APPENDIX

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APPENDIX A

Supreme Court of Missouri
en banc

SC100357
ED111315

[Filed January 30, 2024]

Tamara Yao,	)
Respondent,	)
	)
vs. (TRANSFER)	)
	)
Franck William Yao,	)
Appellant.	)
	)

MANDATE

January Session, 2024

Now at this day, on consideration of Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of

said Supreme Court, entered of record at the January Session, 2024, and on the 30th day of January, 2024, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 30th day of January, 2024.

/s/ Betsy AuBuchon, Clerk

/s/ [signature], Deputy Clerk

[SEAL]

APPENDIX B

In the Missouri Court of Appeals
Eastern District

DIVISION TWO

No. ED111315

[Filed October 10, 2023]

TAMARA YAO,	)
Respondent,	)
	)
vs.	)
	)
FRANCK WILLIAM YAO,	)
Appellant.	)
	)

Appeal from the Circuit Court
of St. Louis County

Honorable Heather R. Cunningham

FILED: October 10, 2023

Before Kurt S. Odenwald, P.J., Michael E. Gardner, J., and Renée D. Hardin-Tammons, J.

PER CURIAM

ORDER

Franck William Yao appeals from the judgment of the circuit court modifying the custody arrangement and child support award relating to his and Tamara Yao's minor child. Having reviewed the briefs of the parties and the record on appeal, we conclude no reversible error occurred. A written opinion would serve no jurisprudential purpose. We have, however, provided a memorandum setting forth the reasons for our decision to the parties for their use only. We affirm the judgment pursuant to Missouri Supreme Court Rule 84.16(b) (2023).

APPENDIX C

In the Missouri Court of Appeals
Eastern District

DIVISION TWO

No. ED111315

[Filed October 10, 2023]

TAMARA YAO,	)
Respondent,	)
	)
vs.	)
	)
FRANCK WILLIAM YAO,	)
Appellant.	)
	)

Appeal from the Circuit Court
of St. Louis County

Honorable Heather R. Cunningham

FILED: October 10, 2023

Before Kurt S. Odenwald, P.J., Michael E. Gardner, J., and Renée D. Hardin-Tammons, J.

MEMORANDUM SUPPLEMENTING
ORDER AFFIRMING JUDGMENT
PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Franck William Yao ("Father") appeals from the trial court's judgment on competing motions to modify a prior modification of the decree of dissolution between him and his former wife, Tamara Yao ("Mother"). Father raises eight points on appeal. Finding no reversible error, we affirm.

Factual and Procedural Background

There is an extensive and litigious history between the parties from the dissolution of their marriage until the judgment at issue in this case. We do not recite that full history here, and only discuss the background that is necessary for the resolution of the issues on appeal.

Mother and Father's marriage was dissolved in 2012. The judgment of dissolution granted the parties joint legal custody of their one child ("Child") and awarded Mother sole physical custody. Father, who has lived in California since before Child was born, was granted periods of temporary custody and visitation and was ordered to pay $1,288.00 per month in child support. In 2014, Father sought modification of physical custody and requested Child be relocated to California. Mother also sought modification of the judgment and requested sole legal custody of Child. In 2016, the trial court entered its judgment modifying the 2012 Dissolution Judgment by granting Mother sole legal custody of Child and decreasing Father's child support contribution to $847.00 per month. The 2016 Modification Judgment maintained Mother's sole physical custody of Child and granted Father visitation for one weekend per month from 12:00 p.m. on Friday to 9:00 a.m. on Monday in St. Louis, with the possibility of an additional weekend with 30 days' notice, and additional time during school breaks and holidays. Father was prohibited from removing Child from Missouri without Mother's consent and was prohibited from applying for a passport for Child. Father was able to exercise visitation in California once Child turned 10 years old.

In October 2020, Father filed a motion to modify the Modification Judgment, seeking sole legal and physical custody of Child and seeking to relocate Child to California. He later filed a "First Amended Motion to Modify," which sought sole legal and physical custody of Child and permission to relocate Child to California, and a "Second Amended Motion to Modify," which

sought to remove restrictions on his ability to obtain a passport for Child and travel internationally with Child. Mother filed a counter-motion to modify requesting that all of Father's visitation be supervised and occur in St. Louis, that child support be recalculated, and that she be awarded attorney fees. The trial court appointed a Guardian Ad Litem ("GAL") in March 2021. The trial court later entered a Custody Evaluation Order, on Father's motion, and a custody evaluation was completed by Dr. D.L.[1]

In March 2021, Mother filed for a temporary restraining order ("TRO") and preliminary injunction. The trial court issued a TRO in March 2021 that enjoined Father from exercising visitation in California, from initiating telephone calls with Child to which Child did not consent, and from contacting officials at Child's schools. The trial court issued another TRO in September 2021 that restrained Father from unsupervised visitation, and issued a preliminary injunction in November 2021. This preliminary injunction enjoined Father from exercising unsupervised visitation with Child, granted Father supervised visitation for one weekend per month from 9:00 a.m. to 5:00 p.m. on Saturday and Sunday in St. Louis with the option for Father to have a second weekend with 30 days' notice, and enjoined Father from initiating telephone calls with Child to which Child did not consent. The preliminary injunction was ordered to be in full force and effect until the court's

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[1] In accordance with section 509.520, we do not utilize the names of witnesses in this case and instead refer to them by their initials. *See* section 509.520.1(5) (effective August 28, 2023).

ultimate ruling on the merits of the motions to modify, after a trial.

The trial on the merits of the parties' motions to modify was held over three days in September 2022. Per the trial court's order, the parties were each given 6.5 hours to present their case, and the GAL was given four hours. The parties testified at trial, along with Father's current wife, Child's psychiatrist, the court-ordered custody evaluator, an expert who reviewed the custody evaluation, and the Director of Special Education for Child's school district. Both Mother and Father submitted requests for attorney fees. In December 2022, the trial court entered its Modification Judgment. The 2022 Modification Judgment maintained Mother's sole legal and physical custody of Child, altered Father's visitation, increased Father's monthly child support obligation, and ordered Father to pay some of Mother's attorney fees. This appeal follows.

Standard of Review

Our review of a judgment on a motion to modify a dissolution decree, or previous modification thereof, is governed by the standard announced in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *Mehler v. Martin*, 440 S.W.3d 529, 531 (Mo. App. E.D. 2014). Accordingly, we will affirm the modification judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* On review, we view the evidence and all reasonable inferences therefrom in the light most favorable to the judgment. *Id.* Broad deference is afforded to the trial court in child custody matters and we will not reverse a custody

determination "unless it is manifestly erroneous and the best interests of the child[] require a different result." *Id.*

Discussion

In eight points on appeal, Father challenges the trial court's 2022 Modification Judgment. In his first three points, Father disputes the trial court's denial of his motion to modify the custody arrangement, in which he sought to relocate Child and reduce restrictions on his visitation rights. In his fourth point, Father complains of the trial court's finding that the court-appointed custody evaluator was not credible. In his sixth point on appeal, Father takes issue with the trial court's management of the trial and the time allotted for the parties' presentation of evidence. And in his remaining three points, Father contests the trial court's calculation of child support and award of attorney fees. For the following reasons, we conclude that none of Father's claims have merit. For clarity, we address Father's arguments out of order.

