

NO. A08-0190

State of Minnesota
In Court of Appeals

KRISTINE ANNE SCHISEL,

Appellant,

vs.

DANIEL TODD SCHISEL,

Respondent.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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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 THE ISSUES

1. Did the District Court abuse its discretion by imposing a legally impermissible in-state geographic restriction?

Trial Court Held: Appellant was awarded the primary residence of the minor children in Independent School District #77 (Mankato-area schools).

Apposite Authorities:

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

LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000)

Dailey v. Chermak, 709 N.W.2d 626 (Minn. Ct. App. 2006)

In re Marriage of Goldman, ___ N.W.2d ___, 2008 WL 821011 (Minn. 2008)

2. Even if legally permitted, was the District Court's Finding of Fact that it is in the best interests of the children to stay in Mankato, MN instead of allowing Appellant and the children to relocate to Lakeville, MN clearly erroneous?

Trial Court Held: It would be in the best interests of the children to have a primary residence with Appellant in Independent School District #77 (Mankato-area schools).

Apposite Authorities:

LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000)

Dailey v. Chermak, 709 N.W.2d 626 (Minn. Ct. App. 2006)

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

MINN.STAT. § 518.17, subd. 1(a) (4), (5), (6), (7), and (8) (2006)

- 3. Did the District Court abuse its discretion by ordering child support without properly considering Appellant's ordinary and necessary business expenses and by incorrectly calculating her FICA deduction?**

Trial Court Held: The District Court ignored Appellant's ordinary and necessary business expenses and applied 7.65% as the FICA deduction in calculating Appellant's net income for child support.

Apposite Authorities:

Davis v. Davis, 631 N.W.2d 822, (Minn. Ct. App. 2001)

MINN.STAT. § 518.551 subd. 5b(f) (2005)

MINN.STAT. § 518.551 subd. 5(b) (2005)

26 U.S.C. §1401 (2007)

- 4. Did the District Court err by applying a speculative parenting time schedule to the *Hortis/Valento* child support calculation instead of utilizing the actual parenting time schedule ordered by the court and shown by the evidence?**

Trial Court Held: The District Court applied a 60/40 parenting time allocation for purposes of calculating child support.

Apposite Authorities:

Schlichting v. Paulus, 632 N.W.2d 790 (Minn. Ct. App. 2001)

Valento v. Valento, 385 N.W.2d 860 (Minn. Ct. App. 1986)

Hortis v. Hortis, 367 N.W.2d 633 (Minn.Ct.App. 1985)

Rogers v. Rogers, 606 N.W.2d 724 (Minn. Ct. App. 2000)

- 5. Did the District Court abuse its discretion by awarding Respondent a parcel of land on the same block as Appellant's homestead in contradiction to its Findings of Fact that the parties should have privacy from each other when with the children?**

Trial Court Held: The District Court awarded Respondent a lot that is one parcel away from Appellant's homestead

Apposite Authorities:

Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984);

STATEMENT OF THE CASE

Appellant, Kristine Schisel, filed a petition in Blue Earth County for dissolution of marriage on July 21, 2006.¹ The court ordered the parties to submit to a neutral custody evaluation, which was completed.² Upon Appellant's subsequent motion for temporary relief, the Court ordered the Respondent to leave the parties' joint residence and granted Appellant's request to reside in the primary residence with the children. The parties resolved several property issues prior to trial and resolved the custody labels, and proceeded to trial in front of Judge Kurt Johnson to determine child support, primary residence of the children, the custodial schedule, whether Appellant would be permitted to relocate with the children from Mankato, MN to Lakeville, MN, and an equitable division of their marital property. Judge Johnson accepted the parties' agreement that they would share joint legal and physical custody of the children and provided that the children's primary residence would be with Appellant.³ He determined a parenting time schedule for Respondent, ordered Respondent to pay child support in the amount of \$114.86 per month based on a 60/40 parenting time split, awarded Appellant the parties' homestead in Mankato, and denied Appellant's proposed move to Lakeville, MN with the children, instead finding it within the children's best interests to live in Mankato.⁴ Judge Johnson ordered one of the parties' vacant lot sold, and awarded a bare parcel of land,

¹ Appellant's Appendix.1. Citations to Appellant's Appendix are hereinafter abbreviated "AA."

² AA.7.

³ AA.11.

⁴ AA.13-14, 118-119.

two doors down from the marital homestead, to Respondent with the condition that he make no improvements on the property until the youngest child turns eighteen.⁵

Appellant brought a motion for reconsideration of several issues. Appellant argued that child support was incorrectly determined based upon failure to deduct ordinary and necessary business expenses, miscalculation of Appellant's FICA deduction, and incorrect application of a 60/40 parenting time schedule, and that support was incorrectly applied retroactively.⁶ Appellant also requested reconsideration of the court's conclusion that it was in the children's best interests to reside within the City of Mankato, and, alternatively, requested reconsideration of the failure to order the sale of Lot 1, Block 1, Schisel Subdivision.⁷ The court amended its finding and conclusion that it was in the best interests of the children to live in Mankato to provide that it was in their best interests to reside within Independent School District 77 (the Mankato area school district), but made no further changes.⁸ This appeal followed.

⁵ AA.33-34.

⁶ AA.59-70.

⁷ AA.59-70.

⁸ AA.118-119.

STATEMENT OF THE FACTS

Kristine Anne Schisel, APPELLANT, and Daniel Todd Schisel, RESPONDENT, were married on July 29, 1995⁹ They have two joint children, Jacob Daniel Schisel, age nine, born August 21, 1998, and Natalie Anne Schisel, age seven, born January 16, 2001.¹⁰ During the marriage the parties lived in Mankato, Minnesota. (Petitioner's Ex. 11). The parties owned a homestead at 151 Goodyear Avenue, in Mankato, Minnesota, and two adjacent vacant lots.¹¹

Respondent is a police commander for the City of Mankato.¹² As a police commander, Respondent works three different twelve-hour shifts, beginning at 6 p.m., 6 a.m., or 3 p.m., generally works at each shift for six weeks at a time before rotating to the next shift, and works between fourteen and sixteen days per month.¹³ He is required to work weekends, and works a rotation of three weekends on and three off.¹⁴ Working an eight-to-five, day shift is not an option.¹⁵ Respondent has an unusual sleep schedule as a result of his shift work.¹⁶ Respondent cannot guarantee flexibility in his schedule, and did not demonstrate flexibility during the dissolution process.¹⁷ When Respondent is

⁹ Trial Transcript, Day 1, Page 9; Citations to the Trial Transcripts are abbreviated "T.T."

¹⁰ T.T. Day 1, pg. 9-10, 86.

¹¹ AA.87, 91.

¹² T.T. Day 1, pg.13.

¹³ AA.77; T.T. Day 1, pg.13-14, 17.

¹⁴ AA.77; T.T. Day 1, pg.14.

