

A12-0699

**State of Minnesota
In Court of Appeals**

In re the Marriage of:

Michelle Beth Kremer, petitioner,

Respondent,

and

Robbie Michael Kremer,

Appellant.

**BRIEF AND ADDENDUM OF APPELLANT
ROBBIE MICHAEL KREMER**

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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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND FACTS 3

 A. The Parties and Their Daughter Resided in Minnesota When This
 Marriage Dissolution Action Was Commenced 3

 B. Michelle Moved to Estherville, Iowa Because Her Boyfriend Resides
 There 4

 C. In June 2010, the Parties Were Granted Temporary Joint Legal and
 Physical Custody and Rob Made Clear He Did Not Consent to
 Daughter Residing Outside of Minnesota on a Permanent Basis 6

 D. Michelle Has Rented Homes in Estherville, Iowa to Stay Near Her
 Boyfriend 7

 E. The Trial Court Denied Michelle Temporary Physical Custody of
 Daughter 8

 F. Michelle Was Unemployed at Time of Custody Hearing 8

 G. Hatfield Has a History of Alcohol Abuse and Has Abused His Ex-
 Wife and Children 9

 H. Michelle Enjoys Spending Time With Her Friends Using Alcohol 9

 I. Rob Is a Successful Farmer 10

 J. Michelle Left Verdoorn and Moved in With Rob 11

 K. Rob Paid for the Expenses of the Verdoorn Children While They
 Resided With Him and Michelle Admits He Was a Good Stepfather
 to Her Children 12

 L. The Parties Married on March 6, 2001 13

M.	Michelle Admits She Never Developed an Emotional Bond With Rob, but Rob Loved Michelle	14
N.	Michelle Decided to Divorce Rob in 2007, but She Never Told Him That and Stayed With Rob When She Found Out She Was Pregnant With Daughter	15
O.	Daughter Has a Strong Bond With Rob’s Mother	15
P.	Michelle, Although Unemployed, Places Daughter in Daycare in September 2009	16
Q.	Michelle Has Affair With Hatfield While Her Father Is Dying	17
R.	Rob Assumes Full-Time Care of Daughter While Michelle Is in Iowa ..	17
S.	Michelle Files for Divorce in April 2010 and Served Him With Divorce Papers	18
T.	Rob Cares for Daughter 50% of the Time for the 21 Months Before the Judgment and Decree	18
U.	Rob Hired Additional Help for Fall Harvest 2010	18
V.	Stability and Parenting Factors Favor Rob	19
W.	Evaluator Larson Inappropriately Used Psychologist Brinkman’s Parenting Assessment	21
X.	The Trial Court Grants Michelle Sole Physical Custody of Daughter ...	22
ARGUMENT		27
THE TRIAL COURT COMMITTED ERROR IN GRANTING SOLE PHYSICAL CUSTODY TO RESPONDENT MICHELLE BETH KRAMER		27
A.	The Standard of Review Is Abuse of Discretion	29
B.	Michelle Failed to Carry Her Burden of Demonstrating That It Is in Daughter’s Best Interests to Change Her Primary Residence From Nobles County, Minnesota to Estherville, Iowa	31

C.	The Trial Court Abused Its Discretion in Failing to Make Requisite Findings Under Minn. Stat. § 518.17, subd. 1(a) and Explain How the Best Interest Factors Led to Its Conclusion That Michelle Should Be Awarded Sole Physical Custody	32
1.	The trial court must address the interaction and relationships between Daughter and other persons who may significantly affect her best interests	33
2.	The trial court must address Daughter’s present adjustment to home, school and community	35
3.	The trial court must address the length of time Daughter has lived in a stable, satisfactory environment and the desirability of maintaining continuity	36
4.	The permanence, as a family unit, of existing or proposed custodial home must be addressed	39
5.	The trial court’s findings fail to address stability	40
D.	The Trial Court’s Use of Custody Evaluator Larson’s Report Requires Reversal and a New Trial	40
	CONCLUSION	45
	CERTIFICATION OF BRIEF LENGTH	46

TABLE OF AUTHORITIES

Rules:

Minn. R. Civ. P. 52.01 30
Minn. R. Civ. P. 59.01 2
Minn. R. Civ. P. 59.01, subd. (a) 41
Minn. R. Civ. P. 59.01, subd. (g) 41

Statutes:

Minn. Stat. § 518.17 25
Minn. Stat. § 518.17, subd. 1 1, 23
Minn. Stat. § 518.17, subd. 1(a) 3, 19, 27-29, 32, 40
Minn. Stat. § 518.17, subd. 1(a)(5) 20, 33
Minn. Stat. § 518.17, subd. 1(a)(6) 20, 33, 35
Minn. Stat. § 518.17, subd. 1(a)(7) 20, 33, 36
Minn. Stat. § 518.17, subd. 1(a)(8) 20, 33
Minn. Stat. § 518.175, subd. 3 1, 3, 22
Minn. Stat. § 518.175, subd. 3(b) 28, 31, 32
Minn. Stat. § 518.175, subd. 3(c) 28, 31, 32

Cases:

Auge v. Auge,
334 N.W.2d 393 (Minn. 1983) 31

Ayers v. Ayers,
508 N.W.2d 515 (Minn. 1993) 30

Bliss v. Bliss,
493 N.W.2d 583 (Minn. Ct. App. 1992) 33

Dammann v. Dammann,
351 N.W.2d 651 (Minn. Ct. App. 1984) 29

Dittbrenner v. Dittbrenner,
2007 WL 1248047 (Minn. Ct. App. 2007) 30

Geibe v. Geibe,
571 N.W.2d 774 (Minn. Ct. App. 1997) 40

Goldman v. Greenwood,
748 N.W.2d 279 (Minn. 2008) 1, 31

In re C.D./G.D.,
800 N.W.2d 652 (Minn. Ct. App. 2011) 30

In re Estate of Balafas,
293 Minn. 94, 198 N.W.2d 260 (1972) 30

In re Welfare of M.M.,
452 N.W.2d 236 (Minn. 1990) 1, 33

Kampf v. Kampf,
732 N.W.2d 630 (Minn. Ct. App. 2007), *rev. denied* 30

Myers v. Hearth Techs., Inc.,
621 N.W.2d 787 (Minn. Ct. App. 2001), *rev. denied* 2, 31

Putz v. Putz,
645 N.W.2d 343 (Minn. 2002) 29

Sefkow v. Sefkow,
427 N.W.2d 203 (Minn. 1988) 1, 33

Silbaugh v. Silbaugh,
543 N.W.2d 639 (Minn. 1996) 29

Vangsness v. Vangsness,
607 N.W.2d 468 (Minn. Ct. App. 2000) 30

Wallin v. Wallin,
290 Minn. 261, 187 N.W.2d 627 (Minn. 1971) 33

Zander v. Zander,
720 N.W.2d 360 (Minn. Ct. App. 2006), *rev. denied* 27

STATEMENT OF THE ISSUES

- I. DID THE TRIAL COURT COMMIT ERROR IN GRANTING SOLE PHYSICAL CUSTODY OF THE PARTIES' CHILD TO RESPONDENT WHERE IT FAILED TO MAKE DETAILED FINDINGS ON EACH OF THE MINN. STAT. § 518.17, SUBD. 1 BEST INTERESTS OF THE CHILD FACTORS AND EXPLAIN HOW THOSE FACTORS LED TO ITS CONCLUSION AND TO THE DETERMINATION THE BEST INTERESTS OF THE CHILD WAS SOLE PHYSICAL CUSTODY WITH RESPONDENT?

This issue was raised by Appellant in response to the trial court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree (Add. 1) by Appellant's motion for Amended Findings of Fact, Conclusions of Law and/or New Trial. (Add. 1; A. 15). The trial court denied Appellant's post trial motions. (Add. 18, 20).

Minn. Stat. § 518.17, subd. 1.

Sefkow v. Sefkow, 427 N.W.2d 203 (Minn. 1988).

In re Welfare of M.M., 452 N.W.2d 236 (Minn. 1990).

- II. IN GRANTING RESPONDENT SOLE PHYSICAL CUSTODY OF THE PARTIES' CHILD DID THE TRIAL COURT COMMIT ERROR IN NOT ADDRESSING RESPONDENT'S RELOCATION TO IOWA, AS REQUIRED BY MINNESOTA LAW?

This issue was raised at the custody trial, was not addressed in the trial court's findings of fact and conclusions of law and was raised post trial in Appellant's motion for Amended Findings of Fact, Conclusions of Law and Order for Judgment. Appellant's post-trial motions were denied without explanation.

Minn. Stat. § 518.175, subd. 3.

Goldman v. Greenwood, 748 N.W.2d 279 (Minn. 2008).

