

STATE OF MINNESOTA
IN COURT OF APPEALS
Case No. A09-743

Taylor Rae Hagen and Amy Sue Hagen,

Respondents,

vs.

Daniel John Schirmers,

Appellant.

APPELLANT'S REPLY BRIEF

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I.

THE DISTRICT COURT ERRED IN SUBSTANTIALLY RESTRICTING APPELLANT'S PARENTING TIME.

In her responsive brief, Respondent claims that the 25% presumptive parenting time rule set out in Minn. Stat. § 518.175 subd. 1 does not require a District Court to adhere rigidly to that percentage. Appellant has no quarrel with the notion that the "at least 25%" figure is not set in stone. The problem with this case, however, is that the parenting time allotted to Mr. Schirmers under the District Court's order is approximately 6%, or less than one-fourth of the parenting time contemplated by the statute. The appellant's quarrel with the District Court's order is not that it departs from the statutory presumption *per se*: - it is that it is an extreme departure from that presumption.

The cases make it clear that if the Court significantly decreases parenting time, legal problems arise. If parenting time is curtailed too sharply, the curtailment may have to be based upon child endangerment or impairment, like a change of custody under Minn. Stat. § 518.18. See *Lutzi v. Lutzi v. Lutzi*, 485 N.W.2d 311 (Minn. App. 1992). If the curtailment of parenting time is somewhat less than would trigger the impairment rule, Courts will carefully scrutinize the visitational arrangements to insure that the non-custodial parent's rights are not significantly prejudiced by the other parent's move. In this regard, it is useful to examine those cases, such as *Lutzi Anderson v. Archer*, 510 N.W.2d 1 (Minn. App. 1993) which discuss

the issue of substantial decrease in parenting time due to factors beyond the non-custodial parent's control, such as a move out of state. *Anderson* summarizes the law nicely:

A modification of visitation that "results in a reduction of total visitation time, is not necessarily a 'restriction' of visitation," *Danielson v. Danielson*, 393 N.W.2d 405, 407 (Minn. App. 1986). When determining whether a reduction constitutes a restriction, the court should consider the reasons for the change as well as the amount of the reduction. See, *Auge v. Auge*, 334 N.W.2d 393, 400 (Minn. 1983) (when modification of visitation is required due to removal of child from jurisdiction, district court shall make reasonable and necessary adjustments to visitation schedule provided the adjustments are in the child's best interests); *Danielson*, 393 N.W.2d at 406, 407 (following removal of children to Montana, change in visitation from every other weekend plus alternating holidays to summer visitation of 2 weeks in 1986, 3 weeks in 1987, and 4 weeks in 1988 plus visitation in Montana on reasonable notice and 24 hours visitation during children's visits to Montana governed by best interest standard); *Clark v. Clark*, 346 N.W. 2d 383, 385-86 (Minn. Appl. 1984) (gradual reduction of visitation from 14 weeks to 5 ½ weeks per year during 4-year period following removal of child from Minnesota constituted "restriction" of visitation rights) pet. for rev. denied (Minn. June 12, 1984).

(*Id.* at 4)

This case is much like *Clark*. Mr. Schirmers' visitation went from 150 days per year to 26 days per year. His visitation went from overnights of about 50 days to overnights of about 25 days. So the reduction in Mr. Schirmers' visitation was between a 50% and a 85% loss of parenting time. This is the sort of "significant reduction" which brings the endangerment standard into play; at the very least, it places a heavy burden on Ms.

Hagen to show why visitation should be limited to such an extensive degree.

The Respondent goes on to argue that a District Court can depart from the presumptive 25% parenting time figure if it sets forth good reasons for that departure. Once again, Appellant has no quarrel with that claim as a theoretical proposition. The problem, rather, is with the applicability of that claim in this case. First, the District Court did not make many findings relevant to the issue of why it reduced Mr. Schirmers' parenting time so significantly. Second, the few findings that it did make with respect to the limitation of his parenting time are not only weak and inconclusive - they contradict Respondent's argument that the District Court's principal consideration in determining parenting time should be the best interests of the child.

