

NO. A06-1110

State of Minnesota
In Court of Appeals

In Re the Marriage of:

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

MARK E. GREENWOOD,
Respondent.

APPELLANT'S REPLY BRIEF

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POINT I - RESPONDENT'S ADMISSION OF ERROR OF LAW BY TRIAL COURT ON APPLICATION OF MINN.STATUTE SEC. 518.18(D) ON ITS EVALUATION OF CHANGE OF CIRCUMSTANCES BEING ALSO APPLICABLE TO PARTIES' CHANGES SEEKS TO MISREPRESENT AND DISGUISE THE RELATED FACTUAL FINDING BY SUCH TRIAL COURT THAT THE REMARRIAGE OF THE APPELLANT DOES CONSTITUTE A SIGNIFICANT CHANGE OF CIRCUMSTANCES

Respondent does recognize that the provisions of Minn. Statute Sec. 518.18(d) provide for the consideration of changes in circumstances of the parties or the child on a custody modification motion (R.B. Pg. 13), thus recognizing the validity of Point I of the appellant's brief that the district court stated in error that only changes of circumstances of a child must be considered in its evaluation. However, respondent then distorts the appeal's record by stating that such change of circumstances of the appellant was considered not to be substantial by the district court (R.B.Pg.16). On the contrary, the district court found such change of circumstances as indeed real as per footnote 2 but erroneously limited its analysis to the child only (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 is whether there has been a substantial change of circumstances that impacts Isaac, not whether there has been a change that impacts or will impact Petitioner”.

Also the court did state “...*they represent a change in Petitioner’s circumstances*” (AA-14). Point I of the brief remains unchallenged by the respondent’s brief and therefore constitutes a significant change of circumstances just as the same judicial officer did recognize in 2001 the Appellant had stated on the record that she would not remarry, and now she has changed her marital status (A.B.Pg.15). The district court therefore did consider that the petitioner would relocate to New York without Isaac, contrary to the misrepresentations of respondent on his brief (AA-17). The district court considered this eventuality and the respondent cannot claim on appeal that such consideration is out of bounds on this appeal. Respondent on his brief even acquiesces that there is no statement on the motion record that appellant would not move away from Minnesota without Isaac (R.B.Pg.16) and the district court thus assumed correctly on its analysis that such eventuality may indeed occur (AA-17) but failed to fully evaluate the true endangerment and harm caused by such moving vis-à-vis the benefits of allowing such relocation of the child with the appellant to New York. The proposal by the respondent that both appellant and her husband commute back and forth from New York to Minnesota even disregards the consequential disruption on Isaac’s life by such shuffling of his primary care taker and her husband .

These circumstances are not the circumstances in 2001 when Appellant sought to relocate to Boston when there was no engagement or husband , contrary to the false assertions by the respondent (R.B.Pg. 17). The appeal record did contain such evidence, contrary to respondent's false assertions, that the appellant here in 2006 lacked flexibility on remaining in Minnesota as the trial court was appraised that her then future husband was an attorney in New York State with a sole practice and that he lived with his two sons in New York (AA-75) in addition to having Josh Goldman, appellant's son , now relocating to New York City (AA-76) as well as her other son Samuel Goldman relocating to being just a few hours driving distance away from New York City (AA-76). The trial court fully understood that these different circumstances as to her choices on moving away from Isaac in case the motion be denied and specifically addressed such "*dilemma*" (AA-17) of the appellant on the court order appealed.

POINT II - RESPONDENT CONCEDES, BY HIS FAILURE TO ADDRESS POINT II OF THE APPELLANT'S BRIEF, AS TO ISAAC'S EXPRESSED DESIRE , AS CONVEYED BY APPELLANT, THAT THERE HAS BEEN AN ABUSE OF DISCRETION IN DENYING AN EVIDENTIARY HEARING REGARDING THE CHILD'S PREFERENCE

Though Respondent's brief admits that the appeal record contains the statement by Isaac conveyed to the Appellant (R.B.Pg. 14) that he "*wants to move from Minnesota to New York..*" (Tr.Pg. 27)., Respondent then omits any further discussion of this change of circumstances of this 10 year old child vis-à-vis the 2001 circumstances when this child was 4 years old and could not then express a preference as to relocation . Hence, the legal analysis as contained on Appellant's brief Point II remains unchallenged by the Respondent and must be admittedly correct that another substantial change of circumstances was evinced on the appeal record and that the district court abused its discretion by denying at least an evidentiary hearing on this issue, since we are dealing with Isaac's own future and his wishes must be considered. And respondent's brief (R.B.Pg. 19) is again false and fails to account that there is no statement or proof on the appeal record denying that such preference was expressed by Isaac to the appellant . (AA-76-77)