III. IS APPELLANT ENTITLED TO A NEW TRIAL WHERE THE CUSTODY EVALUATOR AND HER REPORT ARE BIASED?

Appellant challenged the custody evaluator and her report as biased at trial and post trial by his motion for Amended Findings of Fact, Conclusions of Law and Judgment. The trial court found as fact that the custody evaluator's report and supporting testimony "is thorough, credible and not overly biased." (Add. 7).

Minn. R. Civ. P. 59.01.

Myers v. Hearth Techs., Inc., 621 N.W.2d 787 (Minn. Ct. App. 2001), *rev. denied*.

STATEMENT OF THE CASE AND FACTS

The trial court, the Honorable George I. Harrelson, awarded the parties joint legal custody of their daughter (Daughter), _____, but awarded Respondent/ Petitioner Michelle Beth Kremer (Michelle) sole physical custody. (Conclusions of Law 3, 4; Add. 9-10). Although Michelle and Daughter were residents of Minnesota when Michelle commenced this marital dissolution action, which action encompasses this custody dispute, Michelle has since chosen to move to Estherville, Iowa. (A. 1; Add. 1). The trial court did not address Michelle's move to Iowa and the resulting relocation of Daughter to Iowa in its grant to Michelle of sole physical custody and as required by Minn. Stat. § 518.175, subd. 3. Nor did the trial court, in granting Michelle sole physical custody, "make detailed findings on each of the [best interest] factors and explain how the factors led to its conclusions and determination" that the best interest of the child was to grant sole physical custody to Michelle as Minn. Stat. § 518.17, subd. 1(a) mandates. (Add. 8). Also at issue, and in the alternative, is Appellant Robbie Michael Kremer's (Rob) request for a new trial. Appellant Robbie Michael Kremer seeks reversal and remand.

A. The Parties and Their Daughter Resided in Minnesota When This Marriage Dissolution Action Was Commenced.

Michelle commenced this marital dissolution action by Petition in Dissolution dated April 8, 2010. (A. 1). In Michelle's Petition, she states her residence and that of Rob is Fulda, Minnesota. (Id.) Michelle sought sole legal and physical custody of Daughter. (A. 4). The parties ultimately agreed to joint legal custody. (T. 258). The

custody dispute was over which parent should be awarded sole physical custody. (T. 245, 445).

B. Michelle Moved to Estherville, Iowa Because Her Boyfriend Resides There.

When Michelle left the Fulda, Minnesota marital home when she filed for divorce, she stayed for one week with her mother, Phyllis Wahlberg, in Spirit Lake, Iowa. (T. 142, 171-172). Michelle then moved in with her boyfriend, Mike Hatfield (Hatfield), in Estherville, Iowa. (T. 172). Michelle had no relatives living in Estherville or close by. (T. 181, 249). Spirit Lake, Iowa is 15 to 18 miles away from Estherville. (T. 143). Michelle had no job in Estherville. (T. 215).

Michelle met Hatfield on Facebook in December 2009 while living with Rob.¹ By January of 2010, Michelle was romantically involved with Hatfield. (T. 294-295). In February 2010 Michelle's father entered hospice care in Iowa for an 8 to 9 week period. (T. 145-146). Michelle admits she lied to Rob and told him she needed to be at the hospice 24/7 for her father. (T. 304-305). Instead, she was carrying on her affair with Hatfield in Iowa. (Id.) Michelle also lied to her mother. Michelle's mother was unaware Michelle was having an affair with Hatfield. (T. 160, 304-305). During this 8 to 9 week period the parties' Daughter was in Rob's care. (T. 176, 306).

¹ The report of Custody Evaluator Sara Larson dated November 4, 2010 was not made an exhibit at trial. (T. 16-18). The report will be referenced as Report and by its page number. The Report states Michelle met Hatfield while in Iowa visiting her dying father (Report, p. 2). Michelle admitted at trial that is not true. (T. 294-295).

Michelle also has three children from her previous marriage to Wayne Verdoorn (Verdoorn). (T. 48, 201, 285). Verdoorn lives in Worthington, Minnesota. (T. 48, 180). Michelle and Wayne shared joint legal and physical custody of the three children (Verdoorn children). The Verdoorn children alternated between their parents' care every other week. (T. 288). During the time period that Michelle was in Iowa supposedly attending her dying father, the Verdoorn children continued to stay with Rob during Michelle's weeks of custody. (T. 845).

As Verdoorn explained to Custody Evaluator Sara Larson (Evaluator Larson) "Michelle does fine for a while but then she needs a change." Verdoorn did not trust Michelle's parenting. (T. 49-50). Michelle lied to the Verdoorn children. (T. 50, 309, 320, 834). The Verdoorn children were upset when they found out their mother had not spent time with their dying grandfather but with her new boyfriend. (T. 50, 309, 834). They were also angry and bitter for her disrupting their lives with Rob. (T. 309). Michelle's sons refused to see their mother for many months. (T. 50, 309). Michelle's daughter was granted court permission on August 16, 2010 to live with her mother. (T. 49, 214-215). The trial court, the Honorable Jeffrey L. Flynn, so ordered in large part because Verdoorn daughter "unmistakably indicated her preference." (Trial Exhibit 9; T. 168-169).

Michelle now has sole physical custody of Verdoorn daughter. The Verdoorn son, who was still a minor, is in the sole physical custody of Verdoorn. (Id.) Michelle's sons, as well as Verdoorn, continue to reside in Worthington, Minnesota, with one of the sons

now attending college. (T. 821, 829-830). Michelle's daughter has since expressed a desire to come back to live in Worthington with Verdoorn. (T. 828-829).

C. In June 2010, the Parties Were Granted Temporary Joint Legal and Physical Custody and Rob Made Clear He Did Not Consent to Daughter Residing Outside of Minnesota on a Permanent Basis.

In June 2010, the trial court, the Honorable Timothy K. Connell, issued an Order for Temporary Relief. The parties were granted temporary joint legal and joint physical custody of Daughter with each party sharing equally (50-50) parenting time by alternating weeks. (Add. 24). Rob was ordered to pay Michelle child support of \$1,500 per month for the months of April, May and June 2010, and \$1,000 per month thereafter. (Id.) Rob was granted the temporary exclusive use and possession of the homestead located in Fulda. (A. 22). Nothing is stated in that order with regard to the residence of Michelle. (Add. 22). Sara Larson was appointed Custody Evaluator and Rob was ordered to pay for the custody study. (Add. 24).

Thereafter, Rob's counsel sent a letter to Michelle's lawyer making it clear that Rob "has not and does not consent to having [Daughter] reside outside the State of Minnesota" The letter continued: "[Rob's] willingness to accept your client's current, temporary, housing dilemma should not and will not be construed as [Rob's] consent to allowing [Daughter] to be permanently removed from the State of Minnesota for residence purposes. (M.S.A. 518.175, subd. 3)." (Trial Exhibit 6; T. 308-309; Add. 27). Michelle understood that Rob did not consent that Daughter could permanently reside in Iowa. (T. 308-309).

D. Michelle Has Rented Homes in Estherville, Iowa to Stay Near Her Boyfriend.

After receiving child support from Rob, Michelle rented a home in Estherville, Iowa for four months. (T. 171). She then left that home and rented another home, also in Estherville, which house was up for sale at the time of the custody trial. (T. 170-171). Michelle's boyfriend, Hatfield, lives across the street from Michelle's current house. (T. 107). Michelle sees him daily and they eat supper together. (T. 301-302).

Hatfield testified that he has not asked Michelle to marry him and told Evaluator Larson it was a possibility – "I said I gotta see how things go." (T. 484). When Hatfield was asked whether Michelle planned on moving in with him after the divorce, Hatfield testified "I have no idea what she's planning. You'd have to ask her." (Id.) Michelle testified that she cannot predict the future. (T. 321-322). Evaluator Larson states in her Report: "It is likely that Michelle will move in with [Hatfield] in the near future. It is unclear if this relationship will last." (Report, p. 9). Evaluator Larson then discusses Hatfield's history of assaults and alcohol abuse:

[Hatfield] has a poor reputation in Estherville, IA. He tends to have a smart mouth with law enforcement and others when he is drinking. His family is known to have problems with alcohol. [Hatfield] was in a domestic incident with his ex-wife when they separated in 1995. He also threatened to kill himself. [Hatfield] has two DUIs on his record from 1996 & 2007. He assaulted an officer at the hospital after his arrest in 1997.

(Id.)

In August 2010 Michelle found a part time job with Emmet County Bank located in Estherville. (T. 215, 278). While employed, Michelle placed Daughter in daycare.

(T. 225). Evaluator Larson states in her November 10, 2010 Report: “[Michelle] likes her job and plans to remain there. When one of the teller’s retires she will be eligible for a full time position.” (Report, p. 8). Emmet County Bank terminated Michelle’s employment in March 2011. (T. 215, 278).

