SD35239

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

CHRISTINE B. OLSON,
Respondent,

vs.

JACK FREDERICK OLSON,
Appellant.

On Appeal from the Circuit Court of Newton County
Honorable Gregory N. Stremel, Associate Circuit Judge
Case No. 11NW-CV01223-01

BRIEF OF THE APPELLANT

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Preliminary Statement

Father and Mother moved from Wisconsin to Missouri with their three children, where they dissolved their marriage. When Husband later returned to Wisconsin, both parties sought to modify parenting time and child support.

The trial court entered Wife's proposed parenting plan, requiring Father to arrange and pay for nearly all travel and giving him parenting time only during (a) two monthly 48-hour periods in Missouri; (b) spring break for three or four days; (c) broken two-week summer periods requiring up to six round trips to Missouri; (d) eight hours within seven days of the children's respective birthdays, possibly requiring travel to Missouri; (e) periods around Thanksgiving and Christmas; and (f) Father's Day weekend, possibly requiring travel to Missouri. It also prohibits him from ever seeing the children on Christmas Day or their spending Thanksgiving with him at his home, and never gives him time on any three-day or other extended weekend.

The trial court abused its discretion in entering this long-distance parenting schedule. By contemplating Father making upward of 54 ten-hour trips in a year between Wisconsin and Missouri, its extreme, arduous travel provisions deny Father and the children frequent, continuing, and meaningful contact, and are not in the children's best interests.

The trial court also misapplied the law by failing to delineate custody on four required schoolyear holidays, as well as by failing to state how it calculated its Form 14 presumed child support amount.

This Court should reverse the trial court's judgment and remand this case for entry of a new parenting plan and a redetermination of child support.

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Newton County modifying the previous judgment that dissolved the parties' marriage.

This case does not involve the validity of a Missouri statute or constitutional provision or of a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction, and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Newton County. Under § 477.060, R.S.Mo., venue lies in the Southern District.

Statement of Facts

A. Background

Appellant Jack Olson ("Father") and Respondent Christine Olson ("Mother") were married in Wisconsin in 1996 (D23 p. 2). Three children were born of the marriage: Nathan, age 11 at the time of the judgment below, and Justin and Madison, both age 9 at the time of the judgment below (D19 p. 2). Justin and Madison are twins (Tr. 9). The twins' birthday is March 18 and often falls during their spring break (Tr. 17), and Nathan's birthday is November 6, during the schoolyear (Tr. 8).

Both Father and Mother originally were from the same area in Wisconsin (Tr. 6). In June 2010, they moved to Neosho, Missouri with the children for a career opportunity for Mother (Tr. 6).

In October 2011, the parties entered into a marital settlement and separation agreement, which the Circuit Court of Newton County accepted and dissolved their marriage (Tr. 5, 58; D23; App. A27). It gave the parties joint legal and joint physical custody of the children, with Mother's address designated as theirs for educational and mailing purposes and Father being given parenting time on alternating weekends, from 5:00 p.m. Friday to 7:00 p.m. Sunday, plus every Tuesday and Thursday evening from 4:30 p.m. to 7:30 p.m. (Tr. 8, 49; D23 p. 12; App. A38). For Father's summer parenting time, in even-numbered years it gave him two periods, June 15 to June 30 and again from July 15 to July 30, and in odd-numbered years it gave him three, June 1 to June 15, June 30 to July 15, and July 30 to August 14 (Tr. 9-10; D23 p. 15; App. A41). The parties also agreed neither would pay child

support until January 2013, when Father would begin paying Mother $579 per month (Tr. 58; Doc. 23 p. 19; App. A45).

In February 2012, Father moved back to Lake Geneva, Wisconsin, where he was from and had grown up (Tr. 4-6, 58). Besides the children, all his family resides there: his parents, sisters, a 26-year-old son from a different marriage, and a granddaughter (Tr. 7). Father's only family in Neosho is the children (Tr. 7).

Though Father was to begin paying child support in January 2013, he did not until June or July, creating an arrearage (Tr. 59, 106; D23 p. 19; App. A45). Father said Mother told him she was not worried about it at that time (Tr. 106), though she later sought to hold him in contempt for this (Tr. 37-38).

Father said that after his move back to Wisconsin, he was not able to have any regular weekend or weekday parenting time (Tr. 8, 49). But he said that in summer 2012, 2013, and 2014, he and Mother were able to coordinate his summer parenting time along the basics of what the dissolution judgment had stated (Tr. 11). He said sometimes the visits felt restricted because they were "always under [Mother]'s terms" (Tr. 11). He said that, until the end of 2014, he was staying in a bedroom in his sister's basement apartment, and when the children would be with him in Wisconsin they would sleep out on the living room floor, which the children liked (Tr. 32, 62).

Father said it was costly for him to return to Neosho to see the children (Tr. 12). And the drive from Lake Geneva to Neosho took about ten hours (Tr. 80). Sometimes, Mother would help make some arrangements for him like comping a hotel room through her employer (Tr. 11-12, 50).

B. The children's counseling

Father agreed that Nathan had eating issues (Tr. 25). He said Nathan usually would eat only grilled-cheese sandwiches or crackers for all his meals, which was something he was trying to figure out for years, even before the dissolution (Tr. 25-26, 65). He said Nathan also had an attendance problem in school and often was tardy, roughly 40 times in 2015 (Tr. 37). He said Justin also had some eating issues and would eat a little more than Nathan, but opined Justin does this because he thinks he can get away with it, as Nathan does (Tr. 30-31).

In February 2015, Nathan began counseling with Angie Brower, a licensed clinical social worker and therapist (Tr. 27, 47, 110, 138; Pet.Ex. 10). In July 2015, Ms. Brower began seeing all three children (Tr. 139; Pet.Ex. 10).

Ms. Brower said Nathan had a sensory or selective eating disorder, which was a diagnosis under the DSM-5 (Tr. 111). She said this went far beyond just a child being a picky eater (Tr. 111). Sensory meant the child may not like how some food feels in his mouth and can cause him to gag and want to vomit, which in turn can cause the child to want to avoid social settings where this could be an issue (Tr. 112). She said this happened with Nathan and a school picnic (Tr. 112). She said this usually means Nathan only likes white and bland foods, which is common for children with this diagnosis (Tr. 112).

Ms. Brower said Nathan's diagnosis, though a disorder all on its own, often was associated with anxiety, which she said both Nathan and Justin

exhibited, though neither suffered from an extreme form of it (Tr. 111, 113, 140, 147). She said she also was working with Nathan on some social anxiety issues from school (Tr. 139). She said there are about five things Nathan has added to being able to eat since he started counseling with her (Tr. 141).

Ms. Brower said the best thing to do to help with the eating issues would be to ensure consistency between when the children are with Father and when they are with Mother (Tr. 130-31). Only one new thing should be introduced at a meal, and in a small portion (Tr. 131-32, 146). She said she had not heard of any issues with this at Mother's house, where Mother had more alternatives in place, but did not know what Father's plan was to deal with it (Tr. 148-49). She said Nathan and Justin even would walk to a gas station near Father's home and buy food because they were afraid they would not like the food Father prepared and otherwise would not be fed (Tr. 149).

Ms. Brower said she also had been working with the children on issues relating to Father and Mother (Tr. 113). She said the children felt put in the middle but were acting per usual for children of a divorce (Tr. 113-14, 140). She said she was not advocating for either parent, but rather only wanted the best for the children (Tr. 114, 135).

Ms. Brower said she first spoke with Father in spring 2015 after she reached out to him and gave him the general background on the children and their counseling (Tr. 117). But Father said he had not seen any improvement in Nathan's eating habits since Nathan began counseling with Ms. Brower (Tr. 27, 47).