¹⁵ T.T. Day 1, pg.18.

¹⁶ *Id.* at pg.14.

¹⁷ AA.78.

working, he is unable to accommodate the children's schedules and needs.¹⁸ Respondent is unable to guarantee a consistent parenting time schedule.¹⁹

Appellant is a commercial real estate broker.²⁰ She is an independent contractor, but works for Welsh Companies, who holds her license with the State.²¹ She has worked for Welsh Companies for the past five years.²² Her physical work location is in downtown Minneapolis, requiring an approximate one hour and forty-five minute, one-way, commute from Mankato, for a total three hours and thirty minute daily commute.²³ Appellant has commuted for approximately eight years, since Jacob was born.²⁴ She is currently able to work from home on Fridays, and only commutes Monday through Thursday.²⁵ In this case, Appellant proposed moving her residence from Mankato to Lakeville to cut make her more accessible to the children as their primary caretaker.²⁶

Respondent is salaried, and his gross monthly income is \$5,923.72.²⁷ His medical insurance is \$295.65 per month for individual and family coverage and dental insurance is \$99.55 per month for individual and family coverage.²⁸ His retirement contribution is approximately \$502.00 per month and union dues are \$39.50 per month.²⁹ Appellant is

¹⁸ AA.77.

¹⁹ *Id.*

²⁰ AA.84; T.T. Day 1, pg.77.

²¹ T.T. Day 1, pg.78.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ T.T. Day 1, pg.149.

²⁷ AA.84.

²⁸ *Id.*

²⁹ AA.84.

100% commissioned, and her average gross income from self-employment for 2004 through 2006 was \$80,652.³⁰ She had ordinary and necessary business expenses of \$5,757 in 2005, and \$6,465 in 2006.³¹ The District Court determined that the FICA deduction for Appellant was \$514.16 per month, which is 7.65% of her \$6,721 total monthly income.³²

Appellant is the primary caretaker and handles the majority of the parenting responsibilities. She gets the children ready in the morning and drops them off for school.³³ She generally feeds the children, volunteers in their classrooms, attends field trips, cooks, does laundry, enrolls the children in activities, sets the family schedule, sets up play dates, and does bath and bedtime.³⁴ Respondent helps with parenting responsibilities as his schedule allows.³⁵ During the marriage, Respondent would pick the children up from school when his schedule allowed.³⁶ When Respondent was unable to pick the children up from daycare, his mother would do so.³⁷ The parties agreed to undergo a custody evaluation, which was performed by Dr. Jane McNaught.³⁸ Dr. McNaught's report indicated that Appellant had been the children's primary caretaker,³⁹ that she is more capable than Respondent of placing the children's needs ahead of her

³⁰ AA.84; T.T.Day 1, pg.80, 84; Petitioner's Ex. 4.

³¹ T.T.Day 1, pg.80; Petitioner's Ex. 1, pg.6; Petitioner's Ex. 2, pg.7.

³² AA.85.

³³ T.T. Day 1, pg.94.

³⁴ AA.78.

³⁵ T.T.Day 1, pg.96.

³⁶ AA.78.

³⁷ T.T. Day 1, pg.21.

³⁸ See AA.123.

³⁹ AA.161.

own⁴⁰ and that the children have had a close relationship with both sets of grandparents.⁴¹

Dr. McNaught recommended, among other things, that the children's primary residence be with Appellant, who should be permitted to move to Lakeville, and that Respondent should have parenting time at least every other weekend and two nights per week, as his schedule permitted.⁴² The District Court adopted her recommendations, other than allowing the relocation.⁴³

⁴⁰ AA.161.

⁴¹ AA.157.

⁴² AA.161-2.

⁴³ AA.93-97,118-121.

ARGUMENT

Standard of Review

“Appellate review of custody determinations is limited to whether the District Court abused its discretion by making findings unsupported by the evidence or by improperly applying the law.”⁴⁴ “Even though the trial court is given broad discretion in determining custody matters, it is important that the basis for the court's decision be set forth with a high degree of particularity.”⁴⁵ In applying MINN. R. CIV. P. 52.01, “we view the record in the light most favorable to the judgment of the District Court.”⁴⁶ However, when the court’s factual findings are clearly erroneous or “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole,” reversal is warranted.⁴⁷

A District Court has broad discretion to provide for the support of the parties' children.⁴⁸ A District Court abuses its discretion when it sets support in a manner that is against logic and the facts on the record or misapplies the law.⁴⁹

The trial court has broad discretion with respect to property settlements and will be reversed only for a clear abuse of discretion.⁵⁰

⁴⁴ *In re Marriage of Goldman*, ___ N.W.2d ___, 2008 WL 821011, *2 (Minn. 2008), citing, *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002)); see also, MINN. R. CIV. P. 52.01 (2008).

⁴⁵ *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn.1989).

⁴⁶ *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999).

⁴⁷ *Id.*

⁴⁸ *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002).

⁴⁹ *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984); *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. Ct. App. 1998).

⁵⁰ *Bateman v. Bateman*, 382 N.W.2d 240, 246 (Minn. Ct. App. 1986), rev. denied (Apr 24, 1986).

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPOSING A LEGALLY IMPERMISSIBLE IN-STATE GEOGRAPHIC RESTRICTION.

The District Court determined that it would be in the best interests of the children to live within Independent School District 77, the Mankato area school district. Minnesota law permits a grant of custody conditioned on either remaining in or returning to the State of Minnesota in limited circumstances, but does not provide authority for a court to impose geographical restrictions on a parent who wishes to relocate in-state or to limit where a parent who is awarded primary residence without a geographic restriction may subsequently decide to live within the state. A parent's ability to relocate with his or her children has been a vexing issue for the courts of Minnesota, and a proper understanding of the present state of the law in this area requires a thorough review of precedent.

In *Auge v. Auge*, a custodial parent's motion for permission to travel to Hawaii for part of the year for business was denied without an evidentiary hearing.⁵¹ On appeal, the court noted that denial of permission to remove the child from the state effected a substantial temporary change of custody under the facts of the case.⁵² The court held that the parent opposing the move had the burden of showing that the move would either endanger the child's physical or emotional health and is not in the child's best interests, or that the purpose of the move is to interfere with the visitation rights of the custodial parent.⁵³ Although the holding of *Auge* is no longer valid because of changes to

⁵¹ 334 N.W.2d 393 (Minn. 1983).

⁵² *Id.* at 395.

⁵³ *Id.* at 399.

MINN.STAT. § 518.175, portions of the court's reasoning remain relevant to relocation cases.

