

CASE NO. A05-2094

State of Minnesota
In Court of Appeals

MELINDA ALICE ZANDER,

Appellant,

vs.

JEREMY JAMES ZANDER,

Respondent.

BRIEF AND APPENDIX OF APPELLANT
MELINDA ALICE ZANDER

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STATEMENT OF ISSUES

- I. WHETHER THE COURT SHOULD HAVE RELIED ON RESPONDENT/PETITIONER'S TESTIMONY REGARDING HIS INTENTION TO REMAIN RESIDING ON THE SHAKOPEE MDEWAKANTON SIOUX RESERVATION IN ITS EVALUATION OF CUSTODY.**

The Trial Court held: Yes.

Apposite Authority:

Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985)

Minn. Stat. §518.17

- II. WHETHER THE COURT SHOULD AWARD JOINT CUSTODY PURSUANT TO MINNESOTA STATUTES §518.18, SUBD. 2. BASED UPON THE FACTS CONTAINED IN THE RECORD.**

The Trial Court held: Yes.

Apposite Authority:

Minn. Stat. §518.17

Brauer v. Brauer, 384 N.W.2d 595 (Minn. App. 1986)

- A. WHETHER THE COURT SHOULD AWARD JOINT CUSTODY WHEN PARTIES HAVE REPEATEDLY DEMONSTRATED AN INABILITY TO COOPERATE IN THE REARING OF THEIR CHILDREN.**

The Trial Court held: Yes.

Apposite Authority:

Wopata v. Wopata, 498 N.W.2d 478 (Minn. App. 1993)

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- B. WHETHER THE COURT SHOULD AWARD JOINT CUSTODY WHEN AN INTERMEDIARY IS REQUIRED TO EFFECTUATE BASIC COMMUNICATION AND CONTACT BETWEEN PARENTS.**

The Trial Court held: Yes.

Apposite Authority:

Minn. Stat. §518.17, subd. 2(b)

Chapman v. Chapman, 352 N.W.2d 437 (Minn. App. 1984)

Minn. Stat. §518.1751, subd. 1b (a)

III. WHETHER FUNDS DERIVED FROM PER CAPITA PAYMENTS TO MDEWAKANTON SIOUX (DAKOTA) COMMUNITY MEMBERS ARE MARITAL PROPERTY.

The Trial Court held: Yes.

Apposite Authority:

Minn. Stat. §518.58

Kucera v. Kucera, 146 N.W.2d 181 (Minn. 1966)

Coursolle v. Coursolle, 2002 WL 31501904 (Minn. App. 2002)

STATEMENT OF THE CASE

The parties, Melinda Alice Stade and Jeremy James Zander, were married on September 14, 2001 in Las Vegas, Clark County, Nevada. This matter was tried to the Scott County District Court, The Honorable Diane M. Hanson on March 15, 16, 17 and 18. The Court entered its decision on June 27, 2005. (Appendix (hereafter "A.") 000036). The district court denied Appellant/Respondent's post trial motions on September 22, 2005. (A. 000114). This appeal followed. At the time of their marriage dissolution, the parties two minor children, Cassandra and Warren, were 14 and 10 years old, respectively. Pursuant to the Judgment and Decree, the parties were awarded joint legal and physical custody of the children.

In her post-trial motions, Appellant sought, among other things, an amendment of the findings and divorce decree based on a number of alleged misrepresentations made by Respondent during the course of the dissolution trial. (A. 000089). Specifically, the district court made extensive findings and put great emphasis on the fact that Respondent/Petitioner resided on the Shakopee Mdewakanton Sioux reservation. Appellant/Respondent presented documentary evidence to the district court demonstrating that shortly after the trial, Respondent/Petitioner vacated the residence on the reservation. (A. 000097). Appellant/Respondent also asked the district court to amend its findings with respect to the parties ability to cooperate and methods to solve disputes regarding the children. Appellant/Respondent also challenged the district court's determination and division of marital funds. The district court denied Appellant/Respondent's motions in their entirety.

The Appellant filed this appeal appealing the district court's Judgment and denial of Appellant's post-trial motions.