Credibility Finding Regarding Dr. D.L. (Point IV)

In his fourth point on appeal, Father claims the trial court erred in considering the opinion of Dr. N.W. that Dr. D.L.'s custody evaluation and testimony were not credible. We disagree and find that Father's argument misstates the record.[2]

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[2] We also note that, during his direct examination of Dr. D.L., Father's counsel asked Dr. D.L. for his opinion on Dr. N.W.'s report.

In its 2022 Modification Judgment, the trial court found that, "[a]fter hearing the evidence and reviewing Dr. [D.L.'s] report, the Court finds his report and recommendation not credible." This finding was based "upon the credible testimony of Dr. [N.W.'s] and the Court's concerns regarding Dr. [D.L.'s] failure to follow the Court's Order as well as the recognized guidelines in his profession." The trial court detailed that Dr. D.L. "failed to rely on the AFCC[3] Guidelines and APA[4] Model Standards on many fronts, thus[] violating the standard of practice of an expert in the field of child custody evaluations," including failing to conduct a parent-child observation, failing to administer valid testing to the parties, and failing to interview Child's treating psychiatrist. The trial court also noted multiple instances of concerning behavior and disparate treatment of the parties on the part of Dr. D.L., in addition to the fact that Dr. D.L. did not read the trial court's Child Custody Evaluation Order. Lastly, the trial court also found "no evidence from [Dr. D.L.'s] report that he reviewed any of the mental health records or any other documents that were provided to him."

The trial court's finding that Dr. D.L. was not credible was not based on any inappropriate opinion of Dr. N.W. In fact, at no time did Dr. N.W. opine as to Dr. D.L.'s credibility; instead, her testimony related to professional practices, standards, processes and methodologies, and how Dr. D.L.'s evaluation process

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[3] The AFCC is the Association of Family and Conciliation Courts.

[4] The APA is the American Psychological Association.

either met or deviated from these standards. Indeed, Dr. N.W. specifically declined "to opine on that" when asked if Dr. D.L.'s conclusions regarding custody were in error. Dr. N.W. is a psychologist with extensive experience in court-ordered custody evaluations. The trial court could properly rely on her testimony as to the practices and standards of the profession. *See Hill v. City of St. Louis*, 371 S.W.3d 66, 75-78 (Mo. App. E.D. 2012); *see also Peterson v. Nat'l Carriers, Inc.*, 972 S.W.2d 349, 357 (Mo. App. W.D. 1998) ("An expert does not improperly comment on credibility simply because his or her testimony, if accepted, may cause the [trier of fact] to conclude that a witness is not credible.").

Moreover, there was other evidence beyond Dr. N.W.'s testimony that the trial court could rely upon in its credibility determination. Child's treating psychiatrist also testified to the "unusual" nature of Dr. D.L.'s report in that it lacked "any sort of standardized measures." And Dr. D.L. himself testified that some of the methods employed in his evaluation were not those recommended by the governing professional associations. For instance, Dr. D.L. admitted that the APA Ethics Code indicates that information received from an invalid test should not be relied upon in an evaluation, but he also admitted to administering tests to both Father and Mother that he himself testified were invalid. Similarly, Dr. D.L. also admitted he never met with Child and a parent at the same time to observe their interaction, which is generally standard practice in custody evaluations. Dr. D.L. further admitted that, in contravention of the trial court's evaluation order, he met virtually with Mother while he met in-person with Father.

It was within the trial court's purview to find Dr. D.L. not credible based on his behavior throughout the case and his failure to adhere to the standard practices of his profession during the custody evaluation. We are not convinced that the trial court exceeded its authority in making this credibility finding, and we defer to such credibility determinations. *See Mehler*, 440 S.W.3d at 534. Point IV is denied.

Denial of Amended Motion to Modify - Relocation (Point I)

In his first point on appeal, Father argues the trial court erred in denying his Amended Motion to Modify, in which he requested to modify the parties' custody arrangement and relocate Child to California. Father asserts that he demonstrated a substantial change in circumstances through the dramatic increase in Child's behavioral issues while in Mother's care and the breakdown in communication and cooperation between the parties. He also contends he established that relocating Child to live with him in California would be in Child's best interest. We disagree.

i. Law governing motions to modify custody and approve relocation

A modification of custody is governed by section 452.410,[5] which provides in relevant part that a court

[5] All references to section 452.410 are to RSMo (2016). *See T.J.E. v. M.R.M.*, 592 S.W.3d 399, 401 n.2 (Mo. App. E.D. 2020). Case law relied upon in this opinion discusses substantially similar versions of the statutes discussed herein.

> shall not modify a prior custody decree unless . . . it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child.

Section 452.410.1; *see also Russell v. Russell*, 210 S.W.3d 191, 196 (Mo. banc 2007). This statutory requirement begets a two-part inquiry: (1) whether there is a change in the circumstances of the child or custodial parent; and (2) if such a change in circumstances exists, whether modification is necessary to serve the best interests of the child. *Morgan v. Morgan*, 497 S.W.3d 359, 364 (Mo. App. E.D. 2016).

The required change in circumstances differs based on the type of modification sought. *Russell*, 210 S.W.3d at 196-97. Where, as here, the modification would be from one parent having sole custody to the other parent having sole custody, a substantial change in circumstances is required. *Id.* at 197 ("A change from sole custody in one parent to sole custody in another parent is drastic, and courts rightly conclude[] that the modification must be based on a 'substantial' change."); *Morgan*, 497 S.W.3d at 365 (terming this the "Section 452.410 Case Law Standard"). If the evidence shows a substantial change in circumstances based upon "facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree," the court must then determine if a modification is in the best interests of the child, guided by the factors set

forth in section 452.375.2.[6] *Morgan*, 497 S.W.3d at 371, 373 (quoting section 452.410.1).

ii. The trial court did not err in denying Father's Amended Motion to Modify

In his Amended Motion to Modify, Father argued that he should be awarded sole legal and sole physical custody of Child and that he should be permitted to relocate Child to California. Father contended that modification was necessary based on Child's behavior and Mother's inability to control or care for him, in addition to a breakdown in communication and cooperation between the parties.

To meet his burden on this motion to modify, Father was required to show: first, a substantial change in circumstances of Child or Mother (his custodial parent), related to both physical and legal custody, based upon "facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree"; and second, that modification and relocation to California was in Child's best interest. *Morgan*, 497 S.W.3d at 371, 373. Father failed to meet this burden and therefore the trial court did not err in denying his Amended Motion to Modify.

First, Father failed to show a substantial change in circumstances of Child or Mother based upon "facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree" related to legal custody. Section 452.410.1. The 2016

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[6] All references to section 452.375 are to RSMo (Cum. Supp. 2020). *See id.*

Modification Judgment that Father sought to modify found a substantial change in circumstances relating to legal custody that warranted modifying the joint legal custody arrangement to give Mother sole legal custody. This modification was based on the parties' difficulties in parenting cooperatively and their inability to make decisions "without controversy," along with Father's weaponization of communications. In the present case, Father sought a modification of the legal custody awarded in this judgment because "the lines of communication between [Father] and [Mother] had deteriorated dramatically." According to Father, this included Mother failing to keep Father informed of major decisions in Child's life and to ensure he had access to all of Child's educational and health records. In denying Father's Amended Motion to Modify, the trial court found that the essence of Father's argument was "the same from the Dissolution of Marriage and first Motion to Modify." The trial court also found that, contrary to Father's claims, the evidence from Our Family Wizard showed "a history of direct communication from Mother to Father on all aspects of [Child's] life," but that "Father rarely responds with any productive comments to Mother in said communications." These findings are supported by the record. As such, it was not error to deny Father's Amended Motion to Modify the legal custody arrangement. *See Ndiaye v. Seye*, 489 S.W.3d 887, 897 (Mo. App. W.D. 2016) (noting that evidence showed parties had "not communicated particularly well at any point" and concluding that, "unless the alleged communication problems are different in kind or severity than those anticipated by the [previous]

modification, they should not be considered a change of circumstances").

