

NO. 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 RESPONDENT
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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES

- I. WHETHER THE TRIAL COURT ABUSED DISCRETION BY GRANTING SOLE PHYSICAL CUSTODY TO RESPONDENT HAVING MADE INDEPENDENT FINDINGS AND ADOPTED FINDINGS FROM THE REPORT AND TESTIMONY OF THE CUSTODY EVALUATOR WHEN ANALYZING THE BEST INTEREST FACTORS ON MINN. STAT. § 518.17, SUBD. 1.

The issue of whether the trial court made detailed findings was raised by Appellant in his Motion for Amended Findings of Fact, Conclusions of Law and/or New Trial. (Appellant's App., A. 15).

Rosenfeld v. Rosenfeld, 249 N.W.2d 168, 171-72 (Minn. 1976).

Rutanen v. Olson, 475 N.W.2d 100, 104 (Minn. App.1991).

- II. WHETHER THE TRIAL COURT PROPERLY DEALT WITH RESPONDENT RELOCATING TO IOWA.

The issue of whether the trial court addressed Respondent's relocation to Iowa during the trial was raised by Appellant in his Motion for Amended Findings of Fact, Conclusions of Law and/or New Trial. (Appellant's App., A. 15).

Minn. Stat. § 518.175, subd. 3(a)

- III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S POST TRIAL MOTIONS.

The issue of whether the Appellant is entitled to a new trial was raised by Appellant in his Motion for Amended Findings of Fact, Conclusions of Law and/or New Trial. (Appellant's App., A. 15).

Halla Nursery, Inc. v. Baumann-Furrie & Co., 454 N.W.2d 905 (Minn. 1990)

Rutanen v. Olson, 475 N.W.2d 100, 104 (Minn. App.1991).

Vangness v. Vangness, 607 N.W.2d 468, 472 (Minn.App.2000).

STATEMENT OF THE CASE

Sole physical custody of three-year-old daughter of the parties was granted to Respondent by the Honorable George I. Harrelson following trial of the custody issue by Order dated January 10, 2012 following bifurcation of the custody and financial issues in the case. Appellant seeks review.

STANDARD OF REVIEW

In custody proceedings the Trial Court's findings must be upheld absent an abuse of discretion on the part of the Trial Court. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn.1985). The Appellate Court is to review the record in a light most favorable to the Trial Court's Findings of Fact. *Vangness v. Vangness*, 607 N.W.2d 468, 472 (Minn.App.2000). The factual findings may only be set aside if they are clearly erroneous. *Id.* The trial court's findings of fact will be sustained unless they are clearly erroneous. Minn. R. Civ. P. 52.01. A finding is clearly erroneous if the Court is left with the definite and firm conviction that a mistake has been made. *Vangness*, 607 N.W.2d at 472. The same standard of review, abuse of discretion, applies to Appellant's appeal of the Trial Court's denial of the motion for new trial. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

STATEMENT OF FACTS

The parties were in a nine (9) year marriage when matters proceeded to their split in the spring of 2010. Respondent and child were excluded from the family home by Appellant upon Appellant learning of Respondent's desire to dissolve the marriage. (T. 172, Line 11 through 174, Line 5). The parties' home is located in extreme southwestern Minnesota, some thirteen (13) miles north of Worthington and twenty-five (25) miles from the Minnesota/Iowa border. Having been excluded from the family home Respondent and _____ briefly took up residence with Respondent's mother in her Iowa home some forty (40) miles southeast of Worthington and thereafter briefly with a friend in Estherville, Iowa, some fifty-four (54) miles from Worthington. Since then, Respondent has rented her own home in Estherville, Iowa where she resides with this child and another daughter

The family home was a farm home where the couple engaged in corn and soybean farming on over 2,000 acres and also engaged in a trucking business. The care of the home and domestic duties were that of the Respondent including the primary care of the child subject of these proceedings. (T. 20, Line 5).

