S.D. NO. 25685
IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

BRIAN SPEER, APPELLANT

vs

NEYSA COLON, RESPONDENT

ON APPEAL FROM
THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT
CASE NO. CV195-613DR
THE HONORABLE JON DERMOTT

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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JURISDICTIONAL STATEMENT

This case involves an appeal from a Judgment of Modification of Paternity entered in the Circuit Court of Jasper County, Missouri, by the Honorable John Dermott. Appellant appeals the Court's decision to not award residential custody to the father, the Court's modification to increase the father's child support amount, and the Court's decision to change the parties' current joint custody order. This Appeal does not involve a felony exclusively punishable by death, and this Appeal does not involve the validity of a treaty or statute of the United States, or any statute or provision of the Constitution of this State, the construction of the Revenue Laws of this State or the title to any State office. Therefore, there are no issues herein involving the exclusive appellate jurisdiction of the Missouri Supreme Court pursuant to Article V, Section 3, Constitution of the State of Missouri, as amended November 2, 1982, and therefore jurisdiction of this Appeal lies within the general appellate jurisdiction of the Missouri Court of Appeals for the District covering Jasper County, Missouri, which is the Southern District of the Missouri Court of Appeals.

STATEMENT OF FACTS

Respondent respectfully submits her Statement of Facts relevant to this appeal. An order and judgment was entered by the Court of Jasper County on December 6, 1996, adjudicating that Brian Ray Speer, herein Appellant is the biological father of the minor child, Jose Alejandro Speer, born October 30, 1994. Neysa Colon, herein Respondent is the biological mother of the minor child. The court awarded the parties joint legal custody of the minor child, awarding Respondent primary care and custody (L.F. 27-32).

On March 4, 1999, Respondent filed with the Circuit Court of Jasper County, a Motion to Modify (L.F. 33). Respondent argued that the previous child support order was unjust and unreasonable, that Appellant refused to comply with the joint custody order, that Appellant continually verbally harassed the Respondent and that Appellant did not adequately supervise the minor child (L.F. 34). Respondent attached a proposed parenting plan, as well as a proposed From 14 calculation (L.F. 34). Appellant filed a Counter-Motion to Modify with the court on April 2, 1999 (L.F. 38). On March 7, 2000, the court entered an Order of Modification of Judgment Entry modifying the initial order and judgment of December 6, 1996 (L.F.41-51). The court ordered that the parties continue to have joint legal custody of the minor child with Respondent to continue to have primary physical custody of the minor child, and made a specific finding as to visitation rights for the Appellant (L.F. 41-51). Child support was ordered in the amount of One Hundred Fifty-Five Dollars ($155.00) per month to be paid by Father to Mother (L.F. 48). The court denied Appellant's request for primary physical custody of the minor child (L.F. 41).

On or about October 22, 2001, the juvenile office of Jasper County filed a petition

alleging that the minor child, Jose Speer, had been excessively spanked by his mother (L.F. 52). Appellant, on November 14, 2001, filed a Motion to Modify Order of Judgment dated March 7, 2000, seeking primary physical custody of the parties' minor child (L.F. 54). Appellant simply alleged that the substantial and continuing change of circumstances were that the Respondent had abused the minor child and that the child was emotionally fearful of the Respondent (L.F. 55). Respondent filed her answer to the Motion to Modify on January 28, 2002, requesting any further relief as may be deemed just and proper by this court (S.L.F. 2).

A hearing was held on February 21, 2002, in which the court consolidated the parties' juvenile case in case number 01JU679696 and the parties' civil case, CV195-613DR (L.F. 63).

A motion to place the child on extended visitation with Respondent was filed by Respondent on March 26, 2002 (L.F. 3). On August 23, 2002, a motion for psychological evaluation was filed by Appellant (L.F. 2). A hearing was held on September 17, 2002, and a stipulation was made in court concerning the evaluation (L.F.2). An Order for Psychological Evaluation was filed with the Circuit Court of Jasper County on October 23, 2002, which was not signed off by either Appellant, Respondent or Guardian Ad Litem (S.L.F. 4).

A request to dismiss jurisdiction on the juvenile case was filed on June 3, 2002, by Chad Adams, Deputy Juvenile Officer, due to the child's psychologist, Judith (Garrity) Kellenberger, recommending the return of the child to Mother's primary placement (L.F. 64). A Dismissal Order as to the Juvenile Court's jurisdiction was granted and custody returned to

Mother's primary placement on June 3, 2002 (L.F. 64).

On November 4, 2002, Appellant filed an application for contempt (L.F. 65).

A hearing was held on March 17, 2003, in the Circuit Court of Jasper County, Missouri, Division III in Joplin. The Honorable Judge Dermott presided (L.F. 1). Appellant testified that there had been a substantial and continuing change of circumstance regarding the minor child. Appellant admitted that the parties had each been able to see the minor child on the child's birthday and had previously agreed to such deviation from the visitation schedule (T.R. 29). Appellant admitted that he knew of the letter of the Guardian Ad Litem, which requested for such therapy between the minor child and Jeff Hickey to cease, but went ahead and submitted the child to such therapy (L.F. 123), (T.R. 84). Appellant admitted that the child missed numerous school days when he was in the temporary placement of the Appellant (T.R. 33). Appellant also admitted that he knew that the Department of Family Services and the child's therapist believed that he was prompting the child to tell certain things (T.R. 38). Appellant claimed he was aware that the Department of Family Services had written up several reports indicating that Appellant had not been honest with them (T.R. 39). Appellant indicated that he knew that Ellen Pendley, Respondent's therapist, and the child's therapist, Judy (Garrity) Kellenberger, both recommended that the minor child remain in the physical custody of Respondent, Neysa Colon (T.R. 38-39). Appellant admitted that he was aware that he was six months behind in his child support payments to the Respondent (T.R. 47).

