

NO. A06-1110

State of Minnesota
In Court of Appeals

In Re the Marriage of:

DEBORAH A. GOLDMAN
f/k/a DEBORAH A. GREENWOOD,
Petitioner-Appellant,
-against-

MARK E. GREENWOOD,
Respondent.

APPELLANT'S BRIEF AND APPENDIX

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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 (Minn.App., 1993), citing Sinsabaugh v. Heinerscheid, 428 N.W. 476 (Minn. App. 1988).

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., Dailey v. Chermak, 709 N.W.2d 626 (Minn.App., 2006), LaChapelle v. Mitten, 607 N.W.2d 151 (Minn.App., 2000) citing Pikula v. Pikula , 374 N.W.2d 705 (Minn. 1985) ; Silbaugh v. Silbaugh, 543 N.W.2d 639; Ayers v. Ayers, 508 N.W.2d 515 (Minn.,1993). The appellate court views the record in the light most favorable to the trial court's findings, as per Dailey v. Chermak,*supra*. Findings of fact are clearly erroneous, though, if the reviewing court is left with the definite and firm conviction that a mistake has been made, Fletcher v. St.Paul Pioneer Press, 589 N.W.2d 96 (Minn.,1999).

LEGAL ISSUES

1- Whether the trial court , in hearing a post-decree motion for modification of a custody order under Minn.Sec.Stat. 518.18(d) , erred on the law in its determination of one of the required criteria as to change of circumstances being limited only to the child , even though the statute clearly states that said criteria relates to change of circumstances of the child or the parties?

TRIAL COURT HELD: In its interpretation of the statute, the lower court does not either cite the statute itself or refers to any precedents to support its conclusion of the law that the change of circumstances is limited to those of the child alone.

2- Whether the trial court abused its discretion by disregarding the expressed statement of a 10 year old child, as contained on the affidavit of the appellant, favoring his relocation to New York State, and in not finding , together with all other factors present in the underlying motion, sufficient change of circumstances and/or endangerment to grant an evidentiary hearing, or at least a relocation evaluation where the child's preferences can be verified, and where such statement by the child is not specifically denied by the respondent ?

TRIAL COURT HELD: the trial court differentiated between the words “*favors*” and “*prefers*” in its denial of a *prima facie case* on change of circumstances based on this factor and does not assume that such statement of the child, though not refuted on the record, to be true and denied any additional proceedings to identify such wishes of this 10 year old child.

- 3- Whether the district court erred in law on its application of Dailey v. Chermak, *supra*, in not finding errors of law in the initial issuance of the LaChapelle type of geographical restriction, when such reference on the June 20, 2002 divorce decree neither in its sections of findings of facts nor in its conclusion of law stated such limitation on physical custody award and instead referred such order to a pre-judgment order of September 6, 2001 where such conditional order cannot be found specifically on either a findings of fact or a conclusion of law section of such order either ?

TRIAL COURT HELD: the trial court held that the mere reference on its 2002 judgment decree of a previous order which is merged and incorporated by reference only was sufficient to validate a LaChapelle conditional custody award but did not address whether such 2001 pre-

judgment order contained properly on sections of findings of facts and conclusions of law the required criteria to provide the uniqueness required to impose such conditional geographical award of physical custody .

- 4- Whether the lower court erred in law in its denial of the motion here by failing to analyze the lack of continued existence of initial “*unique criteria*” stated for the 2001 imposition of conditional geographical physical custody based on the current changes of circumstances , as per Dailey v. Chermak,*supra*, ?

TRIAL COURT HELD :The trial court specifically states that it “skipped” all best interest of the child analysis in reaching its decision and that a new undefined higher standard of proof is required by a movant who seeks to modify a conditional geographical award of physical custody and a mere best interest *de novo* analysis is not appropriate.

- 5- Whether the lower court abused its discretion when it assumed facts not on the 2006 motion record relying instead on fact findings from the 2001 pre-judgment order , and when most of the 2006 facts as presented by 15 (fifteen) affidavits by the appellant, which should have been

assumed to be true under *prima facie* , were mostly ignored by the lower court, and yet such entire analysis of the motion record by the lower court , was still not analyzed based on the best interest of the child ?

TRIAL COURT HELD: The trial court does not specifically refer to the 2006 motion record on its analysis of facts but such fact findings per the trial court are not found on the motion record for the most part, and the lower court concludes that the lack of reference to the 15 (fifteen) affidavits submitted by the appellants is because such affidavits are not relevant to the required analysis on the 2006 motion.

- 6- Whether the lower court erred in law by not finding sufficient *prima facie* case in meeting the required threshold on the change of circumstances and in its admitted *skipped* lack of analysis of best interest of the child to grant an evidentiary hearing or at least the requested relocation reevaluation of the child ?

TRIAL COURT HELD: The district court formulates its own rule of law as to *prima facie* case on the relocation and modification application of a conditional geographical award of custody and in doing so imposes an undefined higher standard of proof the appellant is held to , which the lower court determines that the appellant failed to provide here.

7- Whether the lower court abused its discretion on the evaluation of the *prima facie case* as to its finding of no endangerment to the child's physical or emotional health or impairment to his emotional development, where the present environment of the child requires that the custody be switched to respondent from the appellant, who is the only primary care custodial the child has had in his entire 10 year life, upon appellant's relocation to live with her husband in New York State, in spite of 15 (fifteen) affidavits submitted in her behalf on the motion record, all supporting the continuity, stability and best interest of the child based on educational, social and religious grounds for such modification to be granted, and the stated benefits on the motion record associated with such modification outweigh the harm related to such modification ?

TRIAL COURT HELD: The trial court in denying the motion here and even an evidentiary hearing held that the endangerment prong was not met on a *prima facie case* by the appellant, and instead of analyzing all benefits and harms associated with both scenarios of custody on the overwhelmingly presented evidence by the appellant in 15 (fifteen) affidavits, merely stated that the lack of a daily presence of the

respondent in the child's life and the "idolizing" (which is not part of the facts or allegations at the motion record) of a College bound half-brother in the child's life were benefits that could not be overcome by any scenario presented on the motion record.

- 8- Whether, in case the LaChapelle locale restriction is no longer valid and instead the Auge presumption applies, the respondent, despite not having requested custody of Isaac, presented *prima facie* case either alleging interference of visitation rights or endangerment of Isaac in case of relocation as to Isaac's physical or mental state sufficient to warrant the granting of an evidentiary hearing ?

TRIAL COURT HELD : The district court did not embark on such analysis because it outright denied the modification motion of the petitioner-appellant, since it did not find any circumstances to find the imposed *LaChapelle* restriction *void ab initio* or without any basis on best interest of the child because such analysis was skipped altogether.

- 9- Whether the entire record of these proceedings from 2001 through 2006 support the conclusion that the same judicial officer of these proceedings has embarked in a clear and open bias against the appellant by

consistently imposing burdens of erroneous applications of the law against the appellant , and when such judicial officer consistently abuses its discretion on findings of facts against the same appellant and finds no fault or blame on the respondent, though the record is clear that such other party is at fault or blame, and when the same judicial officer has shown disdain for such religious decisions regarding the religious upbringing of the child and disregard of the child's cultural and social uniqueness in the appointment of an evaluator, as per transcript of hearing, thus evincing clear bias against the appellant and making disparaging remarks about such religious practices and even making rulings which have an effect to compel such biased party to violate such religious practices with the child's awareness and knowledge thereof , and the same 2001 assumptions or findings are carried over by this same judicial officer and even mentions "*duplicity*" of the appellant in a new motion record in 2006 prejudicially ?

TRIAL COURT HELD : The lower court is totally oblivious to such repeated lack of objectivity and displays such bias and prejudice against the appellant which precludes a fair and objective determination of the

facts and the applicable law and, if there is a remand of these proceedings, such should take place in either Ramsey County or an adjoining county, since this judicial officer is the chief Family Court Judge assigned to Hennepin County.

- 10-** Whether the imposition of burdens on remarriage of the appellant in requiring the appellant's future husband to commute 1,000 miles daily from New York to Minneapolis, all without an evidentiary hearing, constitute a deprivation of fundamental rights encompassed into the due clause of the Fourteenth Amendment of the United States Constitution, and as such constitutes a denial of due process ?

TRIAL COURT HELD: The lower court failed to analyze any federal constitutional issues or questions on its decision.

STATEMENT OF THE FACTS AND CASE

The parties were married on January 16,1993 and divorced by decree dated June 21,2002 issued by Hon. James Swenson. (AA-22). Since this marriage was a second marriage for the parties, each of the parties had children from their first respective marriages, as follows: the appellant had two sons, Joshua Goldman, born May 24,1982 and Samuel Goldman born

on September 26,1986, while the respondent had three children, namely Heather Greenwood, born July 26,1982, Eleni Greenwood born April 30,1985 and Seth Greenwood born June 2, 1988 (AA-24). During their marriage, the parties had one child named Isaac Greenwood born on January 30, 1996 (AA-23) , who is the subject of these proceedings of relocation to New York State with the appellant. Appellant has had sole physical custody of Isaac continuously since the issuance of the divorce decree and has always admittedly been the primary care parent of this child for his entire 10 year life (AA-77).