In conjunction with temporary motions at the outset of the dissolution case the parties stipulated to the child being in the care of the Respondent one week and the Appellant the following week and rotated this weekly care throughout the case until the trial court decision January 10, 2012. By agreement of the parties, the trial court appointed a custody evaluator to conduct an investigation and make a report to the trial

court pursuant to Minnesota Statute. (Appellant's Brief, Add. 24, paragraph 8). At paragraphs 18 and 19 of the trial court's Findings of Fact the trial court wrote:

"18. In the Order issued June 15, 2010 the Court appointed Sara Larson to conduct a custody evaluation. Ms. Larson filed her custody evaluation with the Court on November 12, 2010. As part of that evaluation she recommended that the parties share joint legal custody and that Petitioner (Respondent) have sole physical custody of the child.

19. During her investigation, Ms. Larson reviewed the Court file, the dissolution file involving Petitioner's (Respondent's) first marriage, information provided by the attorneys, the criminal and civil records of the parties, the parenting assessment from Rainbow Behavioral Health, questionnaires completed by the parties, as well as concerns brought by both parties. During this process Ms. Larson spoke to 40 individuals, some of who were suggested by the parties, and some of whom Ms. Larson sought out to independently verify information provided by the parties. Ms. Larson spoke to each person provided to her by both the Petitioner (Respondent) and Respondent (Appellant)."

The Court went on to identify the relevant information from the evaluator's report in paragraph 20. In paragraph 21 the Court identified the custody evaluator's trial testimony supplementing and supporting the recommendations to the Court. Thereafter, at paragraph 23 of the Findings the Court wrote:

"After considering the testimony of Karen Brinkman, a licensed psychologist, Linda Paplilinski, a custody evaluator, and Linda Bottleson, a divorce coach hired by Respondent (Appellant), the Court finds that Ms. Larson's report and supporting testimony is thorough, credible and not overly biased."

Clearly, the trial Court had occasion to review the report and listen to the testimony of the custody evaluator, as well as observe and hear all of the witnesses provided by the Appellant attacking the report and providing whatever alternative testimony Appellant sought to present. The Court also observed those witnesses cross-

examination by Respondent. Thereafter, the Court made independent findings, as well adopting the conclusions of the custody evaluator, and granted sole physical custody to Respondent.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE DISCRETION BY GRANTING SOLE PHYSICAL CUSTODY TO RESPONDENT.

In making custody determinations, the trial court must base its decisions on the best interests of the child. *Zander v. Zander*, 720 N.W.2d 360, 366 (Minn. 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). However, the trial court is not required to expressly address each factor. *Rosenfeld v. Rosenfeld*, 249 N.W.2d 168, 171-72 (Minn. 1976). Rather, the “findings as a whole” must “reflect that the court has taken the statutory factors into consideration.” *Id.*

If there is evidence to support the trial court's decision, there is no abuse of discretion. *Doren v. Doren*, 431 N.W.2d 558, 561 (Minn.App.1988). “That the record might support findings other than those made by the [trial] court does not show that the [trial] court's findings are defective.” *Vangsness*, 607 N.W.2d at 474.

A. The Trial Court Made the Requisite Findings Under Minn. Stat. § 518.17, subd. 1(a).

Appellant argues that the trial court was required to make express findings on each of the statutory best interest factors. (Appellant's Brief, page 32). However, as

Rosenfeld states, that is not the case. *See Rosenfeld*, 249 N.W.2d at 171-72. *Rosenfeld* states:

“We do not hold that the trial court must make a specific finding on each of the statutory factors, nor do we hold that each factor must be specifically addressed by the trial court. It is sufficient if the findings as a whole reflect that the trial court has taken the statutory factors into consideration, in so far as they are relevant, in reaching its decision.”

Id. A look at the trial court’s findings clearly shows the findings as a whole reflect that the trial court has taken all statutory factors into consideration. (*See Appellant’s Brief*, Add. 1-9).

