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NO. A05-1244

State of Minnesota
In Court of Appeals

In Re the Matter of:

Anne Elizabeth Dailey,

Respondent,

vs.

Tony Christopher Chermak,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF THE LEGAL ISSUES

1. Whether it was an abuse of discretion for the trial court to allow Respondent to relocate with the parties' minor child to Mitchell, South Dakota after Appellant had failed to assert any facts that would overcome the Auge presumption that the move was in the best interest of the child.

The trial court determined that Appellant had failed to show by a preponderance of the evidence that Respondent's move to Mitchell, South Dakota was not in the best interest of the child. Apposite Authority: Minn. Stat. § 518.18; Auge v. Auge, 334 N.W.2d 393, (Minn. 1983); Sefkow v. Sefkow, 427 N.W.2d 203, 214 (Minn. 1988); Warfield v. Warfield, 2002 WL 418366, at 1 (Minn. Ct. App.).

2. Whether it was an abuse of discretion to fail to hold an evidentiary hearing on the issue of relocation of the minor child to Mitchell, South Dakota. Apposite

The trial court determined that Appellant had failed to establish even a *prima facie* case of endangerment or interference that would provide support for an evidentiary hearing. Apposite Authority: Auge v. Auge, 334 N.W.2d 393, (Minn. 1983); Sefkow v. Sefkow, 427 N.W.2d 203, 214 (Minn. 1988); Gordon v. Gordon, 339 N.W.2d 269, 271 (Minn. 1983), Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996).

STATEMENT OF THE CASE AND FACTS

The parties in this matter were married on September 8, 2001, and have one minor child: Kathryn, born June 4, 2002, now three (3) years of age. Appellant's Appendix 11, 12 (hereinafter "AA"). They were divorced pursuant to Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree (hereinafter the "Decree") filed November 10, 2003. AA-10. Pursuant to Respondent's Motion to Amend, the Decree was amended to correct the parenting time schedule, and also addressed a number of other provisions not relevant to the instant motion. AA-10. On May 21, 2004, the Court filed its Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree (hereinafter the "Amended Decree"). AA-10. The Amended

Decree granted the parties joint legal custody, and granted Respondent sole physical custody, subject to Appellant's right of reasonable parenting time as set forth in the Parenting Time Schedule contained therein. AA-21, 22. Additionally, the Amended Decree contains a finding which states "[t]he Court's ruling on physical custody is conditional upon petitioner remaining in the Twin Cities metropolitan area." AA-12. However, Finding No. VII is not reflected in the Conclusions of Law of the Decree or the Amended Decree. Id., at paragraph 3, AA-21, 22. In addition, Finding No. VII is not supported by any factual findings by the trial court and is directly contradicted by Finding No. IX subparagraph (8) wherein the trial court found that "[n]either party indicated any plans to marry, move, or cohabitate with a significant other." AA-18. Respondent filed a Notice of Entry of the Amended Decree on May 26, 2004. Neither party appealed from the May 21, 2004 Amended Decree.

At the time the Amended Decree was entered, Respondent was engaged in her own business, Dailey Design Services, Inc. However, the revenues from Dailey Design Services, Inc. had declined to the point where Respondent made the decision that it was necessary to seek employment elsewhere. Respondent had been offered suitable employment with a firm located in Mitchell, South Dakota. Additionally, Respondent's parents and siblings live in Mitchell, South Dakota, and both Respondent and Kathryn enjoy close ties with them. Respondent's extended family provides an excellent support network for Respondent and Kathryn. Respondent moved to South Dakota with the parties' minor child for the purpose of accepting this job after receiving permission from the trial court. AA-2.

On June 8, 2005 the trial court granted Respondent's motion to move the minor child to Mitchell, South Dakota and denied Appellant's motion for an evidentiary hearing. AA-11. The trial court found that Appellant had not rebutted the presumption in favor of a custodial parent's right to relocate as stated in Auge v. Auge, 334 N.W.2d 393 (Minn. 1983). AA-11. The trial court also found that Appellant did not establish a prima facie case of endangerment that would warrant an evidentiary hearing. AA-3. The trial court also determined that Finding No. VII was not a binding conclusion of law and that the trial court did not intend to impose a residential restriction upon Respondent. AA-3.

