

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,

vs.

Mark E. Greenwood,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

II. DID THE DISTRICT COURT PROPERLY BASE ITS 2001 LOCATION RESTRICTION UPON THE BEST INTEREST FACTORS AND PROPERLY SET FORTH THE RESTRICTION IN THE PARTIES' CONCLUSIONS OF LAW?

Yes.

III. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT TREATED APPELLANT'S MOTION TO RELOCATE ISAAC TO NEW YORK AS A MODIFICATION MOTION PURSUANT TO MINN. STAT. § 518.18 (d) INSTEAD OF A RELOCATION MOTION PURSUANT TO MINN. STAT. § 518.175, SUBD. 3.?

No.

IV. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT A SUBSTANTIAL CHANGE IN CIRCUMSTANCES HAD NOT OCCURRED SINCE ENTRY OF ITS 2001 MEMORANDUM DECISION?

No.

V. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT DID NOT MAKE SPECIFIC FINDINGS REGARDING WHETHER MODIFYING APPELLANT'S EXISTING RELOCATION RESTRICTION WAS IN ISAAC'S BEST INTEREST?

No.

VI. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT ISAAC'S PRESENT ENVIRONMENT DOES NOT ENDANGER HIS PHYSICAL OR EMOTIONAL HEALTH, OR IMPAIR HIS EMOTIONAL DEVELOPMENT?

No.

VII. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT THE ADVANTAGES OF MODIFYING THE LOCATION RESTRICTION DO NOT OUTWEIGH THE HARM LIKELY TO BE CAUSED BY A CHANGE OF ENVIRONMENT?

No.

VIII. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING?

No.

IX. DOES THE DISTRICT COURT'S ORDER VIOLATE APPELLANT'S RIGHT TO MARRY?

No.

X. CAN THE COURT OF APPEALS REMOVE A DISTRICT COURT FOR BIAS?

No.

STATEMENT OF THE FACTS AND CASE

Appellant Deborah A. Goldman (“Appellant”) and Respondent Mark E. Greenwood (“Respondent”) were married on January 16, 1993. Appellant has two children from a previous marriage, Joshua Goldman, born May 24, 1982, and Samuel Goldman, born September 26, 1986. (AA 47). Respondent has three children from a previous marriage, Heather Greenwood (“Heather”), born July 26, 1982, Eleni Greenwood (“Eleni”), born April 30, 1985, and Seth Greenwood (“Seth”), born June 2, 1988. (AA 47). Appellant and Respondent have one child together, Isaac R. Greenwood (“Isaac”), born January 30, 1996, currently ten years old. (AA 3). Appellant and Respondent separated on April 12, 2000. (AA 3).

After the conclusion of a relocation/custody trial, the district court filed a Memorandum Decision on September 10, 2001, resolving the issue of custody of the parties’ son, Isaac, and Appellant’s request to move with Isaac to Boston. (AA 40). In its Memorandum Decision, the district court denied Appellant’s request to move Isaac to Boston and concluded that it was in Isaac’s best interest to remain in the State of Minnesota after reviewing all thirteen best interest factors set forth in Minn. Stat. § 518.17, subd.1. (AA 60). In addition, the district court granted Appellant sole physical custody of Isaac conditioned upon remaining in the State of Minnesota. (AA 60). The district court held that:

If for any reason the *LaChapelle* locale restriction¹ is found 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 [sic] with 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. (AA 60).

The district court deferred the final decision regarding the award of legal custody until the parties had the opportunity to work with a parenting consultant. (AA 61). Appellant did not move to Boston without Isaac.

The remaining issues were then resolved by agreement and the parties' marriage was dissolved by entry of Partial Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree ("Decree") on July 11, 2002. (AA 21). In the Conclusions of Law, on page 7, paragraph 2, of the Decree, the district court incorporated by reference its Memorandum Decision. (AA 27). The district court administrator subsequently entered judgment with the following statement: "I certify that the above Conclusions of Law constitute the Judgment and Decree of the Court." (R 17). Neither party filed post-trial motions or an appeal of the 2001 Memorandum Decision nor the 2002 Decree.

Appellant filed and served affidavits and a motion dated February 27, 2006, requesting that the district court remove the *LaChapelle* restriction, grant her permission to move Isaac to New York, or in the alternative, grant a relocation evaluation followed by an evidentiary hearing. (AA 63-64). Respondent filed and

¹ This Court in *LaChapelle v. Mitten*, 607 N.W.2d 151, 162-163 (Minn. App. 2000), held that "the lack of statutory authority explicitly allowing conditional custody awards [based on location] does not preclude such an award when it is in the child's best interest."

served affidavits and a motion dated March 8, 2006, requesting that the district court deny Appellant's motions. (AA 117). The district court held a hearing on March 13, 2006, at which time counsel for each party made oral arguments. (AA 1). The district court issued an Order and Memorandum ("Order") dated April 14, 2006. (AA 1-3). The district court denied Appellant's request to remove the *LaChapelle* location restriction, denied her request to move Isaac to New York and denied her request for a relocation evaluation followed by an evidentiary hearing. Appellant subsequently filed this appeal of the district court's Order dated April 14, 2006.

ARGUMENT

I. STANDARD OF REVIEW.

On appeal, the Court of Appeals reviews a district court's decision regarding modifying custody and changing the residence of minor children for an abuse of discretion. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996); *Pikula v. Pikula*, 374 N.W.2d 478, 481 (Minn. App. 1993). Whether a district court grants or denies a motion for modification without an evidentiary hearing is also reviewed for an abuse of discretion. *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997). A district court abuses its discretion when it makes unsupported findings of fact or improperly applies the law. *Wopata v. Wopata*, 498 N.W.2d 478, 481 (Minn. App. 1993).