STATEMENT OF THE FACTS

Appellant is the mother of two children, Cassandra born December 10, 1990 and Warren born February 21, 1994. Appellant is a member of the Shakopee Mdewakanton Sioux Community. (A. 000242). At all times prior to meeting the Respondent, Appellant was the only parent in the children's lives, inasmuch as both of the children's fathers played a very limited role in the children's lives. (A.000251). Appellant and Respondent began their relationship in 1998, while

Appellant was married to her first husband. (A. 000133). At the time, Cassandra was 7 years of age and Warren was 4 years of age. After some time, Respondent began to play a father figure role in the lives of Cassandra and Warren (A. 000133; 000251). Appellant encouraged Respondent to interact with the children during this period of time. (A. 000251). The parties dated for approximately a year to a year and a half prior to becoming engaged. *Id.* During their engagement the parties began to discuss Respondent's adoption of Cassandra and Warren. (A. 000276-000277). Respondent testified that the Mdewakanton tribal court required that the parties be married before pursuing the adoption. (A. 000133). The parties were married on September 14, 2001 in Las Vegas, Nevada. Following their marriage, Cassandra and Warren were adopted by Respondent. (A. 000253).

The parties disagreed on various aspects of parenting, both during their marriage and since their separation. Respondent testified that he and Appellant disagreed on how to raise their children to show respect to others. (A. 000139). Respondent believes that Appellant spoils the children. (A. 000157). The parties disagreed on whether Cassandra should be allowed to have her ears pierced and own a cell phone. (A. 000275; 000278). The parties also disagreed on whether Warren should be allowed to have violent video games. (A. 000274).

The parties separated and this dissolution action commenced in 2004. The Appellant/Respondent petitioned for, and was granted, an emergency order for protection on January 15, 2004 based upon threats and verbal abuse made by Respondent/Petitioner. (A. 000001). The order for protection was ultimately

dismissed at the temporary relief hearing in the dissolution and the parties agreed to mutual restraining provisions in the temporary order. (A. 000005).

STANDARD OF REVIEW

In custody disputes that are tried to the district court, the district court is afforded broad discretion in awarding custody of minor children. *Durkin v. Hinich*, N.W.2d 148, 151 (Minn. 1989). When reviewing an appeal of a custody award, the appellate court's review is limited to determining whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. Findings of fact made by the trial court will not be set aside unless clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985).

Generally, when the trial court exercises its discretion, the appellate court will not interfere absent clear abuse. *O'Brien v. Kemper*, 149 N.W.2d 487 (Minn. 1967). The reviewing court views the factual record in the light most favorable to the trial court's exercise of discretionary authority. *Kielsa v. St. John's Lutheran Hospital Ass'n*, 177 N.W.2d 420 (Minn. 1970).

ARGUMENT

I. THE COURT'S FINDINGS REGARDING THE RESPONDENT/PETITIONER'S RESIDENCE AS THEY RELATE TO THE ISSUE OF CUSTODY ARE CLEARLY ERRONEOUS.

The best interests of the child test as set forth in Minnesota Statutes section 518.17 contains an analysis of thirteen factors. The district court made findings relevant to each of the statutory factors in its judgment and decree. In this

analysis, the district court placed special emphasis under several of the best interests criteria on the fact that the Respondent resided on the Shakopee Mdewakanton Reservation, of which the Appellant and children are members.

Specifically, the district court found:

“Petitioner Husband currently resides in a two-bedroom trailer home located on land belonging to the Shakopee Mdewakanton (Dakota) Sioux Community...” (A. 000039).

“...but they like being in the Native American community while staying with Petitioner Father.” (A. 000048-000049).

“Petitioner Husband lives on the reservation, providing the children with easy access to Tribal events, which he enjoys himself.” (A. 000050).

“They currently transition between Respondent Wife’s home in Jordan and Petitioner Husband’s home on the reservation, a distance of just a few miles.” *Id.*

“Petitioner Husband enjoys living on the reservation...” Findings, page (A. 000051).

“Petitioner Husband has not indicated any intention of relocating.” *Id.*

“...both parties intend to remain in Scott County in their present homes, if possible.” *Id.*

“Petitioner Husband is not Native American, but currently lives in the Mdewakanton Community...” (A. 000053).