STANDARD OF REVIEW

On appeal, the Court's review of decisions concerning the relocation of the child's residence to another state is limited to "determining whether the trial court abused its discretion by making unsupported findings or improperly applying the law." Wopata v. Wopata, 498 N.W.2d 478, 481 (Minn. Ct. App. 1993), citing Sinsabaugh v. Heinerscheid, 428 N.W.2d 476, 478 (Minn. Ct. App. 1988).

A trial court's findings must be sustained unless clearly erroneous. LaChapelle v. Mitten, 607 N.W.2d 151, 160 (Minn. Ct. App. 2000), citing Pikula v. Pikula, 374 N.W.2d 705, 710 (Minn. 1985). A finding is "clearly erroneous" only if the reviewing court is "left with the definite and firm conviction that a mistake has been made." Id. citing Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999). "When determining whether findings are clearly erroneous, an appellate court views the record in

the light most favorable to the trial court's finding." Id. citing Lossing v. Lossing, 403 N.W.2d 688, 690 (Minn. Ct. App. 1987).

ARGUMENT

Appellant's presents a proverbial house of cards in his attempt to circumvent the Auge presumption favoring a custodial parent's right to relocate with the minor child to another state. Appellant's entire argument is premised on the existence of a residential restriction as part of the initial award of sole physical custody to Respondent. Appellant claims that Finding No. VII represents the trial court's intent to impose a residential restriction despite the fact that the trial court ruled that it did not intend to impose a residential restriction. Appellant claims that Finding No. VII is binding on the parties even though Minnesota case law clearly establishes that Findings of Fact are not binding. Finally, Appellant claims that residential restrictions are not contrary to Minnesota law, thereby directly contradicting the well established line of jurisprudence that holds residential restrictions are an impermissible restriction on the movement of the family and interfere with the stable circumstances of the child. Sefkow v. Sefkow, 372 N.W.2d 37 (Minn. Ct. App. 1985). His arguments regarding the burden of establishing a *prima facie* case and the need for an evidentiary hearing are built on the faulty premise that a binding residential restriction exists. Because the underlying premise of Appellant's entire argument is without a basis in law, fact or logic he has failed to establish that it was an abuse of discretion for the trial court to allow Respondent to relocate with the parties' minor child to Mitchell, South Dakota.

I. PETITIONER, AS THE CUSTODIAL PARENT, IS PRESUMPTIVELY ENTITLED TO PERMISSION FROM THE COURT TO REMOVE THE CHILD OUT OF STATE.

A. The trial court has ruled that it did not intend to impose a residential restriction as part of the award of sole physical custody to Respondent.

A critical failing of Appellant's argument is his failure to acknowledge that the trial court's own interpretation of Finding No. VII is that it is not binding. A trial court's interpretation of its own order is given great weight on appeal. Mikoda v. Mikoda, 413 N.W.2d 238, 242 (Minn. Ct. App. 1987). It is irrelevant for purposes of the record on appeal whether a different judge issued a subsequent ruling. Id. Therefore, when Judge Mabley determined that Finding No. VII was not enforceable, then for the purpose of the record on appeal, it was the same as Judge Peterson saying he never intended to impose a residential restriction on Respondent. Appellant's interpretation that Finding No. VII is binding is rendered irrelevant by the trial court's determination that it is not.

B. Appellant's claim that the award of sole physical custody to Respondent was conditional upon her residing in the Twin Cities metropolitan area is a misrepresentation of the facts.

Finding No. VII in the Judgment and Decree and Amended Judgment and Decree purports to condition the Court's ruling on physical custody "upon Petitioner remaining in the Twin Cities metropolitan area." However, this condition is not found in the Court's Conclusions of Law, which simply states:

> The parties shall share joint legal custody of their minor child and petitioner is awarded the sole physical custody, care and control of the parties' minor child, namely: Kathryn Anne Chermak, born June 4, 2002, currently sixteen months of age subject to respondent's right of reasonable parenting time as set forth herein.

AA-21.

Unnecessary and unsupported findings of fact like Finding No. VII in the case at bar are not subject to review. Weigel v. Miller, 574 N.W.2d 759, (Minn. Ct. App. 1998). "District courts are equipped to recognize that unnecessary findings like those objected to here are not binding in subsequent proceedings." Weigel at 760. Because there were no other findings regarding how a residential restriction was necessary to ensure the best interest of the parties' minor child Finding No. VII was unnecessary to the trial court's award of sole physical custody to Respondent. Therefore, as an unnecessary finding of fact, Finding No. VII was not binding on the parties in subsequent proceedings such as Respondent's request to relocate to Mitchell, South Dakota.

