division of the St. Louis County Circuit Court appointed James R. Wright, Jr., first to serve as Respondent/Cross-Appellant's conservator ad litem and then in July, 2007, to serve as her conservator. *Transcript, pp. 32-33.* He first met Respondent/Cross-Appellant at the time of his appointment as conservator ad litem. *Transcript, p. 38.*

Mr. Wright opined on direct examination, over the objection of Appellant/Cross-Respondent's counsel, that the parties had "irreconcilable differences" and that it was in the Respondent/Cross-Appellant's "best interest to proceed with the dissolution." *Transcript, pp. 33-34.*

On cross-examination Mr. Wright testified that his understanding of “irreconcilable differences” meant that “there are differences of opinions, differences in how decisions are handled in the household, differences in the physical relationship between the two parties that cannot be resolved.” *Transcript, p. 34.*

Mr. Wright indicated that the basis for this testimony was what Respondent/Cross-Appellant had told him when meeting with her “several times,” her “demeanor” when discussing the relationship and what others had told him about the relationship. *Transcript, p. 34.*

These other persons were Respondent/Cross-Appellant’s sisters Margaret Fowler and Jeanette Behan and her brother-in-law, Vincent Behan. *Transcript, p. 37.* He emphasized that he did not know whether what others had told him was true.

Mr. Wright testified that he heard allegations of abuse from Ms. Fowler, but agreed that she had never witnessed any incidents of abuse. *Transcript, pp. 38-39.* He never heard any abuse allegations from the Behans. *Transcript, p. 38.* Mr. Wright acknowledged that he never discussed with Appellant/Cross-Respondent issues related to the divorce. *Transcript, p. 35.*

Arnold Heidbreder

Appellant/Cross-Respondent’s nephew, Arnold Heidbreder, testified that he had known his uncle all of his life and resided with him for a time while in high school. *Transcript, p. 210.* He is married with children. *Transcript, p. 211.* Mr. Heidbreder has witnessed interactions between Appellant/Cross-Respondent and Respondent/Cross-Appellant during the course of their marriage. *Transcript, p. 211.*

Mr. Heidbreder had never witnessed his uncle be verbally abusive to Respondent/Cross-Appellant and thought Appellant/Cross-Respondent's demeanor was cordial. He found the interaction to be much like that between his wife and him. Appellant/Cross-Respondent was respectful to Respondent/Cross-Appellant. *Transcript, p. 211.* Mr. Heidbreder never saw Appellant/Cross-Respondent physically abuse Respondent/Cross-Appellant or witnessed his uncle throwing a temper tantrum. *Transcript, p. 214.*

Mr. Heidbreder testified that in September, 2006, Appellant/Cross-Respondent contacted him and explained that he thought Respondent/Cross-Appellant was living with Ms. Fowler. Appellant/Cross-Respondent requested that Mr. Heidbreder call Ms. Fowler and inquire whether Respondent/Cross-Appellant was staying with her and, if so, how she was feeling. *Transcript, pp. 212-213.*

Mr. Heidbreder then spoke with Ms. Fowler and confirmed that Respondent/Cross-Appellant was staying at her residence. He understood from this conversation that Ms. Fowler did not want to speak with Appellant/Cross-Respondent. Mr. Heidbreder immediately relayed this understanding to his uncle. *Transcript, pp. 213-214.*

In its Judgment the trial court found that Respondent/Cross-Appellant had the "mental capacity" to file her Petition for Dissolution of Marriage, she did not lack the "mental capacity" to testify in her own behalf as to the issue of whether the parties' marriage is irretrievably broken," she had "met her burden of proof" and that the marriage was "therefore irretrievably broken." *Legal File, p. 144, Appendix, p. A7.*

The trial court dissolved the parties' marriage, denied Appellant/Cross-Respondent's pending motions to dismiss for lack of capacity and dismissed Respondent/Cross-Appellant's unverified Amended Petition for Dissolution of Marriage. *Legal File, p. 144, Appendix, p. A7.*

It entered a judgment in favor of Mr. Dunlop and against Appellant/Cross-Respondent in the amount of \$10,000.00 as and for Mr. Dunlop's GAL services. A judgment in favor of Mr. Dunlop was also entered against the parties, jointly and severally, in the amount of \$2,015.00 as and for GAL costs. *Legal File, p. 145, Appendix, p. A8.*

On May 1, 2009, Appellant/Cross-Respondent timely filed his Motion for Rehearing Before Commissioner and his Motion to Amend and/or For New Trial, requesting that the trial court amend the Judgment or order a new trial. *Legal File, pp. 149-201; pp. 202-225.*

On or about May 18, 2009, Respondent/Cross-Appellant filed her Motion to Amend Judgment, seeking a substitution of party. *Legal File, pp. 226-232.* Appellant/Cross-Respondent timely filed his Response to the Motion to Amend Judgment on May 28, 2009. *Legal File, pp. 233-236.*

On May 28, 2009, the trial court denied Appellant/Cross-Respondent's Motion to Amend and/or New Trial and his Motion for Rehearing Before Commissioner and denied Respondent/Cross-Appellant's Motion to Amend Judgment. *Legal File, p. 238.*

Appellant/Cross-Respondent timely filed his Notice of Appeal with the St. Louis County Circuit Court on June 2, 2009. *Legal File*, pp. 243-246. Respondent/Cross-Appellant filed her Notice of Appeal on or about June 8, 2009. *Legal File*, pp. 247-250.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT/CROSS-APPELLANT/CROSS-RESPONDENT HAD THE MENTAL CAPACITY TO INSTITUTE THE ACTION FOR DISSOLUTION OF MARRIAGE BECAUSE THE FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT THE EVIDENCE ADDUCED AT TRIAL CLEARLY ESTABLISHED THAT RESPONDENT/CROSS-APPELLANT WAS INCAPACITATED PRIOR TO THE FILING OF THE PETITION FOR DISSOLUTION OF MARRIAGE.

Novak v. Akers, 669 S.W.2d 644, 647 (Mo.App.S.D. 1984)

Webb v. St. Louis County National Bank, 551 S.W.2d 869, 874 (Mo.App. 1974)

Groenings v. Groenings, 277 S.W.3d 270, 274 (Mo.App.E.D. 2009)

Lee v. Hiler, 141 S.W.3d 517, 523 (Mo.App.S.D. 2004)

Section 452.314 RSMo 2009

Section 632.492 RSMo

Rule 52.02(k)

II.

THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT/CROSS-APPELLANT

DID NOT LACK THE MENTAL CAPACITY TO TESTIFY IN HER OWN BEHALF BECAUSE THE TRIAL COURT’S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT RESPONDENT/CROSS-APPELLANT FAILED TO REBUT THE PRESUMPTION THAT SHE WAS INCOMPETENT TO TESTIFY.