Appellant argues that the trial court abused its discretion in failing to make requisite findings under Minnesota Statute §518.17, Subd. 1 (a) and failed to explain how the best interests factors led to its conclusion that Respondent should be awarded sole physical custody. (*Appellant’s Brief*, pages 32-33). In particular Appellant argues that the Court failed to make findings regarding (1) the interaction and relationships between the minor child and other persons who may significantly affect her best interest, (*Appellant’s Brief*, page 33); (2) the minor child’s present adjustment to home, school, and community, (*Appellant’s Brief*, page 35); (3) the length of time the minor child had lived in a stable, satisfactory environment and the desirability of maintaining continuity, (*Appellant’s Brief*, page 36); (4) the permanence, as a family unit, of existing or proposed custodial home, (*Appellant’s Brief*, page 39); and (5) stability, (*Appellant’s Brief*, pages 40). A review of the record including the Court’s Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree indicate the Court did in fact make

findings in regard to all of the statutory factors. (Appellant’s Brief, Add. 4-9). The trial court went to great lengths in its Findings of Fact to discuss and specify the custody evaluator’s report and conclusions regarding said best interest factors. *Id.* Thereafter, trial court clearly adopted said conclusions. *Id.* The investigative report of a custody evaluator may be received into evidence at hearing, and the trial court may adopt the findings of said report. *Minn. Stat. § 518.167 Subd. 4; See Rutanen v. Olson, 475 N.W.2d 100, 104 (Minn. App.1991).* Further, after hearing testimony of the custody evaluator’s findings, as well as Appellant’s witnesses, the trial court made numerous independent findings. (Appellant’s Brief, Add. 8-9).

i. 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 adopted the findings of the custody evaluator in its analysis of the best interest factors. (*See Appellant’s Brief, Add. 4-7*). Specifically:

“The child was treated well by both parents.”

(Appellant’s Brief, Add. 4, #20a).

“Both parties want to be active parents in the child’s life.”

(Appellant’s Brief, Add. 4, #20c).

“Both sets of grandparents have significant positive involvement in the child’s life.”

(Appellant’s Brief, Add. 5, #20h).

Further, the Court adopted the finding of the custody evaluator that the Respondent’s older daughter currently lived with Respondent and the child, and it

appeared that the two half-siblings had a close relationship. (Appellant's Brief, Add. 7, #20j).

Of particular note regarding the interaction and interrelationship of the child and the parents, the trial court made findings from the custody evaluator's testimony that while watching the interactions between the child and the parents, the custody evaluator found Respondent had a more parental role with the child than did Appellant. (Appellant's Brief, Add. 6, #21g). Specifically, during meal times the Respondent had demonstrated better control over the child by not allowing the child to roam around the room during a meal. *Id.* Further, Respondent was able to keep the child at the table and direct her focus toward eating, while Appellant displayed little control over the child, had little to no follow through when the child refused to follow his instructions or commands. *Id.* The custody evaluator found that Appellant set poor limits for the child. (Appellant's Brief, Add. 6, #20f).

By Appellant's own admission, Respondent is a good mother and has positive interactions with all of her children. (See T. 415-416). Specifically, Appellant stated that Respondent did well as a mother. (T. 415, Lines 15-22), and she is a good mother to her other children leaving him with no concerns about her parenting skills. (T. 415-416, Line 25 of 415 through 416, Line 3; T. 414, Line 23 through 415, Line 1).

Further, Appellant argues that Respondent has not shown on the record that she has the kind of support that is in her daughter's best interests. (Appellant's Brief, page

33). Appellant has from the very beginning of this matter attempted to assail the Respondent's personal conduct and romantic interests as a cause for finding of sole physical custody in favor of the Appellant. A large portion of said argument is Appellant's tiresome attempt at character assassination of Respondent for becoming involved with another man. This theme continues under Appellant's argument regarding interaction and interrelationships, as well other numerous instances. (Appellant's Brief, page 34-35).

This matter was previously addressed by Respondent in Petitioner's (Respondent) Memorandum (Respondent's Add. 1) which was filed in support of Petitioner's proposed findings, as well as in Petitioner's (Respondent's) Memorandum in Response to Respondent's (Appellant's) Motion for Amended Findings, Conclusions, and a New Trial and Other Relief. (Respondent's Add. 2). On the issue of Respondent's conduct, the trial court was guided by Minn. Stat. § 518.17, subd. 1(b) which states that the court shall not consider conduct of a proposed custodian that does not affect the custodian's relationship to the child. *See also Stenzel v. Stenzel*, 401 N.W.2d 130, 132 (Minn. App.1987). In *Stenzel* the court held that although under Minnesota Statute §518.17 subd.1 discusses findings of the conduct of a proposed custodian, it is not required when there is a lack of evidence establishing that the proposed custodian's choice of housemate affected her parenting ability or relationship with the child. *Id.*

