

CASE NO. A05-1244

State of Minnesota
In Court Of Appeals

Anne Elizabeth Dailey,

Petitioner-Respondent,

and

Tony Christopher Chermak,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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STANDARD OF REVIEW

Appellate review of removal and custody modification cases is on an abuse of discretion basis. The trial court's findings will be sustained unless clearly erroneous, but the appellate courts need not defer to the trial court in reviewing questions of law. Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996); Ayers v. Ayers, 508 N.W.2d 515, 518 (Minn. 1993).

LEGAL ISSUES RAISED ON APPEAL

I. The district court erred in granting the mother's post-decree motion to remove the parties' 3-year old child out of the state of Minnesota, over the father's objection, where the trial court had made a finding of fact following a custody trial at the time of the parties' dissolution that the award of physical custody to the mother was conditioned upon her remaining in the Twin Cities metropolitan area with the child.

II. The district court erred in not granting the father an evidentiary hearing prior to allowing the mother to remove the child from the state. The burden was on the respondent/mother to make a prima facie case for modification of custody, since her request to move the minor child to South Dakota is a modification of the conditional custody determination set forth in the parties' Amended Judgment and Decree.

STATEMENT OF THE CASE

In May, 2005, Mother (Respondent herein) of parties' 3-year old child moved the district court for a post-decree order allowing her to move with the child from the Twin Cities to Mitchell, South Dakota, a distance of approximately 300 miles.¹ A-42.

A year and a half before the respondent's motion, in October, 2003, the parties had a contested trial that lasted three days. The issue at trial was custody of the minor child, at that time 16 months old. A-10, 12. The district court, Hon. Bruce Peterson, awarded physical custody to the mother but only after making detailed and specific findings of fact that physical

¹ According to mapquest.com, a reliable and frequently-used website.

custody to the mother was conditioned upon the mother remaining in the Twin Cities metropolitan area with the child in order to ensure regular contact by the father with the child. A-13.

After hearing the post-decree motion to move the child's residence to South Dakota, the district court, Hon. Daniel Mabley², granted the mother's request to move with the child to South Dakota over the father's objection and without an evidentiary hearing. A-4. Father (Appellant herein) appeals the district court's order.

STATEMENT OF FACTS

The significant dates in this case are:

September 8, 2001: The parties married. A-11.

June 4, 2002: Daughter, Kathryn Anne Chermak ("Kate") was born. A-12.

October 7-9, 2003: Marriage dissolution trial. A-10.

November 10, 2003: Original Judgment & Decree filed.

May 21, 2004: Amended Judgment and Decree entered (Hon. Bruce Peterson)
A-10.

May 16, 2005: Mother's post-decree motion to move with child to South Dakota
and modify Father's parenting time heard (Hon. Daniel Mabley).
A-42.

² As is a common practice in Hennepin County Family Court, Judge Peterson's cases were reassigned to Judge Mabley, after Judge Mabley went onto the Family Court bench replacing Judge Peterson.

June 7, 2005: District court granted Respondent's motion without an evidentiary hearing. A-4.

Custody and parenting time were contested issues at trial. A-12. The parties participated in a neutral custody evaluation with Dr. Beth Painter Harrington. Respondent retained experts Mindy Mitnick and Jane McNaught-Stageberg. A-13, 14. Appellant retained expert Dr. Kenneth Waldron. A-16. After hearing the extensive evidence from all experts and others regarding custody and parenting time, the Court found that joint legal custody and physical custody to Respondent, conditioned upon her remaining in the Twin Cities metropolitan area, was in the minor child's best interest. A-12 to A-16. This language is contained in Finding of Fact VII (A-12 to A-16) which states in relevant part, "*The Court's ruling on physical custody is conditional upon petitioner remaining in the Twin Cities metropolitan area.*" (Emphasis added) A-13. This was done in large part because Appellant expressed fear at the time of the trial that the respondent might seek to move out of state and would try to squeeze him out of the child's life. See, subparagraph (c) of trial court's findings, A-19; Appellant's affidavit, paragraphs 5-7, A-58, 59. Prior to the modification allowing the respondent to move the child to South Dakota, Appellant was enjoying a parenting time schedule with Kate as follows:

Week 1: Monday through Thursday, 10:00 a.m. to 4:30 p.m.;

Week 2: Monday through Wednesday, 10:00 a.m. to 4:30 p.m.

Saturday, noon, to Sunday, noon. A-31.

In addition, his parenting time was scheduled to increase in Week 2 to Friday through Sunday, 4:00 p.m. through 4:00 p.m., beginning in June, 2005. Thus, Appellant had almost daily contact with the parties' daughter.