While the "at least 25%" presumption does not require a District Court to justify every percentage its parenting time order departs from that presumption, the further it departs from it, the more solid its justification must be. See, *Danielson, supra*. Ordinarily, when a Court reduce's one parent's parenting time, it does so because his or her parenting of the child has been problematical. For example, in *Kostrzewski v. Fiskinger*, 2009 WL 1921043 (R.A.-22), the Court of Appeals held that the District Court properly ignored the 25% presumption because the mother's parenting impaired the child's health and development:

Appellant argues that the conditions imposed upon her by the contempt order amount to a parenting-time restriction that violates Minn.Stat. § 518.175, subd. 1(e) (2008), which provides, in part, that "[i]n the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child." (Emphasis added.) But appellant's argument ignores the district court's broad discretion in determining parenting time. See *Matson v. Matson*, 638 N.W.2d 462, 465 (Minn.App.2002).

If the court finds, after a hearing, that parenting time with a parent is likely to endanger the child's physical or emotional health or impair the child's emotional development, the court shall restrict parenting time with that parent as to time, place, duration, or supervision and may deny parenting time entirely, as the circumstances warrant.

(*Id.* at 11)

In the instant case, the District Court found nothing wrong with Mr. Schirmers' parenting, and indeed there was no evidence of impairment of the child by way of Mr. Schirmers' parenting offered. Unlike *Kostrzewski*, there was no evidence that he was "likely to endanger the child's physical or emotional health or impair the child's emotional development." Nor was there any evidence which would have justified such a finding.

In this case, most of the justifications the Court used for permitting Ms. Hagen to move to California with the parties' child were used by it as a justification for the Court's drastic restriction on Mr. Schirmers' parenting time. Let us consider those deemed salient by the Respondent in her brief:

1. The extent of Respondent's involvement in Taylor's life has been limited to parenting time consisting of small blocks of time during the week. For the past two years, the schedule has allowed for parenting time consisting of 24 hour blocks of time every other Saturday and two weekday visits consisting of two and on-half hours....

First, this meant that Mr. Schirmers saw his child at least 10 times per months, or well over 120 times per year. Under the present order, if he is fortunate and Ms. Hagen does not interfere with his parenting time, he sees Taylor 26 times per year - about 1/5th as often. To be sure, under the current system, he sees her in longer blocks of time, though nowhere near as long even in hours as he saw her before Ms. Hagen's move. Moreover, "time of possession" is not everything in child-rearing. Frequency is also critical. The fact is that by seeing her father about three times per week, Taylor was in touch with him, familiar with him, saw his face, and was in a position to maintain a close and frequent relationship with him. When her only contacts are by telephone and visits under the control of her mother, this bond is seriously threatened.

Second, the Court is wrong in its description of Mr. Schirmers' parenting time prior to the move. Mr. Schirmers' parenting time had just increased before the District Court's order to about 150 days per year. Mr. Schirmers was able to have parenting time visits with Taylor twice per week and overnight visits twice per month on weekends (A-22). Respondent makes much

of the fact that a District Court can take into consideration a child's age in determining the frequency of parenting time. Indeed it can; it had; and as the child was now of school age and could better understand her familial relationship, the Court had previously increased parenting time appropriately. All of this was torpedoed by the restricted parenting time the Court ordered in conjunction with Ms. Hagen's move to California. Insofar as Finding of Fact No. 7 is used as a basis for restricting Mr. Schirmers' parenting time, it was based upon ancient history.

2. Taylor has demonstrated her ability to develop and maintain long distance relationships during the course of the past two years. This development will assist her in preserving her relationship with her father.

This finding is directed more at permitting Ms. Hagen's move in the first place than to the limitation of Mr. Schirmers' parenting time. But insofar as it also has a bearing on parenting time, it is irrelevant. Taylor's ability has nothing to do with Ms. Hagen's permission. A striking feature of the District Court's parenting time order is its failure to make any provisions for the maintenance of such relationships - i.e. requiring Ms. Hagen to permit Mr. Schirmers' to have telephonic and other contact with Taylor on a regular basis. One of the things that came out in the testimony with considerable frequency was the hostility between Mr. Schirmers and Ms. Hagen, contrasted with the close relationship between both parents and Taylor. Under such circumstances, if the custodial parent is not ordered

to permit her child to stay in touch with her father, she will undermine such contacts, as she has indeed done. In the absence of an enforcement mechanism, the mere desire and ability of a child to stay in contact with an absent parent is meaningless.