II. THE DISTRICT COURT'S 2001 LOCATION RESTRICTION WAS BASED UPON THE BEST INTEREST FACTORS AND WAS PROPERLY SET FORTH IN THE PARTIES' CONCLUSIONS OF LAW.

In *Dailey v. Chermak*, 709 N.W.2d 626, 629 (Minn. App. 2006), the district court granted the parties joint legal custody and granted Dailey unconditional sole physical custody of the parties' daughter in the conclusions of law. In the decree's findings of fact, the district court stated; "The Court's ruling on physical custody is conditional upon petitioner remaining in the Twin Cities metropolitan area." *Dailey* at 629. No such restriction was contained in the conclusions of law. *Dailey* at 631. Neither party made a post-trial motion or appealed the district court's order. Dailey subsequently moved for permission to change the residence of the parties' daughter from Minnesota to South Dakota. *Dailey* at 629.

The Court of Appeals held that the conclusions of law (which became the judgment in the case) prevail over an inconsistent statement in the findings of fact. *Dailey* at 632. Post-trial motions and appeals can correct problems arising from irregularities, inconsistencies or omissions between the findings and conclusions. *Dailey* at 631. In *Dailey*, the times for post-trial motions and appeals from the original judgment and decree had expired, and the judgment was final. *Dailey* at 631. The *Dailey* Court held that the district court did not abuse its discretion in rejecting Chermak's conditional custody argument, thus, allowing Dailey to move to South Dakota. *Dailey* at 632.

The instant case is wholly different from *Dailey*. There can be no doubt that the district court awarded sole physical custody of Isaac to Appellant *only* on the condition

that Isaac remain in Minnesota. After the conclusion of a relocation/custody trial, the district court issued its 2001 Memorandum Decision. (AA 60). The district court denied Appellant's request to move Isaac to Boston and concluded that it was in Isaac's best interest to remain in Minnesota after reviewing all thirteen best interest factors set forth in Minn. Stat. § 518.17, subd.1. (AA 41-60). As such, the district court granted Appellant sole physical custody of Isaac conditioned upon remaining in Minnesota. (AA 60).

The district court held that:

If for any reason the *LaChapelle* locale restriction is found 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 [sic] 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. (AA 60).

The remaining issues were subsequently resolved by agreement, and the parties' marriage was dissolved on June 20, 2002. (AA 21). The district court incorporated by reference its Memorandum Decision into the parties' dissolution Decree's the findings of fact, on page 4, paragraph XVI. In addition, the district court incorporated by reference its Memorandum Decision into the Decree's conclusions of law, on page 7, paragraph 2. The district court administrator subsequently entered judgment with the following statement: "I certify that the above Conclusions of Law constitute the Judgment and Decree of the Court." (R 17). Neither party filed post-trial motions or appealed the 2001 Memorandum Decision nor the 2002 Decree.

The findings of fact and conclusions of law of the parties' Decree are consistent. Both state that Appellant is awarded sole physical custody of Isaac conditioned upon the

child remaining a resident of Minnesota through the incorporation of the district court's Memorandum Decision. It is clear on the face of the parties' Decree that the district court awarded Appellant physical custody of Isaac conditioned on Isaac remaining a resident of Minnesota. It is also clear that on the face of the parties' Decree that no inconsistencies exist between the parties' findings of fact and conclusions of law. By incorporating the Memorandum Decision into the conclusions of law as well as the findings of fact, the district court ensured that the *LaChapelle* location restriction was part of the ultimate judgment, which is exactly how Appellant understood the document and why she asked the district court to remove the *LaChapelle* restriction before seeking permission to move Isaac to New York. There is no doubt that the district court placed a location restriction on Appellant's award of physical custody.²

The *Dailey* Court also held that all custody and custody-related rulings must clearly and genuinely consider and give effect to the best interest of the child. *Dailey* at 632 (citing *In re Custody of N.M.O.*, 399 N.W.2d 700, 703 (Minn. App. 1987) (citing *Wallin v. Wallin*, 187 N.W.2d 627, 630 (Minn. 1971)). When making a custody or custody-related decision, the district court must find that the facts support its decision, and the district court's conclusions of law must be based on adequate factual findings. *Evens v. Evens*, 376 N.W.2d 749, 750 (Minn. App. 1985) (citing *Rosenfeld v. Rosenfeld*, 249 N.W.2d 168, 171-72 (Minn. 1976)). Even if findings and conclusions are mislabeled

² Furthermore, Appellant did not argue at the March 13, 2006, motion hearing that the 2001 Memorandum Decision awarded her unconditional sole physical custody. Based upon Appellant's recognition that the 2001 physical custody award was conditional, she motioned the district court to remove "the *LaChapelle* restriction from this

or perhaps suffer from some other irregularity, “[t]he important consideration in cases of improper designation is not to permit a conclusion of law, in the absence of a finding of fact, to support the ultimate decision.” *Dailey v. Chermak*, 709 N.W.2d 626, (Minn. App. 2006) (citing *Graphic Arts Educ. Found., Inc. v. State*, 59 N.W.2d 841, 844 (1953)).

In *Dailey*, the Court of Appeals held that the district court failed to properly analyze the thirteen statutory best interest custody factors and did not properly support a residency condition in its findings of fact. *Dailey* at 632. Absent the district court making proper findings showing that the initial residency restriction would serve the child’s best interests, a residency restriction should not be part of the conclusions of law. *Dailey* at 632. Such a deficiency would render a conditional-custody conclusion a nullity. *Dailey* at 632.