Two years later, in *Sefkow v. Sefkow*, the Court of Appeals invalidated a condition on the mother's custody of one child on the mother's continued residence "in either Fergus Falls or the Fargo-Moorhead area."⁵⁴ The appellate court held that unnecessary limits on movement of the family unit unlawfully interfere with the stable circumstances of a child.⁵⁵ The courts applied *Sefkow* without challenge for several years, consistently holding in cases where an in-state relocation was requested at the time of an initial custody determination, that a geographical restriction is contrary to law and impermissible, and requires reversal.⁵⁶

Over a decade later, in *LaChapelle v. Mitten*, the court addressed a custody dispute between a biological mother and her former same-sex partner, and a sperm donor biological father.⁵⁷ The court of appeals upheld the trial court's grant of custody to the biological mother conditioned upon her return to Minnesota from Michigan.⁵⁸ The court

⁵⁴ 372 N.W.2d 37 (Minn. Ct. App. 1985), *remanded on other grounds*, 374 N.W.2d 733 (Minn. 1985).

⁵⁵ *Id.* citing *Auge*, 334 N.W.2d at 396-397, 399.

⁵⁶ *See, e.g., Bateman* 382 N.W.2d at 251 (Minn. Ct. App. 1986), *rev. denied* (Apr 24, 1986) (requirement that mother remain in St. Cloud School District contrary to law and impermissible); *Ryan v. Ryan*, 383 N.W.2d 371 (Minn. Ct. App. 1986), *rev. denied* (May 16, 1986) (reaffirming *Sefkow* in dicta, noting that a trial court's mandate that the children reside in a particular city was impermissibly restrictive in regard to relocating the children's residence within the State of Minnesota); *Imdieke v. Imdieke*, 411 N.W.2d 241, 244 (Minn. Ct. App. 1987) *rev. denied*, (Oct 30, 1987) (basing custody or care on a parent's remaining in a certain area is a restrictive condition contrary to Minnesota law).

⁵⁷ 607 N.W.2d 151, 163 (Minn. Ct. App. 2000), *rev. denied*, (May 16, 2000), *cert. denied*, *Mitten v. LaChapelle*, 531 U.S. 1011 (2000).

⁵⁸ *Id.*

reasoned that “[i]n an initial custody proceeding a trial court treats a proposed change of residence by a party as one factor to balance in determining custody of a child.”⁵⁹ The court did not discuss prior cases addressing custody awards conditioned on geographic relocations, and did not overrule *Sefkow* or its progeny. *LaChapelle* merely held that a court may condition custody on a return to Minnesota based on its unique facts.

In *Dailey v. Chermak*, following a grant of custody conditioned on remaining in the Twin Cities, a mother petitioned the court for permission to move to South Dakota.⁶⁰ The District Court granted the motion, and the father appealed. The Court of Appeals held that the locale restriction was valid, reasoning that neither *Imdieke*, which had been cited by the trial court, nor *Auge*, upon which *Imdieke* relied, were controlling because neither involved a grant of conditional custody, and were therefore dicta. However, this case is distinguishable from the present case because it involves a post-dissolution relocation request, rather than an initial custody determination, and it involved an out-of-state, rather than in-state move. The Court stated that any geographical restriction must “demonstrably serve the child’s best interests.”⁶¹ The court did not address *Sefkow* or its progeny.

Most recently, the court decided *In re Marriage of Goldman*,⁶² in which a mother had been granted sole physical custody conditioned upon her continued residence in the State of Minnesota. In a motion five years after the original dissolution, the mother

⁵⁹ *Id.* at 162, citing, *Stangel v. Stangel*, 355 N.W.2d 489, 490 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 6, 1985).

⁶⁰ 709 N.W.2d 626, 630 (Minn. Ct. App. 2006), *rev. denied*, (May 16, 2006).

⁶¹ *Id.* at 630.

⁶² ___ N.W.2d ___, 2008 WL 821011 (Minn. 2008).

requested permission from the court to move to New York. The Minnesota Supreme Court, citing *Dailey* without analysis, first held that the locale restriction was valid.⁶³ The court then held that MINN.STAT. § 518.18(d), not MINN.STAT. § 518.175 subd. 3, governed the mother's motion to remove the child out of state.⁶⁴ Again, however, this case involved a post-dissolution request for relocation and involved an out-of-state, rather than an in-state relocation request.

Because *Sefkow* is still good law, the Court's restriction of Appellant's ability to move the primary residence of the children to Lakeville, Minnesota is clearly in error and must be reversed.

A. The Distinction Between In-State And Out-of-State Restrictions Meaningfully Distinguishes *Sefkow* And Its Progeny From Subsequent Cases Allowing Geographical Restrictions.

Each of the cases permitting a custody award conditioned upon a relocation restriction dealt with an out-of-state restriction.⁶⁵ The legislature showed that it places a distinction between in-state and out-of state moves when it enacted Section 518.175 subd.3, choosing only to address out-of-state moves. Thus, in a post-dissolution setting, the legislature set a specific standard for review when a custodial parent seeks to move with a child out of state, but requires no review when a sole physical custodian or primary residential parent seeks to move with a child within the state.

⁶³ *Goldman*, 2008 WL 821011 at *2.

⁶⁴ *Id.* at *4.

⁶⁵ *LaChapelle*, 607 N.W.2d at 157 (return to Minnesota from Michigan), *Dailey*, 709 N.W.2d at 629 (move to South Dakota), *Goldman*, 2008 WL 821011 (move to New York).

Minnesota courts have not held that an in-state geographic restriction is permissible. The only reported cases considering directly the issue of a limitation on an in-state move in an initial custody/parenting time determination have held that such a limitation is an impermissible restriction and is unlawful.⁶⁶ *Sefkow* has never been overruled, and its holding remains good law. Further, portions of the court's reasoning in *Sefkow* have continued vitality, and aptly apply to the present case. The *Sefkow* Court based its conclusion in large part on its understanding of the analysis in *Auge* that the child's relationship with the primary parent is of utmost importance to the best interests of the children.⁶⁷ The Court of Appeals recognized as much in *In re Marriage of Goldman*, noting that *Auge* cited with approval then-current literature on research advancing the attachment principle, which emphasizes the importance of the child's relationship with the primary parent.⁶⁸

Because this is an initial custody determination and it involves an in-state relocation request, the District Court's mandate that the children reside in a particular school district within the State of Minnesota and refusal to allow a relocation 70 miles away, is overly-restrictive and impermissible given its findings that Appellant is the primary parent and should be awarded the primary residence of the children based on the totality of the best interests factors. Under the District Court's mandate, Appellant cannot even move the children 10 miles north to St. Peter, Minnesota as that would put

⁶⁶ *Sefkow*, 372 N.W.2d 37; *Bateman*, 382 N.W.2d at 251; *Ryan*, 383 N.W.2d 371; *Imdieke*, 411 N.W.2d at 244.

⁶⁷ *Sefkow*, 372 N.W.2d at 47.

⁶⁸ 725 N.W.2d 747, 754 n.4 (Minn. Ct. App. 2007), *rev'd on other grounds*, 2008 WL 821011 (Minn. 2008).

her outside Independent School District #77. Surely, such a restrictive view of relocation within Minnesota is not permissible under the custody statutes and *Sefkow* and its progeny.