Appellant called Jeff Hickey, counselor hired by Appellant, who admitted that he was not licensed in the State of Missouri as a psychologist (T.R. 61). Based on such lack of license

in the State of Missouri, Respondent's attorney objected to the testimony of Mr. Hickey as being unqualified as an expert in this matter (T.R. 63). Respondent's objection was taken into consideration by the court, allowing both parties to submit some authority on a proposition as to whether the court should consider any testimony by a licensed counselor (T.R. 64). Mr. Hickey testified that he had only met with the child five times and never met with Respondent, Neysa Colon, even though he believed that it would have been good to have had contact with the Respondent (T.R. 66). Mr. Hickey testified that he only saw the child when he was with his father and never saw a circumstance when the child was brought to counseling by another party (T.R. 72). Mr. Hickey testified that Bill Perry, Guardian Ad Litem, showed him how to properly provide questions to the minor child, and Mr. Hickey testified that he took Mr. Perry's advice on how to properly evaluate minor children by visiting with all parties (T.R. 64, 79, 81). Mr. Hickey further testified that Mr. Perry had previously informed him in another case that as a counselor, Mr. Hickey needed to interpret for himself what the child was saying (T.R. 66,79,81). Mr. Hickey indicated that he did not do a pen and paper psychological evaluation (T.R. 84).

Kim Plemmons, case worker for the Missouri Department of Family Services, testified that she had tried on numerous occasions to contact Appellant, but was never able to touch base with him, nor did she ever receive any of his messages (T.R. 98). Ms. Plemmons testified that she never witnessed any emotional abuse between Respondent and her minor child (T.R. 102). Ms. Plemmons further testified that she believed Appellant was trying to deceive her concerning the minor child (T.R. 103). Ms. Plemmons testified that the minor child did not

relay to her any other acts of abuse by Respondent, Neysa Colon (T.R. 104). Ms. Plemmons testified that she had no concerns about the minor child's step-father, Robert, and the minor child had always spoken highly of his step-father (T.R. 104). Ms. Plemmons indicated that the Respondent did admit to the single act of abuse of the minor child and that Respondent did seem remorseful for her action (T.R. 96). Ms. Plemmons further testified that she did not have any trouble working with Respondent, Ms. Colon, and Ms. Colon has always been open and honest with her (T.R. 96). Ms. Plemmons indicated that she did not have any concerns between the minor child and Respondent that would lead her to believe there was continuing abuse in the home or emotional abuse between the minor child and the Respondent (T.R. 102). Ms. Plemmons testified that the child seemed at ease with his mother and seemed to be happy living back at home with his mother (T.R. 103). Ms. Plemmons also testified that the child missed seven full days of school that were unexplained by counseling or any other matters while in the care of Appellant (T.R. 115). Ms. Plemmons did have concerns about the Appellant, due to his inability to contact her and his deception towards her as to whether he was employed or not employed (T.R. 103).

Respondent called Ellen Pendley, licensed professional counselor, who was referred by the therapist for Department of Family Services to Respondent for anger management classes and family therapy for Respondent (T.R. 117-118). Ms. Pendley testified that she believed the minor child and Respondent were being used and manipulated in order for Appellant, Mr. Speer, to control his ex partner (T.R. 119). Ms. Pendley was questioned whether Respondent had an anger problem and Ms. Pendley answered, "No, not really" (T.R.

118). Ms. Pendley further testified that she did not notice anything that would lead her to believe that the minor child was fearful of his mother or that Respondent was not a good parent (T.R. 122).

Respondent testified that the parties had always split the minor child's birthday in the past and that Appellant never called to request any time on the minor child's birthday in 2002, but simply showed up at her house (T.R. 144). Respondent testified that she did not know about any court order at that time for counseling (T.R. 146). Respondent also testified that Appellant never asked for the child when he came to her house on the child's birthday, but simply demanded the child pursuant to the Court Order for evaluation (T.R. 189). Respondent offered her Form 14 for an increase in child support as Respondent's Exhibit B, which was not objected to by any party and admitted by the court (T.R. 147), (S.L.F. 1). Ms. Colon further testified that the child had anxiety after he returned home from weekends with the Appellant and the child would cry and have to be held until he went to sleep (T.R. 148). Respondent said she had never witnessed her new husband, Robert, kick Jose (T.R. 151). Respondent further testified that her child had never complained to her about Robert being violent with him (T.R. 152). Respondent claimed that Appellant discontinued the minor child's activities with basketball and scouting, while the child was temporarily in Appellant's physical placement (T.R. 155). Respondent requested normal visitation for Mr. Speer of every other weekend, pursuant to her testimony (T.R.176).

Judith (Garrity) Kellenberger, a licensed psychologist in the State of Missouri, testified as to her counseling with the minor child (T.R. 202). Ms. Kellenberger testified that she was