The judicial officer, whose order is being appealed, contradicts himself based on a recent seminar he supervised and authored the related outline, as per Relocation/Removal Law in Minnesota, by *Hon. Judge James T. Swenson and Lisa Bachmeier*, February 16, 2006, where he stated that “ *the children’s preference to move or stay in Minnesota could play a key role....Even if the child is not yet an older teenage child, the child’s preference is still entitled to significant weight at ten years of age, ... Steinke v. Steinke, 428 N.W.2d 579 (Minn.App.,1988)...*” Here, Isaac is a mature 10 years old child and this same judicial officer disregarded his own rules in not even providing an opportunity for such evaluation hearing to determine Isaac’s preferences as related to Appellant, which Respondent never categorically denied on the appeal record, as falsely presented now on respondent’s brief.

POINT III- NOT ONLY DOES RESPONDENT ADMIT TO CHANGES OF CIRCUMSTANCES EXISTING ON POINTS I & II ABOVE AS TO REMARRIAGE OF APPELLANT AND ISAAC’S EXPRESSED PREFERENCE TO RELOCATE BUT ALSO ADMITS TO CHANGE OF CIRCUMSTANCES IN LACK OF PSYCHOLOGICAL COUNSELING SINCE 2001, IN ADDITION TO THE LACK OF ANY HALF-SIBLINGS CURRENTLY LIVING AT HOME OF RESPONDENT IN CONTRAST TO 2001 WHEN TWO OF THEM RESIDED THERE, AND THAT THE FOUR YEAR OLD CHILD IS NOW A 10 YEAR OLD PRACTICING ORTHODOX JEWISH CHILD

As per footnotes on respondent's brief (R.B.Pg. 15 & 22), Respondent admits that "*he [Isaac] no longer is attending therapy*". This constitutes another change of circumstances that respondent seeks to bury on his brief's footnotes , while falsely misrepresenting that "*appellant alleges that there have been two changes of circumstances (i.e Seth graduating from high school and Appellant's engagement)..*" **This constitutes a serious misrepresentation of the appeal record and of the appellant's brief , as evinced by changes of circumstances on Points I , II and these two additional changes as to lack of psychological counseling and lack of half-siblings living at respondent's home . Hence, there are at least four (4) significant change of circumstances, which are undenied by respondent. While in 2001, the respondent had two children of a previous marriage living with him at home, now there is none, as all three of his children are either in College or Graduate School and living outside his home (R.B.Pg. 16).**

In addition, respondent does not deny a fifth change of circumstances in that the 4 year old child of 2001 who did not know much about religion is now a full practicing mature 10 year Orthodox Jewish child, whose religion absorbs and imbues every facet of his life, such as praying daily

three times a day , to eating only at certain places and certain food, to dressing with special garments and skullcap and to what he thinks and believes in.(AA-66-117)

Furthermore, the required counseling for both parents has not been found to be required for over three years and the new parenting consultant appointed about three years ago has not been required at all to hold any sessions, as such conditions were found to exist in 2001 for the imposition of a residential restriction (A.B.Pg. 63-64).

POINT IV – RESPONDENT DOES NOT DENY THAT THE 2001 DECISION INCORPORATED BY REFERENCE ONLY IN THE 2002 DIVORCE DECREE LACKS THE PROPER IDENTIFICATION OF FINDINGS OF FACTS VIS-À-VIS CONCLUSIONS OF LAW ON THE *LACHAPELLE* RESIDENTIAL RESTRICTION SOUGHT TO BE IMPOSED ON THE SOLE PHYSICAL CUSTODY AWARD TO THE APPELLANT BUT INCORRECTLY STATES THAT ANY *VOID AB INITIO* CHALLENGE IS LOST BECAUSE IT WAS NOT PRESENTED AT THE TRIAL COURT LEVEL

Unlike Dailey v. Chermak, 709 N.W.2d 626 (Minn.App. 2006) where there were properly defined sections for findings of facts and conclusions of law , this case' s 2001 decision seeking to impose a residential restriction on the custody award of the appellant as improperly incorporated by reference only through the