Second, even assuming a substantial change in Child's circumstances related to physical custody—which Father asserts is established by Child's behavioral issues and 2019 diagnoses of DMDD (Disruptive Mood Dysregulation Disorder) and ADHD (Attention-Deficit/Hyperactivity Disorder)—Father had failed to show that awarding him sole custody and relocating Child to California would be in Child's best interest. *See* section 452.377.10[7] ("The party seeking to relocate shall have the burden of proving that the proposed relocation is made in good faith and is in the best interest of the child."). Father argued that Child was "beyond the control of [Mother]" and that relocating to California would provide Child "a fresh start" and a "stable, safe and happy environment" not available to him in Missouri. In determining that it was in Child's best interests for Mother to retain sole custody, the trial court was guided by sections 452.375 and 452.410 and made the following findings on the Child's best interests:

- The Court has considered the wishes of both parties and the Parenting Plans submitted by both as well as the recommendation of the GAL.
- The Court has considered the best interests of the child for a frequent, continuing, and meaningful relationship with both parents.

[7] All references to section 452.377 are to RSMo (Cum. Supp. 2020).

Credible evidence supported that, despite Father's vitriol and attitude toward Mother, Mother has encouraged him to be a part of [Child's] life. Mother testified that [Child] asks for his Father and there have been numerous occasions during this litigation where Father has had the opportunity to see [Child] and Father declined. Mother testified that on one particular occasion [Child] was ready to go and was excited to see Father, and a few minutes before Father was to pick up [Child], Mother received the message from her attorney that Father had refused the visitation because he did not agree with an e-mail sent by Mother's attorney. The Court finds Father has had ample opportunity to see [Child] pursuant to the first Modification Judgment, but failed to avail himself of those visits.

- The Court finds Father's Parenting Plan and continued requests for the Court to grant only supervised visitation to Mother evidences Father's intention to deny [Child] the relationship he requires with Mother. Additionally, the Court finds credible evidence supports Father's efforts to undermine Mother's parental position with [Child] including telling [Child] that he is not "safe" with Mother and continuing to accuse Mother of physical abuse against [Child] that even [Child] denied ever taking place.

- The Court considered the interaction and interrelationships of [Child] with parents and other persons who have a significant effect on the child's best interests. The Court finds [Child] has a plethora of people in which he can rely upon in St. Louis, Missouri. When Father was asked the name of the psychiatrist that he researched in California to treat [Child], Father could not recall such person's name. The Court finds [Child's] interaction and interrelationships with his psychiatrists, counselor, teachers, principal, special school district, resource police officer and other care providers beneficial and critical to [Child's] success. The Court finds credible evidence that Mother is doing her best to sustain and support this interaction and interrelationships for [Child]. The Court finds credible evidence that Father does not support the interaction and interrelationships that [Child] experiences here in St. Louis, mainly because he does not acknowledge, understand, or comprehend [Child's] emotional, psychological, or educational needs.

- The Court finds that Mother is more likely than Father to encourage frequent and meaningful contact with the other parent. The Court finds credible evidence was adduced that Mother demonstrated a willingness to do so. The Court finds Father continues to be an obstruction to Mother's

efforts in a number of areas of parenting. For example, during Mother's testimony regarding her relationship with [Child], the efforts made to stabilize his behaviors, [Child's] rages, and the challenges that they both face, Father laughed and mocked Mother to the point that the Court instructed Father to refrain from such conduct. Additionally, Father's proposed parenting plan provides less meaningful and frequent contact, demonstrating to the Court[] Father's unwillingness to co-parent.

- The Court heard evidence about the child's adjustments to home and community. The Court finds given [Child's] challenges, [Child] seems to be constantly learning and improving in ways in which Mother is very supportive. The Court finds credible evidence that Father continues to deny [Child's] challenges and demonstrates limited insights to [Child's] behavior issues.

- The Court considered the mental and physical health of all individuals involved. The credible evidence is that [Child] has a diagnosis of DMDD and ADHD. Mother testified that at times [Child] is challenging, but she is managing her own mental health and needs through her own counselor and the support system she has built around herself and [Child]. Father's behavior is concerning to the Court. The Court finds credible evidence that Father failed to demonstrate

> insight into [Child] and denies the challenges [Child] faces. Additionally, the Court finds Father failed to consistently exercise his visitation prior to the injunction. Rather, Father's focus and solution appears to be bringing [Child] to California as the cure to [Child's] issues and challenges. The Court finds Father's continued denial and issues to relocate to California started from the time of [Child's] birth, to the dissolution, to the first Modification, and still exist today.
>
> - The Court finds that Father filed a Motion requesting [Child] to relocate to California. Although Father had filed a request to relocate, the Court finds no evidence to support relocating [Child] to California is in [Child's] best interest.
> - The Court finds there was no credible evidence as to [Child's] true wishes about where he wants to live and with whom. The Court defers to the recommendation of the GAL as evidence of [Child's] wishes to remain in St. Louis, Missouri with his Mother.

The trial court found that all of the best-interest factors weighed in favor of maintaining the current custody arrangement, and that relocating Child to California would not be in Child's best interest. These findings are amply supported by the record.

Father's argument to the contrary is largely premised on Dr. D.L.'s report and testimony, which the

trial court specifically found not to be credible. Father also discounts the trial court's finding that Mother's testimony was credible and that his was not, and recites evidence supporting his requested modification but ignores evidence supporting the judgment. Father's argument, therefore, ignores our standard of review. *See Pasternak v. Pasternak*, 467 S.W.3d 264, 274 (Mo. banc 2015) ("[T]he fact that [f]ather believes that his contrary evidence was more credible and should have been accepted is irrelevant because this Court disregards contrary evidence and instead considers only whether the trial court's decision, considering all inferences in its favor, was supported by substantial evidence."). To follow Father's argument and find in his favor, "this [C]ourt would be required to reweigh the evidence and supersede the trial court's witness credibility determinations. That, this [C]ourt will not do." *Morgan*, 497 S.W.3d at 377 (citations omitted); *see also Hark v. Hark*, 567 S.W.3d 671, 678-79 (Mo. App. E.D. 2019).

Father has failed to convince us the trial court's judgment misstated or misapplied the law, or was otherwise in error.[8] After a careful review of the record,

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[8] We struggle to understand precisely what legal challenge Father brings regarding the denial of his motion to modify. His Point Relied On argues the trial court made "an erroneous conclusion of law," but the thrust of Father's argument appears to be that the trial court's findings and conclusions were against the weight of the evidence. This confusion violates our briefing requirements. *See Wilson v. Murawski*, 634 S.W.3d 678, 684 (Mo. App. E.D. 2021). Moreover, to the extent that Father attempts to articulate an against-the-weight-of-the-evidence challenge, he has wholly failed to follow the four necessary analytical steps to do so. *See*

we are not left with a firm belief that the trial court's denial of Father's Amended Motion to Modify was erroneous or that the best interests of Child require a different result. Point I is denied.