The custody evaluator addressed at trial and found in her recommendations that Mr. Hatland was not a danger to the child. (T. 171, line 24). Additionally, the custody

evaluator found Hatland to be loving, caring and patient with the minor child, and that the child appeared to dote on him. (T. 171, lines1-2). With this testimony and other evidence received, the trial court determined that there was a lack of evidence establishing that Respondent's significant other affected her ability to parent, nor her relationship with the child. Further, the trial court adopted as it's finding the custody evaluator's conclusion that Mr. Hatland was not a danger to the child. (Appellant's Brief, Add. 7, #21i). It is clear that the Court did in fact make a detailed finding regarding Mr. Hatland. The evidence on this issue viewed in a light most favorable to the trial court's findings of fact must negate Appellant's suggestion of an abuse of discretion.

A review of the Court's Findings of Facts indicate that the trial court did in fact make findings in regard to the interaction and interrelationship of the child, parents, and other parties that may have a significant effect on the child's best interest.

ii. The child's adjustment to home, school, and community.

Mindful that the parties split when the child was 26 months old, the trial court made findings in regard to the child's adjustment to home, school, and community.

"The child is still at a young age as to be resilient and adjust in a healthy way to the separation of her parents and her new current living adjustment."

(Appellant's Brief, Add. 8, #28).

The trial court also adopted the finding of the custody evaluator that while the child alternated between both parties on a weekly basis the child was not displaying any significant adjustment issues. (Appellant's Brief, Add. 4, #20a).

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

There are numerous trial court findings that discuss this best interest factor in part. (See Appellant's Brief, Add. 4-9). First, the trial court notes the child's lifetime and timeline when the child was with each parent and for what period of time. (Appellant's Brief, Add. 8, #25). Specifically:

"Petitioner (Respondent) has been the primary caregiver of the child with the exceptions of three months in February, March, and April in 2010. During these three months Respondent (Appellant) was the primary caregiver of the child.

Id.

The trial court also adopted the finding of the custody evaluator that discusses the timeline of when and who the child resided with. (Appellant's Brief, Add. 4-5, #20f). Specifically, that Respondent was the child's primary caregiver since birth, until Respondent's father became ill. *Id.* This is presumably the three months before the separation. Of particular note is the trial court's finding in agreement with the custody evaluator that Appellant only became the primary caretaker of the child after he had to. (Appellant's Brief, Add. 6, #20c). It was not at his request. *Id.*

The trial court made an independent finding that both parents had an adequate home for the child to reside in. (Appellant's Brief, Add. 8, #24). Further, as previously mentioned the trial court adopted the custody evaluator's findings that the child was treated well by both parents and that when living with either party there were no significant adjustment issues. (Appellant's Brief, Add. 4, #20a and #20b). However, the

Court did adopt a finding of the custody evaluator involving concerns about Appellant's current situation and availability to care for the child. (Appellant's Brief, Add. 6, #20d). The custody evaluator found that the couple ran farming and trucking operations which historically had required a great deal of time and commitment by Appellant. *Id.* The Appellant represented that he would need to hire someone to help with these operations in order to allow him to spend adequate time with the child. *Id.* Further, Appellant essentially maintained his historical schedule even when he knew this issue was a concern. *Id.*

These findings of the trial court, clearly demonstrate that the Court did in fact address the question of the length of time the child had lived in a stable, satisfactory environment and the desirability of maintaining that continuity.

iv. The permanence, as a family unit, of existing or proposed custodial home.