Father said Mother had asked him to participate in counseling, but he had been unable to (Tr. 65, 88, 165). He said Ms. Brower said he could participate over Skype or Facetime, but he had not done so (Tr. 65). He agreed it would be beneficial for him to participate in counseling with Ms. Brower and the children (Tr. 88).

Father said he had tried talking to the children about eating other things and had read about eating disorders, both online and in materials Mother had given him (Tr. 72-73). He said he had read some materials about children trying to control the parents through eating habits (Tr. 72). But Ms. Brower did not think Nathan's issues were about control (Tr. 132). He said he spoke to the children's former doctor in Wisconsin about Nathan's eating, and the doctor encouraged setting goals of meals that were not grilled-cheese sandwiches three times each week (Tr. 28-29, 174). But he said he had not been able to try this because he had not seen the children enough (Tr. 29).

Father said he investigated counseling for Nathan and Justin while the children were with him during the summer but did not engage in it because he did not want to take away from their summertime (Tr. 72-73). These times with Father were gaps where the children were not attending counseling (Tr. 32; Pet.Ex. 10). Father admitted he had not consulted a counselor himself to get answers about what was going on with Nathan and Justin (Tr. 73-74).

C. Events leading to the proceedings below

Father said that beginning in summer 2014, issues between him and Mother about parenting time became bad enough that he wanted to modify the parties' parenting plan (Tr. 60-61).

Father said he would see the children for four weeks each summer (Tr. 60). He would come to Neosho and pick them up (Tr. 60). But in summer 2015, Father said he received about five weeks with the children (Tr. 99-100). He said there was no arrangement for that amount of time, but Mother let him have it (Tr. 100).

During that summer, Father took away Justin's iPod because Justin always was on it, trying to talk to Mother (Tr. 22, 69, 97). He said he told the children then could talk to Mother whenever they wanted, and Justin still had telephone contact with Mother even without the iPod (Tr. 22, 107-08).

Father said he and Mother had disputes over Nathan's grilled-cheese sandwiches, because he made Nathan make his own, which Mother did not think was proper, but he said Nathan liked (Tr. 30-31).

Father said Justin and Nathan slept in downstairs rooms in his home in Wisconsin, which Justin did not like because that room frightened him (Tr. 34-35). So, Father moved Justin to an upstairs bedroom across the hall from his own that Madison had used, and moved Madison downstairs, which she was fine with (Tr. 35, 145). Both Father and Ms. Brower said this helped Justin but did not eliminate his sleeping anxiety (Tr. 35, 145). Still, Ms. Brower said this was a great move on Father's part (Tr. 145).

Father said Nathan wanted his own room, and while Father would let Nathan and Justin watch movies and hang out, they had to sleep apart (Tr. 34). He said this was because if they stayed together they would not go to sleep and would make noise and be disruptive (Tr. 34, 62-63). He said Nathan did not have issues sleeping alone, nor did Madison (Tr. 34). Father said he sometimes let the children camp out and sleep in the living room, which Ms. Brower also said was a great idea (Tr. 35, 145).

Nathan had a counseling session set up with Ms. Brower while the children were with Father in Wisconsin that summer, and Father said Nathan was playing with friends and did not want to do the session (Tr. 66, 105, 115). Ms. Brower said the session was set up in case Nathan wanted it (Tr. 105, 115; Pet. 15 p. 1). The session was to be via Skype and was set up by Mother (Tr. 115). Ms. Brower said Mother showed her a text message she sent Father, so she knew Father knew about the session (Tr. 115; Pet.Ex. 15 p. 1). The session was cancelled (Tr. 66, 105; Pet.Ex. 15 p. 1).

Father said he discussed this with Ms. Brower by telephone (Tr. 66-67, 105, 116). He said he told her Nathan did not want to talk and something else could be set up (Tr. 67). Ms. Brower said she did not get a call from Father, and that the conversation Father described did not happen (Tr. 117).

Eventually that summer, Justin did not want to stay with Father anymore, so Mother came and took the children back to Neosho with her (Tr. 89-90). Father said Nathan and Madison wanted to stay, but he said he was not going to force Justin to stay, and Mother would not agree to him keeping just two of the children (Tr. 90).

D. Proceedings below

1. Father's proposals

In August 2015, Father moved to modify the dissolution judgment's parenting plan and child support provisions due to his relocation to Wisconsin (Tr. 8; D13).

Father's proposed parenting plan sought to continue joint legal and joint physical custody (Tr. 13; Res.Ex. A p. 1). He said his goal was to see the children more given the difference of his living in Wisconsin and not being able to have alternating weekends (Tr. 8, 12).

Father proposed his having the children during the summer from one week after they were out of school until one week before they started school, with Mother having one week at some point during that period, meaning Mother would have three weeks: one at the beginning of the summer, one in the middle, and one at the end (Tr. 13-14; Res.Ex. A p. 1; D13 p. 2). He proposed Mother being responsible for travel costs for her week in the middle (Tr. 42).

Father also proposed a change for December (Tr. 14; Res.Ex. A pp. 1-2; D13 p. 3). He would go to Neosho in early December and have the children with him in a hotel, take them to school until winter break started, at which he would take them to Wisconsin (Tr. 15-16, 57, 104; Res.Ex. A p. 2). He said his employer might let him do this, he had talked to the employer about it, and he knew he would not get paid for the extra time off (Tr. 79). But he said that taking off the first two weeks of December would not be a big deal because the employees were off the rest of December and January (Tr. 79).

Then, because Mother always came to Wisconsin to be with her family at Christmastime, Mother would have parenting time with the children during that period (Tr. 16; Res.Ex. A p. 2). Christmas Day would alternate even and odd years, and Mother would get the children back three days before school would start again (Tr. 16; Res.Ex. A p. 2; D13 p. 3). Mother confirmed she travels with the children back to Wisconsin three times each year: in the spring, fall, and for Christmas (Tr. 175).

Father proposed a similar arrangement for spring break (Tr. 17, 61; Res.Ex. A pp. 2-3; D13 pp. 2-3). He would come to Neosho a few weeks before the children's spring break, have them stay with him in hotel, take them to school, and once spring break started take them to Wisconsin (Tr. 17, 104; Res.Ex. A p. 3). He said it was common for Mother to go to Wisconsin around that period for Madison and Justin's birthday, so Mother could have parenting time during that period (Tr. 17-18; Res.Ex. A p. 3). She then could return to Missouri with the children (Tr. 18; Res.Ex. A p. 3; D13 p. 2).

Father proposed having the children during odd-year Thanksgivings from Wednesday to Sunday, though staying in Missouri (Tr. 18; Res.Ex. A p. 3). He also proposed having them in Missouri on any three- or four-day weekends they had during the schoolyear (Tr. 18). And if Mother ever brought the children to Wisconsin, he would have at least 24 consecutive hours with them (Tr. 19; Res.Ex. A p. 3). Exchanges would be by Father picking the children up from wherever Mother was with them, and then Mother coming to get them from him (Tr. 20; Res.Ex. A p. 3).

Father also proposed an electronic communication schedule for contact with one parent while with the other – on Tuesdays, Thursdays, and Sundays (Tr. 20, 22-23; Res.Ex. A p. 4; D13 p. 4). He said this was because he had issues in the past where Mother was hard to get ahold of (Tr. 20-21). He said this particularly involved Justin, who had separation anxiety from being away from Mother (Tr. 21, 69).

Father submitted a Form 14 proposing child support of $246 per month, which included a $594 line 11 adjustment (Tr. 44; Res.Ex. B p. 1). But he also would be willing to pay the existing amount, too (Tr. 44-45).