3. Taylor's relationship with her father will be an important part of her life, and the Court believes the Petitioner will support and encourage this relationship through phone contact, frequent visits, and other electronic communication as appropriate for her age. With the availability of video conference through the phone or internet, e-mail, and regular telephone contact, the Petitioner will be able to offer Taylor many additional avenues she can communicate with her father.

That is, if Ms. Hagen wants to. If, as the record in this case which the Court of Appeals can review both before and after the California move was approved, Ms. Hagen limits the contacts, the Court's mere hopes are worth no more than wishful thinking.

4. The Petitioner's willingness to promote the relationship between Taylor and her father is evidenced by her proposal to accompany Taylor on all flights for scheduled parenting time to accommodate her work schedule accordingly.

If anything, this suggests the opposite - viz., that Ms. Hagen wants to be in control even when her child is visiting Mr. Schirmers. But of course there are good reasons that a six-year old girl should not be sent on an airplane unaccompanied, and for the next few years, Ms. Hagen might have been remiss in not accompanying her daughter to Minnesota. The important point here, however, is that using a "willingness" to do what any parent should do anyway as an argument for her good faith on the

issue of letting Mr. Schirmers into his daughter's life is weak.

The next two findings go to the heart of the matter:

5. At the time of trial Respondent was not willing to propose to the Court a parenting time schedule for [sic] the event that the request to relocate was granted, except to suggest a major modification of custody to a split custody, one-half of each year with each parent. There are no facts to support a change of custody in this case. The Court does not find that a split custody arrangement would be in the best interests of this child.

But whether or not Mr. Schirmers proposed an alternative parenting time schedule for Taylor is almost totally irrelevant to the District Court's independent duty to devise a schedule which is in the best interests of the child. Child custody and parenting time cases differ from most other civil actions in that the parties' strategies and actions before the Court do not count, or at least do not count nearly so much as the best interests of the child. And the best interests of the child have almost nothing to do with a parent's strategy in seeking custody or not presenting a parenting-time plan. A District Court may well feel justified in punishing a litigant because he "places all his eggs in one basket," asking for custody and no removal. But it is not the litigant who counts - it is the child. Using a litigant's weak arguments as a reason to limit the child's exposure to her own father is not fair to her, and it is her welfare that is, or ought to be, the Court's primary concern.

6. Respondent submitted a revised proposed parenting schedule after the evidentiary hearing in response the

Court's request. This proposal would be for the child to spend the entire summer with him, one week at Christmas/New Years, alternate spring breaks, alternate weekends that have a two day school break attached to them, one-half of any time that Taylor is visiting in Minnesota with her mother, half of any time that Respondent spends in California, and that Petitioner travel with the child to and from California for all Minnesota visits and pay all the costs of air travel for the child. The court finds this request, like the change of custody request, to lack consideration for the child's best interests and to be exclusively focused on the wants of the Respondent. It may be appropriate to expand parenting time with the Respondent in the future as Taylor gets older, but Taylor's needs and activities should always be paramount when making any decision regarding parenting time.

There are several problems with this finding. First, punishing a party in a parenting time proceeding for his litigational positions and strategy (as opposed to his actions involving the child) is an improper way to make decisions. The statement "The court finds this request, like the change of custody request, to lack consideration for the child's best interests and to be exclusively focused on the wants of the respondent" is a cheap shot. Worse, it demonstrates that the Court was more focused on punishing Mr. Schirmers than on determining what was best for Taylor. Of course Mr. Schirmers was focused on his wants - he wants what he thinks is best for Taylor. He believes that more frequent contact with Taylor will be in Taylor's best interests. Frankly, in parenting time disputes where there is no allegation of abuse or impairment, it is rare that a parent does not believe he or she is focusing on

the child's best interests. Why would they be litigating otherwise? Neither Mr. Schirmers nor Ms. Hagen have significant pecuniary interest in the time each spends with their child. If asked, each would say that their wishes are Taylor's best interests, and each would be telling the truth as they see it. They should not be treated as selfish narcissists for doing so. Much less should the Court treat only one of them that way.