B. The Court's Order Did Not *Condition* Appellant's Custody On Failure To Relocate, And Its Order Requiring Appellant To Live In ISD 77 Exceeded Its Statutory Authority.

The court did not award Appellant primary residence of the children *if* she remains in ISD 77; instead, the court determined that she should have the primary residence of the children, based on the totality of the best interests factors, *and* separately determined that she should remain in ISD 77 as one of the factors weighing in the children's best interests.⁶⁹ There was no indication that Appellant would not have the primary residence of the children if she chose to relocate. On the contrary, the court made it clear that Respondent *could not* meet the children's basic needs if he were to have the primary residence of the children based on his job and sleep schedule.⁷⁰ The lack of a conditional custody award distinguishes the present case from *Goldman, Dailey, and LaChapelle*.

In dissolution-related matters over which it has jurisdiction, a district court's powers are "strictly limited to that provided for by statute."⁷¹ Minnesota statutes give courts in dissolution actions authority to determine the custody and primary residence of the children.⁷² The statute does not permit the court to place additional restrictions or

⁶⁹ AA.119.

⁷⁰ AA.77.

⁷¹ *Melamed v. Melamed*, 286 N.W.2d 716, 717 (Minn. 1979).

⁷² MINN.STAT. § 518.17 subd. 3 (2006).

demands on the parties that do not relate to custody.⁷³ “In an initial custody proceeding, a trial court treats a proposed change of residence by a party as one factor to balance in determining custody of a child.”⁷⁴ The District Court in this case considered Appellant’s proposed move as one of the best interests factors, determined that that factor weighed against her request for primary residence, and then awarded her the primary residence of the children based on the totality of the best interests factors.⁷⁵ By restricting Appellant’s residence with the children despite the independent conclusion that it would be in the best interests of the children to reside primarily with Appellant, the District Court exceeded its authority.

Because the Court’s residency restriction on Appellant and the children is over-restrictive and impermissible, the Appellate court should reverse the residency restriction provided by the District Court.

II. EVEN IF LEGALLY PERMITTED, THE DISTRICT COURT’S FINDING THAT IT IS IN THE BEST INTERESTS OF THE CHILDREN TO STAY IN MANKATO, MN INSTEAD OF RELOCATING TO LAKEVILLE, MN IS CLEARLY ERRONEOUS.

Assuming, *arguendo*, that the restriction on Appellant’s ability to move out of the school district is a permissible *LaChapelle* restriction under Minnesota law, the restriction in this case is not supported by the District Court’s findings of fact. In addition, portions of the District Court’s findings of fact that might appear to support the court’s relocation restriction are not supported by the evidence and the District Court

⁷³ *Id.*

⁷⁴ *LaChapelle*, 607 N.W.2d at 162 (*emphasis added*), citing, *Stangel*, 355 N.W.2d at 490.

⁷⁵ AA.83; AA.119-120.

ignored portions of the record which support allowing Appellant to move. As a result, the court's restriction of Appellant's ability to move is clearly erroneous and must be reversed.

A. The Residential Restriction Does Not Demonstrably Serve The Children's Best Interests.

While there may be circumstances in which child custody may properly be made conditional on maintaining a particular geographical residence for the child, merely finding that the residential restriction is in the best interest of the child is insufficient. A *LaChapelle* restriction must demonstrably serve the child's best interests.⁷⁶ While there is no "absolute prohibition" of a relocation restriction, in addressing the limited possible scenarios where such a restriction may be appropriate, the Court of Appeals in *Dailey* noted that "[b]esides the unique facts of *LaChapelle*, it is conceivable that a custody award might be properly conditioned on maintaining a certain residence because of the availability in that location of special health or educational services that the child particularly needs and that are not readily or inexpensively obtainable elsewhere."⁷⁷ Although the *Dailey* court did not explicitly define the heightened standard for restricting a parent's ability to relocate, it is clear, from this language, that some unique facts are necessary and that a heightened standard applies. It is equally clear that the facts of the present case are dissimilar to those envisioned in *Dailey*, and cannot meet a heightened standard.

⁷⁶ *Dailey*, 709 N.W.2d at 630, citing, *LaChapelle*, 607 N.W.2d at 163.

⁷⁷ *Id.* at 630.

B. The District Court's Amended Finding That "Allowing The Petitioner To Move The Children's Residence To Lakeville, MN Provides Benefit Only To The Petitioner And Detriment To The Respondent And Children" Is Not Supported By The Evidence And Is An Abuse Of Discretion.

The court must make detailed findings on each of the best interest factors and explain how the factors led to its conclusions.⁷⁸ The court's conclusory finding that "allowing the Petitioner to move the children's residence to Lakeville, MN provides benefit only to the Petitioner and detriment to the Respondent and children"⁷⁹ is both manifestly contrary to the weight of the evidence and not reasonably supported by the evidence as a whole, and warrants reversal. Further, this finding supports Appellant's contention that the Court was considering the best interests of the parties, rather than focusing on the best interests of the children. The Court's finding specifically references benefit to Petitioner, but fails to discuss benefits to the children, which the evidence clearly suggests exist, and focused, instead on the detriment to the Respondent. The Court's focus must be on the best interests of the children and not on the detriment to one parent or the other.⁸⁰

- 1. The District Court did not properly weigh the evidence as the Court had made up its mind regarding relocation, prior to receiving any evidence in this case and based upon the Court's own biases.**

During the hearing on the Appellant's motion for temporary relief on April 11, 2007, Judge Johnson made two comments suggesting that he had made up his mind on

⁷⁸ MINN.STAT. § 518.17 subd. 1 (2006).

⁷⁹ AA.119.

⁸⁰ MINN.STAT. § 518.17 subd. 1 (2006); *see also, LaChapelle*, 607 N.W.2d at 165 ("The focus in applying the best-interests standard is on the child, not the parents").

the relocation issue before hearing the evidence and based on his own bias as a father.

Following arguments by counsel, Judge Johnson remarked: "I can make these decisions and I will because that's my job but I am also a dad and you have to remember that."⁸¹

Judge Johnson followed by commenting that:

I am not at all inclined - - I've not read all this stuff - - and I will - - I am not inclined to move these children out of this town. Their world has been turned upside down enough and to move them someplace else is just not something that I think is appropriate, but I might change my mind when I read the reports, but you wanted to know what I think and that is what I think.⁸²

At that time, Appellant was not requesting to move the children during the pendency of the proceeding.⁸³ Thus, the Court's comments were not directed at the issues before it on a temporary basis, but on a final determination of the issue.

Subsequently, at the Pre-Trial in this matter, on May 29, 2007, the Court and counsel for the parties discussed the issues remaining for the court. The relocation issue was driving the need for a trial and the inability for the parties to resolve their differences.⁸⁴

The Court commented:

You know if you need my help I am happy to help. Obviously you know what I think I have issued by (*sic*) temporary order and I am of the opinion that these parties are spending way too much money on this whole issue so but I can't tell them that enough so that's just the way it is.⁸⁵

⁸¹ Transcript: Hearing on Mot. for Temp. Maint. pg.26.