The trial court's findings and order place the child in the home of her mother and sister. Prior to hiring a divorce coach, Appellant excluded Respondent and the child from the family home. (T. 172, Line 11 through 174, Line 5). Just as described in the above-subdivision, the Court does not specifically address this best interest factor in one finding by its title. However, there are numerous findings that discuss the best interest factor in part. (*See* Appellant's Brief, Add. 4-9). Admittedly, the Court does not make a determination of whether or not either parent will be living at their current residence for any particular amount of time. However, to the important question at hand, the Court

makes numerous findings indicating that the parents want to be a permanent fixture in this young child's life. *Id.* In its independent findings the Court noted that both parents were fit and proper persons to have custody of the child as well as having the adequate homes to care for the child. (Appellant's Brief, Add. 8, #24). Further, the Court found that the child adjusted in healthy ways to her new current living environment regarding the residences of both parents (*See* Appellant's Brief, Add. 8, #28) and that such healthy adjustment was to homes that appear to be a good fit for permanency. (*See* Appellant's Brief, Add. 8, #31).

Further, the trial court adopted the findings of the custody evaluator which discussed permanency. (Appellant's Brief, Add. 4-7). Specifically, that the parents wanted to be an active parent in the child's life (Appellant's Brief, Add. 4, #20c), had seen the child on a weekly basis and the child had not displayed any significant adjustment issues (Appellant's Brief, Add. 4, #20b), were capable of providing care for the child and that both parties had an intimate relationship with the child (Appellant's Brief, Add. 4, #20e and Add. 5 #20g), as well as both sets of grandparents having significant positive involvement in the child's life. (Appellant's Brief, Add. 5, #20h). Further, the parties had adequate places for the child to live, and were capable of providing the child with love, affection, and guidance. Appellant's Brief, Add. 5, #20i and #20k.

However, the trial court made findings from the custody evaluator's testimony indicating a concern about the permanency with the Appellant. (*See* Appellant's Brief,

Add. 6, #21c). Specifically, the custody evaluator noted that the Appellant (Respondent) only became the primary caretaker of the child after he had to at the request of the Respondent. *Id.*

Through the above-stated findings of the trial court, although there is not a single finding with a heading holding the title of “the permanence, as a family unit, of an existing or proposed custodial homes,” it is quite clear that through a number of findings in part the Court has clearly reflected its finding in regards to the best interest factor.

v. The trial court addressed stability in a number of its findings.

Appellant appears to see stability as permanence of geography, income, economic security and remaining married. Minnesota has long ago departed from this parochial view by adopting our current dissolution framework. The trial court found that the minor child did not appear to have suffered any ill effects of the separation of her parents and appeared to have adjusted in a healthy way to her current living environment. (Appellant’s Brief, Add. 8, #28). The Court found that the parties appeared to be capable of providing permanent, stable, and loving environments for the child. (Appellant’s Brief, Add. 8, #31). The Court also found that that the parties indicated they wanted to be involved with the child in activities and to have her succeed in her education. (Appellant’s Brief, Add. 9, #34).

The Court further adopted the findings of the custody evaluator which stated that the child was being treated well by the parties (Appellant’s Brief, Add. 4, #20a); the child

had been alternating between the parties on a weekly basis and displayed no significant adjustment issues (Appellant's Brief, Add. 4, #20b); the parties wanted to be active in the child's life (Appellant's Brief, Add. 4, #20c); were capable of providing care for the child (Appellant's Brief, Add. 4, #20e); had an intimate relationship with the child (Appellant's Brief, Add. 5, #20g); had an adequate places for the child to live (Appellant's Brief, Add. 5, #20i); and were capable of providing the child with love, affection, and guidance. (Appellant's Brief, Add. 5, #20k).

If Appellant's definition was the standard, any party leaving an outwardly appearing stable home would fail this factor. The investigation uncovered an unhappy couple where Appellant exercised control through finance and refused counseling when suggested by Respondent. The trial court found concerns of whether Appellant could provide a stable environment for the child. (*See* Appellant's Brief, Add. 5, #21a and Add. 6 #21i). Respondent demonstrated better parental control over the child than did the Appellant. (Appellant's Brief, Add. 5, #21a). The custody evaluator specifically noted that the Respondent was able to keep control over the child during meals and she was able to keep the child in-line at the table as well as keep the child focused towards eating. *Id.* Conversely, the custody evaluator noted that Appellant displayed little to no follow through with the child and did not impose any repercussions when the child would not follow the commands of the Appellant. (Appellant's Brief, Add. 5, #21a). Further, custody evaluator noted that the Appellant set poor limits for the child. (Appellant's

Brief, Add. 6, #21f). This brings into question the ability for the Appellant to provide a stable atmosphere for the minor child.