Second, the Court's statement "It may be appropriate to expand parenting time with the Respondent in the future as Taylor gets older...." is a recipe for endless litigation as long as the disparity in parenting time remains as great as it is in the District Court's order. It is important to remember that at the time of the instant motion, Mr. Schirmers' visitation time had increased considerably, an increase which the District Court not only failed to acknowledge, but eviscerated. Where, as here, there is as much hostility and lack of communication between the parents as there is in this case, acknowledging a right to increased parenting time as a child grows older without providing for such increase is an invitation to litigate the issue every year. And if the Court of Appeals does not take action to require some sort of framework for such increased visitation, it is likely that such an invitation will be taken up with

considerably frequency.¹

7. Taylor's best interests will be served by adopting the Petitioner's proposed parenting time schedule which provides for week long parenting time throughout the year, including during Taylor's spring breaks and summer school vacation. At this time, it is not in Taylor's best interests to award Respondent extended summer parenting time as this is his busy time of year in his business, requiring him to work from 5:00 to 8:00 p.m. six days a week. Furthermore, Taylor is only four years old and not accustomed to being away from the Petitioner's care for an extended period of time.

First, Mr. Schirmers is self-employed and testified that he could take the time off to be with his daughter. He was asking for considerable visitation time in the summer, and how he makes that time is up to him, not the Court. Second, since Ms. Hagen was going to accompany her daughter to Minnesota and was permitted to work at her job in Minnesota while in this state, Taylor would be able to see her on a regular basis even during Mr. Schirmers' summer visitation periods. Third, Taylor is now nearly six years old, and, as noted in the previous section, "at this time" determinations in an environment such as these two parents have developed is a prescription for continued feuding. Indeed, there seems to be more than a little "tender years" theorizing by the District Court, a suspicion borne out by the

¹Notice how, in cases like *Danielson* and *Anderson, Infra*, where the Court permitted a removal from the State and noted that this would affect visitation, those Courts were careful to structure future visitation so that it would increase as the child grew older so that the Court would not have to face a motion every year as the child matured.

next determination to which Respondent draws attention:

8. ...Taylor's father has exercised 24 hour visits and short visits for a few hours during the week. If Taylor were separated from her mother who has been the most significant presence in her young life due to her primary care giving role, it would be detrimental to Taylor.

But the "tender years" doctrine has been repealed, and wisely so. See, e.g., Minn.Stat. § 518.17, subd. 3(3); See also, *Sefkow v. Sefkow*, 427 N.W.2d 203, 212 (Minn.1988). Of course, the District Court did not directly apply the tender years doctrine to its decision in this case; but it did apply tender years-type thinking. Why is separation detrimental to Taylor? What evidence is it based on? Why would spending a month or so with her father in the summer damage her, when it hardly damages thousands of other children of about the same age? And why does one week not damage a child and one month does? If Taylor's age prevents extended visitation now, when will it not prevent it? By the eighth motion? At least the "tender years" doctrine was about custody, where continued bonding is demonstrably important. Extending it to visitation, where the issue is maintaining a relationship with an absent parent, has no place in the law.

There is a great danger to future parent-child relations inherent in the District Court's approach to this case. One of the primary reasons for the adoption of the 25% presumption is that the legislature did not want to make it attractive for a person to move out of state to deny significant parenting time to

the other party. Minn. Stat. § 518.175, which includes both the removal-from-state rule and the 25% parenting time presumption, must be read as a whole. The legislature wanted to make sure that a removal from the State of Minnesota did not result in significant loss of parenting time for the non-custodial parent, unless there was good reason why that parenting time should be restricted anyway. Minn. Stat. § 518.175 subd. 1(3) and § 518.175 subd. 3 work in tandem toward the same purpose: protecting contact between non-custodial parent and child. One of the most important factors in determining whether a move should be granted at all is § 518.175 subd. 3(c):

The feasibility of preserving the relationship between the non-relocating person and the child through suitable parenting time arrangements, considering the logistics and financial circumstances of the parties.

The statute puts the burden of proof of each of these elements on the party seeking relocation. Thus, the statute puts the burden of proof on the Respondent (and ultimately the District Court) to insure that if a move is authorized, the non-relocating party's parenting time arrangements are preserved. In effect, the legislature defines these arrangements as 25%.