Section 475.078.3

Section 475.078.2

Section 491.060(1)

Preston v. State, 33 S.W.3d 574, 580 (Mo.App.W.D. 2000).

Clark v. Reeves, 854 S.W.2d 28, 30 (Mo.App.W.D. 1993)

State v. Beine, 730 S.W.2d 304, 307 (Mo.App.E.D. 1987)

Rule 52.02(k)

III.

THE TRIAL COURT ERRED IN PERMITTING THE DISSOLUTION OF MARRIAGE MATTER TO PROCEED BECAUSE THE TRIAL COURT’S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT THERE WAS NOT A PROPER REAL PARTY IN INTEREST.

Rule 52.02(k)

Rule 52.01

Walters v. Walters, 113 S.W.3d 214, 216 (Mo.App.S.D. 2003)

Rule 52.13(b)

Section 475.120.3

Rule 52.04(a)

Rule 52.13(b)

Section 475.120.3

Section 452.314

Preston v. State of Missouri, 33 S.W. 3d 574 (MO. App. W.D. 2000)

Section 475.091(2)

Johnson by Burns v. Johnson, 811 S.W.2d 822, 825 (Mo.App.S.D. 1991)

City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189 (Mo. banc 2006)

IV.

THE TRIAL COURT ERRED IN FINDING THE PARTIES' MARRIAGE WAS IRRETRIEVABLY BROKEN BECAUSE THE FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT RESPONDENT/CROSS-APPELLANT FAILED TO ADDUCE EVIDENCE IN SUPPORT OF THE APPLICATION OF ANY OF THE FIVE FACTORS IN SECTION 452.320.2(1).

452.320.2(1)(a)-(e) RSMo 2009

In re Marriage of Thompson, 894 S.W.2d 255, 256 (Mo.App.S.D. 1995)

Lawrence v. Lawrence, 938 S.W.2d 333,336 (Mo.App.W.D. 1997)

Koon v. Koon, 969 S.W.2d 828 (Mo.App.S.D. 1998)

Nieters v. Nieters, 815 S.W.2d 124 (Mo.App.E.D. 1991)

V.

THE TRIAL COURT ERRED IN AWARDING FEES TO THE GUARDIAN AD LITEM BECAUSE THE TRIAL COURT LACKED JURISDICTION TO CONTINUE THE GUARDIAN AD LITEM'S PARTICIPATION IN THE DISSOLUTION OF MARRIAGE MATTER AND THEREFORE THE AWARD OF FEES IS VOID AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT THE PROBATE DIVISION APPOINTED A GUARDIAN FOR RESPONDENT/CROSS-APPELLANT.

Rule 52.02(k)

Section 475.097.1

Section 475.097.2

In re Estate of Scott, 932 S.W.2d 413, 414 (Mo.App.E.D. 1996)

ARGUMENT

Standard of review

It has been held that “. . . the decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless erroneously applies the law. Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is ‘against the weight of the evidence’ with caution and with a firm belief that the decree or judgment is wrong.” Murphy v Carron, 536 S.W.2d. 30, 32 (Mo.banc 1976). *See also* 8000 Maryland, LLC v. Huntleigh Financial Services, Inc., 292 S.W.3d 439, 444 (Mo.App.E.D. 2009).

“Substantial evidence is competent evidence from which the trial court could reasonably decide the case.” Bauer v. Bauer, 38 S.W.3d 449, 455 (Mo.App.E.D. 2001)(*citations omitted*).

“‘Weight of the evidence’ means its weight in probative value, not the quantity or amount of evidence. The weight of evidence is not determined by mathematics, but on its effect in inducing belief.” Waddell v. Dir. of Revenue, 856 S.W.2d 94, 95 (Mo.App.S.D.1993)(*citations omitted*). “. . . [T]he trial court’s decision in a court-tried case is presumed correct, and the appellant has the burden of showing error.” McAllister v. McAllister, 101 S.W.3d 287, 291 (Mo.App.E.D. 2003)(*citations omitted*).

I.

THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT/CROSS-APPELLANT HAD THE MENTAL CAPACITY TO INSTITUTE THE ACTION FOR DISSOLUTION OF MARRIAGE BECAUSE THE FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT THE EVIDENCE ADDUCED AT TRIAL CLEARLY ESTABLISHED THAT RESPONDENT/CROSS-APPELLANT WAS INCAPACITATED PRIOR TO THE FILING OF THE PETITION FOR DISSOLUTION OF MARRIAGE.

The case presents issues having strong public policy implications as Missouri's population ages and the incidents of Alzheimer's disease increase.

Nearly 5.3 million Americans of all ages have Alzheimer's disease, including 5.1 million people aged 65 and older. The Alzheimer's Association estimates that there are 500,000 Americans younger than 65 with Alzheimer's and other forms of dementia.

It is also estimated that currently 100,000 Missourians age 65 and older suffer from Alzheimer's disease. That figure is expected to increase to 130,000 by 2025, an 18% increase since 2000. *Alzheimer's Association, 2010 Alzheimer's Disease Facts and Figures, Alzheimer's & Dementia, Volume 6.*

Additionally, the United States population is aging at an unprecedented rate. The portion of the population age sixty (60) years and older has grown enormously. Since 1950, average life expectancy has increased from 65.6 years for men and 71.1 years for women to 75.1 years for men and 80.2 years for women in 2006.

While the United States population has roughly doubled during the same time period, the population over age sixty-five (65) far tripled. *Nat'l Ctr. for Health Statistics, Health, United States, 2008, at 20 (2009).*

Accordingly, it is likely that there will be more instances in which an individual exhibiting symptoms of Alzheimer's disease seeks to dissolve her lengthy marriage.

Courts in this state will likely be required on a more regular basis to determine whether the allegations raised by the petitioner under these circumstances are rooted in reality or simply a manifestation of paranoia occasioned by the Alzheimer's disease and, if so, what weight to accord them.

This case presents the Court with the opportunity to establish the legal framework for dealing with this type of situation and to create the standards to be applied when determining whether an Alzheimer suffer has the capacity to institute an action for dissolution of marriage.

At issue in this case is whether Respondent/Cross-Appellant had the mental capacity on November 14, 2006, to institute an action for dissolution of marriage.

On December 11, 2006, Appellant/Cross-Respondent specifically raised in a timely fashion the issue of Respondent's capacity to proceed with the Petition for Dissolution of Marriage. *Legal File, pp. 14-15. See Novak v. Akers*, 669 S.W.2d 644, 647 (Mo.App.S.D. 1984). An Amended Motion for Lack of Capacity was filed on October 30, 2007. *Legal File, pp. 16-19.*

Appellant/Cross-Respondent's counsel argued these Motions on the day of trial. *Transcript, pp. 5-7.* The trial court denied these Motions. *Legal File, p. 144.* In the

Judgment the trial court simply stated that Respondent/Cross-Appellant “had the mental capacity to file her [Petition] . . .” *Legal File*, p. 144.