"It is the conclusion of law, not the finding of fact, that is binding." Warfield v. Warfield, 2002 WL 418366, at 1 (Minn. Ct. App.) (unpublished and attached hereto in accordance with Minn. Stat. §480A.08(3)). In Warfield, the stipulated judgment and decree contained a finding that appellant's child support obligation would be based on his gross income. However, in the Decree's Conclusions of Law, the trial court ordered that appellant's child support obligation be based on his income. The word "gross," although present in the Finding, was not present in the Conclusion of Law. The Child Support Magistrate based its calculations of support on appellant's gross income rather than his net income, citing the finding in the Judgment and Decree. This Court reversed on appeal, finding that "the binding portion of the stipulated judgment, which is in accord with the statute, is dispositive." Id.

The instant case presents a similar dilemma: the Court's language in its Finding No. VII regarding a purported conditional ruling on custody is not present in the binding

portion of the Decree. Further, as in Warfield, the binding portion of the Decree is in accord with Minnesota law regarding geographical restrictions as a condition of granting physical custody. Appellant's argument that the failure to incorporate Finding No. VII into a conclusion of law was a mere clerical error that should be corrected pursuant to Minn. R. Civ. Pro. 60.01 is faulty for two reasons. First, Finding No. VII is unsupported by any other factual finding in the Decree or the Amended Decree. In the Order dated June 8, 2004 allowing the relocation, the trial court determined that Judge Peterson's analysis of the statutory custody factors did not rely on a residential restriction. AA-7.

However, Appellant incorrectly asserts that Finding No. IX, subparagraph (c) is a finding by the court supporting a residential restriction. (Appellant's Brief, page 3, paragraph 1.) Finding No. IX, subparagraph (c) contains an allegation by Appellant that Respondent "would try and squeeze him out of the child's life." AA-19. This allegation by Appellant is not the equivalent of a finding by the trial court supporting a geographical restriction. In addition the trial court discredited Appellant's unfounded allegation within the same finding by stating that "[h]owever, [Respondent] has abided by court orders regarding access and the court credits her testimony that she recognizes the importance of the child's relationship with her father." AA-19. In fact, the trial court discredited any connection between Appellant's allegation in Finding No. IX, subparagraph (c) and a residential restriction in Finding No. IX subparagraph (8) wherein the trial court found that "[n]either party indicated any plans to marry, move, or cohabitate with a significant other." AA-18. One lone statement without any other factual finding related to a residential restriction does not establish the trial court's intent to create a residential

restriction, especially where the trial court neither supported the finding as being in the best interests of the child or incorporated that finding into a binding conclusion of law.

The second reason the trial court's failure to include Finding No. VII as a conclusion of law should not be corrected as a clerical error at the appellate level can be found in Appellant's failure to pursue a remedy to this alleged "clerical error" at the trial level. The Decree was entered November 10, 2003. On December 22, 2003 Respondent filed for amended findings or a new trial. Respondent's Appendix 1-12 (hereinafter "RA"). On March 26, 2004 after a change to Appellant's current counsel, Appellant filed a responsive notice of motion and motion to amend the Judgment and Decree, modify the parenting time schedule and for other property related relief. RA-13, 14.

Nowhere in Appellant's motion to amend the Decree did he request that Finding No. VII be incorporated as a conclusion of law. If, as Appellant now claims, the trial court's clear intent was to impose a residential restriction, then logic would dictate that Appellant would have availed himself of the remedy for this inconsistency at the time he filed for an amended judgment and decree. Appellant addressed personal property issues in his motion to amend the Judgment and Decree, but failed to address what he now claims was a condition regarding sole physical custody. RA-15-23. In fact, Appellant has never requested that Finding No. VII be incorporated as a binding conclusion of law in the year since the Decree was entered on May 21, 2004. It is disingenuous and inappropriate for Appellant to ask the appellate court to correct a problem when

Appellant failed to address the issue when he had the chance.[1] Appellant's adoption of the binding conclusions of law in the Amended Decree as entered is a tacit acknowledgement that there was an insufficient factual basis to support a residential restriction and that no such restriction was ever intended by the trial court.

C. Finding No. VII is an impermissible attempt to limit petitioner's freedom to move. Not only is the geographical limitation found in the non-binding portion of the Judgment and Decree, it is also contrary to Minnesota law, and must be disregarded.

