THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a)

SUPREME COURT APPEAL NO. 123602

APPEAL TO THE ILLINOIS SUPREME COURT FROM THE APPELLATE COURT THIRD JUDICIAL DISTRICT

TODD FATKIN, **Respondent-Appellant,** **vs.** **DANIELLE S. FATKIN,** **Petitioner-Appellee**	**Third District Appellate Court No. 3-17-0779** **Knox County Circuit Court Case No. 14 D 96** **The Honorable Paul L. Mangieri Circuit Court Judge Presiding** **Trial Court Order: 11/13/17** **Appellate Court Order: 4/25/18**

BRIEF OF APPELLEE, DANIELLE S. FATKIN

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TABLE OF POINTS AND AUTHORITIES

ARGUMENT

The Petitioner-Appellee, DANIELLE S. FATKIN ("Danielle"), respectfully submits the following as her Response Brief in this cause.

STATEMENT OF FACTS

The Statement of Facts portion of the Brief filed by the Petitioner-Appellant, TODD FATKIN ("Todd"), is correct to a significant degree and largely tracks the Statement of Facts portion of Danielle's brief in the Appellate Court. However, various additional facts are set forth below to supplement Todd's Statement of Facts, namely:

Todd and Danielle were husband and wife, having married on August 4, 2004. (C. 22).[1] The parties resided in a single family home in East Galesburg, Illinois until their separation in June 2014 which then led to the divorce filing by Danielle. (C. 65).

In addition to the six (6) days and nights of parenting time that Danielle receives with the children in a fourteen (14)-day cycle, the parenting time schedule established by the trial court upon the conclusion of the original divorce action permitted Danielle to have additional parenting time on Wednesday, Thursday and Friday afternoons (when those days were otherwise Todd's to have parenting time) from after the children were released from school until Todd returned home from work. (C. 183).

In Todd's original submission/closing argument filed with the trial court on April 17, 2015 at the end of the initial custody hearing, he stated, in part, that "[t]he children are well-adjusted to the East Galesburg home." (C. 65). He further stated that "Lucas was well adjusted at Knoxville [public school] and doing well there." (C. 66). Todd also took the position that "both parents have been integrally involved in raising the children[, that]

[1] "(C. __)" are references to the common law record. "(R. __)" are references to the report of proceedings. "(E. __)" are references to trial court exhibits.

[e]ach party has played an important role in the caretaking for the children[, and that] [t]he children have a close, loving bond with both parties." (C. 67). Todd opined that "[t]he children are lucky to have two parents of this caliber." (C. 68).

Danielle is on tenure track as a professor at Knox College and anticipates being granted tenure. (R. 808).

Todd has lived in the former marital residence in East Galesburg for approximately six (6) or seven (7) years. (R. 625). With regard to the children and the close proximity of his and Danielle's respective residences, Todd stated that that was a good thing. (R. 625-626).

Todd was fired from his dental hygienist job in Moline in late November or early December 2015. (R. 635-637). He applied for unemployment compensation but was denied on the basis that he lost his job for misconduct. (R. 660).

Regarding potential employment, Todd presented a letter that he has a retail sales job available to him at REI (Recreational Equipment Inc.) where he used to work years ago. (E. 68; R. 611-612). The job would pay an hourly wage of anywhere from $9.50 per hour to $16.50 per hour. (E. 68). While Todd felt that he would be able to locate a job in Virginia Beach as a dental hygienist, he had not obtained an offer of employment for a dental hygienist position in Virginia Beach nor made reference to whether he had any job interviews scheduled. (R. 616). Todd hoped to work part-time as a dental hygienist and part-time at REI. (R. 615).

Todd testified that he was familiar with the Virginia Beach public school system because he had grown up in Virginia Beach. (R. 593). Although, he and his family moved away from Virginia Beach approximately thirty-one (31) years ago, and Todd had not lived

in Virginia Beach since, except for a period of approximately ten (10) months back in 2007 into 2008 when he and Danielle had lived there. (R. 597). Todd had not been in Virginia Beach for more than three (3) years as of the time of the relocation hearing. (R. 700).

With regard to extracurricular activities, Todd stated, "[t]he extracurricular activities [in Virginia Beach] are enormous compared to Knoxville." (R. 593). He indicated that Virginia Beach had lacrosse, field hockey and all of the other traditional sports. (R. 593). Todd made reference to the fact that Lucas wanted to surf and that Todd knew all the good surfing spots. (R. 618).