2002 judgment decree, lacks either section defined as such, as per the appellant's brief Pg. 19 and AA-40 . Once again this fact is not denied by respondent (R.B.Pgs.6-7) . Instead, respondent claims that it was clear to all , including the appellant , that such residential restriction had been found there and applied to this award of custody forever. And on footnote # 2 (R.B.Pg. 2) Respondent argues that because such present appeal's claim that this clear and obvious defect should render the 2002 judgment *void ab initio* was not orally argued on March 13,2006, the date the motions were heard, such argument cannot be raised on first instance at the appeal level, citing Thiele v. Stich, 425 N.W.2d 580 (Minn.,1988). This cited case by Respondent deals with a claim of statute of limitations and personal jurisdiction on service of a defendant not having been raised at the trial court and not being part of the trial record and instead raised for the first time at the appeal level. Here, on the contrary, the issue of the applicability of Dailey v. Chermak,*supra*, to this case was argued by trial counsel for appellant , as per the transcript record (Tr. Pg. 8-16,26). Furthermore, the 2001 decision was part of the motion record (AA-40) and such clear and obvious defects of lacking findings of facts and conclusions of law as required by Dailey v. Chermak, *supra*, is evident from the motion and appeal record. In addition, this is not an issue of personal jurisdiction not raised

at the trial court below, assuming *arguendo*, but instead a fatal defect that renders the 2001 court order and consequently the 2002 judgment decree of divorce *void ab initio* as to the imposition of a residential restriction, and such conclusion of law is appropriate to be derived at an appeal without having been raised at the trial court below, such as when a court lacks subject matter jurisdiction (instead of lacking personal jurisdiction). This is just basic black letter law . For certainly, in Dailey v. Chermak, *supra*, there is no mention of *void ab initio* arguments on the parties' briefs presented before this Court ; instead , it was a proper and valid conclusion of law as to the holding of that case as derived by basic application of black letter law.

Lest not be forgotten that this Court under Minn.R.Civ. App.P. 103.04 has discretion, in any event, to address any issue that the interest of justice may require. And just because appellant's counsel may have raised one argument under Dailey v. Chermak, *supra*, and not the other basic argument of such holding at oral argument, though contained on the appeal record and on the notice of motion for relief as though a motion for relocation under Minn.Statute Sec. 518.175, subd. 3 (AA-63) when asking on par. 2 of such motion which is separate from par. 1 relief as to a possible *La Chapelle locale* restriction, which

may found to be valid despite the stated defect and despite the lack of best interest still in effect for such possible residential restriction five years after it was imposed on the appellant in 2001, such review responsibility should not be diluted by legal counsel's oversights or failure to specify issues on oral argument , as per Greenbush State Bank v. Stephens, 436 N.W.2d 303 (Minn.App.,1990).

The Respondent states (R.B.Pg. 5) that *the findings of fact and conclusions of law of the parties' Decree are consistent..*” They are consistent because both sections of the 2002 decree refer to the same unspecified portion of a 2001 decision , which could be a finding of fact, a conclusion of law, or both or a hybrid. Such defect in issuing court orders constitutes a fatal defect rendering it *void ab initio*, and the party must not be left with any uncertainty as to what it means and what legal force it entails, specifically as to a restriction of residence so unique and so harshly applied to appellant in this case, that this judicial officer in 10 years of the bench only applied in one other instance (Tr.Pg.26). The 2002 decree does not specifically state anywhere that the residential restriction on a *LaChapelle type* would remain forever and that custody would shift to respondent upon relocation by the appellant. Instead, it just states a language that any parent seeking relocation

permission from the court would expect. (AA-21)

POINT V – RESPONDENT’S BRIEF FAILS TO ADDRESS THE ERROR OF LAW AND FACT BY THE DISTRICT COURT IN NOT REEVALUATING THE *UNIQUE FACTS* FOUND TO BE EXISTING IN 2001 FOR A RESIDENTIAL RESTRICTION BASED ON CHANGED CIRCUMSTANCES PRESENTED ON THE 2006 MOTION RECORD WHICH WOULD SERVE THE BEST INTERESTS OF ISAAC IN 2006 AS OPPOSED TO 2001, AS PER DAILEY v. CHERMAK, *SUPRA*

Respondent’ analysis of Point III by appellant’s brief (R.B.Pgs.7-8) somehow never leaves 2001 and does not address the changes of circumstances on the unique facts found by the trial court in 2001 which necessitated the imposition of a residential restriction on the appellant and the child to Minnesota, as required to be undertaken by Dailey v. Chermak, *supra*, under a best interest analysis. Appellant’s brief on such Point III does not even raise the issue of a collateral attack to the judgment decree as falsely claimed by respondent on his brief. And respondent does not even address on this point why skipping the best interest analysis as claimed by the lower court was appropriate as to the analysis on Dailey v. Chermak, *supra*. This entire argument was presented at oral argument on March 13,2006 (Tr.Pg.8-16,26) and resulted on an another error of law by the district court which is presented on appellant’s brief Points II,III and IV.