In contrast to the *Dailey* case, in the instant case, the district court clearly analyzed Appellant’s request to move Isaac to Boston and the thirteen best interest factors from pages 2 through 21 of its Memorandum Decision. (AA 41-60). The district court in *Dailey* failed to undertake any type of analysis of the best interest factors in relationship to a conditional award of custody. Here, we have the opposite. The district court undertook an extensive analysis of the best interest factors in conjunction with Appellant’s request to move Isaac to Boston.³

Court’s award of physical custody to petitioner.” (AA 63). As a threshold matter, issues that have not been raised in the district court cannot be raised for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

³ Furthermore, Appellant did not argue at the March 13, 2006, motion hearing that the district court’s 2001 location restriction was null and void. Appellant argued that the district court should use a best interest standard when analyzing her request to remove the *LaChapelle* restriction and her request to move Isaac to New York. As a threshold matter, issues that have not been raised in the district court cannot be raised for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

While Appellant may disagree with the district court's substantive analysis when it initially conditioned her award of custody, the time for post-trial motions and appeals has expired. In this appeal, Appellant cannot now attack the substance of the district court's best interest analysis. *Dailey* at 631 (citing *Dieseth v. Calder Mfg. Co.*, 147 N.W.2d 100, 103 (Minn. 1966) (stating "[e]ven though the decision of the trial court in the first order may have been wrong, if it is an appealable order it is still final after the time for appeal has expired"). Furthermore, a party cannot collaterally challenge a judgment. *Dailey* at 631 (citing *Nussbaumer v. Fetrow*, 556 N.W.2d 595, 599 (Minn. App. 1996) (stating Minnesota does not permit collateral attack of facially valid judgments, and judgments alleged to be merely erroneous or founded on nonjurisdictional defects are "not subject to attack"), *review denied* (Minn. Feb. 26, 1997).

Thus, the district court properly placed its 2001 *LaChapelle* restriction in the conclusions of law and properly supported its location restriction by a thorough best interest analysis. The district court's 2001 location restriction is valid and is not subject to a substantive collateral attack.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT TREATED APPELLANT'S MOTION TO RELOCATE ISAAC TO NEW YORK AS A MODIFICATION MOTION PURSUANT TO MINN. STAT. § 518.18 (d) INSTEAD OF A RELOCATION MOTION PURSUANT TO MINN. STAT. § 518.175, SUBD. 3.

Custody awards conditioned on a parent's continuing residence in Minnesota are within the district court's authority. *Dailey* at 630. (Minn. App. 2006) (holding 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); *LaChapelle v. Mitten*, 607 N.W.2d 151, 162-63 (Minn. App. 2000) (holding that conditional custody awards are within the district court's authority and do not violate constitutional rights), *review denied* (Minn. May 16, 2000).

The question before this Court is this: if a party is awarded sole physical custody conditioned on a parent's continuing residence in Minnesota, and then said party subsequently files a motion requesting permission to relocate the minor child outside of the State of Minnesota, should the district court treat her motion as a modification of custody motion under Minn. Stat. § 518.18 (d), or as a motion to move out of state pursuant to Minn. Stat. § 518.175, subd. 3. The Court of Appeals has not issued a published decision on this point.

In an unpublished Court of Appeals opinion, *Swarthout v. Siroki*, C9-00-2219, 2001 Minn. App. LEXIS 772 (July 10, 2001), the Court of Appeals reasoned that the *Auge* presumption⁴ does not apply to a relocation request when the prior award of custody was conditional. The *Swarthout* Court stated:

Appellant's motion did not ask for a mere alteration of the visitation provisions of the original order. Instead, it asked the district court to remove the condition on physical custody provided by the original order. If the district court granted appellant's motion, respondent's right to custody would terminate and she would effectively have sole physical custody. Consequently, appellant's motion constituted a request for a modification of the physical custody term of the original order. *Cf. Allan v. Allan*, 509

⁴ In *Auge v. Auge*, 334 N.W.2d 393, 399 (Minn. 1983), the Minnesota Supreme Court held that sole physical custodians are presumptively entitled to judicial permission to move their children to other states.

N.W.2d 593, 596 (Minn. App. 1993) (changing child support obligation from formula to specific dollar amount was a modification of child support). Motions for modification of physical custody are governed by Minn. Stat. § 518.18 (d). *Id.*; *Frauenschuh v. Giese*, 599 *N.W.2d 153, 157 (Minn. 1999)*. Accordingly, we conclude that the district court properly treated appellant's motion as one for modification of custody under Minn. Stat. § 518.18 (d), rather than a motion for relocation under Minn. Stat. § 518.175, subd. 3.

In *Auge*, unlike *Swarthout* and the instant case, the district court granted sole physical custody without a location restriction. In *Auge*, the Minnesota Supreme Court determined that parents with unconditional physical custody are presumptively entitled to judicial permission to move their children to other states, with the noncustodial parents required to overcome the presumption in order to keep the children in Minnesota. *Auge* at 399. The *Auge* opinion observed that a presumption favoring custodial parents would benefit the court system, as well as parents in general, because it “would obviate *de novo* consideration of who is best suited to have custody, an issue which has already been resolved once by the courts . . . [and] would minimize judicial interference with decisions which affect that family unit.” *Auge* at 399.

There is no need for a similar presumption in the instant case, because the initial custody decision already determined, based on the specific circumstances at hand, that removing Isaac from Minnesota would be inconsistent with his best interests and that Respondent is best-suited to have physical custody of Isaac if Appellant leaves the state. The district court's 2001 Memorandum Decision explained why Isaac's best interests would not be served by moving him to Boston, and added that if Appellant did not

remain in Minnesota to provide Isaac's daily care and control, his best interests would be served by awarding physical custody to Respondent.