hired by the Missouri Department of Family Services as counselor for the minor child, Jose Speer (T.R. 203). Ms. Kellenberger testified that she had met with both Mr. Speer, Ms. Colon and the minor child on several occasions (T.R. 204). Ms. Kellenberger testified that the minor child had stomachaches when he would accompany his father to therapeutic sessions with his mother and believed it to be stressors that were increased when he was around his father that did not occur when the child was placed back on extended visitations with his mother (T.R. 206). Ms. Kellenberger claimed that Appellant worked nights and was only able to set up appointments during the day (T.R. 209). Appellant never informed Ms. Kellenberger that he was unemployed (T.R. 209). Ms. Kellenberger testified that she believed the child has a strong and loving bond with his mother and she never noticed Jose to be fearful of his mother or afraid of his mother other than the initial meeting between the parties (T.R. 211). Ms. Kellenberger further testified that Jose relayed information to her that his mother had hit his father and dragged him away from his father, but Jose admitted that he did not remember these events, but had been told these statements by his father (T.R. 212, 213). Ms. Kellenberger felt that the child was being prejudiced against his mother by his father (T.R. 213). Ms. Kellenberger testified in her report that "Jose's face lights up with anticipation and joy about the possibility of living at his mother's home full time" (T.R. 218). Ms. Kellenberger stated that she believed Mr. Speer was attempting to sabotage and alienate the mother/son relationship (T.R. 218-219). Ms. Kellenberger testified that she, like the Respondent, believed that every other weekend visitation was in the best interest of the minor child and that Wednesday visitation was not in the best interest of the minor child (T.R. 223). Ms. Kellenberger testified that she did not have

any concerns towards Respondent's parenting abilities (T.R. 223). Ms. Kellenberger indicated that she had seen Jose about 35 times (T.R. 225). Finally, Ms. Kellenberger testified that the relationship between the minor child and Appellant, Mr. Speer, "seemed to be a dependent, unhealthy relationship in some respects ..." (T.R. 235).

The minor child, Jose Speer, testified that he did not know whether he wished to see his father more (T.R. 265). The minor child also claimed that his father is not doing anything when he gets into trouble at his father's place (T.R. 267).

Mr. William Perry, Guardian Ad Litem, recommended that custody not be changed and that the minor child remain with his natural mother (T.R. 273). Mr. Perry testified that the minor child "seemed to be like a happy, normal eight year-old and that the minor child, his mother and step-father all seemed to be very content together" (T.R. 273). The minor child indicated to Mr. Perry that he was very happy when Mr. Perry last visited them (T.R. 273). The Guardian Ad Litem further recommended Mr. Speer to have every other weekend visitation, alternating holidays and two three-week periods during the summer (T.R. 273). Mr. Perry testified that he believed the parties should attend some cooperative parenting counseling with Judith (Garrity) Kellenberger (T.R. 273).

After all evidence had been presented and submitted to the court, the court indicated it did not intend to change primary physical custody (T.R. 275). The court indicated that it thought "the likelihood that he (Jose) will maintain a working relationship with both of you is enhanced if he lives with his mother" (T.R. 276). The court added that it wished for a current Form 14 showing Respondent's actual wages for the part time that she works, which the court

indicated was twenty-four times her hourly rate, and submit such support (T.R. 280). The court further stated that it wished to adopt the recommended parenting plan as of today's date, which did not include Wednesdays (T.R. 280). The court stated that it did not wish to include Wednesdays because of Judy (Garrity) Kellenberger's testimony that it was not good for the child (T.R. 281). The court indicated that it agreed that the adopted parenting plan would be every other weekend and alternating holidays (T.R. 283).

The trial court entered a Judgment of Modification on May 7, 2003 (L.F. 124).

POINTS RELIED ON

I. THE TRIAL COURT OF JASPER COUNTY, MISSOURI, DID NOT ABUSE ITS DISCRETION IN MODIFYING THE PARTIES' JOINT LEGAL AND RESPONDENT'S

PHYSICAL CUSTODY ORDER AS TO VISITATION. SUCH CONCLUSION WAS SUPPORTED BY EVIDENCE PRESENTED IN COURT AND WAS NOT AGAINST THE WEIGHT OF SUBSTANTIAL EVIDENCE AND WAS FOUND TO BE IN THE BEST INTEREST OF THE CHILD; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID CONSIDER THE RELEVANT FACTORS OF SECTION 452.375.2 RSMO.(1998) AND MADE SPECIFIC ORAL DETERMINATIONS AFTER HEARING ALL EVIDENCE AS TO THE BEST INTEREST OF THE MINOR CHILD AS REQUIRED BY 452.375.6 RSMO.(1998); THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SETTING SPECIFIC VISITATION AS ALLOWED BY SECTION 452.375 RSMO.; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID CONSIDER ALL EVIDENCE PRESENTED BY THE APPELLANT AND RESPONDENT AND MAY MODIFY AN ORDER GRANTING OR DENYING VISITATION RIGHTS WHENEVER SUCH MODIFICATION IS IN THE BEST INTEREST OF THE CHILD, SECTION 452.400.2 RSMO.(1998); THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND PROPERLY ALLOWED THE EVIDENCE TO BE CONFORMED TO THE PLEADINGS THEREIN AS ALLOWED BY MISSOURI SUPREME COURT RULE 55.33.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS DECISION TO MODIFY THE AMOUNT OF CHILD SUPPORT PAID BY APPELLANT, AS IT WAS SUPPORTED BY CREDIBLE EVIDENCE, WAS NOT EXCESSIVE, WAS NOT AGAINST THE WEIGHT OF EVIDENCE AND IS NOT A MISAPPLICATION OF THE LAW; THE TRIAL

COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING APPELLANT'S CHILD SUPPORT OBLIGATION BECAUSE THE COURT DID ADHERE TO THE REQUIREMENT OF SECTION 452.370 RSMO., DUE TO THE TRIAL COURT ACCEPTING INTO EVIDENCE APPELLANT AND RESPONDENT'S FORMS 14 AS REQUIRED BY MISSOURI SUPREME COURT RULE 88.01, WHICH WAS IN LINE WITH THE COURT INDICATING HOW IT WISHED THE FORM 14 TO BE CONSISTENT WITH THE EVIDENCE PRESENTED IN COURT, AND ALLOWED INTO EVIDENCE BY SUPREME COURT RULE 55.33.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID CONSIDER APPELLANT'S MOTION FOR CONTEMPT IN ITS MOTION TO MODIFY, WHICH WAS TAKEN UP BY ALL PARTIES IN THE EVIDENCE PRESENTED TO THE COURT; THE TRIAL COURT PROPERLY TOOK UP AND ALLOWED ALL MOTIONS WHEN SUCH HEARING WAS MADE AS REQUIRED BY SECTION 509.370 RSMO.(1998).