POINT VI- RESPONDENT DOES NOT ADDRESS THE POINT THAT THE INITIAL PHYSICAL AWARD CONTINGENT ON RESIDENCE MAY BE CONSIDERED AN IMPROPER AWARD OF JOINT CUSTODY, WHICH THESE CIRCUMSTANCES IN 2001 SPECIFICALLY PRECLUDED AND AS SUCH IT MUST BE *VOID AB INITIO*

Respondent fails to address the holding in Bateman v. Bateman, 382 N.W.2d 240 (Minn.App., 1986)*pet. For rev'w den'd* (1986) which ruled that a custody award on rotation based on a specified event was a *de facto* joint legal custody, and as such it was nullified. On March 13,2006, the trial court confirmed this special custody arrangement ordered in this case as stronger than a mere *LaChapelle* type and that custody would automatically shift here in case of removal from the state (Tr. Pg.26). The unique 2001 order in this case has precisely the same effect here, for it changes custody award based on change of residence out of the state. Such conditional award is not permissible when parties such as these two parties here in 2001 needed the services of a parenting consultant to aid them resolve their differences (AA-21 & AA-40). Hence, the 2001 conditional award based on residence incorporated into the 2002 decree is null and void here (A.B.Pg. 46) .

POINT VII- RESPONDENT ALSO FAILS TO ADDRESS ALL ARGUMENTS PRESENTED BY APPELLANT OF CHANGE IN PARENTING TIME AND CHANGE OF CUSTODIAL PARENT REQUIRING AN EVIDENTIARY HEARING

The authorities cited by appellant on her brief (A.B.Pg. 52/53) on this point that an evidentiary hearing is required when substantial parenting time or custodial award is being changed is again totally disregarded by the respondent and ought be assumed to be correct .

POINT VIII- RESPONDENT , IN HIS POINT III AS TO RELOCATION MOTION BEING PROPERLY TREATED UNDER MINN.STAT.SEC. 518.18(d) INSTEAD OF UNDER MINN.STAT.SEC. 518.175 Sub.3, FAILED TO ADDRESS THE RECENT CHANGES OF SUCH STATUTES IN 2006 AND THE DISTRICT COURT'S KNOWLEDGE WITH CERTAINTY THAT SUCH LEGISLATION INCLUDING BEST INTEREST ANALYSIS WOULD BE REQUIRED AND , DESPITE SUCH KNOWLEDGE, THE DISTRICT COURT SKIPPED ITS BEST INTEREST ANALYSIS IN THIS RELOCATION MOTION.

Respondent on his brief (R.B.Pg. 12) states that in the case a parent seeks to remove the child from the state as is the case here “ *the appropriate standard of proof is endangerment and not a simple de novo best interest burden*” . Yet, Respondent fails to address the amendment of the law incorporating exactly the opposite conclusion . Respondent’s assertions as to best interest analysis based on Minn.Stat.Sec. 518.17 now also need further modification and are not correct on

the position of respondent's brief on this point either.

As of May 30, 2006, Minn.Stat.Sec. 518.175 Sub. 3 has been amended to state that :

“ The parent with whom the child resides shall not move the residence of the child to another state except upon order of the court or with the consent of the other parent, if the other parent has been given parenting time by the decree. If the purpose of the move is to interfere with parenting time given to the other parent by the decree, the court shall not permit the child's residence to be moved to another state.

The Court shall apply a best interests standard when considering the request of the parent with whom the child resides to move the child's best interest to another state. The factors the court must consider in determining the child's best interest interests include, but are not limited to:

- (1) the nature , quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the nonrelocating person, siblings, and other significant persons in the child's life;*
- (2) the age, development stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;*
- (3) the feasibility of preserving the relationship between the nonrelocating person and the child through suitable parenting time arrangements, considering the logistics and financial circumstances of the parties;*
- (4) the child's preferences, taking into consideration the age and maturity of the child;*
- (5) whether there is an established pattern of conduct of person seeking the relocation either to promote or thwart the relationship of the child and the nonrelocating person;*
- (6) whether the relocation of the child will enhance the general quality of life for the custodial parent seeking to relocation of the child including, but not limited to financial or emotional benefit or educational opportunity;*

- (7) *the reasons of each person for seeking or opposing the relocation; and*
- (8) *the effect on the safety and welfare of the child, or of the parent requesting to move the child's residence, of domestic abuse, as defined in Section 5188.01.*

The burden of proof is upon the parent requesting to move the residence of the child to another state , except that if the court finds the existence of domestic abuse between the parents, the burden of proof is upon the parent opposing the move. The court must consider all of the factors in this subdivision in determining the best interest of the child”.

