

NO. A06-1110

707-1046

State of Minnesota
In Supreme Court

In Re the Marriage of:

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

Respondent,

vs.

Mark E. Greenwood,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

1. To what extent do the 2006 amendments to Minn. Stat. § 518.175, subd. 3 overrule this Court's decision in Auge v. Auge, 334 N.W.2d 393 (Minn. 1983).

The Minnesota Court of Appeals held that the 2006 amendments to Minn. Stat. § 518.175, subd. 3 had overruled Auge v. Auge by removing the presumption in favor of a custodial parent's motion to remove a minor child's residence to another state and by permitting scrutiny of the worthiness of the custodial parent's proposed reasons for the move. However, the Court of Appeals held that portions of the Auge holding remained intact, including: (1) Auge's implication of Minn. Stat. § 518.18 (d) through its requirement that a trial court consider the consequences of separating the child from the custodial parent if the trial court were to deny the motion to remove; and (2) Auge's preclusion of "excessive deference" to the child's parenting time with the non-custodial parent.

2. May a trial court require a sole physical custodian who has a locale restricting conditional custody award to make a prima facie showing pursuant to Minn. Stat. § 518.18 (d) (iv) in order to be entitled to an evidentiary hearing on a subsequent motion to remove the minor child's residence to another state?

The Minnesota Court of Appeals held in the negative.

3. Did Respondent make a prima facie showing entitling her to an evidentiary hearing on her motion to remove the minor child's residence to New York?

The Minnesota Court of Appeals held in the affirmative.

STATEMENT OF THE CASE

This appeal arises out of the denial of Respondent's motion to move the minor child's residence to New York. A.173. On February 27, 2006, Respondent brought a motion to: (1) remove "the LaChapelle restriction¹ from [the] trial court's award of physical custody to [Respondent];" and (2) permit her "to move, with the parties' minor child, to New York City in the spring of 2006."² A.92. In an attached Affidavit, Respondent asserted that requiring the minor child to remain in Minnesota as a condition of Respondent having custody was "contrary to the minor child's best interests and endanger[ed] [the minor child's] emotional, spiritual, and academic development." A.96. Respondent requested that the matter be set for an evidentiary hearing if her motion was not immediately granted. A.93.

The hearing on Respondent's motion occurred on March 13, 2006,³ before the Honorable James T. Swenson, Judge of Hennepin County District Court. A.173. On April 14, 2006, Judge Swenson issued an order denying Respondent's motion. A.173 – 174. In an attached Memorandum, the district court explained that Respondent had failed

¹ The "LaChapelle restriction" refers to the Minnesota Court of Appeals' decision in LaChapelle v. Mitten, 607 N.W.2d 151, 162 – 63 (Minn. App. 2000), which upheld a trial court's award of physical custody conditioned upon the physical custodian's remaining in the State of Minnesota.

² Respondent served and filed her motion and 15 affidavits 14 days before the date of the March 13, 2006 hearing – the minimum number of days allowed under the Rules of General Practice. See Minn. R. Gen. Prac. 303 (a) (1). Respondent's February 27, 2006 motion mistakenly lists February 23, 2006 as the hearing date. A.92. The hearing was originally scheduled for February 23, 2006, but was subsequently changed to March 13, 2006. A.91, A.173.

³The parties' attorneys presented written submissions in advance of the hearing and made oral arguments at the hearing. No oral testimony was taken at the hearing. A.139

to make a prima facie case for modification of the conditional award of physical custody pursuant to Minn. Stat. § 518.18. A. 191.