Respondent makes three arguments against this analysis. First, she argues that Minn. Stat. § 518.175 subd. 1(e) only applies in the absence of other evidence. But while the statute does use that phrase (which is, redundantly, the definition of "rebuttable presumption,") it does not indicate what that "other

evidence" would be. In a contested removal/parenting time case, there will almost always be some evidence bearing on suitable parenting time. Since the legislature is presumed not to promulgate vain provisions, it must have meant this provision to mean "evidence showing that a 25% parenting time arrangement was inappropriate." There is no such evidence in this case. There is a good deal of evidence which bears on the issue of parenting time, of course. But none of it addresses the 25% presumption. Indeed, it is not clear from the District Court's order that it was even aware of subd. 1(e)'s existence.

Thus District Court which awards significantly less than 25% parenting time to a parent and significantly reduces his existing parenting time in the process must explicitly indicate why it does so. At a minimum, its findings must justify significantly departing from that figure. This is the "other evidence" which would relieve the District Court of any obligation to grant a non-custodial parent 25% parenting time. In the instant case, not only are there no explicit findings; there are no findings at all upon which an appellate court could figure out why the 25% figure was completely ignored.² If there is one thing that is

²It will usually be the case in removals that longer blocks of time will have to be substituted for frequency of contact. If the parents live in the same area before the move, the child will typically see both parents on a regular basis, as here. When the child moves with one parent, such frequent visitation will no longer be feasible, and the only way to make it up is to permit the non-custodial parent longer blocks of time in which to see

clear about § 518.175 subd. 3, it is that to the extent possible, an out-of-state removal should not significantly reduce the overall parenting time of the noncustodial parent, provided (a) there is no abuse; and (b) maintenance of the approximate amount of parenting time is feasible. The burden is on the removing party to show either abuse or unfeasibility, (see Minn. Stat. § 518.175 subd. 3(c)), and Ms. Hagen has shown neither.

Second, Ms. Hagen argues that the 25% rule is "only" a presumption. This is true, of course; to put it another way, it is a rebuttable presumption. The question is, is there anything in Ms. Hagen's submissions or the District Court's analysis that rebuts the presumption. The answer is, "No." The District Court points to the age of the child and the distance from Minnesota to California, and that is effectively all. Nothing here indicates that two three-week blocks would harm the child, and if there had been such a finding, there was no testimony to support it. Courts are no better at pop-psychology than other lay people, and

the child. Thus, for example, a parent seeing a child three times a week, but having only one overnight visitation, might see a child 30 hours per week, or 1,500 per year. To obtain a comparable figure, the non-custodial parent would have to have parenting time about 60 days per year, perhaps consisting of two three-week summer visits, a one week Christmas and one week Easter visit. There are many other ways to work this out, of course, and in some cases it may not be feasible to work out quite the number of hours the parent had before. But absent abuse or unfeasibility, the Court has an obligation to come close. Here, there is no evidence of abuse or unfeasibility, yet the Court did not even try to give Mr. Schirmers anything like he had before the move.

the conclusion "If Taylor were separated from her mother ... it would be detrimental to Taylor," is based upon no evidence at all. Hundreds of thousands of children of Taylor's age are separated from a custodial parent for three weeks or more every year without particular damage. There is no evidence in the file indicating that Taylor is any different.

Respondent argues that a rebuttable presumption is not difficult to overcome, and that the District Court overcame it. She cites three unpublished cases in support of this claim.³ Two of them involve presumptions which do not relate to parenting time. *Andersen-Emeziem v. Giddings*, 2010 WL 432589 (Feb. 9, 2010) involved the presumption of joint legal custody. *Perez v. Perez*, 2010 WL 346386 (Feb. 2, 2010) involves child support. And *Kostrzewski, supra*, involves the application of the 25% percent presumption in the context of parental unfitness, where of course it is of little effect.

The law suggests otherwise. The rule defining "presumption, Minn.R.Evid. 301 states:

³The fact that she has to cite unpublished cases is, of course, significant. That said, it is surprising that no published case has yet addressed the 25% rule, and the only case which has discussed it at all - *Kostrzewski* - involved the extreme case of parental unfitness. It is a very important legislative act, and deserves more discussion than it has received. In particular, Courts, parents, and attorneys have a real need to know how seriously to take this presumption. That the legislature considered it important, and more than a passing consideration, is the care with which it tried to define time for parenting purposes in subd. 1(e).