⁸² *Id.*

⁸³ *Id.* at.2.

⁸⁴ *Id.* at 14-15; Transcript: Pre-Trial, pg. 3.

⁸⁵ Transcript Pre-Trial, pg.4.

The Court also stated, "I mean if I could be of any service to get it done I am happy to help, but as I said I think my views on this have been made very clear nothing has changed, so that is just the way it is."⁸⁶

Appellant does not argue that these comments show bias to the extent that Appellant should be entitled to a new trial, but nonetheless they are relevant to a review of whether the District Court's ultimate conclusions were sufficiently supported by the evidence or were simply a conclusion the court wished to reach despite a lack of evidentiary support and based upon the Court's own feelings and biases as a father.

2. The District Court ignored the highly probative neutral evaluation without making appropriate findings.

At an early stage in the dissolution process, the court ordered the parties to undergo a neutral evaluation, which was completed by Dr. Jane McNaught, Ph.D. Dr. McNaught issued a comprehensive report based on extensive interviews with the parties, children, and other witnesses, psychological testing, and review of numerous records. In her summary and conclusions, Dr. McNaught recommended that the children reside with their mother in the Twin Cities during the school year, with Respondent having the children every other weekend and one weeknight per week, from after school until 8 p.m., with additional parenting time during the summer.⁸⁷ The District Court did not follow Dr. McNaught's recommendation regarding the move, which was within its discretion.⁸⁸ However, findings contrary to the recommendations of a neutral study

⁸⁶ *Id.* at pg.5.

⁸⁷ AA.123, 162.

⁸⁸ *Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. Ct. App. 1991).

enlarge the need for particularized findings.⁸⁹ The District Court's findings are almost identical to Dr. McNaught's recommendations, including the parenting time schedule, except for her recommendation allowing relocation. Yet, the District Court failed to address Dr. McNaught's reasoning and conclusion that the move to Lakeville would be in the children's best interests, and failed to make particularized findings establishing why this recommendation was not in the children's best interests. Instead, the District Court made only a summary conclusion that a move would be detrimental to Respondent and the children.⁹⁰ As a result, its findings are insufficient.

3. The District Court's findings concerning the statutory best interest factors do not support its conclusion that relocation is not in the children's best interests.

In *LaChapelle*, the court highlighted the statutory best interest factors that would be most probative of whether relocation is in the children's best interests:

The factors stressing stability and continuity of care are of particular importance in light of a parent's proposed move to another state. Also important are the intimacy of the relationships between each parent and the child; the interaction of the child with parents and other people who affect the child's best interests; the child's adjustment to home, school, and community; and the permanence, as a family unit, of the existing or proposed custodial home.⁹¹

An examination of the District Court's findings with respect to these best interest factors demonstrates that, even taken in the light most favorable to the Respondent, the District

⁸⁹ See, *Id.* (trial court's detailed findings reflected a complete analysis of the same factors concerning the children's best interests the study had raised).

⁹⁰ AA.119-120 (*emphasis added*).

⁹¹ *LaChapelle*, 607 N.W.2d at 162, *citing*, MINN.STAT. §§ 518.17, subd. 1(a)(4), (5), (6), (7), and (8) (1998).

Court's conclusion that it would be in the best interests of the children to remain in the Mankato School District is not reasonably supported by the evidence as a whole.

With respect to the children's adjustment to home, school, and community,⁹² the court essentially only pointed out that the children have lived in Mankato their entire lives, and have been ingrained in the community.⁹³ But being ingrained in a community at the ages of seven and nine does not mean that the children would be unable to adjust to a new community, nor does it logically follow that an adjustment to a new community, such as Lakeville, would not be in the children's best interests. The only other evidence that the move may be detrimental to the children was Respondent's testimony that the kids "should not have to deal" with a change in school, church, and home.⁹⁴

The evidence is clear, however, that both Jacob and Natalie adjust well to change in general, and would have little or no problem adjusting to a move. Respondent testified that Jacob is "a person that is cautious and caring, can adapt, and is close to his mother and father[.]"⁹⁵ Appellant testified that Jacob did not have trouble adjusting to his new third grade class, despite the fact that most of his second grade friends were in a different classroom.⁹⁶ Kristy Roush, Jacob's third grade teacher, testified that when Jacob came into third grade, which incorporates a mix of kids from different second grade classes, he did not have any trouble adjusting and made friends quickly.⁹⁷ She did not anticipate any

⁹² MINN.STAT. § 518.17 subd. 1(a)(6) (2006).

⁹³ AA.80.

⁹⁴ T.T. Day 2, pg.65-66.

⁹⁵ T.T. Day 1, pg.23.

⁹⁶ *Id.* at 89-90.

⁹⁷ *Id.* at 186.

problems for Jacob if he had to move to a new school as long as there was structure for him.⁹⁸ Following a pool party with a friend in Lakeville, Jacob commented to his mother that it would not be so bad moving to Lakeville because he already met a friend named Alex who would be going into fourth grade with him.⁹⁹ Gayla Satre, a neighbor who has known the children since 2001, testified that both children can adapt to change.¹⁰⁰ Dr. McNaught concluded that both children “seem capable of adjusting to a new environment[.]”¹⁰¹

Appellant testified that Natalie had some problems adjusting to kindergarten, but generally does not have trouble with adjustments, and had no problems prior to kindergarten.¹⁰² Gwen Walz, an educator and the mother of Natalie’s best friend, testified that she had observed that Natalie is able to adjust well to changes and “truly has those traits of resiliency.”¹⁰³ Ms. Walz further testified, based on her familiarity with Natalie, that although change is always hard for children, Natalie would do well with a move to Lakeville, and that she would work to make sure Natalie and her daughter remained good friends.¹⁰⁴ Respondent agreed that “Natalie is very adaptable because of her age at this point.”¹⁰⁵

⁹⁸ *Id.* at 189.

⁹⁹ *Id.* at 119.

¹⁰⁰ T.T. Day 2, pg.89.

¹⁰¹ AA.157.

¹⁰² T.T. Day 1, pg.89-90, 92.

¹⁰³ *Id.* at168.

¹⁰⁴ *Id.* at172-4.

¹⁰⁵ *Id.* at 23.

The District Court did not make any findings concerning the ability of the children *to adapt* to change, only implied that change *would occur* if the children were to move from Mankato, and by implication appears to have found that change could only be negative. In light of the overwhelming evidence that the children are resilient and adapt well to change, and the positive aspects of a move, the court's finding that the children are ingrained in the Mankato community does not support its conclusion that it would be in their best interests to remain in Mankato.