To further bolster the Court's decision in awarding sole physical custody to the Respondent, the trial court made findings from the court evaluator's testimony that Respondent has three older children from a previous marriage, and that it appeared from the custody evaluator's observation that Respondent provided good, healthy meals for the children and they were all well dressed, as well as Respondent being involved in their coaching activities. (Appellant's Brief, Add. 6, #21g). Most importantly the court found there were never any concerns regarding the health and safety of the minor child while in the Respondent's care. (*Id.*).

Further, the trial court found, based from the custody evaluator's testimony concerns that the parties' farming operations require a great deal of time and commitment. (Appellant's Brief, Add. 6, #21d). Appellant stated to the custody evaluator he would need to hire someone during harvest to help with the farming operation in order to allow Appellant time to care for the child. *Id.* However, Appellant failed to hire anyone. *Id.* This goes directly to the heart of the question of whether or not the Appellant can provide a stable environment for the minor child.

Looking at the above discussed items the Court did in fact make findings on the issue of stability.

B. Respondent resided in Iowa throughout these proceedings and Minn. Stat. § 518.175, Subd. 3(b) does not pertain or is implicit in Trial Court Findings.

Appellant argues that Respondent failed to carry a burden of demonstrating that it was in the child's best interest to change the primary residence from Nobles County, Minnesota to Estherville, Iowa. (Appellant's Brief, page 31) Appellant erroneously directs the Appellate Court to Minn. Stat. § 518.175, subd. 3(b) stating that the trial court was required to determine whether the move was in the child's best interests by analyzing specific factors. *id.*

In pertinent part, the statute states that:

"The parent with whom the parent resides shall not move the residence of the child to another state except upon order of the court with the consent of the other parent, if the other parent has been given parenting time by the decree."

Minn. Stat. § 518.175 subd. 3(a) (**emphasis added**). A clear reading of the statute dictates that it is inapplicable under facts of this case. Respondent moved to the State of Iowa, less than 70 miles from the marital home on April 19, 2010. (T. 171-173). Since moving to Iowa at the end of April of 2010 she has resided there continuously. Of particular note, this matter is a custody case rather than a motion to move a child out of state following a decree. A prior decree is required in order for the statute to be applicable. Appellant cites no authority to the contrary. The trial court was aware of the location of Respondent's home when the Findings and Order was issued. The Appellant made no argument that the move to Iowa was for the purpose of interfering with

Appellant's relationship with the child. Further, as a practical matter, the distance is insignificant but is demonstrative of the weakness of Appellant's arguments herein.

For the above-stated reasons, Respondent was free to relocate without consent of the Appellant.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S POST TRIAL MOTIONS.

Appellant argues the trial court's use of the custody evaluator's report requires reversal and a new trial. (Appellant's Brief, page 40). Decisions to grant a new trial lies within the sound discretion of the trial court and will not be reversed absent clear abuse of discretion. *Halla Nursery, Inc.*, 454 N.W.2d at 910. Appellant argues that the custody evaluator was biased against Appellant, and mistakenly claims that the trial court found bias and therefore erred in adopting the custody evaluator's findings. (Appellant's Brief, pages 40-44). Appellant identifies no bias on the part of the evaluator. Respondent is left to guess what bias appellant is referring to in this matter.

Whether to accept the opinions of a court-appointed custody evaluator is a matter within the trial court's discretion. *See Rutanen*, 475 N.W.2d at 104. Accordingly, an Appellate Court will not second-guess the trial court's determination that the custody evaluator was credible. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn.1988) (stating that "[d]eference must be given to the opportunity of the [trial] court to assess the credibility of the witnesses"). The investigative report of a custody evaluator may be received into evidence at hearing. *Minn. Stat.* § 518.167 Subd. 4. Absent an abuse of

discretion, the Appellant Court shall not overturn a trial court's decision whether to adopt the findings of the custody investigator. *Rutanen*, 475 N.W.2d at 104. The trial court's findings of fact will be sustained unless they are clearly erroneous. Minn. R. Civ. P. 52.01. A finding is clearly erroneous if the Court is left with the definite and firm conviction that a mistake has been made. *Vangsness*, 607 N.W.2d at 472.

