

OFFICE OF
APPELLATE COURTS

DEC 03 2012

FILED

A12-0699

State of Minnesota
In Court of Appeals

In re the Marriage of:

Michelle Beth Kremer, petitioner,

Respondent,

and

Robbie Michael Kremer,

Appellant.

**REPLY BRIEF AND SUPPLEMENTAL APPENDIX
OF APPELLANT ROBBIE MICHAEL KREMER**

Kay Nord Hunt (I.D. No. 138289)
Marc A. Johannsen (I.D. No. 202654)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

*Attorneys for Appellant
Robbie Michael Kremer*

William J. Wetering (I.D. No. 184007)
HEDEEN, HUGHES & WETERING
1206 Oxford Street
P.O. Box 9
Worthington, MN 56187
(507) 376-3181

*Attorneys for Respondent
Michelle Beth Kremer*

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 ii

I. MINN. STAT. § 518.175, SUBD. 3(a) IS APPLICABLE TO THIS CASE
AND MANDATES REVERSAL OF THE AWARD OF SOLE CUSTODY
TO MICHELLE 1

II. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING
SOLE PHYSICAL CUSTODY TO RESPONDENT 5

 A. The Trial Court Failed to Make the Requisite Detailed Findings and
 Explain How the Best Interest Factors Led to Its Determination to
 Grant Sole Physical Custody to Michelle 5

 B. Michelle’s Rendition of Events Is Not Accurate 6

 C. The Court Must Consider the Interactions and Interrelationship of
 Daughter With Hatfield 7

 D. Rob Provides Stability; Michelle Does Not 9

 E. Evaluator Larson, by Her Report and Testimony, Was Both
 Inconsistent and Biased 10

CONCLUSION 13

CERTIFICATION OF BRIEF LENGTH 14

TABLE OF AUTHORITIES

Statutes:

Minn. Stat. § 518.17 5
Minn. Stat. § 518.17, subd. 1(a)(5) 8
Minn. Stat. § 518.17, subd. 1(a)(7) 9
Minn. Stat. § 518.17, subd. 1(a)(8) 9
Minn. Stat. § 518.17, subd. 1(a)(13) 5
Minn. Stat. § 518.175, subd. 3 3, 4
Minn. Stat. § 518.175, subd. 3(a) 1
Minn. Stat. § 518.175, subd. 3(b) 1, 3, 4
Minn. Stat. § 518.175, subd. 3(c) 1
Minn. Stat. § 518D.102(d) 4
Minn. Stat. § 518D.102(e) 4
Minn. Stat. § 518D.102(h) 4
Minn. Stat. § 518D.201(a)(1) 4
Minn. Stat. Ann. § 518.17 5

Cases:

First Nat’l Bank v. Profit Pork, LLC,
820 N.W.2d 592 (Minn. Ct. App. 2012) 4

Geibe v. Geibe,
571 N.W.2d 774 (Minn. Ct. App. 1987) 9

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

Mattson v. Flynn,
216 Minn. 354, 13 N.W.2d 11 (1944) 4

Nelson v. Nelson,
1997 WL 714737 (Minn. Ct. App. 1997) 8

Rosenfeld v. Rosenfeld,
249 N.W.2d 168 (Minn. 1976) 5

I. MINN. STAT. § 518.175, SUBD. 3(a) IS APPLICABLE TO THIS CASE AND MANDATES REVERSAL OF THE AWARD OF SOLE CUSTODY TO MICHELLE.

Respondent Michelle Kremer (Michelle) asserts for the first time on appeal that Minn. Stat. § 518.175, subd. 3(a) is not applicable to this case. (Respondent's Brief, p. 17; see T. 3/12/12, pp. 9-10, 13-14, 17). "Determination of the applicable statutory standard and interpretation of statutes are questions of law that [this court] review[s] de novo." Goldman v. Greenwood, 748 N.W.2d 279, 282 (Minn. 2008) (internal citations omitted). Minn. Stat. § 518.175, subs. 3(b) and(c) clearly provide that 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. Id. Rob has opposed Daughter's relocation to Iowa and the trial court has failed to address the statutory best interest factors, as set out in Minn. Stat. § 518.175, subd. 3(b), that the court must apply and on which the burden is placed on Michelle.

Michelle's Respondent's Brief does not set out the facts accurately or completely leading up to Michelle's move to Iowa. Nor does she acknowledge Appellant Robbie Kremer's (Rob) explicit statements throughout these proceedings that he does not consent to Daughter relocating to Iowa. (T. 572-573). The facts are as follows.