2. Mother's proposals

Mother answered Father's motion to modify and filed her own counter-motion to modify (D14; D15).

Under Mother's proposed parenting plan, the parties would retain joint physical and joint legal custody (Tr. 153; D17 p. 1). Father would have the children two weekends each month from 6:00 p.m. Friday to 6:00 p.m. Sunday, though he would have to pick up and return the children in Neosho and give Mother ten days' notice (Tr. 153; D17 pp. 3-4). At trial, Mother agreed this would be impractical (Tr. 172).

Though Mother's proposal plan claimed it would give Father "[a] total of six (6) weeks summer visitation", it actually would have given Father only four weeks in even years, broken into two two-week periods, and five weeks in odd years, broken into two two-week periods and one one-week period (Tr. 153, 178; D17 p. 4). Father would be responsible for all summer transportation, meaning he would have to come to Neosho, get the children,

and take them to Wisconsin, and then return with them to Neosho, drop them off, and return to Wisconsin (Tr. 155; D17 p. 5).

For Christmas, Mother proposed Father having the children every year from noon on December 23 to 10:00 p.m. on Christmas Eve, after which she would have the children in Wisconsin until noon on December 28, and then Father would have the children until 36 hours before school began, and he would be responsible for returning them to Neosho (Tr. 154; D17 p. 4). She proposed that the exchanges in Wisconsin would occur at her sister's home and said she would take the children to Wisconsin every year for Christmas break (Tr. 154; D17 p. 4).

Mother proposed splitting spring break from noon on the first Saturday until noon on Wednesday for one parent, and then noon on Wednesday until noon on the second Saturday for the other parent, alternating each year (Tr. 155; D17 p. 5). She said she would transport the children to Wisconsin and back each year for spring break (Tr. 155; D17 p. 5).

Mother's proposed parenting plan did not address any three-day-weekend schoolyear holidays or any other extended weekends (D17).

Mother proposed a specific provision that Nathan and Justin share a room while visiting Father (Tr. 155; D17 p. 5). She also proposed being entitled to communicate with each child for 30 minutes each day they are visiting Father, without Father's interference, and Father having the same when the children were with her (Tr. 158-59; D17 p. 7).

Mother filed a Form 14 proposing that Father pay $1,037 per month in child support (D18). She sought a wage assignment (Tr. 165).

3. Events between the parties during the proceedings below

Ms. Brower continued to counsel the children during the proceedings below. She said part of the reason for this was Justin having additional anxiety over sleepovers (Tr. 123-25, 144). She said Justin had been improving and even successfully had stayed over at a friend's house (Tr. 144). She said Nathan told her he felt bad for Justin and that Justin had been crying at Father's house and Nathan was not allowed to go help him, but instead Father made Nathan lock his door when Justin would try to sleep in Nathan's room (Tr. 125-26). She said this was not a way to get a child like Justin to grow out of anxiety (Tr. 129).

In December 2015, Ms. Brower wrote a letter about the children and she sent it to Father at Mother's request (Tr. 70, 122; Pet.Ex. 5). It stated Nathan felt like he was in the middle between Father and his siblings and Father would not let Nathan and Justin share a room (Tr. 70; Pet.Ex. 5). She said she knew Father shared the letter with the children and asked them questions about it (Tr. 122). She said when she then saw the children in early 2016, Nathan was upset about the letter (Tr. 122, 128; Pet.Ex. 5; Pet.Ex. 15).

Ms. Brower never met Father, but they spoke via telephone and communicated via e-mail (Tr. 25, 66, 101; Res.Ex. D; Pet.Ex. 15). In June 2016, Ms. Brower e-mailed a letter to Father stating he and Mother might be focusing too much on each other, rather than their children (Tr. 105; Pet.Ex. 15). She had seen Justin and Nathan in the days before sending it (Tr. 121; Pet.Ex. 15). She said the letter was an attempt to clear up misconceptions

about her counseling and gave suggestions on how to deal with Justin's anxiety (Tr. 120-21; Pet.Ex. 15).

Ms. Brower said she never received a response to the letter from Father (Tr. 142), though a reply e-mail from Father was admitted into evidence at trial (Tr. 142; Res.Ex. D). She said she never saw the reply but suggested it could have wound up in her junk mail folder (Tr. 142). In the reply, Father asked her for a video chat session (Tr. 143; Res.Ex. D). She said Father never followed up on this (Tr. 150).

Ms. Brower's letter also said Justin had heard negative talk from Father about Mother (Tr. 103; Pet.Ex. 15). Ms. Brower said she never had any indication from the children that they had heard Mother speak negatively of Father (Tr. 133). But Ms. Brower said Nathan told her that when he spoke with Father, he sometimes felt like Mother was outside his door listening to him, which Mother denied (Tr. 136, 159). Ms. Brower said she spoke with Mother about this to address it and had brought Mother into counseling sessions with the children to address issues with her (Tr. 136-37). She said she would be willing to include Father in the sessions by telephone but had not done so because Nathan and Justin do not want her to, as they think it will make Father angry (Tr. 138).

In summer 2016, Father and Mother negotiated that Father could have the children for four straight weeks instead of the two-week increments stated in the parenting plan (Tr. 75; Pet.Ex. 4). Father signed an agreement to do so and have the children back to Mother on July 22, which Mother wanted because Madison's cheerleading camp began on July 23 (Tr. 75-76;

Pet.Ex. 4). Father said he intended to have the children back by then but did not, and instead brought them back on the following day or two (Tr. 75-76). He said this was because he could not get off work in time, as too many other people had taken off work (Tr. 78, 80, 93). He said he looked up Madison's camp's start date online and thought this would not be a problem, though he agreed he was wrong (Tr. 77-78). Mother said Madison missed the first day and was behind the rest of the girls in the camp for several weeks (Tr. 176).

When Father came to get the children that summer, Justin threw a fit because he did not want to go (Tr. 81-82). Father said that to get Justin to go, he used a tactic making Justin think he was going to stay in Missouri and miss out (Tr. 82). Father said he never actually was going to leave Justin behind (Tr. 82). During the children's time with Father, Father again took away Justin's iPod because he was always on it trying to talk to Mother (Tr. 22, 69, 97). But he said he again told the children they can talk to Mother whenever they want, and Justin still had telephone contact with Mother (Tr. 22, 107, 173-74).

Father said he believes Justin's anxiety issues have to do with him being babied too much, and that he needs more time with his dad (Tr. 36, 82, 97). He said Mother coddles the children and struggles to let them grow up (Tr. 97). He said Justin's anxiety would get better as the summer went along (Tr. 36). He said Justin did fine that year sleeping alone in a separate room and has no more issues with it (Tr. 90).

Father said visitation continued to be an issue during the proceedings below (Tr. 45-50). For example, he said he got in from Wisconsin for a court

hearing around 3:30 p.m. the day before, and though he asked Mother if he could have the children for a few days before the hearing, she had refused, saying she had plans (Tr. 45; Pet.Ex. 14). At the same time, he said that several times since moving to Wisconsin, he had come back down to see the children not on his regularly scheduled weekends according to the parenting plan, and Mother had let him see the children (Tr. 49-50).

4. The parties at the time of trial

a. Father

At the time of trial, Father resided in Lake Geneva, Wisconsin, where he had lived for a year-and-a-half after moving back from Missouri (Tr. 4-6). He worked as a heavy equipment operator for a company named Payne and Dolan, a union job that he had before moving to Missouri and resumed upon returning to Wisconsin (Tr. 5, 58). Father earns about $26.85 per hour and usually does not receive bonuses or overtime (Tr. 52, 58-59). He only had two weeks of vacation per year (Tr. 52).