Todd believed the children would be benefited by the arts and culture scene in Virginia Beach. That scene would include six (6) to seven (7) art festivals and the East Coast Surfing Championships, which apparently includes bands that play on the beach all week during the festival, and not just any "rinky-dink" bands, but bands like Metallica. (R. 596-597).

When asked if Lucas was familiar with the Virginia Beach community, Todd responded, "very much so." (R. 598). Lucas was between the ages of three (3) and four (4) when Danielle and Todd lived in Virginia Beach for about ten (10) months in 2007 and 2008. (C. 23). Lucas and Lillian last visited Virginia Beach in 2013, a little more than four (4) years ago as of the time of the hearing, according to Todd's recollection. (R. 700). Lucas was nine (9) years old and Lillian was three (3) years old the last time either of them was in Virginia Beach. (C. 23).

The only family members in Virginia Beach are Todd's parents. (R. 600). Lucas and Lillian last saw Todd's father in 2013 and his mother in 2014. (R. 701). Todd has other family members who live four (4) to five (5) hours away in Maryland. (R. 600).

Todd did not feel that there would be a negative impact on the children if they moved to Virginia Beach and away from their mother in Galesburg. (R. 624, 677).

ARGUMENT

I. Appellate Jurisdiction Existed Pursuant To Illinois Supreme Court Rule 304(b)(6)

Illinois Supreme Court Rule ("Rule") 303 (Appeals from Final Judgments of the Circuit Court in Civil Cases) does not apply to this case at this time because the trial court reserved the issues of transportation costs and child support.

Rule 306 (Interlocutory Appeals by Permission) does not apply to this case because the trial court's order permitting Todd to relocate with the minor children out of the State of Illinois and modifying the parenting time schedule of Danielle is not an interlocutory order. Rather, the trial court's order was a final order on the issues of relocation and modification of parenting time. The trial court's order was not, for example, a temporary child support or spousal maintenance award within an original divorce case subject to final disposition at a later date. Thus, Rule 306 is inapplicable.

Rule 304 (Appeals from Final Judgments that do not Dispose of an Entire Proceeding) is the proper basis of appellate jurisdiction in this appeal. Danielle did not seek a Rule 304(a) finding because such a finding was unnecessary under the circumstances due to the plain language of Rule 304(b)(6), which permits a party to appeal a "custody or allocation of parental responsibilities judgment or modification of such judgment entered pursuant to the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/101 et seq.) or Illinois Parentage Act of 2015 (750 ILCS 46/101 et seq.)."

Todd and *Amici* take the position that Rule 304(b)(6), which does not contain the word "relocation," did not confer appellate jurisdiction and therefore the appeal should be

dismissed as premature. There are at least two (2) flaws in said reasoning. First, the umbrella term of "parental responsibilities" is clearly and concisely defined at 750 ILCS 5/600(d) as meaning "both parenting time and significant decision-making responsibilities with respect to a child." An "allocation judgment" is defined at 750 ILCS 5/600(b) as "a judgment allocating parental responsibilities." In other words, an allocation judgment is a judgment that allocates both parenting time and significant decision-making responsibilities with respect to a child. While the original custody and visitation order entered by the trial court in this case was entered prior to the new vocabulary employed by the January 2016 revisions to the Illinois Marriage and Dissolution of Marriage Act ("IMDMA"), the original order obviously is to be viewed as an "allocation judgment" under the new version of the statute.

Thus, when Todd's relocation petition sought to (a) grant him permission to relocate with the minor children from the State of Illinois and (b) amend the original order "regarding allocation of parental rights and responsibilities to, among other things, facilitate time between the children and [Danielle] after the allowance of such relocation." (C. 284-285), the trial court's order granting his petition modified the allocation of parental responsibilities when it modified Danielle's parenting time schedule upon the contemplated relocation of Todd to Virginia. Todd cannot argue that the trial court decision in this case does not involve a modification of the allocation of parental responsibilities when that is precisely the relief he sought and received.

If Todd's argument that the Appellate Court lacked jurisdiction under Rule 304(b)(6) is to be adopted here, then the Supreme Court must be at peace concluding that the definition of "allocation of parental responsibilities" has two (2) different definitions

depending on whether one is looking at Section 5/600(d) of the IMDMA or Rule 604(b)(6). That is an untenable position that should not be adopted.