Minnesota law is clear that the Court may not condition the grant of custody on the custodial parent's remaining in a certain area. (Imdieke v. Imdieke, 411 N.W.2d 241 (Minn. Ct. App. 1987), *review denied*, October 30, 1987) ("To base custody or care on a parent's remaining in a certain area is a restrictive condition contrary to Minnesota law." Id., 244). Appellant's attempt to distinguish Imdieke because it is a split custody case is irrelevant. The fundamental premise that a residential restriction is contrary to Minnesota law exists in Auge as well as Imdieke. Appellant quotes extensively from Auge in his brief thereby acknowledging that the proposition quoted in Imdieke is a valid rule of law.

Appellant cites Custody of S.S.E. and M.M.E., 2004 WL 1327808 (Minn. Ct. App. 2004) for the proposition that Imdieke is not apposite. Custody of S.S.E. and M.M.E distinguished Imdieke *factually*, stating that Imdieke addressed a split custody arrangement, "not whether the district court erred by awarding a conditional custody award based on location of residence." Custody of S.S.E. and M.M.E at 4. However, the Imdieke court, while addressing split custody, found that the trial court's consideration of

[1] Respondent was barred from appealing Finding No. VII. Weigel v. Miller, 574 N.W.2d 759, (Minn. Ct. App. 1998)

the mother's need to move due to her uncertain living arrangement was improper in awarding custody. In any event, Custody of S.S.E. and M.M.E is a joint physical custody case, which is factually distinguished from the case at bar. Auge is not at issue in a joint physical custody removal case, because any request to remove is clearly a modification of custody rather than visitation. Custody of S.S.E. and M.M.E also discusses the constitutional implications of a geographical restriction, and raises the standard of strict scrutiny. Finally, in Custody of S.S.E. and M.M.E, "[t]he district court specifically found that it would be in the children's best interests to live in close proximity to their father and extended family in the area where they had always lived." Custody of S.S.E. and M.M.E at 7. No such finding can be found in the case at bar.

"Geographic considerations may not be decided in advance but instead 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 . . . ." (citations omitted) Lundquist v. Lundquist, 1994 WL 510168, 2 (Minn. Ct. App.) (unpublished and attached hereto in accordance with Minn. Stat. §480A.08(3)). Clearly, in the case at bar, Appellant's attempt to condition the award of physical custody on Petitioner's remaining in the Twin Cities Metropolitan Area, before any issue of removal was before it, was erroneous.

In Lundquist, the parties had agreed to joint physical custody prior to trial, and the issue concerned the primary residence of the children during the school year. The Court found that the trial court erred because it went beyond considering location as a factor and "required that the custodial parent remain in the North Branch School District."

Id., 2. Appellant has disingenuously edited his quote from Lundquist. The entire quote, with the underlined portion being the portion left out by Appellant states:

> Geographic considerations may not be decided in advance but instead 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. The district court's reliance on location as a factor is not consistent with the law or the facts and that part of the order requiring the children to live in the North Branch School District is vacated.

Id. at 2. Clearly in the case at bar, if the Court adopts Appellant's interpretation of Finding No. VII, then the trial court will in effect have decided geographic considerations in advance. Additionally, the trial court made no specific finding as to how a residential restriction would be in the best interest of the child, so there is no way to decide when or how the geographic condition in the case at bar affects the best interest of the child.

The Court in Bateman v. Bateman, in reversing an attempted residential restriction on the custodial parent even *before* the custodial parent made a showing that she sought to move, held that the issue was timely and cited Sefkow in finding that "[b]ecause the trial court's residential restriction is contrary to law, it is an impermissible limit, and we, therefore, reverse. *See Sefkow v Sefkow*, 372 N.W.2d 37, 47 (Minn. Ct. App. 1985) (trial court's mandate that custodial parent reside in one of two Minnesota cities held to be unnecessary and unlawful)." Bateman v. Bateman, 382 N.W.2d 240, 251 (Minn. Ct. App. 1986). Appellant's attempt to distinguish Bateman because of the size of the geographical area involved in the residential restriction is irrelevant.