Respondent appealed, arguing that the district court had erred by applying Minn. Stat. § 518.18's custody modification standard instead of Minn. Stat. § 518.175 to her motion for removal. See Goldman v. Greenwood, 725 N.W.2d 747, 751 (Minn. App. 2007). A.199. The Court of Appeals reversed and remanded for an evidentiary hearing holding that the district court erred in failing to apply Minn. Stat. § 518.175, subd. 3. See id. at 749, 755. A.195, A.208. The Court of Appeals stated that it was applying the 2006 legislative amendments to Minn. Stat. § 518.175, subd. 3.⁴ See id. A.199 – A.200. The Court of Appeals further determined that Respondent's reasons for the proposed move, including the minor child's alleged preference and the beneficial aspects of the proposed change, needed to be addressed at a hearing because Respondent's affidavits established prima facie proof on these issues. See id. at 760 – 61. A.219 – A.220. Both parties filed petitions for review of the Court of Appeals' decision. This Court has granted the parties' petitions.⁵ A.222 – A.223.

⁴ See 2006 Minn. Laws ch. 280, § 13.

⁵ Appellant's petition was granted in its entirety. Respondent's petition was granted only as to the statutory issue. A.222.

STATEMENT OF THE FACTS

Appellant and Respondent were married on January 16, 1993. June 21, 2002 Decree at 2. The parties have one child, Isaac Greenwood, who was born on January 30, 1996. A.74. Appellant has three children from a previous marriage, namely: (1) Heather Greenwood, born July 26, 1982; (2) Eleni Greenwood, born April 20, 1985; and (3) Seth Greenwood, born June 2, 1988. A.75. Respondent has two children from a previous marriage, namely: (1) Joshua Goldman, born May 24, 1982; and (2) Samuel Goldman, born September 26, 1986. A.75.

Appellant and Respondent separated on April 12, 2000. A.75. Custody of Isaac was contested, with both parties seeking sole legal and sole physical custody. A.23. The issue of custody was ultimately tried in 2001, along with Respondent's motion to remove Isaac's residence to Boston, Massachusetts.⁶ A.22.

On September 6, 2001, the district court issued a Memorandum Decision denying Respondent's motion to remove Isaac's residence to Boston and awarding Respondent sole physical custody of Isaac as long as she remained available to parent him in Minnesota. A.41 – A.42. The district court stated that if its conditional award of custody to Respondent was found wanting, the court would award Appellant sole physical custody of Isaac to ensure that Isaac continues to prosper from his intimate relationship

⁶ The 2001 trial was the second time that the court had heard a motion brought by Respondent to remove Isaac's residence to Boston, Massachusetts. Respondent's first motion to relocate Isaac was heard by the district court on October 4, 2000. A.1. The district court issued its order denying Respondent's motion to remove Isaac from Minnesota, on October 6, 2000. A.18 – A.19.

with his father and siblings and so that he could continue with his existing school and religious arrangements. A.42. In reaching its decision, the district court made a number of findings about Isaac's relationship with Appellant and Appellant's children from his previous marriage. The district court noted that Heather was attending Northwestern University in Chicago and that Eleni was finishing high school and would soon be off to college. A.29. The court stated that Seth, who was closest in age to Isaac, was adored by Isaac "to the point of worship." A.29. The district court found: "If Isaac remains in Minnesota and [Respondent] does not interfere as she has in the past, he should have opportunities to continue his strong relationship with Seth and see Heather and Eleni when they come home from school." A.29. The district court found that it was Appellant, not Respondent, who regularly played outside with Isaac and who provided more transportation to and from Isaac's child care and events. A.27. The district court found that Appellant and Isaac had an intimate and loving relationship and noted that Hennepin County Family Court Services had reported that Isaac was more involved, more responsive and more intimate with Appellant. A.28. The district court found that although Respondent was Isaac's primary caregiver, the primacy of her role abated as Isaac grew older, and that she was not in a better position than Appellant to devote more time to Isaac's daily care. A.28. The district court expressed concerns about Respondent's lack of credibility, noting that her credibility had been "substantially damaged" at trial. A.25. The district court noted that Respondent had destroyed tapes of conversations with Appellant that she had secretly recorded and that she had destroyed calendars Appellant had requested. A.25. The district court found that Respondent was