In this case the appellant's brief already addresses all of these points based on the facts of this case and how the best interest of Isaac would support such relocation including Isaac's own preference towards such relocation, as follows, corresponding to each respective item on the statute:

- 1) The nature of the relationship of the appellant to Isaac is that of the only prime caretaker this 10 year old child ever had and the attachment and involvement of Isaac to her is attested in detail on the 15 (fifteen) affidavits produced on the appeal record (AA-66-117). She exclusively spends 2 out of 3 days with Isaac , with respondent having the remaining one third. Isaac has relationships with his much older half-siblings (eight to nine years older) born to the parties from previous marriages, Seth Greenwood, to a lesser extent Eleni and Heather Greenwood, who do not live in Minnesota,

as well as Josh Goldman and Sam Goldman who presently live in New York or within driving distance from New York. None of the other extended family members of Isaac has any special relationship with him.

- 2) Isaac, being 10 years of age, has special need of a very close relationship with his mother, the appellant, living in an Orthodox Jewish community, related school covering the curriculum secular and non-secular, a nearby synagogue within walking distance and friends he derives exclusively from these circles (AA66-117). His relocation to New York will geometrically increase his educational and social opportunities as his present community numbers less than 1,000 members in the entire city of Minneapolis, while New York City has such Orthodox Jewish community numbering in several 100,000s members.
- 3) The feasibility of keeping Isaac's relationship with respondent for the twice a month visitations, similar to the ones they presently enjoy, is enhanced because the respondent is a dentist with his own practice, which obviously can be injected with flexibility of the

appointments he keeps with his patients. In addition, respondent does have a sister living in the New York City area, where he could stay during these visitations. These facts are unrefuted at the appeal record. Finally, also unrefuted, is the fact that none of the respondent's other children will be living at home, again providing him the needed flexibility to travel to New York for the weekend visitations with Isaac. Obviously, in a few years, some weekend visitations may be shifted to Minneapolis.

- 4) For the child preferences – see Point II of the appellant's brief, which are clearly for the relocation to New York.
- 5) There is no allegation of interference with visitation rights by respondent on the appeal record. Instead, appellant has clearly stated and acted to encourage the fostering of the relationship between Isaac and the respondent.
- 6) The relocation will clearly enhance the quality of life of the appellant as it will enable her to live with her fiancée/husband, and live in close proximity to her two other sons, Josh Goldman and Sam Goldman as well as her mother and sister. The relocation will also increase significantly her earning capacity in her profession, to

where she already had been offered positions at higher salaries and compensation than she presently receives. The relocation will also enhance her life which she presently enjoys as a single parent not having another mature member of the household assisting and helping her on all daily activities. Such living in a house with a future husband is the traditional role of family which will also enhance the quality of life of Isaac, specially as it relates to his education and religious upbringing in the same religion he presently practices. (AA-66 – AA-117).

- 7) The relocation is sought by the appellant due to her remarriage to a New York State attorney, who lives with his two own sons at his home, and to increase the quality of Isaac's education, social opportunities , while respondent claims that the physical distance during non-visitations periods will affect his relationship with Isaac.
- 8) This factor is not applicable to this case.

It must be noted that the judicial officer who issued the court order being appealed skipped the best interest analysis did know about this legislation being enacted and still disregarded it in writing the court order

appealed where endangerment standard and not best interest analysis was undertaken on the application to move by a custodial parent. For in Relocation/Removal Law in Minnesota, by *Hon. Judge James T.Swenson and Lisa Bachmeier* , February 16,2006 stated as to the conflict of either applying the endangerment test or the best interest of the child that :

Possible Legislative Relief

During the 2005 legislative session , H.F. No. 761 and S.F.No. 64 were both passed by wide margins: 124-9 and 56-9, respectively. The bill was included in the family law omnibus bill that never got out of conference committee during the year-end debacle. The key operative language is as follows:

The court shall apply a best interest standard when considering the request of a parent with whom the child resides to move the child's residence to another state.

A copy of the legislation is attached ”.

And indeed the final version of the Minn.Stat.Sec. 518.1705 sub 3 was attached and is in the exactly the same version as recently enacted on May 30,2006.

This disregard by this judicial officer as to what standards he should apply in this case once again reveal the bias displayed against the appellant in six years of litigation and appearances before that trial court in Hennepin County.

If the effect of this legislation is to potentially nullify the Auge presumption , there is now a burden of proof by the custodial parent seeking to move and consequently any derivate novel new law rule as a LaChapelle presumption that the district court sought to create here in the appealed order for skipping best interest analysis, even if the motion were under Minn.Stat.Sec. 518.18 instead of Minn.Stat.Sec. 518.1705 sub 3 , must also be discarded .

