

No. A09-743

*State of Minnesota
In Court of Appeals*

Trial Court Case No. 05-F3-04-50166
Appellate Court Case No. A09-743

Amy Sue Hagen,

Respondent,

vs.

Daniel John Schirmers

Appellant.

RESPONDENT'S BRIEF

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STATEMENT OF LEGAL ISSUES

I. Did the Respondent rebut the statutory presumption under Minn.Stat. § 518.175, Subd. 1 (e) that Appellant should receive at least 25 percent of the parenting time with the child?

The trial court held that given the child's age and school schedule, the Appellant's demanding work schedule, and the fact that the child has never been out of the Respondent's care for any extended period of time, the parenting time awarded will serve the child's best interests.

Authorities: Minn.Stat. § 518.175, Subd. 1(e).

II. Should the Respondent's motion to relocate to another state with the parties' minor child have been granted by the trial court?

The trial court held that the Respondent met the burden of proof in establishing that, when applying the best interest standard set forth under Minn.Stat. § 518.175, Subd. 3(b), the best interests of the child would be met by granting Respondent's motion to relocate with the minor child to the state of California.

Authorities: Minn.Stat. § 518.175, Subd. 3(b)(1 through 8).

STATEMENT OF THE CASE

This matter is an appeal from the Findings of Fact, Conclusions of Law, and Order for Judgment issued by the Honorable James W. Hoolihan of the District Court, Seventh Judicial District, Benton County on April 3, 2009, granting Respondent's motion to relocate with the parties' minor child to the state of California and modifying the Appellant's parenting time to reflect the relocation.

On November 4, 2008, the Respondent filed a motion to allow her to relocate for the purpose of changing the parties' minor child's residence to the state of California pursuant to Minn.Stat. § 518.175, Subd. 3. The Appellant contested the motion. Based upon the affidavits submitted by the parties, the district court held that Respondent had made a prima facie showing that such a relocation would meet the best interests of the child and scheduled the matter for an evidentiary hearing.

A one day evidentiary hearing was held on March 6, 2009. Based upon all of the testimony and evidence adduced at the trial, the Honorable James W. Hoolihan issued Findings of Fact, Conclusions of Law, and Order for Judgment on April 3, 2009. The Court, in applying the statutory factors as set forth under Minn.Stat. § 518.175, Subd. 3, held that the best interests of the child would be served by granting the Respondent's motion to relocate to the state of California and to modify the Appellant's parenting time to conform to the relocation.

This appealed followed.

STATEMENT OF FACTS

Appellant, Daniel Schirmers, and Respondent, Amy Sue Hagen, are the biological parents of the minor child, Taylor Rae Hagen, who was four years of age at the time of the evidentiary hearing, being born on April 19, 2004. (TT-6) Ms. Hagen and Mr. Schirmers were never married. (TT-7) On January 27, 2005, the parties entered into a Stipulation and Order establishing custody and parenting time. Ms. Hagen was awarded sole physical custody, with the parties being awarded joint legal custody. (AA-2) Mr. Schirmers was awarded parenting time on a structured, graduated schedule. (AA-2) For about two years prior to the evidentiary hearing, Mr. Schirmers had parenting time with Taylor every Tuesday and Thursday for a period of two hours each day during daycare hours, and every other weekend for a period of 24 hours from 9:00 a.m. on Saturday until 9:00 a.m. on Sunday. (AA-2)

On November 4, 2008, Ms. Hagen filed a motion seeking permission from the court to relocate with Taylor to the state of California. (AA-27) The reason for her request to relocate was to enable her to get married to Steve Casazza, an individual with whom she had maintained a long distance relationship for a period of about two years. (TT-10-11) Ms. Hagen and Mr. Casazza met through their employer, ING Direct. (TT-11) Mr. Casazza is a long time resident of California. (TT-85-86) Ms. Hagen and Mr. Casazza are engaged to be married. (TT-11) During the course of their relationship, Ms. Hagen and Taylor traveled to California to visit Mr. Casazza on average six times each year. (TT-12) Mr. Casazza, in turn, traveled to Minnesota every four to six weeks. (TT-12) Mr. Casazza has two children from a previous relationship, namely Connor, age five,

and Sophia, age two. *(TT-12)* Mr. Casazza has a great relationship with Taylor and they are very close. *(TT-92)* Mr. Casazza does not wish to replace, in any respect, Mr. Schirmers' role in Taylor's life as her father. *(TT-96)* He only wishes to be a strong role model for Taylor. *(TT-93)* Mr. Casazza acknowledges that Mr. Schirmers' relationship with Taylor is critical, and there is no desire to replace that relationship. *(TT-97)*

Ms. Hagen also has two brothers, Chris and Scott Hagen, who reside in California with whom she and Taylor have maintained a close relationship. *(TT-19)* Both of Ms. Hagen's brothers reside within 30 to 40 minutes of where Mr. Casazza resides. *(TT-19)* Ms. Hagen has ten siblings. *(TT-19)* She is the youngest child of the family. *(TT-19)* The age difference between Ms. Hagen and her eldest sibling is 18 years. *(TT-19)* Other than Chris and Scott Hagen, the other siblings reside in Minnesota. *(TT-22)* Ms. Hagen typically visits her extended family in Minnesota on holidays and family reunions, with the exception of one sister and brother with whom she visits about once a month. *(TT-22)* Ms. Hagen does not visit them as often because their children are older and busy in their school activities. *(TT-22)* Although Ms. Hagen talks to her siblings in Minnesota via telephone often, she and Taylor do not typically get together with them. *(T-22)* In fact, Ms. Hagen talks to her brothers in California more often than her siblings in Minnesota. *(TT-22)* Ms. Hagen and her brothers, Chris and Scott Hagen from California, are closer in age. *(TT-19)* They grew up together and, as a result, are very close. *(TT-19)* Also, Chris and Scott have children around Taylor's age, so they have more in common. *(TT-20-23)* Chris has a son, Christopher, who is four and a half years old, and Cameron, who just turned two years of age. *(TT-20)* During their trips to California during the past two

years, Ms. Hagen and Taylor have spent significant time with Chris and his children. (TT-20) Taylor has formed a strong bond with her cousins in California. (TT-21) Taylor does also have seventeen cousins residing in Minnesota. (TT-23) Two of Taylor's cousins are under the age of ten. The others range between ten to thirty-five years of age. (TT-23) Because of the significant age differences, Taylor is not particularly close to her cousins in Minnesota. (TT-24)