In the case at bar the report of the custody evaluator was admitted into evidence and the custody evaluator testified at length to her conclusions. (T. 8-141). The trial court found:

“During her investigation Ms. Larson reviewed the Court file, the dissolution file involving the Petitioner’s (Respondent’s) marriage, information provided by attorneys, the criminal and civil records of the parties, the parenting assessment from Rainbow Behavior Health, questionnaires completed by the parties, as well as concerns brought by both parties. During the process Ms. Larson spoke to over 40 individuals, some of who were suggested by the parties, and some of whom Ms. Larson sought out to independently verify information provided by the parties. Ms. Larson spoke to each person provided to her by both the Petitioner (Respondent) and Respondent (Appellant).”

(Appellant’s Brief, Add. 4, #19). The Court went on to state that;

“After considering the testimony of Karen Brinkman, a licensed psychologist, Linda Paplinksi, a custody evaluator, and Linda Bottleson, a divorce coach hired by the Respondent (Appellant), the Court finds that Ms. Larson’s report and supporting testimony was thorough, credible, and not overly bias.”

(Appellant’s Brief, Add. 7, #23). The Court discussed at length the Custody Evaluator’s experience, finding:

“As of January of 2011, Ms. Larson conducted 110 custody determinations. Of these 110 determinations Ms. Larson recommended sole custody to a father 32 times,

sole custody to the mother 38 times, sole custody to the grandparents 4 times, and joint custody between the mother and father 36 times.”

(Appellant’s Brief, Add. 7, #22).

Appellant argues that, although the Court found Ms. Larson’s report and testimony to be thorough, credible, the Court nevertheless found her to be biased, because it found her to be “not overly biased,” and as such was in error to adopt her findings. (Appellant’s Brief, Page 41). Appellant is grasping at straws by trying to insinuate that the Court did in fact find bias when it stated “not overly biased.” The Court took care to list specific people who testified on behalf of Appellant, including one witness who was described as an alleged divorce coach who is also a custody evaluator, who was specifically hired to instruct and coach Appellant through the custody evaluation. *See Id.* The trial court’s acceptance of the custody evaluator’s opinion was not an abuse of the trial court’s discretion because the Court considered the criticisms of the evaluator and addressed the evaluator’s experience and thoroughness. Further, the Court was aware Appellant paid the “divorce coach” \$30,000.00 and had hired other expert witnesses in the case. The Appellate Court should defer to the trial court for its opportunity to assess the credibility of the witness, and it is apparent with the significant findings of the trial court that the trial court felt that the custody evaluator was more credible than the witnesses presented by Appellant. *See Sefkow*, 427 N.W.2d at 210; (Appellant’s Brief, Add. 7, #23).

In regards to the adoption by the trial court of the custody evaluator’s findings, as previously mentioned, the investigative report of a custody evaluator may be received

into evidence at hearing. Minn. Stat. § 518.167 subd. 4. After analyzing the trial court's independent findings, along with the adopted findings of the custody evaluation, a definitive and firm conviction that a mistake has been made cannot be found. *See Vangness*, 607 N.W.2d at 472. There was no abuse of discretion. *Halla Nursery, Inc.*, 454 N.W.2d at 910.

For the above-stated reasons the trial court's acceptance of the opinions of the custody evaluator over the evidence presented by the Appellant, as well as its adoption of the custody evaluation's findings, was proper. A reversal or new trial is not proper and unjustified.

CONCLUSION

Respondent respectfully requests Appellants prayers for appellate relief be denied in their entirety.

HEDEEN HUGHES & WETERING

Dated: November 19, 2012

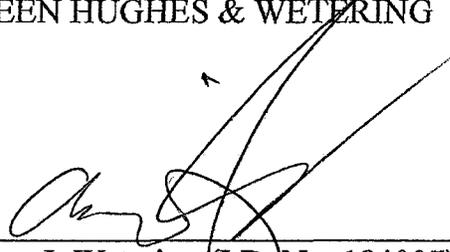


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CERIFICATE OF BRIEF LENGTH

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 5,368 words. This brief was prepared using Microsoft Office Word 2007.

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