“In addition to what has been noted above, Petitioner Husband’s residence in the Mdewakanton Community places him in a unique position to encourage and support this essential connection with respect to the children.” (A. 000060).

“The children enjoy spending time with Petitioner Husband at the mobile home...It has become a source of security and comfort to

them, and it gives them easy access to activities and friends within the tribal community.” (A. 000063-000064).

“[Petitioner’s] loss of use of the mobile home at this time would create a hardship for both him and the children.” (A. 000064).

The custody evaluator also placed significant importance on the Respondent residing on the reservation. Specifically, Sandy LaRoy, the custody evaluator, indicated that by virtue of living on the reservation, the Respondent was supportive of the children’s Native American culture because he was “surrounded by other tribal members.” (A. 000210).

The facts presented to the district court at the post-trial motion hearing demonstrate that the Respondent/Petitioner did not intend to continue living on the reservation despite his testimony, and the court’s findings, that he would do so. The Respondent vacated the residence shortly after the trial and the power supply was ultimately terminated. (A. 000097-000098). Furthermore, the Respondent was ultimately served with a harassment restraining order for actions committed against the Appellant and her property. (A. 000102-000109). Respondent was served at a new residence that was not on the reservation. In its analysis of the children’s cultural background, the district court placed significant emphasis on Respondent’s testimony regarding his intention to remain on the reservation. That emphasis is misplaced in light of the fact that Respondent no longer resides on the reservation, and for the most part, has not since the conclusion of the trial. As a result, the district court’s findings regarding the Respondent’s residence are clearly erroneous and should be amended. Failure to amend its findings with

respect to the Respondent's residence in light of Respondent's actions immediately post-trial constitutes an abuse of discretion by the district court that requires correction.

II. THE COURT SHOULD NOT AWARD JOINT CUSTODY WHEN THE PARTIES HAVE DEMONSTRATED AN INABILITY TO COOPERATE IN THE RAISING OF THEIR CHILDREN, AND AN INABILITY TO COMMUNICATE OR RESOLVE EVEN SIMPLE ISSUES CONCERNING THEIR CHILDREN.

According to Minnesota Statutes section 518.17, custody is determined by considering the best interests of the child. *Id.*, subd. 3(a)(3) (2004). " 'The best interests of the child' means all relevant factors to be considered and evaluated by the court," including the 13 factors listed in the statute. *Id.*, at subd. 1(a) (2004). When contemplating an award of joint legal or physical custody, the court should consider four additional factors including the ability of the parents to cooperate in the rearing of their children, their methods for resolving disputes, and whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing. *Id.*, at subd. 2(a), (b), (c). If the court decides to award joint custody over the objection of one of the parties, it must make detailed findings on each of the factors in subdivision two of the statute. *Id.* It has been stated by the Minnesota Court of Appeals that joint physical custody is appropriate only in "exceptional cases". *Brauer v. Brauer*, 384 N.W.2d 595 (Minn. App. 1986).

A. THE COURT SHOULD NOT AWARD JOINT PHYSICAL CUSTODY WHEN PARTIES HAVE REPEATEDLY DEMONSTRATED AN INABILITY TO COOPERATE IN THE REARING OF THEIR CHILDREN.

One of the factors for courts to consider when contemplating an award of joint custody is the ability of the parties to cooperate in the rearing of their children. Minn. Stat. §518.17, subd. 1 (a). Minnesota Courts that have addressed this issue have stated a reluctance to order joint physical custody if the parents have demonstrated an inability to cooperate. *Wopata v. Wopata*, 498 N.W.2d 478 (Minn. App. 1993) (joint physical custody order reversed where difficulties between parents precluded cooperation); *Ozenna v. Parmelee*, 407 N.W.2d 428 (Minn. App. 1987) (joint physical custody award was reversed where mother demonstrated lack of ability to cooperate in rearing of children); *Heard v. Heard*, 353 N.W.2d 157 (Minn. App. 1984) (joint legal custody order reversed where parties could not cooperate and frequently quarreled). Under the best interests of the child standard, there is a preference against joint physical custody unless there is “evidence of unusual circumstances, either special reasons for the arrangement or special accommodations to ease disruption and instability for the child.” *Steinke v. Steinke*, 428 N.W.2d 579 (Minn. App. 1988). The Court of Appeals has affirmed grants of joint legal and physical custody in situations where the record reflected that the parties shared the same parenting philosophies and were able to communicate and cooperate regarding the major decisions on their children’s

lives. *Berthiaume v. Berthiaume*, 368 N.W.2d 328, 332-33 (Minn. App. 1985) (emphasis added).