In 2001 the appellant moved the district court for permission to relocate with Isaac to Boston, and though such relocation application was denied, the appellant was awarded sole physical custody of Isaac contingent on her remaining in Minnesota for reasons not identified on such order as either findings of facts or conclusions of law, and should she relocate despite the imposition of such conditions, the lower court would then award physical custody to the respondent (AA-61). The 2002 divorce decree then on Section XVI (AA-24) granted sole physical custody to appellant and stated that “*the memorandum decision of this Court dated September 6,2001 is hereby incorporated as if fully set forth herein*” . Yet,

there was neither specific mention on the 2002 decree of any findings of fact as to conditions of the physical custody award and conclusions of law on such findings nor a specific reference to the 22 page 2001 order (AA-27) where such findings of fact and conclusions of law sections may be located, as it does not exist.

The instant April 14, 2006 (AA-1) order by Hon. James Swenson of the Family Court Division-Fourth Judicial District- Hennepin County being appealed denied the appellant's motion to relocate with Isaac to New York , to alternatively modify and remove the contingent geographical restriction on her award of sole physical custody without an evidentiary hearing ,and, alternatively, if needed, to grant a relocation evaluation by a court appointed expert followed by an evidentiary hearing (AA-63) . The trial court did not rule on *prima facie* case by the respondent as to either interference of visitation rights or endangerment of the child as a result of the relocation, as such respondent did not even file a cross-motion for custody as a result of the relocation (AA-117).

In further support of her motion, the appellant filed , in addition to her own sworn affidavit, those of 14 (fourteen) third parties who included two principals of the school Isaac attends, his teachers , parents of classmates of

Isaac, neighbors and friends of the appellant and Isaac in the community they reside and even those of a Little League coach and Boy Scouts officers where both the appellant took a leading role and Isaac participated as well (AA-66 through 114). In opposition of the motion, the respondent merely filed his own affidavit unsupported by any other affidavit other than that of his own minor son from a previous marriage (A-119 through 131).

In its denial of the 2006 motion, this same judicial officer who issued all three decisions of 2001, 2002 and 2006 in this case, made several errors of law in its application of Minn.Sec. 518.18 and 518.175 as well as created unprecedented rules of law without any basis or foundation. In addition, serious errors of fact were made where facts were created and assumed by the trial court and the facts on the record were ignored or disregarded, thus abusing his judicial discretion and displaying a consistent bias and lack of objectivity towards the appellant and making rulings and disparaging statements showing disrespect and disregard of the Orthodox Jewish religion of the appellant , as more detailed in the argument below. And in doing so , this lower court also violated the United States Constitutional protections of the appellant as to fundamental rights and due process

encompassed by the Fourteenth Amendment . Any remanded proceedings are therefore requested to be assigned outside Hennepin County, where this judicial officer serves as Chief Family Court Judge.

ARGUMENT

POINT I :

IN ITS DENIAL OF THE APPELLANT'S MOTION FOR MODIFICATION OF THE ORDER TO REMOVE THE LOCALE RESTRICTION AND RELOCATE TO NEW YORK UPON HER REMARRYING, THE DISTRICT COURT ERRED IN ITS APPLICATION OF MINN. STATUTE SEC. 518.18(d) BY LIMITING ITS EVALUATION TO ONLY CHANGES OF CIRCUMSTANCES OF THE CHILD AND THUS IMPROPERLY EXCLUDING THE PRECISE LANGUAGE OF THE STATUTE WHICH ALSO APPLIES TO CHANGE OF CIRCUMSTANCES OF THE PARTIES .

Minn.Stat. Sec. 518.18(d) states in that in its consideration of a prior custody order under a post-judgment decree modification motion, the Court must find either:

“...unwarranted denial of, interference with, a duly parenting time schedule, that have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties [underlining added] and that the modification is necessary to serve the best interests of the child”.

In its application of the law on the motion by the appellant seeking modification of the prior court order to modify a geographical restriction and permission to relocate with Isaac as to change of circumstances here, the

lower court made a clear error of the law because it incorrectly limited his analysis as to change of circumstances of the child, Isaac,(AA-14) where it stated :

“The Court must accept these assertions [as to the remarriage of the appellant to a NYC attorney] as true for prima facie purposes and they represent a change in Petitioner’s circumstances , but not for Isaac’.”

The trial court in such analysis clearly dismissed the inclusion, consideration, and relevance per the statute, of change of circumstances of the parties, namely those of the appellant here. Hence, a major change of circumstances regarding the appellant as to her upcoming remarriage and relocation to New York to live with her husband, never placed in doubt on the record as to its veracity on the *prima facie* case of the appellant, was erroneously deemed not to be a criteria according to the law, which Minn.Statute Sec.518.18(d) clearly states that it is .

And such error of law by the lower court here is compounded by the recognition that there is a change of circumstances on this fact of remarriage by the appellant. Because on Footnote 2 of the 2006 order (AA-17) the trial court stated that:

“The court acknowledges that there has been a change of circumstances in Petitioner’s circumstances since 2001 when she advised the Court that she would not remarry”. “She is now engaged”.

The court mistakenly then states that :

“Petitioner told the Court in 2001 that she would not leave Minnesota unless she could not take Isaac with her” . Her current submissions do not suggest any change in heart”.

The district court then contradicted itself when it stated that the denial of the motion to relocate will place the appellant in a dilemma as to “*leaving Isaac*” in Minnesota or living apart from her future husband (AA-17). This dilemma would not exist to the lower court if its erroneous assumption that “*her current submissions do not suggest any change in heart*” as to leaving Minnesota and Isaac behind, were correct.

And this trial court’s error of law then is also repeated on the same Footnote 2 (AA-17) :

“this no doubt will be a very unfortunate situation for petitioner [to leave Isaac behind in Minnesota to live with her husband in NYC] but the question here is whether there has been a substantial change in circumstances that impacts Isaac, not whether there has been a change that impacts or will impact Petitioner” .

This error of law by the lower court in excluding change of circumstances to the appellant is flagrant against the statute and all existing case law on this point, as previous cases even mention custodians instead of parties . Yet, such widely reading of the statute for what it clearly states is also upheld in Geibe v. Geibe, 571 N.W.2d 774 (Minn.App.,1997) amongst

many other cases cited elsewhere in this brief.

POINT II :

DISTRICT COURT'S ERRONEOUS FINDING OF FACT AS TO THE EXPRESSED CHILD'S WISHES ON HIS RELOCATION TO NEW YORK CONSTITUTES AN ABUSE OF DISCRETION AND SAID STATEMENT OF THE CHILD, AS CONVEYED TO THE APPELLANT, MUST BE ASSUMED TO BE TRUE UNLESS PROVEN OTHERWISE AT AN EVIDENTIARY HEARING, WHICH WAS WRONGFULLY DENIED HERE.

When appellant informed Isaac as to her impending remarriage and relocating to New York , she asked what Isaac wants to do. Isaac's clear and unequivocal desire was to favor and be part of the relocation to New York, as included on the motion record (AA-76). Respondent (AA-128) does not assert that he in turn asked Isaac what he prefers or favors to do, though he had opportunity to do so , and only speculates what Isaac may or may not want based on alleged statements made over 4 years ago. Nowhere does the respondent categorically refute such allegation and the trial court erred in its finding of fact that no *prima facie* case was made on this issue because the appellant stated that Isaac, a 10 year old child used the word "*favours*" instead of "*prefer*" (AA-10/11). The difference made by the trial court between the two words is disingenuous and against the assumption of truth

on the assertions of the party seeking to establish a *prima facie* case, and as such it constitutes an error of law as well and an abuse of discretion in not even granting an evidentiary hearing .

Unlike Knott v. Knott, 418 N.W.2d 505 (Minn.App.,1988) where the lack of an interview by the court on the preference of the child as to custody was not found to be a determinative factor, here the affidavit by petitioner-appellant clearly states that the child **favours** a relocation to New York with his mother, thus leave Minnesota (AA-76) , where the respondent resides. This lack of considering the preference of the child here to remain with the only primary care custodial he ever had, which preference has greater strength as per Geibe v. Geibe,*supra*, as Isaac would remain with her instead of switching custody to the respondent, when supplemented with all other factors and changes of circumstances in this record , per the submitted 15 affidavits on the record, make the trial court's decision not to grant an evidentiary hearing or even a reevaluation relocation prior to the evidentiary hearing an abuse of discretion. For as this Court held in Frauenshuh v. Frauenshuh , 599 N.W.2d 153 (Minn.,1999), the welfare of the child is paramount.

POINT III :

DISTRICT COURT ERRED IN ITS APPLICATION OF *DAILY V. CHERMAK*, BY FAILING TO RECOGNIZE ITS ERROR ON THE 2002 DECREE , WHICH LACKED THE PROPER ANALYSIS AND STATEMENT OF THE REQUIREMENTS SOUGHT TO IMPOSE ON THE APPELLANT AS TO A LOCALE RESTRICTION ON EITHER THE FINDINGS OF FACTS OR CONCLUSIONS OF LAW, AND AS TO ANY CONTINUED NEED FOR MAINTAINING SUCH LOCALE RESTRICTION FOUR YEARS THEREAFTER, BASED ON THE CHANGED CIRCUMSTANCES ESTABLISHED ON THE 2006 MOTION RECORD UNDER THE BEST INTEREST OF THE CHILD STANDARD.