E. The Trial Court Denied Michelle Temporary Physical Custody of Daughter.

In June 2011, Michelle brought a motion seeking an order granting her temporary physical custody of Daughter during the pendency of these proceedings. That motion was denied by the trial court, the Honorable Timothy K. Connell, by Order filed August 2, 2011. (Add. 26).

F. Michelle Was Unemployed at Time of Custody Hearing.

At the time of the custody trial held in October 2011, Michelle was still unemployed. (T. 215). Michelle has a diploma in cosmetology but has no work history in that field. (T. 182, 611). In the past 21 years, Michelle has had nine part-time jobs and one full-time job. (T. 271, 276-278). Michelle testified that she was hopeful to begin employment in mid-October 2011 with the American Chiropractic Board of Sports Physicians, also located in Estherville, Iowa. (T. 215). Her job entails “office management type duties.” (*Id.*) No hours or wages had been determined for such prospective employment. (T. 216; Trial Exhibit 10; A. 44).

Presently still living with Michelle is her daughter. (T. 214-215). Michelle’s plan is once she returns to work, Daughter will again be placed in daycare when Daughter is not in preschool. (T. 225-226).

G. Hatfield Has a History of Alcohol Abuse and Has Abused His Ex-Wife and Children.

As previously stated, Michelle lives across the street from her present boyfriend Hatfield. Hatfield admits he has had criminal charges filed against him for physically abusing his two sons. (T. 476). He pled guilty to abusing his ex-wife and went to jail. (T. 477). Hatfield has had two DUI's and went through two long term treatments for alcohol abuse. (T. 302-304, 476-478). He nonetheless testified he never has had a problem with the use of alcohol. (T. 478). Hatfield states that he still drinks alcohol and on occasion will drink in excess of 12 drinks per sitting. (T. 479).

Hatfield's ex-wife testified that Hatfield is both physically and verbally abusive. (T. 877). She expressed concern for Daughter and her safety. (T. 887). Hatfield is not stable and "you never know when he'll fly off the handle." (T. 891). "[H]e doesn't listen to anybody. "He thinks he's right. He's cocky. . . . He laughs at authority." Hatfield did not provide a stable and safe home for his sons. (T. 892).

H. Michelle Enjoys Spending Time With Her Friends Using Alcohol.

Michelle acknowledges she likes to socialize outside the home and at times she has spent a great deal of time with friends using alcohol. (T. 193, 320). Michelle described Rob as not a party type of guy. He prefers to keep himself busy and active around his farm. (T. 274). Rob is happy at home. (T. 275).

During Evaluator Larson's visit to Michelle's home (but not stated in her custody report), Evaluator Larson saw Michelle's yard littered with "beer bottles and cigarettes." (T. 27). A friend of Hatfield's testified she told Michelle she was proud of her because

one night when they were at a campground, Michelle made sure Daughter was in bed before Michelle started drinking. (T. 404).

Verdoorn explained Michelle will abuse alcohol and “that messes her up and changes her priorities.” (T. 836). Michelle will then follow her feelings rather than the needs of her children. (T. 836-837). Verdoorn has already had to address alcohol abuse issues with their daughter. (T. 838). Their daughter became drunk on vodka. After she sobered up, she explained to Verdoorn that “she was angry at her mom and she wanted to forget about her, that’s why she wanted to get drunk.” (T. 838).

Evaluator Larson states Michelle “doesn’t appear to display any overt alcohol issues that stick out.” (T. 45).

I. Rob Is a Successful Farmer.

Rob was born and raised on his parents’ farm with his three sisters. (T. 507). After graduating from high school in 1988, Rob purchased acreage near his parents’ home and began farming on his own right, right after high school. (T. 507-508). Rob was assisted in his farming efforts with help and machinery from his father, and Rob slowly began to grow his farming operation. (T. 508-509). Rob raises corn and soybeans and does some trucking as well. (T. 508). He has no livestock. (T. 510).

In 1989, Rob bought a farm with a house, where he presently still lives. (T. 509). It is a large home. It has seven bedrooms and is 6,000 square feet. (T. 290-291). This is the only home Daughter knew until Michelle decided to terminate her marriage with Rob. (T. 245).

Michelle testified and Rob agreed that December, January and February is the time period Rob hauls grain. Rob then works from 8 a.m. to 5 p.m. (T. 245-246, 639). Rob has even more flexibility with his work schedule in July and August. (*Id.*) Spring and fall are Rob's busy time with planting and harvesting. (T. 245-246). Depending on the weather, both planting and harvesting last two to three weeks. (T. 639-640).

J. Michelle Left Verdoorn and Moved in With Rob.

Prior to meeting Rob, in August of 1990, Michelle was married to Verdoorn. While married to Verdoorn Michelle began having an affair with M S , a friend of Rob's. (T. 278-280). Through S , Rob met Michelle. (T. 280, 511). During Michelle's affair with S , and prior to Michelle leaving her marriage, Rob and Michelle became friends. (T. 282, 511-513). Eventually, Michelle called Rob late one evening. She wanted to leave her marriage and had no place to go with her three children, (T. 283-285, 515).

Michelle admits she knew Rob had a nice home and that he farmed. (T. 324). She knew Rob could provide her with the necessities of life. (*Id.*) Rob had a few girlfriends over the years but had been in no serious relationship. (T. 510).

Rob agreed to help provide Michelle and her children with a place to stay in his home. (T. 515). Michelle, however, left Verdoorn that evening without her children.

² Rob understood, through Michelle, that Verdoorn was abusive to her. (T. 467, 512-513, 843). And at one point, Michelle and Wayne had an altercation and Michelle was arrested. (T. 519). At the dissolution trial, there was no testimony and no evidence that Verdoorn was in fact abusive.

She moved in with Rob. (T. 283-284). Michelle never went back to live with Verdoorn. (T. 284).

K. Rob Paid for the Expenses of the Verdoorn Children While They Resided With Him and Michelle Admits He Was a Good Stepfather to Her Children.

The divorce between Michelle and Verdoorn resulted in a joint physical custody arrangement between Michelle and Verdoorn whereby each parent would have the children for alternate weeks at a time. (T. 288). Michelle's three children would spend Michelle's week in Rob's home. (T. 175, 284-285, 288, 516).

After Michelle and her three young children moved into Rob's home in 1997, Rob provided for all of Michelle's needs as well as that of her children. Rob provided them with food, clothing, shelter, beds, transportation and all other needs. (T. 156-157, 285, 287, 520-521). Rob loves the Verdoorn children. (T. 521).

Michelle admits Rob was a good stepfather to her children and provided a stable home. Her children enjoyed living with him. (T. 286, 292). He would discipline the children when necessary. (T. 288). Rob attended the Verdoorn children's sporting events and recitals. (T. 290). He played games with them. (Id.) He installed a weight room in the basement which also contained ping pong, foosball and video games. (T. 291). Rob and Michelle would go on yearly winter vacations. Rob took the Verdoorn children to Disney World on a number of occasions. Rob paid for all expenses. (T. 252-253, 536-537).

Michelle's mother agreed with Michelle that Rob raised the Verdoorn children as if they were his own children. (T. 156). Neither Michelle nor the Verdoorn children ever complained that Rob was not a good stepfather. (T. 157).

Michelle admits Rob footed the bill for everything and did not ask her to pay for anything for her or her children. (T. 292-294). One year, Michelle put \$34,000 on one of the credit cards and Rob paid the bill. (T. 294). Rob did not complain about what Michelle would purchase but he wanted receipts. (T. 293-294).

Michelle and Rob cohabited together from 1997 until March of 2001. During this time, Rob continued to work in his farming operation and Michelle did some very part-time work. (T. 271, 277).

L. The Parties Married on March 6, 2001.

Rob and Michelle married on March 6, 2001. (T. 174). Rob had Michelle sign a prenuptial agreement (T. 534-535). Evaluator Larson states in her report that "[i]t does not appear that [Rob] ever really trusted [Michelle] because he had her sign a prenuptial agreement He managed all the finances and made her account for any expenses she incurred on the credit card he gave her to use." (Report, p. 6, see also T. 94). Although Michelle testified at trial that Rob never complained of Michelle's purchases, Evaluator Larson states Michelle needed Rob's approval. (T. 95-96). Evaluator Larson also viewed a prenuptial agreement as a form of domestic abuse. (Report, p. 13; T. 125).

M. Michelle Admits She Never Developed an Emotional Bond With Rob, but Rob Loved Michelle.

Michelle admits she did not have an emotional bond to Rob when she moved in with him and never developed such a bond. (T. 324). Rob testified he loved Michelle. (T. 536). Evaluator Larson accuses Rob of not meeting Michelle's emotional needs. (T. 324-325). In her report, Evaluator Larson states: "Michelle states that Robbie gave her and her children financially whatever they wanted but emotionally he was not there for them Michelle states that Robbie was not there emotionally for her [when her father was dying] so she sought this support elsewhere. Michelle met Mike Hatfield when her father was in the hospital." (Report, p. 10).