Furthermore, joint physical custody is only appropriate in "exceptional cases." *Brauer* at 599. Exceptional cases are those in which the parties exhibit the ability to cooperate, communicate, and place the best interests of their children before their own interests and desires. *See, e.g., Gorz v. Gorz*, 428 N.W.2d 839, 843 (Minn. App. 1988).

This case demonstrates a clear inability of the parties to cooperate with respect to raising their children. The parties sought court intervention regarding parenting time on multiple occasions. (A. 000008; 000019). The parties have also had documented disagreements over their differences and inability to cooperate regarding removing the children from school. (A. 000110-000113; 000010). Sandy LaRoy, the custody evaluator, testified on direct examination by Respondent's counsel that this was a particularly conflict-oriented dissolution. (A. 000203). Likewise, Linda Gerr, the parenting time expeditor appointed by the court stated that the parties were not communicating without her intervention. (A. 000185).

When cross-examined on his ability to cooperate and agree with the Appellant, Respondent testified that "I don't make agreements with Melinda." (A. 000154). The Respondent testified further that he cannot, and does not, try to communicate with the Appellant. *Id.* With respect to having methods of co-parenting with the Appellant, the Respondent testified that he "can't communicate

with her.” *Id.* The Respondent testified about disagreements with the Appellant over the school the children would attend. (A. 000155). Respondent also testified that he feels the Appellant spoils the children. (A. 000157). When Respondent was asked whether he would have allowed Cassandra to have a cell phone if he knew it was against Appellants’ wishes, he stated that he has his own set of rules for the children and the Appellant has her own set of different rules and the rules would differ “When I don’t agree with what Melinda has to say.” (A. 000165).

Most telling regarding the parties’ ability to cooperate in rearing their children is the following exchange during cross-examination of Respondent:

Q: We are not only talking about a dissolution action. We are talking about the rest of their lives, and I’m interested to know do you anticipate having a different set of rules from those of [Appellant]?

A: Depends on the circumstance.

Q: Okay. When will the rules differ?

A: When I don’t agree with what Melinda has to say?

Q: How often do the two of you agree?

A: Right now, hardly ever.

Q: Can you think of an instance where you have agreed?

A: We both agreed I should adopt these children.

Q: Right. Since the separation, have you had an instance where the two of you have agreed?

A: Not that I can really recall.

(A. 000165-000166).

In addition to the problems of communication between the parties, there was a significant amount of testimony at trial devoted to the parties' different parenting philosophies. Appellant testified at length about the various disagreements of the parties in rearing their children. Specifically, Appellant described a disagreement over whether the parties 10 year old son should be allowed to have an extremely violent and adult oriented video game, Grand Theft Auto. (A. 000274). Appellant stated that she had learned that the video game was rated M and did not think it was appropriate for the parties' 10-year-old son. Appellant testified that she and Respondent had an understanding that video games of that nature were not appropriate for Warren. Despite Appellant's position on mature-rated video games, Respondent purchased Grand Theft Auto for Warren. *Id.* Respondent stated that he was aware of video game ratings but that he was "not sure" of the rating for Grand Theft Auto. Respondent testified that when Warren asked if he could have Grand Theft Auto, Respondent "[made] a judgment call" and bought the game. (A. 000155).

Appellant also testified about an incident in which the Respondent allowed Cassandra to get her ears pierced over Appellant's objection. While she was staying with Respondent, Cassandra called Appellant to ask if she could get her ears pierced. Appellant described how Cassandra had requested ear piercing in the past and at all times had been told no. Respondent was aware of Appellant's

position on ear piercing, but nonetheless, took Cassandra to get her ears pierced the very same week. (A. 000275-000276).