ARGUMENT

I

I. THE TRIAL COURT OF JASPER COUNTY, MISSOURI, DID NOT ABUSE ITS DISCRETION IN MODIFYING THE PARTIES' JOINT LEGAL AND RESPONDENT'S PHYSICAL CUSTODY ORDER AS TO VISITATION. SUCH CONCLUSION WAS

SUPPORTED BY EVIDENCE PRESENTED IN COURT AND WAS NOT AGAINST THE WEIGHT OF SUBSTANTIAL EVIDENCE AND WAS FOUND TO BE IN THE BEST INTEREST OF THE CHILD; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID CONSIDER THE RELEVANT FACTORS OF SECTION 452.375.2 RSMO.(1998) AND MADE SPECIFIC ORAL DETERMINATIONS AFTER HEARING ALL EVIDENCE AS TO THE BEST INTEREST OF THE MINOR CHILD AS REQUIRED BY 452.375.6 RSMO.(1998); THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SETTING SPECIFIC VISITATION AS ALLOWED BY SECTION 452.375 RSMO.; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID CONSIDER ALL EVIDENCE PRESENTED BY THE APPELLANT AND RESPONDENT AND MAY MODIFY AN ORDER GRANTING OR DENYING VISITATION RIGHTS WHENEVER SUCH MODIFICATION IS IN THE BEST INTEREST OF THE CHILD, SECTION 452.400.2 RSMO.(1998); THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND PROPERLY ALLOWED THE EVIDENCE TO BE CONFORMED TO THE PLEADINGS THEREIN AS ALLOWED BY MISSOURI SUPREME COURT

RULE 55.33.

The court, by its specific findings on record, took into account all relevant statutory factors and, therefore, such decision by the trial court was supported by substantial evidence. It has been previously held that in reviewing an award of custody, the appellate court presumes that all evidence was considered by the trial court, and should not substitute its judgment for

that of the trial court, so long as there is any credible evidence on which the trial court could formulate its beliefs. Powell vs. Powell, 948 S.W.2d 153,156 (Mo.App.S.D. 1997). The court of appeals will also view the evidence and permissible inferences that may be drawn from there in a light most favorable to the judgment. Hall vs. Hall, 53 S.W.2d 214,217 (Mo.App.S.D. 2001). Such case also found that fact issues without specific finding are considered as being found in accordance with the result the trial court reached. Hall vs. Hall, id at 218. It has also been held that custody should lie with the party, where evidence was presented concerning the parent which is more likely to allow frequent and meaningful contact. Newsom vs. Newsom, 976 S.W.2d 33,35 (Mo.App.W.D. 1998). It is presumed that the trial court reviewed all evidence and awarded custody in light of the best interest of the child with such presumption being based on the trial court being in a better position to evaluate the credibility of witnesses than the appellate court. Davidson vs. Fisher, 96 S.W.3d 160,165 (Mo.App.W.D. 2003).

While Section 452.375(6), RSMo., provides that the court shall include a written finding in its Judgment if the parties have not agreed as to a custodial arrangement, such statute would not apply where the custodial arrangement is not changed, but the court simply changes the visitation with the sole criteria being that the court may modify an order granting or denying visitation rights when the modification would serve the best interest of the child. Searcy vs. Searcy, 38S.W.3d 462,471 (Mo.App.W.D. 2001).

Section 452.375 does not apply to the case at hand in that custody was not changed between the parties. Appellant argues that joint physical custody was changed to primary physical custody by the Judgment of Modification of Dissolution of Marriage (L.F. 124).

However, it was held in Lumiet vs. Lumiet, that the real determining factor in classifying physical custodial arrangements as either joint or sole is whether the periods of physical custodial time awarded parents are deemed "significant". Lumiet vs. Lumiet, 103 S.W.3d 332,336 (Mo.App.W.D. 2003). The trial court awarded Appellant alternating weekends, alternating holidays and five weeks during the summer (L.F. 124-126). It has been further found that it is up to the trial court for its determination of what constitutes significant periods of time as to allow joint physical custody, which is undefined. Lumier vs. Lumier, 103 S.W.3d 332,337 (Mo.App.W.D. 2003). Lumier also held that the designation of award of physical custody as being joint or sole means little, except in the resulting denomination of the parent's status as a custodian and the denomination of the custody and visitation schedules. Lumier vs. Lumier, id at 337. This court has concluded that the requirements for modifying rights of parents following a dissolution of marriage must be determined on a case-by-case basis regardless of the terminology used in the judgment that is sought to be modified. Baker vs. Welborn, 77 S.W.3d 711,718 (Mo.App.S.D. 2002). It has previously been held that an award of a party of alternating weekends, alternating major holidays and two to three weeks during the summer was not an unreasonable award of visitation. Hankins vs. Hankins, 920 S.W.2d 181,187(Mo.App.W.D. 1996).

While the trial court did designate Respondent as primary physical custodian in its Judgment of Modification and all previous court orders, by its actions in the visitation time awarded to Appellant, it effectually awarded joint legal and physical custody as previously given to the parties and its delineation by announcing Respondent as primary physical custodian

would be of no significance or detriment to the Appellant concerning his actual custodial periods allowed by the judgment.