As previously stated Michelle admits she met Hatfield before her father was in hospice care. In light of Evaluator Larson's report and Michelle's testimony at trial that she never had an emotional bond with Rob, Michelle was asked the following on cross examination:

Q. But you made it crystal clear to Ms. Larson that you left Rob because he did not have an emotional attachment to you. Well, how can he have an emotional attachment to a woman that doesn't have any attachment to him?

A. (No oral response.)

Q. Your willingness to leave relationships has nothing to do with emotional attachments, does it?

A. I don't know.

(T. 325).

N. Michelle Decided to Divorce Rob in 2007, but She Never Told Him That and Stayed With Rob When She Found Out She Was Pregnant With Daughter.

After their marriage, Rob and Michelle continued to live at Rob's home in rural Nobles County near Worthington, Minnesota. Rob continued to farm and operate his grain hauling business. Michelle would sporadically work very part-time. (T. 223-224, 277-278, 292).

In April of 2007, Michelle began having thoughts of leaving Rob and talked to her present lawyer about starting a divorce. (T. 266). Rob did not know that fact until this divorce proceeding. (T. 265, 540-541). Within two months of seeing a divorce attorney, Michelle became pregnant. (T. 266, 304). Rob was very excited to have a child. (T. 542). Michelle testified that Rob wanted children, but she did not. (T. 298-299). Once Michelle became pregnant, Michelle decided to remain married to Rob. (T. 266). Michelle stopped drinking alcohol. (T. 546-547). On February 24, 2008, their daughter was born. (T. 32).

O. Daughter Has a Strong Bond With Rob's Mother.

After Daughter was born, Michelle stayed at home and breast fed her. (T. 546-547). Michelle was the primary parent for Daughter during this time, although Rob was a loving father and also did provide care for Daughter. (T. 415, 543-544).

Michelle would often contact Rob's mother, Barbara Kremer, who lives nearby to take care of Daughter. (T. 217-218, 851). Sometimes such requests were made several times a week. (Id.) Daughter has a very close and loving relationship with Rob's mother

and Rob's father who live in Worthington. Rob's mother has been providing care for Daughter since birth. (T. 645, 851, 854). One of Rob's sisters also lives in Worthington. (T. 238, 645). His other two sisters live in Texas and Kansas. (T. 239). They would attend family events and Rob and Michelle would visit at their homes for holidays. (T. 238-239).

After Daughter was born, Michelle had various part time jobs off and on. Two of those jobs were in the evening and Rob would take care of Daughter. (T. 82).

P. Michelle, Although Unemployed, Places Daughter in Daycare in September 2009.

After Michelle ceased breast feeding, Rob began noticing changes in Michelle's behavior. Michelle had a strong desire to engage in social outings with her friends, which included consuming alcohol. (T. 552-553, 560-561). Rob prefers to stay at home. (T. 274). Michelle also spent considerable time on Facebook. (T. 294).

In September 2009, and although Michelle was not then working outside the home, Michelle placed Daughter in daycare two to three days a week with a private daycare provider. (T. 220, 297-298, 463-464). Rob preferred that Daughter stay at home, but he agreed with Michelle that part-time daycare would be good for Daughter's social development. (T. 297-298, 464).

In December of 2009, unbeknownst to Rob, Michelle began having an online relationship with Hatfield. (T. 294). Michelle first started having a sexual relationship with Hatfield in January of 2010. (T. 295). Rob was unaware of this affair. (T. 565).

Q. Michelle Has Affair With Hatfield While Her Father Is Dying.

As previously stated, in February 2010, Michelle's father was placed in hospice care in Iowa. Michelle's father was in hospice approximately 8 to 9 weeks prior to his death. (T. 145-146). During this time, Michelle told Rob that she was with her father 24/7 while he was in the hospice. (T. 304-305). Rob was fine with Michelle's decision because it was her dad. (T. 562). Rob believed that Michelle was with her father as he explained "she loved her dad and her dad was dying and it was, you know, it was a bad deal and, no, I believed her." (T. 565). As previously stated Michelle has admitted she lied to Rob as to where she was and whom she was with. (T. 304-305).

R. Rob Assumes Full-Time Care of Daughter While Michelle Is in Iowa.

During this time period, Rob cared for Daughter on a full-time basis. (T. 562-563). Michelle admits she had no concerns about Rob's care of their Daughter. (T. 306).³ During this time, Rob did use daycare, but he also took on a full-time role as the primary parent of Daughter due to Michelle's absence. Rob's mother would also help Rob with daycare during this time, as requested by Rob. (T. 852-854).

During this 8 to 9 week period Michelle occasionally came back to Daughter and would take her back to Iowa to visit her dying father. (T. 563-565). Michelle's time with Daughter would vary, by week, between one day and two days per week. (Id.)

³ Evaluator Larson states in her Report that during this time period "On several occasions Robbie called Michelle for advice and even demanded that she return home." (Report, p. 4). Evaluator Larson does not state where she obtained such information to make that statement; one presumes it was from Michelle but Michelle did not so testify at trial. And Rob denied that occurred. (T. 563).

S. Michelle Files for Divorce in April 2010 and Served Him With Divorce Papers.

In April of 2010, Michelle decided to leave Rob and served him with divorce papers. Michelle then went to Iowa, stating she would be residing with her mother, but in fact, within a week was residing with Hatfield in Estherville, Iowa. (T. 566, 569, 572). Rob did not know of Hatfield until after Michelle filed for divorce. (T. 565). Rob was hurt, angry and bitter. (T. 566). Rob has never agreed that Michelle could live in Iowa with Daughter on a permanent basis. (T. 572-573).

T. Rob Cares for Daughter 50% of the Time for the 21 Months Before the Judgment and Decree.

During the divorce proceeding, the parties shared custody of their daughter, alternating weeks. (Add. 24). For the 21 months before the Judgment and Decree, the parties equally shared on a 50-50 basis the parenting of the child. (Id.) After the parties separated and shared custody of Daughter on a week-by-week basis, Rob hired a college student to help care for Daughter while he worked. (T. 438). That student worked Monday through Friday 8 to 5. (Id.) Rob's mother who has been involved in Daughter's care since birth also would help out when asked. (Id.)

U. Rob Hired Additional Help for Fall Harvest 2010.

Although Evaluator Larson's report indicates that Rob did not hire additional help during the harvest season of 2010, the facts are to the contrary. (Report, p. 8, T. 596-597). Evaluator Larson admits she had no idea how many weeks it took to harvest in the fall of 2010. (T. 68, 132). She also admitted she had no idea how long it takes to plant

and harvest generally. (T. 132-132). Evaluator Larson was told by one of Rob's hired hands that they typically work from 8 to 9 during harvest, 9 to 5 in summer and winter and 8 to 7 in the spring. (T. 132). Rob had 6 people, which included his father, helping him in the fall. (T. 638). During harvest season – which lasted 3 weeks in 2010 – Daughter was in daycare during the day. Rob's mother picked her up and Daughter and Rob would have supper together. (T. 597-598). Supper was around 6:00 p.m. (Id.)

It is true that during that time period Rob does not quit work at 5:00 p.m. (Id.) Rob explained that he never told Evaluator Larson that he would only work 8 to 5 during harvest season. (T. 596). Nor did he ever tell her that he would turn over his farming operation to someone else which she inaccurately states in her report. (T. 609-610; Report, p. 8). Rob does hire extra hands but he cannot afford to just hand over the farm operation to someone else. (T. 609-610).

V. Stability and Parenting Factors Favor Rob.

Michelle and Rob have stipulated to joint legal custody of Daughter. Both parties desired sole physical custody of the child. The minor child is too young to express a preference as to custodian. Evaluator Larson recommended Michelle have sole physical custody of Daughter. (Report, p. 18). In Evaluator Larson's report, Evaluator Larson does not explain whether in her view the identified Minn. Stat. § 518.17, subd. 1(a) best interest factors favor custody to Rob or Michelle. (See Report, pp. 3-14). At trial, Evaluator Larson was asked that question. Evaluator Larson admits that both parents need to work and therefore Daughter will need daycare. (T. 88). She acknowledges both

parents have an intimate relationship with the child. (T. 88-89). She also acknowledges that under the temporary custody arrangement, when Daughter is in Rob's care he is her primary caretaker. (T. 85).

As to Minn. Stat. § 518.17, subd. 1(a)(5) – the interaction and interrelationship of the child with a parent and other persons – Evaluator Larson states this factor favored neither parent. (T. 104). The same was true with regard to Subdivision 1(a)(6) – child's adjustment to home, school and community. (T. 104-105).