Denial of Amended Motion to Modify – Travel Restrictions (Point II)

In his second point on appeal, Father contends the trial court erred in denying his request to remove the travel restrictions that prohibited Father from applying for a passport for Child or travelling internationally together. As explained below, Father's briefing of this point is deficient such that our review thereof is impeded and we therefore deem Point II abandoned.[9] *See E.K.H.-G. v. R.C.*, 613 S.W.3d 449, 453 (Mo. App. E.D. 2020).

Hark v. Hark, 567 S.W.3d 671, 678 (Mo. App. E.D. 2019) ("[T]o succeed in an 'against the weight of the evidence' challenge, [m]other needed to provide this Court all the evidence in the record supporting the trial court's decision, provide all the evidence contrary to the trial court's decision resolving all conflicts in testimony in accordance with the trial court's credibility determinations, and then demonstrate why the favorable evidence, with the reasonable inferences drawn from that evidence, is so lacking in probative value. Here, all [m]other does is reargue her evidence, ignoring all the contrary evidence.") (citing and applying test laid out in *Houston v. Crider*, 317 S.W.3d 178, 187-88 (Mo. App. S.D. 2010)).

[9] In addition to his deficient argument given its lack of legal authority, Father has also failed to include a statement describing whether, and how, his claim of error was preserved for appellate review, in violation of Rule 84.04(e). *See Williams v. Williams*, 669 S.W.3d 708, 716 (Mo. App. E.D. 2023).

The argument section of an appellant's brief must "demonstrate how principles of law and the facts of the case interact" and "must explain why, in the context of the case, the law supports the claim of reversible error." *Pickett v. Bostwick*, 667 S.W.3d 653, 661 (Mo. App. W.D. 2023) (citations omitted). The "[f]ailure to cite relevant authority supporting the point or to explain the failure to do so preserves nothing for review." *E.K.H.-G.*, 613 S.W.3d at 453. In his argument, Father makes conclusory statements and cites no supporting legal authority in either his appellate or reply briefing.[10] "Mere conclusions and the failure to develop an argument with support from legal authority preserves nothing for review." *Williams v. Williams*, 669 S.W.3d 161, 167 (Mo. App. E.D. 2023) (quoting *Bennett v. Taylor*, 615 S.W.3d 96, 100 (Mo. App. E.D. 2020)). Further, the argument highlights only the evidence favorable to Father's claims and ignores evidence supporting the trial court's judgment, in contravention of our standard of review. *See Pasternak*, 467 S.W.3d at 274; *Mehler*, 440 S.W.3d at 531. Father's argument regarding travel restrictions is analytically insufficient. *See Pickett*, 667 S.W.3d at 661-62 (finding argument insufficient where appellant did "not include any meaningful caselaw supporting his claims beyond vaguely citing a standard [of] review," failed "to provide a concise statement describing whether the error was preserved for our review," and cited "biased facts and makes broad conclusions unconnected to authority").

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[10] The only legal citation included in the argument section is for the general proposition that, "if the decision is against the weight of the evidence, the judgment can be overturned."

Moreover, even were we to attempt to engage with Father's argument, we would find it meritless. The 2022 Modification Judgment placed the restriction that "Father is required to surrender to the Court or the GAL, any United States or foreign passport in his possession for the child, including a passport issued in the name of the child or both the Father and the child. Father is prohibited from applying on behalf of the child for a new or replacement passport or visa." We are not convinced that these restrictions constituted an abuse of the trial court's broad discretion. Father contends that the travel restrictions were based upon a mistaken belief about his immigration status; he asserts that, because he is a lawful permanent resident, the travel restrictions are unjustified. Contrary to Father's argument that the travel restrictions could only be based on a misunderstanding of Father's immigration status, there are many factors a trial court considers when determining the parameters of custody.

Trial courts hold significant discretion over the structure of visitation rights and ensuring such visitation is in the child's best interests, including the fashioning of appropriate travel restrictions. *See, e.g.*, *Rios v. Rios*, 935 S.W.2d 49, 51-52 (Mo. App. E.D. 1996); *In re C.H.*, 412 S.W.3d 375, 388-89 (Mo. App. E.D. 2013). Here, for instance, the trial court could properly consider numerous factors outside of Father's legal immigration status, including Father's stated intentions to travel with Child outside the country, Father's significant familial ties with Côte d'Ivoire and France, Father's means, and the location of Child's support systems. Although we recognize that the

international travel limitation is restrictive, we are not convinced that it constituted an abuse of discretion. *See Rios*, 935 S.W.2d at 51-52. Point II is denied.

Reduction in Father's Visitation Time (Point III)

In his third point on appeal, Father asserts the trial court erred in restricting his visitation time without a finding that such visitation would endanger Child's physical health or impair his emotional development pursuant to section 452.400.2(1).[11] Because Father failed to file a motion to amend the judgment raising this issue, this argument is not preserved for appellate review. *See* Rule 78.07(c).[12]

Father's claim of error in this point is based on the trial court's failure to make a finding allegedly required by section 452.400.2(1). Pursuant to Rule 78.07(c), this claim of error was required to be raised in a motion to amend the judgment to be preserved for appellate review. *See* Rule 78.07(c) ("In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review."). The record does not show that Father filed any after-trial motions, including a motion to amend the judgment. Accordingly, Point III is unpreserved and must be denied. *See Williams*, 669 S.W.3d at 718;

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[11] All references to section 452.400 are to RSMo (2016).

[12] All rule references are to the Missouri Supreme Court Rules (2022), unless otherwise indicated.

In re Holland, 203 S.W.3d 295, 301-02 (Mo. App. S.D. 2006).

Award of Attorney Fees (Point V)

In his fifth point on appeal, Father challenges the trial court's award of $200,000 in attorney fees to Mother. We find no abuse of discretion.

We review a trial court's award of attorney fees for an abuse of discretion. *Russell*, 210 S.W.3d at 199. To show an abuse of discretion, Father must prove the trial court's decision was against the logic of the circumstances and was so arbitrary and unreasonable as to shock our sense of justice. *Id.* Section 452.355 permits a trial court to award attorney fees "after considering all relevant factors including the financial resources of both parties, the merits of the case and the actions of the parties during the pendency of the action." Section 452.355.1.[13] "The relevant factors will balance differently in each case." *Frawley v. Frawley*, 597 S.W.3d 742, 758 (Mo. App. W.D. 2020) (quoting *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 94 (Mo. App. W.D. 2006)).

In the 2022 Modification Judgment, the trial court ordered that Father pay his own $417,825.60 in attorney fees and $200,000 of Mother's attorney fees still owed. The trial court found that Mother's attorney fees amounted to $235,777.04, and that the fees incurred were reasonable. After considering the relevant statutory factors, the trial court concluded

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[13] All references to section 452.355 are to the Revised Statutes of Missouri (2016).

that Father should bear the majority of the cost of Mother's attorney fees for three primary reasons: that many of the expenses were based upon Father's non-meritorious motions to modify; that "costs of this litigation were increased due to Father's continued filings, some of which were duplicative in nature, ruled on by various judges assigned to this matter throughout this tumultuous litigation requiring an increase in attorney's fees and delay of the litigation"; and "the respective financial resources of the parties," because Mother "does not have sufficient assets by which to pay her attorney's fees, especially in light of the unreasonable increase in fees that were caused by Father's repeated filings and hearings, and repeated changes in counsel."