Addressing the length of time the children have lived in a stable, satisfactory environment and the desirability of maintaining continuity,¹⁰⁶ the District Court again focused exclusively on the fact that the children had "lived in Mankato their entire lives," and that they could "continue their friendships, activities and relationships with family, school and church in Mankato."¹⁰⁷ The court did not address the fact that as a result of the family's visits to Appellant's parents nearly every other weekend, the children were very familiar with the Twin Cities and were used to the drive to and from Mankato.¹⁰⁸ By moving to Lakeville, the children would spend less time in the car when they visit Appellant's parents, lessening the impact on the children.¹⁰⁹ If the children lived in Lakeville, given the parenting time schedule the court adopted, the children would have to travel for weekend parenting time during the school year two times per month, as it is assumed that weekday parenting time would take place in the Twin Cities. They are

¹⁰⁶ MINN.STAT. § 518.17, subd. 1(a)(7) (2006).

¹⁰⁷ AA.80.

¹⁰⁸ T.T. Day 1, pg.145.

¹⁰⁹ *Id.* at 197.

accustomed to this amount of travel as a result of their visits to their maternal grandparents twice a month. Further, with Respondent continuing to live in Mankato, the children could remain involved with their friends, activities, and church in Mankato.

A move to Lakeville would permit Appellant, as primary caretaker, to have more time available for the children generally because of the shorter physical distance between her job and the children's home, school, and activities.¹¹⁰ She would be able to both drop the kids off at school and pick them up following their after school care program located at the school.¹¹¹ As the children grew older, Appellant would be able to stay more involved with their extracurricular activities as they became more active.¹¹² The children would be able to spend around eight to twelve extra hours per week with a parent instead of a non-parent caretaker. Appellant would also be able to handle emergencies with the children more easily.¹¹³ If Appellant is required to stay in Mankato, the children would have significantly less time to spend with their primary caretaking parent, which is undoubtedly not in the best interests of the children.¹¹⁴ This conclusion was echoed by Dr. McNaught, who noted that were the children to live with Respondent, "they would spend a significant number of evenings without a parent available to them."¹¹⁵

¹¹⁰ *Id.* at 149.

¹¹¹ *Id.* at 149-50.

¹¹² *Id.* at 196.

¹¹³ T.T. Day 2, pg.6.

¹¹⁴ See Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281, 290 (2006) (concluding that the more effectively custodial parents can function, the better will be their children's adjustment) (cited with approval in *In re Marriage of Goldman*, 725 N.W.2d at 754 n.4).

¹¹⁵ AA.158; see also, AA.166 (not in children's best interests for mother to commute long distances to work).

The court found that the children “spend some time in the Twin Cities at Petitioner’s parents’; however they have traditionally spent considerably more time with Respondent’s family.”¹¹⁶ This finding is not supported by the evidence. As noted in discussing stable environment and continuity factors, the children spend significant time with both sets of grandparents. Although the children would occasionally spend time after school with Respondent’s parents, there is no evidence that they spent any more time with them than with Appellant’s parents during weekend trips. Whether or not the children have spent more time with Respondent’s parents than Appellant’s parents, the court did not indicate that this factor would support a conclusion that it is in the children’s best interests to stay in Mankato. To the contrary, the court specifically found that “it would be beneficial for the parties in their parenting to have more separation between Respondent’s mother and the children so that she can assume a grandmother role and allow the parties to parent.”¹¹⁷ This finding can only support the conclusion that it would be in the children’s best interests to move to Lakeville.

The court’s finding with respect to the permanence, as a family unit, of the existing or proposed custodial home¹¹⁸ did not support the conclusion that relocation to Lakeville was not in the children’s best interests. The court found that “[a]s primary caretaker, [Appellant] would continue to live in the homestead. However, because Respondent would also live in Mankato, both parents’ homes would be permanent family

¹¹⁶ AA.79.

¹¹⁷ AA.70-80.

¹¹⁸ MINN.STAT. § 518.17, subd. 1(a)(8) (2006).

units.”¹¹⁹ The court offers no explanation as to why the parties must live in the same school district in order for both homes to be permanent family units. Respondent testified that if Appellant relocates to Lakeville with the children, he will make every effort to see them when he is not working, and that he would stay involved in decision making, including which church and schools the children attend, and would assist in locating housing.¹²⁰ The court has abused its discretion by failing to clearly demonstrate why maintaining two homes in Mankato, as opposed to one home in Mankato and one in Lakeville, approximately one hour away, is demonstrably contrary to the children’s best interests.

C. Evidence That Relocation Is In The Best Interests Of The Children Significantly Outweighs Evidence To The Contrary.

One of Respondent’s primary reasons for believing that a relocation to Lakeville would not be in the children’s best interests was that it would remove his ability, as an ‘exempt employee’ to stop in and visit the children while he was working.¹²¹ But as Appellant testified, these visits would be significantly reduced, whether she lived in Mankato or Lakeville, because Respondent will no longer be able to stop in and visit the children, in most situations, when they are in her care and it is not his scheduled time.¹²² Further, these visits would be outside his court-ordered parenting time, during Appellant’s time. It is the divorce, not the physical location of Appellant’s residence,

¹¹⁹ AA.80.

¹²⁰ T.T. Day 1 pg.46.

¹²¹ T.T. Day 1.208; T.T. Day 2.93.

¹²² T.T. Day 1, pg.221.

which will limit this “drop-in” time.¹²³ As Dr. Bruch noted, “the quality of the relationship between the nonresidential parent and child rather than sheer frequency of visitation ... is most important.”¹²⁴

Respondent also points to the fact that he would generally not be able to see the children as easily if they relocate to Mankato.¹²⁵ This concern is echoed by Marva Harding, a family friend.¹²⁶ There is little doubt that Respondent will have, at least to some degree, less time to spend with the children because of a greater distance between them, but the greater factor in both parties’ diminished time with the children is the fact that they will be divorced, which reduces the time each of them will have with the children. The District Court’s failure to weigh the impact on Respondent’s diminished time with the children against Appellant’s diminished time with the children as a result of her commute is clearly deficient.

It is clear from the District Court’s Findings of Fact that the Court only considered the impact of the drive time between Mankato and Lakeville on Respondent. There was no mention of the three additional hours per day, for a total of twelve hours per week that the primary custodial parent would not be available to the children. The District Court specifically found that the move would “provide benefit only to Petitioner and detriment to the Respondent and children.”¹²⁷ As previously discussed, the interests of Respondent are not the appropriate focus – it is the best interests of the children, not of the parents,

¹²³ *Id.*

¹²⁴ *Bruch*, 40 FAM. L.Q. at 290-1.

¹²⁵ T.T. Day 2, pg.64.

¹²⁶ *Id.* at 103.

¹²⁷ AA.119.

which is paramount. The court's finding that the children would not reap *any* benefit from a move to Lakeville ignores the great weight of the evidence and is clearly erroneous.