Under this amendment to the statute, best interest of the child needs to be reevaluated based on the criteria identified and it is therefore not set on cement back to the initial determination of 2001, as erroneously stated by respondent on R.B. Pg. 10. Hence, the trial court's error in denying a *de novo best interest analysis* as supported by respondent (R.B.Pg. 11) does not support the notion of having a *LaChapelle* presumption similar to the *Auge* presumption when there is no residency limitation as to the custody award..

The argument presented by respondent (R.B.Pg. 12) that such *de novo best interest analysis* should not be implemented because judicial officers deciding such motions are not usually the same judicial officers initially

imposing such residential restrictions on the appellant belies the truth of the appeal record in that this particular judicial officer is the same who issued court orders in this proceeding in 2000,2001, 2002, 2003 and 2006, and that in his 10 year at the bench he only imposed such residency restriction on only one other litigant.

Furthermore, respondent fails to address the existing parenting consultant agreement as incorporated through the 2002 judgment decree where it was agreed that best interest analysis would be followed by the parties (AA-28). This only magnifies even more why the district court erred in admittedly skipping best interest analysis on the appealed court order.

POINT IX- DISTORTED ANALYSIS OF CHANGE OF CIRCUMSTANCES BY RESPONDENT IS NOT SUPPORTED BY THE APPEAL RECORD AND HAS NO REFERENCES TO THE APPEAL RECORD AND MUST BE DISREGARDED

On Point IV of his brief , Pages 14/15 , Respondent enumerates 17 items that are stated incorrectly not to have changed since 2001 by the trial court on its April 14,2006 order. This analysis is flawed and must be disregarded as it lacks any reference to a specific part of the appealed court order and it is substantially incorrect. For instance, item 17 claims that the appellant demonstrated a less than strong disposition to encourage frequent contact

between Isaac and respondent, which is false and unsupported by the appeal record (AA-72). Even the respondent's motion submissions failed to allege interference with visitation rights (AA-119). Another instance of this significant distortion of the appeal record is item 12 where the district court is claimed not to have concerns regarding the mental and physical health of the parties either in 2001 or 2006, which again is false as both parties were ordered to undergo counseling in 2001 and no such counseling has been found needed for several years now (AA-40). Almost all of these 17 so called no "changes of circumstances" are similarly seriously flawed and must be disregarded. Instead, Points I through III above should be referenced for significant changes of circumstances here.

Furthermore, respondent fails to address Point IV of the appellant's brief on the incomplete analysis by the district court of all the enumerated *LaChapelle* criteria in the 2001 decision and order and how factually erroneous such analysis is in the 2006 appealed court order based on the four corners of the motion record, which is now the appeal record.

POINT X- RESPONDENT FAILED TO ADDRESS THE AUTHORITIES CITED ON POINT V OF THE APPELLANT'S BRIEF SUPPORTING THE CONCLUSION THAT THE THRESHOLD *PRIMA FACIE* CASE HAD BEEN MET HERE BY APPELLANT AND DOES NOT DENY THAT SUCH AUTHORITIES MERELY REQUIRE A CHANGE OF CIRCUMSTANCES AND BEST INTEREST *PRIMA FACIE* CASE IN ORDER TO THEN HOLD AN EVIDENTIARY HEARING

Since there is abundant evidence of change of circumstances which are not denied by the respondent on this appeal and as stated on the appellant's main brief and this reply brief, and in view of the skipped best interest analysis, which is evident that should not have been skipped and has indeed being met by the appellant on a *prima facie* case here, as presented on the appellant's brief, the threshold for an evidentiary hearing had been met and the district court erred in denying such hearing here. The several authorities cited on the main appellant's brief on Point V have not been discussed or denied by the respondent on his brief. Respondent cites one of these authorities for a different reason ignoring other branches of the holding in that case (R.B.Pg.27) and makes the opposite incorrect conclusion of law, unsupported by any authority, on this point (R.B.Pg. 18) where he states that lacking evidence (and not just a *prima facie case*) of endangerment
“...the district court was not required to make

specific findings or undertake the best interest analysis”.