less likely than Appellant to foster Isaac's relationship with the other parent. A.39. The district court noted that Respondent had: (1) concealed from Appellant the fact that she had involved Isaac in therapy; (2) unilaterally removed Isaac from a school at which he had been attending a pre-kindergarten class without any notice to the school or Appellant; (3) forced Appellant to fight to gain reasonable temporary parenting time with Isaac during the pendency of the dissolution proceedings; and (4) proposed relocating Isaac to Boston without offering "well-conceived ideas" as to how Appellant would be able to have frequent contact with Isaac. A.25, A.30, A.31. The district court characterized Respondent as "an extremely intelligent, dedicated, and at most times caring mother who occasionally loses control and acts in inappropriate, harmful ways." A.34. Although the district court acknowledged that Respondent had a greater disposition to continue Isaac's religious training, it found that the evidence was "very strong that Isaac's religious training would be more than adequately advanced if he stay[ed] in Minnesota." A.36 – A.37. The district court concluded that the following combined factors demonstrated that a move out of state would not be in Isaac's best interests: (1) Appellant's intimate relationship with Isaac; (2) Isaac's interaction with Appellant and Isaac's siblings; (3) Isaac's difficult but successful adjustment to two households; (4) Isaac's success at and adjustment to school; and (5) the fact that Isaac's care would continue unabated if he remained in Minnesota. A.41. The court found that the LaChapelle restriction was "most consistent with Isaac's best interests." A.42.

On June 10, 2002, the parties and their attorneys appeared in court and entered an oral stipulation into the record after several hours of negotiation. A.44 – A.45. That day,

as reflected in the transcript, the parties' attorneys engaged in the following colloquy:

Ms. Kissoon (Appellant's attorney): Petitioner's awarded sole physical custody of Isaac Robson Greenwood born January 30, 1996 presently six years of age, subject to reasonable parenting time by Respondent. Provisions of the Memorandum Decision of the Court dated September 6, 2000 are hereby incorporated by reference as is fully set forth herein.

Under parenting time, under sub C will be - -

Ms. Barr (Respondent's attorney): Kathy, there's no reason now to have the provisions of the Memorandum in here.

Ms. Kissoon (Appellant's attorney): Yes, because it talks about leaving the state and all of those other things.

Ms. Barr (Respondent's attorney): You're right. Okay.

A.49 – A.50.

Both parties affirmed their understanding and acceptance of the terms of the agreement when questioned by the court. A.63 – A.68.

A partial decree incorporating the parties' oral stipulation was entered on July 11, 2002. A.72. Paragraph 2 of the Decree's Conclusions of Law awarded Respondent sole physical custody of Isaac, subject to reasonable parenting time by Appellant. A.78.

Paragraph 2 also provided:

The provisions of the Memorandum Decision of the Court dated September 6, 2001, are hereby incorporated by reference as if fully set forth herein. Legal custody of the minor child is reserved. Neither party shall have sole legal custody pending a final determination of that issue by the Court.

A.78.

Paragraph 3 of the Decree's Conclusions of Law granted Appellant regularly

scheduled parenting time with Isaac with five out of fourteen overnights during a bi-weekly period as follows: (1) every Wednesday evening from 5:00 p.m. to Thursday morning; and (2) every other weekend from 5:00 p.m. on Friday to Monday morning.

A.79. Paragraph 6 of the Decree's Conclusions of Law provided as follows:

Neither party shall remove the minor child of the parties from the State of Minnesota for the purpose of changing his place of residence without the written consent of the other party or until further Order of the Court. **The Court's decision with regard to [Respondent's] request to remove the minor child from the state of Minnesota has been separately addressed by the Memorandum Decision of the Court dated September 6, 2001 which is incorporated by reference as if fully set forth herein.**⁷ (Emphasis added).

A.81.