Randall J. Bateman, M.D., saw Respondent/Cross-Appellant on December 22, 2006, and noted that she had at least a five (5) year history of “progressive memory disturbance and severe cognitive disturbance. Dr. Bateman determined from testing that Respondent/Cross-Appellant had “severe disturbances in memory, orientation and judgment.” *Appendix*, pp. A60 – A82.

It does not appear that any Missouri case specifically addresses the issue of mental capacity to institute an action for dissolution of marriage. However, cases involving mental capacity to execute deeds, wills and trusts are instructive.

It has been held “[a]s in the case of deeds and wills where it is sought to have a trust declared invalid because the settlor lacked the mental capacity to execute a valid trust, the burden is upon those seeking to have it so declared to prove that the settlor lacked such mental capacity at the time settlor executed the trust instrument.” *Webb v. St. Louis County National Bank*, 551 S.W.2d 869, 874 (Mo.App. 1974).

“It is the settled rule of evidence in such cases that occurrences and circumstances close to the time of the execution of the will, both before and after, which tend to shed light on the issue of testamentary incapacity at the time of the execution of the will, are competent.” *Morse v. Volz*, 808 S.W.2d 424, 430 (Mo.App.W.D. 1991), *see also Lee v. Hiler*, 141 S.W.3d 517, 523 (Mo.App.S.D. 2004).

However, any test to determine mental capacity to institute a dissolution of marriage action must take in consideration the delusional and paranoid thoughts which

often are manifestations of Alzheimer's disease and seeks to avoid empowering the sufferer to act on such thoughts.

In the present case the trial court failed to address in any way the evidence showing that Respondent/Cross-Appellant's cognitive problems were manifested as early as November, 2005, a year prior to the filing of the Petition for Dissolution of Marriage.

Appellant/Cross-Respondent testified that in November, 2005, Respondent was stopped by a St. Louis County Police officer for driving in the wrong direction on Manchester Road. *Transcript, p. 137.* This is not mentioned in the Judgment.

Prior to June, 2006, Appellant/Cross-Respondent noticed that his wife was frequently misplacing things and she was becoming much more reliant on him. *Transcript, p. 139; 151.* He was sufficiently concerned so as to attend a lecture on Alzheimer's disease in March, 2006. *Transcript, pp. 143-144.* Again, this was not addressed by the trial court.

By October, 2006, Appellant/Cross-Respondent was concerned enough about his wife's condition to file a petition for appointment of guardian and conservator. *Transcript, pp. 160-161.*

The Judgment is silent as to the July 11, 2006, driving incident in which Sergeant Picha observed Respondent/Cross-Appellant driving in the wrong direction on Lindbergh Boulevard at 2:30 a.m. *Transcript, pp. 41-43.* This led to the sergeant's decision to file a Driver Condition Report with the Missouri Department of Revenue. *Transcript, p. 45.*

The trial court ignored the August 1, 2006, Forest Park Hospital testing results and

the determination that Respondent/Cross-Appellant “presented significant difficulty in cognitive and motor processing.” A road test was deemed imprudent. *Appendix, pp. A84-94.*

Most importantly, the trial court failed to acknowledge in any fashion Dr. Wilson’s findings. She opined that from her observations between August 10, 2006, and August 31, 2006, Respondent/Cross-Appellant was “disabled” and “incapacitated.” The bases for her diagnostic conclusions were “impaired cognitive function” and Alzheimer’s disease “as evidenced by clinical presentation of memory disorder and abnormal Mini-Mental State Exam results.” *Appendix, pp. A51-A54.*²

In response to Appellant/Cross-Respondent/Cross-Respondent’s argument that the trial court simply ignored and failed to address this evidence the Court of Appeals held that “. . . our standard of review compels us to disregard contrary evidence and inferences that are not favorable to the judgment.” *Appendix, p. A15.*

However, this does not relieve the trial court from the responsibility to support its decision with substantial evidence or to not render a decision against the weight of the evidence. “The judgment must be affirmed unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law.” *Groenings v. Groenings*, 277 S.W.3d 270, 274 (Mo.App.E.D. 2009).

Here, the Appellant/Cross-Respondent provided ample evidence demonstrating

² Additionally, due to the lack of capacity Respondent’s Petition for Dissolution of Marriage was not verified. *See 452.310.1 RSMo 2009.*

that Respondent/Cross-Appellant lacked the mental capacity at the time the dissolution of marriage action was filed in November, 2006. The trial court failed to address this evidence and the Court of Appeals simply excused this failure and in so doing misapplied the law.

Furthermore, the Court of Appeals mentioned that “[t]he trial court acknowledged [Respondent/Cross-Appellant] had difficulty remembering some dates and some events, but was able to articulate why she wanted a divorce.” *Appendix, p. A15*. However, a careful review of the transcript shows that Respondent/Cross-Appellant simply testified that she wanted a divorce but never stated any reason for wanting it. *Transcript, p. 72-73*.

Interestingly, the Court of Appeals noted that “. . . the trial court found [Respondent/Cross-Appellant’s] testimony from the probate proceeding and the dissolution proceedings were consistent.” *Appendix, p. A15*.

It is important to remember that the probate proceeding at which Respondent/Cross-Appellant testified resulted in a finding that she was incapacitated. Consistency should not be confused with lucidity. Sadly, Respondent/Cross-Appellant could not even recall testifying in the Probate matter. *Transcript, p. 72; 78*.

Also, neither the trial court nor the Court of Appeals addressed whether, or how, this alleged consistency was relevant to the most important question -- whether Respondent/Cross-Appellant had the mental capacity in November, 2006, over two (2) years earlier, to institute an action for dissolution of marriage.

The Court of Appeals appears to suggest that Rule 52.02 of the Rules of Civil Procedure excuses the need for a litigant to have mental capacity to file a dissolution action. *Appendix, p. A15.*

Relying on *Nixon v. Kinder*, 129 S.W.3d 5, 8 (Mo.App.W.D. 2003), the Court of Appeals held that Rule 52.02 provides that persons “. . . who suffer from mental infirmity are not prevented from initiating litigation . . .” *Appendix, p. A15.*

However, *Nixon* involved a proceeding for civil commitment pursuant to Section 632.492. The State of Missouri was seeking to have a sexually violent person confined for treatment. It did not involve an action for dissolution of marriage, a crucial distinction.

It may be reasonably inferred that the Missouri General Assembly believes that the right to bring a dissolution action is strictly personal and volitional in nature. In fact, the only exception made is for a duly-appointed guardian who has reasonable cause to believe that the incapacitated person has been the victim of abuse by the spouse. *See* Section 452.314 RSMo 2009. There was no allegation of abuse raised in the pleadings in the instant case.

