

**IN THE FAMILY COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

In re: The Matter of:)	
ANGELA FREINER,)	
)	
Petitioner,)	
)	Cause No. 14SL-DR02617-01
vs.)	
)	
JAMES S. JUDY,)	Division: 31
)	
)	
Respondent.)	

MOTION TO AMEND/MODIFY OR FOR NEW TRIAL

COMES NOW, Petitioner, by and through counsel, Hais, Hais & Goldberger, P.C., and for her post-trial Motion to Amend/Modify or for New Trial, states:

1. The above-captioned case is a modification of child custody case, for which a trial was conducted on the record on August 14, 2020. On August 28, 2020, this Court entered a Judgment of Modification (Hereinafter the “Judgment”).
2. The Judgment changed the residence of the minor child from primarily living with Petitioner in St. Louis, where she has lived for her entire 14 year life, to having her live primarily with Respondent and his new wife in Montana.
3. This Motion to Amend/Modify or for New Trial is brought pursuant to Missouri Supreme Court Rules 75.01 and 78.04.
4. Petitioner seeks to have a new trial, or for the Judgment to be amended for the foregoing reasons:

I. The Missouri Standards for Guardians ad Litem were not followed during the trial.

5. The official comment to Standard 11.0 of the MO Supreme Court Standards for Guardians ad Litem (GAL) provides in relevant part that “A guardian ad litem may

testify to particular facts and issues before the court relating to the child's best interests or the guardian ad litem's recommendation, if any. Under such circumstances, the guardian ad litem may be subject to cross-examination."

- a. In the present case, the GAL did not present her recommendation during the trial. Instead, the GAL presented her recommendation for custody of the minor child after the conclusion of the trial.
 - b. By allowing the GAL to present her recommendation after the conclusion of the trial, both parties were deprived their right to cross-examine the GAL as to her recommendation. On information and belief, Petitioner did not consent to this and there was no pre-trial motion on the record regarding this irregularity.
 - c. It is error to have allowed the GAL to present her recommendation outside of the presence of the parties. The parties should be granted the opportunity to cross-examine the GAL as to her recommendation.
6. The official comment to Standard 13.0 of the MO Supreme Court Standards for Guardians ad Litem (GAL) provides in relevant part that "During the proceedings, the guardian ad litem must inform the court of the child's wishes and preferences even though different from the guardian ad litem's recommendation."
- a. Here, the minor child testified via zoom from the GAL's office. Both parties were excluded from being present during the minor child's testimony. On information and belief, Petitioner did not consent to this and there was no pre-trial motion on the record regarding this irregularity.
 - b. The Judgment notes the minor child's preference to stay living in St. Louis with Petitioner, the Petitioner should have been given the opportunity to cross examine

the child, in great detail, as to her reasons.

II. Respondent's counsel delivered their trial documents and discovery to Petitioner the night before trial, denying Respondent the ability to adequately prepare for trial.

7. Despite the age of the case, Respondent's counsel only delivered to Petitioner his trial documents and discovery the night before the trial.
 - a. At the Final Pretrial Conference, held on August 12, 2020, the Court ordered that the parties exchange their trial exhibits no later than 5:00 PM the following day, August 13, 2020. This was too short of a time for Respondent to adequately prepare for trial.
8. On October 29, 2020, this Court ordered that Respondent answer Petitioner's interrogatories within 14 days. On information and belief, those answers were not provided until the night before trial, nearly 10 months later.
9. Respondent's delay in delivering to Petitioner his discovery and trial documents caused Petitioner undue prejudice and prohibited her from adequately preparing for trial. Petitioner raised this issue at trial.

III. The Court either misstates or misheard the testimony of Petitioner and relied on that incorrectly heard testimony in formulating the Judgment.

10. Several times in the Judgment, such as paragraph 10 and 26, the Court states that it believed that Petitioner testified that she intended to move out of the State of Missouri shortly after the trial. Petitioner actually testified that, although she would like to move away from St. Louis, that she had to stay in St. Louis for her daughter's schooling and her connections to the community.
 - a. Furthermore, even if it is Petitioner's desire to relocate after the trial, that should

have no bearing on the Court's determination, as Respondent has already relocated to Montana. Therefore, it would not be prejudicial to Respondent even if Petitioner did relocate.