In the recent decision of Dailey v. Chermak, *supra*, this Court held that any discrepancies or lack of statements by the lower court on the previous court order sought to be modified as to either findings of facts or conclusions of law on the need to have a geographical contingent locale restriction, and how such need is directly related to the best interest of the child will render effectively such previous court order *void ab initio* . This Court goes on to state that :

“ The dissolution court’s statements about conditional custody is not in itself a factual finding because it contains no facts and implies no particular facts. Nor is there any reference to, alone an analysis of, a restriction on residency as the child’s best interests in any of the other findings of fact or conclusions of law in the amended judgment and decree”.

“... the maintenance of a particular parenting-time pattern is not a proper basis for a residency restriction, at least in the absence of findings that the maintenance of such pattern serves the child’s best

interests, Auge, 334 N.W.2d at 398”

“Thus we hold that there was no factual finding in the dissolution proceeding to show that conditional custody or restriction on the child’s residence would be in the best interests, and that deficiency renders the conditional-custody statement a nullity.”

Here, the lower court in a memorandum decision on a pre-judgment of divorce relocation motion by the appellant issued on September 6,2001 (AA-40) denied her motion to relocate then to Boston and granted her conditional sole physical custody of Isaac as long as she resided in Minnesota and, in case of non-compliance with such condition, physical custody would be then transferred to the respondent. That 2001 decision is structured under the following categories : Introduction, Analysis, Conclusions. **Hence, this 2001 decision initial order by the trial court is defective in that it does not properly identify findings of facts vis-à-vis conclusions of law supporting the basis for the order,** as required by the holding in Dailey v. Chermak,*supra*, and consequently, and similarly, such order should be found *void ab initio* as well.

Furthermore, when the divorce proceedings were decided without a trial, nine months later, on June 21,2002, as per the same lower court(AA-21) , the trial court did not reevaluate the pre-judgment of divorce findings of fact appropriately to condition the physical custody of the child, merely

referring to an already defective initial order of September 6,2001, in which such conditional physical custody order had been ordered without properly differentiating on such order findings of facts and conclusions of law , as presently held to be required by Dailey v. Chermak,*supra*, and consequently such conditional physical custody part of the divorce decree is *void ab initio* as well. The trial court in the 2006 order under appeal neglects to acknowledge the errors on such previous court orders and instead seeks to justify them by stating that appellant did not claim such procedural error on her 2006 motion record.

Such argument , as per Dailey v. Chermak,*supra*, fails under appeal because this Court reviews errors of law *de novo* . In addition, the 2002 divorce decree in its findings of fact (AA-24) under Section XVI states that:

“The best interests and welfare of Isaac Greenwood will be served if Petitioner is granted sole physical custody subject to reasonable parenting time by respondent. The memorandum decision of this Court dated September 6,2001 is hereby incorporated by reference as if fully set forth herein”.

Hence, this finding of fact contained on the 2002 judgment of divorce is not expressly by itself making such physical custody contingent on the appellant remaining in Minnesota. Instead, it refers to a legally defective

prior order.

As to best interest of the child and a continued locale geographical restriction on the sole physical custody by the appellant, the trial court erroneously stated on a Footnote #3 in its 2006 order that the “*the Court has skipped the best interest analysis*” , and should it be required, implicitly on remand from this appeal , it would reevaluate based on best interests of child(AA-17) . Such erroneous application of the law is underlined by this Court’s decision on Dailey v. Chermak,*supra* :

“ All custody and custody-related rulings must clearly and genuinely consider and give effect to the best interest of the child . In re Custody of N.M.O, 399 N.W.2d 700 (Minn.App., 1987) citing Wallin v. Wallin, 290 Minn.261,264, 187 N.W.2d 627,630(1971)”.

“ We hold that there is no absolute prohibition under Minnesota law against awarding child custody on the condition of maintaining a specific geographic residence for the child , as long as that residence is shown clearly and genuinely to serve the child’s best interests”.

When legal counsel for appellant at the 2006 preliminary hearing beseeched the lower court to find *prima facie* for change of circumstances , on the 2001 criteria initially found to justify the imposition of such condition no longer being applicable(Tr.Pg.28-30), and that no such remaining criteria really met the need for such geographical

condition as per Dailey v. Chermak, *supra*, as this Court held that under “the unique facts of LaChapelle”,

it is conceivable that a custody award might be properly conditioned on maintaining a certain residence because of the availability in that location of special health or educational services that the child particularly needs and that are not readily or inexpensively obtained elsewhere”,

the trial court’s only real factual remaining argument then was asking as to the effect on the visitation rights of the respondent, which in total aggregate about 120 days a year, and such were proposed to be counterbalanced by the appellant with an approximate similar number of visitation days to the respondent both in Minnesota and in New York. Yet, the lower court kept on reiterating incorrectly to a non-existent day-to-day contact with “dad”, and legal counsel for appellant then sought to clarify to the lower court its repeated error in fact (Tr.11,14,27,29). The record is totally devoid in its totality, even in the light most favorable to the trial court standard, to find any unique facts in this case to justify the geographical restriction and condition imposed on the appellant in 2001 and even much less so in 2006 to clearly and genuinely serving the best interests of Isaac as per Minn.Stat,Sec 257.025, as substantial changes of circumstances were amply supported in the motion record.

POINT IV:

DISTRICT COURT'S EVALUATION OF CHANGE OF CIRCUMSTANCES AS PRESENTED BY THE MOTION RECORD IS FACTUALLY INCOMPLETE ON THE FACTORS IDENTIFIED FOR THE *LACHAPELLE* LOCALE RESTRICTION IMPOSED ON THE APPELLANT BY THE 2001 PRE-JUDGMENT OF DIVORCE COURT ORDER, AS WELL AS FACTUALLY ERRONEOUS BASED ON THE FACTS PRESENTED ON THE FOUR CORNERS OF THE ENTIRE 2006 MOTION RECORD

The lower court additionally erred in factual findings and application of the law on the instant 2006 custody modification motion by not reevaluating all the criteria initially found to be “*unique*” to this case in 2001, which would require the exceptional imposition of such conditional physical custody award, **based on the facts existing in 2006**, and whether such remaining criteria in 2006 now justify to have such conditional physical custody order modified, **based on the best interest of the child** .

In a section merely labeled “Physical Custody” (AA-60) the trial court in 2001 found the following “unique” criteria in this case which would justify the imposition of a LaChapelle type of conditional geographical restriction on the custody of Isaac:

- 1- Isaac (being then only 4 years old) “....*only recently completed therapy to adjust to two households, a major change in his daily routine would not be consistent with his best interest as long as mother remains available to parent him in Minnesota,*
- 2- *Specific schedule ensures parenting time for father*
- 3- *Both parents engage in counseling , and*

- 4- *Parenting consultant in parenting time expeditor is appointed.*
- 5- *Continuity of these existing arrangements under the circumstances outlined above (with Isaac living in his mother's residence) appears more consistent with Isaac's best interest. "*

Furthermore, in its Footnote # 8 to such order , the lower court stated

(AA-60):

“ If for any reason the LaChapelle locale restriction is found to be wanting, this Court would award sole physical custody to father. It would award sole physical custody to father to ensure that Isaac continues to prosper from his intimate relationships with his father, Seth, Eleni and Heather , does not have to suffer yet another major change in his young life, and could continue with his existing school and religious arrangements”.

It is an undisputed fact in the underlying 2006 motion record that circumstances as criteria found as “*unique*” to this case on 1) above and 3) above are no longer in existence and a that a change of circumstances did occur. Neither the child nor the parents of the child have undergone or needed any counseling now for four (4) years and all is well in the status of the “divorced family”. As to these changes of circumstances , which the lower court acknowledges to have ceased to exist (AA-14) , based on the letter of the psychologist assigned to this case for the child and parents (AA-78), the lower court incredibly and in a rather cavalier statement finds that the child's community, school and both respondent and appellant are

“serving him well”. The lower court does not deny the existence of the change of circumstances in the lack of counseling on either party or Isaac but makes the assumption, without any proof whatsoever on the motion record, that such lack of needed counseling for years now would be required somehow again if Isaac relocated with the appellant. The lower court abuses its discretion here again in not finding a change of circumstances as they exist presently and elevates the burden of petitioner-appellant one step further than the law requires her to go because it states as to these change of circumstances that *“there have been no substantial change here that would suggest the need to go elsewhere.”*

Hence, circumstance 4) was no longer in existence in 2006 at the time of the motion either. Respondent (AA-119) failed to allege any instance of interference with his visitation rights for the last six years, since Isaac is now 10 years of age and not 4 as he was in 2001. Lastly, on item 5), the lower court refused to undertake an analysis of best interest of Isaac as part of the modification motion analysis. It should be noted that the lower court disregarded Auge v. Auge, supra, in this analysis, for such removal may not be denied merely because the move may require an adjustment in the existing pattern of visitation rights. 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”, as per Benson v. Benson, 346 N.W.2d 196 (Minn.App., 1984). In Benson,*supra*, in a case against removal of the child, *prima facie* case was found on the record and evidentiary hearing ordered on appeal based on lower court’s error of not evaluating the best interest of the child. Here, too, the lower court failed to evaluate properly the *prima facie* case of the appellant for relocation and admittedly “*skipped*” the best interest analysis of Isaac.