Second, the presence of the word "relocation" should not be a litmus test for whether a particular Rule applies or not. Post-judgment family law litigation comes in all shapes and sizes and different cases raise many different issues to be dealt with by trial courts. Some relocation cases – for example, a primary residential parent who wants to move sixty-five (65) miles away from a downstate (*i.e.* not Cook County or collar counties) residence – may not involve modification of an allocation of parental responsibilities at all because the proposed relocation is not so drastic that parenting time must be modified. There is a flawed, underlying assumption in the position of Todd and the *Amici* that every relocation case is just a relocation case and should be construed as such. For the reasons stated above, it cannot be argued that Todd did not ask for and receive a modification of the allocation of parental responsibilities. This case – but perhaps not others depending on the circumstances – falls squarely within the plan language of Rule 304(b)(6) unless the Supreme Court is willing to conclude that there are two (2) different definitions of "parental responsibilities" in the IMDMA versus Rule 304(b)(6).

II. The Appellate Court Was Correct To Conclude That The Trial Court Decision Was Against The Manifest Weight Of The Evidence

A. The Appellate Court Correctly Applied The Standard Of Review

The most striking aspect of Todd's Brief is that it does not really defend the trial court decision on the merits – that is, the facts and circumstances supporting Todd's requested relocation. Instead, Todd repeatedly makes reference to the standard of review and asserts that the Appellate Court, in essence, should not second guess the trial court because the trial court was in the best position to evaluate the evidence and testimony of

witnesses. Todd, in essence, is proposing that there be no review and that the Appellate Court's job was simply to rubber stamp the trial court decision because it is not the trial court.

The Appellate Court properly acknowledged and applied the standard of review which is manifest weight of the evidence. "A trial court's determination regarding the child's best interests will not be reversed on appeal unless it is against the manifest weight of the evidence and it appears that a manifest injustice has occurred." In re Parentage of P.D., 2017 IL App (2d) 170355 at *4 (2d Dist. 2017). Todd, as the moving party in the trial court, had the burden to prove by a preponderance of the evidence that a relocation to Virginia Beach, taking all factors into account, was in the best interests of the children. Thus, more specifically, the standard of review is whether the trial court's conclusion that Todd carried his burden by a preponderance of the evidence was against the manifest weight of the evidence. See id.

In fact, there are many Appellate Court decisions where the trial court's decision with regard to removal/relocation was reversed on appeal. See In re Marriage of Davis, 229 Ill. App. 3d 653 (4th Dist. 1992) (finding that trial court ruling permitting removal was against the manifest weight of the evidence when residential parent had insufficient reasons to remove, even though she was engaged to a man who lived out of State); see also In re Marriage of Repond, 349 Ill. App. 3d 910 (2d Dist. 2004); In re Marriage of Ludwinski, 312 Ill. App. 3d 495 (4th Dist. 2000); In re Marriage of Roppo, 225 Ill. App. 3d 721 (1st Dist. 1991); and In re Marriage of Parr, 345 Ill. App. 3d 371 (4th Dist. 2003). These decisions are just a sampling of cases where the Appellate Court has reversed a trial court's removal/relocation decision under the applicable standard of review.

B. The General Assembly's 50-Mile (Downstate) Radius Restriction Is Indicative Of Legislative Intent That Divorced Parents With Minor Children Should Remain Living Close To Each Other Unless Good Cause Exists

One of the major amendments to the IMDMA in 2016 was newly-defining the concept of relocation and, with regard to downstate parents like Todd and Danielle, imposing a 50-mile radius around the primary residential parent. 750 ILCS 5/600(g). If that parent wishes to move outside that radius, he/she must get permission from the other parent or leave of court to do so. Prior versions of the IMDMA allowed a primary residential parent with sole custody living in, for example, Galena, Illinois to move to Cairo, Illinois without any permission from anyone. This drastic change in the law is indicative of a legislative and policy determination that divorced parents should remain in somewhat close proximity to each other so that both parents can remain actively and frequently involved first-hand in their children's lives. See 750 ILCS 5/102(7)(D) (providing that the IMDMA should be applied to achieve certain purposes, including with regard to a determination of children's best interests, to "continue existing parent-child relationships, and secure the maximum involvement and cooperation of parents regarding the physical, mental, moral and emotional well-being of the children during and after the litigation"). Danielle requests that this Court view relocation and the Appellate Court's decision in the context of this aspect of the new IMDMA which cut against Todd's relocation request.