11. Several times in the Judgment (e.g. paragraph 8) the Court stated that during the course of the trial, that Petitioner stated she "would not" submit to a drug test. This is not strictly accurate. Petitioner testified that she "could not" submit to a drug test because she could not afford it at the time.
12. The Court relies heavily (e.g. paragraph 33) upon its contention that Petitioner texted with the minor child immediately after the child gave testimony, in violation of the Court's instructions to the parties to not contact the child after her testimony. The Judgment fails to note that Respondent also not only communicated with the child after his testimony, but took her out for lunch on the day of trial and talked to her about her testimony. This discrepancy was raised to the Court, but is not reflected in the Judgment.
13. The Court also relied on testimony from Respondent that he needed to involve the police during one of his visits during the course of litigation. The Judgment completely ignores Petitioner's explanation of that event. Specifically, that Respondent came early for his visit in the early morning hours while the child and Petitioner were still sleeping, knocked one time, and left to fetch the police before Petitioner could get up and be ready to see who was there. This strongly indicates a "set-up" by Respondent.

IV. The Court impermissibly relied upon inadmissible hearsay at trial.

14. The general rule in Missouri is that hearsay evidence is inadmissible. *State v. Freeman*, 212 S.W.3d 173, 175 (Mo. Ct. App. S.D. 2007) (hearsay is inadmissible unless exception to hearsay rule applies); see also *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 101 (Mo.

Ct. App. W.D. 2006) (same).

- a. *State v. Sutherland*, 939 S.W.2d 373, 376 (Mo. 1997), as modified, (Mar. 25, 1997) (hearsay is an “out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value”).

15. In paragraph 16 of the Judgment, the Court noted that Petitioner’s family worried over the child’s safety when Petitioner was stranded out-of-state in 2019. Respondent testified that Petitioner’s family told him this. The alleged statements of Petitioner’s family are out of court statements, taken for the truth of the matter asserted. As such, it was improper for the Court to rely upon them, especially since they were not subject to any sort of examination by the parties or the Court.

V. The Court unfairly inferred that Petitioner used drugs beyond marijuana in formulating the Judgment.

16. During the litigation, the Court issued several orders (9/11/2019; 10/29/2019; and 2/5/2020) for Petitioner to submit to a drug test. None of the orders indicate that failure to take such a test would result in an inference against Petitioner that she was taking drugs, or more serious drugs.
17. The Court specifically noted in the Judgment that because Petitioner failed to submit to a drug test, that the Court was inferring that she had been taking drugs that did not appear on the test.
18. This may have been a permissible inference had the Court not given Petitioner the opportunity to take the drug test after her initial failure. If the Court was going to consider her failed tests as inferring drug use, then there was no need to order Petitioner to take a test on 2/5/2020. By reaching the inference of the drug use, the Court is

essentially ignoring the results of the 2/5/2020 test which it ordered. This is tantamount to the Court pre-judging Petitioner before the trial, which is impermissible and improper under the law.

19. As for the positive test for marijuana, Petitioner would point out that most family court judges in St. Louis County, St. Louis City, and St. Charles County do not consider marijuana use alone to be a determinative factor in deciding custody due to the changing legislative attitudes towards marijuana on both a State and National level.

VI. The Court impermissibly relied upon medical testimony from the GAL, for which she was incompetent to testify.

20. Parent alienation is a medical term, not a legal term.
- a. Parental alienation is not mentioned in any Missouri statute.
 - b. Parental alienation syndrome (PAS) is a term introduced by child psychiatrist Richard Gardner in 1985 to describe a distinctive suite of behaviors in children that includes showing extreme but unwarranted fear, disrespect or hostility towards a parent. Gardner, Richard (Summer 1985). "*Recent Trends in Divorce and Custody Litigation*" *Academy Forum*. 29 (2): 3–7.
21. In the Judgment, the Court expressly relied upon the GAL's belief that Petitioner had alienated the minor child from Respondent (Paragraph 35 and 38(1)(4)). Additionally, the language of the Court in those same paragraphs indicate that the Court believed Petitioner had alienated the minor child from the Respondent.
22. No experts provided any testimony or evidence in this case. Specifically, no expert testified that Petitioner alienated the child from Respondent.
23. A review of Missouri caselaw reveals no cases where a trial court was found justified in