In summer 2014, Father began dating Kerry Graziano in Wisconsin (Tr. 108-09). They were engaged to be married a few months before trial, and though no wedding date then had been set,[1] they lived together (Tr. 55, 109). He said the children did not yet know about the engagement, which had occurred after his 2016 summer parenting time (Tr. 55, 85, 109).

Father said the children like Ms. Graziano and he did not believe there had been any problems with her interfering with the children contacting Mother or saying anything bad about Mother (Tr. 55, 64, 84-86, 104, 107).

[1] After the proceedings below ended, Father and Ms. Graziano were married.

Mother disagreed, saying Ms. Graziano treats the children unfairly, particularly Justin (Tr. 167). She described one incident in which Justin was crying to her on Facetime and saying he missed her, but Ms. Graziano told Justin to stop whining because he was a big boy (Tr. 159). Father said this was referring to whining about food, not Mother (Tr. 86). Mother also said that another time, when Father was dropping off the children at her sister's house in Wisconsin, Ms. Graziano negatively exchanged words with her sister about her (Tr. 154).

Mother said she had known Ms. Graziano for 25 years, as Ms. Graziano was married to Father's best man during Father and Mother's wedding (Tr. 166). She denied reacting badly when Father started dating Ms. Graziano, but said she felt Ms. Graziano acts differently toward her now (Tr. 166-67).

b. Mother

Mother resided with the children in Neosho (Tr. 162). Ms. Brower said the children seem completely at ease with Mother (Tr. 121).

Mother works for a company named Irby and earns a salary of $70,000 per year, plus occasional bonuses, including one she once received of $34,000 (Tr. 44, 162; Res.Ex. C). But she did not receive a bonus in 2015 and said she likely would not receive one in 2017 (Tr. 163). Mother had no family in Neosho besides the children (Tr. 7, 18). She had extended family in Wisconsin, including a sister, her mother and stepfather, and cousins (Tr. 6-7, 18).

Mother said she encouraged the children to visit Father and had tried to contact Father and call a truce to end the ugly texting wars between them

(Tr. 156-57, 165). But she said Father's most recent response to her about this was "We don't agree on anything, so why bother?" (Tr. 157; Pet.Ex. 14). She said she sometimes would not get responses from Father when she tried to contact him (Tr. 178-79). She said there had been times when she and Father got along, and the only major issues had been in the year-and-a-half before trial (Tr. 166).

c. The children

Nathan, Justin, and Madison lived primarily with Mother in Neosho (Tr. 9). Justin had asthma and used an inhaler (Tr. 37). At Mother's house, Nathan and Justin roomed together (Tr. 62). The boys were active in cub scouts, basketball, and little league baseball, and Madison was active in basketball and cheerleading (Tr. 9, 169).

Father said there were no disciplinary issues with the children, and they all got along well (Tr. 36). Mother agreed that the children like being with Father (Tr. 157). She said that while she disagreed with some of Father's approaches to things with the children, she did not think that Father was mean to them (Tr. 157).

Mother said her communication with the children felt inconsistent when they were with Father (Tr. 178-79). But she said she could contact the children while Father was home or when he was at work (Tr. 178-79).

5. Trial, judgment, and appeal

The parties' motions to modify were tried to the court over one day in October 2016[2] (Tr. 2; D12 p. 9). The only witnesses were Father, Ms. Brower, and Mother (Tr. 2).

The trial court entered a judgment in February 2017, but after Father timely moved to amend it, the court set it aside in May 2017 (D12 pp. 10-11, 13). The court then entered a new judgment in July 2017[3] (D19; App. A1).

The judgment adopted Mother's proposed parenting plan (*cf.* D19 pp. 9-20; App. A9-20 *with* D17 pp. 1-7).[4] It also set the amount of Father's child support at $814 per month (D19 pp. 9, 20; App. A9, A20). It stated this amount was "in accordance" or "in conformity" "with Rule 88 and Form 14 guidelines" but did not state how the court calculated this amount, and no Form 14 was attached to the judgment (D19 pp. 9, 20; App. A9, A20).

Besides making findings addressing issues already mentioned in this statement of facts, the court also found Father had not participated in any counseling, which he could have over the internet, nor had he taken the children to counseling in Wisconsin, which he could have (D19 p. 6; App. A6). It found Mother's and Ms. Brower's testimony was more credible than

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[2] The transcript incorrectly bears a date of October 2017 (Tr. 2).

[3] The February 2017 judgment was set aside because the parties agreed the court had not made any findings on the factors in § 452.375.2, R.S.Mo. Both the February and July judgments adopted Mother's respective proposed judgments in their entirety, without change.

[4] The judgment states that Mother's plan was "modified by the court" (D19 p. 8). But Mother proposed the judgment and the court signed it without making any change to that proposal, so this is not precisely accurate.

Father's (D19 p. 6; App. A6). It found that the only changed circumstance was that Father moved to Wisconsin, and there had been no change of circumstance in the condition of the children and Mother (D19 p. 6; App. A6). It found Mother is more likely to allow frequent and meaningful contact with the children than Father, and that the children's best interests would be served by making modifications to Father's periods of visitation and custody (D19 pp. 6-7; App. A6-7). As to the factors in § 452.375, it found all of them favored Mother except the wishes of the parents and the intent of the parents to relocate, which were neutral (D19 pp. 7-8; App. A7-8).

Father timely moved to amend the judgment (D12 p. 14; D20). When the trial court made no ruling on that motion within 90 days, Father timely appealed to this Court (D12 pp. 14-15).

Points Relied On

I. The trial court abused its discretion in entering its parenting schedule for Father *because* the schedule does not provide the children frequent, continuing, and meaningful parenting time with Father and is not in the children's best interests *in that* Father lives in Wisconsin and the children in Missouri, but the schedule, which requires Father to arrange and pay for nearly all travel, contemplates Father making upward of 54 trips in a year between Wisconsin and Missouri, and gives him parenting time only during (a) two monthly 48-hour periods in Missouri; (b) spring break for three or four days; (c) broken two-week periods during the summer requiring up to twelve trips between Wisconsin and Missouri; (d) eight hours within seven days of the children's respective birthdays, possibly requiring travel to Missouri; (e) periods around Thanksgiving and Christmas; and (f) Father's Day weekend, possibly requiring travel to Missouri, but prohibits him from ever seeing the children on Christmas Day or their spending Thanksgiving with him at his home, and never gives him time on any three-day or other extended weekend.

In re S.E.P. v. Petry, 35 S.W.3d 862 (Mo. App. 2001)
McElroy v. McElroy, 910 S.W.2d 798 (Mo. App. 1995)
Riley v. Riley, 904 S.W.2d 272 (Mo. App. 1995)
Lavalle v. Lavalle, 11 S.W.3d 640 (Mo. App. 1999)
§ 452.375, R.S.Mo.

II. The trial court misapplied the law in entering its parenting plan *because* §§ 452.375.9 and 452.310.8(a) and (b), R.S.Mo., as well as the Supreme Court's Parenting Plan Guidelines, require all parenting plans to delineate the custody, visitation, and residential time for each child with each party specifically on Martin Luther King Day, Presidents' Day, Memorial Day, and Labor Day *in that* the trial court's visitation schedule is devoid of any mention of these holidays.

Wennihan v. Wennihan, 452 S.W.3d 723 (Mo. App. 2015)

In re Marriage of Murphey, 207 S.W.3d 679 (Mo. App. 2006)

In re Marriage of Alred, 291 S.W.3d 328 (Mo. App. 2009)

§ 452.310

§ 452.375

Order re: Parenting Plan Guidelines (Mo. banc Aug. 17, 2009)

III. The trial court misapplied the law in awarding Mother child support of $814.00 per month *because* under § 452.340, R.S.Mo., and Rule 88.01, when a trial court awards an amount of child support that neither party requested, it must attach its own Form 14 or otherwise lay out in its judgment exactly how it calculated that amount *in that* neither Father's nor Mother's Form 14 calculated child support at $814 per month, but the trial court's judgment does not state exactly how calculated this amount, nor did the court attach its own Form 14 to the judgment.