The trial court erred in finding that Respondent/Cross-Appellant had the mental capacity to institute the dissolution of marriage action because the evidence adduced at trial clearly demonstrated that Respondent/Cross-Appellant’s incapacity existed prior to November 14, 2006.

II.

THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT/CROSS-APPELLANT DID NOT LACK THE MENTAL CAPACITY TO TESTIFY IN HER OWN BEHALF BECAUSE THE TRIAL COURT'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT RESPONDENT/CROSS-APPELLANT FAILED TO REBUT THE PRESUMPTION THAT SHE WAS INCOMPETENT TO TESTIFY.

In July, 2007, the Probate Division of the St. Louis County Circuit Court adjudicated Respondent/Cross-Appellant incapacitated and disabled. *Legal File, p. 25-26.*

Respondent/Cross-Appellant was called to testify at trial in support of the Petition for Dissolution of Marriage. Appellant/Cross-Respondent's counsel timely objected to her testimony on the grounds that she was incompetent to testify. *Transcript, pp. 51-53.* The trial court overruled said objection and permitted Respondent/Cross-Appellant to testify. *Transcript, p. 53.*

In its Judgment the trial court found that Respondent/Cross-Appellant "does not lack the mental capacity to testify in her own behalf as to the issue of whether the parties' marriage is irretrievably broken." *Legal File, p. 144, Appendix, p.A7.*

Section 475.078.3 of the Revised Statutes of Missouri states that "[a] person who has been adjudicated, incapacitated or disabled or both shall be presumed to be incompetent."

Section 475.078.2 provides in part that “[a]n adjudication of incapacity or disability does operate to impose upon the ward or protectee all legal disabilities provided by the law.”

Section 491.060(1) indicates that a person who is “mentally incapacitated at that time of his or her production for examination” shall be “incompetent to testify.” See Preston v. State, 33 S.W.3d 574, 580 (Mo.App.W.D. 2000).

It has been held that this presumption may be overcome “. . . by extrinsic evidence that the witness both (1) understands the obligation of the oath, and (2) has sufficient mind and memory to notice, recollect, and communicate the events.” Clark v. Reeves, 854 S.W.2d 28, 30 (Mo.App.W.D. 1993). The burden to rebut the presumption rests on the party who offers the witness. State v. Beine, 730 S.W2d 304, 307 (Mo.App.E.D. 1987).

The Court of Appeals stated that Respondent/Cross-Appellant “. . . was able to competently testify with respect to her living situation, her education and previous employment, and the problems in her marriage that led her to file for dissolution.” *Appendix, p. A19*. In so finding the Court of Appeals, like the trial court, ignored the evidence which clearly demonstrated that Respondent/Cross-Appellant did not have “sufficient mind and memory to notice, recollect and communicate events.”

It is extremely clear that at trial Respondent/Cross-Appellant was not oriented to time and space and had great difficulty recalling significant events. She did not know the date. *Transcript, p. 74*. She contradicted herself while testifying regarding her eyesight, the alleged abuse and the availability of food. *Transcript, p. 58; p. 63; p. 64; p. 66; p.*

76; p. 77; pp. 60-61; p. 69.

Respondent/Cross-Appellant's allegation that her husband failed and refused to take her to an eye doctor was not corroborated by any other witness, was directly contradicted by Appellant/Cross-Respondent's testimony and disproved by Dr. Rao's records. *Transcript*, p. 80; pp. 144-145; p. 194; pp. 145-146; *Appendix*, pp. A30-A37.

As previously noted, she was unable to recall her doctor's name and had no recollection of testifying in the Probate Division matter. *Transcript*, p. 72; 78.

Respondent/Cross-Respondent testified that she walked to Ms. Fowler's home to live with her sister and that the home was close by. *Transcript*, pp. 78-79. However, Ms. Fowler directly contradicted her sister, testifying that the Behans transported Respondent/Cross-Appellant by automobile from the marital residence in West St. Louis County to Ms. Fowler's residence in South St. Louis County. *Transcript*, pp. 104-105.

Additionally, the trial court's finding regarding the capacity to testify is contradictory of the trial court's decision on May 31, 2007, to appoint a guardian ad litem pursuant to Rule 52.02(k). *Legal File*, p. 2.

Rule 52.02(k) of the Rules of Civil Procedure specifically permits the appointment of a guardian ad litem for a litigant who the court believes is incapable by reason of a mental infirmity of properly caring for her interests in the litigation.

Thus, the trial court determined in May, 2007, that Respondent/Cross-Appellant was incapable of caring for her interests in the litigation but decided that she did not lack the capacity to testify in December, 2008.

Absolutely no evidence was presented at trial which corroborated Respondent/Cross-Appellant's testimony and Appellant/Cross-Respondent presented evidence which specifically contradicted his wife's testimony. Thus, Respondent/Cross-Appellant failed to rebut the incompetence presumption and the trial court abused its discretion when it permitted her to testify.

III.

THE TRIAL COURT ERRED IN PERMITTING THE DISSOLUTION OF MARRIAGE MATTER TO PROCEED BECAUSE THE TRIAL COURT'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT THERE WAS NOT A PROPER REAL PARTY IN INTEREST.

On December 6, 2007, Appellant/Cross-Respondent filed his Amended Motion to Dismiss Petition for Dissolution for Lack of Capacity and for Lack of Proper Parties to the Action.

In this Motion he alleged, among other things, that the action should not proceed because neither Respondent/Cross-Appellant's duly-appointed guardian nor conservator was named as a party in the case. *Legal File, pp. 33-36.*

The Motion was argued to the trial court on the day of trial. *Transcript, pp. 4-11.* The trial court denied Appellant/Cross-Respondent's Amended Motion. *Legal File, p. 144.*

The trial court's appointment of a guardian ad litem in May, 2007, pursuant to Rule 52.02(k) of the Rules of Civil Procedure demonstrated that the trial court believed then that Respondent/Cross-Appellant was incapable by reason of a mental infirmity of properly caring for her interests in the litigation.

Rule 52.01 of the Rules of Civil Procedure requires that every civil action be prosecuted in the name of the real party in interest, but permits a guardian to proceed with the case. However, Rule 52.13(b) provides that “[i]f a party becomes incompetent, upon motion for substitution . . . , the court may allow the action to be continued by or against the party's representative.” (*emphasis added*).

In Walters v. Walters, 113 S.W.3d 214, 216 (Mo.App.S.D. 2003), the husband was involved in a motor vehicle accident after the wife had filed for dissolution of marriage. The collision left the husband incapacitated and his mother was appointed to serve as the guardian. The mother was substituted for the husband in the litigation pursuant to Rule 52.13(b).

Section 475.120.3 of the Revised Statutes of Missouri requires a guardian to “. . . take charge of the person of the ward and to provide for the ward's care, treatment, habilitation, education, support and maintenance.” Clearly, Ms. Fowler had the duty to protect Respondent/Cross-Appellant's best interests and therefore has a statutorily-created interest in the dissolution of marriage proceeding.