finding parental alienation without the supporting testimony of a psychological expert. There are numerous examples though of the Court making such a finding after considering the in-dept testimony of child psychologists and other qualified mental healthcare providers. For example, see *Noland-Vance v. Vance* 321 S.W.3d 398 (Mo. App. S.W. 2010); See also *L.J.S. v. F.R.S.* 247 S.W.3d 921 (Mo. App. S.D. 2008): See also *Hazelbaker v. Hazelbaker* 475 S.W.3d 143 S.W.3d 143 (Mo. App. E.D. 2014).

24. As a general rule, expert testimony is necessary on any medical subject which is not a matter of common knowledge. See *North Kansas City Memorial Hospital v. Wiley*, 385 S.W.2d 218, 220–21 (Mo. Ct. App. 1964); see also *Cebula v. Benoit*, 652 S.W.2d 304, 307–08 (Mo. Ct. App. W.D. 1983). Expert medical testimony must be given to a reasonable degree of medical certainty. *McBurney v. Cameron*, 248 S.W.3d 36, 50 (Mo. Ct. App. W.D. 2008).
25. Here, the GAL offered testimony that the minor child was alienated from Respondent by Petitioner. This is medical testimony, for which a medical expert is required. The GAL is not a medical expert, and so she was incompetent to provide such testimony. Therefore, it was improper for the Court to consider, much less rely, upon the GAL’s testimony regarding parental alienation.
26. Additionally, the Court failed to consider the testimony from the minor child that indicates that Petitioner actively encouraged the child’s relationship with Respondent.

During trial, the child testified:

“GAL- Ok. Did your Mother tell you that you did not have to go with your Dad last summer?

Dalilah- Uhm, last summer she said that if I, even though I didn’t want to I still had to. Per courts.

GAL- What about Thanksgiving?

Dalilah- She told me that I had to because it was his time.

GAL- What about last Christmas?

Dalilah- She told me that I had to even though I did not want to.

GAL- And, this summer did she tell you that you didn't have to go?

Dalilah- No, she told me that I had to even though I didn't want to.

GAL- Is your Dad able to reach you by telephone?

Dalilah- Yes.

GAL- Does your Mother block his number?

Dalilah- No.

GAL- Are your Father's calls frequently unanswered or ignored throughout the year by you?

Dalilah- Yeah, because I don't like talking to him.

GAL- Ok, you don't like talking to him?

Dalilah- No"

VII. The Court failed to give proper weight to the preferences of the minor child and failed to adequately consider the child's reasons for wanting to live with Petitioner.

27. It is an uncontroverted fact that the minor child, who is 14 years old, testified that she wants to continue living primarily with Petitioner.

28. The Court, in paragraph 35(2) noted that Respondent testified that the minor child has a good relationship with his wife. This goes against the specific testimony of the minor child.

a. When asked about her stepmother, the minor child testified "She's (the stepmother) just uhm controlling. Get's in my head and like whenever I try to talk to her about I feel she's always like 'really?' my feelings and tells me that's not how I feel and uhm try to tell me how I do feel even though that's not how I feel and every time I do tell her how I actually feel that that's not how I actually feel. She tells me that I'm lying."

29. As stated before, the Court severely discounted the child's connections to St. Louis because it believed that Petitioner intended to move after the trial concluded. This was

not the testimony at trial though. The child testified about her own connections to St. Louis.