Neal v. Neal, 941 S.W.2d 501 (Mo. banc 1997)
Wood v. Wood, 391 S.W.3d 41 (Mo. App. 2012)
Crow v. Crow, 300 S.W.3d 561 (Mo. App. 2009)
Reis v. Reis, 105 S.W.3d 514 (Mo. App. 2003)
§ 452.340, R.S.Mo.
Rule 88.01

Argument

Standard of Review as to All Points

As this case was tried by a court, rather than a jury, the trial court's judgment "will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Hightower v. Myers*, 304 S.W.3d 727, 731-32 (Mo. banc 2010) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)).

I. The trial court abused its discretion in entering its parenting schedule for Father *because* the schedule does not provide the children frequent, continuing, and meaningful parenting time with Father and is not in the children's best interests *in that* Father lives in Wisconsin and the children in Missouri, but the schedule, which requires Father to arrange and pay for nearly all travel, contemplates Father making upward of 54 trips in a year between Wisconsin and Missouri, and gives him parenting time only during (a) two monthly 48-hour periods in Missouri; (b) spring break for three or four days; (c) broken two-week periods during the summer requiring up to twelve trips between Wisconsin and Missouri; (d) eight hours within seven days of the children's respective birthdays, possibly requiring travel to Missouri; (e) periods around Thanksgiving and Christmas; and (f) Father's Day weekend, possibly requiring travel to Missouri, but prohibits him from ever seeing the children on Christmas Day or their spending Thanksgiving with him at his home, and never gives him time on any three-day or other extended weekend.

Additional Standard of Review

The "trial court has broad discretion in deciding visitation and custody issues", and this Court "accord[s] the trial court's custody determination great deference." *Lavalle v. Lavalle*, 11 S.W.3d 640, 646 (Mo. App. 1999). This Court "will not overturn a decision resolving custody and visitation issues unless it is not in the child's best interest." *Id.*

* * *

Rule 84.04(e) Preservation Statement

Under Rule 78.07(c), Father preserved this issue for review in his timely motion to amend the judgment (D20 pp. 2-7).

* * *

Missouri's public policy is "that frequent, continuing, and meaningful contact with both parents … is in the best interests of the child …." § 452.375.4, R.S.Mo. (App. A86). So, any parenting plan that "necessarily deprive[s a child] of" frequent, continuing, and meaningful contact with one parent – or that parent with the child – is an abuse of discretion. *Fohey v. Knickerbocker*, 130 S.W.3d 730, 738 (Mo. App. 2004).

Here, the trial court's parenting plan manifestly does not provide Father and the parties' three children with frequent, continuing, and meaningful contact as the law of Missouri has meant it for more than 30 years. This Court should reverse the trial court's judgment and remand this case for entry of a new parenting plan containing a parenting schedule that meets the children's best interests and provides them with truly frequent, continuing, and meaningful contact with both parents.

A. The trial court's parenting schedule requires Father to have short long-distance visitation, long-distance visitation at peak periods paid for entirely by him, and a profusion of long-distance travel for him and the children each year, and prohibits him from ever seeing his children on Christmas or spending Thanksgiving with him at his home.

Father now lives in Wisconsin and the children live with Mother in Missouri (D19 pp. 3, 13; App. A3, A13). The judgment generally makes it Father's "responsibility … to make travel arrangements for his visitation

periods and [he] shall be solely responsible for the travel expenses for each such visitation" (D19 p. 17; App. A17). The only exceptions are for spring break and part of Christmas break (D19 pp. 14, 16; App. A14, A16).

Then, the judgment provides Father with a maximum of two 48-hour weekend visitations each month (D19 p. 13; App. A13). The visits must be in Neosho (D19 p. 13), ten hours from Lake Geneva by car (Tr. 80): 500 miles from Lake Geneva "as the crow flies," or 650 miles by car (D20 p. 2).

So, to exercise this two-day visitation, Father must drive a total of 20 hours. Otherwise, he has no regular visitation allowed. Mother herself agreed at trial that this would be impractical (Tr. 172).

The only "special" parenting time the judgment gives the children with Father is around Thanksgiving, Christmas, Father's Day weekend, summer and spring breaks, and for eight hours within seven days of the children's birthdays – "best efforts" permitting (D19 pp. 13-16; App. A13-16).

Father receives parenting time in odd-year Thanksgivings, but the judgment requires Father to pick up the children after 6:00 p.m. on the day before Thanksgiving (D19 p. 14; App. A14). That means that to make it back to Lake Geneva with the children for Thanksgiving Day, Father would have to drive ten hours to Neosho, pick them up, and then drive another ten hours through the night. Obviously, that is unrealistic (Tr. 80). At the very least, it would make it extremely taxing for all (Tr. 80). As a practical matter this order means the children must spend their Thanksgiving Day with Father in Neosho, where he does not live, and the children never will be able to spend Thanksgiving with him and his family at his home in in Lake Geneva.

And for Christmas, the judgment provides the children only will have parenting time with Father "from 12:00 p.m. (Noon) on December 23 until 10:00 p.m. on Christmas Eve, December 24," Mother will have them every year on Christmas Day, and Father will have them from December 28 until three days before school begins, at which he must return them to Neosho (D19 p. 14; App. A14). That means the children never will spend Christmas Day with Father ever again.

Then, there is no provision for any schoolyear three-day weekend or other extended weekend holidays (and no mention particularly of Martin Luther King Day, Presidents' Day, Memorial Day, Labor Day[5]). In the summer, the children must be shuttled between Neosho and Lake Geneva for two two-week periods in even-numbered years, plus an additional week in odd-numbered years, all at Father's responsibility for arranging and paying for (D19 p. 15; App. A15). And each spring break, the children will have parenting time with Father for either four days (odd years) or three days (even years) (D19 pp. 15-16; App. A15-16).

Finally, the judgment gives Mother the children every Mother's Day weekend and Father the children every Father's Day weekend (D19 pp. 13-14; App. A13-14). But while Mother would have the children over Mother's Day weekend anyway, as Mother's Day is the second Sunday in May, 36 U.S.C. § 117(a), Father's Day is the third Sunday in June, 36 U.S.C. § 109(a), meaning that in certain years Father will have to make an extra 20-hour summer round trip to Neosho in order to exercise this (D19 p. 15; App. A15).

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[5] This is a reversible misapplication of law itself, addressed in Point II, *infra*.

In sum, the judgment gives the children and Father time only:

- For a maximum of two 48-hour periods per month if Father drives a round-trip 20 hours to attend it;
- Thanksgiving break in odd-numbered years, but as a practical matter never on Thanksgiving Day at Father's home;
- Only on Christmas Eve and never on Christmas Day, with Father having to return the children to Neosho;
- In even years, for two broken two-week periods each summer for which Father must drive a collective 80 hours (four round trips between Lake Geneva and Neosho, eight trips total) or 100 hours if Father's Day weekend falls during Mother's time with the children;
- In odd years, for two broken two-week periods plus an additional one-week period each summer for which Father must drive a collective 120 hours (six round trips between Lake Geneva and Neosho, twelve trips total) or 140 hours if Father's Day weekend falls during Mother's time with the children;
- Four or three days during spring break, depending on the year;
- For eight hours within seven days of the children's respective birthdays,[6] "best efforts" permitting; and
- Never on any three-day or other extended weekends.