Appellant's reliance on LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000) is misplaced. LaChapelle is procedurally, factually and legally distinguishable from the case at bar. The procedural posture of LaChapelle was an initial custody

determination. Lachapelle at 157. LaChapelle only applies to a residential restriction sought to be put in place at the time of the initial custody award. LaChapelle cannot be used to create a residential restriction that did not exist at the time of the initial custody determination. The procedural posture of the case at bar is that of a post trial motion to relocate the minor child pursuant to Minn. Stat. § 518.18. Appellant's attempt to use LaChapelle to enforce a purported residential restriction at this stage of the proceeding is nothing more than a back-door attempt to amend the Decree and make Finding No. VII binding.

LaChapelle is factually distinguishable from the case at bar because a critical component to the residential restriction in LaChapelle was the fact that the custodial parent had actively sought to interfere with the non-custodial parent's visitation rights. LaChapelle at 164. A residential restriction requires a balance between the fundamental right of a parent to travel and the state's interest in protecting the best interest of the child. Id. In LaChapelle the court's strict scrutiny analysis tipped in favor of intrusion on the parent's right to travel due in large part to the fact that it was found that the custodial parent had interfered with the non-custodial parent's visitation. Id. In the case at bar the trial court specifically found that the purpose of the move to South Dakota was "not for the purpose of interfering with [Appellant's] parenting time." AA-3. Therefore, putting aside the fact that Lachapelle dealt with two lesbian parents, a sperm donor, a fraudulent adoption and a series of other unique factual elements, the most critical element of interference simply does not exist in the case at bar. Therefore, Lachapelle is factually distinguishable from the case at bar.

Because of the strict scrutiny analysis involved, Lachapelle is also legally distinguishable from the case at bar. Lachapelle does not give trial courts the unfettered discretion to implement residential restrictions as Appellant contends. If Lachapelle gave trial courts the sort of discretion implied by Appellant, Lachapelle would have overturned Auge, which it did not. It is legally and logically inconsistent to have the Auge presumption favoring relocation if a trial court could remove the presumption at the time of the initial custody determination before relocation was an issue and before any determination could be made as to whether there was interference with parenting time. In fact, this Court has explicitly rejected such an interpretation by emphatically establishing Auge as an "important rule of law." Sefkow v. Sefkow, 372 N.W.2d 37, (427 N.W.2d 203 (Minn. 1988). Clearly, there is nothing in LaChapelle explicitly overturning Auge. Therefore, Appellant's attempt to elevate LaChapelle to a rule of law is unsupported by the facts of the case at bar and the long line of Minnesota jurisprudence implementing Auge.

II. APPELLANT, NOT RESPONDENT HAD THE BURDEN OF ESTABLISHING A *PRIMA FACIE* CASE SUFFICIENT TO WARRANT AN EVIDENTIARY HEARING.

Appellant's arguments regarding whether Respondent had established a *prima facie* case for modification of custody are irrelevant and illogical. The arguments are irrelevant because they are based on a non-binding, unsupported residential restriction. Appellant claims that Respondent, the non-moving party, failed to establish a *prima facie* case sufficient to warrant an evidentiary hearing. However, within the construct of the Auge presumption, Appellant, as the party objecting to the move has the burden of

establishing a *prima facie* case sufficient to warrant an evidentiary hearing. Madgett v. Madgett, 360 N.W.2d 411 (Minn. Ct. App. 1985). It is illogical for Appellant to say Respondent did not establish a *prima facie* case sufficient to warrant an evidentiary hearing when Respondent never had the burden to establish a *prima facie* case in the first place.

Appellant slides further down an illogical slope when he argues that "[t]he district court erred in granting [Respondent's] motion, especially without further inquiry, viz., an evidentiary hearing." Appellant's Brief, page 6, paragraph 2. Appellant is therefore arguing that Respondent did not provide sufficient grounds to warrant an evidentiary hearing while at the same time arguing that the district court erred by not holding an evidentiary hearing. Nice-Peterson v. Nice-Peterson, 310 N.W.2d 471 (Minn. 1981). Appellant's unsupported allegations of interference with his parenting time were not facts sufficient to overcome the Auge presumption and did not provide a sufficient basis to warrant an evidentiary hearing.

Appellant's reliance on Swarthout v. Siroki, 2001 WL766870 (Minn. App.) is equally irrelevant. Contrary to the case at bar, in Swarthout, there was no disagreement that a residential restriction was a condition of the initial custody award. Therefore, the threshold issue that exists in the case at bar did not exist in Swarthout. All Swarthout stands for is that where a residential restriction is an acknowledged condition of an award of sole physical custody, a motion to relocate will be considered a modification of custody. In the case at bar, neither the trial court nor Respondent acknowledged that the

residential restriction was a condition of the initial custody award. Therefore, Swarthout is of little or no relevance to the case at bar.

