

NO. A08-0190

State of Minnesota
In Court of Appeals

KRISTINE ANNE SCHISEL,

Appellant,

vs.

DANIEL TODD SCHISEL,

Respondent.

APPELLANT'S REPLY BRIEF AND ADDENDUM

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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).

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ARGUMENT

I. THE PARTIES' STIPULATION TO JOINT PHYSICAL CUSTODY DOES NOT ALTER THE CONCLUSION THAT AN AWARD OF CUSTODY CONDITIONED UPON AN IN-STATE GEOGRAPHIC RESTRICTION IS IMPERMISSIBLE.

Joint physical custody, as Respondent notes, means that the “routine daily care and control and the residence of the child is structured between the parties.”¹ Respondent appears to misunderstand the implications of a determination of “joint physical custody” by going further, and assuming that joint physical custody implies that both parents will provide routine daily care and control each day and provide a structured residence of the children between the parties in the same community.² Daily care by both parents is neither required by the language of the statute nor practical, no matter how close the parties live to each other.³

Appellant does not argue that the parties are not bound by the stipulation to joint physical custody, only that the stipulation to joint physical custody does not necessitate or obligate the court or the parties to ensure daily contact by each parent. As a result, the fact that the parties agreed to joint physical custody does not require that parties must live within a geographic area conducive to daily contact by both parties with the children.

¹ MINN. STAT. § 518.003, Subd. 3(d) (2006).

² See Resp. Brief, page 17-18 (“70-mile distance between homes effectively severs the ability of both parents to have routine daily care and control and a structured residence of the child between two parents”).

³ See *Lutzi v. Lutzi*, 485 N.W.2d 311, 314 (Minn. Ct. App. 1992) (“trial courts may unequally divide physical custody but still label the arrangement as joint”); see also, *Blonigen v. Blonigen*, 621 N.W.2d 276, 283 (Minn. Ct. App. 2001) (Crippen, Judge, dissenting) (noting in case that “[n]othing in the law precludes a 90%/10% care-sharing arrangement with the label ‘joint’ ”).

Respondent argues that *Ayers v. Ayer*⁴ supports the proposition that once the parties stipulate to joint physical custody, they have implicitly agreed to live within a certain area. *Ayers* is not on point, because the parties in *Ayers* agreed to joint physical custody and a specific parenting time schedule.⁵ The parties in *Ayers* would not have been able to maintain the agreed upon parenting time schedule if one parent moved. No parenting time agreement was reached in the present case,⁶ and joint physical custody does not imply any particular parenting time schedule. The *Ayers* Court recognized that a primary residence with one parent is statutorily compatible with the term “joint physical custody,”⁷ and had no problem with the label of “joint physical custody” where the father had physical custody of the children only on alternating weekends during the school year.⁸

Respondent flatly asserts that there is no practical manner in which to effectively implement the parties’ stipulation to joint physical custody without some restriction on the distance between the parties. This statement is unpersuasive in this case for two reasons. First, the assertion is based on the underlying assumption that joint physical custody implies daily contact. As noted above, the label of joint physical custody carries no such implication, and even a 90/10 parenting time split is permissible under the “joint physical custody” label.⁹

⁴ *Ayers v. Ayers*, 508 N.W.2d 515 (Minn. 1993).

⁵ *Id.* at 520.

⁶ See AA. 73. The parenting time schedule is one of the issues that necessitated trial.

⁷ See *Ayers*, 508 N.W.2d at 519.

⁸ *Id.* at 520.

⁹ *Blonigen*, 621 N.W.2d at 283.

Second, the limitation to the Mankato School District is far too arbitrary and restrictive. It is far more restrictive than the 20-mile radius area the court deemed permissible in the unpublished case cited by Respondent.¹⁰ The District Court has not included any findings as to why the restriction to the Mankato School District, as opposed to some other geographic restriction, is in the children's best interests. To permit a court to limit a party's residence to an extremely narrow geographic area offers the potential for significant abuse. As a practical matter, affirming this decision will subject this court to future arguments between parents about which suburb in the Metro area the parents may live in or even why one parent living on one particular block instead of another is in the children's best interests. Theoretically, parents could have joint physical custody and structure the routine daily care and residence of their children between themselves, even if one parent lived in Arizona and another lived in Minnesota, with one parent having custody during the school year and another during summer vacation.