If criteria for the locale restriction is expanded to include what the trial court stated on its Footnote # 8 to the September 6,2001 initial order (AA-60), the trial court included a justification and not a criteria for his alternate ruling of physical custody that Isaac “*continues to prosper from his intimate relationships with father, Seth , Eleni and Heather* ”. On this point too, there is change of circumstances . The lower court’s analysis of this point (AA-12) is disingenuous as well as misleading because it cites from an analysis section of the 2001 opinion ,which is in discrepancy with the added footnote on the same order. Heather and Eleni Greenwood were specifically made part of Footnote #8 and given equal mentioning and importance, as was their brother Seth Greenwood, as it relates to their

relationships with Isaac. For it is admitted by the respondent that neither Eleni nor Heather reside with him any more in 2006, and as respondent also admits that , starting in Fall of 2006 , Seth will be residing in a local College's dormitory (A-125) (Tr.Pg.11,15). Therefore, none of the three children from a respondent's previous marriage are living at home and that constitutes another major change of circumstances.

And as to Seth's continuation of prosperity of the relationship with Isaac, his half-brother, the lower court uses such terms as "*worshipping*" (2001)(AA-13) and "*idolizing*" (2006), which have absolutely no support for such finding of fact on the 2006 motion record or even the preliminary hearing. After all of these changes of circumstances are properly and correctly identified in 2006, the only remaining criteria of 2001 imposed contingent restriction is the relationship that respondent, as father, has with Isaac, assuming that such relationship was initially valid to impose a geographical conditional custody award .

The lower court's recognition (AA-13) that there is an "*onset of minor changes regarding Isaac's step-sibling interaction since 2001*" and yet such change of circumstances "*do not represent a prima facie case that a substantial change of circumstances has occurred...*" constitutes a clear

abuse of discretion by the lower court in even denying an evidentiary hearing or a relocation evaluation.

Another fabricated fact by the lower court in its 2006 decision from the four corners of the 2006 motion record is that the respondent has a “*thriving*” professional practice in Minnesota and therefore cannot relocate to New York to be with Isaac. Nowhere on the motion record is there any mention on how respondent’s work schedule would either facilitate or impede his changed visitation with Isaac, whom he definitely does not see now on a daily basis, as erroneously pointed out by the lower court on the transcript several times (Tr.Pg.11,14,29).

Additionally, there are changes of circumstances, as per Points I and II, on other factors found by the lower court for imposing the LaChapelle type of conditional restriction as to the lack of communication of Isaac in 2001 when he was then 4 years old (AA-42) as to his preference on custodial parents and the statement then made by the appellant in 2001 that she would never remarry(AA-17). Yet, once again the lower court abused its discretion and ignored these additional changes of circumstances.

The glaring lack of analysis on all these changes of circumstances as they affect Isaac’s best interest is dwarfed against the continuity of him

remaining with the appellant who would only increase or enhance Isaac's educational, social and religious arrangements with her relocation to New York as per third party affidavits submitted in behalf of petitioner-appellant's motion (A-81,92,94, 97,99,101,104, 105,108,111,112, 116) , as further elaborated on Point VI.

POINT V :

DISTRICT COURT ERRED BY FINDING THAT APPELLANT HAD NOT MADE A *PRIMA FACIE* CASE IN THAT SHE MET THE REQUIRED THRESHOLD IN CHANGE OF CIRCUMSTANCES FOR THE MODIFICATION MOTION AND ESTABLISHED THAT SUCH MODIFICATION WOULD SERVE THE BEST INTERESTS OF THE CHILD, AND INSTEAD THE LOWER COURT CREATED AN UNPRECEDENTED UNSUPPORTED HIGHER STANDARD WITHOUT ANY BASIS OR SUPPORT IN EITHER STATUTE OR LAW .

The concept of "*endangerment*" is amorphous, as per Ross v. Ross, 477 N.W.2d 753 (Minn.App., 1991) and Koivisto v. Koivisto, 2001 WL 641755 (Minn.App.,2001). Its existence is determined based on the particular circumstances of each case, as per Sharp v. Bilbro, 614 N.W.2d 260 (Minn.App., 2000). Here, the circumstances are without any precedent whatsoever in Minnesota. For the change of custody provisions sought here is not from parent "A" to parent "B" , but instead from parent "A" to parent "A" without any locale restrictions imposed as per the

judgment decree of 2002(AA-21).

The lower court here erroneously advocates the adoption of an unpublished opinion of this Court : Swarthout v. Swarthout., Unpublished Decision (Minn.App.2001) 2001 WL 766870. . In dismissing any support of any unpublished opinion by this Court , this Court in Dailey v.

Chernak,*supra*, stated that :

“*unpublished opinions have no precedential effect.*
Minn.Stat.Sec..480A.08 Subd. 3 (2004)”.

Swarthout v. Swarthout.,*supra*, is inapplicable here because the holding there was that no modification motion of the original judgment could be entertained under Minn.Stat.Sec. 518.18(a) if such motion is brought within one year of the initial award, which was done in that case, unless 518.18(c) would be met on the endangerment of the child or that there has been a persistent and willful denial or interference with visitation, which standard then the appellant in that case did not meet either. The trial court erroneously asserts that *dicta* in this unpublished case of this Court, even if such holding deals instead with the burden of overcoming Minn.Stat.Sec. 518.18(a) , which is clearly not applicable here, constitutes prevailing law (“*Swarthout imposed the correct burden on parents seeking to lift locale restrictions*”). Such analysis was not even reached on

Swarthout v. Swarthout,*supra*, Its *dicta* that the Auge presumption does not apply to cases when switching custody based on non-compliance with locale restrictions , if such is found to be valid by this Court, is in direct contradiction of Geiger v. Geiger, 470 N.W.2d 704, where the Auge presumption was found to be applicable when both parents shared joint legal custody and the appellant there, due to his liberal visitation schedule had even claimed to be *a defacto* joint physical custodian of the children.

The lower court on its advancement of a new legal standard for this very rare type of case with a locale restriction seeks to reverse and undo the logic and analysis of such long standing cases as Silbaugh v. Silbaugh, *supra*, that provides for the presumption of best interest of child on a physical custody parent's application for removal of the state and readily accepts that such best interest of the child, for the relocation is achieved despite the family unit, as already divorced, disruptions and geographical distances. And in Silbaugh, *supra*, the petitioner-movant there also had a restriction on her relocation to another State as prior consent of the other parent or court order was necessary for such relocation. The Court then began its analysis by stating "*that this case requires us to clarify the standard for removal of children to another state when the noncustodial*

parent opposes the move". The Court went on to cite Auge v. Auge, *supra*, on the created implicit presumption that removal would be permitted even in cases where joint custody existed as in Silbaugh v. Silbaugh, *supra*, citing Gordon v. Gordon, 339 N.W.2d 269 (Minn.,1983) and stated that

" to defeat the presumption, the party opposing removal must offer evidence which would establish that the removal is not in the best interest of the child and would endanger the child's health or well being. Sefkow v. Sefkow, 427 N.W.2d 203 (Minn.,1988), or that the removal is intended to interfere with visitation, Minn.Statute Sec. 518.75 subd. 3. "... "In Auge we said unless respondent can make a prima facie case showing against removal , permission to remove may be granted without a full evidentiary hearing ".

Hence, the lower court's concerns that the noncustodial parent may have his visitation rights inconvenienced due to the geographical distance (A-11,14,27) is outweighed by the presumption of continuity and stability for Isaac to remain to with the petitioner-appellant . As the Court in Silbaugh v. Silbaugh, *supra*, stated :

"The Court is mindful of the sense of loss and the worry experienced by noncustodial parents who face the prospect that their children may move to another state and that their visitation arrangements may be significantly altered. However, our concern must be for the Silbaugh children and their need for a sense of stability in their family arrangements. "

Hence, such conclusion of law erroneously presented by the lower court here (AA-8) that LaChapelle locale conditions *".. should be afforded the same initial deference as unconditional awards"* as the Auge presumption

to relocate was extended in Silbaugh v. Siblaugh, supra, **is indeed contrary** to “maintain the child” with the same custodial parent he/she is with all the years of his life, which in this case, is the appellant

On a total new and unsupported presentation of a new rule of law , the trial court then proposes that best interest *de novo* should not be applicable to a LaChapelle conditional custody award as an extension of the Auge presumption as it states (AA-9):

“parents seeking to remove locale restrictions should be required to meet a greater burden of proof than a simple de novo best interest burden”.