C. Proper Application Of The 750 ILCS 5/609.2 Factors Mandated A Reversal Of The Trial Court's Decision

1. The Circumstances And Reasons For The Intended Relocation

The trial court concluded that Todd's reasons for his proposed relocation were not improper or motivated by a desire to lessen Danielle's role in the children's lives. (C. 315-316). The trial court went on to find that Todd primarily wished to relocate to provide the children with a better quality of life and higher standard of living – more specifically (a) his employment would be more stable, (b) he would earn greater income, (c) the schools in Virginia Beach were superior, (d) Virginia Beach is more culturally and ethnically diverse than Central Illinois, (e) the children would have greater opportunities in the arts, science and athletics in Virginia Beach and (f) living with his parents would provide the children with a sense of extended family. (C. 316). The trial court correctly summarized the reasons that Todd professed to want to move to Virginia Beach, but the more important question is whether the trial court's conclusion was incorrect that Todd proved by a preponderance of the evidence that what Virginia Beach has to offer in terms of these topics serves the best interests of the children. Todd fell far short of carrying his burden for the reasons explained in greater detail below, and the Appellate Court was correct to overturn the trial court.

Todd is voluntarily underemployed in Central Illinois despite his education and qualifications. It was against the manifest weight of the evidence for the trial court to conclude that it was in the children's best interests to be removed from the almost daily presence of their mother in their lives so that Todd could pursue employment in Virginia Beach.

Todd presented paltry evidence of his employment prospects in Virginia Beach. He had an offer to work retail sales at REI earning between $9.50 per hour up to $16.50 per hour. The REI letter of intent did not indicate how many hours of employment would be available to Todd. Nor did Todd mention a single dental office in Virginia Beach by name where he wanted to work or thought he would be hired. Todd did not indicate that he had even submitted a resume to a dental office in Virginia Beach. Todd had not interviewed with a dental office in Virginia Beach. And, there was cause for concern that Todd would not maintain steady employment in the dental hygienist field anyway. He quit his job of four (4) years at Aspen Dental in Peoria because, in part, he had a problem with the way the business was run. He then took a dental hygienist position at a dental office in Moline, only to be fired four (4) months later. He was denied unemployment on the basis of misconduct. Todd did not appeal the unemployment ruling. He does not list the Moline dental office as a job reference. Todd admittedly did not search for dental hygienist employment in Peoria or the Quad Cities, the two (2) larger urban areas in the vicinity of Galesburg, because he is not a fan of the commute and the work schedule is not to his liking. The trial court was given a window into Todd's mindset about his employment and the conveniences to which he feels entitled by the following testimony about wintertime commuting in the Midwest, namely:

> The wintertime is the scariest thing that I've ever done and I did it for four or five years. (R. 589).
>
> It's a horrid commute, especially in the wintertime. I honestly can say that I feel blessed that I didn't end up in a ditch at any point in time during the winter. I have witnessed severe accidents happening – happening right in front of me on that commute. (R. 697).

Todd also complained about the commute from Galesburg to Peoria somehow being eighty-five (85) minutes even though Peoria is only a forty-five (45) minute drive from Galesburg. (R. 590). It does not take an additional forty-five (45) minutes of drive time to get off Interstate 74 in Galesburg or Peoria to arrive at home or work.

In light of the above perceived obstacles to Todd's employment prospects in Central Illinois, his solution was to move to Virginia Beach. Alternatively, if he truly could not obtain employment as a dental hygienist in Galesburg, he could take the less drastic step and move to Peoria or the Quad Cities and alleviate his commuting concerns and not move halfway across the country with the children.

Inexplicably, the trial court referenced the REI job and found it materially significant that Todd could earn $13,650.00 gross annually instead of his current $12,000.00 gross annually that he earned with his employment with the City of Galesburg. This is in direct contrast to case law discussed later in this brief where the relocating parent stands to earn significantly more at a new job or a new position in a different state. Furthermore, if Todd wishes to work as a retail sales associate, he could find such employment in Central Illinois. Or he could seek to be employed as a teacher at a Montessori school due to his certification to teach in that curriculum. Again, Danielle respectfully submits that Todd is voluntarily underemployed. How many people can say they have the benefit of a Bachelor's Degree, a teaching certificate and a dental hygienist's license? Todd has the ability to locate employment in Central Illinois. There are an abundance of dental offices everywhere. Todd is not working in a highly specialized profession where, for example, jobs in that particular field are located only in certain geographic regions. The Appellate Court was correct to conclude that the trial court

decision finding Todd's potential future employment situation in Virginia Beach was a valid basis to relocate the children away from their mother was against the manifest weight of the evidence.

Todd's evidence and testimony was insufficient to establish that Virginia Beach public schools are superior to those in Knoxville, Illinois. The trial court admitted as much, stating "[a]cademically, there is no objective evidence of record to allow a qualitative assessment." (C. 316). The trial court went on to state that societal factors also play a role in education and that, in light of testimony that Lucas had been called a "girl," teased for not playing football and that a fellow student in math class had called him a "Jew," the children would be benefited from a more diverse educational setting in Virginia Beach. There was no testimony in relation to whether these were isolated comments or continuous teasing and bullying of Lucas. Regardless, many children tease other children. Emotional and psychological bumps and bruises or occasional hurt feelings are part of growing up in a society and going to school with your peers.