Evaluator Larson admits Subdivision 1(a)(7) – the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity – favors Rob. (T. 105-118). The same is true with regard to Subdivision 1(a)(8) – the permanence, as a family unit, of the existing or proposed custodial home. (Id.)

Evaluator Larson's report states that Michelle has difficulty "finding stability and permanency in her life." (Report, p. 9). The testimony at trial validated Evaluator Larson's statements. Since 1990, Michelle left two stable marriages and had an affair prior to leaving each marriage. Michelle has put a large amount of stress on her children as a result of her actions. (Report, p. 9). According to Evaluator Larson, "Michelle is a good mother" but then Evaluator Larson states Michelle "has placed her own needs and desires above her children." (Report, p. 9). Her actions of leaving the children with their fathers to participate in an affair with Hatfield displayed "a huge gap in judgment and displaced priorities." (Id.) Michelle has held many part-time jobs. She has trouble maintaining friendships and has spent a considerable amount of her free time consuming

alcohol with her friends. According to Evaluator Larson, “[Michelle] appears to [be] searching for something.” (Id.)

Rob admits he was hurt, angry and bitter when he found out about Michelle’s deceit. (T. 566). Rob went to counseling to work through his feelings. (T. 573-574). By October 2011, he was no longer angry or bitter. (T. 578). He was resigned to the fact his marriage was over and it was time to move on. (T. 578-579). Rob’s only concern as to Michelle is as it affects their Daughter’s best interests. (T. 579). Rob has completed classes such as Parents Forever and ECFE. (T. 578).

Rob expressed concern as to Michelle’s lack of stability and permanency and its effects on their Daughter. (T. 611-612). Michelle went to school for cosmetology but has never had a job in that line of work. (T. 611, 614). She constantly switches jobs and cannot maintain friendships. (Id.) The last time Michelle moved, she did not tell Rob. (T. 612).

W. Evaluator Larson Inappropriately Used Psychologist Brinkman’s Parenting Assessment.

Karen Brinkman, a licensed psychologist, did a parenting assessment of Rob. (T. 351-352). This involved various psychological tests. (T. 355). Rob requested this assessment. Rob was seeing therapist Greg Wasberg but wanted to know what his parenting skills were and how to improve on them. (T. 355). Although Evaluator Larson has recommended therapy for Michelle, Michelle has refused therapy. (T. 275).

Ms. Brinkman testified that Evaluator Larson had inappropriately used her assessments of Rob in her subsequent custody report. (T. 375; Report, pp. 11-12).

Evaluator Larson had misstated and taken out of context various portions of Ms. Brinkman's work. (T. 378-381). Ms. Brinkman explained the various misstatements contained in Evaluator Larson's report. (T. 378-379).

Also of record is the report (Trial Exhibit 3; T. 777) and the testimony of Linda Paplinski. Ms. Paplinski, age 70, has been doing custody evaluations for over 18 years. (T. 770-771). Ms. Paplinski assessed Evaluator Larson's custody study which is the subject of her report. Of great concern to Ms. Paplinski is Evaluator Larson does not identify where she obtained the information stated in her report and one does not know when Evaluator Larson is expressing her own opinion. (T. 773-774; Trial Ex. 3, p. 12). By the language used, Evaluator Larson's Report is not neutral. (T. 781; Trial Ex. 3, p. 12). Evaluator Larson uses negative terms such as notoriously, demanded and fought for, when describing Rob's actions. Id. She takes Michelle's word for many things but does not ask Rob for his version of events. Id. The report does not explain how Evaluator Larson reaches her custody recommendation. (T. 782).

X. The Trial Court Grants Michelle Sole Physical Custody of Daughter.

The trial court by Judgment and Decree entered March 19, 2012 granted Michelle sole physical custody of Daughter. (Add. 10). In granting Michelle sole physical custody of Daughter, the trial court does not acknowledge Minn. Stat. § 518.175, subd. 3, and that Michelle had the burden to prove such move to Iowa was in the best interests of Daughter. Nor did the trial court address the statutory factors mandated in making that determination. The trial court simply notes in the Judgment and Decree that Michelle

“has since moved to Estherville, Iowa, while [Rob] continues to be a resident of Nobles County.” (Finding of Fact 5; Add. 2).

Nor does the trial court directly address Minn. Stat. § 518.17, subd. 1(a) and its 13 best interest factors and how those factors lead to the custody determination. In Finding of Fact 20 the trial court states “Ms. Larson’s custody evaluation contained the following relevant information.” (Add. 4). The trial court after reciting certain information in Finding of Fact 20a through l does not explain how any of that relayed information factors into its determination to grant custody to Michelle. (Add. 4-5).

In Finding of Fact 21, the trial court refers to Evaluator Larson’s trial testimony as “supplementing her report.” (Add. 5). Evaluator Larson however stated at trial she was not supplementing her report. (T. 75-76). The trial court in Finding of Fact 21 a through j then sets out Evaluator Larson’s purported supplementation. (Add. 5).

In Finding of Fact 21, the trial court describes that Evaluator Larson observed Michelle kept better control of Daughter during mealtime. (Id. at Finding of Fact 21a; Add. 5; see T. 21-24). “[Rob] set poor limits.” (Finding of Fact 21f; Add. 6).⁴ The trial court now describes Michelle as the primary caretaker “until her father took ill” and Rob “became the primary caretaker of the child only when he had to.” (Finding of Fact 21c; Add. 6; see T. 77).

⁴ Evaluator Larson later states both parents spoil their daughter and they have different parenting styles. (T. 122).

The trial court credits Evaluator Larson's testimony that Rob failed to hire any person to help with the farm operations during the Fall Harvest of 2011 as he said he would. (Finding of Fact 21d; Add. 6). Actually the harvest at issue was the fall of 2010. (T. 34). Evaluator Larson's complaint was Rob did not quit work during harvest time at 5:00 p.m. (T. 34-36).

The trial court credits Evaluator Larson's testimony that "[Rob] had inappropriate conversations with Ms. Larson regarding [Michelle] in front of the child." (Finding of Fact 21e; Add. 6). Evaluator Larson admitted Rob had valid concerns such as concerns about Michelle's use of alcohol but thought such should not be discussed in front of Daughter. (T. 24-25). Evaluator Larson acknowledged she did not know how much of what was stated Daughter could understand. (T. 67).

The trial court also credits Evaluator Larson's conclusion "Hatfield does not appear to be a current danger to the child."⁵ and Michelle's "alcohol use" is not in issue in recommending custody of the child because any such activity did not affect her parenting. (Finding of Fact 21h and i; Add. 7). Evaluator Larson found Daughter and Michelle's older daughter "have a close relationship." (Finding of Fact 21j; Add. 7).

Evaluator Larson also acknowledges Michelle's relationship with her two boys is strained but that "[Michelle] was able to provide good healthy meals for the children, was

⁵ Ms. Larson describes in great detail Hatfield's sordid history. (T. 54-56). She then states Hatfield is not a great choice but "he didn't appear to be of any danger. The child, to my knowledge, is rarely ever alone with Mr. Hatfield." (T. 56-57).

able to keep them well dressed and was involved in coaching their activities.”⁶ (Finding of Fact 21g; Add. 6). The trial court in Finding of Fact 23 then finds Evaluator Larson’s “report and supporting testimony is thorough, credible and not openly biased.” (Add. 7).

The trial court in Findings of Fact 24 to 35 then appears to be addressing the Minn. Stat. § 518.17 best interest factors. (Add. 8-9). The trial court states Michelle has been the primary caregiver of the child with the exception of three months in February, March and April of 2010, but during these three months Rob was the primary caretaker. The trial court then finds as fact: “As of April 2010, both parents have equally shared the caretaking responsibility of the child pursuant to a temporary court order.” (Finding of Fact 25; Add. 8).

In Findings of Fact 24 through 35 (Add. 8-9) the trial court does not give any detailed findings on statutory factor 5 (“the interaction and the interrelationship of the child with a parent or parents, siblings and any other person who may significantly affect the child’s best interests”), factor 6 (“the child’s adjustment to home, school and community”), factor 7 (“the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity”) or factor 8 (“the permanence, as a family unit, of the existing or proposed custodial home”). The trial court simply states:

⁶ The undisputed fact is while the Verdoorn children were growing up, when they lived with Michelle they were also with Rob and he provided for those children.

- While [Michelle] has demonstrated poor choices, the Court ultimately finds that both parents have the capability to provide a permanent, stable and loving environment for the child. (Finding of Fact 31; Add. 8).
- The child is still at a young enough age as to be resilient and adjust in a healthy way to the separation of her parents and her new current living environment. (Finding of Fact 28; Add. 8).
- Both parents are fit and proper persons to have legal and physical custody and both have an adequate home for the child to reside in. (Finding of Fact 24; Add. 8).