Four years later, Respondent filed her motion to remove the "LaChapelle restriction" and to move Isaac's residence to New York City. A.92. The substitute parenting time Respondent proposed for Appellant consisted of: (1) two weekends per month in New York during the school year; (2) Thanksgiving weekend, winter break, Memorial Day weekend and Labor Day weekend in Minnesota; and (3) six weeks during the summer (with Respondent having two – three day visits with Isaac during that period). A.92 – A.93. In an affidavit accompanying her motion, Respondent claimed that circumstances had changed since the district court issued its September 6, 2001 Memorandum Decision, which rendered the court's conditional award of custody "contrary to Isaac's best interests and endanger[ed] Isaac's emotional, spiritual, and

⁷ Paragraph XVI of the Findings also incorporated the September 6, 2001 Memorandum Decision. A.75.

academic development.” A.96. Respondent alleged the following changes in circumstances: (1) Isaac’s sisters, Heather and Eleni were living in other states, and Isaac’s brother, Seth, was a senior in high school and would be moving out of Appellant’s home to attend college in the fall of 2006; (2) Isaac had successfully adjusted since the divorce; (3) Isaac would have greater ability to practice his faith as an Orthodox Jew in New York City; and (4) Isaac would be able to continue to have an intimate relationship with his father despite the fact that he would be living in New York City.⁸

A.96 – A. 102. Respondent disclosed that she was engaged to marry Philip Orner, an attorney who lived and practiced law in New York City. A.104. Respondent claimed that Isaac “really enjoyed spending time” with Mr. Orner, and that Isaac had “expressed a passion” for New York City and had “expressed interest” in residing in New York City. A.104 – A.105.

Appellant responded with a motion opposing Respondent’s request to move Isaac’s residence to New York City. A.119. In an attached Affidavit, Appellant detailed his loving relationship with Isaac and the significant amount of time they had spent together since the divorce. A.121. Appellant discussed his involvement in Isaac’s education and school activities, including his assistance with Isaac’s homework. A.122 – A.124. Appellant also described Isaac’s close relationship with other friends and family members in Minnesota and specifically addressed Isaac’s relationship with his half-siblings. A.125 – A.128. Appellant expressed concerns about the proposed relocation of

⁸ The four changes in circumstances listed by Respondent in her Affidavit are separately designated by her as a, b, c and d. A.96 – A.102.

Isaac to New York City given Respondent's concealment of information regarding Isaac and her obstruction of Appellant's communications with Isaac. A.131. Appellant stated that he was unaware of Respondent's intent to move to New York City until January of 2007, when a parent of a fellow student at Isaac's school told Appellant that Respondent was getting married in New York.⁹ A.131. Seth Greenwood submitted an Affidavit in which he detailed his close relationship with Isaac and the various activities and pastimes which they enjoy together. A.133 – A.135.

On April 14, 2006, the district court issued its order denying Respondent's motion to allow her to remove the minor child to New York. A.173. In an attached Memorandum, the district court explained that the Decree's locale restriction granting Respondent sole physical custody conditioned on her remaining in Minnesota created an existing physical custody arrangement which could not be modified absent a showing pursuant to Minn. Stat. § 518.18 (d) (iv) of: (1) significant changed circumstances; (2) endangerment; and (3) the fact that the advantages associated with a move outweighed the harm caused by the move. A.178 – A.181. The district court also examined the

⁹ Respondent attached as Exhibit a to her February 27, 2006 Affidavit a copy of a letter dated November 22, 2005, written by Dr. Mary Kenning, a therapist who had last seen Isaac on February 22, 2001. A.107. Respondent claimed that Dr. Kenning's letter was proof that Isaac had "a grounded relationship with [Respondent] and [Appellant] and has not needed counseling since the 2001 Memorandum Decision." A.96. The content of the letter leaves little doubt that it was procured for purposes of litigation. The length of time between the date of the letter and Respondent's notifying Appellant of the hearing exposes an intent on Respondent's part to keep Appellant in the dark for as long as possible prior to revealing her plans to bring a motion to remove Isaac's residence to New York. The fact that the originally scheduled hearing date for Respondent's motion was February 23, 2007, means that Respondent gave Appellant scant advance warning of her desire to move Isaac's residence to New York. A.91.