LEGAL ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING THE MOTHER'S POST-DECREE MOTION TO REMOVE THE PARTIES' 3-YEAR OLD CHILD OUT OF THE STATE OF MINNESOTA, OVER THE FATHER'S OBJECTION, WHERE THE TRIAL COURT HAD MADE A FINDING OF FACT FOLLOWING A CUSTODY TRIAL AT THE TIME OF THE PARTIES' DISSOLUTION THAT THE AWARD OF PHYSICAL CUSTODY TO THE MOTHER WAS CONDITIONED UPON HER REMAINING IN THE TWIN CITIES METROPOLITAN AREA WITH THE CHILD.

In this case, the respondent was not presumptively entitled to permission from the court to remove the minor child from the State of Minnesota. She argued that she had the presumptive entitlement because she is the custodial parent. A-46. Auge v. Auge, 334 N.W.2d 393 (Minn. 1983). However, the Auge presumption does not apply in this case and this is not a mere "removal" request under Minn. Stat. §518.18(e), since the mother's sole physical custody designation is specifically conditioned upon her remaining in the Twin Cities metropolitan area.

The Minnesota Supreme Court, in Auge, which dealt with the issue of whether a custodial parent in Minnesota is presumptively entitled to permission to remove a child to another state, set forth the basis for this presumption:

"Since denial of permission to remove would effect a change of custody in many cases, this statute [518.18] should be construed as establishing an implicit presumption that removal will be permitted, subject to the noncustodial parent's ability to establish that removal is not in the best interest of the child."

Id. at 397. The Auge holding is that, "motions for removal brought by the custodial parent may not be denied without an evidentiary hearing, where denial would effect a modification of custody." Id. at 399 (emphasis added). In the case at bar, a denial of Respondent's motion for removal would not effect a modification of custody but would be upholding the custody award in the parties' Amended Judgment and Decree, since the mother's sole physical custody is

conditioned upon her remaining in the Twin Cities metropolitan area. The point of the Auge presumption does not apply here because Appellant, who sought to retain the status quo and deny the respondent's request to move the minor child out of Minnesota, is not the party seeking a modification of the Court's conditional sole physical custody designation. Knott v. Knott, 418 N.W.2d 505, 508 (Minn. App. 1988) (holding "the point of the *Auge* presumption is that a person opposing removal in a sole physical custody case is the one seeking to modify the original custody arrangement and should thus bear the burden of proof").

Minnesota law provides that a custody order may not be modified unless the court finds that a change has occurred in the circumstances of the child or parties and that the modification is necessary to serve the best interests of the child. Minn. Stat. §518.18 (d). In this case, since the alternate factors set forth in Minn. Stat. §518.18 (d)(i), (ii) and (iii) do not apply, the prior custody arrangement must be maintained unless, "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." Minn. Stat. §518.18 (d)(iv).

The party seeking modification must submit affidavits setting forth facts supporting the requested modification. Minn. Stat. §518.185. An evidentiary hearing may be denied when the moving party's affidavits do not provide sufficient grounds to make a *prima facie* case for modification. Axford v. Axford, 402 N.W.2d 143, 145 (Minn.App. 1987).

The case of Swarthout v. Swarthout, 2001 WL 766870 (Minn.App. 2001), is factually similar to the current case. In Swarthout, sole physical custody of the child to the mother was conditioned upon mother's continuing residence in Minnesota. Id. Mother filed a motion to

remove the child from the state. Id. The district court treated mother's motion as one for modification of custody under Minn. Stat. §518.18 because mother's motion sought to alter the physical custody provision of the original custody order. Id. Mother appealed, claiming the district court abused its discretion by treating her motion as one for modification of custody. Id. The Minnesota Court of Appeals affirmed the district court's treatment of the motion as a request for modification of custody, rather than mere permission for removal from the state. Id. The Court stated:

“Appellant's [mother's] motion did not ask for mere alteration of the visitation provisions of the original order. Instead, it asked the district court to remove the condition on physical custody provided by the original custody order. ... Consequently, appellant's motion constituted a request for a modification of the physical custody term of the original order.” Id.

In the case at bar, the respondent was not able to establish a *prima facie* case for a modification of the custody designation conditioned on the child remaining in the Twin Cities metropolitan area. Respondent, the custodial parent, did not assert that the minor child's present environment endangers the child's physical or emotional health or impairs her emotional development. Respondent's reliance on her extended family in Mitchell, South Dakota as a support network for the parties' minor child is not new since the time of trial, and there has been no change in circumstances. A-18. Respondent is not able to establish that the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child. The mother's request to remove the minor child, which would be a modification of the original conditional custody award, should have been denied. The district court erred in granting her motion, especially without further inquiry, viz., an evidentiary hearing.