Appellant further argues that the court abused its discretion by failing to make written findings detailing the specific relevant factors it made in its custody arrangement as according to Section 452.375.6 RSMo. However, it has been found that the trial court in custody proceedings is not required to enter written findings relating to all eight factors in Section 452.375, as long as the court discussed in its findings the facts that it considered most relevant, including the parties' greater likelihood to permit meaningful contact between the child and the opposite party. Davidson vs. Fisher, 96 S.W3d 160,162 (Mo.App.W.D. 2003). Such case also held that the party seeking reversal of the trial court's ruling concerning custody of a child has to overcome a high standard of review, Davidson vs. Fisher, id at 164. This court has also found that if the time changed concerning visitation rights given to one party is changed to a lesser extent considering the entire custody scheme, then a change of visitation rights occurred and not a change of custody, Baker vs. Welborn, 77 S.W.3d 711,718 (Mo.App.S.D. 2002). Respondent argues that any written findings required by 452.375 RSMo. were not triggered, due to the fact that the court effectively did not change the custody of the Appellant and Respondent, but simply used outdated terminology in the designation of Respondent as primary physical custodian, and in reality left the parties with joint legal and joint physical custody, pursuant to its order of such custodial periods for each party (L.F. 124,126).

Appellant cites Gross vs. Helm, 98 S.W.2d 85 (Mo.App.S.D. 2003), where the appellate court reversed the trial court's decision for failing to include written findings in its judgment.

Such case is clearly distinguishable from this case in that no written findings were required, due to the fact that the court did not modify its previous custody arrangement, but only the visitation schedule of the parties, which would not trigger the requirements of Section 452.375.6 RSMo. It has been further found that an increase in the amount of visitation by one party was a mere modification of the visitation schedule and not a modification of custody, therefore, the modification was governed by the best interest of the child statute without the necessity of the court finding a substantial change of circumstances. Baker vs. Welborn, 77 S.W.3d 711,715 (Mo.App.S.D. 2002). Furthermore, if the judgment awards each parent significant periods of time, the parties have joint physical custody regardless of how that judgment characterizes their respective custodial rights. Baker, id at 718.

Appellant argued in his brief that the court awarded sole physical custody to the Respondent, but failed to show any evidence where the court actually granted sole physical custody to the Respondent and, in fact, has misstated several times the court's judgment, which gave Respondent primary physical custody (L.F. 124), but effectually made no changes to Appellant's custodial rights and even granted the Appellant extra visitation with the minor child, (T.R. 283), which in effect continued the joint physical custody as described by Section 452.375.1 RSMo. While the trial court did describe Respondent as the primary physical custodian, in effect by its actions and custody periods awarded the Appellant and Respondent joint physical custody as defined by Section 452.375.1 RSMo.

Appellant next argued that the court did not take into consideration the wishes articulated by the minor child. The court clearly addressed such issue in its decision by

indicating to all parties when the child testified that he preferred to live with his father and that it was difficult to disregard what the child said, but that the court did not intend to change custody (T.R. 275). While the trial court did remove the preference that the father was allowed to care for the minor child while the mother was at work, it did make specific findings for its reason on removing that preference, due to testimony that "it was not good for the child" (T.R. 281). Appellant also included the argument that the trial reduced his custody by removing his option to have the minor child during the mother's working hours, but failed to state that the court increased such holiday visitation and also awarded an extra two weeks of summer visitation (L.F. 125). Such specific findings on record have been found to be sufficient in lieu of written findings where the court discussed in its findings the facts that were considered most relevant. Davidson vs. Fisher, 96 S.W.3d 160,163 (Mo.App.W.D. 2002). Such ruling is in line with Searcy, where it was decided that the lower court may modify an order granting or denying visitation rights whenever modification would serve the best interest of the child. Searcy vs. Searcy, 38 S.W.3d 462, 471 (Mo.App. W.D. 2001).

The court may apply the standards set forth in Baker vs. Welborn as to the findings of facts and conclusions of law, if the court finds that a pattern of abuse has occurred, but absent findings of a pattern of abuse, there is no mandate upon the court to make a written findings of fact and conclusions of law. Lumier vs. Lumier, 103 S.W.3d 332,343 (Mo.App.W.D. 2003). The court made no findings on record that a pattern of abuse occurred and heard specific evidence from Respondent's witnesses that this was an isolated incident (T.R. 104,231).

The court properly considered all evidence and properly found in the best interest of the

child that a modification of visitation was warranted in accordance with the wishes of Respondent and the Guardian Ad Litem. It has been found that the report of the Guardian Ad Litem may be appropriately considered by trial courts in making their decision regarding the best interest of the children in context of a proposed modification of a visitation schedule. Baker vs. Welborn, 77 S.W.3d 711,720 (Mo.App.S.D. 2002). The Guardian Ad Litem in Respondent's case clearly indicated that he believed that custody not be changed and that an alternative visitation schedule be allowed (T.R. 273). The Guardian Ad Litem further found that he most recently visited with the child at the mother's residence and that "he seemed to be like a happy, normal eight year-old. He and brother, mother and step-father all seem very content" (T.R. 273).