Rule 52.04(a) provides in pertinent part that “[a] person shall be joined in the action if: . . . (2) the person claims an interest relating to the subject of the action and is

so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impeded the person's ability to protect that interest."

No effort was made to substitute Ms. Fowler for Respondent/Cross-Appellant as was required by Rule 52.13(b). Instead, Respondent/Cross-Respondent's counsel simply filed a Motion for Leave to File Amended Petition on December 5, 2008, apparently in the name of the guardian ad litem.

The Motion's caption identified the petitioner as "DOROTHY SZRAMKOWSKI By Her G.A.L. BRIAN DUNLOP." The appointment of Mr. Dunlop in May, 2007, was listed as the only basis for the Motion. There was not any mention of the July, 2007, appointment of the guardian and conservator. *Legal File, pp. 44-45.* This was simply an improper and unauthorized substitution and was an effort to permit someone without standing to proceed on Respondent/Cross-Appellant's behalf.³

The caption of the proposed Amended Petition for Dissolution of Petition filed with the Motion for Leave identified the petitioner as "DOROTHY SZRAMKOWSKI By Her G.A.L. BRIAN DUNLOP Her Guardian MARGARET FOWLER Her Conservator JAMES WRIGHT. The proposed Amended Petition was not verified and for the first time raised the allegation of abuse. *Legal File, pp. 40-43.*

It was only during oral argument on this Motion (after this deficiency was noted) that Respondent/Cross-Appellant's counsel sought to substitute Ms. Fowler by way of an oral

³ This late attempt to seek Leave appeared to be an admission that Respondent was incompetent and unable to prosecute this litigation.

motion. *Transcript*, p. 12. No evidence was presented in support of this oral motion, including whether Ms. Fowler was actually seeking the substitution (or simply Respondent's counsel).⁴

In the Judgment the trial court dismissed the unverified Amended Petition without prejudice. *Legal File*, p. 144, *Appendix*, p. A7. However, the trial court "reserved ruling" on Respondent/Cross-Appellant's request for Leave to File the Amended Petition and no decision was ever issued in this regard. *Transcript*, p. 12. Therefore, the Amended Petition was never "filed" with the trial court.

Ms. Fowler's failure to move for substitution in this matter appears to have violated her statutory duty of care to Respondent/Cross-Appellant and might impair her ability to protect the ward's interest. See *Preston v. State of Missouri*, 33 S.W. 3d 574 (MO. App. W.D. 2000). More importantly, it can reasonably be inferred from Ms. Fowler's failure to seek substitution that there was no extant evidence of abuse.

Furthermore, Section 475.091(2) specifically authorizes the Probate Division to approve a conservator's prosecution of an action for dissolution of marriage. However, Mr. Wright never sought Leave of Court to be substituted as the real party in interest and did not seek approval from the Probate Division to prosecute the Petition for Dissolution of Marriage.

It is important to note that ". . . [475.091] does not authorize the prosecution of such action simply because it may serve the interest of the conservator to determine what property

⁴ Appellant/Cross-Respondent objected to this request as not being timely. However, this request may be viewed as an admission that Appellant/Cross-Respondent's position regarding this issue was correct.

belongs to each spouse.” Johnson by Burns v. Johnson, 811 S.W.2d 822, 825 (Mo.App.S.D. 1991).

The Court of Appeals treated the substitution issue as a mere technicality, holding that the guardian “. . . should have been substituted as the real party in interest pursuant to Rule 52.13(b) after [Respondent/Cross-Appellant] was adjudicated incapacitated and disabled.” *Appendix, p. A16*.

However, implicit in this decision is that the Court of Appeals found Respondent/Cross-Appellant *incompetent* sometime before the trial. This directly conflicts with the Court of Appeal’s ruling that the trial court did not abuse its discretion in finding Respondent/Cross-Appellant competent to testify.

Additionally, the decision to permit the substitution of Ms. Fowler conflicts with Section 452.314 which permits a guardian to file a petition for dissolution of marriage (or for legal separation if the ward has a history of religious objection to divorce) only if the guardian has reasonable cause to believe that the incapacitated person has been the victim of abuse by the spouse. Nothing in Rule 52.13(b) relieves the guardian from this statutory restriction.

The original Petition did not allege abuse. *Legal File, pp. 11-13*. The only information that Ms. Fowler might have gleaned in this regard would have been from the incapacitated person at or near the time of incapacity, rendering its veracity highly suspect and not providing reasonable cause. *Transcript, p. 99*.

The Court of Appeals relies on City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189 (Mo. banc 2006), to find that “. . . the trial court should have permitted

[Respondent/Cross-Appellant] leave to file her proposed amended petition or wife's motion to substitute parties." *Appendix, pp. A16-A17.*

However, in that case the issue before this Court was whether third and fourth class cities had the statutory right to sue in their own names for the collection of taxes. This Court held that "Missouri courts on multiple occasions have treated errors in bringing a claim directly rather than in the name of another party, or similar defects, as issues of capacity rather than standing, which may be waived or avoided by amendment of the pleadings." *City of Wellston v. SBC Communications, Inc.*, at 193.

However, in the present case the issue is whether, absent reasonable cause to believe Respondent/Cross-Appellant had been the victim of abuse, Ms. Fowler had standing to prosecute the pending cause of action which did not allege abuse.

This litigation should not have proceeded and the trial court should have dismissed the Petition since Respondent was incapacitated, there was no substitution of a real party in interest and the guardian did not have reasonable cause to believe that Respondent/Cross-Appellant was a victim of abuse.

The last minute attempt by Respondent/Cross-Appellant's counsel to file an Amended Petition, besides being improperly presented, simply did not remedy the problem that there was no real party in interest to prosecute this litigation.

IV.

THE TRIAL COURT ERRED IN FINDING THE PARTIES' MARRIAGE WAS IRRETRIEVABLY BROKEN BECAUSE THE FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT RESPONDENT/CROSS-APPELLANT FAILED TO ADDUCE EVIDENCE IN SUPPORT OF THE APPLICATION OF ANY OF THE FIVE FACTORS IN SECTION 452.320.2(1).

Section 452.320.2(1) of the Revised Statutes of Missouri provides in pertinent part that when a party has denied that the marriage is irretrievably broken

. . . the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and after the hearing shall

(1) Make a finding whether or not the marriage is irretrievably broken, and in order for the court to find that the marriage is irretrievably broken, the petitioner shall satisfy the court of one or more of the following facts:

(a) That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

- (b) That the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- (c) That the respondent has abandoned the petition for a continuous period of at least six month preceding the presentation of the petition;
- (d) That the parties to the marriage have lived separate and apart by mutual consent for a continuous period of twelve months immediately preceding the filing of the petition;
- (e) That the parties to the marriage have lived separate and apart for a continuous period of at least twenty-four months preceding the filing of the petition

452.320.2(1)(a)-(e) RSMo 2009.