POINT XI – PRESENT JUDICIALLY APPROVED ENVIRONMENT INCLUDES THE SHIFTING OF CUSTODY IN CASE OF RELOCATION AND RESPONDENT FAILS TO ADDRESS ON HIS BRIEF THAT HIS RELATIONSHIP WITH ISAAC IS NOT THAT OF A PRIMARY CARETAKER AND WHEN THAT SHIFT WOULD TAKE PLACE ISAAC’S MENTAL WELL BEING WILL BE ENDANGERED OR HIS EMOTIONAL DEVELOPMENT JEOPARDIZED AS STATED ON THE APPELLANT’S BRIEF

This entire analysis by respondent on Point VI of his brief fails to address the points made by Appellant on Point VI above . The endangerment analysis must be analyzed on the entire present custodial environment as to the effects on the child, as per Relocation/Removal Law in Minnesota, by *Hon. Judge James T.Swenson and Lisa Bachmeier* , February 16,2006, and that such evaluation of “*endangerment can be prospective*” and “*the court need not wait until present manifestation of harm*”. This is the same judicial officer whose court order is being appealed and yet he wrote on that seminar’s outline that “*case law in the relocation/removal context seems to ignore this language nuance [on real endangerment] and focuses instead on whether the move itself will endanger the children*”, “*the disruption and anxiety typically associated with a move is not enough [to deny the move]*”

Respondent's relationship is not at the same level of need and sufficiency as is appellant's to Isaac. To equate both is to disregard the fourteen affidavits on the appeal record (AA-79-117).

Respondent misleads this Court when he asserts that he is involved on the daily activities of Isaac and school, for the Respondent's appendix merely contains a compendium of exhibits dating back mostly to when Isaac was in First Grade or even earlier, while Isaac has just completed the Fourth Grade, though taking Fifth Grade Math and other advanced courses. Hence, respondents' exhibits R-20/21 (over three years old), R-23,R-27 are just newsletters addressed to all parents,R-24/26, R-32,R-34,R-36-37,68,71,72,74,76 (first grade), R-30,R-39 to R-42 (kindergarten), R-44, R-48 (2nd Grade Secular studies), R-45 (General studies conference teacher 3rd Grade), R-50 (4th Grade temporary report progress), R-52 (fifth grade math teacher report). Hence, all of these reports on the respondent's appendix only show that the respondent has spent at most four days of his life in the last three years of schooling of Isaac with secular teachers of Isaac, and only one disciplinary action in the last four years in which he was involved. None of

these exhibits show that the respondent spent any time at all with any of Jewish studies teachers , though Isaac spends over half a day each day in school with such Jewish studies teachers. These exhibits show a total disregard of Isaac's present Jewish education , religious upbringing, which respondent obviously does not care about. These four days of parent teachers conferences in a period of over three years hardly reflect a day to day contact with Isaac and his education, and a relocation to New York will not affect respondent's contacts with his future teachers, if he so chooses in the future.

Respondent claims that appellant should have retained a therapist or expert psychologist without taking notice of the history of these proceedings. For when the appellant did that in 2000 , the lower court berated her for having done so unilaterally and without court approval (AA-43).

Certainly, the respondent fails to properly report the correct proceedings in that endangerment had been provided for in the 14 affidavits supplied on the appeal record stating how attached and dependent Isaac is with

appellant on at least two out of three days of his life, which is when respondent is not with Isaac (Tr.Pg..8,12,-17,26). This argument is not brought for first instance at the appeal, as falsely claimed by respondent on his brief (R.B. Pg. 22) .

The appellant did not need to provide more than a *prima facie* case at the preliminary hearing to support an evidentiary hearing and respondent's repeated assertions that psychological, expert or medical testimony at this stage of the proceeding is needed is without any legal support or any stated precedent by respondent to make such assertions, which would only have brought more ire from a biased judicial officer against her.

Finally on this point of an endangerment *prima facie* case , respondent fails to address the precedents cited on this point that even a child's preference, as is the case per Point II here, can be used to satisfy the endangerment from an emotional point of view (A.B.Pg. 54). Even this same judicial officer whose court order is being appealed endorsed this conclusion in Relocation/Removal Law in Minnesota, by *Hon. Judge James T.Swenson and Lisa Bachmeier* , February 16,2006, when citing Ross v.

Ross, 477 N.W.2d 753 (Minn.App.,1991), which is a case cited by the appellant in his brief, by stating that “ *...a mature teenager’s residential preference may be enough to satisfy the endangerment test, simultaneously qualify as a substantial change of circumstances and supply the requisite best interest showing as well..*” , further citing Eckman v. Eckman , 410 N.W.2d 385 (Minn.App.,1997) and Giebe v. Giebe, 571 N.W.2d 774 (Minn.App., 1997)

POINT XII- RESPONDENT REPEATEDLY MISTATES THE REQUIREMENTS OF A THRESHOLD FOR AN EVIDENTIARY HEARING AS PER POINTS V AND VI OF APPELLANT’S BRIEF

Respondent repeatedly makes such false allegations that appellant seeks to convert him into a Disneyland Dad. Should there be no modification of the present court orders, the Court will convert the Appellant into a “missing Mom” because she will not be with Isaac and Isaac will suffer tremendously by the lack of his primary care taker. Respondent has not filled that role in Isaac’s 10 years of life and it is clearly in Isaac’s best interest to keep her in that role instead of promoting up the respondent as the primary care taker of Isaac. This so self-proclaimed Disneyland Dad would have the same total number of visitation right days as he enjoys now with a relocation to New York by the appellant, but he again seeks to distort the record.. No one

is seeking to remove Isaac's father from Isaac's day to day activities. He is not there even now as falsely asserted on his brief and as repeatedly demonstrated on the appellant's brief (also see previous discussion on Point XI) .