These findings are supported by the record and Father has failed to convince us that the award of attorney fees to Mother was an abuse of the trial court's discretion. The trial court considered the outcome of the parties' motions and found that Mother's motion was meritorious whereas Father's motions were not, and noted that the arguments raised in Father's motions were reiterations of the arguments he had brought throughout the prior dissolution and modification proceedings. The trial court also considered the actions of the parties during the pendency of the case and found that Father's actions were responsible for increasing the attorney fees and prolonging the litigation. Lastly, the trial court considered the disparate financial resources of the parties and discussed the fact that Mother had suffered a decrease in income to less than half her previous salary and less than half of Father's income. Father

does not challenge any of these findings on appeal. Instead, Father asserts additional facts that would potentially militate in his favor, including Dr. D.L.'s report, Father's higher cost of living and travel expenses to visit Child, and Mother's filing of various motions such as the motions for TRO. The function of appellate review is not, however, to reweigh these considerations and the relative conduct of the parties. *See Frawley*, 597 S.W.3d at 759.

The record substantially supports the trial court's justifications for Father paying a larger proportion of Mother's attorney fees and, given its reasoned consideration of the statutory factors that all weighed in favor of Mother, this award was within the trial court's discretion. *See id.* at 758-59; *Morgan*, 497 S.W.3d at 378-80; *Russell*, 210 S.W.3d at 199. Point V is denied.

Time for Parties' Presentation of Evidence (Point VI)

In his sixth point on appeal, Father disputes the trial court's management of the modification trial and specifically complains of the time allotted to the parties for their presentations of evidence. Father asserts that Mother's presentation of evidence exceeded the six-and-a-half-hour allotment by 0.233 hours, and that the evidence presented during these 13 minutes should not have been considered by the trial court.

For the following reasons, Father's violations of Rule 84.04's briefing requirements render Father's argument wholly deficient. Identical to the deficiencies in his briefing of Point II, Father's argument in this

point on appeal is analytically insufficient and we deem Point VI abandoned. *See E.K.H.-G.*, 613 S.W.3d at 453. Again, the argument section of an appellant's brief must "demonstrate how principles of law and the facts of the case interact" and "must explain why, in the context of the case, the law supports the claim of reversible error." *Pickett*, 667 S.W.3d at 661 (citations omitted). The "[f]ailure to cite relevant authority supporting the point or to explain the failure to do so preserves nothing for review." *E.K.H.-G.*, 613 S.W.3d at 453. In his argument, Father cites no supporting legal authority in either his appellate or reply briefing and does not explain his failure to do so. "Mere conclusions and the failure to develop an argument with support from legal authority preserves nothing for review." *Williams*, 669 S.W.3d at 167 (quoting *Bennett*, 615 S.W.3d at 100).

Moreover, even were we to attempt to engage with Father's argument, we would find it belied by the record. The trial court specifically stated that it would strike from the record any testimony that occurred after the parties' allotted 6.5 hours, and it refused to admit exhibits offered after that time. Further, Father is unable to specifically identify where the 2022 Modification Judgment erroneously relied upon evidence occurring after the 6.5-hour mark. Father complains that Mother "put in significant evidence concerning the child's medical expenses, [Father's] income, and other information that impacted the trial court's award on attorney's fees and child support." Although some discussion of these areas did occur after Mother's time had expired, we note that there was also other properly admitted evidence of these issues before

the trial court, including through Mother's Motion to Determine Amounts Due, Mother's Memorandum of Income, Father's Statement of Income and Expenses, and the parties' proposed Form 14s submitted with their proposed judgments and accepted by the trial court. Point VI is denied.

Calculation of Child Support (Point VII)

In his seventh point on appeal,[14] Father contends the trial court's calculation as to child support was erroneous for four reasons: (1) Father provides medical insurance for Child but the trial court credited Mother with providing medical insurance for Child; (2) the trial court improperly included $45,000 in gambling winnings in Father's annual income; (3) the trial court failed to take into account the travel expenses incurred by Father in exercising his visitation with Child; and (4) the trial court relied upon evidence and argument introduced after Mother's allotted 6.5 hours for the

[14] Mirroring the deficiencies in his Points II and VI, Father's Point VII again violates our appellate briefing requirements. Father has failed to include a statement describing whether, and how, his claim of error was preserved for appellate review in violation of Rule 84.04(e); has failed to cite any legal authority supporting his argument in either his opening or reply brief; and many of his purported factual citations to the record are incomplete or missing. For these reasons, we again note that Father's argument of this claim of error is deficient and has preserved nothing for our review. *See Williams*, 669 S.W.3d at 167; *E.K.H.-G. v. R.C.*, 613 S.W.3d 449, 453 (Mo. App. E.D. 2020); *Pickett v. Bostwick*, 667 S.W.3d 653, 661-62 (Mo. App. W.D. 2023).

presentation of her case had elapsed. We disagree, and address each issue in turn.[15]

In the 2022 Modification Judgment, the trial court increased the monthly child support amount owed by Father from $847.00 to $3,069.00. This change is accounted for primarily by the decrease in Mother's income and increase in Father's income, in addition to increased uninsured extraordinary medical costs for Child's care. The trial court completed its own Form 14 and calculated a presumed monthly child support amount of $3,069.00 and refused to rebut this amount. This amount is presumed correct. *See* Rule 88.01(b); *Frawley*, 597 S.W.3d at 754. Father has failed to show this calculation was error.[16]

First, the trial court did not err in determining that Mother provides health insurance for Child. At trial, Father testified that Mother "has been using [his] health insurance"; Mother submitted that she provided Child's health insurance.[17] It was for the trial court to

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[15] Father does not claim that Mother failed to show a substantial and continuing change necessary to modify child support pursuant to section 452.370.1, RSMo (2016).

[16] There does appear to be a clerical error on the trial court's Form 14. In its judgment, the trial court found Father's gross monthly income to be $22,737.00, but on the Form 14 it listed this number as $22,736.00. This difference, however, does not affect the proportionate share of combined adjusted monthly gross income (Line 4) or the ultimate presumed child support amount (Line 12).

[17] Although it appears that this testimony occurred after Mother's 6.5 hours had elapsed, evidence that Mother provided Child's health insurance was also included in the exhibits supporting

weigh this testimony, and it resolved this issue in Mother's favor. We note that this determination is supported by the fact that both the 2016 and 2022 Modification Judgments ordered Mother to maintain and pay the cost of medical insurance for Child. Father presented no evidence at trial to support his claim that he provided medical insurance for Child, and points to no such evidence on appeal. In fact, Father's proposed Form 14 lists the health insurance costs for Child as "$0" for both parties. We conclude the trial court did not err in its health insurance calculation on the Form 14 line 6(c). *See Frawley*, 597 S.W.3d at 756 (finding no error in trial court refusing to give credit to father for cost of any health insurance coverage he purchased, where mother was the party ordered by the court to provide health insurance).