The most concerning disagreement between the parties involves the sleeping arrangements that Respondent maintained for Cassandra during the dissolution. Appellant testified that Respondent was allowing Cassandra to sleep in his bed with him while Warren slept on the floor in Respondent's bedroom. (A. 000276). Appellant specifically brought this development to the attention of the custody evaluator and Dr. Brian Brewer, a psychologist with the Mdewakanton Tribe. The sleeping arrangement was also brought to the attention of the district court during a motion hearing on July 14, 2004. (A. 000017-000027). As a result of Appellants concerns, the district court ordered that the children and parents are to maintain separate bedrooms during all parenting time and the custody evaluator instructed Respondent to make sure that the children were sleeping in their own beds. (A. 000033). Appellant testified that despite the court order, the Respondent continued to allow Cassandra, a 13- year-old girl, to sleep in his bed. (A. 000276). The custody evaluator was asked whether the sleeping arrangements changed following her discussions with the Respondent and the court order: "[the sleeping arrangement at Respondent's home] looked the same as it did the time before." (A. 000206). Respondent himself testified that he allowed Cassandra to sleep in his bed, though he claims to have been sleeping on the floor. (A. 000156).

Appellant and Respondent also differ over the degree of influence the children should have over parenting decisions. Respondent feels that the children

should have greater influence over which school they attend and should be allowed to make decisions regarding their education based on “what they like.” (A. 000153).

Mr. Zander testified that he and the Appellant do not agree on what is important to teach the children regarding respect, that he believes the Appellant makes damaging statements about him as a father, and that the Appellant’s parenting style is very demanding to such a degree that he is concerned with her ability to parent the parties’ children appropriately. (A. 000139; 000145).

The custody evaluator’s testimony provides specific insight into the inapplicability of joint physical custody to these parties. The district court pointed to the report of the custody evaluator to support the conclusion that the parties can share joint legal and physical custody. However, the courts have a duty to do more than rubber stamp the report of an evaluator. *Stanford v. Stanford*, 123 N.W.2d 187 (Minn.1963). The court must consider all of the evidence before it and apply the facts to the law. Sandy LaRoy testified that the parties did not voluntarily adopt her summer 2004 parenting time schedule, did not support each other’s parenting decisions, could not agree on parenting issues; had differing parenting styles that may have been fostering disputes or problems, and that there was little evidence that the parties were able to work out their problems. (A. 000205; 000211-000212). Despite the overwhelming evidence to the contrary, Ms. LaRoy, like the district court in its Findings, believed that the parties would “learn” to co-parent. The overwhelming testimony of the Appellant, Respondent

and the custody evaluator demonstrates that these parents have not, and will not, be capable of cooperating in making decisions regarding raising their children. The district court's findings that the parties were able to cooperate in rearing their children were contrary to the facts in the record and should be overturned.

B. THE COURT SHOULD NOT AWARD JOINT CUSTODY WHEN AN INTERMEDIARY IS NECESSARY TO EFFECTUATE THE MOST BASIC CONTACT AND COOPERATION BETWEEN THE PARTIES.

Minnesota Statutes section 518.17, subd. 2 (b) requires the court to consider “methods for resolving disputes regarding any major decision concerning the life of the child, and the parents’ willingness to use those methods. (emphasis added).

In the case of *Chapman v. Chapman*, this Court stated that “joint legal custody should not be used as a ‘legal baseball bat’ to coerce cooperation.” 352 N.W.2d 437, 441 (Minn App. 1984) The *Chapman* Court recognized that the parties were unable to cooperate or communicate in a way that would allow them to come to an agreement regarding the general upbringing of the children. The Court reasoned that, in this situation “joint custody would only exacerbate the problem by dividing authority and increasing opportunities for conflicts.” *Id.* The *Chapman* holding was cited in *Ozenna*, when the Court of Appeals reversed the trial court’s award of joint physical custody. 407 N.W.2d at 433. In *Ozenna*, the Court of Appeals found error when the trial court imposed mandatory mediation as a means of forcing the parents to cooperate, when the record was replete with evidence of the parties’ inability to cooperate.