POINT XIII- EXISTENCE OF BIAS AGAINST APPELLANT BY JUDICIAL OFFICER AT DISTRICT COURT IS NOT DENIED BY RESPONDENT BECAUSE OF THE OVERWHELMING EVIDENCE OF ITS EXISTENCE AND THE CANNONS OF JUSTICE DO NOT DEPRIVE THIS COURT JURISDCITION ON THIS ISSUE AS MINN.R.CIV.P. 103.04 PROVIDES THAT THIS COURT HAS DISCRETION TO ADDRESS AND TAKE ACTION ON ANY ISSUE THAT THE INTEREST OF JUSTICE MAY REQUIRE UNDER THE CIRCUMSTANCES

Though not addressing the overwhelming evidence presented by the appellant on her brief on Point VIII as to unmistakable bias displayed by the judicial officer in this proceeding at the trial court, respondent merely asserts that this Court lacks any authority to identify and recognize bias at the trial level and after an appeal , though finding and identifying such bias, this Court's only recourse is then remanding the proceedings to the same biased judicial officer for him/her to admit and remove himself/herself under Minn.Rule 106 of General Practice for Civil Actions. Such rule , contrary to respondent's assertion, does not address the authority and power of the appellate court when confronted with open and unmistakable bias against a

litigant as identified on the extensive appeal record, as it is here . A change of venue in case of remand to an adjoining district court in such case as is the present involving a judicial officer, who is the Family Court Chief in that district court and who is also now the assistant chief for the entire district court , after an appeal of a flawed and one-sided order where facts and law are disregarded by him, beseech the review and action of this Court under Minn.R.Civ.App.P. 103.04 as the interest of justice may require. Certainly, Respondent does not argue that this Court lacks jurisdiction or authority to review the existence of bias on this appeal against the Appellant by this judicial officer, as it is routinely done on any case that such point is raised on appeal. Rather, Respondent argues the ludicrous position that once the bias is identified and recognized by the appellate court, this Court would have no recourse ,despite its powers stated on Minn.R.Civ.App.P. 103.04, to subject the appellant to further abuse by the same judicial officer who is also an administrative judge in the same district court. The appellant would once again need to have such bias issue be reviewed by this appellate court on a subsequent appeal. This is not what the interest of justice requires under these circumstances. Instead, a change of venue , should there be a

remand, is what must be considered to be appropriate by this Court.

POINT XIV- RESPONDENT IGNORES THE POINT OF DUE PROCESS ON THE CONSTITUTIONAL ISSUE OF DEPRIVATION OF AN EVIDENTIARY HEARING

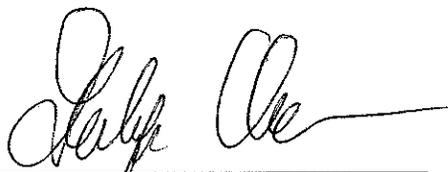
Again, respondent misrepresents the facts and law of this case. For the argument on this point is the deprivation of due process to the appellant on her fundamental constitutional right to marry, as per the Fourteenth Amendment of the United States Constitution. Such argument was certainly not made in Lachapelle v. Mitten, 607 N.W.2d 151 (Minn.App. 2000) which involved the rights of two lesbians and a sperm donor and did not deny the litigants of an evidentiary hearing, as the instant case did. The issue on this point is deprivation of due process on such fundamental constitutional right and respondent totally misses the point on this argument. And contrary to the Federal cases cited by the appellant on her brief, respondent failed to cite any authority for his unsupported assertions which do not even state the key aspect of this argument : deprivation of due process by not providing for a full evidentiary hearing.

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 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.

August 10 , 2006



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CERTIFICATE OF COMPLIANCE

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

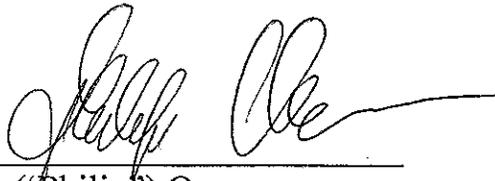
The foregoing appellant's brief was prepared on a computer using Microsoft Word 2000. A proportionally spaced typeface was used as follows:

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 6,888.



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