Second, Father has presented no evidence that the trial court considered any gambling winnings in calculating his monthly income. Father's appellate brief cites generally to the 2022 Modification Judgment, without a specific page number, to support his factual assertion regarding the gambling winnings. But the Modification Judgment references no such winnings. And we can find no reference to any gambling winnings in the record on appeal or transcript at trial. As such, we cannot find the trial court erred. *See Lokeman v. Flattery*, 146 S.W.3d 422, 429 (Mo. App. W.D. 2004).

Mother's memorandum of income. This evidence was also included in Mother's proposed Form 14 attached to her proposed Findings of Fact and Conclusions of Law.

Third, the trial court did not err in failing to credit Father for travel expenses he incurred in exercising his visitation with Child. "The trial court has broad discretion in apportioning the expense of exercising child custody rights when it comes to transportation costs associated with visitation," and can consider the financial circumstances of the parties in making this determination. *Selby v. Smith*, 193 S.W.3d 819, 827-28 (Mo. App. S.D. 2006). At trial, evidence was presented that Father's income was over twice that of Mother's and that Father shared expenses with his new wife, whose income exceeded that of both parties. We are not convinced that it was an abuse of discretion to not credit Father for any travel expenses he incurred in exercising his visitation. *See id.*

Fourth, we have already found meritless Father's arguments regarding the parties' time for the presentation of evidence in our discussion of Father's sixth point on appeal. The only specific information that Father contends was elicited during this time and directly influenced the child support amount was "testimony regarding bonuses [Father] previously received which [Mother] believed should increase [Father's] monthly income from $18,394.46 to $22,734." Having reviewed the transcript, we find no testimony regarding Father's purported bonuses; instead, Mother testified that she arrived at the $22,734 amount based on Father's "employment records that were produced in this case and his Income & Expense Statement." Father's statement of income and expenses was properly admitted at trial, and formed a basis for the trial court to perform its Form 14 calculation. Moreover, we note that the directions for completing

the Form 14 specifically provide that "[o]vertime compensation, bonuses, earnings from secondary employment, recurring capital gains, prizes, retained earnings and significant employment-related benefits may be included, in whole or in part, in 'gross income' in appropriate circumstances." Mo. Civ. P. Form 14, DIRECTIONS, COMMENTS FOR USE AND EXAMPLES FOR COMPLETION OF FORM NO. 14. As such, we are not convinced the trial court erred. Point VII is denied.

Failure to Credit Child Support Overpayments (Point VIII)

In his eighth point on appeal, Father argues the trial court erred in failing to credit his past overpayments of child support against his future child support obligations. We disagree.

Father's argument on appeal relates solely to *future* child support obligations, and we therefore confine our analysis to that claim. Father submitted records of his child support payments from July 2012 to November 2022, which showed that he had overpayments totaling $8,665.66 as of November 2022. "Child support credits are treated differently depending on whether they involve past or future support obligations." *Wilson v. Murawski*, 634 S.W.3d 678, 692 (Mo. App. E.D. 2021). A party is generally entitled to a credit against retroactive child support obligations, even if the overpayments were voluntary. *Id.* For future child support obligations, on the other hand, "[t]he general rule is that a party who overpays child support may not claim those payments as a credit . . . if the overpayment was voluntarily made." *Id.* (quoting *Eichacker v. Eichacker*, 596 S.W.3d 177, 187 (Mo. App.

E.D. 2020)). "[A]n overpayment is presumed voluntary and may not be credited against future support obligations unless the parties have agreed to such an arrangement or when other equitable considerations exist." *Id.* (emphasis omitted) (quoting *Eichacker*, 596 S.W.3d at 187). The party seeking a future credit bears the burden of overcoming the presumption of voluntariness. *Eichacker*, 596 S.W.3d at 187.

To receive credit against his future support obligations, Father bears the burden of overcoming the presumption that his overpayments were voluntary. Father has not met this burden. Father contends the overpayments were not voluntary because they resulted from a mandatory court-ordered income withholding. But, on its own, the mandatory nature of a withholding is insufficient to overcome the presumption of voluntariness. *Id.* at 187-88. As additional evidence of involuntariness, Father points to the fact that he brought these overpayments to the attention of the trial court in his motion to modify and at trial. We find this to be insufficient to overcome the presumption of voluntariness. The Family Support Division Records submitted by Father show that the overpayments of which he complains were made between the time that he began paying child support again following the 2016 Modification Judgment,[18] and

[18] In the 2016 Modification Judgment, Father received credit for $6,358.41 in overpayments against his future support obligations and was ordered to not pay child support for 7.5 months. Such credit appears to have been based on a stipulation by the parties. This meets one of the exceptions to the general rule that "an overpayment is presumed voluntary and may not be credited against future support obligations." *Wilson*, 634 S.W.3d at 692

December 2018. After December 2018, the payments made by Father were exactly the required $847.00 per month. Although Father noted these overpayments in his October 2020 motion to modify, there is no evidence that Father sought to adjust or challenge the payment amounts prior to that time. As the overpayments were accumulated nearly two years prior to the time Father first brought these overpayments to the trial court's attention, we are not convinced that such action is sufficient to overcome the presumption that his overpayments were voluntary.

Because Father has failed to overcome the presumption that the overpayments were voluntary, the trial court did not err in failing to credit any overpayments against his future child support obligations. *See id.* at 188. Point VIII is denied.

Conclusion

For the foregoing reasons, we affirm the judgment.

PER CURIAM

(noting one exception to this rule is where the parties agree to the arrangement). Here, there was no evidence of any such stipulation or agreement.

APPENDIX D

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED111315

[Filed October 25, 2023]

TAMARA YAO	)
Plaintiff-Respondent	)
	)
v.	)
	)
FRANCK WILLIAM YAO	)
Defendant-Appellant	)
	)

APPELLANT FRANCK WILLIAM YAO'S MOTION FOR REHEARING

Appellant Franck William Yao, pursuant to Rule 84.17(a)(1) and 84.17(a)(3), hereby moves for rehearing of the Order and the Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(B) filed on October 10, 2023 by the Eastern Division of the Missouri Court of Appeals ("Memorandum") for the reason that the Memorandum which sets forth the reasons for the Order filed contemporaneously with the Memorandum overlooked or misinterpreted material matters of law and fact. In this motion, Mr. Yao sets forth the material matters of law and fact that have been overlooked or

misinterpreted by the Court, in accordance with Rule 84.17(a).

I. INTRODUCTORY STATEMENT.

The Court's October 10, 2023, Memorandum is replete with legal and factual errors that compel Mr. Yao to file this motion. This Court's opinion should be withdrawn and relief granted for the following reasons that the Memorandum overlooks and misstates material matters of fact which led the Court's erroneous conclusions of law. These issues provide substantial justification for this Court to withdraw its October 10, 2023, Order and to remand the case for further proceedings.

II. ARGUMENT IN SUPPORT OF REHEARING.

To show the numerous matters of fact and law that were overlooked or misinterpreted by the Court in the Memorandum, the argument here will address the errors from each section of the Memorandum.