After addressing the factors in Minn. Stat. § 518.17, subd 1(a), and three of the four in subd. 2, the trial court awarded joint custody to both parties. The trial court stated that it “did not expect that the parties will always agree with each other regarding parenting decisions,” and it appointed a parenting time expeditor to teach them “to communicate and work together following the dissolution.” (A. 000058). Unfortunately, the trial court’s analysis falls short of addressing the major issue for these parties. The trial court believed that by appointing a parenting time expeditor, these parties would at some point become able to use that expeditor to resolve major issues in raising their children. However, there is substantial evidence in the record that the parties cannot cooperate with respect to even the simplest of issues involving their children. The parties struggle with differing sets of rules with respect to what video games the children can play, and whether or not the children should be allowed to have their ears pierced. Following the reasoning of *Chapman*, the trial court should not have used the appointment of a parenting time expeditor to attempt to force the parties to work together and cooperate.

The Respondent testified specifically that he and the Appellant do not have any methods in place by which they could parent when imposing consequences or limits on the children. (A. 000154). This testimony came in reaction to cross-examination about Respondent’s use of homework and after school activities as a method of discipline and parenting. Interestingly, this testimony by Respondent centered on a period of time in which the parenting time expeditor was already in

place. Despite Respondent's testimony that he could not work with Appellant to parent the children, even with a parenting time expeditor in place, the trial court awarded the parties joint physical custody.

The testimony of Maureen Peterson, a teacher at St. Michael's School, also reflects a recognition that the parties were unable to effectively communicate at all regarding the children's school needs. Ms. Peterson testified that "our staff at the school felt it would be better to meet with Ms. Zander separately." (A. 000180). Following the trial, the parties disagreed over Respondent's desire to remove the children from school for a vacation. This came at a time when the children were struggling with maintaining their attendance and schoolwork. Respondent took the children out of school without having cleared tutoring arrangements through the Prior Lake schools. (A. 000098-000100).

In this case, the district court's reliance on a parenting time expeditor to resolve dispute regarding issues in raising their children is misplaced. Minnesota Statutes §518.1751 states that the purpose of a parenting time expeditor "is to resolve parenting time disputes by enforcing, interpreting, clarifying, and addressing circumstances not specifically addressed by an existing parenting time order and, if appropriate, to make a determination as to whether the existing parenting time order has been violated." Minn. Stat. Ann. §518.1751, Subd. 1b (a). §518.1751, Subd. 1b (b) defines a parenting time dispute as "a disagreement among parties about parenting time with a child." Nowhere in the parenting time dispute resolution statute is there a discussion of the role of a parenting time

expeditor to resolve “disputes regarding any major decision concerning the life of the child.” Minn. Stat. §518.17, subd. 2 (b). With respect to Minn. Stat. §518.17, subd. 2 (b) (methods of dispute resolution regarding major decisions concerning the lives of the children), the district court found that:

...The Court does not expect that the parties will always agree with each other regarding parenting decisions, but they have demonstrated their ability to talk, seek and follow guidance, and work things out. The custody evaluator recommends that they use the service of a parenting time expeditor for a period of time following the dissolution to assist them in making the transition from adversarial parties to co-parents. Since they have interacted effectively with an expeditor during the pendency of this case, this appears to be an appropriate way for them to learn to communicate and work together following the dissolution. (A. 000058).

Again, the district court placed emphasis on the use of a parenting time expeditor to resolve actual *parenting decisions* not just parenting time disputes as authorized by §518.1751. The parties’ post-trial affidavits reflect the inability of the parenting time expeditor to handle non-parenting time related disputes regarding the raising of these children. Both parties indicated that they had attempted to utilize the expeditor to address the disagreement over removing the children from school without appropriate tutoring arrangements, thought it is clear that the expeditor could not help with that issue. (A. 000098-000100).

The district court’s determination that the parties have methods in place to resolve disputes regarding major decision in the lives of their children is unsupported by the evidence. In contrast, both parties testified regarding their inability to resolve any differences in decision making regarding their children.