At the time of the evidentiary hearing, Ms. Hagen was employed as the document integrity administrator for ING Direct at its St. Cloud branch office. (TT-27) ING Direct formally approved Ms. Hagen's request for a transfer from the St. Cloud office to the Los Angeles office. (TT-28-29) The transfer allowed Ms. Hagen to maintain the same position, benefits, and earnings. (TT-29) On occasion, ING Direct will allow Ms. Hagen to return to Minnesota and work in the St. Cloud office. (TT-30) Because of this unique employment opportunity, Ms. Hagen can travel back and forth between Minnesota and California for the purpose of accompanying Taylor on all flights for parenting time. (TT-38)

Ms. Hagen submitted a parenting time proposal as a part of her motion to relocate. (TT-34) Her proposal took into account the school breaks that were identified on the 2008-2009 district calendar from the school where she intended to enroll Taylor. (TT-35-36) Ms. Hagen also proposed two seven day periods of parenting time during the month of June and August. (TT-36) The reason for limiting summer parenting time to two weeks was, in part, to take into account Mr. Schirmers' demanding work schedule during the summer. (TT-37) Mr. Schirmers is self-employed in the concrete business. (TT-111)

During the summer, Mr. Schirmers generally works from 5:00 a.m. until 8:00 p.m. six days a week. *(TT-37, 161)* It also took into account the fact that Taylor was not accustomed to being out of Ms. Hagen's care for extended periods of time. The longest period of time in which Taylor had been away from Ms. Hagen's care was for two nights, which occurred about two years ago. *(TT-37)* Limiting parenting time during the summer to one week blocks of time would also allow Taylor to develop and maintain friendships in California. *(TT-37)* Mr. Schirmers testified during the hearing that his counterproposal for parenting time was "Six months with, six months without. And divide them up equally so we don't have a long period of time in between visits." *(TT-165)* Following the hearing, Mr. Schirmers submitted an additional affidavit stating that as a part of any parenting time schedule, he should be awarded parenting time during the entire summer. *(AA-8-9)*

Taylor is a very happy, outgoing, energetic little girl who makes friends very easily and is very adaptable. *(TT-18-19)* Taylor started Kindergarten in California in September, 2009. *(TT-32)*¹ She is a very versatile individual who would transition well to moving to California. *(TT-130)* Ms. Hagen is not aware of any behavioral issues involving Taylor that are atypical for a child of her age. *(TT-41)* Ms. Hagen has never received any indication from Taylor's teachers or any third parties that counseling may be warranted. *(TT-41)*

¹ As acknowledged by the Appellant in his brief, the Respondent and the minor child relocated to the state of California in June, 2009.

The parenting time expeditor, Virginia Marso, has never met Taylor. (RA-4, 5) She had never had any communication with Taylor. (RA-4, 5) Any opinions or observations offered by Ms. Marso were not specific to Taylor, but rather to a “typical” child of Taylor’s age. (RA-3, 4) Ms. Marso acknowledged that she has no personal opinions as to how Taylor would adjust to relocating to California. (RA-4)

STANDARD OF REVIEW

The District court has extensive discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion. Dahl v. Dahl, 765 N.W.2d 118 (Minn.App.2009); Crosby v. Crosby, 587 N.W.2d 292 (Minn.App.1998). A district court abuses its discretion in determining parenting-time issues if its findings of fact are unsupported by the record or if it misapplies the laws. Dahl v. Dahl, 765 N.W.2d 118 (Minn.App.2009). The district court is granted broad discretion to determine what is in the best interests of the child when it comes to parenting time and an appellate court will not overturn its determination absent an abuse of discretion. Braith v. Fischer, 632 N.W.2d 716 (Minn.App.2001). In fixing parenting time rights, the children’s welfare is controlling consideration, and the district court is vested with wide discretion in determining those issues. Bryant v. Bryant, 119 N.W.2d 714 (Minn.1963). When reviewing parenting time determinations for an abuse of discretion, the Court must not reverse the court’s findings unless they are clearly erroneous. SooHoo v. Johnson, 731 N.W.2d 815 (Minn.2007).

The Appellate court shall set aside a district court’s findings of fact only if they are clearly erroneous, Minn.R.Civ.P. 52.01; Sefkow v. Sefkow, 427 N.W.2d 203, 210

(Minn.1988). Due regard shall be given to the presence of the judge during the trial and to the opportunity to determine the credibility of the witnesses. Lange v. Fidelity & Cas. Co. of New York, 185 N.W.2d 881 (Minn.1971). To set aside a district court's findings of fact as clearly erroneous, the findings must be manifestly contrary to the weight of the evidence, or not reasonably supported by the evidence as a whole. City of Golden Valley v. One 1998 Pontiac Grand Prix, 616 N.W.2d 780 (Minn.App.2000). The reviewing court should be very reluctant to remand findings dependent upon the credibility of the witnesses which the trial court has seen and heard. In re Estate of Gollner, 260 N.W.2d 567 (Minn.1977). A decision can be overturned under the "clearly erroneous" standard only if on review of the entire evidence the appellate court is left with a definite and firm conviction that a mistake has been made. Peterson v. Peterson, 242 N.W.2d 88, 94, n.4 (Minn.1976). The Appellate court must view the record in the light most favorable to the district court's findings. Dailey v. Chermack, 709 N.W.2d 626, 629 (Minn.App.2006). Findings of fact should be upheld if they are reasonably supported by the evidence. In re Trusteeship of the Trust of Williams, 631 N.W.2d 398 (Minn.App.2001).