A. Credibility Finding Regarding Dr. D.L. (Point IV)

The Memorandum misinterpreted the law regarding the ability of witnesses to testify as to the credibility of other witnesses. The Memorandum cited two cases for its contention that the trial court did not err by allowing the testimony of Dr. N.W. as to Dr. D.L.'s credibility:

> . . . [A]t no time did Dr. N.W. opine as to Dr. D.L.'s credibility; instead, her testimony related to professional practices, standards, processes

> and methodologies, and how Dr. D.L.'s evaluation process either met or deviated from these standards. Indeed, Dr. N.W. specifically declined "to opine on that" when asked if Dr. D.L.'s conclusions regarding custody were in error. Dr. N.W. is a psychologist with extensive experience in court-ordered custody evaluations. The trial court could properly rely on her testimony as to the practices and standards of the profession. *See Hill v. City of St. Louis*, 371 S.W.3d 66, 75-78 (Mo. App. E.D. 2012); *see also Peterson v. Nat'l Carriers, Inc.*, 972 S.W.2d 349, 357 (Mo. App. W.D. 1998) ("An expert does not improperly comment on credibility simply because his or her testimony, if accepted, may cause the [trier of fact] to conclude that a witness is not credible.").

However, the Court misstated the law on this point for two reasons. First, of all, the case of *See Hill v. City of St. Louis* does not stand for the principle espoused by the court. *See Hill v. City of St. Louis*, 371 S.W.3d 66, 75-78 (Mo. App. E.D. 2012). Even though the defendant raised similar objections in that case, the court never actually reached the merits of the objection on appeal because it specifically found that the Defendant has not preserved the objection in the trial court. *Id.* Also, the case of *Peterson v. Nat'l Carriers, Inc.* is completely distinguishable from the present case. *Peterson v. Nat'l Carriers, Inc.*, 972 S.W.2d 349, 357 (Mo. App. W.D. 1998). In *Peterson,* the expert in that case did not testify as to another expert's methodology or practices, rather "he simply testified concerning how fast the parties would have been going and where they would

have been placed assuming that the facts stated by [the witnesses] were true." *Id*. The Memorandum fails to even address the cases raised by the Mr. Yao, and misinterprets the law on this area, which is that:

> [Commentary. . . directly challenging the credibility of another witness, is not a proper subject for expert testimony and should not be admitted at trial. As noted supra, "[e]xpert testimony that comments directly on a particular witness' credibility, as well as expert testimony that expresses an opinion with respect to the credibility or truthfulness of witnesses of the same type under consideration invests 'scientific cachet' on the central issue of credibility and should not be admitted.

State v. Williams, 858 S.W.2d 796, 800 (Mo. App. E.D. 1993)

B. Denial of Amended Motion to Modify – Point I

In this section the Memorandum misinterpreted the facts of the case as well as Mr. Yao's argument on appeal. First, the court misinterpreted the facts and law regarding the change in circumstances. The Court assumed, incorrectly, that the nature of Mr. Yao's request was based upon exactly the same reasoning as his previous request to modify, and therefore there was not a significant change in circumstances. See Memorandum, pp. 8-9. The Court cited the case of *Ndiaye v. Seye* as justification for upholding the trial court's decision. *Ndiaye v. Seye*, 489 S.W.3d 887, 897 (Mo. App. W.D. 2016). In *Ndiaye*, the Court noted that

evidence showed parties had "not communicated particularly well at any point" and concluded that, "unless the alleged communication problems are different in kind or severity than those anticipated by the [previous] modification, they should not be considered a change of circumstances."

However, deterioration of communication was not Mr. Yao's only basis for making the request. The uncontroverted evidence showed that there was a dramatic increase in the child's behavioral issues with the mother (including police intervention and hospitalization) which, according to *Hueckel v. Wondel* can and should qualify as a substantial change in circumstances. *Hueckel v. Wondel*, 270 S.W.3d 450, 454 (Mo. App. S.D. 2008). See Appellant's Opening Brief, p. 15-16. As noted below, the Court applied the wrong analysis to this issue.

Secondly, the deterioration in communication was shown by Mr. Yao to be different both in kind and severity then before. See Appellant's Opening Brief, p. 16 (describing how the lines of communication between Appellant and Respondent had deteriorated from before). So, the court's reference to *Ndiaye* does not hurt Mr. Yao's case, but only further proves that there was a significant change in circumstances.

Next, the Court incorrectly characterizes Mr. Yao's argument on appeal. The correct standard to challenge a trial court's decision in a child custody modification is whether the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. *Speer v.*

Colon, 155 S.W.3d 60, 61 (Mo. banc 2005); *In re Holland*, 203 S.W.3d 295, 299 (Mo. Ct. App. 2006).

Here, the Court accused Mr. Yao of not precisely stating what legal challenge Father brings regarding the denial of his motion to modify. Memorandum, p. 13, fn 8. The court correctly assessed that Mr. Yao's argument was that the judgment was against the weight of the evidence. However, in its analysis, the Court denied Mr. Yao's assignment of error because the decision was supported by substantial evidence. See Memorandum, p. 12 ("These findings are amply supported by the record.") However, as the Court should know, the against-the-weight-of-the-evidence standard is an entirely different analysis from the substantial evidence standard. The against-the-weight-of-the-evidence standard was explained in *Ivie v. Smith*:

> Appellate courts act with caution in exercising the power to set aside a decree or judgment on the ground that it is against the weight of the evidence. *JAS Apartments, Inc. v. Naji*, 354 S.W.3d 175, 182 (Mo. banc 2011). "[A] claim that the judgment is against the weight of the evidence presupposes that there is sufficient evidence to support the judgment." *In re J.A.R.*, 426 S.W.3d at 630. In other words, "weight of the evidence" denotes an appellate test of how much persuasive value evidence has, not just whether sufficient evidence exists that tends to prove a necessary fact. *See White v. Dir. of Revenue*, 321 S.W.3d 298, 309 (Mo. banc 2010) (stating that "weight" denotes probative value,

not the quantity of the evidence). The against-the-weight-of-the-evidence standard serves only as a check on a circuit court's potential abuse of power in weighing the evidence, and an appellate court will reverse only in rare cases, when it has a firm belief that the decree or judgment is wrong. *See JAS Apartments, Inc.*, 354 S.W.3d at 182.

When reviewing the record in an against-the-weight-of-the-evidence challenge, this Court defers to the circuit court's findings of fact when the factual issues are contested and when the facts as found by the circuit court depend on credibility determinations. *See Pearson v. Koster*, 367 S.W.3d 36, 43–44 (Mo. banc 2012); *White*, 321 S.W.3d at 307-09. A circuit court's judgment is against the weight of the evidence only if the circuit court could not have reasonably found, from the record at trial, the existence of a fact that is necessary to sustain the judgment. *See Pearson*, 367 S.W.3d at 43–44; *White*, 321 S.W.3d at 307-09. When the evidence poses two reasonable but different conclusions, appellate courts must defer to the circuit court's assessment of that evidence. *In re J.A.R.*, 426 S.W.3d at 626, 632 n. 14; *Pearson*, 367 S.W.3d at 43-44; *White*, 321 S.W.3d at 307-09.

This Court defers on credibility determinations when reviewing an against-the-weight-of-the-evidence challenge because the circuit court is in a better position to weigh the contested and conflicting evidence in the context

> of the whole case. *In re J.A.R.*, 426 S.W.3d at 626. The circuit court is able to judge directly not only the demeanor of witnesses, but also their sincerity and character and other trial intangibles that the record may not completely reveal. *Id*. at 627. Accordingly, this standard of review takes into consideration which party has the burden of proof and that the circuit court is free to believe all, some, or none of the evidence offered to prove a contested fact, and the appellate court will not re-find facts based on credibility determinations through its own perspective. *Id.*; *Pearson*, 367 S.W.3d at 43-44. This includes facts expressly found in the written judgment or necessarily deemed found in accordance with the result reached. Rule 73.01(c); *In re J.A.R.*, 426 S.W.3d at 626. Evidence not based on a credibility determination, contrary to the circuit court's judgment, can be considered in an appellate court's review of an against-the-weight-of-the-evidence challenge.