If the trial court's rationale was accepted, then Illinois law would allow any parent whose child had been the target of some teasing or bullying at school, to move to a more populated and urban area because of increased diversity where, the assumption would be, the teasing and bullying would not occur because the school children in a diverse and multi-cultural environment would not do such a thing. Of course, that is not true. Some teasing and bullying occurs throughout the world in any environment. There was no evidence whatsoever that Lucas is the subject of school teasing or bullying to such an extent that it is affecting him physically or psychologically.

Also with regard to the professed superiority of Virginia Beach public schools *vis-à-vis* Knoxville public schools, the trial court concluded that Todd's assessment of them as superior was credible and accurate because: (a) he had grown up in Virginia Beach and attended schools there as a child; and (b) had done some research. Yet, Todd, who was forty-eight (48) years old at the time of the hearing, testified that he and his family had moved away from Virginia Beach when he was seventeen (17) years old. (R. 597). That was in 1986. Then he lived in Virginia Beach with Danielle and Lucas, who was three (3) or four (4) years old at the time and not of school age, for ten (10) months in 2007 to 2008. To ascribe any credibility to Todd's knowledge of the local school system because he attended school in Virginia Beach as recently as thirty-one (31) years ago was against the manifest weight of the evidence.

As for Todd's research into the Virginia Beach schools to which the trial court gave credence, no statistics were provided. No student-teacher ratio information was provided. No standardized testing performance information was provided. No list of class offerings was provided. No school-specific extracurricular activity information was provided. Todd simply said that Virginia Beach schools as compared to Knoxville schools were "night and day", "[i]t is a way better school system" and "[the children are] going to have much, much better opportunities within the education [*sic*] where we would be moving to." (R. 593). And Todd testified that lacrosse and field hockey were offered as sports as well as the other traditional sports offerings similar to those offered at Knoxville public schools. (R. 593). That was it. Todd offered nothing more. As such, the Appellate Court properly concluded that the trial court committed reversible error to find that Todd had proven that Virginia Beach public schools are superior to those of Knoxville, and particularly in light of the fact

that Lucas and Lillian are established in the local school system and have friends. Todd admitted as much as recently as April 2015, at least with regard to Lucas, when he said "Lucas was well adjusted at Knoxville [schools] and doing well there." (C. 66).

As already alluded to above, it is a slippery slope to place too much weight on a proposed relocation on the basis of greater cultural and ethnic diversity in a more populated region. If trial courts are allowed to place too much emphasis on such an argument, then a situation is created where larger cities are favored over more rural areas. That should not be the law in Illinois.

Basically the extent of Todd's testimony about cultural or art scene activities in Virginia Beach was that they were "enormous." (R. 595). He elaborated a bit by stating that there was a marine biology museum, six (6) to seven (7) art festivals a year and a national surfing competition. Some of these festivals are accompanied by bands playing on the beach, and prominent bands to boot, such as Metallica. (R. 596-597). If this rationale were to be adopted under Illinois law as favoring relocation, then any parent could just seek to move with the children to a more urban environment and be allowed to do so. With a population of 400,000 people, Virginia Beach probably has more festivals and concerts than Galesburg or Peoria. And Chicago would have more festivals and concerts than Virginia Beach. And New York City would have more festivals and concerts as compared to Chicago. The trial court's rationale created a litmus test and a presumption in favor of more urban areas and the attendant activities that go along with a larger population. There is nothing wrong with rural, Midwestern living, and Illinois law does not favor relocation to urban areas as somehow a direct benefit to children. Even if it was

determined that there was a benefit to the children, it certainly does not outweigh the fact that the children spend just short of one-half (1/2) of their time with Danielle.

Todd's parents live in Virginia Beach. Todd and the children would be moving into Todd's parents' home and not their own home. By all accounts, Todd's parents' home is adequate in size to accommodate Todd and the children. Todd's parents are sixty-six (66) or sixty-seven (67) years old. His father is reported to be in good health. Todd's mother is in Stage 5 renal failure, and Todd does not know how much longer she will live. Lucas and Lilly were last in Virginia Beach visiting Todd's parents more than four (4) years ago, for Thanksgiving 2013 when Danielle took them there for the holiday. Todd's mother traveled to Galesburg in 2014 for a visit, and the children saw her on that occasion. Todd's father has never traveled to Galesburg to visit or see the children. Under these circumstances, it could not be claimed that the children have a close relationship with Todd's parents. Yes, the children would be in the presence of extended family if they moved to Virginia Beach, and that was a factor favoring relocation under 750 ILCS 5/609.2. However, the importance of this is tempered by the fact that Todd's parents are the *only* family that he has in Virginia Beach and no other family member lives in the vicinity. (R. 600). The closest relatives to Virginia Beach live a four (4) to five (5) hour drive away in Maryland. (R. 600). There was no evidence presented one way or the other as to whether Todd even has a close relationship with these relatives. Todd has other relatives in Texas and Colorado. (R. 743). Under these circumstances, the factor of the children living around extended family does not support relocation in this case.