In an effort to show that the distance between Lakeville and Mankato is so great that it would effectively cut Respondent off from his children, Respondent points to the difficulties of living seventy miles away from the children. Respondent is oblivious to the fact that Appellant's work situation makes it necessary that either one parent or the other will need to drive seventy miles one way, either for work four days per week in the case of Appellant, or for parenting time for Respondent once or twice per week. It is clear that Respondent is concerned exclusively with the impact of a seventy-mile drive on

¹⁰ *In re Custody of S.S.E.*, 2004 WL 1327808 (Minn. Ct. App. June 15, 2004).

the time he spends with the children, and is not interested in considering the cumulative effects of a seventy-mile drive on the ability of the children to spend time with either parent, and specifically with their primary caregiver.

Respondent argues unpersuasively that reliance on *Sefkow v. Sefkow*¹¹ and its progeny is misplaced because the facts of the cases involved geographic conditions upon *sole* physical custody, not *joint* physical custody. Respondent ignores the fact that *LaChapelle v. Mitten*,¹² *Dailey v. Chermak*,¹³ and *In re Marriage of Goldman*¹⁴ all also considered conditional awards of *sole* physical custody, and Respondent's position is, apparently, that the sole/joint distinction undermines cases supporting Appellant's arguments but not his own arguments. If reliance on these cases is appropriate only when sole physical custody is at issue, then there is no caselaw which provides any authority upon which a court may condition joint physical custody or primary residence upon a geographical restriction.

Respondent's position ignores the clear premise that in order to impose a residential geographic condition on custody, a court must make a finding that the specific geographic residence "clearly and genuinely" serves the children's best interests.¹⁵ *Sefkow's* holding that an in-state geographic condition on custody is impermissible

¹¹ *Sefkow v. Sefkow*, 372 N.W.2d 37 (Minn. Ct. App. 1985).

¹² 607 N.W.2d 151, 158 (Minn. Ct. App. 2000) ("the court awarded sole physical custody of L.M.K.O. to Mitten on the condition that Mitten provide a permanent residence for L.M.K.O. in Minnesota").

¹³ 709 N.W.2d 626, 628 (Minn. Ct. App. 2006) ("the dissolution court awarded ... Dailey sole physical custody").

¹⁴ 748 N.W.2d 279, 280 (Minn. 2008).

¹⁵ See *Dailey*, 709 N.W.2d at 630.

remains valid, and its reasoning is clearly applicable to the case at hand, regardless of the custody label.

II. THE TRIAL COURT DID NOT CONDITION ITS DETERMINATION THAT THE CHILDREN SHOULD HAVE THEIR PRIMARY RESIDENCE WITH APPELLANT ON A GEOGRAPHIC RESTRICTION.

While the *Goldman* court did note that “there is no absolute prohibition under Minnesota law against awarding child custody on the condition of maintaining a specific geographic residence for the child,”¹⁶ the trial court in this case did not award child custody or primary residence on the condition of maintaining a specific geographic residence.

A. The Court’s Order May Not Reasonably Be Read To Imply A Conditional Award Of The Children’s Primary Residence To Appellant.

Respondent cites *Goldman* in support of the argument that a locale restriction may be interpreted as a conditional award of physical custody.¹⁷ In *Goldman*, the issue was not before the court, because the parties agreed that the district court awarded the mother sole physical custody contingent on her remaining in Minnesota.¹⁸ The relevant portion of the trial court order in *Goldman* read:

If for any reason the *LaChapelle* locale restriction is found wanting, this [c]ourt would award sole physical custody to father. It would award sole physical custody to father to ensure that [I.G.] continues to prosper from his intimate relationships with father [and father's other children], does not have to suffer yet another major change in his young life, and could continue with his existing school and religious arrangements.¹⁹

¹⁶ *Goldman*, 748 N.W.2d at 282.

¹⁷ See Resp. Brief, pg. 14, fn 72.

¹⁸ *Goldman*, 748 N.W.2d at 280 (“The parties agree that the district court awarded respondent sole physical custody contingent on her remaining in Minnesota”).