- I. **Did the Respondent rebut the statutory presumption under Minn.Stat. §518.175, Subd. 1 (e) that Appellant should receive at least 25 percent of the parenting time with the child?**

LEGAL ARGUMENT

The primary aim of all child custody and parenting time issues in Minnesota has always been to protect the child's best interest. Manthei v. Manthei, 268 N.W.2d 45 (Minn.1978)(noting the paramount nature of the child's best interests in family law matters). A district court has broad discretion in deciding how to serve the child's best

interests. Anderson v. Archer, 510 N.W.2d 1 (Minn.App.1993). In reviewing the Appellant's brief as a whole, it appears that the cornerstone of his dissatisfaction with the district court's order lies with the modification of the Respondent's parenting time schedule.

The Appellant first addresses the issue of parenting time in relation to the rebuttable presumption under Minn.Stat. § 518.175, Subd. 1(e)². The statute provides as follows:

(e) In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child. For the purpose of this paragraph, the percentage of parenting time may be determined by calculating the number of overnights that a child spends with a parent or by using a method other than overnights if the parent has significant time periods on separate days when the child is in the parent's physical custody but does not stay overnight. The Court may consider the age of the child in determining whether a child is with a parent for a significant period of time. (emphasis added).

As highlighted above, there are three controlling considerations when applying the 25 percent parenting time presumption. First, the presumption is rebuttable. Second, the presumption only applies in the absence of other evidence. Third, the presumption grants the Court the explicit discretion to consider the age of the child in determining whether the child is with a parent for a significant period of time.

This court has recently issued a string of decisions which directly bear on the application of a rebuttable presumption. In Andersen- Emeziem v. Giddings, 2010 WL 431589 (Feb.9, 2010)(unpublished opinion) this court directly addressed the application

² The Appellant cites to Minn.Stat. § 518.175, Subd 1 (3), which relates to relocating to another state, as opposed to Subd. 1(e), which relates to the rebuttable presumption of the percentage of parenting time a parent should receive.

of the “rebuttable presumption” within the context of determining the best interest of the child. In that case, the issue presented was whether or not the district court incorrectly applied the statutory rebuttable presumption when it determined that the non-custodial parent had failed to meet his burden relative to joint legal custody. This Court defined the standard relative to the application of a rebuttable presumption in family law cases. It states as follows:

... Under Minnesota’s rules of evidence, “a presumption imposes on the party against whom it is direct the burden of going forward with evidence to rebut or meet the presumption.” Minn.R.Evid. 301. “[T]he burden of proof[,] in the sense of the risk of nonpersuasion, remains... upon the party on whom it was originally cast.” *Id.* The comment to this rule explains that “If sufficient evidence is introduced that would justify a finding of fact contrary to the assumed fact[,] the presumption is rebutted and has no further function.” *Id.*

Andersen-Emeziem v. Giddings, 2010 WL 431589 at 3(unpublished opinion).

This court also addressed the rebuttable presumption standard of proof in the context of child support in Perez v. Perez, 2010 WL 346386 (Feb. 2, 2010)(unpublished opinion). In that case, this Court recognized that the statutory presumption of unreasonableness and unfairness in calculating child support does not result in an automatic modification and the Court still may exercise its discretion to deny the presumption when sufficient evidence is provided to rebut that presumption. *Id.* at 2. See also Kostrzewski v. Frisinger, 2009 WL 1921043 (Minn.App.2009) (unpublished opinion)(the rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child does not ignore the district court’s broad discretion in determining parenting time. Citing Matson v. Matson, 638 N.W.2d 462, 465 (Minn.App.2002).

Like the custodial parent in Andersen-Emeziem, Ms. Hagen provided substantial evidence to rebut the presumption that Taylor's best interests would not be served by awarding Mr. Schirmers at least 25 percent parenting time. The district court made specific findings of fact to show how and why the statutory presumption was rebutted through evidence at the trial, as well as to support why the parenting time awarded serves the child's best interests. The following are the specific findings issued by the district court which rebut the statutory presumption:

1. The extent of Respondent's [Mr. Schirmers] involvement in Taylor's life has been limited to parenting time consisting of small blocks of time during the week. For the past two years, the schedule has allowed for parenting time consisting of 24 hour blocks of time every other Saturday and two weekday visits consisting of two and one-half hours.... *(See Findings of Fact No. 7 at AA-4.)*
2. Taylor has demonstrated her ability to develop and maintain long distance relationships during the course of the past two years. This development will assist her in preserving her relationship with her father. *(See Findings of Fact No. 21 at AA-6.)*
3. Taylor's relationship with her father will be an important part of her life, and the Court believes the Petitioner [Ms. Hagen] will support and encourage this relationship through phone contact, frequent visits, and other electronic communication as appropriate for her age. With the availability of video conferencing through the phone or internet, e-mail, and regular telephone contact, the Petitioner will be able to offer Taylor many additional avenues she can communicate with her father. *(See Findings of Fact No. 22 at AA-6.)*
4. The Petitioner's willingness to promote the relationship between Taylor and her father is evidenced by her proposal to accompany Taylor on all flights for scheduled parenting time and to accommodate her work schedule accordingly. *(See Findings of Fact No. 27 at AA-7.)*
5. At the time of trial Respondent was not willing to propose to the Court a parenting time schedule for the event that the request to relocate was granted, except to suggest a major modification of custody to a split

custody, one-half of each year with each parent. There are no facts to support a change of custody in this case. The Court does not find that a split custody arrangement would be in the best interests of this child. (*See Findings of Fact No. 31 at AA-8.*)