In 1989, Rob purchased a farm with a house, where he presently resides. (T. 509.) In 1997, Michelle moved into Rob's farm home and on March 6, 2001, they married. (T. 174, 513-515).

Michelle told Rob in February 2010 that it was necessary for her to be with her father 24/7 while he was in hospice care in Iowa. (T. 305). The parties' Daughter, remained in Rob's care at their farm home in Minnesota. (T. 306). During this time period, on April 8, 2010, Michelle signed her Petition for Dissolution of the parties' marriage (A. 6), seeking sole legal and physical custody of Daughter. (A. 3). Michelle's father died on April 10, 2010. (T. 145).

Rob first learned that Michelle was even contemplating a divorce when Michelle's attorney called him in April 2010 after Michelle's father's death. (T. 566-569). Rob was shocked. (T. 569). Michelle then came to the farm home that evening. (T. 568). The parties talked. Michelle refused counseling. She just wanted a divorce. (T. 568).

Rob understood Michelle was still staying in Iowa with Michelle's mother. (T. 568). Rob told Michelle that since she had been gone for 9 to 10 weeks staying with her mother during her father's illness, a few more days there would be beneficial and the parties could talk in the future. (T. 569). Rob only later learned that Michelle had been staying with Mike Hatfield, with whom she was having an affair. (T. 304-305).

After that discussion, Michelle nonetheless showed up later that night at the farm home. (T. 570). Rob was nervous and scared because he knew Michelle had been involved in a domestic altercation with Verdoorn, her ex-husband, and Michelle had ended up in jail. (T. 570). Michelle ultimately left, taking the parties' Daughter to her mother's place in Iowa. (T. 173, 571).

Michelle stayed one week with her mother in Spirit Lake, Iowa. (T. 142, 171-172). Michelle then moved in with her boyfriend, Mike Hatfield, in Estherville, Iowa. (T. 172). Michelle had no relatives living in Estherville. She had no job. (T. 181, 215, 249).

In June 2010, the trial court issued an order for temporary relief. The parties were granted temporary joint legal and joint physical custody of Daughter with each party sharing 50/50 parenting time by alternating weeks. (Add. 24). Nothing is stated in that order with regard to the residence of Michelle. (Add. 22).

Thereafter, Rob's counsel sent a letter to Michelle's lawyer explicitly stating Rob "has not and does not consent to having [Daughter] reside outside the State of Minnesota" Rob's attorney cites Minn. Stat. § 518.175, subd. 3. That letter was later made a trial exhibit and introduced at trial as 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).

In granting Michelle sole physical custody of Daughter, the trial court failed to address the relocation of Daughter to Iowa raised specifically by Rob and denied Rob's post-trial motion without explanation. (T. 3/12/12, pp. 9-10, 13-14; Add. 1, 18, 22, 26). Michelle now argues for the first time on appeal that Minn. Stat. § 518.175, subd. 3(b) is inapplicable because Michelle has chosen to reside in Iowa after starting these divorce and child custody proceedings. (Respondent's Brief p. 17). But Michelle was never given consent by Rob to move Daughter's residence to Iowa, which relocation occurred

when the trial court granted Michelle sole physical custody. (Add. 10). And the trial court, when it did so order, did not apply the mandated best interest factors and place the burden on Michelle, as set out in Minn. Stat. § 518.175, subd. 3(b).

There is no question that Daughter's home state is Minnesota. Minn. Stat. § 518D.201(a)(1). A child's "home state" is the state where the child lives with a parent for at least six consecutive months immediately before a child custody proceeding is commenced. Minn. Stat. § 518D.102(d), (e), (h). In Michelle's Petition for Dissolution, in which she requests custody of Daughter, she asserts she is a resident of Minnesota. (A. 1).

The Minnesota Legislature has determined Minnesota's public policy and it is expressed in Minn. Stat. § 518.175, subd. 3. Mattson v. Flynn, 216 Minn. 354, 13 N.W.2d 11, 16 (1944) (public policy is determined by the Legislature). Michelle, by her request for sole custody of Daughter and given her decision after initiating these proceedings to reside in Estherville, Iowa, was requesting leave to relocate with Daughter to another state – Iowa. To adopt Michelle's view of the law, a parent can bring suit for custody in Minnesota and while the case is pending remove the child from Minnesota, thereby defeating the purpose of Minn. Stat. § 518.175, subd. 3(b). Minnesota law does not so support. And such a ruling would lead to an absurd result. First Nat'l Bank v. Profit Pork, LLC, 820 N.W.2d 592, 595 (Minn. Ct. App. 2012) (Legislature does not intend absurd results).