This new theory by the lower court is without any foundation on statute or precedent and erroneously claims to be based on the same logic or rationale as Auge v. Auge, supra.

Here, the appellant , the only admittedly primary custodial parent Isaac ever had, maintains a post-divorce family unit . Hence, under Geiger v. Geiger, supra, the new rule of law- presumption rationale advanced by the lower court is clearly erroneous because here there would not be a maintenance of the child in the family unit the child currently belongs. Furthermore, the decision of the relocation on “ *the person best able to consider he child’s needs*” is not the respondent but instead the appellant who

has been his primary caretaker for his entire life and hence the reasons for forming and applying the Auge presumption to a new LaChapelle assumption are clearly erroneous.

The overwhelming consideration in a child-custody dispute is the child's best interest based on Minn. Statute Sec. 518.17, as per Ryg v. Kerkow, 207 N.W.2d 701 (1973). The entire presumption of Auge, is based on concern for stability and continuity with the custodial parent, and such is proven in Sydnes v. Sydnes, 338 N.W.2d 3 (Minn.App.,1986) and such is the best interest of the child as per Frauenschuh v. Giese, *supra*. Consequently, such erroneous creation here by the lower court of a LaChapelle presumption, where continuity and stability of a locale restriction is more fundamental and important than continuity and stability for the child to remain with the same custodial parent, based on rationale of the Auge presumption, is contrary to Min. Stat. Sec. 518.18 and all precedents on this issue, on which this lower court purports to model itself after. Under such erroneous new rule of law authored by the lower court here, this LaChapelle assumption would trump and freeze the best interest of the child at the initial custody determination and would indeed require that

custody shift automatically in the future by changing the physical custodial parent of the child , regardless of new circumstances or the child's best interest and solely be determined by one factor : the relocation of the custodial parent out-of-state.

Still the lower court erroneously clings to the notion that the noncustodial parent's visitation rights together with those of the child's half-brother , who will not admittedly reside in the noncustodial home but instead will be going off to College in the Fall of 2006, more than outweigh the continuity and stability of the child remaining under the same primary care provider this 10 year old boy has had his entire life, (Tr.Pg.11,14,27) (AA-17,19) . This conclusion of the lower court , without an evidentiary hearing , and without considering best interest of the child , per Ftn.#3 (AA-17) is an abuse of discretion.

As per 14 Minn. Prac., Family Law Sec. 6.46 (2nd Ed.):

“There is a two-pronged test that needs to be satisfied in order for the court to entertain a motion for modification of child custody:

- 1. Based upon the facts that have arisen since the prior order or that were unknown to the court at the time of the prior order, a change of circumstances must have occurred in the circumstances of the child or his custodian*
- 2. Modification is necessary to serve the best interests of the child.*

If the threshold test can be met, that is , if it can be shown that a

change of circumstances has occurred , and the modification is necessary to serve the best interests of the child , then an evidentiary hearing is warranted. ”

This Minnesota Practice Series goes to note that after the threshold test is met, with an evidentiary hearing then held, then the court must refuse a modification unless one of three alternative criteria apply with one of them being the child’s present environment endangering his physical or emotional health or impairing his emotional development , and the harm likely to be caused by a change of environment is outweighed by the advantage of the change to the child . **In any event, the endangerment test if at all applicable to the appellant would not need to be satisfied until after the evidentiary hearing** is held and decided upon, which the trial court, in an abuse of discretion, refused to grant here, as per 14 Minn. Prac.Family Law Sec. 6.46 (2nd Ed., 2005). These conclusions were upheld in Harkema v. Harkema, 474 N.W.2d 10 (Minn.App, 1991) where this Court held that :

“Because evidentiary hearings are strongly encouraged, an evidentiary hearing should be held where the trial court already found a change of circumstances and modification is in the boy’s best interests. Where some dispute exists as to whether the present environment endangers the boy’s emotional development, an evidentiary hearing would be helpful and is justified. Whether the underlying facts developed at such a hearing then justify modification is a question left to the discretion of the trial court. Therefore, we reverse and remand for an evidentiary hearing”.

A more recent decision of this Court adopts the decision of Harkema v. Harkema,*supra*, on this issue of a *prima facie* case on a custody modification order and also held that

“..if some dispute exists as to whether the present environment endangers the child’s emotional development, an evidentiary hearing would be helpful and is justified, as per In re Weber, 653 N.W.2d 804 (Minn.App.,2002) .

Here, too , and especially as amplified on Point VI, there is very extensive presentation on the *prima facie* case as to the present environment endangering Isaac, which at least is disputed, and consequently, an evidentiary hearing is justified and helpful in deciding the motion, which the trial court below abused its discretion by denying it altogether.

POINT VI:

DISTRICT COURT’S FINDING OF FACTS ON THE ISSUE OF THE REQUIRED PROOF OF THE PRESENT ENVIRONMENT ENDANGERMENT OF THE CHILD IGNORES THAT APPELLANT DID PRESENT A *PRIMA FACIE* CASE AS A RESULT OF HER LEAVING THE CHILD BEHIND IN THIS STATE AFTER THE PETITIONER-APPELLANT REMARRIES TO LIVE WITH HER HUSBAND IN NEW YORK , OVERLOOKS AND TOTALLY DISREGARDS THE UNREFUTTED SUBMITTED 14 AFFIDAVITS AND THE HARM THAT WOULD COME TO HIM IF CONTINUITY AND STABILITY ARE NOT PROVIDED BY A REQUIRED CHANGE OF THE “*LACHAPELLE*” CREATED ENVIRONMENT, IN THAT THE RESPONDENT IF HE WERE TO ASSUME THE PHYSICAL CUSTODIAL ROLE OF THE CHILD WOULD CAUSE

AN EMOTIONAL HEALTH ENDANGERMENT TO THE CHILD OR THAT SUCH THEN AUTOMATIC UNDER A “LACHAPELLE” CHANGE IN CUSTODY WOULD IMPAIR THE CHILD’S EMOTIONAL DEVELOPMENT .

The underlying motion record clearly indicates that the appellant will relocate to New York upon her upcoming marriage to her current fiancé, a New York State attorney, who is a single parent with two sons who reside with him , and who observes the Orthodox Jewish religion as does the appellant and her son Isaac (AA-75,76). The trial court below , on the appealed order does not preclude the appellant from moving to be with her husband in New York. Instead, the lower court just states that the child must remain in Minnesota without his mother , who has been the only primary care parent Isaac has ever known in his 10 years of life (AA-11), under the “LaChapelle” geographical limitation imposed on her, on criteria found applicable by the court in 2001, and under the same “*environment*” created by the court in 2001 still assumed to be in existence by the lower court in 2006, and where the physical custodianship of the child will be then automatically transferred to the respondent on a simple finding of fact that the appellant no longer resides in Minnesota. This is the “*environment*” the lower court believes the appellant is under Minn.Stat.Sec. 518.18(d)(iv) and then erroneously concludes, in denying the modification motion, that the

petitioner failed to even present a *prima facie* case on the endangerment criteria. Yet, on this point the trial court made both an error of law in not properly applying the balancing test on the detriment and danger to the child on the automatic shift of physical custodial arrangement from mother to father and errors of fact as to the true practicing religion of the child , (A-81,90,94, 96,97, 99,101, 108,110, 115) Isaac, and , as to how will the respondent's conduct and practice of religion, which is not Jewish Orthodox, will affect Isaac's emotional health or how such change would impair Isaac's mental development and the potential harm inflicted on such 10 year old by separating him from his primary care parent, his mother.

For the lower court never undertakes an evaluation and balancing of the lesser of the two harms :

1) **Harm of Isaac moving to New York: Change of environment**

A) A change of visitation schedule for the respondent which does include weekly visitation in both New York , where respondent has a sister living , and in Minnesota, (AA-73) offered per the motion record and which schedule **will still**

give him about the same 120 days annually as he currently enjoys with Isaac, with **the great majority of such days of visitation in Minnesota** , and different visitation opportunities for all three Greenwood half-siblings of Isaac, all over 18 years of age, and none of whom will be residing with the respondent beginning in the Fall of 2006, when the youngest of said half-siblings will not be residing at the home of the respondent , based on the respondent's own affidavits (AA-123-125), as he will be dorming in College locally .

Vis-a- vis benefits or advantages of the change for the child

- 1) Retaining the continuity and stability as the primary care physical parent, the appellant who is admittedly the undisputed primary care parent of the child and has been so for his entire life of 10 years through this date, (AA-10) (AA-91,94,96,97,99,102,103,104,105,108,110,111,116).
- 2) Geometrically increasing child's educational opportunities from the present Orthodox Jewish education he is receiving

at Torah Academy, (AA-80,81,96,97,101,108,115) which the respondent himself has approved and glowingly endorses without reservation, to over 15 (fifteen) such similar schools in the immediate area in NYC (AA-71) where the petitioner-appellant is relocating to live with her future husband and providing greater educational opportunities for Isaac.

Geometrically increasing his social opportunities with much larger number of boys of the same religious practice where he will be attending where grades are a product of population of the 100,000's, in contrast to only six boys with a variety of learning issues at his present school in Minneapolis (AA-72).