In *Auge*, the Minnesota Supreme Court stated that "it would tend to maintain the child in the family unit to which he or she currently belongs." *Auge* at 399. Under normal circumstances, the current family unit would be the custodial parent's family unit. Appellant's request to move Isaac to New York represents a drastic modification to the 2001 decision, as would any motion to modify custody from sole to joint or vice versa.

In sharp contrast, the location condition contained in the district court's 2001 Memorandum Decision was imposed for the very reason that the continued presence and involvement of both family units was consistent with Isaac's best interests. The 2001 Memorandum Decision explained that Respondent's vibrant household with active step-children, at least one of whom (Seth) was present full time and whom Isaac idolizes, was integral to Isaac's emotional well-being. Viewed in that context, it can be argued that location conditions should be afforded the same initial deference as unconditional custody awards because, using the language in *Auge*, such initial deference would "tend to maintain the child" in the family environments which existed at the time the initial awards were granted.

Auge seemed to be heavily influenced by the Minnesota Supreme Court's belief that "continuity and stability in relationships are important for the child" and thus "courts should be restricted in their authority to interfere with post-divorce family-unit decision-making." *Auge* at 399. Circumstances unique to this case already resulted in a location-

conditioned custody award, meaning that the “continuity and stability in [the] relationships [that] are important for the child” involved more relationships than just the relationship between the custodial parent and the child. Since district courts have been restricted in their ability to interfere with the stability and continuity of initial custody decisions, then parents seeking to remove location restrictions should be required to meet the same standard of proof that a parent must meet who is requesting a modification of custody. Thus, the appropriate standard of proof is endangerment and not a simple *de novo* best interests burden.

It should not be forgotten that requests to remove location conditions are often addressed by judicial officers who did not impose the conditions. Such judicial officers are rarely privy to the credibility calls that may have influenced the judicial officers who imposed the location restrictions and are unlikely to be privy to every nuance that influenced the initial decisions. Having subsequent, different judicial officers decide whether to remove location restrictions based on nothing more than a best interests analysis could indeed amount to the type of *de novo* considerations rejected by *Auge*.

In the instant case, and all other cases, the location condition is an integral part of the original “custodial arrangement.” Thus, the Court of Appeals should conclude that *Swarthout* and the district court correctly treated Appellant’s motion as a modification of custody motion under Minn. Stat. § 518.18 (d), and not as a motion to move out of state pursuant to Minn. Stat. § 518.175, subd. 3. As such, the district court, in the instant case, did not abuse its discretion when it treated Appellant’s motion as a modification of

custody motion under Minn. Stat. § 518.18 (d), and not as a motion to move out of state pursuant to Minn. Stat. § 518.175, subd. 3.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT A SUBSTANTIAL CHANGE IN CIRCUMSTANCES HAD NOT OCCURRED SINCE ENTRY OF ITS 2001 MEMORANDUM DECISION.

Pursuant to Minn. Stat. § 518.18 (d), a party motioning to modify custody must show that there has been a substantial change in circumstances of the child or a party, and must show that the modification is necessary to serve the best interests of the child. Furthermore, in applying these standards, the district court shall retain the existing custodial arrangement unless one of the following four factors exists:

(i) the court finds that a change in the custody arrangement or primary residence is in the best interests of the child and the parties previously agreed, in writing approved by a court, to apply the best interests standard in section 518.17 or 257.025, as applicable; and, with respect to agreements approved by a court on or after April 28, 2000, both parties were represented by counsel when the agreement was approved or the court found the parties were fully informed, the agreement was approved or the court found the parties were aware of its implications;

(ii) both parties agree to the modification;

(iii) the child has been integrated into the family of the petitioner with the consent of the other party; or

(iv) the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child. Minn. Stat. § 518.18 (d) (2006).

The district court must perform a four-step analysis by determining whether or not a moving party has made a prima facie showing that 1) a change in circumstances of the

child or a party has occurred, 2) that the modification serves the best interests of the child, 3) that the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development,⁵ and 4) that the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

When a party makes a motion to modify custody, the change in circumstances must be significant and must have occurred since the original custody order. *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997).

The district court in its Order dated April 14, 2006, the order which Appellant now appeals, stated that the following circumstances have not changed since 2001:

- 1) Appellant wanted sole physical custody plus permission to move Isaac to the eastern seaboard;
- 2) Isaac's was too young to express his preference in 2001, and Appellant does not now assert that Isaac actually wants to move from Minnesota to New York;
- 3) Appellant was Isaac's primary caretaker;
- 4) Both parents enjoyed an intimate and loving relationship with Isaac;
- 5) Heather did not live in Minnesota and was in college;
- 6) Eleni was finishing high school and would be attending college; Eleni is attending college;
- 7) Sam lived on the eastern seaboard;
- 8) Joshi was not living at home with Isaac;

⁵ Subdivision (ii) and (iii) of Minn. Stat. § 518.18 (d) do not apply to the instant case.

- 9) Seth lived at home with Isaac and had the most significant sibling relationship with Isaac; Seth will continue to reside in the Twin Cities and attend the University of Minnesota and still will have the most significant sibling relationship with Isaac;
- 10) Isaac adjusted well to home, school and community;⁶
- 11) Appellant asserted that she would not move to Boston without Isaac; Appellant did not assert a contrary intention to the district court;
- 12) The district court did not have concerns regarding the mental and physical health of the parties;
- 13) The district court found that Appellant had demonstrated a slightly greater capacity to attend to Isaac's religious training; The district court, however, also found that "[t]he evidence is very strong that Isaac's religious training will be more than adequately advanced if he stays in Minnesota."
- 14) Both parents had the capacity to give Isaac love and affection;
- 15) The district court found that the "cultural background" factor was "highly tied into the religion issue;"
- 16) The district court did not find that domestic abuse was a factor; and
- 17) The district court found that Appellant demonstrated a less than strong disposition to encourage frequent contact between Isaac and Respondent.⁷

⁶ The fact that Minneapolis has a small Orthodox community and offers fewer Orthodox-related opportunities has not detracted from the undisputed fact that the ten-year-old Isaac is doing exceptionally well at the present time. Isaac is doing so well that he no longer is attending therapy.