The trial court's decision in not changing custody of the minor child, but simply modifying the visitation rights between the Appellant and Respondent, was not an abuse of discretion or against the weight of the evidence and was supported by substantial evidence and found to be in the best interest of the minor child. Although the trial court did designate Respondent as the primary physical custodian, it did so harmlessly and it did not change the custodial periods by either party but, in fact, increased the period of custodial time that the Appellant would have with the minor child in its order.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS DECISION TO MODIFY THE AMOUNT OF CHILD SUPPORT PAID BY APPELLANT, AS IT WAS

SUPPORTED BY CREDIBLE EVIDENCE, WAS NOT EXCESSIVE, WAS NOT AGAINST THE WEIGHT OF EVIDENCE AND IS NOT A MISAPPLICATION OF THE LAW; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING APPELLANT'S CHILD SUPPORT OBLIGATION BECAUSE THE COURT DID ADHERE TO THE REQUIREMENT OF SECTION 452.370 RSMO., DUE TO THE TRIAL COURT ACCEPTING INTO EVIDENCE APPELLANT AND RESPONDENT'S FORMS 14 AS REQUIRED BY MISSOURI SUPREME COURT RULE 88.01, WHICH WAS IN LINE WITH THE COURT INDICATING HOW IT WISHED THE FORM 14 TO BE CONSISTENT WITH THE EVIDENCE PRESENTED IN COURT, AND ALLOWED INTO EVIDENCE BY SUPREME COURT RULE 55.33.

The trial court did not abuse its discretion when it modified Appellant's child support obligation and should affirm the trial court's decision because its decision to modify the child support paid by Appellant was supported by credible evidence, was not excessive, was not against the weight of evidence and was not a misapplication of the law according to Section 452.340 RSMo. The trial court made specific findings regarding a substantial change of circumstance in order to make a modification of support by entry of such Form 14 calculations by both parties, which were not objected to by Appellant and which became evidence and which were conformed to the pleadings as allowed by Supreme Court Rule 55.33 and in line with Form 14 and Supreme Court Rule 88 guidelines.

Child support is allocated pursuant to the requirements of Section 452.340, allowing any determination to award a modification of child support to lie within the discretion of the trial court, and such court's decision will be reversed only for abuse of discretion or

misapplication of the law. Potter vs. Potter, 90 S.W.3d 517,520 (Mo.App.S.D. 2002). The Appellate Court will only set aside the trial court's judgment modifying child support on the grounds that it is against the weight of evidence with caution and only if the Appellate Court has a firm belief that the judgment is wrong. Potter vs. Potter, id at520.

Section 452.370(1) allows a modification of judgment as to child support when the application of the child support guidelines as set forth in Section 452.340 and applicable with Supreme Court Rule 88 shows that the calculated financial circumstances of the parties result in a change of child support from the existing amount by twenty percent or more, then a prima facie showing has been made for a change of circumstance so substantial and continuing to make the present terms unreasonable, if the existing amount was based upon the presumed amount pursuant to the child support guidelines.

It has been found that in child support modification cases, once the trial court makes a determination of the required level of changed circumstances occurs to child support, its primary concern is the best interest and welfare of the child. Potter vs. Potter, 90 S.W.3d 517,521 (Mo.App.S.D. 2002); Dickson vs. Dickson, 62 S.W.3d 589,596 (Mo.App.2001). Brown vs. Brown, 19 S.W.3d 717,724 (Mo.App.2000). It has been found that using the child support calculation worksheet to establish a prima facie showing of a substantial and continuing change of circumstances to warrant a modification of child support is only applicable in situations where such child support calculation form was previously used as the basis for child support amount in the parties' original decree. Potter vs. Potter, 90 S.W.3d 517,522 (Mo.App.S.D. 2002). Failure to timely and specifically object to evidence as beyond the

scope of the pleadings, constitutes consent for the determination of issues thereby raised, and issues raised by implied consent are treated as if they are raised by the pleadings even though the pleadings are not formally admitted to confirm to the evidence. Midwest Material Company vs. Village Development Company, 806 S.W.2d 477,488 (Mo.App.S.D. 1991). Such evidence presented at trial without objection shall result in an automatic amendment to the pleadings to conform the evidence and issues tried by consent. Murray vs. Ray, 862 S.W.2d 931,935 (Mo.App.S.D. 1993). Likewise, failure to timely and specifically object to evidence on grounds as beyond the scope of the pleadings constitutes consent for the determination of issues thereby raised. Kackley vs. Burtrum, 947 S.W.2d 461,465 (Mo.App.S.D. 1997). Such entry by the Respondent of her Form 14 calculation, without objection, led to a prima facie showing of a substantial and continuing change of circumstance by her Form 14 calculation, of which such calculation of child support in the parties' original decree was also based on the Form 14 calculation pursuant to Supreme Court Rule 88 (L.F. 48).

In the case at hand, Appellant had been previously ordered to pay child support in the amount of One Hundred Fifty-Five Dollars ($155.00) as pursuant to Section 452.340.1, Rule 88.1, Form 14 and the parties' Judgment of Modification (L.F. 48). Appellant entered his Form 14 calculation in this case requesting child support be paid by Respondent to Appellant in the amount of One Hundred Fifty-Three Dollars ($153.00) (L.F. 85). Likewise, Respondent entered her own Form 14 into evidence, which on record was not objected to by any party (T.R. 147), and which calculated child support to be Two Hundred Sixty-Four Dollars and Nine Cents ($264.09) per month (S.L.F.). The court indicated that it agreed with the figures from

Appellant's and Respondent's Form 14, which both calculated Appellant's income at $2000 per month (T.R. 279,280). The court made specific findings on the record indicating that the only change it wished to make was to calculate Respondent's income by twenty-four times whatever her hourly rate was, as testified to in the evidence (T.R. 280). Respondent testified that her hourly rate was $7.69 per hour, which came out to $800 per month, as opposed to Respondent's initial Form 14 imputing her at minimum wage (S.L.F. 1). When such Form 14 calculation was made pursuant to the specific requests and findings of the court, such child support came out to be $262.44, as seen in the Judgment of Modification of Dissolution of Marriage (L.F. 126), and which is only $1.65 less than Respondent's Form 14 (S.L.F. 1). Such calculation of child support by the court and specific findings by the court in its request for child support calculations led to a finding of child support in the amount of $262.44, which is a fifty-nine percent (59%) change in Appellant's child support obligation, as opposed to his last order for child support in the amount of $155.00 (L.F. 48). Such fifty-nine percent increase in child support calculations made a prima facie case for a substantial and continuing change of circumstance in which to allow a modification of child support according to Section 452.370.1 RSMo.