Along the same lines, Todd claims that he has no support network in Galesburg or Central Illinois to help with the children, and that his parents would fill that void for him.

(R. 603). Yet the truth is that Danielle is the best possible support network for Todd with regard to the children. As already stated, the parties live just two (2) miles apart. Danielle works locally in Galesburg, has a work schedule that permits flexibility and has the children just under one-half (1/2) of the time anyway. The Appellate Court was correct that the trial court committed reversible error by concluding that Todd's parents being a support network for him could justify relocation in light of the facts and circumstances of this case.

2. The Reasons, If Any, Why A Parent Is Objecting To The Intended Relocation

The trial court correctly concluded that Danielle opposed the relocation for legitimate, good faith reasons. Danielle has joint custody of the children, exercises her parenting time consistently, has parenting time with the children almost one-half (1/2) of the time, has seen the children on an almost daily basis, volunteered with children's activities, volunteered as a room mother, been the parent who primarily schedules medical appointments and on and on.

The undersigned counsel's review of Illinois removal/relocation cases reveals no decision that has permitted relocation when the other parent (Danielle) has such extensive parenting time and is involved in the daily lives of the children to such a great degree. In that vein, it is troubling that Todd testified that he believes there would be no negative impact on the relationship between the children and Danielle if the relocation was permitted. (R. 624). This factor weighed heavily against relocation.

3. The History And Quality Of Each Parent's Relationship With The Child And Specifically Whether A Parent Has Substantially Failed Or Refused To Exercise The Parental Responsibilities Allocated To Him Or Her Under The Parenting Plan Or Allocation Judgment

The trial court acknowledged that Danielle's relationship with Lillian was "good." (C. 316). The trial court then concluded that Danielle's relationship with Lucas was somewhat strained and tenuous. (C. 316). While Lucas now prefers at his age to stay home alone after school on Wednesday, Thursday and Friday afternoons instead of going to Danielle's for a short while like he has always done in the past, that does not alter the fact that Danielle still has parenting time with Lucas almost one-half (1/2) of the time. Second, Lucas claimed that Danielle will sometimes go into her room for a while to be by herself, and that she had gone into her car a few times for some privacy. (R. 752-754). Danielle stated that she does those things infrequently and it is only when she needs a few minutes alone by herself, or when she needs privacy to make a phone call when the children are around. (R. 784-786). There is nothing strange about that behavior whatsoever. Nor was that a sufficient basis for the trial court to conclude that Danielle can be "confusing, arbitrary, withdrawn and attempts to distance herself from the children." A review of the transcript of Lucas' testimony shows that such a conclusion is blown out of proportion.

Most importantly, if the trial court believed that Lucas' relationship with Danielle was strained and somewhat tenuous, a relocation to Virginia Beach will potentially be the death knell of that parent-child relationship. It will allow any such issues between parent-child to go unaddressed for significant periods of time. Relocation will deprive Lucas of the frequent contact with Danielle that would be necessary to maintain a healthy parent-child relationship. This factor weighed heavily against relocation.

4. The Educational Opportunities For The Child At The Existing Location And At The Proposed New Location

Danielle incorporates her arguments set forth above regarding Virginia Beach public schools. Todd did not adequately establish – or really establish at all – that Virginia

Beach public school where the children would attend are somehow superior to the Knoxville public schools. This factor did not support relocation.

5. The Presence Or Absence Of Extended Family At The Existing Location And At The Proposed New Location

Danielle incorporates her arguments set forth above about the proposed move to Virginia Beach where Todd's parents live. For the reasons already stated, this factor does not support relocation.

6. The Anticipated Impact Of The Relocation On The Child

For reasons already set forth above relating to Danielle's involvement with the daily lives of the children, the anticipated impact of the relocation on the children would be devastating and not in their best interests. This factor weighed very heavily against relocation. Todd does not have good enough reasons to relocate to risk the negative impact that it would have on the children.