6. Respondent submitted a revised proposed parenting schedule after the evidentiary hearing in response to the Court's request. This proposal would be for the child to spend the entire summer with him, one week at Christmas/New Years, alternate spring breaks, alternate weekends that have a two day school break attached to them, one-half of any time that Taylor is visiting in Minnesota with her mother, half of any time that Respondent spends in California, and that Petitioner travel with the child to and from California for all Minnesota visits and pay all the costs of air travel for the child. The court finds this request, like the change of custody request, to lack consideration for the child's best interests and to be exclusively focused on the wants of the Respondent. It may be appropriate to expand parenting time with the Respondent in the future as Taylor gets older, but Taylor's needs and activities should always be paramount when making any decision regarding parenting time. (*See Findings of Fact No. 32 at AA-9.*)
7. Taylor's best interests will be served by adopting the Petitioner's proposed parenting time schedule which provides for week long parenting time throughout the year, including during Taylor's spring breaks and summer school vacation. At this time, it is not in Taylor's best interest to award Respondent extended summer parenting time as this is his busy time of year in his business, requiring him to work from 5:00 a.m. to 8:00 p.m. six days a week. Furthermore, Taylor is only four years old and not accustomed to being away from the Petitioner's care for an extended period of time. (*See Findings of Fact No. 33 at AA-9; and Conclusions of Law 3 at AA-17.*)
8. ...Taylor's father has exercised 24 hour visits and short visits for a few hours during the week. If Taylor were separated from her mother who has been the most significant presence in her young life due to her primary care giving role, it would be detrimental to Taylor. (*See Conclusion of Law 1a at AA-13.*)

The above findings of fact were made after giving deference to the credibility of the witnesses and the weight of the evidence as a whole. The evidence shows that the parenting time awarded by the district court takes into consideration the following

evidence 1) Taylor's young age of four years (*TT-6*); 2) Taylor's school schedule (*TT-35-36*); 3) Mr. Schirmers' work schedule during the summer which consists of him working from 5:00 a.m. to 8:00 p.m. six days a week (*TT-37, TT-161*); 4) the fact that the longest period of time in which Taylor has been away from her mother was for two nights which occurred about two years ago (*TT-37*); 5) limiting summer parenting time to one week blocks will allow Taylor to develop and maintain friendships in California (*TT-37*); and 6) the schedule allows Ms. Hagen to arrange her employment so she can accompany Taylor on all flights back to Minnesota for parenting time. (*TT-38*)

Mr. Schirmers argues that the district court abused its discretion because, contrary to the evidence as a whole and the above findings of fact, the district court did not apply to statutory presumption in awarding him at least 25 percent of the parenting time. This argument is seriously flawed, and completely ignores the explicit language within the statute which, through evidence, makes the presumption rebuttable.³ Rather, Mr. Schirmers argues simply that there were other parenting time schedules that the district court "*might have*" implemented. *See Appellant's Brief at page 8*. The fact that "[T]hat the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Vangness v. Vangness*, 607 N.W.2d 468, 474 (Minn.App.2000); *see also Meyer v. Thalacker*, 2009 WL 2498066 (Minn.App.2009)

³ First, Appellant cites to Minn.Stat. 518A.36, Subd. 1 for a method of calculating parenting for the purposes of Minn.Stat. 518.175, Subd. 1. The language contained within both statutes mirror one another. In other words, there is no need to refer to Minn.Stat. 518A.36 [statute addressing parenting expense adjustment for child support purposes] as the same method of calculation is contained verbatim within Minn.Stat. 518 175, Subd. 1 [statutory rebuttable presumption of 25 percent parenting time].³ Thus, for the purpose of addressing Appellant's argument, the Respondent will rely upon Minn.Stat. 518.175, Subd. 1.

(unpublished opinion)(acknowledging that “a different structure and parenting-time schedule toward a more equal balance might have resulted from the facts. But the district court’s discretion is significant regarding the allocation of parenting time that most favors the child’s best interests, and the limits imposed by our standard of review prevent us from invading that discretion by replacing the district court’s judgment with our own”). The non-custodial parent in Andersen-Emeziem, likewise argued that he should be given eight weeks of summer parenting time instead of the four weeks that was awarded. The district court found that given the child’s adjustment to her community which included summer activities and that more than four weeks away from her home would be disruptive, this Court affirmed the decision as being “well within the district court’s discretion.” Id. at 3.

The district court awarded Mr. Schirmers the following parenting time: 1) two weeks during the summer months of June and August; 2) four days during Taylor’s school break in October; 3) one week during the Thanksgiving holiday in alternating years; 4) one week during the Christmas break in those years when Mr. Schirmers does not have the Thanksgiving holiday; and 5) one week in April during Taylor’s spring school break. Mr. Schirmers attempts to bolster his position by comparing this schedule with the pre-existing order by comparing the number of “weeks” to “120 days of parenting time.” (*See Appellant’s Brief at page 6.*) The Appellant did not have 120 “days” of parenting time under the then existing schedule. He had 26 “days” of parenting time each year (one overnight consisting of 24 hours every other Saturday). The two and

one-half hour visits twice a week do not constitute “days of parenting time.” They consist of “hours”, or, as the Court described them “small blocks of time during the week.”

Be that as it may, Mr. Schirmers’ arguments relative to the days, hours, and percentages of parenting time are nothing more than red herrings in order to detract the Court from the real issue at hand: the best interests of the child. As Mr. Schirmers acknowledges himself, a “pure ‘count the hours’ is not always appropriate.” (*See Appellant’s Brief at page 8.*) The Court’s role is not to act as a mathematician in determining the number of days needed to arrive at 25 percent of parenting time, but rather to act as the fact finder in determining what parenting time schedule will serve the child’s best interest and whether or not the presumption contained in Minn.Stat. § 518.175, Subd. 1(e) has been rebutted through the evidence. Mr. Schirmers expended significant effort discussing how the district court “might have” calculated the percentage of parenting time to arrive at 25 percent. (*See Appellant’s brief at page 8-10.*) He does little, however, to discuss the best interests of the child or the fact that the presumption is in fact rebuttable.