Based on those findings, the trial court then awards sole physical custody to Michelle. (Conclusion of Law 4; Add. 10). As previously stated, the trial court never addresses the relocation of the child from Minnesota to Iowa.

In response to the trial court's order, Rob brought a motion for Amended Findings of Fact and Conclusions of Law or in the alternative for a new trial. (A. 15).

Specifically, Rob asserted that the trial court had failed to adequately examine the best interest factors and the trial court did not make the detailed findings necessary for appellate review. Specifically, as laid out in Rob's amended findings and amply supported by the record, Michelle leads a very unstable lifestyle and does not have the capacity to maintain stability, consistency and continuity for Daughter. Her frequent moves, her multiple jobs, her difficulty with relationships, her bad choices and other issues fully presented at trial demonstrate that she is not the best equipped parent to provide the safe, structured, nurturing home that Rob has consistently provided Daughter since birth. It is more desirable to allow Daughter to continue in her primary stable environment in Minnesota with Rob.

Rob argued that Michelle failed to carry her burden of demonstrating that it was in Daughter's best interests to change her primary residence from Nobles County, Minnesota to Estherville, Iowa. Michelle unilaterally moved to Iowa. She took Daughter away from her familiar, safe, comfortable and stable life in order for her to be with Michelle's boyfriend. The Minnesota Legislature has announced a public policy that in cases of relocating a child to another state, the court must exercise a presumption that the child should remain in Minnesota and the party proposing the change must demonstrate that it is the child's best interests to move to another state. Here, Michelle did not meet that burden, nor did the trial court address that factor.

Rob also challenged Evaluator Larson's report and recommendation as biased and not supported by the greater weight of the evidence. (A. 18-19). Given the fact the trial court recognized Evaluator Larson was biased, just not "overly biased," a new trial was warranted.

The trial court denied Rob's motion without explanation. (Add. 18). Rob then filed this appeal. (A. 38).

ARGUMENT

THE TRIAL COURT COMMITTED ERROR IN GRANTING SOLE PHYSICAL CUSTODY TO RESPONDENT MICHELLE BETH KRAMER.

In making child custody determinations, the trial court must base its decision on the best interests of the child. Zander v. Zander, 720 N.W.2d 360, 366 (Minn. Ct. App. 2006), *rev. denied*. To that end, the trial court must consider and balance the relevant statutory best interest factors. Minn. Stat. § 518.17, subd. 1(a). In considering the

factors, the Legislature mandates that “[t]he court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.” Id. at subd. 1(a).

Under Minnesota law, a parent cannot move a child to another state unless it is in the child’s best interests, and the parent proposing the move has the burden of proof in the matter. Minn. Stat. § 518.175, subd. 3(b) and (c). The statute then places on the trial court the burden to evaluate several special best interest factors: (1) the child’s relationship with the parent relocating and with the non-relocating persons in the child’s life; (2) the child’s development and needs; (3) the feasibility of preserving the child’s relationship with the non-relocating parent; (4) the child’s preference; (5) whether there is a pattern by the relocating parent to promote or thwart the child’s relationship with the other parent; (6) whether relocation will enhance the child and the relocating parent’s quality of life; (7) each parent’s reasons for opposing or supporting relocation; and (8) the safety and welfare of the child or relocating parent relating to domestic abuse. Id., subd. 3(b).

It is Rob’s position that the trial court committed error in ordering, by its grant of the physical custody to Michelle, that Daughter’s primary residence be changed to Estherville, Iowa without placing the burden on Michelle to demonstrate this is in Daughter’s best interest and by analyzing the Minn. Stat. § 518.175, subd. 3(b) factors. Michelle had the obligation under Minn. Stat. § 518.175, subd. 3(c), to prove that moving Daughter outside Minnesota to Iowa was in the child’s best interests. There has been no

such showing. Further, she did not rebut the presumption that the child remain in Minnesota. The record does not reveal any permanent connections that mandate Michelle remain in Estherville. She does not have a permanent full-time job. She does not own real estate. She does not have family in town.

The trial court committed error in its failure to analyze the best interest factors contained in Minn. Stat. § 518.17, subd. 1(a), particularly the factors which address the need for stability and how all the best interest factors led to its conclusion that the best interest of the child was to place her in Michelle's sole physical custody. Based on the trial court's failure to follow the statutory mandate as applied to the facts of record, Rob seeks reversal of the grant of sole physical custody to Michelle and remand with instructions that the trial court address all the statutory factors.

In the alternative Rob seeks a new trial.

A. The Standard of Review Is Abuse of Discretion.

A trial court abuses its discretion by making findings unsupported by the evidence or by improperly applying Minnesota law. Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996); Putz v. Putz, 645 N.W.2d 343, 347 (Minn. 2002) (court abuses its discretion when its child custody determination findings are contrary to the facts of record and/or logic). The trial court's failure to follow the requirements of a statute is an abuse of discretion. Dammann v. Dammann, 351 N.W.2d 651, 652 (Minn. Ct. App. 1984). The trial court abuses its discretion when it fails to apply the required burden imposed by the

statute to the statutory standard. In re C.D./G.D., 800 N.W.2d 652, 661 (Minn. Ct. App. 2011).

This Court reviews the record in a light most favorable to the trial court's findings of fact. Vangsness v. Vangsness, 607 N.W.2d 468, 477 (Minn. Ct. App. 2000). Factual findings that underlie a custody decision will be set aside if they are clearly erroneous. Ayers v. Ayers, 508 N.W.2d 515, 518 (Minn. 1993); Minn. R. Civ. P. 52.01.

The clearly erroneous standard of review is "the broadest exercised by an appellate court for, even though there is evidence to support a finding, the finding can be held to be clearly erroneous if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In re Estate of Balafas, 293 Minn. 94, 198 N.W.2d 260, 261 (1972) (internal quotation omitted). The clearly erroneous standard "establishes a broader scope of appellate review than that applied when the court is reviewing findings of a jury or of an administrative tribunal." Id. at 261.

If one of the trial court's findings leading to its ultimate best interests of the children determination is found to be clearly erroneous, the trial court's determination with regard to custody is to be reversed. See Kampf v. Kampf, 732 N.W.2d 630, 630 (Minn. Ct. App. 2007), *rev. denied* (stating that a court abuses its discretion by relying on a clearly erroneous finding of fact); Dittbrenner v. Dittbrenner, 2007 WL 1248047 at *4 (Minn. Ct. App. 2007) (A. 45) (court abused its discretion by relying on clearly erroneous findings of fact to support its grant of custody mandating reversal).

A trial court's decision to deny a new trial motion is within its sound discretion and its decision is also reviewed for abuse of that discretion. Myers v. Hearth Techs., Inc., 621 N.W.2d 787, 790 (Minn. Ct. App. 2001), *rev. denied*.

B. Michelle Failed to Carry Her Burden of Demonstrating That It Is in Daughter's Best Interests to Change Her Primary Residence From Nobles County, Minnesota to Estherville, Iowa.

Michelle moved to Iowa and took Daughter away from her familiar, safe, comfortable and stable life in Minnesota in order for Michelle to be with Michelle's boyfriend. The Minnesota Legislature requires the trial court to determine if the move is in the child's best interests, specifying precise factors the court is to consider. Minn. Stat. § 518.175, subd. 3(b). The party proposing the change has the burden of demonstrating that it is the child's best interests to move to another state. Minn. Stat. § 518.175, subd. 3(c). This statute replaced and overruled the case law as had been announced in Auge v. Auge, 334 N.W.2d 393 (Minn. 1983), where it had been held such a move was presumptively in the child's best interests and the party opposing the move bore the burden of proof. Goldman v. Greenwood, 748 N.W.2d 279, 283 n.5 (Minn. 2008), *reh'g denied* (recognizing Auge had no remaining vitality and was superseded by statute).

Here, Michelle did not present any evidence that it was in the child's best interests to leave the stability, continuity, safety and structure of Nobles County to move 70 miles away to Estherville, Iowa. There Michelle has no permanent connections, no full-time job or even a permanent place to stay, in order to live near her boyfriend.

The trial court's findings of fact do not address Michelle's move to Iowa. In its findings, the trial court merely identifies Michelle's present address as Estherville, Iowa (Finding of Fact 1; Add. 1), and that since filing her divorce Michelle "has since moved to Estherville, Iowa, while [Rob] continues to be a resident of Nobles County" (Finding of Fact 5; Add. 2). The trial court states as fact that Michelle "is employed with the American Chiropractic Board of Sports Medicine in Estherville, IA." (Finding of Fact 8; Add. 8). This finding of fact is clearly erroneous. At the time of trial, Michelle was unemployed. (T. 215). Michelle was merely hopeful to begin employment in mid-October 2011. (T. 215-216; Ex. 10; A. 44). That employment entails "office management type duties" but no hours or wages had been determined. (Id.)