In the present case the Judgment provides “[t]hat based upon the credible evidence adduced, the Court finds that [Respondent/Cross-Appellant] has met her burden of proof and that there is no reasonable likelihood that the marriage between the parties can be preserved, and that the parties’ marriage is irretrievably broken.” *Legal File, p. 144, Appendix, p. A7.*

“While the trial court must make a finding that the marriage is irretrievably broken, it need not make a finding concerning the specific statutory ground upon which it

based that conclusion. Nevertheless, the decree must be supported by substantial evidence, must not be against the weight of the evidence, and must not erroneously declare or apply the law.” In re Marriage of Thompson, 894 S.W.2d 255, 256 (Mo.App.S.D. 1995)(citations omitted).

Most importantly, “[t]here must be factual support found in one or more of the five factors when one party denies the marriage is irretrievably broken.” Lawrence v. Lawrence, 938 S.W.2d 333,336 (Mo.App.W.D. 1997)(citations omitted).

Respondent/Cross-Appellant did not plead facts to support of the application of any of the five (5) factors in Section 452.320.2(1)(a-e). Instead, paragraph 7 of the Petition simply states the conclusion that “[t]here is no reasonable likelihood that the marriage can be preserved and, therefore, the marriage is irretrievably broken.” *Legal File, pp. 11-13.*

In Koon v. Koon, 969 S.W.2d 828 (Mo.App.S.D. 1998), the court reversed the finding of the trial court that the marriage was irretrievably broken. The parties were married for nearly twenty-six (26) years and four (4) children were born of the marriage. The wife filed for dissolution of marriage, alleging that the husband had behaved in such a way that she could not reasonably be expected to live with him. The husband denied that the marriage was irretrievably broken. Id. at 829-830.

The wife testified at trial that the husband was controlling, the parties argued over money, he was opposed to her obtaining a college education and she was happier during a fifteen (15) month period when the husband was working in Virginia. The wife alleged

that there was no possibility of reconciliation. The husband denied the allegations and indicated that he did not want the marriage dissolved. *Id.* at 830.

The trial court found the marriage irretrievably broken, but specifically stated that it did not find that the husband had behaved in such a way that the wife could not be reasonably expected to live with him. *Id.*

In reversing the trial court's decision, the Court of Appeals carefully reviewed the evidence in the context of the remaining four (4) factors set forth in Section 452.320.2(1). The court did not find any evidence to support the application of any of these factors. "Having concluded that there was no evidence to support a finding of any of the other circumstances set forth in the statute, the judgment must be reversed." *Koon v. Koon* at 833.

In *Nieters v. Nieters*, 815 S.W.2d 124 (Mo.App.E.D. 1991), the court reversed the trial court's finding that the marriage was irretrievably broken. The husband had filed for dissolution of marriage and the wife denied that it was irretrievably broken. At trial, the husband presented evidence of the parties' separation, their problems during the marriage and his relationship with another woman. While denying that the marriage was irretrievably broken, the wife did acknowledge differences during the marriage about the children and money donated to a televangelist. *Id.* at 125.

This Court reversed the trial court's decision ". . . because the evidence does not establish any of the five fact situations necessary when one party denies the marriage is irretrievably broken." *Id.* at 126. Specifically, this Court noted that the husband's testimony regarding the parties' failures to get along and violent arguments between them

over the previous three (3) or four (4) years did not provide “substantial evidence” of the first three (3) factors set forth in Section 452.320.2(1). The differences about child rearing and the donations was determined by this Court to not be “. . . behavior that one could not be reasonably expected to live with.” There was no evidence whatsoever regarding the last two (2) statutory factors. *Id.*

In the present case, there is nothing in the Judgment indicating upon which of the statutory factors set forth in Section 452.320 the trial court relied in making the finding that the marriage was irretrievably broken. Thus, each of these factors must be analyzed to determine whether there is substantial evidence in the record to support the trial court’s finding.

Clearly, Respondent/Cross-Appellant presented no evidence that her husband ever committed adultery during the parties’ thirty-four (34) year marriage. *See* Section 452.320.2(1)(a). This factor is therefore not applicable in this matter.

There was no evidence that Appellant/Cross-Respondent abandoned his wife for a continuous period of at least six (6) months preceding the presentation of the Petition. *See Section 452.320.2(1)(c).*

“Abandonment may be established by cessation of cohabitation without good cause with intent on the part of the deserter not to resume living with the other party together with an absence of consent to the separation on the part of the alleged abandoned party.” *In re Marriage of Uhls*, 549 S.W.2d 107, 110 (Mo.App.E.D. 1977).

Here, the evidence showed that the parties continuously resided together from the date of the marriage in 1974 until September 21, 2006. Respondent/Cross-Appellant was

taken that day from the marital home by the Behans against Appellant/Cross-Respondent's wishes and transported to Ms. Fowler's residence.⁵ *Transcript, pp. 149-150; pp. 104-105.* The Behans enlisted the assistance of the Creve Coeur Police Department on September 21, 2006. *Transcript, p. 194.*

Appellant/Cross-Respondent spoke with his wife by telephone on one (1) occasion after September 21, 2006, at which time Respondent/Cross-Appellant professed her love for her husband. *Transcript, pp. 150-151; p. 109.* His other attempts to reach his wife were rebuffed by Ms. Fowler and he was never presented with another opportunity to have contact with his wife from October, 2006, to July, 2007. *Transcript, pp. 150-151; pp. 154-155; p. 165.*

Appellant/Cross-Respondent enlisted his nephew's assistance in trying to reach Respondent/Cross-Appellant. *Transcript, p. 157; pp. 212-213.* Mr. Heidbreder contacted Ms. Fowler at his uncle's request but understood from this conversation that Ms. Fowler would not speak with Appellant/Cross-Respondent. *Transcript p. 213; p. 102.* Ms. Fowler never contacted Appellant/Cross-Respondent or took her sister to see him. *Transcript, pp. 115-116; p. 117.*

In October, 2006, Appellant/Cross-Respondent sought to be appointed his wife's guardian and conservator out of concern for her welfare and care. *Transcript, pp. 160-161.* He never ignored and forgot about his wife. *Transcript, p. 153.*

⁵ The trial court incorrectly found that Ms. Fowler participated in the removal of Respondent/Cross-Appellant from the marital residence. *Legal File, p. 142, Appendix, p. A5.*

Respondent/Cross-Appellant failed to adduce at trial substantial evidence to support the application of Section 452.320.2(1)(c). In fact, substantial evidence was presented at trial which clearly establishes that Appellant/Cross-Respondent did not “abandon” his wife.