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party who it was originally case.

In this case, Ms. Hagen had the burden of persuasion too, because she was asking the Court to substantially limit, and hence negatively change, Mr. Schirmers' parenting time.

Finally, Ms. Hagen argues that the Court had discretion to modify the parenting time, particularly if the child "is with a parent for a significant period of time." First, while no one doubts that the Court has discretion in this area, the discretion is abused if the Court takes away substantial parenting time without good reason. See *Lutzi, supra*. second, the provision of the statute cited by Respondent does not mean that the Court can take into consideration the age of the child in avoiding the 25% presumption (though obviously in the proper case, it can). Rather, it refers to the fact that if a child is very young, it may not be fair to subject the noncustodial parent to the total time he is with the child, because when the child is very young, the duration of his visits with the child may be limited. Hence, what this portion of § 518.175 indicates is that as the child matures, the 25% rule should be applied more strictly, not less strictly.

In sum, the District Court ignored the law and the cases in

determining appropriate parenting time after removal. It did not refer to the 25% presumption, did not examine the cases indicating that the noncustodial parent should be allowed "make up time" in blocks to insure that he was not substantially prejudiced by the removal, cited and obtained no evidence in support of his claim that the child's young age precluded more significant visitation, and did not make any provisions for increased visitation as the child matured. This case involves such a substantial change in parenting time that it comes close to invoking - if it does not actually invoke - the endangerment standard of Minn. Stat. § 518.18.

II.

THE DISTRICT COURT ERRED IN PERMITTING A REMOVAL FROM THE STATE WITH THE MINOR CHILD.

The Respondent's brief on the relocation issue is largely a recitation of the District Court's order. Because of lack of space, the analysis which is most important for this brief to submit a reply is the third of the required determinations:

The feasibility of preserving the relationship between the nonrelocating person and the child through suitable parenting time arrangements, considering the logistics and financial circumstances of the parties.

No suitable parenting time arrangements, no relocation. As noted in the section of this brief which deals with parenting time, the Court's "attempts" to produce suitable parenting time arrangements failed, and to a large extent was not even

attempted. The Respondent argues:

Although the court did consider the "logistics and financial circumstances," as required under this factor, it also addressed the feasibility of preserving the relationship between Mr. Schirmers and Taylor through suitable parenting time arrangements.

The District Court did not address the feasibility of such arrangements, because it did not make such arrangements in its order. It did not require Petitioner to grant telephone or other wired or wireless communication between Mr. Schirmers and Taylor. All it did was "believe" that Petitioner will support and encourage this relationship through phone contact, frequent visits, and other electronic communication." Given the hostility between these parents and Ms. Hagen's controlling nature, this is not an order - it is wishful thinking. Moreover, the finding that Taylor herself has kept in contact with her friends in California is irrelevant. Taylor is not the gatekeeper of her contact with her father. Ms. Hagen is.

Although Respondent denied any interference, there is considerable evidence that before the parenting time expediter came on the case, Ms. Hagen denied visitation regularly (T-141 through 143 and the entire file, including court records in the file now before the Court of Appeals).

Whether it is feasible to preserve the relationship between the father and his daughter lies in the hands of the District Court. If the order is ill-crafted or erroneous with regard to

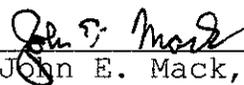
the preservation of that relationship, then it may not be feasible to preserve it. But in that case, the Court should not have granted the removal petition, much less excoriated Mr. Schirmers for opposing it.

CONCLUSION

The case should be reversed and remanded, with instructions to the District Court to craft an order giving Mr. Schirmers parenting time of approximately 25%, and instructing it that if it does not have evidence to support the feasibility of such an arrangement now, to craft an order raising Mr. Schirmers' parenting time to 25% or more within the next three years. It should also require the District Court to craft an order insuring reasonable access by telephone and other electronic means between Mr. Schirmers and his daughter. And the Court of Appeals should indicate that if the District Court believes it is not feasible to do these things, it should deny the Respondent's request to relocate to California with Taylor.

Dated: February 28th, 2010

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