On this record and with the lack of findings, this Court must reverse the grant of physical custody of Daughter to Michelle. The trial court is required on remand to address Minn. Stat. § 518.175, subd. 3(b) best interest factors with placement of the burden on Michelle to prove such move is in Daughter's best interests as mandated by Minn. Stat. § 518.175, subd. 3(c).

C. The Trial Court Abused Its Discretion in Failing to Make Requisite Findings Under Minn. Stat. § 518.17, subd. 1(a) and Explain How the Best Interest Factors Led to Its Conclusion That Michelle Should Be Awarded Sole Physical Custody.

The trial court here did not specifically identify in its Finding of Fact all of the best interests of the child factors enunciated in Minn. Stat. § 518.17, subd. 1(a). Its findings reference portions of those best interests factors. (Findings of Fact 24-35; Add. 8-9). The trial court does not discuss how the factual findings it did make weighed in favor for or

against each party. It did not draw a nexus between such findings and its ultimate conclusion that Michelle is awarded sole physical custody of Daughter. Reversal and remand is necessary. See, e.g., In re Welfare of M.M., 452 N.W.2d 236, 239 (Minn. 1990) (holding that trial court’s findings were “inadequate to facilitate effective appellate review, to provide insight into which facts or opinions were most persuasive of the ultimate decision, or to demonstrate the trial court’s comprehensive consideration of the statutory criteria”); Wallin v. Wallin, 290 Minn. 261, 187 N.W.2d 627, 631 (Minn. 1971) (“it is especially important that the basis for the court’s decision [in family matters] be set forth with a high degree of particularity if appellate review is to be meaningful.”); Bliss v. Bliss, 493 N.W.2d 583, 590 (Minn. Ct. App. 1992).

The Minnesota Supreme Court has emphasized the importance of stability in determining child custody. Sefkow v. Sefkow, 427 N.W.2d 203, 212 (Minn. 1988). Specifically missing from the trial court’s findings were particularized findings pursuant to Minn. Stat. § 518.17, subd. 1(a)(5), (6), (7) and (8), all of which address stability and continuity or how the findings it did make would support custody to Michelle. Even Evaluator Larson agreed that Rob, not Michelle, could provide Daughter with a stable home.

- 1. The trial court must address the interaction and relationships between Daughter and other persons who may significantly affect her best interests.**

Minn. Stat. § 518.17, subd. 1(a)(5) mandates that the trial court make detailed findings of fact on “the interaction and interrelationship of the child with a parent or

parents, siblings, and any other person who may significantly affect the child's best interests." The trial court finds as fact that "[b]oth sets of grandparents have significant positive involvement in the child's life." (Finding of Fact 20h; Add. 5).

The undisputed fact of record is that Daughter has a very close and loving relationship with Rob's family. Rob's mother, Barbara, who resides in Worthington, has a particularly close and loving relationship with Daughter. Barbara has been providing care for Daughter since birth. Daughter's half brothers (one is at college) continue to reside in Worthington as well. (T. 148). The trial court does not address Daughter's half brothers but references only Michelle's older daughter and that they have "a close relationship." (Finding of Fact 21j; Add. 7). While Michelle's daughter is living presently with Michelle, her father testified that his daughter has also expressed wishes to return to Worthington. (T. 827-829).

Of particular concern is Michelle's relationship with Hatfield. Evaluator Larson determined "Hatfield does not appear to be a current danger to the child." (Finding of Fact 21i; Add. 7). And at trial Evaluator Larson acknowledged Hatfield is not a great choice but "didn't appear to be of any danger." This was based on Evaluator Larson's understanding that Daughter, to her knowledge, is rarely ever alone with Hatfield. (T. 56-57). Hatfield will not be a good influence on Daughter (or Michelle) and there is no question that even if somehow concludes Hatfield is not currently dangerous (a conclusion the record does not support) he certainly has that propensity. Evaluator Larson acknowledges in her Custody Report that "[Hatfield] has a poor reputation in

Estherville IA.” (Report, p. 9). She states “[h]e tends to have a smart mouth with law enforcement and others when he is drinking.” (Id., p. 9).

Hatfield admits he still drinks and on occasion will drink 12 or more beers at a time. (T. 479). Hatfield has been through extensive alcohol abuse treatment programs and had two DUI’s. Nonetheless he testified he has never had a problem with the use of alcohol. (T. 478). Not only does Hatfield have a history of alcohol abuse, he admits to still using alcohol and at times excessively.

Hatfield has a violent temper. He has abused his sons, has assaulted his ex-wife and has violated restraining orders. His prior relationships have been unstable. He has assaulted a police officer and has a bad reputation with Iowa law enforcement. Exposing Daughter to this individual is certainly not in her best interests. Michelle is in Estherville solely because of this individual and Evaluator Larson reports “Michelle and [Hatfield] spend most of their free time together.” (Report, p. 8).

As the record reflects, Michelle cannot maintain friendships. Evaluator Larson’s report states “[Michelle] cut ties to all of her friends in Worthington, MN.” (Report, p. 2). There is no showing on this record that Michelle has the kind of support that is in Daughter’s best interests.

2. The trial court must address Daughter’s present adjustment to home, school and community.

Factor number 6 is the “child’s adjustment to home, school, and community.” Minn. Stat. § 518.17, subd. 1(a)(6). The trial court states that “the child is still at a young enough age as to be resilient and adjust in a healthy way to the separation of her parents

and her new current living environment.” (Finding of Fact 28; Add. 8). That, however, does not address the best interest factor. The best interests factor asks for the child’s present adjustment to home, school and community.

The record is that Daughter was born in Nobles County and raised in Rob’s rural home. The home is large, comfortable and well-maintained. In contrast, Michelle has moved Daughter to a series of temporary residences. Since early 2010, Michelle has lived in four different residences: (1) with her mother for a week, (2) at her boyfriend’s residence in Estherville for several months, (3) a rental home across town, and (4) then yet another rental home across the street from her boyfriend. Michelle’s current residence is listed for sale and she will have to move when the home sells.

Daughter was enrolled in a Montessori school in Worthington in September of 2011 and thrived there. (T. 163). Daughter is much more adjusted and connected to Rob’s home environment.

3. The trial court must address the length of time Daughter has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

Factor number 7 is “the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.” Minn. Stat. § 518.17, subd. 1(a)(7). With regard to this factor, all the trial court states is that “while [Michelle] has demonstrated poor choices, the Court ultimately finds that both parents have the capability to provide a permanent, stable and loving environment for the child.” (Finding of Fact 31; Add. 8). Notably that statement does not address factor 7, which addresses

the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

The undisputed facts of record are that Daughter has lived in a stable, healthy home environment with Rob since her birth. She is well cared for in Rob's home and is not exposed to negative influences. Rob has no plans to move away from his home. He has a very stable job. He is a farmer and has had his own farming operation since he was 18 years old. In contrast to Michelle, Rob sought professional help when he felt he needed it to handle his anger issues due to Michelle's deceit.

The trial court finds as fact that Rob "owns a farming operation which requires a great deal of time and commitment." (Finding of Fact 21d; Add. 6). That is true. But everyone knows what that commitment is and Rob did hire extra help when necessary to run the farm and to provide time for him with his daughter. A parent should not be penalized because he or she is gainfully self-employed but that appeared to be the view of Evaluator Larson and the trial court.

There is no showing on this record as to how Michelle can possibly provide a stable environment for Daughter. In contrast to Rob who knows what his farming operation entails, Michelle presents a picture of utter uncertainty. Michelle was unemployed at the time of the custody trial. Evaluator Larson acknowledges Michelle's pattern is to move in with boyfriends and allow them to care for her needs. (Report, p. 8). Michelle has had nine different part-time jobs. Most recently, she was employed at a bank in Estherville and was terminated from that position prior to trial. It is not feasible

that Michelle can provide for her Daughter if she cannot remain gainfully full time employed. Michelle has not been able to do that in the past and there was certainly no reason on this record to believe she could do so in the future. Her only other option would be, as is her pattern, to find a boyfriend to pay for her needs, which certainly does not promote stability or continuity.

Ironically, in Finding of Fact 21g (Add. 6), the trial court credits Michelle with being able to provide the Verdoorn children with “good healthy meals” and “keep them well dressed” and there were no concerns regarding their “health and safety.” What is ignored is that those children lived with Rob. It was Rob who provided for those children.

The undisputed fact is Michelle’s life has been very unstable, both before and after her marriage to Rob. Evaluator Larson states that Michelle has had difficulty finding stability and permanency in her life and agrees the stability factors favor Rob. All agree that Michelle’s tendencies are to put her own needs before that of her children. Since 1990, Michelle left two stable marriages and had affairs prior to leaving both marriages. Her children from both marriages have been very stressed as a result of her actions. Removing Daughter from her father so Michelle can be near Hatfield is not in Daughter’s best interests.