Appellant next argued that he objected to an increase in child support because no pleadings were filed by Respondent alleging a substantial and continuing change of circumstance of 20% in the parties' income. Such argument by Appellant is flawed, due to the fact that Appellant did not make any formal objection during testimony, but only made a brief statement after the court announced its ruling (T.R. 282). It has been previously held that the

trial court may award child support even where one party did not file an affirmative pleading to increase child support, but where the issue of child support was tried with the express consent of the husband. Murphy vs. Murphy, 536 S.W.2d 951,952 (Mo.App.W.D. 1976). Such case also held that when issues are not raised by pleadings or tried by consent of the parties, they are treated as though they had been pled and the failure to amend or conform to the proof if not formally requested and made is presumed and will not affect trial of the issues. Murphy vs. Murphy, 536 S.W.2d 951,953 (Mo.App.W.D. 1976), Rogers vs. Rogers, 430 S.W.2d 305,308 (Mo.App. 1968).

Amendments to allow the pleadings to conform to the evidence is recognized by Supreme Court Rule 55.33(b) which allows issues not raised by pleadings, but which are tried by implied consent of the parties, to be treated in all respects as if they had been raised by the pleadings. It has also been found that when neither party files pleadings seeking a modification of an existing child support order that such order cannot be increased, Luna vs. Luna, 855 S.W.2d 483,485 (Mo.App.S.D. 1993). However, in our case, Appellant affirmatively sought such modification of child support by his pleadings, which allowed the court to amend the parties' child support pursuant to the evidence submitted to the court and by a prima facie showing by Respondent of a 20% change of circumstance as required by Section 452.370.1, to allow an increase in child support to be paid by the Appellant to Respondent.

Appellant also argues that the trial court must enter specific findings on record as to its amount of child support. However, it has been determined that in absence of one party's request for specific findings of facts, the rule governing presumed child support amount does

not require the trial court to make specific findings of fact regarding a change found to have occurred as to the modification of a party's support obligation. Potter vs. Potter, 90 S.W.3d 517,523 (Mo.App.S.D. 2002). Lack of specific findings as to how the trial court made its presumed child support calculation will not automatically trigger a reversal on appeal on that issue, provided the record clearly indicates how the trial court provided its calculation. Woolridge vs. Woolridge, 915 S.W.2d 372,382 (Mo.App.W.D. 1996). Likewise, the trial must articulate for the record how it calculated its presumed child support calculation worksheet by specific written findings, findings in the judgment entry or by oral findings on the record. Woolridge, id at 381 (Mo.App.W.D. 1996). It has also been found that deviation from the presumed child support amount is permissible if the trial court makes specific findings on record that the amount so calculated, after considering all relevant factors, is unjust and inappropriate. Buckner vs. Jordan, 952 S.W.2d 710,711 (Mo.App. 1997). In our case, the court clearly indicated that it only rebutted the parties' calculation as to Respondent's income and made a clear indication how it wished such income to be calculated in order to form a correct Form 14 calculation (T.R. 279,280). Such specific oral findings by the court on record, as allowed by case law and supported by the evidence, clearly allows such an increase in child support to be paid by Appellant to Respondent, as in the best interest of the child and in line with the Judgment of Modification of Decree of Dissolution of Marriage entered on May 7, 2003 (L.F. 1). Since Appellant's counsel made no formal objection at the time such Form 14 calculation was entered with the court and simply inquired as to the findings of the court when such decision was made, no error was committed by the court in allowing in

Respondent's evidence in support of her Form 14 calculations.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID CONSIDER APPELLANT'S MOTION FOR CONTEMPT IN ITS MOTION TO MODIFY, WHICH WAS TAKEN UP BY ALL PARTIES IN THE EVIDENCE PRESENTED TO THE COURT; THE TRIAL COURT PROPERLY TOOK UP AND ALLOWED ALL MOTIONS WHEN SUCH HEARING WAS MADE AS REQUIRED BY SECTION 509.370 RSMO.(1998).

In visitation right matters, courts are reluctant to impose harsh sanctions of contempt upon parents, absent findings that the disobedience of the court's orders is willful and intentional. Warren vs. Warren, 909 S.W.2d 752,755 (Mo.App.W.D. 1995). Additionally, the Appellate Courts have found that fact issues without specific findings are considered as being found in accordance with the result of the trial court reached. Hall vs. Hall, 53 S.W.3d 214,218 (Mo.App.S.D. 2001).

The trial court did not commit error and did address Appellant's contempt motion within the motion to modify by hearing all testimony presented concerning Appellant's motion to modify.

Section 452.400.3 RSMo. allows non-compliance with the parties' court order upon a showing with good cause. While Section 509.370 RSMo. states that all objections to motions shall be heard before trial, such statute allows the court for good cause to order that a hearing and determination on such issues be deferred until trial. In our case, Appellant filed his Motion for Contempt as to visitation on November 4, 2002 (L.F. 2). Summons was not made on the

petition until November 25, 2002 (L.F. 1). A hearing was set for December 11, 2002 (L.F. 69). Appellant filed a motion for continuance on December 6, 2002, and the hearing was, therefore, canceled by the Court, pursuant to the request of Appellant (L.F. 1). The contempt hearing was reset for trial with the Motion to Modify on January 13, 2003, to be held on March 17, 2003, as requested by Appellant in his request for hearing on January 13, 2003 (L.F. 1). The Court by its actions in sustaining Appellant's motion for continuance on his motion for contempt allowed "for good cause" that the hearing and determination be deferred until the trial date as clearly indicated in the legal file and allowed by Section 509.370 RSMo. (L.F. 1). It is further relevant that Section 509.370 RSMo. is only applicable to objections raised by motions, of which no objection was filed by Respondent to Appellant's contempt motion (L.F. 1,2).