- 3) Geometrically increasing his playing team sports where other kids are just like him, wearing special garments called "tzitzis" on their torsos and covering their heads with skullcaps and not having to be embarrassed by either wearing them or having to remove them (AA-69,70).
- 4) Geometrically increasing his enjoyment of amenities, such as Jewish concerts, children's Jewish theater, as well as hundreds of kosher restaurants and pizza places that children

of Isaac's age enjoy(AA-70)

- 5) Allowing access to his two other half-siblings, Josh and Sam Goldman, with whom Isaac does enjoy a very good relationship, and who reside in the East Coast, as well as appellant's extended family (AA-76).
- 6) Not having to go through another motion or proceeding in 2 years hence when the Orthodox Jewish schooling opportunities for Isaac (AA-81) will require him to study outside Minnesota, which the trial court's faulty piecemeal analysis defers the entertaining of this issue again two years henceforth (AA-15) . Even on this analysis, the lower court's piecemeal approach is to ignore the fact that kids adjust to a new environment better at an earlier age and are more likely to form friendships earlier rather than later in life, especially if Isaac is a new sixth grader vis-à-vis a new freshman starting high school .(AA-72)
- 7) Being able to follow role models what Isaac wants to become: an Orthodox Jewish young man . Such opportunity will be provided to him at the home of appellant's husband

in NYC where Isaac has already spent considerable visitation and is extremely happy to be with, especially in the company of the two sons of appellant's fiancée. Isaac follows their example in praying and studying Jewish subjects, an opportunity he presently lacks.(AA-75,114,116)

9) Improve his family outlook to have two adults (AA-75) in the same household who undertake the roles of a traditional family unit instead of being part of a household of a single parent as the respondent will admittedly have no children at all living with him in his house beginning in the Fall of 2006 (AA-123).

10) Decreasing Isaac's "*attending stigma*" (AA-18) of his physical appearance, as Orthodox Jewish by wearing special garments with fringes ("tzitzis") and skullcaps from discomfort and being different, as it is presently in Minneapolis where his community numbers approximately 100 families , to being a member of a significant group numbering in several 100,000 s (AA-

70,80) and where he is not being looked at strangely and causing no discomfort to him. And on this point once again, the lower court makes a bizarre and incomprehensible conclusion when it states that:

“ the fact that Isaac may feel different and stigmatized [by his appearance as an Orthodox Jewish boy] is not the product of the current custodial environment. . Rather , if Isaac is truly stigmatized by his appearance , it necessarily reflects a judgment call by Petitioner that the benefits of meeting Orthodox appearance demands outweigh the attendant stigma. If there is any harm here , it is not causally related to the physical custody environment. Instead it is the product of a decision that is more legal than physical in nature”.

Such remarks by the trial court again reflect insensitivity to the practice of the Orthodox Jewish religion, as it did when it ordered that visitation exchanges take place on the Sabbath (AA-28), reflect lack of comprehension on the beliefs of such religion, and more importantly, a blindness to the great benefit to Isaac by relocating to New York on this religious point alone, which is not the product of a decision that is more legal than physical in nature, as such incomprehensible statement by the lower court is included on the appealed order. Even such part of the decision is contrary to what this Court

stated in Chapman v. Chapman, 352 N.W.2d 437

(Minn.App.,1984).that as a custodial parent, her wishes on matters of religion must be respected by the Court.

2) Harm or endangerment to Isaac if he stays in the present environment upon the appellant's remarriage and relocating to New York City and physical custody being shifted to respondent :

A) Isaac's emotional health will be significantly impaired as he will no longer have daily contact with the only primary care parent he ever had in his entire 10 year life. (AA-71,79,81,94,97,99,102,103,104,105,108,111,112, 116). The trial court's error in fact of ignoring the submitted 14 affidavits from two principals of the school, teachers, parents of friends of the child, friends who attest to the relationship and interaction between the petitioner-appellant and Isaac. (AA-81 – AA- 114). On the other side, respondent has only offered his affidavit in evidence as well as that of his minor son from a prior marriage (A-119-131). More importantly,

the respondent did not even request on a cross-application for the physical custody of Isaac on his cross-motion or responsive motion, further weakening facts not on the record by the lower court's order (AA-117). And it should be pointed out that in Bateman v. Bateman, 382 N.W.2d 240 (Minn.App., 1986) *pet. For rev'w den'd* (1986), this Court held that in a decree where there is an automatic rotation of custody of the children after a specified event, as it was there the passage of 3 years, such arrangement was a *de facto* joint legal custody; such arrangement in that case was erroneous because the parties in Bateman v. Bateman, supra, displayed no ability to cooperate with each other and such *de facto* joint custody award was reversed. In addition, this Court stated that: "*generally, it is not in the best interest of children to unnecessarily change custody*". Here, too, the lower court found no ability to cooperate and yet also created improperly a *de facto* joint custody under which custody will change merely based on a condition imposed over five years ago and the lower court refuses to undertake

a best interest analysis of the child *de novo*, as such is required under the present circumstances. Furthermore, the courts of this State generally disfavor restrictions on a custodial parent's ability to relocate under Geiger v. Geiger, *supra* .

B) While appellant has always been there for Isaac, (AA-80,90,94,96,97,98,99,101,102,103,104,105,107,108,111,112,114,115) and such fact is not refuted by the respondent on the motion , respondent has failed to be with Isaac on all of his scheduled visitations, and has left Isaac under the care of relatives, babysitters, his youngest son then a minor or just friends , and traveled out-of-state without Isaac during those occasions (AA-73) . On none of these occasions, did the respondent request permission of the appellant or inform her as to said circumstances, the appellant only finding about them subsequently. Respondent on his own affidavit admits to doing as claimed by the appellant, but claims that such instances were only four times (AA-129). For even if it is only four times while he was the parent enjoying visitation rights, such

opportunities will only geometrically increase with the respondent overtaking the role of primary care parent and his business and pleasures trips take precedence over the accounting for Isaac's safety and well being. This is another gross error of fact by the lower court who totally ignored this consideration and did not balance it at all.

C) Even Isaac's emotional development will significantly be hampered by his father assuming the role of physical custodial parent as he has demonstrated total disregard for the religious teachings Isaac has been receiving at the school he attends, an Orthodox Jewish school , (AA-73,74,79,81) , which is not denied or refuted by respondent. Though respondent fully endorses, and agrees that Isaac be enrolled at this school (AA-120-121), he purposely engages, during the exercise of his visitation rights, in activities that are forbidden in the Jewish religion , and as taught at that school, such as traveling on the Sabbath and taking his son to non-kosher restaurants (AA-132). The respondent does not deny on the record that he has never

spoken to any of the Jewish Studies teachers at Isaac's school, which comprises half of the education Isaac receives at Torah Academy. The hypocrisy and lack of example set by the respondent perhaps can be excused as necessary exceptions by the child while he is enjoying visitation with the respondent, but the danger to his emotional development will reach a new plateau when the appellant is removed from Isaac's daily routines and he is faced to reconcile the huge changes in his life all by himself, which no psychological analysis or counseling can possibly overcome this religious gap and hypocrisy in his future life. A potential change of schools in Minneapolis would be even more dangerous or catastrophic for Isaac where his Orthodox Jewish education is either discontinued or diminished.

Vis-a- vis benefits or advantages of keeping the environment for

Isaac

- 1) Isaac will remain behind in Minnesota with his father, the respondent, with whom he has reportedly an acceptable relationship as a non-custodial parent and takes him on

various recreational trips, activities and occasionally comes to watch Isaac play ball . The respondent has not participated in any school extracurricular activities for the last three years as admitted on the motion record with all of his allegations, as per motion record of photos and letters when Isaac was in 1st Grade, over 3 (three) years ago.

2) Isaac will stay in the same school environment with the same few friends he has , where some of his best friends have moved away (AA-71). His mother, the appellant will not be there for him on a daily basis for Isaac to attend all extracurricular activities and participate with friendships in the community where the school is located (AA-4,80,88,90,93,96,99,104,105,108,110,112,114). Instead the respondent will drive Isaac to school on a daily basis, Isaac will have difficulty in adjusting to the distance between his new home, several miles away, and the community and friends he has known which is currently within walking

distance.. The respondent failed to include any affidavit in his support from any principal, teacher, friend, neighbor in the community or fellow parents of other children who attend Torah Academy attesting to the different status respondent occupies in such regard vis-à-vis the place the appellant occupies in the school, the synagogue, the religion, the society and the community in general that Isaac is involved on a day-to-day basis. (AA-81-through AA-114).

Consequently, the lower court erred in its findings of facts and its application of the law in the required balancing of the harm and benefit to Isaac. There is no analysis by the trial court of **the resulting advantages and/or disadvantages of each scenario**, which clearly and overwhelmingly favors the appellant to change the present environment of danger to Isaac as to his physical and mental well-being and emotional development when the appellant relocates to New York, as a result of her upcoming marriage, given that the physical custody will be automatically shifted then to the respondent, based on footnote #8 of the 2001 decision by the lower court (AA-60).