4. The permanence, as a family unit, of existing or proposed custodial home must be addressed.

Factor number 8 requires the court to look at “the permanence, as a family unit, of the existing or proposed custodial home.” Again, the trial court does not directly address this factor. It merely states that Michelle has demonstrated poor choices but “both parents have the capability to provide a permanent, stable and loving environment for the child.” (Finding of Fact 31; Add. 8). Any such conclusion that Michelle has the capability to do so is clearly erroneous on this record.

This factor looks to whether the family unit will remain intact. The facts of record are that Rob’s family unit is Rob and Daughter. Rob’s family unit is permanent, stable and beneficial to Daughter. She has a close, loving relationship with her father and is in a stable home environment. He does not expose her to inappropriate people or situations and does not move her around frequently.

Michelle’s life is unstable and chaotic. The home environment provided by Michelle is transitory. She threw all of her children into an unstable environment so she can pursue her relationship with Hatfield. She did all this even though there is no commitment from Hatfield to make the relationship permanent. Michelle has not found any permanency or consistency in her life, as set forth previously. She has left two marriages, has held nine part-time jobs, and has never been employed full-time. She has moved to four different places since January 2010. She has difficulty maintaining relationships. Michelle has lied to her mother, her children and to Rob to hide her actions

and allow her to continue to make bad choices. She spent time with Hatfield rather than spending time with her terminally ill father.

There is no evidence in the record that Michelle has found any permanency and her lifestyle is a significant negative factor.

5. The trial court's findings fail to address stability.

As this Court has recognized, stability of a child's care and environment is a very important consideration when determining custody. Geibe v. Geibe, 571 N.W.2d 774, 780 (Minn. Ct. App. 1997) (stating that "Minnesota law rests on a presumption that stability of custody is in child's best interests."). Here on this record, even when viewing the facts in a light most favorable to the trial court's findings, based on the record as a whole, one cannot reach the conclusion that Michelle offers that to Daughter.

Based on this record, the trial court has failed in its Minn. Stat. § 518.17, subd. 1(a) obligation to carefully consider all relevant best interest factors. It has failed in its Minn. Stat. § 518.17, subd. 1(a) obligation to "make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child." Reversal is required.

D. The Trial Court's Use of Custody Evaluator Larson's Report Requires Reversal and a New Trial.

Evaluator Larson recommended sole physical custody be granted to Michelle. Evaluator Larson, like the trial court, fails in her written report to connect up her statements regarding each best interest factor and her ultimate recommendation. And the trial court's view of Evaluator Larson and her report is confusing and contradictory.

The trial court finds as fact that “Ms. Larson’s report and supporting testimony is thorough, credible and not overly biased.” (Finding of Fact 23; Add. 7). One can reach no other conclusion that the trial court finds Evaluator Larson “biased” just “not overly” so. This bias entitles Rob to a new trial. Evaluator Larson’s bias supports the grant of a new trial in accord with Minn. R. Civ. P. 59.01, subd. (a) (irregularity in proceeding whereby party deprived of a fair trial) and subd. (g) (decision is not justified by the evidence or is contrary to law).

As previously stated, the trial court’s use of Evaluator Larson’s Report is confusing. The trial court in Finding of Fact 20, states “Ms. Larson’s custody evaluation contains the following relevant information” (Add. 4-5). From what the trial court then recites, it appears the trial court is not adopting all or even the majority of what Evaluator Larson states in her report. None of the findings at Findings of Fact 20 a through l support the grant of sole physical custody to Michelle. (Add. 4-5).

A fundamental problem with Evaluator Larson’s report, which the trial testimony reveals, is that throughout her report Evaluator Larson apparently credits Michelle’s statements to her, many of which Michelle herself then disavows at trial. The statements of Evaluator Larson regarding when Michelle started her affair with Hatfield and Rob not being emotionally there for Michelle are just two examples. Evaluator Larson’s report unfortunately does not identify where she obtains the information she reports. As an example, Evaluator Larson stresses throughout her report that “[Rob] has taken [Daughter] to the doctor and gotten a prescription for her and not informed Michelle of

this.” (See Report, pp. 3, 15). There is no truth to this statement. The medical records show no medication was prescribed. (T. 69-72).

Presented at trial was the testimony and report of Linda Paplinski. Ms. Paplinski has been doing custody evaluations for over 18 years. (T. 771; Trial Exhibit 3; T. 777). Ms. Paplinski in great detail both in her Report and a trial explained the fundamental problems with Evaluator Larson’s report which include:

- Cherry picking information to place Rob in a negative light. (T. 775-776).
- Never stating on what basis Evaluator Larson reaches her recommendation of sole physical custody to Michelle. (T. 782-783).
- One cannot identify the source of Evaluator Larson’s statements. (T. 783-785).
- No examples are given to support many of Evaluator Larson’s statements. (T. 787).
- Evaluator Larson’s statements are in conflict – i.e. how can she state Michelle is a good mother but then state Michelle places her own needs and desires above her child. (T. 794).

In Finding of Fact 21, the trial court states that “[i]n supplementing her report, Ms. Larson provided the following testimony at trial to support her recommendations to the Court.” (Add. 5). The trial court then credits Evaluator Larson’s trial testimony but gets it wrong. Credited statements include “[Rob] became the primary caretaker of the child only after he had to” and Rob “told Ms. Larson that he would hire someone to help with the operation of the farming to allow him to spend more time with the child. During the fall harvest of 2011, [Rob] failed to hire any person to help with the farming operation, as he said he would do.” (Finding of Fact 21c and d; Add. 6).

Actually, at trial, Evaluator Larson testified that Rob took care of Daughter because Michelle was absent from the home. (T. 77). Evaluator Larson admitted she had nothing in her report to show that Rob did not appropriately and properly care for Daughter during that time period. (Id.) She further admitted that best interest factors 7 and 8 with regard to stability and permanency favored Rob, a fact the trial court fails to mention. (T. 107-112).

Somehow, Evaluator Larson came to the incorrect conclusion that Rob was going to hire somebody to run his farm for him so that he could be “like a Mr. Mom.” (T. 36). Rob never so stated, and frankly, such an assertion makes no sense. As Rob explained:

Q. . . . Obviously, the custody study indicates that you were going to hire additional help in the fall of 2010. Did you do that?

A. Yes.

...

Q. Now – okay. Did hiring this extra help allow you to have more time with [Daughter]?

A. Yes.

Q. All right. Now, did you ever say that you were going to turn over the responsibility of your farming operation to someone else?

A. No.

...

Q. Okay. When – when you are in harvest, there is no such thing as an eight-to-five, is there?

A. Um, no. I mean, when you're self-employed and you're farming, you kind of do what you want and when you want, but, I mean, for the most part, it is eight to five. I'm – you know, I wouldn't say that there's never an issue that I'm not home at 5:00, I mean, but it's pretty much I'm home at 5:00 and I don't leave the house before eight.

(T. 596-597).

Rob then explained that the harvest in 2010 took a total time of two to three weeks.

(T. 597). For fall harvesting, Rob had six employees, including his father. (T. 638).

Rob's mother would pick up Daughter and then Daughter and Rob would have supper together. (T. 597-598). Rob explained during that time he did not quit at 5:00, but he would come home and have supper with Daughter about 5:30 and 6:00. (T. 597-598).

Evaluator Larson's report shows bias, as the trial court appears to recognize in Finding of Fact 23. (Add. 7). Evaluator Larson's testimony at trial, which the trial court then regards in Finding of Fact 21 (Add. 5-6) as supplementing her report (even though Evaluator Larson stated she was not so supplementing), contains clearly erroneous findings.

Given this record, Rob was prejudiced by the way these custody proceedings were handled and it was an abuse of discretion to deny him a new trial.

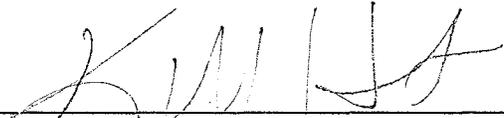
Based on this record and given the trial court's apparent acknowledgment of Evaluator Larson's bias, a new trial should be ordered.

CONCLUSION

Appellant respectfully requests that the trial court judgment granting Respondent sole physical custody of Daughter be reversed.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: October 15, 2012

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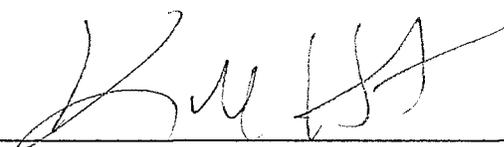
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 11,418 words. This brief was prepared using Word Perfect 10.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

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