⁷ Currently, Appellant proposes that Respondent's only regular monthly contact with Isaac should occur in New York.

Appellant alleges that there have been two changes in circumstances (i.e. Seth graduating from high school and Appellant's engagement), since the district court's 2001 conditional custody decision. The district court decided that neither change was substantial, nor supported Appellant's motion to modify the relocation restriction allowing her to relocate Isaac to New York. Seth lived at home and attended high school in 2001. Seth will be graduating from high school this year and will be attending the University of Minnesota. (AA 133). Seth will still reside in the Twin Cities. Seth and Isaac will still be able to see each other on a regular basis. There is no doubt that Seth will continue to be the most significant sibling in Isaac's life. Thus, the district court found that this circumstance did not constitute a substantive change that would warrant removing the relocation restriction.

With regard to Appellant's acceptance of a marriage proposal, Appellant should not be rewarded for creating a change in circumstances by accepting a marriage proposal before she knew whether or not she had permission to move Isaac to New York. Since Appellant had a location restriction on her original award of physical custody, she should have known that her ability to move Isaac anywhere would be very difficult, if not impossible. Although, Appellant's marital status has changed since 2001, in 2001 Appellant stated to the district court that she would not move from Minnesota without Isaac. In Appellant's 2006 motion pleadings, she never expressed a contrary intention. The district court appropriately assumed, based upon Appellant's silence that Appellant would not move without Isaac. Appellant argues for the first time in her Court of

Appeals brief that Isaac will suffer harm and/or be endangered if she moves to New York without him. This argument is disingenuous.

Furthermore, Appellant can still pursue her marriage plans. Her husband can either move to Minnesota, or Appellant can keep Minnesota as her primary residence and she and her husband can travel back and forth between New York and Minnesota to spend time together. Thus, the district court found that comparing the global circumstances that caused the district court to reject Appellant's 2001 request to remove Isaac from Minnesota to Boston with the circumstances advanced by Appellant in her motion pleadings, yields an inescapable conclusion that little has changed since 2001, especially in relationship to the material circumstances creating the location restriction.

The district court did not abuse its discretion when it concluded Appellant had not made a prima facie showing that a substantial change in *circumstances* had not occurred since entry of the 2001 custody order and denied her request for an evidentiary hearing.

V. **THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT MAKE SPECIFIC FINDINGS REGARDING WHETHER MODIFYING APPELLANT'S EXISTING RELOCATION RESTRICTION WAS IN ISAAC'S BEST INTEREST.**

The best interests of a child are determined according to Minn. Stat. § 518.17, subd.1. *Geibe* at 778. If a moving party, however, fails to demonstrate a prima facie case of sufficient changed circumstances, the district court need not address the remaining Minn. Stat. § 518.17 best interest factors. Although the district court cannot modify custody without making findings on each factor, the converse is not true. The district court is not obligated to specifically address the remaining considerations if it denies a

modification because, for example, a change in circumstances is lacking or modification is not in the best interests.

Because the district court found that there was no substantial change in circumstances that warranted a modification of the location restriction and also found that Isaac's present environment (physical custody with Appellant conditioned by location) did not endanger his physical or emotional health or impair his emotional development⁸, the district court was not required to make specific findings or undertake the best interest analysis. Thus, the district court did not abuse its discretion when it did not undertake the best interest analysis and did not make specific findings regarding Isaac's best interest.

If the district court did undertake the best interest analysis, it would have concluded that modifying Appellant's conditional award of custody and allowing Appellant to relocate Isaac to New York are not in Isaac's best interest. Respondent currently spends every other weekend from Friday after school until Monday morning and every Wednesday overnight with Isaac. (AA 120). In addition, Respondent spends one-half of all holidays and school breaks with Isaac and spends three weeks with Isaac in the summer. (AA 120). Respondent participates in Isaac's school conferences and attends his school and sports activities. (AA 120-122). Respondent also participates in Isaac's day-to-day routines. Isaac brings friends over to Respondent's house during his parenting time. (AA 125-126). Respondent helps Isaac with his homework and has met with the school teachers regarding disciplinary issues at school. (AA 120-122). Also,

⁸ Respondent's argument supporting this conclusion is set forth below in paragraph VI.

Respondent's extended family is an integral part of Isaac's life here in Minnesota. (AA 122-125).

Isaac is ten years old and has made many friends with boys his age with whom he spends time and participates in activities. (AA 125). Isaac attends school at the Torah Academy, an outstanding school of excellence. (AA 120). Isaac has excelled in school receiving exceptional scores. (AA 70).

Appellant argues that it is in Isaac's best interest to move to New York, so he can attend an Orthodox Jewish high school. Appellant also argues that moving to New York will give Isaac more opportunities to eat out since there are more kosher restaurants in New York than in Minnesota, and argues that moving to New York will allow Isaac to be a part of a larger Orthodox community which will be in Isaac's best interest.