As recognized by the district court, Mr. Schirmers, in addressing the issue of parenting time, incorrectly places the focus on himself and not on the evidence that was offered and considered as a whole in determining the best interests of Taylor. For instance, he argues that the district court failed to make findings that suggest that Mr. Schirmers has been, is, or will be, a problematic parent, or that he has failed to pay child support or maintain contact with the child. (*See Appellant’s Brief at page 10.*) The district court properly placed the focus on *Taylor’s* best interests. Specifically, Taylor’s

young age, the fact she was entering school, had not been out of her mother's care for more than two days at one time, and Mr. Schirmers' demanding work schedule during the summer. It was through that evidence that the presumption that Mr. Schirmers should have at least 25 percentage was rebutted.

A close examination of Mr. Schirmers' argument also defies public policy. If this court were to accept Mr. Schirmers' argument that the district court abused its discretion by not awarding him 25 percent of the parenting time under Minn.Stat. § 518.175, Subd. 1(e), the precedent established would be to essentially strip the district court, trier of fact, of its broad discretion in addressing issues of custody and parenting time and in determining the best interests of the child. This is inconsistent with the long-standing and well-established law within Minnesota. See Dahl v. Dahl, 765 N.W.2d 118 (Minn.App.2009)(district court has extensive discretion in determining parenting time issues and in determining what is in the best interests of the child); Bryant v. Bryant, 119 N.W.2d 714 (Minn.1963)(in fixing parenting time rights, the district court is vested with wide discretion). This broad discretion would essentially be replaced with the use of a mathematical formula to calculate the number of hours, days, or weeks of parenting time to be awarded to arrive at 25 percent. This not only goes against the paramount consideration of what is in the best interests of the child, but gives no effect to the explicit legislature language that the presumed 25 percent is rebuttable through evidence.

The district court exercised its broad discretion in awarding Mr. Schirmers' parenting time consisting of longer periods of time throughout the course of the year. In so doing, the district court, in weighing the evidence and the credibility of the witnesses

at trial, made the determination that such a parenting time schedule served Taylor's best interests and, that Ms. Hagen, had rebutted the statutory presumption under Minn.Stat. § 518.175, Subd. 1(e). The district court's findings of fact are well supported by the record and do not constitute any abuse of discretion.

II. Should the Respondent's motion to relocate to another state with the parties' minor child have been granted by the district court?

Secondary in nature, Mr. Schirmers challenges the district court's findings of fact and conclusions of law in determining that the statutory factors set forth under Minn.Stat. § 518.175, Subd. 3⁴, were supported by the evidence. The legislature has established eight factors upon which the court is to apply and address when considering a request of a parent to relocate with a minor child to another state. Based upon all of the evidence, the court made specific, detailed findings of fact which support its conclusions of law that the best interests of Taylor will be served by granting Ms. Hagen's motion to relocate to California.

In addressing each of the eight factors, Mr. Schirmers cites to "piecemeal" evidence which, in many cases, was disputed through testimony from Ms. Hagen and/or other witness. Due regard is to be given to the presence of the judge during the trial and to the opportunity to determine the credibility of the witnesses. Estate of Serbus v. Serbus, 324 N.W.2d 381 (Minn.1982). The fact that the record might support findings other than those made by the district court, does not show that the court's findings of fact

⁴ Mr. Schirmers cites to Minn.Stat. 518.175, Subd. 4 throughout his brief. Subdivision 4 was repealed in 1996. The eight factors upon which the Court is to apply when considering the request of such a relocation are set forth in Minn.Stat. 518.175, Subd. 3

are clearly erroneous or otherwise defective. Vangness v. Vangness, 607 N.W.2d 468, 474 (Minn.App.2000).

With that standard in mind, Ms. Hagen will address each of the statutory factors in relation to the evidence that was adduced at the hearing and the findings of fact specifically made by the district court.

1) **THE NATURE, QUALITY, EXTENT OF INVOLVEMENT, AND DURATION OF THE CHILD'S RELATIONSHIP WITH THE PERSON PROPOSING TO RELOCATE AND WITH THE NONRELOCATING PERSON, SIBLINGS, AND OTHER SIGNIFICANT PERSONS IN THE CHILD'S LIFE... (EMPHASIS ADDED)**

Under this fact, the court is not only to look at the relationships between the parents and the child, but also the child's relationship with other significant persons in the child's life. Mr. Schirmers argues that the court erred in this factor on the sole basis that his involvement with Taylor consisting of 104 days worth of contacts per year is not "limited." That was one of many factors considered by the district court in addressing this factor. The other findings (which are recited in pertinent part) that the Court made specifically applying the evidence to this first factor include the following:

- a. Petitioner has been the sole primary caretaker and custodial parent of Taylor since her birth. The nature, quality, extent of involvement and duration of Taylor's relationship to the Petitioner is of the most significance... (*See Findings of Fact No. 6 at AA-4.*)
- b. During the course of Petitioner's relationship with Mr. Casazza, Taylor has established a strong, healthy bond with Mr. Casazza and his children.... (*See Findings of Fact No. 11 at AA-4.*)
- c. In addition, Petitioner has two brothers, Scott and Chris Hagen who also reside in California. ...Chris Hagen has two children around the same age as Taylor who have also established a strong personal relationship with

Petitioner and Taylor. Petitioner proposes to reside within 45 minutes of both brothers. (*See Findings of Fact No. 12 at AA-5.*)