[6] While the twins' (Madison's and Justin's) birthday is March 18 and often falls during their spring break (Tr. 17), Nathan's birthday is November 6, which is during the schoolyear (Tr. 8). This means that to exercise this birthday time, Father would have to drive a round-trip 20 hours to spend eight hours with Nathan.

B. The parenting schedule is an abuse of discretion, does not provide the children frequent, continuing, and meaningful contact with Father, and is not in the children's best interest.

The law of Missouri is that this is an abuse of discretion and is not in the children's best interests. The trial court's parenting plan makes it extraordinarily and unduly arduous for the children to have parenting time with Father. In so doing, it is unreasonable, indicates a lack of careful consideration, and one with which reasonable minds could not agree.

It is well-established that "when a child is distant from a parent, a scheduled visitation period should not be less than two consecutive days and no visitation requiring travel by the child should be shorter than three days." *In re S.E.P. v. Petry*, 35 S.W.3d 862, 872 (Mo. App. 2001) (quoting *Lavalle*, 11 S.W.3d at 648). "It is unrealistic to expect either the parent or the child to climb aboard an airplane … to take advantage of a few hours of allowed visitation, even assuming such extensive travel is within the parties' means." *Id.* (quoting *Riley v. Riley,* 904 S.W.2d 272, 279 (Mo. App. 1995)).

Otherwise, "[t]he travel required of the parties to exercise visitation compared to the limited time each would have to enjoy the other's company 'would undoubtedly diminish the quality of any time spent together and may well engender deep resentment on the part of the child, the parent or both.'" *Id.* (quoting *McElroy v. McElroy,* 910 S.W.2d 798, 805 (Mo. App. 1995)). And requiring children or parents "to travel [between a distant state and Missouri] ten or more times per year [is] an excessive amount of travel" and *per se* is an abuse of discretion. *Id.*

In *S.E.P.*, with the father in Missouri and the children in Florida, the parenting plan called for the father to have parenting time on several alternating three-day weekends, Christmas Eve or Day, Halloween, and half of each of the children's breaks (consecutively, not broken into two-week chunks as here), with the mother paying for travel expenses three of the times. *Id.* at 871-72. It also allowed the father reasonable visitation with the children in Florida if he came there. *Id.*

This Court held this was not in the children's best interests. *Id.* at 872. Given the distance involved, no holiday could be "one day only," and the amount of travel was excessive and unduly burdensome to the father and the children. *Id.* The Court reversed and remanded the case "to issue a new visitation schedule." *S.E.P.*, 35 S.W.3d at 872-73.

The Court further advised the trial court on remand:

> to take into consideration the distance between the parties and the time spent traveling from one parent to the other, the opportunity for visitation posed by the children's extended school breaks and three-day weekends, as well as the children's weekend activities in developing the new schedule. In devising a realistic visitation for a parent and child located in distant cities, factors such as minimizing travel by both the parent and child, assuring that the length of scheduled visits is sufficient to permit meaningful time together and maintaining sufficient frequency of visitation to maintain the parental bond clearly take precedence over desirable but subordinate concerns such as equal division of holidays and other significant days. No scheduled visitation periods should be less than two consecutive days and no visitation requiring travel by the child should be shorter than three days. It is simply unrealistic to expect that visitation between a parent and child separated by [distance] can be of the same frequency or duration as may have been feasible when they

> were located in the same city, and requiring the children to travel [to the non-residential parent] ten or more times per year would be an excessive amount of travel.

Id. at 873 (internal citations and quotation marks omitted).

Similarly, in *McElroy*, with the father 200 miles (or three hours' driving time) away in Iowa and the children in Missouri, the parenting plan called for the father to have parenting time on several alternating weekends, alternating major holidays, and ordering the father to provide all holiday transportation. 910 S.W.2d at 805.

This Court held this was not in the children's best interests. *Id.* The "schedule, as it pertains to holidays spent in father's custody, allow[ed] little time for the children to have valuable contact with their father." *Id.* The short periods, "not considering the time spent in the car traveling, [were] insufficient to allow the children" and their father "meaningful holidays with one another." *Id.* And the weekend schedule did not consider "the five to six hours needed to travel back and forth." *Id.* At the same time, the trial court had failed to "recognize the valuable opportunities for meaningful visitation presented by", among other things, "the occasional three-day weekend." *Id.*

In so holding, the Court in *McElroy* followed *Riley*, 904 S.W.2d at 279:

> In *Riley*, the trial court established a "Siegenthaler Schedule" of visitation for the mother. The child resided in Missouri while the mother had moved to Texas. This court found the schedule unworkable where the parties were separated by such distances. Although the distances in the instant case are not as great as those addressed by the court in *Riley*, we nonetheless believe the underlying logic applies. The travel required of the parties to exercise visitation compared to the limited time each would have to enjoy the other's company "would undoubtedly diminish the

> quality of any time spent together and may well engender deep resentment on the part of the child, the parent or both."

Id. (quoting *Riley*, 904 S.W.2d at 279) (footnote omitted).

Finally, *Maher v. Maher*, 951 S.W.2d 669, 676 (Mo. App. 1997), also followed *Riley*. In *Maher*, the father was in Missouri and the child in Florida. *Id.* at 675. The father was given every-other-weekend visitation when the child was ages six through eight, but it required him to travel to Florida or, when the child turned eight, required the child to travel to Missouri. *Id.* at 676. Effectively, the schedule required the father or the child to travel between Florida and Missouri upward of 26 times per year. *Id.*

Once again, this Court held this was an abuse of discretion and reversed. *Id.* While it was "unrealistic to expect that visitation between a parent and child separated by" a great distance "can be of the same frequency or duration as may have been feasible when they were located in the same city", and the "bare fact that the visitation schedule ordered by the court does not afford" one parent "the same amount or frequency of visitation he enjoyed" when living in the same city as the child "is not, by itself, a basis for reversal", requiring that level of travel was "clearly excessive." *Id.*

Instead, the Court offered a set of "principles" for the parties and the trial court to formulate in making a new parenting plan:

> Many of the problems posed by the visitation schedule are attributable to [the trial court]'s attempt to divide all of the holidays and other significant days "even-Steven" among Mother and Father in alternating years. We recognize that certain holidays and special days such as birthdays can be highly significant to a child and that parents have an understandable desire to be with the child on the actual day of the event. When both parents and the child reside in the same city, it is often

feasible and appropriate to divide these days between the parents on an alternating basis as was done here. Unfortunately, holidays also happen to be the most logical dates to use for visitation involving travel because that is when the child or parent is free to travel and still have a sufficient amount of time remaining for a meaningful visit. In addition, holidays tend to be dispersed throughout the year, allowing for more frequent visitation, an important consideration in maintaining the bond with the non-custodial parent. In devising a realistic visitation for a parent and child located in distant cities, factors such as minimizing travel by both the parent and child, assuring that the length of scheduled visits is sufficient to permit meaningful time together and maintaining sufficient frequency of visitation to maintain the parental bond clearly take precedence over desirable but subordinate concerns such as equal division of holidays and other significant days.