Where a parent has sole physical custody, and the custodial parent seeks to move the residence of the minor children to another state, the court presumes that preserving the family unit and permitting removal is in the best interests of the children. Auge v. Auge, 334 N.W.2d 393, 397 (Minn. 1983). The preference for maintaining the family unit is not defeated by the fact that the parties share joint legal custody. Gordon v. Gordon, 339 N.W.2d 269, 271 (Minn. 1983). As the Court said in Knott v. Knott, 418 N.W.2d 505, 508 (Minn. Ct. App. 1988):

> Under Minnesota law it is presumed that a custodial parent's proposed removal of a child to another jurisdiction is in the best interest of the child sought to be removed.

The Supreme Court has verified that the best interest factors are controlling:

> To defeat that presumption, the party opposing removal must offer evidence which would establish that the removal is not in the best interests of the child and would endanger the child's health and well-being.

Sefkow v. Sefkow, 427 N.W.2d 203, 214 (Minn. 1988); Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996).

To overcome the presumption in favor of the custodial parent, the non-custodial parent must prove that removal would endanger the health and well-being of the minor children or is intended to interfere with the non-custodial parent's right to visitation. Sefkow v. Sefkow, 427 N.W.2d 203, 214 (Minn. 1988); Silbaugh v. Silbaugh, 543 N.W.2d 639 (Minn. 1996).

The non-custodial parent needs to demonstrate a *prima facie* case against removal to obtain an evidentiary hearing. Madgett v. Madgett, 360 N.W.2d 411 (Minn. Ct. App. 1985). A *prima facie* case is "a case which has proceeded upon sufficient proof to that stage where it will support a finding if evidence to the contrary is disregarded." Benson v. Benson, 346 N.W.2d 196, 198 (Minn. Ct. App. 1984). If the non-custodial parent cannot make a *prima facie* showing against removal, permission to remove the children may be granted without an evidentiary hearing. Auge 334 N.W.2d at 396, citing Nice-Peterson v. Nice-Peterson, 310 N.W.2d 471, 472 (Minn. 1981).

The Silbaugh case is instructive. In Silbaugh, the father attempted to make a *prima facie* case by an affidavit alleging that mother's "wish to relocate the residence of the children is intended to interfere with his visitation rights." 543 N.W.2d at 641. The Court noted that the "bare allegations" in the affidavit were "otherwise unsupported by the record" and did not constitute the "prima facie showing necessary to trigger an evidentiary hearing on the motion for removal." Id. at 642.

Another helpful case is Geiger v. Geiger, 470 N.W.2d 704 (Minn. Ct. App. 1991). There, in trying to make a *prima facie* case, the father:

> made conclusory statements that the move would be traumatic for the children and would endanger their emotional well-being due to the separation from their father and the adjustments they would have to make.

Id. at 709.

The Court found mere allegations did not give rise to a *prima facie* case, and that:

> aside from these natural adjustments and difficulties of moving to a new community and away from one parent, [the father] cited no specific facts to show how the move would be against the children's best interests.

Id.

Here, removal is in the minor child's best interests. Respondent's opportunity to better herself economically is clearly in the minor child's best interests, and there is no indication that moving the minor child to South Dakota would endanger her. To the contrary, Respondent has substantial roots in Mitchell, and both Respondent and the minor child have close ties and extended family there.

Similarly, there is no indication that Respondent intends the move to deny access or visitation to Appellant; to the contrary, her move was motivated by a documented employment prospect. Further, while removal to South Dakota will preclude continuation of the current visitation arrangement, Mitchell is not so far distant from the Twin Cities metropolitan area as to prevent Appellant's regular contact with the minor child. The case law is clear that, while the Court may not approve a move if its purpose is to interfere with visitation, it may not deny the move simply because it may require an adjustment in the existing pattern of visitation. See, *e.g.*, Auge v. Auge, at 398 ("Though removal should not be allowed for frivolous or spiteful reasons, neither should it be disallowed solely to maintain the existing visitation patterns.").

The burden is on Appellant to clearly establish a *prima facie* case that the minor child is currently endangered, or will be endangered, by Respondent if she moves to South Dakota. The burden is also on Appellant to clearly establish a *prima facie* case that the reason Respondent wishes to remove the child from Minnesota is to interfere with Appellant's visitation. If he is unable to do so, Auge, Gordon, Sefkow, and Silbaugh dictate that this Court must affirm the trial court's grant of permission allowing

Respondent and the child to move to South Dakota, without an evidentiary hearing. Appellant cannot make out a *prima facie* case.