- d. During their visits, Petitioner and Taylor have visited and gone on trips with their extended families. Taylor has also established friendships with several other children, including cousins of her approximate age, in the state of California. (*See Findings of Fact No. 13 at AA-5*)
- e. Although Petitioner does have other siblings who are residents of the state of Minnesota, Petitioner and Taylor have not established as close bonds with the children of this extended family given the differences in their respective ages. (*See Findings of Fact No. 15 at AA-5*)
- f. During the course of the last two years, Taylor has traveled to and spent a considerable amount of time in California. She is familiar with the area and has established significant personal relationships with Petitioner's fiancé and his children, as well as other extended family members and friends in California...(*See Findings of Fact No. 18 at AA-6*)

As found by the district court, Taylor has “significant family that she has established relationships with in both Minnesota and California.” (*See Conclusions of Law No. 1(a) at AA-12.*)The district court properly took the evidence as a whole and considered all of Taylor's established relationships, not only with her parents, but with other significant persons in her life. Whether or not the district court improperly “classified” Mr. Schirmers' involvement as “limited” does not erase all of the other evidence of relationships that Taylor has with other significant persons in her life – many of whom reside in California.

- 2) **THE AGE, DEVELOPMENTAL STAGE, NEEDS OF THE CHILD, AND THE LIKELY IMPACT THE RELOCATION WILL HAVE ON THE CHILD'S PHYSICAL, EDUCATIONAL AND EMOTIONAL DEVELOPMENT, TAKING INTO CONSIDERATION SPECIAL NEEDS OF THE CHILD...**

The district court concluded that, based upon all of the credible evidence before the court, Taylor will not be hindered in her development by relocating from the state of Minnesota. (*See Conclusions of Law No. 1(b) at AA-13.*) Mr. Schirmers argues that the district court again erred by failing to consider this factor because it did not “accept” the visitation expeditor Virginia Marso’s recommendation relative to counseling for Taylor. The district court is not bound by an independent evaluator’s recommendations. Pikula, 374 N.W.2d at 712; see also Rutanen v. Olson, 475 N.W.2d 100, 104 (Minn.App.1991) (acceptance of an independent evaluator’s recommendation is discretionary with the district court). However, the district court must articulate its reasons for rejecting the recommendation or make “detailed findings that examine the same factors the custody study raised.” Rogge v. Rogge, 509 N.W.2d 163, 166 (Minn.App.1993).

Here, the Court did weigh the credibility of Ms. Marso’s testimony in addressing this second factor. In doing so, it found that Ms. Marso’s opinions and testimony were speculative based upon a lack of personal knowledge. The district court specifically found as follows:

- a. Virginia Marso provided testimony relative to the best interests of a “stereotypical” child of Taylor’s age. Ms. Marso has not met Taylor, nor observed the parties in their parenting, rendering her opinions speculative as they relate to Taylor’s best interest. (*See Findings of Fact No. 29 at A-8.*)

This particular finding of fact is supported by Ms. Marso’s own testimony. Virginia Marso is a parenting-expediting consultant. (*RA-2*) The testimony she gave was not specific to Taylor, but rather were general to a “typical” child of Taylor’s age. (*RA-3, 4*) Ms. Marso also acknowledged that every child is different in how they transition to

change. (RA-3) She even used the example of her own children and how significantly they differ in their ability to adjust to change. (RA-4) It depends significantly on the child's personality. (RA-4) Ms. Marso has never met Taylor. (RA-4, 5) She has no personal opinion as to how Taylor would adjust to the move to California. (RA-4)

The district court's consideration of this factor did not end with Ms. Marso's testimony. Rather, it further evaluated the other considerations contained within this second factor, such as the child's age, development stage, needs, educational and emotional development and the likely impact any relocation may have on the child. Specifically, the district court made the following findings in support of this second factor:

- a. Taylor is not of sufficient age and maturity for the court to give weight to her preferences. She has, however, expressed to Petitioner her excitement over the prospect of moving to California to live with Mr. Casazza and his children. Taylor is an outgoing, well-adjusted four-year old. (*See Findings of Fact No. 14 at AA-5.*)
- b. During the course of the last two years, Taylor has traveled to and spent a considerable amount of time in California. She is familiar with the area and has established significant personal relationships with Petitioner's fiancé and his children, as well as other extended family members and friends in California, which will reduce any likely impact the relocation will have on Taylor's physical and/or emotional development. (*See Findings of Fact No. 18 at AA-6.*)
- c. ...From what the Court has heard about Taylor during this proceeding, she is a loving child who has shown a capacity to care for many individuals who are involved in her life.)*See Findings of Fact No. 20 at AA-6.*)
- d. Taylor has demonstrated her ability to develop and maintain long distance relationships during the course of the past two years. This development will assist her in preserving her relationship with her father. (*See Findings of Fact No. 21 at AA-6.*)

- e. Petitioner has researched various daycare facility options... Petitioner intends to enroll Taylor into the YMCA program which provides a pre-school/kindergarten learning environment and structure similar to that which Taylor currently engages in at New Horizons. The educational opportunities afforded to Taylor will not be compromised by relocating to California. (*See Findings of Fact No. 26 at AA-7.*)

All of these facts support the district court's conclusion of law that, based on all of the credible evidence before the Court, Taylor's development as a child will not be hindered by moving from the state of Minnesota. (*Conclusion of Law No. 1(c) at AA-13.*) The district court properly and adequately viewed the evidence as a whole in considering this second factor in relation to Taylor's best interests.

3. THE FEASIBILITY OF PRESERVING THE RELATIONSHIP BETWEEN THE NONRELOCATING PERSON AND THE CHILD THROUGH SUITABLE PARENTING TIME ARRANGEMENTS, CONSIDERING THE LOGISTICS AND FINANCIAL CIRCUMSTANCES OF THE PARTIES.