Remand for a determination of whether relocation is in the best interests of the child is unnecessary, because the record can *only* support the conclusion that the residential restriction is not demonstrably in the best interests of the children. As a result, the District Court's finding of fact that it would be in the best interests of the children to live in Independent School District 77 should be reversed, and the corresponding conclusion that Appellant must keep the children's primary residence in Independent School District 77 must also be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY ORDERING CHILD SUPPORT WITHOUT PROPERLY CONSIDERING APPELLANT'S ORDINARY AND NECESSARY BUSINESS EXPENSES, INCORRECTLY CALCULATING HER FICA DEDUCTION, AND FAILING TO APPLY THE ACTUAL PARENTING TIME SCHEDULE TO THE *HORTIS/VALENTO* CALCULATION.

The case was filed prior to January 1, 2007. As a result, MINN.STAT. Ch. 518, rather than Ch. 518A, applies. A District Court's finding on net income for purposes of child support will be affirmed on appeal only if those findings have a reasonable basis in fact and are not clearly erroneous.¹²⁸ The court improperly calculated Appellant's net income by omitting her ordinary and necessary business deductions and improperly calculating her FICA deduction, resulting in an incorrect child support determination. As

¹²⁸ *Davis v. Davis*, 631 N.W.2d 822, 827 (Minn. Ct. App. 2001), *citing*, *State ex rel. Rimolde v. Tinker*, 601 N.W.2d 468, 470 (Minn. Ct. App. 1999).

a result, the child support issue should be remanded, with instruction to the District Court for calculation.

A. The District Court Erred In Failing To Deduct Appellant's Ordinary And Necessary Business Expenses In Determining Child Support.

For child support purposes, income from self employment is defined as “gross receipts minus ordinary and necessary expenses.”¹²⁹ “The person seeking to deduct an expense, including depreciation, has the burden of proving, *if challenged*, that the expense is ordinary and necessary.”¹³⁰ Respondent did not challenge Appellant’s ordinary and necessary business expenses at trial.¹³¹ A court may exclude certain expenses from income, but must first specifically determine that such expenses were inappropriate or excessive.¹³² However, if a court completely fails to make a finding concerning the amount of ordinary and necessary business expenses, the decision concerning income from self-employment cannot have a reasonable basis in fact.¹³³

In the present case, the District Court actually found that Appellant had “ordinary and necessary business expenses”, but did not determine an amount.¹³⁴ The only evidence presented at trial were the parties’ tax returns, which reflected a business expense figure of \$5,757 in 2005 and \$6,465 in 2006.¹³⁵ The evidence can only support the conclusion that Appellant’s proposed ordinary and necessary business expenses were

¹²⁹ MINN.STAT. § 518.551 subd. 5b (f) (2005).

¹³⁰ *Id.* (*emphasis added*).

¹³¹ T.T.Day 1, pg.80; Petitioner’s Exhibit. 1, pg.6; Petitioner’s Exhibit 2, pg.7.

¹³² MINN.STAT. § 518.551 subd. 5b (f) (2005).

¹³³ *See Davis*, 631 N.W.2d at 827-82.

¹³⁴ AA.84 (describing Appellant’s gross wages “prior to deduction of her ordinary and necessary business expenses”).

¹³⁵ Petitioner’s Exhibit 1, pg.6, Petitioner’s Exhibit 2, pg.7.

accurate as they were unchallenged and the Court referred to them as ordinary and necessary in its findings. The Court accepted an income averaging approach for Petitioner's income¹³⁶ As a result, it is appropriate to average the business expense evidence supplied by Appellant, and unchallenged by Respondent, which results in average annual ordinary and necessary expenses in the amount of \$6,111 annually, or \$509.25 monthly.¹³⁷ Deducting this amount from Appellant's average monthly gross receipts of \$6,721 yields Appellant's correct gross monthly income from self-employment of \$6,211.

As a result of the change in gross income from self-employment, the federal and state taxes deducted from Appellant's gross income will also be modified. It is not apparent that the District Court used the tax tables to determine state and federal taxes in its Findings. Upon remand, the District Court should be instructed to utilize gross income of \$6,211 for Appellant and apply the tax tables appropriately to this gross income figure.¹³⁸

B. The District Court Abused Its Discretion By Failing To Apply The Correct FICA Deduction For A Self-Employed Individual.

The District Court also incorrectly calculated Appellant's Social Security deductions at 7.65% of her gross income. An abuse of discretion occurs when the judge improperly applies the law to the facts.¹³⁹ Net monthly income for child support

¹³⁶ AA.84.

¹³⁷ AA.27.

¹³⁸ MINN.STAT. § 518.551 (2005).

¹³⁹ *Ver Kuilen*, 578 N.W.2d at 792.

purposes is defined as “total income less ... (iii) Social Security Deductions.”¹⁴⁰ The FICA deduction for a self-employed individual is 15.3% of her “self-employment” income, not the 7.65% of net income for a W-2 wage earner.¹⁴¹

The guideline support amount is presumed to be correct,¹⁴² and deviation from the guidelines requires specific findings on factors listed in the child support statutes.¹⁴³ The District Court made no such findings, and the record as a whole indicates that the FICA miscalculation was a simple clerical error, not an attempt to deviate from the guidelines.

By failing to apply the proper FICA deduction, the District Court abused its discretion. Because the modification of income creates a need for recalculation of the federal and state taxes, it is appropriate to remand the issue of the calculation of child support to the District Court. Upon remand, the District Court should be instructed to utilize 0.153 for calculation of Appellant’s FICA deduction.

C. The District Court Erred By Applying A Speculative 60/40 Parenting Time Schedule To The Child Support Calculation Instead Of The Actual Schedule Ordered By The Court And Shown By The Evidence.

Because the parties agreed to joint physical custody, the court appropriately applied the *Hortis/Valento* formula to the parties’ net income for child support to determine the Respondent’s child support obligation. However, its calculation of child support under the *Hortis/Valento* formula was in error.

1. The Court must use the actual, not speculative, parenting time schedule to determine child support.

¹⁴⁰ MINN.STAT. § 518.551 subd. 5(b) (2005).

¹⁴¹ See 26 U.S.C. §1401 (2007) (setting rate at 15.3%).

¹⁴² MINN.STAT. § 518.551, subd. 5(i) (2005).

¹⁴³ MINN.STAT. § 518.551, subd. 5(c) (2005).

Under the *Hortis/Valento* formula, the guideline child support amount is the amount indicated by the guidelines, but only for the periods of time that the other parent has *actual* custody of the children.¹⁴⁴ While the court may be hopeful that the “ultimate” parenting time schedule will be approximately 60/40, the court must apply the *actual* parenting time schedule, even if it is “not set in stone” to determine child support.¹⁴⁵ The reasoning behind the *Hortis/Valento* formula supports this conclusion. The *Valento* and *Hortis* courts reasoned that the parent should not be required to pay child support for periods when the parent has the physical custody of the child, because during those periods the party will be paying for the children’s typical expenses.¹⁴⁶ If Respondent, for whatever reason, does not actually exercise 40% parenting time, the child support for the children will be drastically inadequate. As a result, Appellant would be supporting the children in an amount disproportionate to the amount the legislature deemed appropriate.