Consequently, unlike the facts under Axford v. Axford, 402 N.W.2d

143 (Minn.App., 1987) where the evidentiary hearing was denied based on unsubstantiated allegations on the movant's affidavit on totally different facts and issue of law before the court in that case, the appellant, has fully met here all the elements of a *prima facie* case for modification : 1) change of circumstances of the child or parties , 2) best interest of the child to change environment of the present conditional custody award, if such is found to be valid by this Court, 3) endangerment of keeping the same environment by switching the physical custody to respondent when the appellant marries and moves to New York (leaving Isaac in Minnesota) and 4) harm of keeping the same environment of switched physical custody being outweighed by the benefits of the modification of the custody sought on the motion, as per Chapman v. Chapman, *supra* . In that case , this Court held that a trial court must defer to a custodial parent's decisions on health, education, and religion, unless it determines, after an evidentiary hearing, that failure to limit custodial parent's authority will endanger children's health or development and that modification of visitation are based on best interest of children under Min. Stat. 518.175(5).

Furthermore, under Matson v. Matson, 638 N.W.2d 462 (Minn.App.,2002), any change of parenting time between the parties

requires an evidentiary hearing. Also, per Lutzi v. Lutzi, 485 N.W.2d 311 (Minn.App.,1992) **the loss of a custodial right requires an evidential hearing.** Here, the parenting time will be most significantly altered as a result of the present environment that, if unchanged, the locale restriction placed on the appellant will result in a very significant change of custody and parenting time between the appellant and the respondent as a result of the present 2006,2002 and 2001 orders Trial courts are admonished to and strongly encouraged to grant evidentiary hearings under these circumstances, as per Lilleboe v. Lilleboe, 453 N.W.2d 721 (Minn.App.,1990).

A *prima facie* case of all the above four stated elements for a modification motion is established when the accompanying 15 (fifteen) affidavits demonstrate sufficient facts , which if true, justify modification; there is no requirement of ultimate proof at the setting of the *prima facie* case ,as per Frauenschuh v. Frauenschuh , *supra*, Geibe v. Geibe, *supra*, (no requirement of independent substantiation) , Nice-Peterson v. Nice-Peterson, 310 N.W.2d 471 (Minn.1981), Lewis-Miller v. Ross, 699 N.W.2d 9 (Minn.App.,2005), and Matson v Matson,*supra*. Here, per the very extensive analysis on the above points of best interest of the child, existence of endangerment of the “present environment” of switched custody and the

benefits outweighing the ensuing harm as a result of the modification of the custody order on the relocation of appellant given the change of circumstances for both Isaac and the parties, there is ample proof on the motion record that the *prima facie* case has been established by the appellant and the finding of facts by the lower court on the lack of endangerment to the child of the “present environment” and the lack of change of circumstances (albeit significant) on the child , as erroneously limited by the district court, constitutes an abuse of discretion. For evidentiary hearings are “ *strongly encouraged where there are allegations of present endangerment to a child’s health or emotional well being*”, as per Geibe v. Geibe,*supra* . Even a child’s preference can be used to satisfy the endangerment from an emotional view, as per Geibe v. Geibe,*supra*,_ and Ross v. Ross, *supra*, and again as Point II indicates on this brief the lower court erred on its finding of fact here as to change of circumstances and as to this factor of endangerment of emotional health as well. And in Geibe v. Geibe,*supra*, this Court stated that :

“ In general, however, the case law indicates that a child’s motive for an expression of preference are to be considered at the evidentiary hearing stage rather than in determining whether a prima facie case has been made. See Ross, 477 N.W.2d at 757 (remanding for hearing despite affidavit asserting that child’s preference resulted from desire to live with more lenient parent) ”

POINT VII:

DISTRICT COURT'S ERROR IN LAW OF NOT FINDING THAT THE *LACHAPELLE* LOCALE RESTRICTION IS EITHER INVALID OR NO LONGER NECESSARY NOW, THEN CARRIED OVER TO THE ERROR OF LAW OF NOT APPLYING THE *AUGE* PRESUMPTION TO THE APPELLANT , AND HAVING MET HER BURDEN OF PROOF ON THE RECORD WITHOUT THE RESPONDENT HAVING MET HIS SHIFTED BURDEN OF PROOF AS TO EITHER ENDANGERMENT OF THE CHILD AS A RESULT OF THE RELOCATION OR INTERFERENCE WITH HIS VISITATION RIGHTS, THE CONSEQUENTIQUAL ERROR WAS THEN FAILURE TO GRANT THE RELOCATION MOTION WITHOUT ANY FURTHER COURT PROCEEDINGS

Should this Court find under Dailey v. Chermak, *supra*, that either Points II and or III are meritorious and the LaChapelle conditional restriction is either *void ab initio* or no longer necessary under the present circumstances in 2006 based on the clear evidence of the underlying motion record, the Auge presumption of relocation to the physical custody parent then applies and based on the respondent's failure to meet his shifted burden of proof as to either endangerment of Isaac as a result of the relocation of the appellant to New York on her upcoming remarriage or any interference with his visitation rights , either on the past five years or alleged for the future based on any evidence on the motion record, this Court should then grant the

relocation branch of the motion based on the found errors of law and errors of application of the law of the lower court pursuant to Minn.Stat.Sec. 518.175.

POINT VIII :

THE HISTORY OF THESE PROCEEDINGS REplete WITH ERRORS OF LAW AGAINST THE APPELLANT, SUCH AS THE IMPOSITION OF UNIQUE, UNREASONABLE AND UNPRECEDENTED STANDARDS AGAINST HER, THE DISREGARD AND DISRESPECT SHOWN BY THE TRIAL COURT OF THE PETITIONER'S RELIGIOUS PRACTICES AND OBSERVANCES, AND THE BLATANT DISREGARD OF FACTS IN APPELLANT'S FAVOR BY THE TRIAL COURT, LEAD TO THE INEVITABLE CONCLUSION AS TO THE EXISTENCE OF BIAS AND LACK OF JUDICIAL OBJECTIVITY BY THIS TRIAL COURT, AND SHOULD THIS APPELLATE COURT REMAND THIS CASE FOR FURTHER PROCEEDINGS, THE INTEREST OF JUSTICE REQUIRES THAT SUCH PROCEEDINGS , IF ANY, BE REMANDED TO RAMSEY OR ANY OTHER ADJOINING COUNTY.

The district court stated that this case is only one in two cases on all cases disposed by such court over a period of 10 years where the imposition of a conditional locale restriction on the granting of a physical custody award was applicable Tr.Pg.- 26. Yet, the original LaChapelle provision, as defectively as contained in this case on the 2001 pre-judgment order and the 2002 judgment decree as sought to be included by reference there from

the 2001 order, does not sustain the “*uniqueness*” criteria needed for the imposition of such geographical restriction, see Points III & IV. For counseling could have been provided to the parties and the child anywhere , even in Boston , and there was no requirement that all parties undergo simultaneous group counseling.

Historically in these proceedings, the lower court has consistently and without reason displayed bias on these proceedings against the appellant. Undoubtedly, the entire record of these proceedings shows a definite bias against her on the lower court’ s very selective reference to any facts whatsoever derogatory of her but none whatsoever of the respondent, though there is such abundance on the entire record against the respondent, as detailed below. This district court has furthered ignored the appellant’s religious observances of not traveling on the Sabbath by imposing visitation exchanges specifically on the Sabbath, thus ignoring the appellant’s and child’s religious practices which is different from that of the respondent, as per the judgment decree of 2002(AA-28). Furthermore, though the child’s welfare and best interest is what should prevail, the lower court further displayed his bias against the religious observances and ethnicity of the

appellant by stating at the preliminary hearing that there is no reason why a Jewish evaluator be appointed in this case who would better understand the issues than an evaluator who is not Jewish .Tr.Pg.4-6.

The appellant's veracity was impugned incorrectly on the 2001 record by the same very lower court **based only on** testimony not relevant to Isaac but relevant as to Heather, a step-daughter, with whom there was a "strained relationship" (AA-43). The district court's 2001 discussion of lack of credibility then of the appellant was based on testimony of a neighbor who testified that the appellant had told her allegedly not to use Heather as a babysitter, which the appellant denied, and that of a school volunteer who alleged negative remarks attributed to the appellant on Heather receiving a school award, which the appellant also denied. There is nothing on the 2006 motion record that supports a finding that any such conclusions, as marginally found by the lower court five years ago, are still applicable in 2006. On the contrary, 14 affidavits (AA-81 through AA-114) from two principals , teachers, parents of fellow friends and classmates of Isaac, a Little League coach, Boys Scout's officials , neighbors and friends produced on the appellant's motion record were not refuted by the respondent . Yet, despite this consortium of affidavits from different

sources, and without refutation of all significant and relevant factors to the underlying motion, all supporting the 2006 veracity of the appellant, this trial court though recognizing that “*she has been doing a wonderful job as the primary caretaker* “ (AA-15) shows its bias against the appellant by making reference to “*duplicity*” (Tr.Pg.28) all based on testimony given five years ago on circumstances related to a tense relationship between a step-mother and her oldest stepchild.