¹⁹ *Id.*

The *Goldman* order is significantly different from the present order. First, it cites directly to *LaChapelle*, a case permitting a conditional custody award, and describes the award as a “locale restriction.” In the present case, there is no mention of *LaChapelle*,²⁰ and the court does not describe the award of primary residence to Appellant as conditional or as subject to a locale restriction. Second, the *Goldman* order explicitly notes that it would award sole physical custody to father if the restriction is found wanting. In the present case, the District Court came to the opposite conclusion, noting that the Respondent could not meet the children’s basic needs if he were awarded primary residence.²¹ As a result, it is unreasonable to interpret the court’s order as implicitly rendering a conditional custody award.

Instead, in the present case, the parties agreed to joint custody and the agreement was adopted by the District Court in its order.²² The District Court still needed to consider the best interest factors to determine the proper parenting time schedule and with which parent the children would have their primary residence.²³ The District Court considered all of the appropriate best interest factors, finding, as one element of that analysis, that it would not be in the children’s best interests to live approximately seventy miles away from their father. Despite that finding, however, the District Court ultimately concluded that the children’s primary residence should be with their mother.

²⁰ Because *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2001) was the first case upholding a custody award conditional upon an in-state restriction, such restrictions are often referred to colloquially as “*LaChapelle* restrictions.”

²¹ AA. 77.

²² AA. 76.

²³ AA. 73.

Undoubtedly, the District Court expressed a strong preference that the mother remain with the children within the Mankato School District, but it did not and could not go so far as to condition primary residence upon such a geographic restriction under the facts of this case. As outlined in Appellant's original brief, the District Court does not have the authority to issue an unconditional award of primary custody to the mother, and separately order her to live in a certain geographic location.²⁴ The court has authority to determine with whom the children will have a primary residence, but not where that primary residence will be located.²⁵

B. The Unpublished Case Of *In re Custody of S.S.E.* Is Plainly Distinguishable From The Present Case.

*In re Custody of S.S.E.*²⁶ is easily distinguishable from the present case on similar grounds. In *S.S.E.*, the district court awarded joint legal and joint physical custody and "ruled that if mother, who had moved approximately 300 miles from the home she had shared with father, returned to live within 20 miles of father, the children would reside with her and father would have parenting time two evenings per week and every other weekend."²⁷ Thus, the court's determination that the children should reside primarily with the mother was expressly conditioned on a geographic location. If the mother in *S.S.E.* chose not to move within 20 miles of the father, the father would be awarded primary custody.²⁸ No such condition was placed on Appellant's award of the children's

²⁴ See Appellant's Original Brief, pp. 16-17.

²⁵ See MINN. STAT. § 518.17, Subd. 3 (2006).

²⁶ 2004 WL 1327808 (Minn. Ct. App. June 15, 2004).

²⁷ *In re Custody of S.S.E.*, 2004 WL 1327808 at *1.

²⁸ *Id.*

primary residence in this case. As indicated earlier, the District Court in the present case stated that Respondent could not be awarded the children's primary residence.

The present case is also factually distinguishable. In *S.S.E.*, the mother had moved some 300 miles away during the divorce proceedings. The 300-mile move made it such that the father could only have non-weekend contact with the children via telephone.²⁹ The distance in the present case between Lakeville and Mankato will not have similar drastic effects. Here, the children are already familiar with the area where Appellant proposes to move. Appellant only seeks to move the same seventy miles that she already drives to work each day, which will not impact the children's ability to have the contact with Respondent ordered by the District Court, or more.

Because *S.S.E.* is an unpublished opinion, to the extent it blurs the distinction between in-state and out-of-state moves, or would otherwise support Respondent's legal analysis, it has no precedential authority.³⁰ Respondent cites no other authority for the position that an in-state geographic restriction is permissible in a joint custody situation.

III. THE DISTRICT COURT'S FINDING THAT IT IS IN THE BEST INTERESTS OF THE CHILDREN TO STAY IN MANKATO, MINNESOTA INSTEAD OF RELOCATING TO LAKEVILLE, MINNESOTA IS CLEARLY ERRONEOUS.

It is not enough to merely state conclusively that the trial court based its ruling on sufficient evidence. An award of custody conditioned upon a relocation restriction must *demonstrably* serve the child's best interests, a heightened standard. Respondent does no

²⁹ *S.S.E.*, 2004 WL 1327808 at *3.