Another major problem with [the trial court]'s approach is the placement of excessive limitations on Father's visitation in Florida. As a practical matter, all that should ordinarily be required is sufficient advance notice to the custodial parent to avoid disrupting planned events involving the child. The non-custodial parent's employment obligations will ordinarily prevent them from spending an inordinate amount of time in a distant city. If necessary, the decree could authorize some maximum number of days of visitation in the child's city, to be exercised as the non-custodial parent's schedule permits. Designating specific days for visitation in the child's city of residence virtually assures that there will be times that the non-custodial parent will be unable to exercise scheduled visitation. Even the most understanding employer cannot always assure its employees that they will be able to take time off from work whenever they want it. An employer may also sometimes find it necessary to require its employees to work overtime or on weekends. If this occurs at a time when visitation is scheduled in the child's city, the child may interpret the failure to exercise visitation on the scheduled date as a sign of loss of affection. The custodial parent may also attempt to use a non-custodial parent's failure to exercise all

> scheduled visitation as a weapon in future custody disputes. These problems can be ameliorated if not eliminated by allowing the non-custodial parent to exercise visitation in the child's city whenever his schedule permits, limited solely by a requirement of specified notice.

Id. at 676-77.

The Court instructed the trial court to give the parties "a reasonable opportunity to agree upon a reasonable visitation schedule" and if they could not, to give them "an opportunity to present additional evidence and" then "adopt a new schedule consistent with the [above] principles …." *Id.* at 677.

The plan in this case is even more burdensome than those in *S.E.P.*, *McElroy*, *Riley*, or *Maher*, and contradicts all this Court's directives in those decisions. At least in *S.E.P.* (but not *McElroy*, *Riley*, or *Maher*) the plan at issue provided for three-day weekends, made the local parent responsible for some general travel, provided for consecutive-day summer vacation, rather than split, and alternated Christmas Day. 35 S.W.3d at 871-72.

But here there are no three-day weekends, Father must drive 20 hours to see his children for 48 hours (or eight hours in the case of Nathan's birthday), the children must be shuttled 650 miles eight-to-twelve times each summer alone, and they will never see their father on Christmas again. The trial court's plan requires Father or the children to travel between Neosho and Lake Geneva far more than the ten times each year in *S.E.P.*, the 18 in *McElroy*, or the 26 in *Maher*, all of which were deemed an abuse of discretion.

Indeed, in certain odd years, Father faces up to a total of 29 round trips between Lake Geneva and Neosho, for a total of 58 trips equaling 580 hours of driving (more than 24 days and 37,000 miles, nearly one-and-a-half times

the circumference of the Earth), not counting spring break or the beginning of Christmas break, when Father is not responsible for the children's transportation:

- 18 round trips (36 trips total) for semimonthly 48-hour visitations during the nine months of the children's schoolyear;
- two round trips (four trips) for Thanksgiving if Father wishes to take the children to Lake Geneva for the time;
- one round trip (two trips) to return the children to Neosho after Christmas break;
- six round trips (twelve trips) in odd years for his summer periods;
- one round trip (two trips) for Father's Day weekend if it falls during Mother's summer parenting time that year; and
- one round trip (two trips) for eight hours around Nathan's birthday.

As this Court held in *S.E.P.*, *McElroy*, *Riley*, and *Maher*, this is *per se* not in the children's best interests, and *per se* is an abuse of discretion.

C. The remedy is to reverse the trial court's judgment and remand this case for entry of a parenting plan with a schedule that obeys the strictures of Missouri law for long-distance joint custody awards, which Father's proposal fit.

Conversely, Father's proposed parenting plan would have complied with the law and served the children's best interests (Res.Ex. A). Under Father's plan, he would have parenting time with the children during:

- most of the summer, except for a week with Mother;
- two weeks prior to spring break in Missouri, followed by spring break;
- equal splitting of travel costs;
- December for two weeks in Missouri and two weeks in Wisconsin;

- alternating Christmas Eve/Day;
- every other Thanksgiving from Wednesday to Sunday;
- any three- or four-day weekend the children have during the schoolyear, in Missouri, with at least ten days' notice to Mother;
- in Wisconsin for 24 hours if Mother brings the children there; and
- there would be electronic communication with the other parent.

(Res.Ex. A).

Father's plan echoes this Court's instructions and principles announced in *S.E.P.*, *McElroy*, *Riley*, *Maher*, and particularly *Lavalle*.

In *Lavalle*, with the father in Missouri but the child in Maryland, just like Father's proposed schedule here the trial court appropriately ordered the father to have parenting time during: (1) three-day weekends in Maryland during the schoolyear; (2) Thanksgiving vacation from Wednesday to Monday; (3) spring break; (4) alternating Christmas vacation; (5) for the summer except for one week. 11 S.W.3d at 644-45. This Court affirmed, noting, "The specified holiday visits are for a period greater than twenty-four hours, and there is no requirement of weekend visitation every other week. The frequency of travel required annually by either Father or Daughter is not excessive. Moreover, the visitation schedule incorporates visits during extended school breaks and three-day weekends." *Id.* at 649.

A *Lavalle*-style plan uniformly has been upheld as the quintessential long-distance parenting plan in Missouri. *See, e.g.*, *S.E.P.*, 35 S.W.3d at 872; *Dunkle v. Dunkle*, 158 S.W.3d 823, 840 (Mo. App. 2005); *Ratteree v. Will*, 258 S.W.3d 864, 870 (Mo. App. 2008). Father's proposed plan reiterated its

reasoning and logic. The trial court's plan (i.e., Mother's plan) violated it entirely.

This Court should reverse the trial court's judgment and remand this case with instructions to (a) give the parties a reasonable opportunity to agree on a reasonable visitation schedule and (b) otherwise, present evidence and the trial court adopt a new schedule consistent with the principles in *S.E.P.*, *McElroy*, *Riley*, *Maher*, and *Lavalle*, which truly provides for frequent, continuing, and meaningful contact between Father and his children.

II. The trial court misapplied the law in entering its parenting plan *because* §§ 452.375.9 and 452.310.8(a) and (b), R.S.Mo., as well as the Supreme Court's Parenting Plan Guidelines, require all parenting plans to delineate the custody, visitation, and residential time for each child with each party specifically on Martin Luther King Day, Presidents' Day, Memorial Day, and Labor Day *in that* the trial court's visitation schedule is devoid of any mention of these holidays.

Rule 84.04(e) Preservation Statement

Under Rule 78.07(c), Father preserved this issue for review in his timely motion to amend the judgment (D20 pp. 7-8).

* * *

The trial court's failure to account for schoolyear and other three-day-weekend and extended holidays in its parenting plan does not merely run afoul of this Court's well-established requirements for long-distance parenting plans and deny Father frequent, continuing, and meaningful contact with the children. It also directly violates §§ 452.375.9 and 452.310.8(a) and (b), R.S.Mo., as well as the Supreme Court's Parenting Plan Guidelines, and is a reversible misapplication of law by itself.

Section 452.375.9 requires that "[a]ny judgment providing for custody shall include a specific written parenting plan setting forth the terms of such parenting plan arrangements specified in subsection 8 of section 452.310" (App. A87). Section 452.310.8 then provides that the plan "shall include but not be limited to: (1) A specific written schedule detailing the custody, visitation and residential time for each child with each party including: (a)

Major holidays stating which holidays a party has each year; (b) School holidays for school-age children ….” (App. A54).

“School holidays” mean those addressed in the Supreme Court’s Parenting Plan Guidelines. *Wennihan v. Wennihan*, 452 S.W.3d 723, 737 (Mo. App. 2015). These are all public holidays occurring during the schoolyear or on three-day weekends, expressly including Martin Luther King Day, Presidents’ Day, Memorial Day, and Labor Day. *Id.*; *In re Marriage of Murphey*, 207 S.W.3d 679, 686 (Mo. App. 2006); *see* Order re: Parenting Plan Guidelines (Mo. banc Aug. 17, 2009) (App. A62).

The trial court “is not free to disregard any of the[se] enumerated events.” *Wennihan*, 452 S.W.3d at 737. Rather, “each of these days must be specifically addressed” and the parenting plan must state “how and with whom … contact occurs” on those days. *In re Marriage of Alred*, 291 S.W.3d 328, 335-36 (Mo. App. 2009).