2. The 60/40 parenting time finding of fact is not supported by the evidence and is clearly erroneous.

Even if the District Court could apply a speculative parenting time schedule to determine child support, the evidence does not support a finding that Respondent will be with the children 40 percent of the time. To calculate the actual time the parent spends

¹⁴⁴ *Schlichting v. Paulus*, 632 N.W.2d 790, 792 (Minn. Ct. App. 2001) (*emphasis added*), *citing*, *Valento v. Valento*, 385 N.W.2d 860, 862-3 (Minn. Ct. App.1986), *rev. denied*, (Minn. June 30, 1986); *Hortis v. Hortis*, 367 N.W.2d 633 (Minn.Ct.App.1985), *rev. denied*, (June 30, 1986).

¹⁴⁵ *Id.*

¹⁴⁶ *See, Valento*, 385 N.W.2d at 862.

with a child, the court considers the number of overnights, and then divides the number of overnights each parent has by the total number of overnights available.¹⁴⁷

During the school year, Respondent has overnights for four days per month, and during the summer school break he has one additional overnight per week for the approximate twelve week break.¹⁴⁸ Each parent also has two weeks of overnight vacation, at five days per week, which will result in up to an additional ten overnights per year for Respondent.¹⁴⁹ Respondent will also have approximately 6 additional overnights for holidays (six before or after Christmas and four for either Thanksgiving or Labor and Memorial Days).¹⁵⁰ Respondent has 79 overnights under the visitation schedule for each child, out of 365 possible overnights, or approximately 22 percent. Appellant has parenting time for the other 78 percent.

In order to reach the ultimate 40 percent figure envisioned by the District Court, Respondent would need an additional 68 overnights each year, or nearly twice what he has available under the minimum plan. The District Court's Findings of Fact and Respondent's testimony make it clear that Respondent's work schedule will make that amount of additional parenting time impossible. The court specifically found that "[w]hen he is working, he is unable to accommodate the children's schedules and needs."¹⁵¹ Although Respondent testified that his schedule would permit him to spend

¹⁴⁷ See *Rogers v. Rogers*, 606 N.W.2d 724, 727-728 (Minn. Ct. App. 2000), *rev'd on other grounds*, 622 N.W.2d 813 (Minn. 2001).

¹⁴⁸ AA.94-95.

¹⁴⁹ AA.96.

¹⁵⁰ AA.95-96.

¹⁵¹ AA.77.

additional overnights with the children,¹⁵² Respondent did not present evidence that he actually has the flexibility to take additional time with the children,¹⁵³ nor has he typically used his time off to spend with the children during school in the past.¹⁵⁴ Respondent himself testified that he believed it would be in the best interests of the children if they did not stay overnight with him during the school year.¹⁵⁵

Upon remand for recalculation of child support, the District Court should be instructed to utilize parenting time percentages of 22% for Respondent and 78% for appellant for purposes of the *Hortis/Valento* child support calculation.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY AWARDING A PARCEL OF LAND ON THE SAME BLOCK AS APPELLANT'S HOMESTEAD TO RESPONDENT IN CONTRADICTION TO ITS FINDINGS OF FACT THAT THE PARTIES SHOULD HAVE PRIVACY FROM EACH OTHER WHEN WITH THE CHILDREN.

If a conclusion is against logic and conflicts with the facts on the record, the conclusion is an abuse of discretion.¹⁵⁶ The District Court awarded a vacant lot described as Lot 1, Block 1, Schisel Subdivision to Respondent.¹⁵⁷ The lot is one lot away from the marital homestead,¹⁵⁸ which was awarded to Appellant.¹⁵⁹ The court specifically found that “[Appellant] and the children should have privacy and separation from Respondent

¹⁵² T.T. Day 2, pg.69.

¹⁵³ AA.78.

¹⁵⁴ T.T. Day 1, pg.158; Day 2, pg.19.

¹⁵⁵ T.T. Day 2, pg.73.

¹⁵⁶ See *Rutten*, 347 N.W.2d at 50; see also, *In re Marriage of Windebank*, 2000 WL 1869560, *2 (Minn. Ct. App. Dec. 26, 2000) (A direct conflict between a finding of fact and a conclusion of law creates an illogical result, which the court of appeals must correct).

¹⁵⁷ AA.105-106.

¹⁵⁸ AA.88.

¹⁵⁹ AA.105-106.

when the children are with [Appellant] and vice versa.”¹⁶⁰ The court did not permit Respondent to improve the lot until the children turned eighteen, but did permit routine maintenance.¹⁶¹ Undisputed testimony established that the lot requires weekly maintenance year-round.¹⁶² Appellant testified that, during the pendency of the proceedings, Respondent interfered with her parenting time and privacy and distracted the children by being present in the neighborhood to perform maintenance and dropping in to visit neighbors during her scheduled time with the children.¹⁶³ The award of the lot to Respondent and the finding that the parties need separation, coupled with his need to be present weekly to perform maintenance, is against logic and the facts on the record, and must be reversed, if Appellant is required to remain living in ISD #77.

CONCLUSION

The District Court in this case abused its discretion by ordering that Appellant may not relocate to Lakeville with the children, and the Court of Appeals should reverse this finding and permit Appellant to relocate to Lakeville with the children at the earliest practical time.

The Court of Appeals should remand to the District Court to correct the erroneous calculation of child support with instructions to the District Court to utilize \$6,211 as Appellant’s gross monthly income from self-employment, to appropriately apply the tax tables to this new income figure, and to use 15.3% for Appellant’s FICA deduction, and

¹⁶⁰ AA.88.

¹⁶¹ AA.89.

¹⁶² T.T. Day 2, pg.57.

¹⁶³ T.T. Day 2, pg.33.

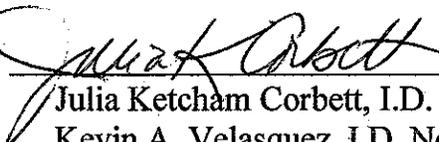
in the application of the *Hortis/Valento* formula, to apply the 22/78 parenting time percentage to determine child support.

If the Court of Appeals does not permit Appellant to relocate to Lakeville, Appellant requests reversal of the District Court order awarding Respondent Lot 1, Block 1, Schisel Subdivision, and a requirement that the lot be sold.

Respectfully Submitted,

Dated: May 1, 2008

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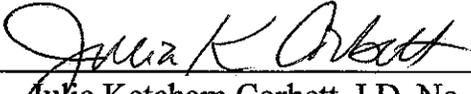
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CERTIFICATE OF COMPLIANCE

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

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