Appellant/Cross-Respondent’s actions after Respondent/Cross-Appellant was removed from the marital home by her sister and brother-in-law clearly demonstrate his efforts to reunite with his wife and are consistent with his testimony that the marriage is not irretrievably broken.

Furthermore, Respondent/Cross-Appellant presented no evidence that the parties lived separate and apart by mutual consent for twelve (12) consecutive months prior to the filing of the Petition for Dissolution of Marriage or that they lived apart for twenty-four (24) months prior to the filing of the Petition. *See Section 452.320.2(1)(d) and (e).*

Therefore, these factors are simply not applicable in this matter and could not have formed the basis for the trial court’s decision that the marriage is irretrievably broken.

There was not substantial evidence presented from which the trial court could conclude that Appellant/Cross-Respondent behaved in such a way that his wife could not be expected to live with him and therefore find the marriage irretrievably broken. *See Section 452.320.2(1)(b).*

In *Simpson v. Strong*, 234 S.W3d 567 (Mo.App.S.D. 2007), it was held that the marriage was not irretrievably broken. The parties separated after nearly fifty (50) years of marriage. The wife had fallen and was placed in a care facility was recovering from her injuries. The husband continued to reside in the marital home. The wife moved from

the care facility to her daughter's home. A petition for dissolution of marriage was then filed and it was alleged that the marriage was irretrievably broken. The husband ultimately denied this allegation. *Id.* at 570.

It was determined after examinations that the wife had significant memory problems and marginal judgment skills. She declared during the examinations that her marriage was unhappy, that she could not stand her husband and wanted a divorce. *Id.*

One examiner noted that the events preceding the filing of the divorce might distort the wife's memories of the marriage. Specifically, the husband placing the wife into a care facility might be viewed by her as abandonment and the daughter removing her viewed as rescue. *Id.* at 570-571. The husband testified that he was shocked by the divorce filing and knew nothing about it. He was concerned that the children might be influencing the wife. *Id.* at 571.

The trial court's finding that the marriage was not irretrievably broken was upheld on appeal. The court noted that the wife had failed to carry her burden of proving that the husband had behaved in such a way that the wife could not be expected to live with him. *Id.* at 577. The evidence reflected that the husband had only spoken once to his wife after her discharge from the care facility because the daughter thwarted his subsequent efforts. *Id.*

In the present case, Respondent/Cross-Appellant similarly failed to satisfy the trial court that her husband behaved in such a way that she could not be expected to live with him. The trial court's Judgment simply recites some of the testimony presented at the

trial without specifying whether it constituted a “finding” of the trial court. *Legal File, pp. 138-144, Appendix, pp A1-A9.*

In fact, the evidence adduced at trial shows that the Behans removed Respondent/Cross-Appellant from the marital home without warning to Appellant/Cross-Respondent during the time period between Respondent/Cross-Appellant’s two (2) eye surgeries. *Transcript, pp. 149-150.* Ms. Fowler rejected Appellant/Cross-Respondent’s subsequent efforts to contact his wife. *Transcript, p. 165; p. 157; p. 110; p. 113.*

Appellant/Cross-Respondent testified that he loved his wife and hoped for a reunification. *Transcript, p. 196.* He explained how he provided for Respondent/Cross-Appellant’s needs. *Transcript, p. 148.* He specifically denied abusing his wife in any manner. *Transcript, pp. 171-172.*

Respondent/Cross-Appellant’s testimony regarding abuse was contradictory. She initially denied that Appellant/Cross-Respondent ever had temper tantrums but later stated that he screamed and “hollered like a kid.” *Transcript, p. 61.*

Respondent/Cross-Appellant testified that her husband’s unidentified brother pushed her down the steps when the mood struck. *Transcript, p. 76.* However, Respondent/Cross-Appellant testified that she liked the brother and that he was a “very nice person.” *Transcript, p. 64.*

Respondent/Cross-Appellant indicated that she had marks from the falls that were observed by others. *Transcript, p. 68; p. 75.* However, Ms. Fowler denied ever seeing any signs of physical abuse. *Transcript, pp. 101-102; p. 117.* In fact, Ms. Fowler acknowledged that Respondent/Cross-Appellant was the source of her information

regarding the alleged physical abuse. This was after the date of Dr. Wilson's findings. *Transcript, p. 99.*

Mr. Wright testified that Ms. Fowler was his source for the abuse allegations but that the Behans never mentioned anything to him in this regard. *Transcript, pp. 38-39.*

"A substantial fraction of demented individuals become paranoid. They believe, for example, that their belongings have been stolen because they cannot remember that they used and moved them. The paranoia may take the form of diffuse suspiciousness or specific delusions about being persecuted or mistreated." *Douglas Mossman and Amanda N. Shoemaker, Incompetence to Maintain a Divorce Action: When Breaking Up is Odd to Do, 84 St. John's L. Rev. 117 (Winter, 2010), pp. 10-11, citing DSM-IV-TR, note 36, at 150. Appendix, pp. A128-A212.*

Respondent/Cross-Appellant's abuse allegations were so fanciful as to clearly be an expression of the paranoia and delusions of mistreatment resulting from the onset of her Alzheimer's disease.

In fact, she was unable to recall the number of times she was pushed down the stair, instead testifying that Appellant/Cross-Respondent and his brother would do so whenever "they'd get in the mood." *Transcript, p. 76.* Respondent/Cross-Appellant suggested that they did this for fun. *Transcript, p. 60; p. 68; p. 75.* She responded to a question about the number of occasions with "[t]hat was funny." *Transcript, p. 77.*

Respondent/Cross-Appellant's Alzheimer's disease interfered with her ability to

recall events at the trial.⁶ The outrageousness of the allegations and Respondent/Cross-Appellant's inability to provide details substantiating the charges make her allegations extremely suspect.

Respondent/Cross-Appellant failed to carry her burden of demonstrating to the trial court that her husband behaved in such a way that she could not be expected to live with him. As such, there was no basis on which the trial court could determine that the parties' marriage was irretrievably broken.

The trial court erred in finding the marriage irretrievably broken since Respondent/Cross-Appellant failed to adduce evidence in support of the application of any of the five (5) statutory factors.

V.

THE TRIAL COURT ERRED IN AWARDING FEES TO THE GUARDIAN AD LITEM BECAUSE THE TRIAL COURT LACKED JURISDICTION TO CONTINUE THE GUARDIAN AD LITEM'S PARTICIPATION IN THE DISSOLUTION OF MARRIAGE MATTER AND THEREFORE THE AWARD OF FEES IS VOID AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT THE PROBATE DIVISION APPOINTED A GUARDIAN FOR RESPONDENT/CROSS-APPELLANT.

⁶ Point II of Appellant/Cross-Respondent's Brief discusses Respondent/Cross-Appellant's presumed incompetence to testify.