Notably, in response to Rob's brief, Michelle does not assert nor present any evidence of record that it is in Daughter's best interest to leave the stability, continuity, safety and structure of Nobles County and move to Estherville, Iowa. There Michelle has no permanent connections, no full time job or even a permanent place to stay. On this record, this Court must reverse the grant of sole physical custody of Daughter to Michelle.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING SOLE PHYSICAL CUSTODY TO RESPONDENT.

A. The Trial Court Failed to Make the Requisite Detailed Findings and Explain How the Best Interest Factors Led to Its Determination to Grant Sole Physical Custody to Michelle.

Michelle asserts the trial court was not required to make express findings on each of the statutory best interest factors citing Rosenfeld v. Rosenfeld, 249 N.W.2d 168, 171-72 (Minn. 1976). Michelle ignores that Rosenfeld was decided in 1976. Minn. Stat. § 518.17 was subsequently revised. See Minn. Stat. Ann. § 518.17 historical and statutory notes setting out pre-1978 version of statute. At the time of the Minnesota Supreme Court's decision in Rosenfeld, the statute did not contain the mandate, which it now contains, that "[t]he court must make detailed findings on each of the [best interest] factors and explain how the factors led to its conclusions and to the determination of the best interests of the child." Minn. Stat. § 518.17, subd. (a). This mandate the trial court did not follow.

Michelle suggests to this Court that the trial court adopted Custody Evaluator Larson's report and conclusions regarding the best interest factors. The trial court

findings do not so state. In Finding of Fact 20, the trial court states “Ms. Larson’s custody evaluation contained the following relevant information.” (Add. 4-5). The trial court then lists the information which the trial court considers “relevant.” That finding does not suggest that the trial court adopted Ms. Larson’s report or any of her conclusions other than stated in Finding of Fact 20. That finding does not support the award of sole physical custody to Michelle.

The trial court, in Finding of Fact 21, states that “in supplementing her report, Ms. Larson provided the following testimony at trial to support her recommendations to the Court.” (Add. 5-7). The trial court, after setting forth Ms. Larson’s purported supplementation, does not state it is adopting her statements. (Id.) The trial court then follows up that finding with Findings of Fact 24 through 35, by which it purports to make partial best interest factors findings. The trial court does not explain how those findings relate to its earlier findings or to its ultimate decision on custody contained in Conclusion of Law 3. (Add. 9-10). Reversal and remand is required.

B. Michelle’s Rendition of Events Is Not Accurate.

In responding to Rob’s brief and in setting out testimony of record, Michelle does not do so accurately. Michelle states that by Rob’s own admission Michelle is a good mother. (Respondent’s Brief, p. 8). Rob’s cited testimony actually states that during the first year and a half of Daughter’s life, Michelle did a good job of caring for the parties’ child. (T. 415). Rob testified:

Q. Okay. And, uh, you – at that point in time then you had no issue with her having the control of the child at home and taking care of her every day.

A. No, like I said, she was excellent the first, you know, through the breast feeding and stuff and going good, you know, up to the first year, no, I didn't have any concerns. She wasn't drinking and she was – she was good. She was.

(T. 415).

Michelle thereafter, however, began a pattern that has existed throughout her adult life. She again began consuming alcohol. (T. 552-553, 560-561). As Michelle's ex-husband Verdoorn explained, Michelle will abuse alcohol and "that messes her up and changes her priorities." (T. 836). Michelle will follow her feelings rather than the needs of her children. (T. 836-837).

As even Evaluator Larson admits, 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 trouble maintaining friendships and has spent a considerable amount of her free time consuming alcohol or with her friends. (Id.)