Isaac will not attend high school for over four years. Isaac can continue to receive an excellent education right here in Minnesota, close to both of his parents, extended family and friends. Finally, we have no idea whether or not being in a larger Orthodox community is really in Isaac's best interest, and Isaac has not expressed a desire to move to New York. Although Appellant generally alleges that due to Isaac's Orthodox appearance he feels different and out of place, she gives no specific examples of Isaac feeling this way. Respondent, on the contrary, states that Isaac has never expressed concerns about feeling out of place or different to him. (AA 127). In fact, it appears that Isaac is very comfortable being out in public. (AA 126-127). In addition, all of Appellant's affiants state that Isaac is a bright, outgoing, and well-adjusted ten year old

boy. Practicing Orthodox Judaism in Minnesota has not negatively impacted Isaac. Thus, it is *not* in Isaac's best interest to uproot him from the only school he has attended, a community that includes extended family and friends, and a life with two involved parents.

Clearly, Appellant has not shown that moving to New York is in Isaac's best interest. In fact, it appears that moving would *not* be in his best interest and could be harmful. Thus, the district court did not abuse its discretion when it denied Appellant's request to modify custody and relocate Isaac to New York without an evidentiary hearing.

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT ISAAC'S PRESENT ENVIRONMENT DOES NOT ENDANGER HIS PHYSICAL OR EMOTIONAL HEALTH, OR IMPAIR HIS EMOTIONAL DEVELOPMENT.

Minn. Stat. § 518.18 (d) (iv) states that a district court shall retain the custody arrangement unless:

the child's *present* environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child. Minn. Stat. § 518.18 (d) (2006). (Emphasis added).

Minn. Stat. § 518.18's "reference to 'present environment' is intended to mean the judicially approved environment." *Taflin v. Taflin*, 366 N.W.2d 315, 320-21 (Minn. App. 1985). In addition, a showing of endangerment requires a "significant degree of danger." *Geibe* at 778.

In the instant case, Appellant does not make *any* specific allegations based upon credible evidence that Isaac's current environment (physical custody with Appellant conditioned upon by location) significantly endangers Isaac's physical or emotional health, or impairs his emotional development. Quite the contrary, Isaac is thriving in his current environment.

Appellant's affidavits focus on the opportunities that will be available to Isaac if Appellant is allowed to move him to New York. Appellant argues that Isaac's future academic success will be best served by moving to New York and that Isaac will have numerous kosher restaurants to frequent. The only suggestion or hint of harm involves Appellant's assertion that she believes that Isaac feels stigmatized by his Orthodox Jewish appearance. (AA 71). Appellants asserts that Isaac feels "different or out of place" in Minnesota. (AA 71). Even though every affidavit submitted by Appellant states how well Isaac is doing academically and socially and has no need for therapy. Furthermore, feeling stigmatized certainly does not rise to the level of endangerment. Appellant does not offer any evidence from Isaac's pediatricians. She does not offer any evidence from a therapist or expert psychologist. Appellant does not suggest that Isaac is doing poorly in school or that he is acting out. Appellant in fact confirms that Isaac is doing extremely well physically, emotionally and academically and does not need the assistance of a counselor and has not for some time.⁹ Assuming arguendo that Isaac feels stigmatized, based on the facts of this case, felling stigmatized does not rise to the level

of endangerment. Clearly, Isaac's current custodial environment does not significantly endanger his physical or emotional health, or impair his emotional development.

Appellant argues that she proved that Isaac would be endangered if she moves to New York without Isaac.¹⁰ This is not the yardstick by which endangerment is measured. This alleged environment is a future environment not a "present environment," as required by Minn. Stat. § 518.18 (d) (iv). Furthermore, Appellant offered no specific allegations showing that Isaac's physical and emotional health and well-being would in fact be endangered if Isaac remains in Minnesota with Respondent and Appellant moves to New York. Once again, Appellant did not submit any supporting medical evidence. She did not submit any supporting expert testimony from a psychologist or therapist. The record is lacking any evidence regarding endangerment.

Thus, without *any* credible evidence that Isaac's present environment significantly endangers his physical and emotional well-being, the district did not abuse its discretion when it denied Appellant's request to modifying the current location restriction allowing Isaac to move New York without an evidentiary hearing.

⁹ There is no dispute that Isaac can continue to attend the Torah Academy that provides an Orthodox Jewish education. There is also no dispute that Isaac excels academically. There is no dispute that Isaac is not in therapy and has not been in therapy for quite some time.

¹⁰ Appellant did not argue at the March 13, 2006, motion hearing that she made a prima facie showing that if she moves to New York without Isaac, he will be endangered. At the motion hearing, Appellant argued that it was Respondent's burden of proof to show endangerment. As a threshold matter, issues that have not been raised in the district court cannot be raised for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT THE ADVANTAGES OF MODIFYING THE LOCATION RESTRICTION DO NOT OUTWEIGH THE HARM LIKELY TO BE CAUSED BY A CHANGE OF ENVIRONMENT.

As set forth above in paragraphs IV, V, VI, Appellant has not made a prima facie showing of 1) substantial changed circumstances, 2) of best interest, or 3) of endangerment as required by Minn. Stat. § 518.18 (d). Assuming arguendo that Appellant has in fact done so, she still has not made a prima facie showing that allowing Isaac to move to New York with Appellant, and thus alleviating any alleged stigma associated with practicing Orthodox Judaism in Minnesota, would outweigh the harm likely caused by moving Isaac from his father, family, friends and school in Minnesota.