Appellant has failed to assert a single fact in support of his contention that the purpose of Respondent's move is to interfere with his parenting time. Instead Appellant relies on inferences and unsupported conclusory allegations to support his claim of interference. Appellant implies that Respondent's disagreement with Appellant regarding the parenting time schedule at the time of trial in October 2003 and Respondent's request for amended findings seeking a different parenting time schedule in December 2003 are indications that Respondent is seeking to interfere with Appellant's parenting time with the minor child in 2005. Appellant's Brief, pages 8-9. However, the fact that Respondent availed herself of the legal process to advocate for a schedule that she considered in her daughter's best interest is not an indication of interference.

In addition, Appellant has not averred a single instance where Respondent refused him parenting time. Nowhere in Appellant's brief does he discuss an instance where the child was not returned, where Respondent was inflexible concerning changes to the schedule or where Respondent has short-changed him on a holiday or summer vacation. The fact is that the trial court correctly found that Appellant has exercised extensive parenting time since the Judgment and Decree, that Respondent has been flexible regarding Appellant's request for more parenting time and that "no pattern has developed to indicate that [Respondent] has historically sought to restrict [Appellant's] access." AA 3. Appellant's unsupported allegations are not facts, and do not constitute the "prima

facie showing necessary to trigger an evidentiary hearing on the motion for removal." Silbaugh at 642.

Appellant next implies that the scheduled increase in his parenting time in June 2005 is evidence that Respondent's move is an act of interference. He also states that Respondent's father has a drinking problem and that the minor child's relationship with his extended family are evidence of interference. Appellant's Brief, pages 9-10. A change in schedule is evidence of a change in schedule and nothing more. The allegations about Respondent's father are unsupported and were never brought up until Respondent's motion to relocate. RA-30, 31. Appellant states that the minor child's relationship with her extended family in South Dakota has not changed since the time of trial and that he has been well aware of the frequent visits by Respondent and the minor child to South Dakota since 2003. AA-59 and AA-66. Therefore, Appellant knew that the minor child was spending significant amounts of time with her extended family in South Dakota. However, the fact that Appellant did not raise this as issue at the time of the highly contested trial or in the past two years indicates that Appellant's last minute character attacks are more in the nature of mud slinging than of actual concern. Appellant's unsupported allegations lack any credibility.

Appellant's final attempt to establish interference is to attack Respondent's efforts to obtain employment. However, the Auge presumption does not require that Respondent conduct an exhaustive employment search, only that the move be in the best interest of the child. As in Auge, Respondent's move is based on a firm offer of employment that will provide steady and increasing income, a flexible work schedule and will allow the

minor child to have extensive access to her extended family in Mitchell, South Dakota. There is no question that the move to Mitchell, South Dakota will benefit Respondent personally and professionally and thereby also benefiting the minor child. Appellant's unsupported attempts to imply interference are merely conclusory averments which are unsupported by the record and do not provide a sufficient basis to establish a *prima facie* basis for an evidentiary hearing.

CONCLUSION

Respondent was awarded sole physical custody of the parties' minor child, with a reasonable parental access schedule afforded to Appellant. At the time the Decree and the Amended Decree were entered, Respondent was engaged in her own design business. Since that time, the income from the business has declined, and Respondent made the decision to seek other employment. Respondent accepted a job offer from a firm in Mitchell, South Dakota, where she was raised, and where she has a large network of family to support her. The proposed removal to Mitchell, South Dakota, is for the purpose of bettering Respondent's financial situation, and not for the purpose of interfering with Appellant's visitation with the minor child. There is a presumption that, under such circumstances, she be allowed to move with the child. The presumption cannot be rebutted by mere allegation, and Appellant has not presented more than mere allegations.

The Court's purported residential restriction conditioning its ruling on physical custody is contained only in a Finding, and not in the binding portion of the Amended Decree, and must be disregarded. Additionally, the purported residential restriction is

unsupported by any other findings regarding whether such a restriction is in the best interest of the child. Finally, such a residential restriction is contrary to law and an impermissible limit on petitioner's ability to seek to better herself economically. For all these reasons, the trial court should be affirmed.

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).