Even on the relationships between Isaac and his Greenwood half-siblings, Eleni, Heather and Seth, the lower court treats them as though they were **the only** half-siblings in Isaac’s life, minimizing the relationship between Isaac and his other half-siblings, Josh and Sam Goldman, who live in the East Coast (Tr.Pg.15)(AA-11,12) (AA-60). On the contrary, the motion record reflects that Isaac does have a close, warm and loving relationship with his two Goldman half-siblings (AA-76).

Furthermore, several instances of disregard of visitation rules and exchanges between the parties as displayed by the respondent (AA-73) are condoned and ignored by the lower court. See Point VI(2)(B). Yet, the lower court disregards the wrongful respondent’s practice without a reproach on his lengthy 2006 decision. This again constitutes total bias

against the appellant.

Another instance of expression of bias by the lower court against the appellant is reflected on the trial court's statement that "*airplanes fly both directions*", (AA-14) and expects either the appellant or her future husband to "*commute*" 1,000 miles **and impose such burden on the entire household for** 365 days of the year instead of rearranging the visitation schedule of Isaac with the petitioner for about 120 days , with most time being spent in Minnesota anyways, when Summer, Winter vacations and long weekend holidays are all counted in. The bias, one-sided analysis and approach of the lower court by the same judicial officer repeatedly is clearly inescapable and is palpable all throughout the order appealed and the entire history of these proceedings.

Furthermore, as detailed above on Points I through VII, the lower court has consistently made errors of facts, created or fabricated non-existent facts on the motion record, such as the assumption of facts not on the four corners of the motion record, (previous discussion of "*idolization, worshipped Seth and thriving practice*"), the lower court consistently misapplied the law against the appellant constituting errors of law and should these proceedings be remanded to the same lower court in Hennepin

County or any other court in such county, as this judicial officer is the chief judge of such court, the appellant cannot receive an objective and fair judgment in these proceedings from this judicial officer or from any of the judges he supervises.

POINT IX:

DISTRICT COURT'S IMPOSED BURDENS ON PETITIONER-APPELLANT'S RIGHT TO REMARRY BY REQUIRING HER FUTURE HUSBAND TO COMMUTE 1,000 MILES IN ORDER FOR HER TO MAINTAIN CUSTODY OF THE CHILD IN THIS STATE CONSTITUTES A VIOLATION OF FUNDAMENTAL RIGHTS ENCOMPASSED INTO THE RIGHT OF PRIVACY OF THE DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND SUCH DEPRIVATION, WITHOUT AN EVIDENTIARY HEARING, CONSTITUTES A DENIAL OF DUE PROCESS

Though the respondent does not have day-to-day contact with Isaac, as erroneously and repeatedly suggested by the lower court (Tr.Pg.11,14 & 27) and as when the respondent himself on his affidavit (AA-120) claims that he spends about 145 days of the year with Isaac , the trial court (AA-17) remarks that because the respondent has a "*thriving*" practice in this locality, though no such fact was adduced anywhere on the motion record, he should not have to relocate to New York where the appellant will relocate upon her upcoming remarriage to a New York State attorney. Instead, the lower court suggests that if the appellant wants to

marry this New York State attorney, then he should be commuting daily between New York and Minneapolis in order for the appellant to retain custody of Isaac under the conditional geographic limitation placed on her under the 2001-2002 court orders. Such conclusion of law and facts is reached by the lower court without an evidentiary hearing .

In Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct., 673, 54 L.Ed.2d 618 (1978), citing Massachusetts Board of Retirement v. Burgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) and Loving v. Virginia, 388 U.S.1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) the U.S. Supreme Court held that right to marry is of fundamental importance and any state means to achieve its interests impinging on such fundamental right requires critical examination of such interests . Here, the district court in its assumptions and application of Min.Stat. Sec. 518.18, to the facts of this case, in denying the appellant's relocation with Isaac impinges on her fundamental right to remarry and the due process clause of the Fourteenth Amendment of the United States constitution requires such critical examination of state interests undergo a full evidentiary hearing in order to evaluate the state interests vis-à-vis the fundamental right of privacy and liberty embedded into the Fourteenth Amendment of the United States Constitution.

Unlike LaChapelle v. Mitten, *supra* which involved constitutional claims to travel, equality and privacy and the Equal Protection Clause in general, this case involves a more fundamental right : the right to marry ; this is the most fundamental right, which that case did not relate to .

Neither did LaChapelle v. Mitten, *supra*, involve the denial of due process, when faced with encroachment of such fundamental constitutional rights as it is present here, because in that case an evidentiary hearing had been held. In this case, the trial court erroneously even denied the branch of the motion to undertake a relocation evaluation followed by an evidentiary hearing, which is a clear violation of the due process rights of the appellant as it relates to her fundamental right to marry. If such constitutional right of hers is trumped by the state interest as to the child here remaining in Minnesota, such analysis is needed to determine the critical standard of such state interest after a proper evaluation of Isaac is undertaken and a proper full evidentiary hearing is held, especially since the appellant has been the only primary care parent of this child.

POINT X- DISTRICT COURT ERRED IN LEAVING OPEN ISSUE OF APPOINTMENT OF A SUCCESSOR PARENTING CONSULTANT AS RELIEF REQUESTED ON RESPONDENT'S CROSS-MOTION, AS SUCH WAS CLEARLY MOOT AS OF THE DATE OF THE ORDER APPEALED AND SUCH ORDER IS CLEARLY FINAL ON ALL ISSUES ON BOTH MOTIONS

Respondent's cross-motion to appellant's initial motion on the issues related to modification of the divorce judgment incorrectly requests relief which was moot at the point of the preliminary hearing of March 13,2006 because a previous court order by the same district court dated November 4,2003 had already appointed Gay Rosenthal, **with agreement and consent by the parties**, as the "*Parenting Consultant in this matter*", as the initial parent consultant Lisa Schlesinger had withdrawn by that date. Before the initial filing of the appellant's motion, appellant had even paid the retainer deposit fee to such appointed Parenting Consultant. Since the date of her appointment, the parties have been able to resolve all parenting issues by themselves without the need of a direct intervention of the parenting consultant appointed as agreed by both parties. These undisputed facts were brought to the attention of the district court at the preliminary hearing on March 13,2006 by appellant's legal counsel and respondent's legal counsel did not dispute them or address them at all, clearly rendering the issue of the appointment of a Parenting Consultant and the district court's reply to this point was simply "*Okay*" (Tr. Pg 19). Hence, the order appealed is erroneous on the need of an appointment of a Parenting Consultant and there

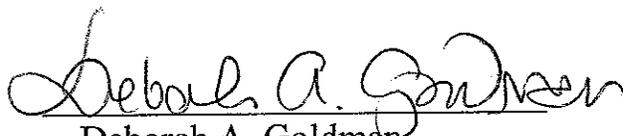
is no further issue to be determined on the order of April 14,2006 as such order is final on all issues that needed to be disposed as of the date of the preliminary hearing on both the appellant's motion and the respondent's cross-motion. Furthermore, the district court did not require additional submissions on the moot point but instead suggested " *that the parties may provide the Court with additional submissions regarding the Court's authority in this area sans the parties' agreement*" (AA-20). Since there was clear agreement here, which was undisputed, the suggestion to the parties here is clearly an error of fact and a disposition of this error of fact by the lower court must have been disposed already by such trial court 81 days after the issuance of such erroneous portion of the appealed court order. In addition, the lower court had even disclaimed authority to compel the parties to a parenting consultant rendering such relief improper and not within its jurisdiction to adjudicate again rendering the court order of April 14,2006 final on all issues it had jurisdiction over.

CONCLUSION

In summary, due to the extensive and comprehensive assemblage of errors of law by the lower court and the abuse of discretion and errors of facts on the appealed order, the appealed order , which is final on all issues

that needed relief, ought to be reversed in its entirety and the appellant given consent to relocate with the child with a revised visitation schedule to be worked out , and alternatively, should additional court proceedings be required , in view of the clear bias of the district court's judicial officer in Hennepin County, such proceedings are requested to be remanded to Family Court of either Ramsey County or another adjoining county in the interests of judicial efficiency and justice.

July 3 , 2006


Deborah A. Goldman
Appellant Pro Se

CERTIFICATE OF COMPLIANCE

PURSUANT TO MINN.R.CIV.APP.P. 132.01 Sub.3(a)(1)

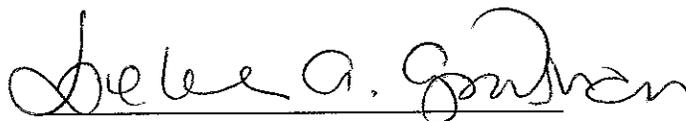
The foregoing appellant's brief was prepared on a computer using Microsoft Word 2000. A proportionally spaced typeface was used as follows:

Name of Typeface: Times New Roman

Point Size : 14

Line Spacing : Double

The total number of words in this appellant's brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations , proof of service, certificate of compliance or any addendum containing statutes , rules , regulations, etc. and any appendix, is 13,965.



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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).