Even if the Court had applied the Auge presumption, Respondent's request to move the residence of the parties' minor child to South Dakota should have been denied, because it was designed to interfere with Appellant's parenting time, is not in the minor child's best interest, and would endanger the minor child's well-being.

When one parent has been given substantial parenting time, as in this case, and the child resides with the other parent, the custodial parent "shall not move the residence of the child to another state except upon order of the court or with the consent of the other parent." Minn. Stat. §518.175, subd. 3. Under Auge, a custodial parent is presumptively entitled to removal. (334 N.W.2d at 396) Although the Court in Auge did not extend this holding to cases involving joint legal custody, subsequent case law has extended the Auge presumption to such cases. Gordon v. Gordon, 339 N.W.2d 269, 271 (Minn. 1983). To defeat the Auge presumption, the party opposing the removal must offer evidence which would establish that removal is not in the best interest of the child and would endanger the child's health and well-being. Sefkow v. Sefkow, 427 N.W.2d 203, 214 (Minn. 1988).

Removal may not be denied merely because the move may require an adjustment in the existing pattern of visitation. Auge, 334 N.W.2d at 397. However, the Auge presumption may also be overcome by a showing that the purpose of the proposed removal is to interfere with the non-custodial parent's parenting time. Minn. Stat. §518.175, subd. 3; Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996).

The party opposing removal need only present a *prima facie* case against removal, however, in order to obtain an evidentiary hearing. Benson v. Benson, 346 N.W.2d 196, 198 (Minn.App. 1984). A *prima facie* case is "a case which has proceeded upon sufficient proof to

that state where it will support a finding if evidence to the contrary is disregarded.” Id.

Permission to remove may be granted without an evidentiary hearing if the opposing parent fails to make a prima facie case. Auge, 334 N.W.2d at 396.

Respondent’s request to move the minor child’s residence from St. Louis Park, Minnesota to Mitchell, South Dakota was intended to interfere with Appellant’s parenting time. The custody and parenting time of the parties’ minor child was highly contested at the time of the parties’ dissolution, resulting in a three-day trial, one neutral custody evaluator, and three additional experts retained by the parties to support their respective requests regarding custody and parenting time. A-12 to A-19. The Court’s Judgment and Decree granted Appellant the following parenting time schedule:

- A. Commencing from the date of this Order [November 10, 2003] through June 2004,
 - Week 1: Monday, Tuesday, Thursday, Saturday from 10:00 a.m. to 4:30 p.m.
 - Week 2: Monday, Tuesday, Wednesday, Thursday, from 10:00 a.m. to 4:30 p.m.

- B. From June 2004 through June 2005, same as above except Week 1 Saturday visitation to be from 12:00 noon Saturday until 12:00 noon Sunday.

- C. Beginning June 2005, same as above except
 - Week 1 Saturday visitation to be expanded to 4:00 p.m. Friday to 4:00 p.m. Sunday.
 - Also, each party upon 30 days notice to be entitled to two non-consecutive four-day vacations each year.

Conclusion of Law No. 4, (original) Judgment and Decree.

Following the entry of the Judgment and Decree, Respondent’s post-decree motion for amended findings or new trial sought to restrict the parenting time granted to Appellant. She requested that the Court amend Conclusion of Law No. 4 to take away one full day of Appellant’s time in Week #1 and one full day from his time in Week #2.³

³ See Ms. Dailey’s motion for amended findings, 12/22/03, paragraph 2A, page 5.

Additionally, Respondent sought to have Appellant's parenting time from June, 2004 through June, 2005 restricted. Id. She also sought to restrict Appellant's right of first refusal by requesting an amendment that right of first refusal be triggered only if one party would be unavailable for over three hours (rather than the one hour decided by the court). Id. at Paragraph 2B, page 6. The Court decided that the Judgment and Decree should be amended to reflect the parenting time schedule that the parties agreed was actually in place, i.e. Week 1, from 10:00 a.m. to 4:30 p.m. on Mondays through Thursdays, and Week 2 from 10:00 a.m. to 4:30 p.m. on Mondays through Wednesdays, plus Saturdays. A-31. The district court, Hon. Bruce Peterson, denied Respondent's request to restrict Appellant's parenting time. Id.