C. The Court Must Consider the Interactions and Interrelationship of Daughter With Hatfield.

Michelle complains that a large portion of Rob's argument is "Appellant's tiresome attempt at character assassination of [Michelle] for becoming involved with another man." (Respondent's Brief, p. 9). Rob does not care that Michelle has a romantic interest. What he does care about is his Daughter's best interests. Michelle can

consort with whomever she chooses, but such does factor into custody under the facts of this record. Michelle asserts that the Court “shall not consider conduct of a proposed custodian that does not affect the custodian’s relationship to the child.” (Id.) But Michelle ignores that the court is required to consider the “interaction and interrelationship of the child with . . . any other person who may significantly affect the child’s best interests.” Minn. Stat. § 518.17, subd. 1(a)(5). In Nelson v. Nelson, 1997 WL 714737 (Minn. Ct. App. 1997) (Supplemental Appendix [S.A.] 1), this Court specifically rejected an argument similar to that being made by Michelle where appellant contended the court should not consider the conduct of a significant other. This Court disagreed, stating:

Here, the court considered evidence that both a former and a present live-in partner of appellant have abused alcohol while living with appellant and N.N. The court also noted that appellant’s present live-in partner’s testimony concerning his current alcohol use was inconsistent. The court must consider the “interaction and interrelationship of the child with * * * any other person who may significantly affect the child’s best interests.” Minn. Stat. § 518.17, subd. 1(a)(5) (1996). Because alcohol abuse by a person living with appellant may affect N.N.’s best interests, the district court properly considered this in its analysis.

Nelson, 1997 WL 714737 at * 2 (Minn. Ct. App. 1997) (S.A. 2).

Hatfield is extremely relevant to this case because Hatfield is the sole reason Michelle is in Estherville. Michelle has no family in Estherville and has no known support system. Given Michelle’s documented history of lack of good judgment, her admitted lack of stability coupled with Hatfield’s history of physical abuse as well as alcohol abuse, Hatfield’s day-to-day interactions with Daughter makes Hatfield of prime concern to custody.

There is no question Hatfield has a sordid history. Hatfield's ex-wife testified that Hatfield is both physically and verbally abusive. (T. 877). More importantly, she expressed present concern for Daughter and her safety. (T. 887). Hatfield is not stable. (T. 891). Hatfield has had serious problems with the law and with alcohol abuse. (T. 302-304, 476-478). Hatfield still drinks alcohol and on occasion will drink in excess of 12 drinks per sitting. (T. 479). And Hatfield is a person that Michelle has chosen to have their Daughter connect with on a daily basis. (T. 301-302).

D. Rob Provides Stability; Michelle Does Not.

Stability is a very important consideration in determining custody. Geibe v. Geibe, 571 N.W.2d 774, 780 (Minn. Ct. App. 1987). Michelle's personal conduct is therefore an integral factor here because she does not and has not shown she can provide the stability necessary to raise Daughter. Michelle argues that to apply Rob's definition of providing "permanent, stable, and loving environments for the child" any party leaving an outwardly appearing stable home would fail the factor. (Respondent's Brief, pp. 14-15). But Best Interest Statutory Factor 7 expressly requires the court to address "the length of time a child has lived in a stable, satisfactory environment and the desirability of maintaining continuity." Minn. Stat. § 518.17, subd. 1(a)(7). Best Interest Statutory Factor 8 requires the court to address "the permanence, as a family unit, of the existing or proposed custodial home." Minn. Stat. § 518.17, subd. 1(a)(8). Michelle has had difficulty finding stability and permanency throughout her life and even Evaluator Larson agrees the stability factors favor Rob. (T. 105-118).

The undisputed fact of record is that Daughter lived in a stable, healthy home environment with Rob since birth. She was well cared for in Rob's home and was not exposed to negative influences. Rob provides stability.

Michelle admits she has difficulty finding stability in her life. (T. 319). She has problems maintaining friends. (T. 320). All agree that Michelle's tendencies are to put her own needs before those of her children. There is no showing on this record as to how Michelle can possibly provide a stable environment for Daughter. Michelle was unemployed at the time of the custody trial, which was not true when she was meeting with Evaluator Larson. Evaluator Larson acknowledges Michelle's pattern is to move in with boyfriends and allow them to care for her needs. (Report p. 8).

Rob is a farmer and he has obligations that go with such employment. Rob should not be penalized because he is gainfully employed. The testimony of record regarding Rob's running of his farm and the changes he made to care for his Daughter with citations to the record are set forth in detail on pages 43-44 of Appellant's Brief filed with this Court. Michelle's statement at page 16 of her brief that Rob "failed to hire anyone" to help with the operation during harvest is untrue.