It was held in Warren vs. Warren, 909 S.W.2d 752,754 (Mo.App.W.D. 1995), that an abandonment of the visitation schedule did not compel filing for contempt where the father failed to follow the schedule to phase in his visits as planned. In this case before the court, due to both parties admissions that they had not followed the previous visitation schedule, willful contempt cannot be found, due to both parties' abandonment of Court's ordered visitation schedule on the child's birthday.

In the case before this Court, Appellant filed such civil motion for contempt stating that Respondent had failed to allow him visitation on the child's birthday in 2002 and also failed to allow the child to meet with a counselor (L.F. 65, 68). The parties' previous court order allowed Appellant visitation with the minor child on his birthday in even years (L.F. 46).

However, Respondent testified that the parties had never gone by such custody order as to the child's birthday and had split the minor child's birthday in previous years (T.R. 144). Appellant admitted that the parties had always worked out that each party would get a percentage of the child's birthday and, specifically, answered "We just pretty much – whoever was open for that day had her hours, which she's the one that always had unsaid hours I'd accommodate her in that in any way" (T.R. 28-29). Appellant, further admitted that he had been able to see the child on each and every birthday in the past and that the Respondent had also been able to see the child each and every birthday in the past (T.R. 29). Respondent testified that Appellant had never called her to request any visitation time on the child's birthday (T.R. 144), but Appellant simply showed up at her residence saying he had a court order for the child to see a psychologist on the child's birthday (T.R. 189). It was clear from the evidence adduced that Appellant and Respondent had never followed the parties' custody as to visitation and had always allowed each party some time to visit the child on the child's birthday (T.R. 29,144). Appellant did not indicate in his motion or on the record that he was specifically denied any further visitation with the child other than the singular event on the child's birthday (T.R. 21) (L.F. 65-66).

Appellant further claims that Respondent was contemptuous of the Court's judgment by not following the Court's order for a psychological evaluation entered on October 29, 2002, (S.L.F. 4). Respondent testified that she did not know of such court order when Appellant came by Respondent's residence on the child's birthday demanding the child (T.R. 189). Jeff Hickey, a professional counselor, licensed in the State of Missouri, was employed by Appellant to conduct a psychological evaluation on the minor child (T.R. 65). Mr. Hickey admitted he was

not a licensed psychologist in the State of Missouri (T.R. 61). Because Mr. Hickey was not licensed in the State of Missouri, Respondent's attorney objected to Mr. Hickey's testimony as being unqualified as an expert in this matter (T.R. 63). Mr. Hickey further admitted that he had not performed a pen and paper psychological evaluation (T.R. 84). Appellant testified that the knew that Guardian Ad Litem, William Perry, requested for all such therapy between the minor child and Mr. Hickey to cease (T.R. 84).

The trial court heard all evidence by Appellant and other witnesses as to the contempt pled by Appellant and by its own choosing the court made no specific findings as to the alleged contempt by Respondent, but made statements about the incident stating, "that was an unfortunate thing, kind of like the birthday, it should never have happened from both sides" (T.R. 283).

Based on the testimony of the parties and the statement of the Court, it can be adduced that the trial court found the Respondent not to be in contempt of court, pursuant to the motion filed by Appellant.

NOTICE OF REQUEST FOR ORAL ARGUMENT

Notice is hereby given that Neysa Colon, Respondent, desires to orally argue her cause.

Respectfully submitted,

Aaron W. Farber
Missouri Bar #48278
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CERTIFICATE OF SERVICE

STATE OF MISSOURI)
) ss.
COUNTY OF NEWTON)

Comes now Aaron W. Farber, of the law firm of Sims, Johnson, Wood & Farber, Attorneys at Law, and being of lawful age and having been first duly sworn on his oath, states:

1. That Respondent's Brief in the above cause by him was caused to be hand-delivered or mailed, postage pre-paid, by the United States Mail in the following stated number of copies, addressed to the following named persons at the addresses shown, all on the 7th day of January, 2004.

10 copies:

Sandra Skinner, Clerk
Missouri Court of Appeals
Southern District
300 Hammons Parkway, Suite 300
Springfield, MO 65806-2546

2 copies:

Sarah Luce Reeder
Attorney at Law
530 Byers Avenue
Joplin, MO 64801

2. That pursuant to Rule 84.06(c) that Respondent's Brief complies with the limitations contained in Rule 84.06(b) or that motion requesting relief from the Rule has been filed.

3. That pursuant to Rule 84.06(c)(3) Respondent's Brief contains 7,944 words.

4. The pursuant to Rule 84.06(g) that a floppy disk is being provided herein, which contains Respondent's Brief, and which has been scanned for viruses and is virus free to the best of the undersigned's knowledge.

5. That a copy of the disk has been served on Appellant's attorney per Rule 84.06(g)

Further affiant sayeth not.

_____

Aaron W. Farber
Missouri Bar Number 48278
119 S. Washington
P. O. Box 276
Neosho, Missouri 64850
(417) 451-4141

Subscribed and sworn to before me this 7th day of January, 2004.

My Commission Expires:

_____

Notary Public