The trial court awarded a judgment in favor of Mr. Dunlop and against Appellant/Cross-Respondent in the amount of \$10,000.00 as and for Mr. Dunlop's GAL services. A judgment in favor of Mr. Dunlop was also entered against the parties, jointly and severally, in the amount of \$2,015.00 as and for GAL costs. *Legal File, p. 145, Appendix, p. A8.*

On November 29, 2007, Appellant/Cross-Appellant filed his Motion to Dismiss Guardian Ad Litem, citing the Probate Division's July 9, 2007, appointment of Ms. Fowler as guardian. *Legal File, pp. 23-26* His Amended Motion to Dismiss Guardian Ad Litem was filed on November 30, 2007. *Legal File, pp. 31-32.* On December 12, 2008, Respondent/Cross-Appellant objected in a timely matter to the GAL's participation in the trial of this matter. *Transcript, p. 6.*

Rule 52.02(k) provides that a GAL shall be appointed whenever a mental or physical infirmity makes a party incapable of caring for her own interests in the litigation. However, this only applies when the person does not have a "duly appointed guardian." Thus, Mr. Dunlop's participation in this matter should have ceased on July 9, 2007.

The Court of Appeals found that "... nothing in Rule 52.02(k) requires the trial court to remove the appointed GAL merely because [Respondent/Cross-Appellant] has subsequently been adjudicated incapacitated." *Appendix, p. A23.*

Appellant/Cross-Respondent respectfully disagrees. Rule 52.02(k) explicitly prohibits the appointment of a guardian ad litem when there is already a duly appointed guardian.

It can be inferred that the rule assumes that the interests of a person represented by a guardian will be adequately protected during the litigation and by prohibiting the appointment of a second guardian seeks to avoid any potential conflicts that might arise between them.

Accordingly, it is reasonable to conclude that the guardian ad litem's participation in the litigation must cease once a guardian is duly appointed by the Probate Division. It is irrelevant which appointment might have made first – Rule 52.02(k) prohibits the participation of a guardian ad litem when the litigant has a duly appointed guardian.

Section 475.097.1 provides that a guardian ad litem is only appropriate once a guardian has been appointed if the guardian is “. . . not effectively performing his duties and the court further finds that the welfare of the . . . incapacitated or disabled person requires immediate action . . .”

In the present case, there was no allegation that Ms. Fowler was not performing her duties and there was no finding by the trial court at any time that Respondent/Cross-Appellant's welfare required “immediate action.”

Section 475.097.2 permits the appointment of a guardian ad litem if it is shown in or it appears from a petition that “. . . there is a possible conflict of interest between the ward or protectee and his guardian or conservator.” No such pleading was filed in this matter and there was no allegation of any conflict of interest.

Therefore, Mr. Dunlop's involvement and participation in this litigation became unnecessary and improper after Ms. Fowler's appointment and the trial court lacked jurisdiction to continue Mr. Dunlop's appointment beyond July 9, 2007.

“Where an order appointing a guardian ad litem is rendered void for want of jurisdiction, the order allowing fees and costs for services of the guardian ad litem is also void.” *In re Estate of Scott*, 932 S.W.2d 413, 414 (Mo.App.E.D. 1996)(citation omitted).

The trial court erred in awarding fees to the GAL because his participation in this matter was improper after the Probate Division’s July 9, 2007, guardian appointment and the Judgment in this regard is void.

CONCLUSION

Respondent/Cross-Appellant failed to rebut the presumption that she was incompetent to testify, and, furthermore, the evidence established that she was incapacitated prior to the filing of the Petition for Dissolution of Marriage.

The dissolution of marriage action should not have been permitted to proceed since there was not a proper real party in interest.

Respondent/Cross-Appellant failed to carry her burden of demonstrating that the marriage was irretrievably broken. Specifically, she failed to present any evidence to the trial court which supported the application of any of the five (5) factors in Section 452.320.2(1).

Finally, the trial court lacked the jurisdiction to permit the GAL to participate in this matter after the July 9, 2007, guardian appointment by the Probate Division. The award of GAL fees is therefore void.

Accordingly, Appellant/Cross-Respondent submits that the trial court's decision was not supported by substantial evidence, is against the weight of the evidence and erroneously applies the law.

Therefore, Appellant/Cross-Respondent respectfully requests that the trial court's Judgment be reversed and the Petition for Dissolution of Marriage be dismissed.

Respectfully Submitted,

YATES & MAY, L.C.

By: _____
BRIAN H. MAY, #39694
Attorneys for Appellant/Cross-Respondent
7710 Carondelet, Suite 101
St. Louis, Missouri 63105
yatesandmay@yatesandmay.com
(314) 725-8285
(314) 725-8201 Facsimile

CERTIFICATE OF SERVICE

Signature above is also certification that a true and correct copy of the above and foregoing document has been mailed, postage prepaid, this 1st day of December, 2010 to:

Mark W. Hagemeister, Esq.
13321 N. Outer Forty Drive
Suite 300
Town & Country, MO 63017

Brian Dunlop, Esq.
7905 Forsyth
Clayton, Missouri 63105

Steve Wolf, Esq.
11939 Manchester, #211
St. Louis, Missouri 63131

IN THE SUPREME COURT OF MISSOURI

JOSEPH SZRAMKOWSKI,)	
)	
Appellant/Cross-Respondent,)	
)	
vs.)	Supreme Court No. SC91108
)	
DOROTHY SZRAMKOWSKI,)	
)	
Respondent/Cross-Appellant.)	

CERTIFICATION

I, ***Brian H. May***, pursuant to Rule 84.06(c) do hereby certify:

1. That Appellant/Cross-Respondent's Brief complies with the information required by Rule 55.03, and is within the Rule 84.06(c) limitations by containing 14, 397 words and 1,438 lines in said Brief;
2. That Appellant/Cross-Respondent's Brief was saved on a 3.5" disk and labeled with the case caption and is hereto attached;
3. That the disk has been scanned and is virus free;
4. That the word processing program utilized to create and save the brief was Microsoft Word.

Respectfully Submitted,

YATES & MAY, L.C.

By: _____
BRIAN H. MAY, #39694
Attorney for Appellant/Cross-Respondent
7710 Carondelet, Suite 101
St. Louis, Missouri 63105
yatesandmay@yatesandmay.com
(314) 725-8285
(314) 725-8201 Facsimile

CERTIFICATE OF SERVICE

Signature above is also certification that a true and correct copy of the above and foregoing document has been mailed, postage prepaid, this 1st day of December, 2010 to:

Mark W. Hagemeister, Esq.
13321 N. Outer Forty Drive
Suite 300
Town & Country, MO 63017

Brian Dunlop, Esq.
7905 Forsyth
Clayton, Missouri 63105

Steve Wolf, Esq.
11939 Manchester, #211
St. Louis, Missouri 63131