7. Whether The Court Will Be Able To Fashion A Reasonable Allocation Of Parental Responsibilities Between All Parents If The Relocation Occurs

For the reasons previously stated herein – namely the level of Danielle's involvement in the children's lives at all times up to the present – a reasonable allocation of parental responsibilities could not be fashioned if Todd and the children relocate to Virginia Beach. This factor weighed against relocation.

8. The Wishes Of The Child, Taking Into Account The Child's Maturity And Ability To Express Reasoned And Independent Preferences As To Relocation

Lillian expressed no preference. The trial court clearly placed significant emphasis on Lucas' *in camera* interview and his expressed preference to move to Virginia Beach. There are at least two (2) concerns with the trial court having placed too great an emphasis

on Lucas' testimony. First, a review of the transcript of the *in camera* proceeding reflects that Lucas parroted many of the same topics and phrases that Todd was testifying to in open court. It raises questions about whether Lucas was expressing an independent and well-reasoned preference. Second, there is concern as to whether Lucas should be completely believed. For example, Lucas was critical of his current school at Knoxville because he felt that he was not sufficiently challenged. (R. 738). Yet, Lucas had been getting Bs, Cs and Ds in his academic classes of late, suggesting that the curriculum at Knoxville is challenging him plenty. (R. 773). This factor should have been considered neutral.

9. Possible Arrangements For The Exercise Of Parental Responsibilities Appropriate To The Parents' Resources And Circumstances And The Developmental Level Of The Child

The trial court concluded that this factor was not a problem because "[t]echnology is such that a parent can participate and attend events far away, albeit physically removed, through the use of teleconferencing, Skype, instant messaging, Snapchat, cell phone and/or webcams." (C. 318). No amount of technology can replace in-person, first-hand contact between children and their mother that has occurred for their entire lives on almost a daily basis. No amount of technology allows the children to meaningful experience things with Danielle such as getting help with homework, being a room mother, a sports coach, a 4-H group leader, a volunteer in the classroom and so on. The trial court erred in this regard, and this factor weighed against relocation.

10. Minimization Of The Impairment To A Parent-Child Relationship Caused By A Parent's Relocation

Danielle incorporates her position set forth in the immediately preceding section. Furthermore, with regard to parenting time, it is not in the best interests of the children to

have parenting time with Danielle only a fraction of the time that they have always spent with her. As for awarding Danielle all but the first and last weeks of Summer Break, approximately one (1) week over Winter Break from school, alternating Spring Breaks and alternating Thanksgiving Breaks, that is roughly the equivalent of Danielle having less than half of the parenting time that she currently exercises with the children. Danielle could travel to Virginia Beach to visit the children. However, spending time with the children in a hotel room is not the equivalent of a normal family or home environment, and such a proposition should be unacceptable under the circumstances of this case. See In re Marriage of Demaret, 964 N.E.2d 756, 771 (1st Dist. 2012) (finding that father's visitation in New Jersey either in ex-wife's family's apartment or a hotel were not conducive to a normal home environment for visitations). The best interests of the children would not be served by such an arrangement. This factor weighed heavily against relocation.

11. Any Other Relevant Factors Bearing On The Child's Best Interests

The trial court called into question the validity of Danielle's opposition to the relocation request based on Lucas' testimony that his mother had discussed moving to Tennessee where Danielle's boyfriend lives and works. (C. 318). In the simplest of terms, the trial court believed Lucas and did not believe Danielle, despite her consistent testimony that she: (a) had not applied for any positions in Tennessee, (b) had not made any inquiries about positions that might be available in Tennessee, (c) had not told her mother that she was wanting to move to Tennessee, (d) had not told the children that she was looking to move to Tennessee and (e) had never had a discussion with her boyfriend about moving to Tennessee. (R. 708-709).

Certainly the trial court is given deference to make credibility determinations regarding witnesses, but it begs the question as to why this was an issue identified by the trial court at all when there was no evidence whatsoever that Danielle had any specific plans to move to Tennessee. Rather, her testimony was that she was on tenure track at Knox College, enjoys living in Galesburg and has every intention of obtaining tenure. The trial court obviously believed that Danielle must have plans or aspirations to move to Tennessee, and that inevitably factored into the trial court's decision to allow Todd to relocate to Virginia Beach. In the absence of actual evidence of specific plans, the trial court should not have placed any weight whatsoever on this issue when there was no basis to do so.