The district court concluded that it is feasible to preserve the relationship between Mr. Schirmers and Taylor. (*See Conclusions of Law No. 1(c) at AA-13.*) Mr. Schirmers argues that the district court failed to properly consider this factor because it only focused on the parties' financial capabilities in contributing to Taylor's transportation costs. Although the court did consider the "logistics and financial circumstances," as required under this factor, it also addressed the feasibility of preserving the relationship between Mr. Schirmers and Taylor through suitable parenting time arrangements. In weighing all of the testimony and evidence, the district court made the following specific findings:

- a. Taylor has demonstrated her ability to develop and maintain long distance relationships [with persons living in California] during the course of the past two years. This development will assist her in preserving her relationship with her father. (*See Finding of Fact No. 21 at AA-6.*)

- b. Taylor's relationship with her father will be an important part of her life, and the Court believes the Petitioner will support and encourage this relationship through phone contact, frequent visits, and other electronic communication as appropriate for her age. With the availability of video conferencing through the phone or internet, e-mail and regular telephone contact, the Petitioner will be able to offer Taylor many additional avenues she can communicate with her father. (*See Findings of Fact No. 22 at AA-6.*)

The district court did not limit its consideration of this factor to the parties' financial circumstances. Rather, it considered the evidence as a whole and found that there exist unique circumstances which make it feasible to preserve the relationship between Mr. Schirmers and Taylor. First, the district court found that Taylor, although of a young age, has established the unique ability to maintain strong bonds with significant persons in her life who reside in California through periodic visits over the course of a year. (*TT-12, 24*) The district court also weighed the evidence and found that Ms. Hagen has made efforts to maintain the child relationship between Mr. Schirmers and Taylor and will encourage and support the relationship through other means of communication. (*TT-41*)

Mr. Schirmers also argues that the evidence shows that Ms. Hagen has interfered with contact between Taylor and himself, both while in Minnesota and when Taylor has been in California and, as a result, the relationship will not be preserved if the relocation occurs.

Although there have been some periodic parenting time disputes between Ms. Hagen and Mr. Schirmers, they were limited to issues when Ms. Hagen took Taylor to California on trips, for both personal and business reasons. (*TT-39*) Mr. Schirmers has

likewise exercised his right to modify the schedule. *(TT-40)* Every time there had been a change in the schedule, Mr. Schirmers was given make-up parenting time. *(TT-40)* He has not lost any parenting time with Taylor as a result of changes in the schedule. *(TT-40)* Mr. Schirmers objected to the provision contained in the court's parenting time order which allowed either parent to change the schedule upon seven days notice. *(TT-39)* However, it was Mr. Schirmers who requested that this specific notice provision be included in the order. *(TT-39-40)*

Ms. Hagen has no intention of frustrating, impairing or thwarting the relationship between Taylor and her father. *(TT-40)* She intends to encourage consistent phone calls, exploring the option of using a webcam, and following any court ordered parenting time schedule. *(TT-41)* Ms. Hagen has never violated a court order with regard to parenting time. *(TT-41)* The parties submitted a total of four parenting time disputes to the expeditor, Virginia Marso. *(RA-6)* Based upon her involvement in this matter, Ms. Marso is not aware of Mr. Schirmers losing any parenting time with Taylor. *(RA-6)* She is not aware of Ms. Hagen ever violating the court order. *(RA-6)* Ms. Marso also testified that she has no reason to believe that if Ms. Hagen relocated to California, that she would violate any court order. *(RA-6, 7)*

From all of the evidence presented, the district court rendered the following

Conclusions of Law:

- a. The Petitioner has made efforts to maintain a parent child relationship between Taylor and her father despite disputes that have come before the Court. The Petitioner has made reasonable proposals for contact with the Respondent based on Taylor's age. The Petitioner has made offers to encourage communication between Taylor and Respondent. With the

availability of phone, e-mail, and web-cams, the Respondent will be able to interact with Taylor on a regular basis and preserve his relationship with her. (*Conclusion of Law No. 1(c) at AA-13.*)

It is well established law that this court must defer to the district court's credibility determinations. Vangness, 607 N.W.2d at 472. Here, the district court found that the credible evidence demonstrated that Ms. Hagen has not interfered with or attempted to thwart Mr. Schirmers' relationship with Taylor. In fact, the district court found that Ms. Hagen will actually encourage and support the relationship. The district court's findings are supported by the evidence.

4. THE CHILD'S PREFERENCE, TAKING INTO CONSIDERATION THE AGE AND MATURITY OF THE CHILD.

The findings that Mr. Schirmers takes issue with again relate to the district court's credibility determinations and resolution of conflicting evidence. As acknowledged by Mr. Schirmers, the district court's findings relative to this particular factor is supported by the evidence. (*See Appellant's brief at page 17.*) The district court's findings of fact relative to this factor is as follows:

- a. Taylor is not of sufficient age and maturity for the court to give weight to her preferences. She has, however, expressed to Petitioner her excitement over the prospect of moving to California to live with Mr. Casazza and his children. Taylor is an outgoing, well-adjusted four-year old. (*See Findings of Fact No. 14 at AA-5.*)

The district court concluded that Taylor is too young for her preference to be considered by the Court, and, as such, did not weigh this factor in favor of, or against, Ms. Hagen's motion to relocate.

5. WHETHER THERE IS AN ESTABLISHED PATTERN OF CONDUCT OF THE PERSON SEEKING THE RELOCATION EITHER TO PROMOTE OR THWART THE RELATIONSHIP OF THE CHILD AND THE NONRELOCATING PERSON....