The district court's findings regarding the use of a parenting time expeditor amounted to a "legal baseball bat" to coerce the parties into cooperation and co-parenting in the absence of an ability to do so in the past. The parenting time expeditor is not statutorily charged with resolving non-parenting time related disputes, and the district court's reliance on that method for dispute resolution is a misapplication of Minnesota Law and should be reversed.

III. ALL FUNDS DERIVED FROM PER CAPITA PAYMENTS TO MDEWAKANTON SIOUX (DAKOTA) COMMUNITY MEMBERS ARE MARITAL PROPERTY.

When trial courts divide marital property, they should consider certain relevant factors. Minn. Stat. § 518.58, subd. 1 (2000). These factors include "the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party." *Id.* Furthermore, the court must consider contribution of each party to the value of the marital property, presuming that "each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife." *Id.*

In the case of *Kucera . Kucera*, 146 N.W.2d 181 (Minn. 1966), the Minnesota Supreme Court found that when the "plaintiff contributed nothing to defendant's assets and that defendant's assets are of a highly speculative nature" the trial court may refuse to award marital property to the plaintiff. *Id.*, at 184. Following the precedent set in *Kucera*, this Court held that the spouse of a

Shakopee Mdewakanton Sioux (Dakota) Community member was not entitled to an “award of marital property as she had contributed nothing to the appellant’s assets, and appellant’s continued accumulation of assets is speculative in that his income is at the discretion of the Mdewakanton Sioux Tribe. *Coursolle v. Coursolle*, 2002 WL 31501904, (Minn. App. 2002) (A. 000312).

Appellant disputes the equal division of the per capita payments she received during their marriage through her membership in the Shakopee Mdewakanton Sioux (Dakota) Community. These funds are non-marital in nature in that Appellant’s per capita payments are unique to her birthright as a member of the Mdewakanton Sioux, a sovereign nation. The Shakopee Mdewakanton Sioux Tribal Domestic Relations Code specifically states that all per capita payments are non-marital property belonging to the tribal member. (Trial Exhibit #44). The Respondent did not contribute to Appellant’s assets, and in fact kept his own separate bank accounts during the marriage. Respondent testified that the funds in his account were acquired from “buying and selling” automobiles, etc. prior to and during the marriage. (A. 000158-000159). All of Respondent’s efforts in preserving assets were directed at preserving and in fact increasing his non-marital accounts.

CONCLUSION

The trial court erred when it did not amend its findings regarding the Respondent’s intention to continue to reside on the Shakopee Mdewakanton Sioux Reservation. The district court had ample evidence that Respondent was not

residing on the reservation shortly after the trial on this matter, and should have amended its findings accordingly. Likewise, the district court adopted statements and recommendations of the custody evaluator that referenced and incorporated the importance of the Respondent's residence on the reservation. The district court's findings regarding the Respondent's residence were contrary to the evidence and should therefore be reversed.

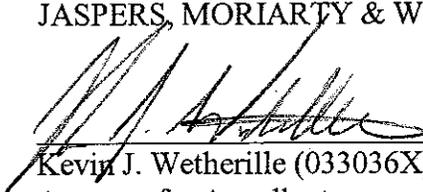
A close examination of the testimony at trial reveals that these parties clearly lack the ability to cooperate and communicate in the rearing of their two children. The parties differ in their most basic parenting philosophies and demonstrate an unwillingness to recognize the parenting philosophies of the other. The district court's findings that the parties have the ability to cooperate and communicate with respect to rearing their children is contrary to the evidence and should be reversed.

The district court found that the parties were able to use a parenting time expeditor to resolve disputes regarding major issues in raising their children. However, the district court's use of a parenting time expeditor is tantamount to forcing cooperation where none currently exists. In fact, the use of a parenting time expeditor in such a fashion is contrary to Minnesota law and beyond the purview of a parenting time expeditor. The district court misapplied the law with respect to the existence of methods of dispute resolution in use by the parties, and should therefore be reversed.

The district court mischaracterized Appellant's per capita funds as marital property. Because the funds are non-marital and the Respondent did not contribute to Appellant's funds, the district court's division should be reversed.

Respectfully submitted,
JASPERS, MORIARTY & WALBURG, P.A.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).