D. Case Law On Removal/Relocation Issue Supports Denial Of Relocation In This Case

Various Appellate Court decisions support the notion that it was against the manifest weight of the evidence for the trial court to grant Todd's relocation petition. In P.D., the mother of the child at issue was the primary residential parent. 2017 IL App (2d) 170355 at *1. She sought to relocate from the Chicago suburbs to New Jersey outside New York City because she had remarried and her husband had an employment opportunity that could increase his income from $250,000 to potentially $450,000 annually. Id. The mother was confident that she would be able to find employment in New York City that would be equivalent to her employment in Illinois. Id. at *2. The trial court denied the removal petition. The Appellate Court affirmed. The facts and circumstances of the P.D. case were much stronger in favor of removal than the circumstances in this case. Todd has no romantic interest, fiancé or spouse in Virginia Beach. And the mother's new husband in P.D. already had a job opportunity earning potentially $450,000.00 per year in New York.

Id. at *8. Todd does not have a job prospect waiting for him in Virginia Beach like the job prospects at issue in P.D.

In the Eckert case, the mother's request to relocate to Arizona from the Belleville-St. Louis area was denied. 119 Ill. 2d at 319. The trial court found that the mother had not sought employment in the St. Louis metropolitan area where she lived, just like Todd has not engaged in a job search in Peoria or the Quad Cities. Id. at 329 (finding it unpersuasive that the mother had not looked for work in the St. Louis area because it would not be feasible to commute from her Belleville home, and she thought the answer would be to move to Arizona instead of somewhere else within the Belleville-St. Louis area). The job that she had been offered in Arizona paid little more than she made in Illinois. Id. at 328. The father in Eckert had exercised his parenting time religiously, and the Court said, "[w]hen a parent has assiduously exercised his or her visitation rights, 'a court should be loath to interfere with it by permitting removal of the children for frivolous or unpersuasive or inadequate reasons." Id. at 327 (citation omitted). The circumstances of the instant case have similarities to Eckert where removal was denied.

In In re Marriage of Kincaid, the mother was permitted to relocate with the minor children to Austin, Texas where she had approximately fifty (50) family members. 972 N.E.2d 1218, 1221 (3d Dist. 2012). The mother had lost her housing in the children's school district. Id. And the trial court questioned the father's motives in opposing the relocation because there was evidence that he said he would consent to the removal if mother withdrew her motion to increase child support. Id. The circumstances in the Kincaid case are contrary to the facts and circumstances under which Todd wishes to relocate to Virginia Beach. The Kincaid case is a counter-example to the instant case.

In In re Marriage of Demaret, the mother and residential parent of the four (4) children sought to relocate from the Chicago suburbs, where the children's father lived, to New Jersey. 964 N.E.2d at 759. The mother had a new job available to her in New Jersey that would increase her annual income from approximately $260,000 to $475,000 annually. Id. at 760. She also had family on the East Coast and her parents lived five (5) miles from Middleton, New Jersey, where the mother intended to relocate. Id. at 761. Her relocation request was denied for various reasons, including that relocation would destroy the father's "desire to maintain his close relationship with frequent visitation with the children[.]" Id. at 770. The Demaret decision contains more compelling reasons to allow a relocation than the instant case does.

These decisions are highlighted as counter-examples to the circumstances under which Todd sought to relocate to Virginia. As such, the Appellate Court was more than justified in concluding that the trial court's decision in this case was against the manifest weight of the evidence.

CONCLUSION

For the reasons stated herein, Danielle respectfully requests as follows:

A. That the Supreme Court conclude that appellate jurisdiction existed in relation to the appeal of the trial court's order that granted relocation and modified the allocation of parental responsibilities; and

B. That the Supreme Court affirm the Appellate Court's reversal of the trial court decision in this cause.

Dated: September 5, 2018

Respectfully submitted,

DANIELLE FATKIN, Respondent-Appellee

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is twenty-four (24) pages.

Daniel M. Cordis

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, and that on September 5, 2018, he caused a copy of the Brief of Appellee, Danielle S. Fatkin to be served by electronic mail (addresses shown below) on the below individuals, to be uploaded to the Illinois Supreme Court electronic filing system for service on the below individuals and for filing with the Illinois Supreme Court Clerk:

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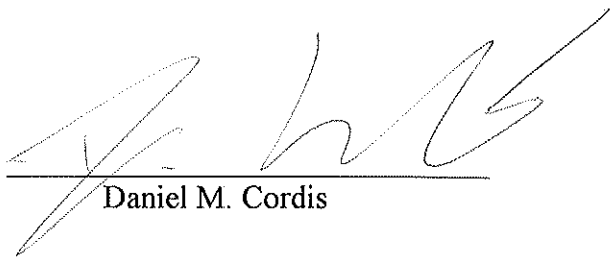

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