Appellant's affidavits contain alleged advantages relating to moving Isaac to New York, however, Appellant's affidavits are silent on the issue of harm. Respondent, on the other hand, did offer evidence regarding likely harm that could come from Isaac moving from Minnesota to New York. Respondent submitted social science research supporting a conclusion that any possible benefits from relocation do not outweigh the long-term harm children suffer from relocation. Richard A. Warshak, Ph.D. in an article entitled Social Science and Children's Best Interest in Relocation Cases: *Burgess* Revisited, and Sanford L. Braver, et.al. in an article entitled Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations both conclude that harm does come to children who experience a relocation.

Dr. Warshak states that children of custodial fathers, especially adolescent boys, are less likely to be delinquent, less prone to antisocial behavior and depression, and less

likely to drop out of school. (R 118). Dr. Warshak's review of existing social science research also found that it is important for children to have a full-service non-custodial parent rather than a non-custodial Disneyland parent. (R 119). Dr. Warshak states that a U.S. Department of Education report shows that a father's involvement in school activities such as attending a school or class event, attending a regularly scheduled parent-teacher conference, attending a general school meeting, and volunteering at the school reduces the likelihood that children are suspended or expelled from school, or repeat a grade, and increases the likelihood that children receive As, enjoy school, and participate in school activities. (R 119). Dr. Warshak concludes that the parental access schedule needs to afford opportunities for each parent's involvement in the child's daily life and routines, including supervision of homework and chores, setting and enforcing limits, arranging and supervising interaction with peers, and dealing with conflicts. (R 119). When a parent child relationship is restricted to weekends and vacation periods, a parent can no longer be a full-service parent, which can harm children.

Furthermore, Dr. Warshak summarizes research that shows as children become older and more involved with friends, they may resent having to travel long distances away from their neighborhood, and regard such visits as unwelcome intrusions. (R 122). These children will miss out on athletic events, parties, and other opportunities for socializing with the peers. Relocation creates a conflict for children between seeing the noncustodial parent and maintaining age-appropriate friendships. This conflict is not likely in a child's best interest.

Mr. Braver's own research and review of existing research also concludes that a custodial parent's move, even for good reasons, thwarts the long-term relationship with the non-moving parent, which in turn will, in some respects, harm the child. Mr. Braver cites prior research that shows "there is substantial evidence that children are more likely to attain their psychological potential when they are able to develop and maintain meaningful relationships with both of their parents, whether or not the two parents live together." (R 140).

Without a doubt, Isaac's move to New York will substantially change his relationship with Respondent, and certainly the change will not be for the better. For the first time in Isaac's life, Respondent and Isaac will have limited contact. Respondent will no longer be involved in Isaac's life and daily routines (i.e. homework, school activities, etc.). Respondent will be disconnected from Isaac's school and his friends. Respondent will become a Disneyland dad. Isaac has clearly thrived in his current environment, which supports substantial involvement from both parents. There is no question that Isaac is an intelligent, well-behaved, thriving fourth grader. Isaac may well have acquired these attributes after he adjusted to the significant change in his life when his parents separated and later divorced. The district court was well aware that Isaac suffered when his mother and father separated. This suffering may predict how he will handle another significant change in his life – the removal of his father, family and friends from his day to day activities.

Appellant erroneously argues that she has proven that no harm will come to Isaac if he moves to New York, when Appellant offered no evidence to the district court on this issue. Respondent offered evidence, based upon existing social science research, that diminishing Respondent's active involvement in Isaac's life, and thus substantially changing Isaac's relationship with his father, will likely harm Isaac. This likely harm is not outweighed by the possible benefits, which are very limited, of Isaac's move.

Appellant also erroneously argues that harm will come to Isaac if the district court does not allow Isaac to move to New York with her. Appellant did not advise the district court that she would move to New York without Isaac. Regardless, Appellant is required to make a prima facie showing that "the harm likely to be caused by a change in environment" (i.e. leaving his father, family, friends and school in Minnesota) "is outweighed by the advantages of a change to the child" (i.e. Isaac's inclusion in a larger Orthodox community in New York). Minn. Stat. § 518.18(d). (2006). Minnesota case law and Minnesota statutes do not require the district court to analyze, as Appellant suggests, whether or not she has made a prima facie showing that the harm likely caused by Isaac remaining Minnesota *without her* is greater than the harm caused if Isaac moves to New York *with her*.

Appellant has not made a prima facie showing that the harm likely caused by allowing Appellant to relocate Isaac to New York is outweighed by possible advantages of the relocation. Thus, the district court did not abuse its discretion when it denied

Appellant's request to remove the *LaChapelle* restrictions and move Isaac to New York without scheduling an evidentiary hearing.

VIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING.

When a district court reviews affidavits setting forth facts demonstrating conditions justifying a modification of custody, the district court must take the alleged facts to be true, and determine whether a prima facie case has been made. *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 472 (Minn. 1981). The district court, however, "may take note of statements in [the nonmoving party's submissions] that explain the circumstances surrounding the [moving party's] accusations. *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997). If the moving party has not made a prima facie case, then the district court should deny the motion for an evidentiary hearing and need not make specific findings on the statutory factors for modification. *Geibe* at 778. A district court may properly deny an evidentiary hearing on a motion to modify custody if the affidavits submitted in support of the motion are devoid of allegations that are supported by any specific, credible evidence. *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). A modification of custody requires a showing that modification is warranted by a preponderance of the evidence. *Auge v. Auge*, 334 N.W.2d 393, 399 (Minn. 1983). A party seeking modification of physical custody must establish all four elements set forth above (change in circumstances, best interest, endangerment and benefit outweighs harm) to make a prima facie case for modification. *Frauenschuh v. Giese*, 599 N.W.2d 153, 157 (Minn. 1999).