In addition, Appellant's parenting time, per the Amended Judgment and Decree was scheduled to increase in two ways in June, 2005, just at about the same time that Respondent brought her motion to move to South Dakota. A-31, 42. First, Week 1 Saturday parenting time was to be expanded to 4:00 p.m. Friday to 4:00 p.m. Sunday. Second, Appellant became entitled to 2 non-consecutive four-day vacations each year. A-31.

Appellant set forth in his affidavit dated May 6, 2005 that a move to Mitchell, South Dakota would not be in the minor child's best interest and would endanger her well-being. A-61. The fact that Respondent's extended family resides in Mitchell, South Dakota, has not changed since the time of the trial, and, even given these family connections, the Court found it was in the minor child's best interest to remain in the Twin Cities metropolitan area, and that the minor child was close to the extended families of **both** parties. Finding of Fact No. IX, Amended Judgment and Decree, A-18. As set forth more fully in Appellant's affidavit and in the supporting affidavits submitted from Jim Davidson, KC Chermak, and Craig Norby, Appellant

and Kate are close to his extended family and family friends and have developed a connection to the community in which they live. A-57 to 74. Taking the child away from these connections, and away from the extensive parenting time Appellant has had with Kate, is not in her best interest and was an abuse of the district court's discretion.

Respondent claimed in her motion that she had an employment opportunity in South Dakota and argued that it would benefit the child financially to allow the move. A-48. However, her affidavit detailed only one employer with whom she interviewed in the Twin Cities area. A-47. Although she indicated that she did not have success in obtaining other interviews in the Twin Cities area, she did not list even one other company where she applied. Further, as Appellant stated, Respondent never asked him to extend his parenting time so she could work a "regular" 40-hour work week. A-62. Also, in her post-decree motion, Respondent did not disclose to the Court her current income (only listing her 2002 income and stating that she is "unable to make financial ends meet."). See, Paragraph #7, Respondent's affidavit, 5/2/2005, A-46. She clearly had enough money while working and residing in the Twin Cities to have tentatively purchased a lot, and plan new construction on a home in Mitchell, South Dakota. A-49. Respondent did not set forth any income information regarding her proposed job in South Dakota, so the Court was unable to review whether this was (1) a bona fide job opportunity; and (2) whether there is any real financial benefit versus income earned or capable of being earned in the Twin Cities metropolitan area.

II. THE DISTRICT COURT ERRED IN NOT GRANTING THE APPELLANT AN EVIDENTIARY HEARING PRIOR TO ALLOWING RESPONDENT TO REMOVE THE CHILD FROM THE STATE. THE BURDEN IS ON RESPONDENT TO MAKE A *PRIMA FACIE* CASE FOR MODIFICATION OF CUSTODY, SINCE HER REQUEST TO MOVE WITH THE CHILD TO SOUTH DAKOTA IS A MODIFICATION OF THE CUSTODY ORDER THAT IS SET FORTH IN THE AMENDED JUDGMENT AND DECREE.

The custody award conditioned upon Respondent's continued residence with the child in the Twin Cities area is permissible and within the district court's authority. In family law cases, the district court has inherent power to grant relief as facts and equities require. DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758 (Minn. 1981). The district court has broad discretion to determine matters of custody. Durkin v. Hinich, 442 N.W.2d 148, 151 (Minn. 1989). The Court must consider all factors and make a determination of what is in the best interest of the minor child. Minn. Stat. §518.17.

This Court has upheld residential restrictions on custody. See LaChapelle v. Mitten, 607 N.W.2d 151 (Minn.App. 2000). In LaChapelle, the trial court granted sole physical custody to mother on the condition that she and the child reside in Minnesota. Id. at 158. The Court of Appeals held that the trial court did not abuse its discretion and affirmed the conditional custody designation, finding the trial court had applied the correct standard and it would be in the best interest of the minor child to remain in the sole physical custody of the mother if she lived in Minnesota. Id. at 162. The LaChapelle Court also rejected mother's arguments against the constitutionality of a conditional custody award as violating her right to travel, privacy, and equal protection under the Minnesota and U. S. Constitutions. Id. at 163.

Respondent argued in her motion that the finding restricting the child's residence to the Twin Cities is an impermissible attempt to limit her freedom to move. However, her post-trial

motion for amended findings/new trial did not request a modification of the residential condition and she did not appeal the issue. Further, this line of argument regarding right to travel was extensively addressed by this Court in LaChapelle, 607 N.W.2d at 151. The Court upheld the trial court's determination that it would be in the minor child's best interest to reside in Minnesota. Id. at 164. As in LaChapelle, the respondent's freedom to move is not restricted. She is free to move to South Dakota if she so chooses. Her right to establish a residence elsewhere is limited only by her desire to retain sole physical custody of the parties' minor daughter. The state has a "compelling interest" in protecting the best interest of children, and several states have found that this interest is compelling enough to allow burdening a parent's fundamental right to travel. Id. at 163.