E. Evaluator Larson, by Her Report and Testimony, Was Both Inconsistent and Biased.

Michelle focuses on the fact that on the one occasion Evaluator Larson evaluated each parent's interaction with Daughter, Evaluator Larson concluded Michelle demonstrated better parental control on that occasion than did Rob. (See Respondent's Brief, pp. 8, 15). But Evaluator Larson's testimony is both

inconsistent and shows her bias. Ms. Larson testified that she observed Rob with Daughter on August 18, 2010. (T. 21). Evaluator Larson acknowledges that Rob prepared a “really healthy meal,” but complains that he allowed Daughter “to eat cheese pizza and Cheetos.” (T. 22) She testified:

but [Rob] let [Daughter] stand and eat and pick at her food and leave the table and come back and forth, and, um, he told her not to eat in the living room but then she took the Cheetos in the living room anyway and he didn't say anything about it, and he let her watch TV as we ate at the table, um, and then he left food on the table and let her pick at it. He didn't let her near the stove or anything like that or the pizza oven. He was very safe about that.

(Id.) Evaluator Larson states she was concerned that when with Rob, Daughter was “only eating cheese pizza.” (T. 137). But pizza was Daughter's diet at Michelle's home as well. (See T. 26-27, 187). Evaluator Larson offered no such criticism of Michelle.

Evaluator Larson describes her visit to Michelle's home on August 6, 2010, where Daughter had pizza. (T. 26, 65). Custody Evaluator Larson testified:

and Michelle ordered pizza and had her boyfriend, Mike – called him to pick up, and – or texted him or something – and, um, then she went outside – [Daughter] and I and her went outside and picked up sticks around the yard to keep her busy and, um, the outside of the house – it was a rental home – was not kept up very good. There was, like, um, beer bottles and cigarettes and stuff outside so they kind of, um, I noticed that.

(T. 26-27). While Evaluator Larson testified she noticed beer bottles and cigarettes at Michelle's home, she did not include that in her written report. In Evaluator Larson's report, she states that both parents have made separate meals for Daughter because “she is such a finicky eater.” (T. 67-68; Report, p. 13). Evaluator Larson admits both parents

spoil Daughter. (T. 122). Evaluator Larson also admits Michelle is more task-oriented in parenting style. Rob allows Daughter more freedom. (T. 122).

Michelle does not address other examples of Evaluator Larson's bias. For example, Evaluator Larson states both in her report and at trial that a prenuptial agreement is a form of domestic abuse. (Report, p. 13; T. 125-126). According to Evaluator Larson, this shows Rob did not trust Michelle. (T. 94; Report, p. 6). Evaluator Larson credits Michelle's statements to her that Rob failed to provide Michelle with information regarding a prescription for Daughter. (See Report, pp. 3, 15). There is no truth to that statement. (T. 69-72). In Evaluator Larson's report she acknowledges Michelle's statement to her that Rob forced sex on Michelle. (T. 123). Michelle did not so testify at trial. And Evaluator Larson admittedly never asked Rob about Michelle's accusation, even though it is in her report because "I didn't state it as a fact" and "I didn't figure he would be honest with me." (T. 123, 124). "I asked him if he had done the name-calling and all of the other items which he said no to." (Id.)

There is no question that a fair reading of the record is that Evaluator Larson was biased against Rob. Rob disagrees with the trial court's finding that Evaluator Larson was "not overly biased." (Finding of Fact 23; Add. 7).

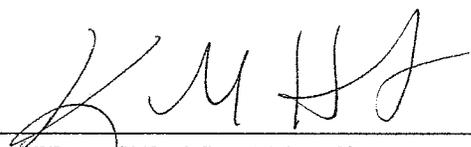
CONCLUSION

Appellant respectfully requests that the trial court judgment granting Respondent sole physical custody of Daughter, which includes her relocation to Iowa, be reversed.

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

Dated: December 3, 2012

BY



Kay Nord Hunt (I.D. No. 138289)

Marc A. Johannsen (I.D. No. 202654)

2000 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

(612) 339-8131

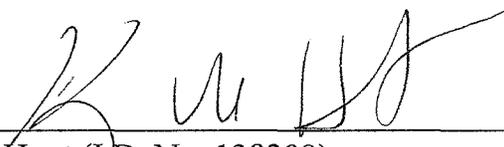
Attorneys for Appellant Robbie Michael Kremer

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,207 words. This brief was prepared using Word Perfect 10.

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

Dated: December 3, 2012

BY 

Kay Nord Hunt (I.D. No. 138289)
Marc A. Johannsen (I.D. No. 202654)
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Appellant Robbie Michael Kremer