Ivie v. Smith, 439 S.W.3d 189, 205-206 (Mo. 2014).

Thus, the Court applied the wrong analysis, and therefore rehearing is warranted.

C. Denial of Amended Motion to Modify – Travel Restrictions (Point II); Time for Parties' Presentation of Evidence (Point VI); and Calculation of Child Support (Point VII).

For purposes of this brief, Appellant will address the Court concerns, since the stated reasons for denying relief on all Points (II, VI, and VII) were based upon Rule 84.04. Notwithstanding any deficiencies which may have been present in Mr. Yao's briefs on appeal, the Court failed to recognize its own prior holdings wherein specifically stated that it permissible relax the rigid requirements of Rule 84.04 when the case relates to the welfare of children. *Stangeland v. Stangeland*, 33 S.W.3d 696, 703, (Mo.App.W.D. 2000). In such cases, this Court may "review the issues presented on their merits, provided 'the argument is sufficient in conjunction with the points relied on to ascertain the issues being raised.'" *Id.* (quoting *Landry v. Miller*, 998 S.W.2d 837, 841 (Mo.App. W.D.1999), abrogated on other grounds by *In re Mclntire*, 33 S.W.3d 565, 567 (Mo.App.W.D.2000)); *In re Holland*, 203 S.W.3d 295, 299 (Mo. Ct. App. 2006).

D. Additional Argument on Point II

As an additional argument regarding Point II, Mr. Yao contends that the Court misinterpreted the law and facts here also. First, the Court claims that Mr. Yao's arguments on these points should be abandoned for its analytical deficiencies. For example, the Court says that the only legal citation included in the argument section is for the general proposition that, "if the decision is against the weight of the evidence, the

judgment can be overturned." Memorandum, p. 14, fn. 10. Yet, nowhere does the court say this was an incorrect statement of the standard of review on this issue. And if he is making an against-the-weight-of-evidence argument, does there really need to be extensive legal citations about the court's authority to make decisions regarding travel restrictions in this case? That was not the substance of Mr. Yao's argument at all. Rather, Mr. Yao argued that based upon the facts and evidence in this case, which admittedly were limited, that the court should not have placed such restrictions. Also, despite claiming on one hand that Mr. Yao's argument on this point was so severely lacking that it should deemed abandoned, the court nevertheless was able to fully address his arguments, which seems that the Court is contradicting itself. See discussion in Memorandum at pp. 14-15.

And, in its discussion as to why Mr. Yao's arguments fail on this point, the court cites the case of *Rios v. Rios*, 935 S.W.2d 49 (Mo. App. 1996). Interestingly enough, in that case the Court cited the standard of review that Mr. Yao did. "The trial court's decision must be affirmed unless it is against the weight of the evidence, it is unsupported by substantial evidence, or it misstates or misapplies the law..." *Rios,* 935 S.W.2d at 51. And in that opinion, the Court did not provide lengthy legal analysis about the power of the courts to make travel restrictions because like this case, that issue was not assigned as error. Also in *Rios,* the Court did not summarily affirm the trial court's travel restrictions on the father for taking the minor child out of the country. Rather, the court amended the

restrictions only to say that the father could not do so without prior approval of the court or the other spouse. *Id.* 935 S.W.2d at 51-52. So, to an extent, the *Rios* case actually supports Mr. Yao's argument on this point. The trial court's restrictions were not necessary, and the Court applied the wrong analysis when considering the appeal.

Further, the trial court never stated a reason for denying the Motion to Modify - Travel Restrictions. This Court's attempt to speculate as to the trial court's reasons is wholly inappropriate. In addition, the Court misstates the facts it based its speculation on. Appellant has no ties to France and there is no evidence produced at trial or in the Legal File that would support such speculation. The Court's ruling based on such speculation should not be allowed to stand. *Francisco v. Hendrick,* 197 S.W.3d 628, 632 (Mo. Ct. App. 2006.)

CONCLUSION

This Court's Memorandum in this case explaining the reasons for its Order in this case contains misstatements of law and fact regarding Mr. Yao's contentions at the trial court, which resulted in the Court misapplying the law to Mr. Yao's case. Mr. Yao requests that the Court grant the Motion for Rehearing.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served electronically via the Court's notification system to the following parties:

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Dated: October 25, 2023

Respectfully submitted,

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Franck William Yao

APPENDIX E

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED111315

[Filed November 20, 2023]

TAMARA YAO, RESPONDENT,	)
vs.	)
FRANCK WILLIAM YAO, APPELLANT.	)

ORDER

Appellant's Motion for Rehearing is denied.

SO ORDERED.

DATED: NOV 20 2023

/s/ [signature]
Chief Judge
Missouri Court of Appeals Eastern District

APPENDIX F

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED111315

[Filed November 2, 2023]

TAMARA YAO	)
Plaintiff-Respondent	)
	)
v.	)
	)
FRANCK WILLIAM YAO	)
Defendant-Appellant	)
	)

APPELLANT'S APPLICATION FOR TIME EXTENSION AND TRANSFER TO MISSOURI SUPREME COURT

COMES NOW, Appellant, Franck William Yao, and for his Application for Transfer to the Missouri Supreme Court and suggestions in support thereof, pursuant to Rules 84.17, 83.02, 83.02, 83.05 with regard to the Order and Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b) of October 10, 2023 by the Eastern Division of the Missouri Court of Appeals ("Memorandum"), states to the court as follows:

I. ARGUMENT IN SUPPORT

Appellant believes this case should be transferred to the Missouri Supreme Court because of the Court of Appeals stated that: "There is no Missouri case expressly addressing how to handle immigration status of parents" (In re Adoption of C.M., 414 S.W.3d 622, 668 (Mo. Ct. App. 2013).) and that they are many parents and children in similar situation where immigration is controversially used in custody determination.

Decisions involving child custody and the welfare of children are of the utmost importance. These cases demand a thorough examination. (See Sanders v. Sanders, 14 S.W.2d 458, 460 (Mo. Ct. App. 1929).).

The transfer would be of precedential value for and would benefit parents and children in similar situations as the welfare of minor children is at stake. (See Stamme v. Stamme, 589 S.W.2d 50, 54 (Mo. Ct. App. 1979).)

Generally, a mandate is not issued until the time for filing a post-opinion motion has expired. If a post-opinion motion is filed, the mandate will not issue until this court and the Court resolve all such motions.

CONCLUSION

For all of the foregoing reasons set forth herein, Defendant-Appellant Frank William Yao respectfully request that this court grant it is Application for Time Extension and Transfer to Missouri Supreme Court.

DATED: 10/26, 2023

Respectfully submitted,

/s/ Franck William Yao
FRANCK WILLIAM YAO

[Notary Public Stamp and signature]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served electronically via the Court's notification system to the following partie(s):

Patricia Susi
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Respectfully submitted,

/s/ Franck WilliamYao
Appellant
FRANCK WILLIAM YAO