The conditional award of custody was clearly within the district court's authority and was supported by an analysis of the best interest of the child. Any technicality of this conditional award of custody being in the Findings of Fact versus the Conclusions of Law should be corrected as a clerical error. The conditional award of custody was the clear intent of the district court after three days of trial and consideration of post-trial motions.

Respondent's reliance on the unpublished decision of Warfield is misplaced. Warfield v. Warfield, 2002 WL 418366 (Minn.App. 2002). In Warfield, the Court of Appeals merely upheld the Conclusion of Law regarding child support because this was (1) contrary to the Finding of Fact in the same document and (2) against the clear language of Minn. Stat. §518.551, which states that income shall be computed from an obligor's net income, not gross income.

In the case at bar, there is no competing clause in the Finding of Fact adverse or inapposite to a conclusion of law. The district court's intent is unequivocally clear that its

decision regarding physical custody was conditional upon Respondent maintaining the child's residence in the Twin Cities area. The finding simply was not incorporated into the conclusions of law. This is merely a clerical error, which should be corrected by the district court pursuant to Minn.R.Civ.P. 60.01, which states, "Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time upon its own initiative or on the motion of any party and after such notice, if any, as the court orders..."

Respondent argues that she cannot be held to this conditional custody designation. She did not challenge it in her post-trial motion for amended findings or new trial, nor did she appeal the amended judgment and decree. To not address this issue previously and now argue that based on a clerical error, three days of trial, and the Court's detailed inquiry into the best interest of the minor child should be "thrown out the window" would produce a result that was clearly not intended by the trial judge.

Respondent misconstrues the Imdieke case. Imdieke v. Imdieke, 411 N.W.2d 241, 242 (Minn.App. 1987). Imdieke does not stand for the proposition that the Court may not condition a grant of custody on the custodial parent's remaining in a certain geographic area, as Respondent suggests. The issue in Imdieke was whether the district court erred in awarding a split custody arrangement, not whether the district court erred in its conditional custody award based on location of residence. Id.

One year ago, this Court analyzed the same citation from Imdieke, quoting Auge. The Court of Appeals found that "the *Imdieke* court, citing *Auge*, merely stated that the mother should not be penalized for having to move after the family home was sold to pay down the

father's debts." Custody of S.S.E. and M.M.E., 2004 WL 1327808 (Minn.App. 2004).

The Lundquist case, which Respondent also relied upon in her motion to move to South Dakota, is distinguishable from the case at bar. Lundquist v. Lundquist, 1994 WL 510168 (Minn.App. 1994). In Lundquist, the parents agreed to joint legal and physical custody before trial. Id. The issue on appeal was the primary residence of the children during the school year. Id. The part of the district court's order which the Court of Appeals vacated was the requirement that the children live in the North Branch School District. Id. The mother had testified as to concerns she had about the North Branch school district, indicating she would make the decision about what school the children should attend when they were of school age. Id. The Court of Appeals' decision to vacate that part of the order regarding residence in the North Branch school district was because "the district court went beyond considering location as a factor..." Id. The Court held such geographic considerations may become relevant, "when they affect the best interest of the child or when the custodial parent uses the children's location to hinder the relationship with the non-custodial parent." Id. In the case at bar, the geographic restriction on the respondent was considered to be in the best interest of the minor child.

Finally, in the case of Bateman v. Bateman, 382 N.W.2d 240, 251 (Minn.App. 1986), which Respondent cited in her motion, the residential restriction was very limited. The trial court's mandate was that the custodial parent remain in the St. Cloud school district. This Court held that this placed an undue burden on the mother's freedom to move to another city within Minnesota. Id. This is factually distinguishable from the case at bar, because the mother's custody award was conditioned on remaining in the Twin Cities area, not a particular school district.

CONCLUSION

In summary, the district court abused its broad discretion and erred when it allowed the respondent to move the child's residence to South Dakota in a post-decree motion that was filed approximately a year and a half after a contested custody trial, in which the presiding judge at the trial granted physical custody of the child to the mother on the express condition that the child's residence remain in the Twin Cities. Further, it was reversible error that the district court granted the mother's motion without even holding an evidentiary hearing, treating this case the same as any Auge-type removal case, which it is not.

Appellant respectfully requests that this Court reverse the district court's order granting the respondent's motion to remove the child to South Dakota.

Respectfully submitted,

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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) (with amendments effective July 1, 2007).