At a minimum, Appellant has not made a prima facie showing on one of the four required modification elements. Certainly, Appellant did not make a prima facie showing that Isaac's present environment (living in Minnesota with both of his parents and Appellant as his primary physical custodian) significantly endangers his physical or emotional health, as set forth in paragraph VI above. Isaac is thriving in Minnesota. It would have been an abuse of discretion for the district court to have found that Appellant made a prima facie showing of endangerment. As set forth in paragraphs IV, V and VII above, Appellant also failed to make a prima facie showing on change in circumstances, best interest and benefit outweighs the harm. Accordingly, the district court did not abuse its discretion when it did not grant Appellant an evidentiary hearing.

IX. THE DISTRICT COURT'S ORDER DOES NOT VIOLATE APPELLANT'S RIGHT TO MARRY.

Appellant argues that the district court's 2006 Order impinges on her fundamental right to marry and violates the due process clause of the Fourteenth Amendment of the United States Constitution.¹¹ In *LaChapelle*, Mitten argued that conditioning sole physical custody on her returning to Minnesota violated her rights to travel, privacy, and equal protection under the Minnesota and United States Constitutions. *LaChapelle* at 163. This Court disagreed. *LaChapelle* did not address the right to marry.

Appellant's constitutional argument is misplaced, since the district court has not prevented Appellant from marrying. Appellant can marry and primarily live in

¹¹ Appellant does not have an unrestricted right to marry. States often restrict a person's right to marry by limiting marriages to heterosexual couples, by forbidding marriages within certain family relationships, by limiting marriage to one spouse and by limiting marriage to persons of a certain age.

Minnesota with Isaac without her husband, or she can marry and primarily live in New York with her husband without Isaac. Appellant has the right to marry, however, she does not have the unlimited right to relocate Isaac to another state. No custodial parent has such an unlimited right.

The district court did not violate Appellant's constitutional right to marry and was not required to hold an evidentiary hearing.

X. THE COURT OF APPEALS CANNOT REMOVE A DISTRICT COURT FOR BIAS.

Minnesota Rule 106 of General Practice for Civil Actions states the following:

All motions for removal of a judge, referee, or judicial officer, on the basis of actual prejudice or bias shall be heard in the first instance by the judge sought to be removed. If that judge denies the motion, it may subsequently be heard and reconsidered by the Chief Judge of the district or another judge designated by the Chief Judge.

Thus, Appellant has improperly requested that this Court remove Judge James T. Swenson for bias. If the case is remanded, as Appellant requests, she can then follow Rule 106 and properly file a motion to remove Judge Swenson. Thus, Appellant's request to remove Judge Swenson for bias and remand the case to another county should be denied.

CONCLUSION

The district court properly supported its 2001 location restriction by a thorough best interest analysis and properly placed its 2001 location restriction in the Decree's conclusions of law. In addition, the district court properly treated Appellant's motion to remove the *LaChapelle* relocation restriction as a modification of custody motion under

Minn. Stat. § 518.18 (d), instead of a motion to move out of state pursuant to Minn. Stat. § 518.175, subd. 3. Consequently, in order for Appellant to prevail, *she* must make a prima facie showing that a change in circumstances has occurred since entry of the district court's 2001 Memorandum Decision, that modifying her current conditional custody award and relocating Isaac to New York is in Isaac's best interest, that Isaac's present environment endangers his well-being, and that any harm caused by the relocation is outweighed by the benefits. If, and only if, Appellant makes her prima facie case by a preponderance of the evidence, then the district court should grant Appellant's request for an evidentiary hearing. Appellant has failed to prove by a preponderance of the evidence that circumstances have substantially and materially changed since entry of the parties' Decree, that removing the location restriction is in Isaac's best interest, that Isaac's present environment significantly endangers his physical or emotional health, or that the harm likely caused by a change in environment is outweighed by the advantages of the relocation.

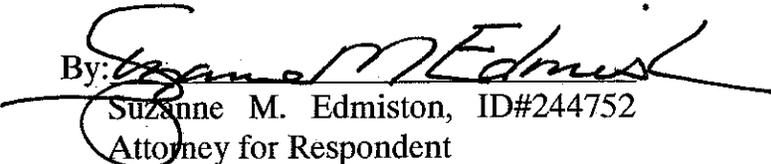
As such, the district court did not abuse its discretion when it denied Appellant's request to remove the 2001 *LaChapelle* location condition and relocate Isaac to New York without granting her an evidentiary hearing. Furthermore, the district court did not impinge on Appellant's constitutional right to marry and was not required to hold an evidentiary hearing.

Thus, Appellant respectfully requests that this Court affirm the district court's April 14, 2006, Order in its entirety and deny Appellant's request for a reversal or remand.

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Dated: August 4, 2006.

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STATE OF MINNESOTA
IN COURT OF APPEALS

In the Marriage of:

APPELLATE COURT CASE NO. A06-1110

Deborah A. Goldman,
f/k/a Deborah H. Greenwood,

Appellant,

vs.

Mark E. Greenwood,

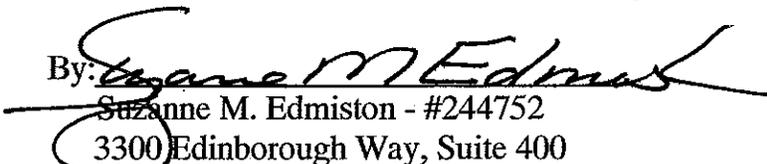
Respondent.

CERTIFICATE OF BRIEF LENGTH
COMPLIANCE WITH RULE 132.01,
SUBD. 3(a), (b) OR (c) OF RULES
OF CIVIL APPELLATE PROCEDURE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 8,011 words. This brief was prepared using Microsoft Office Word 2003 word processing software and 13 point font.

Dated: August 4, 2006

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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).