“The failure to account for such holidays in the parenting plan constitutes reversible error.” *Wennihan*, 452 S.W.3d at 737 (reversing judgment and remanding for new parenting plan where it omitted any mention of Presidents’ Day and Martin Luther King Day); *see also Murphey*, 207 S.W.3d at 686 (same re: omission of any mention of Martin Luther King Day, Presidents’ Day, Memorial Day, or Labor Day); *Alred*, 291 S.W.3d at 335-36 (same).

The same is true here. Indeed, *Murphey* and *Alred* are directly on point. As the trial court’s judgment notes, all three children are school-age (D19 p. 13; App. A13). But the parenting plan is devoid of any mention of

their placement on Martin Luther King Day, Presidents' Day, Memorial Day, or Labor Day (D19 pp. 13-17; App. A13-17).

As in *Murphey*, *Alred*, and *Wennihan*, this is reversible error. The Court should reverse the trial court's judgment and remand this case with instructions to follow the requirements of §§ 452.375.9, 452.310.8, and the Supreme Court's Parenting Plan Guidelines, and include parenting time provisions for Martin Luther King Day, Presidents' Day, Memorial Day, and Labor Day.

III. The trial court misapplied the law in awarding Mother child support of $814.00 per month *because* under § 452.340, R.S.Mo., and Rule 88.01, when a trial court awards an amount of child support that neither party requested, it must attach its own Form 14 or otherwise lay out in its judgment exactly how it calculated that amount *in that* neither Father's nor Mother's Form 14 calculated child support at $814 per month, but the trial court's judgment does not state exactly how calculated this amount, nor did the court attach its own Form 14 to the judgment.

Rule 84.04(e) Preservation Statement

Under Rule 78.07(c), Father preserved this issue for review in his timely motion to amend the judgment (D20 pp. 11-13).

* * *

In its judgment, the trial court set the amount of Father's child support at $814 per month (D19 pp. 9, 20; App. A9, A20). It stated this amount was "in accordance" or "in conformity" "with Rule 88 and Form 14 guidelines" (D19 pp. 9, 20; App. A9, A20). But the judgment never says exactly how the court calculated this amount, nor did the court attach its own Form 14 to the judgment.

The law of Missouri is that this violates § 452.340, R.S.Mo., and Rule 88.01, and is reversible error. This is because the trial court's failure to show how it calculated Father's Form 14 presumed child support at $814 per month by attaching its own Form 14 or otherwise laying out that calculation is inadequate to "allo[w] for meaningful appellate review of [its] child support

calculation." *Wood v. Wood*, 391 S.W.3d 41, 49 (Mo. App. 2012). The Court should reverse the trial court's judgment and remand this case for a new child support calculation.

Section 452.340.8 provides that "[t]he Missouri [S]upreme [C]ourt shall have in effect a rule establishing guidelines by which any award of child support shall be made in any judicial or administrative proceeding." (App. A81). "In compliance with the legislature's mandate, the Missouri Supreme Court has adopted Rule 88.01." *Crow v. Crow*, 300 S.W.3d 561, 564 (Mo. App. 2009). The Supreme Court then "adopted Civil Procedure Form No. 14, which mandates the items to be considered in the calculation of child support and provides a formula for determining the presumed correct child support amount as envisioned by section 452.340 and Rule 88.01." *Id.*

"Rule 88.01 sets forth a two-step procedure for calculating child support." *Id.* The "trial court is required to (1) determine and find for the record the presumed correct child support amount by using Form 14; and (2) make findings on the record to rebut the presumed correct child support amount if the court, after consideration of all relevant factors, determines that amount is unjust and inappropriate." *Id.*; *see* Rule 88.01 (App. A89).

"Under the first step, a trial court can either accept a Form 14 amount calculated by a party, or if the court rejects the parties' Form 14 amounts as incorrect, the court must prepare its own correct Form 14 calculation." *Crow*, 301 S.W.3d at 564. But "[e]ither way", "[t]he use of Form 14 in calculating child support in a modification proceeding is mandatory," and "the record should clearly show how the court arrived at its Form-14 amount." *Id.*

Here, the trial court rejected both parties' Form 14s. Mother's Form 14 had calculated Father's presumed child support amount as $1,037 (D18 p. 1). Father's Form 14 had calculated a presumed amount of $246 (Res.Ex. B). The judgment's stated amount is $814 (D19 pp. 9, 20; App. A9, A20). So, the trial court had to have calculated this amount on its own.

But "the trial court did not attach any Form 14 worksheet to the judgment. The court did not provide any findings as to how it arrived at the amount of Father's child support obligation. Instead, the court merely concludes in its modification judgment that the amount of child support Father was ordered to pay" is $814. *Crow*, 301 S.W.3d at 564.

This was reversible error. *Id.*; *Wood*, 391 S.W.3d at 49. The trial court's failure to attach a Form 14 to the Judgment showing how it calculated child support at $814 "failed to determine and find for the record the presumed correct child support amount pursuant to Form 14 and thus failed to make findings required by Rule 88.01." *Crow*, 300 S.W.3d at 561 (reversing judgment stating child support amount but without showing Form 14 calculation or attaching Form 14).

A trial court either can "complet[e] a Form 14 worksheet and mak[e] it part of the record, or" it can "articulat[e] on the record how it calculated its Form 14 amount." *Killian v. Grindstaff*, 987 S.W.2d 497, 499 (Mo. App. 1999). But it must take one of these routes. *Id.* Here, it did neither.

"[B]ecause the [trial] court did not include the Form 14 in its judgment, and neither its findings nor the record clearly indicate how the court arrived at the $[814] child support amount", the judgment is not "in conformity with

[§] 452.340 and Rule 88.01." *Wood*, 391 S.W.3d at 49. This does not "allo[w] for meaningful appellate review" and cannot stand. *Id.* at 49-50 (reversing judgment that stated child support amount but did not show how calculated either on Form 14 or otherwise); *see also*:

- *Neal v. Neal*, 941 S.W.2d 501, 504 (Mo. banc 1997) (reversing judgment that did not show "mandatory" Form 14 "mathematical calculation", making "meaningful appellate review" "not possible");
- *Reis v. Reis*, 105 S.W.3d 514, 515-16 (Mo. App. 2003) (same);
- *Alred*, 291 S.W.3d at 336 (same);
- *Luckeroth v. Weng*, 53 S.W.3d 603, 606-07 (Mo. App. 2001) (reversing judgment because of failure to indicate on the record how trial court arrived at Form 14 child support amount); and
- *Killian*, 987 S.W.2d 499 (same).

The judgment here suffers from the same, reversible deficiency as in all these cases: stating an amount of child support neither party requested but not showing the Form 14 calculation (D19 pp. 9, 20). This is a reversible misapplication of the law. *Reis*, 105 S.W.3d at 516.

This Court should reverse the trial court's judgment and remand this case with instructions to re-determine child support and follow § 452.340 and Rule 88.01 in doing so by showing how it calculated any Form 14 presumed child support amount, "by either completing a Form 14 worksheet and making it part of the record, or by articulating on the record how it calculated its Form 14 amount." *Killian*, 987 S.W.2d at 499.

Conclusion

The Court should reverse the trial court's judgment and remand this case for entry of a new parenting plan meeting the requirements of Missouri law and for a redetermination of child support.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2016 in Century Schoolbook, size-13 font, which is not smaller than Times New Roman, size-13 font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b), as this brief contains 12,361 words.

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Certificate of Service

I certify that, on March 25, 2018, I filed a true and accurate Adobe PDF copy of this brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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