The District court specifically held that the Respondent's allegations relative to a pattern to thwart his parenting time was not proven by the evidence. (*See Conclusion of Law at AA-14.*) Rather, the district court found that the evidence showed that there was a pattern of the Petitioner rearranging her schedule to accommodate Respondent's request to modify parenting time. *Id.* These conclusions of law are supported by the evidence, as was set forth above in Ms. Hagen's discussion of factor No. 3, above. Based upon that evidence, the district court made the following findings of fact:

- a. On January 18, 2008, an order was filed, based upon the parties' stipulation, which provides that if one party was going to miss parenting time with the child, or cause the other to miss parenting time with the child, he/she is to provide the other party with seven days' notice in advance... The Petitioner has complied with the terms of this order and the Respondent has not missed any parenting time with the minor child. (*See Findings of Fact No. 4 at AA-3.*)
- b. There is no established pattern of conduct on the part of Petitioner to thwart the relationship between Taylor and her father. Although there have been times during which she caused Respondent to miss his scheduled parenting time, it is limited to four occasions and was done in compliance with the parties' own agreement as memorialized in the court's January 18, 2008, order. The Respondent has not lost any parenting time with Taylor as a result of Petitioner's trips with Taylor to California. Respondent, has taken advantage of the parties' agreement and rescheduled parenting time. (*See Findings of Fact No. 6 at AA-3.*)

The district court's findings of fact relative to this factor are not erroneous and are reasonably supported by the evidence as a whole.

6. WHETHER THE RELOCATION OF THE CHILD WILL ENHANCE THE GENERAL QUALITY OF THE LIFE FOR BOTH THE CUSTODIAL PARENT SEEKING THE RELOCATION AND THE CHILD INCLUDING, BUT NOT LIMITED TO, FINANCIAL OR EMOTIONAL BENEFIT OR EDUCATIONAL OPPORTUNITY...

The Appellant himself acknowledges that the district court's findings in this particular factor are not "clearly erroneous" as "it could probably have determined this either way." (*See Appellant's Brief at page 18.*) Mr. Schirmers simply questions the "financial benefit" aspect of the court's findings in relation to the income Ms. Hagen will earn in relation to the cost of living in California.⁵ Ms. Hagen's desire to relocate to California is not to acquire a better job, or to seek better financial opportunities. It is to allow her to become married to Steve Cazassa, with whom she has been involved in a relationship for two years (as of the date of the hearing). By relocating to California, Taylor and Ms. Hagen will be afforded the opportunity to become a part of a loving family unit which would include a constant male figure, two step-siblings, and be surrounded by extended family members, such as aunts and uncles and cousins that are of Taylor's age. (*See Findings of Fact No. 28 at AA-8.*) It is those facts and circumstances that will enhance the general quality of life for both Ms. Hagen and Taylor. In other words, it is the emotional enhancement of quality of life that was found to be of paramount consideration, and not the financial benefits.

⁵ The Appellant claims that "It is predictable that the Casazzas will have a rough go of it, even without Taylor" and that Mr. Casazza will "not be much help" as he has a maintenance and child support obligation. Of interest, is the fact that the Appellant ignores the fact that Mr. Casazza also earns a gross annual income of \$121,500 plus a bonus up to 22% of his income, or more than double than that which is earned by the Respondent. (TT-87) Furthermore, Mr. Casazza's maintenance obligation terminated in December, 2009. (TT-97-98)

7. THE REASONS OF EACH PERSON FOR SEEKING OR OPPOSING THE RELOCATION....

Mr. Schirmers argues that the district court's findings of fact, when viewing the evidence as a whole, is erroneous because his reasons for opposing the move is "overwhelming" given the modified parenting time schedule awarded. As already discussed at length and as established above, the district court properly weighed the evidence and Mr. Schirmers' reasons for opposing the motion and determined that the best interests of Taylor will be served by way of the awarding parenting time schedule – which took into account all of the facts and circumstances surrounding this matter. Based upon the record as a whole, the district court found that Mr. Schirmers did not consider all of the circumstances, opportunities, and the best interests of Taylor in opposing the motion and a parenting time schedule that consists of a six month alternating schedule with Taylor, which would require Taylor to change schools during the middle of the year. The district court further found that Mr. Schirmers' secondary proposal that Taylor reside with him during the entire summer likewise failed to take into account Taylor's young age, his demanding summer work schedule, and the fact that Taylor has never been away from her mother's care for a period of more than two days at one time.

The district court properly and adequately viewed the evidence as a whole in considering this factor in relation to Taylor's best interests.

8. THE EFFECT ON THE SAFETY AND WELFARE OF THE CHILD, OR OF THE PARENT REQUESTING TO MOVE THE CHILD'S RESIDENCE, OF DOMESTIC ABUSE, AS DEFINED IN SECTION 518B.01

This factor does not apply as no evidence was introduced to show any claim of domestic abuse, as defined in section 518B.01. As acknowledged by Mr. Schirmers, because there are no substantial safety issues or claims of domestic abuse, the court's findings of fact in this regard are not erroneous. (*See Appellant's brief at page 19.*)

CONCLUSION

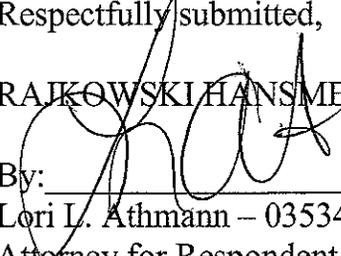
The district court reviewed the evidence as a whole and, based upon its opportunity to determine the credibility of the witnesses and evidence, it granted Ms. Hagen's motion to relocate to California. The district court also fashioned a parenting time schedule that will serve the best interests of Taylor given all of the extenuating circumstances surrounding this case. The district court exercised its broad discretion in determining what is in Taylor's best interests when it came to awarding Mr. Schirmers parenting time. The findings of fact are supported by the evidence. Although Minn.Stat. § 518.175, Subd. 1(e) does provide for the presumption that a parent should receive at least 25 percent of the parenting time, as argued by Mr. Schirmers at the district court level, the district court held that the presumption was rebutted through the evidence offered at trial.

The district court's findings of fact must be upheld, and there is no showing by Mr. Schirmers that they are clearly erroneous or that the district court abused its broad discretion in awarding parenting time. Otava v. Otava, 374 N.W.2d 509 (Minn.App.1985); citing Minn.R.Civ.P. 52.01.

Dated this 10th day of February, 2010.

Respectfully submitted,

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