- a. When asked about how the child spend's her free time with her mother, the child testified that "At my mom's house I do cheer and I was part of the web team this past school year. So, whenever I wasn't doing that I typically had a lot of free time. And, Which I would spend with my Mom and like friends."
 - b. The child's connections to St. Louis are significant and her concerns of her dad and stepmom poses a risk to her. Therefore, the Court's judgment of relocating the child to Montana poses a severe risk of harm to the child.
30. Most importantly, the Court made numerous findings that Petitioner did not encourage the minor child's relationship with Respondent. This directly contradicts the testimony of the child, as discussed above in paragraph 26.
31. In disregarding the minor child's living preferences, the Court failed to take into account Respondent's insensitive and bullying comments that have affected his relationship with the minor child.

- a. At trial, the minor child testified that:

"GAL- ok, these next questions are my questions. Why don't you like talking to your Father?

Dalilah- Because every time I talked to him, he makes me fell uhm insecure whenever I'm with him and I talk about cheer. Because, he would be like uh, well good you could lose a few pounds or comments like that. And it makes me insecure and whenever I talk to him, he always makes jokes that I don't find funny. Like about like my Mom and stuff.

GAL- What does he say about your Mom?

Dalilah- Uhm, like all the time, he will just be making like comments. Uh, like whenever we were in Montana. We would drive past a high school and he would be like that is going to be your high school next year or he would be like I've put a lot of work into this, a lot more than some people have. Oh, you know, just like smirky comments all the time and it really gets to me and so I don't want to talk

to him.

GAL- Is there anything that you would like the court to know?

Dalilah- Uhm, whenever I go out there for the summer, I do get real depressed and it's really hard and I just fell like I can't be me when I'm out there. (crying)"

- b. The above testimony strongly indicates that it is Respondent, and not Petitioner, who has actively hurt both his relationship with the minor child, but also the relationship between Petitioner and the minor child.
32. The minor child did express that she would like to continue to spend time with Respondent, just not so much during the school year. This fact alone strongly goes against Respondent's allegations that Petitioner has hurt the relationship between Respondent and the minor child.

- a. At trial, the child testified that:

"Dalilah- Uhm, I would like to go see my Dad whenever I want to go see my Dad. Uhm, like he could have me during summers but if I didn't want to go out there for the summer then I wouldn't want to be forced to. And same with like Christmas Break and stuff. I would want it to be optional. That if I wanted to go, I could tell him in advance so that he could get me a plane ticket and stuff."

Later, the child testified that:

"Judge- I'll ask you once again Dalilah, I know the GAL has asked you this but do you have any additional comments you would like to make directly to the court before we put you in the waiting room?
Dalilah- Uhm, if I were to go home with my Dad, I would not be happy. (crying) It would be very hard."

VIII. The evidence presented at trial indicate that it is in the minor child's best interests to remain primarily living with Petitioner.

33. Evidence was presented that the minor child, who is 14 years old, strongly prefers to continue living with Petitioner, that she likes her school, and that she has ties in St. Louis.
34. Evidence was presented that Respondent violated the orders of the GAL during the

pendency of the case by staying overnight with the minor child at the home of his father, who is a registered sex offender.

35. Evidence was presented that Respondent has a relatively recent conviction for domestic violence against his present wife.
36. Evidence was presented that Petitioner and the minor child have a strong bond and a good and healthy relationship.
37. Evidence was presented that it would be a financial hardship for Petitioner to travel to Montana to exercise her custody time with the minor child.
38. Evidence was presented that the minor child does not trust Respondent.
39. Evidence was presented that Respondent's adult daughter has concerns over the minor child staying with Respondent, to the point of providing the child with the address of a "safe house" in the event that she needs it.
40. Evidence was presented that the Afton School district is better than the proposed school district for the minor child in Montana.

WHEREFORE, Petitioner prays that this Court amend or modify the Judgment, in the alternative order a new trial, and grant any other orders just and proper.

HAIS, HAIS & GOLDBERGER, P.C.

/s/ Daniel Zdrodowski

By: _____

Susan M. Hais, #25165
Daniel Zdrodowski, #67020
222 S. Central Avenue, Suite 600
Clayton, Missouri 63105
(314) 862-1300
(314) 862-1366 (Fax)
Email: susan@hgg-law.com
Email: daniel@hgg-law.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon all parties of record by way of Missouri electronic filing on this 28th day of September 2020.

/s/Kelsie Barnes