³⁰ See MINN. STAT. § 480A.08 (2007) ("Unpublished opinions of the Court of Appeals are not precedential").

more than make conclusory statements that significant evidence was presented to support the court's restriction, without any citation to the record in support of that statement.

IV. RESPONDENT'S ARGUMENTS CONCERNING THE INCORRECT CALCULATION OF CHILD SUPPORT ARE UNPERSUASIVE.

A. The Court Clearly Misapplied The Law When Calculating Income For Child Support Purposes.

The trial court did not, as Respondent suggests, reduce Appellant's ordinary and necessary business deductions and FICA deductions as a way to modify Appellant's income for child support purposes based on a speculated increase in her future income. There is nothing in the Findings of Fact or Conclusions of law to support that position. The trial court made clear findings that Appellant's gross wages were \$80,652 per year, or \$6,721 per month.³¹ The court was equally clear in recognizing that she had ordinary and necessary business expenses.³² The court used the \$6,721 figure as Appellant's gross monthly income for child support purposes, indicating a clear intent to use Appellant's historical income as a more accurate gauge of her current income than a speculative guess as to what her future income for the year might be.³³ It is clear that the trial court simply overlooked the Appellant's ordinary and necessary business deductions, and incorrectly calculated her FICA deduction. Further, Respondent points to no part of the record

³¹ AA. 84, 85.

³² AA. 84.

³³ AA. 85.

indicating that he challenged Appellant's proposed ordinary and necessary business expenses.³⁴

A court has discretion to determine gross income, which the District Court exercised to determine income based on Appellant's three-year earnings average. But the court does not have discretion to subsequently alter the calculation of income for child support by tinkering with statutorily determined FICA deductions and ordinary and necessary business expense deductions, and Respondent's suggestion that the court intended to do so is a desperate attempt, without legal basis, to avoid the clear conclusion that the trial court misapplied the law.

B. Respondent Can Point To No Evidence In Support Of The Court's Arbitrary Conclusion That The Ultimate Parenting Time Schedule Would Be 60/40.

With respect to the court's determination that the parties would ultimately have a 60/40 parenting time schedule, Respondent again merely offers the conclusory statement that "evidence before the court was sufficient to support the court's findings."³⁵

Respondent does not cite any facts in the record which would support the court's findings and indicate that Respondent will be able to attain anywhere near a 60/40 split.

Respondent's work schedule and the District Court's findings concerning his work schedule and duties, his inability to be the primary parent, and inflexibility with regard to his schedule all establish the impossibility of a 60/40 schedule.

³⁴ See MINN. STAT. § 518.551 subd. 5b (f) (2005) (person seeking to deduct an expense ... has the burden of proving, *if challenged*, that the expense was ordinary and necessary)(emphasis added).

³⁵ See Respondent's Brief, pg. 20.

No evidence exists on the record that could support a 60/40 split. Even if it did, it is not the function of an appellate court to sift through the record in an attempt to ascertain the evidence in support of the court's findings.³⁶

CONCLUSION

The designation of custody as "joint physical custody" does not distinguish *Sefkow* and its progeny, which limit awards of custody based on in-state geographic restrictions, and does not give the court the authority to order a parent to maintain her primary residence with the children in a specific school district. Further, Respondent has presented no persuasive authority for the proposition that the custody order at issue was in fact conditioned on any geographic restriction. As a result, Appellant again asks the Court of Appeals to reverse the District Court's order that Appellant reside with the children within the Mankato Area Independent School District.

Respondent is unable to point to any authority or evidence in the record that would support the District Court's failure to deduct ordinary and necessary business expenses, incorrect deduction of FICA taxes, or application of a 60/40 parenting time split. As a result, Appellant asks the Court of Appeals to remand these issues to the District Court with instructions.

³⁶ See, e.g., *Ganguli v. University of Minnesota*, 512 N.W.2d 918, 923 (Minn. Ct. App. 1994) (not the appellate court's function to sort through the record to ascertain which evidence considered relevant and/or credible below).

Respectfully Submitted,

Dated: June 17, 2008

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to MINN.R.CIV.APP.P. 132.01, subd. 3, for a brief produced using the following font:

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