change in circumstances alleged by Respondent and determined that none of them were significant. The district court noted that the minor child's relationship with the parties and his half-siblings had not changed in any material way since 2001 when the locale restriction was originally imposed. A.182 – A.185. The district court further noted that Respondent had not specifically alleged that the minor child's locale preference had actually changed.¹⁰ A.183. The one obvious change was Respondent's engagement to a fiancé who lived and worked in New York City, which the court characterized as a change in Respondent's circumstances, not Isaac's. A.186. The district court found that Respondent had failed to present a prima facie case of endangerment and that she instead had focused on the opportunities allegedly available to Isaac if Isaac were to move to New York City. A.190. Finally, the district court concluded that Respondent had failed to address whether the advantages presented by Isaac's proposed move to New York City outweighed the harm to be caused to Isaac by moving him away from his father, his brother Seth, and his friends. A.191.

¹⁰ The district court stated that “there is nothing in the submissions to suggest that Isaac actually wants to move so far away from his father and Seth.” A.183.

INTRODUCTION AND STANDARD OF REVIEW

This court should reverse the Court of Appeals and conclude that the district court correctly denied Respondent's motion to remove the minor child's residence to New York without an evidentiary hearing. By declaring that portions of the ruling in Auge v. Auge, 334 N.W.2d 393 (Minn. 1983) remain intact, the Court of Appeals has ignored the Minnesota State Legislature's clear intent to place all of the burden of proof on the proponent of a child's removal to another state, even where the proponent is the child's sole physical custodian. The Court of Appeals also erred by declaring that a trial court should be forbidden from requiring a sole physical custodian with a locale restricting conditional custody award to make a prima facie showing of significant changed circumstances pursuant to Minn. Stat. § 518.18 (d) (iv) before they are entitled to an evidentiary hearing on their motion to remove the child's residence. The trial court's denial of Respondent's motion to remove the minor child's residence without an evidentiary hearing should be upheld because Respondent failed to make a prima facie showing under either Minn. Stat. § 518.18 (d) (iv), or Minn. Stat. § 518.175, subd. 3.

Appellate review of removal and custody modification proceedings is limited to "whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996). Determination of the proper statutory standard is a question of law, which does not require deference to the trial court. Ayers v. Ayers, 508 N.W.2d 515, 518 (Minn. 1993).

ARGUMENT

- I. THE 2006 AMENDMENTS TO MINN. STAT. § 518.175, SUBD. 3 OVERRULE AUGE V. AUGE, 334 N.W.2D 393 (MINN. 1983) BY PLACING THE BURDEN UPON THE PROPONENT OF A REMOVAL OF A CHILD TO ANOTHER STATE TO SHOW THAT THE MOVE IS IN THE CHILD'S BEST INTERESTS EVEN WHERE DENIAL OF THE MOTION TO REMOVE WOULD RESULT IN A MODIFICATION OF PHYSICAL CUSTODY.

The initial problem posed by this case is the Minnesota Court of Appeals' interpretation of the 2006 amendments to Minn. Stat. § 518.175, subd. 3. The Court of Appeals acknowledged that the 2006 amendments eliminated the Auge presumption by requiring the proponent of a move to "show cause" for a removal. Goldman v. Greenwood, 725 N.W.2d 747, 752 (Minn. App. 2007). The Court of Appeals stated that the presumption in favor of removal had been replaced by the need for attention to the "custodian's reasons for relocation." Id. at 756. However, the Court of Appeals also asserted that where denial of a motion to remove could effect a change in physical custody "portions of the Auge holding remain[ed] intact," including: (1) consideration of the consequences of separating the child from his or her custodial parent; and (2) preclusion of "excessive deference to the child's parenting time" with the non-custodial parent. Id. at 757 - 58. Although the Court of Appeals stressed that Minn. Stat. § 518.18 (d) was implicated by the potential denial of a sole physical custodian's motion to remove a child's residence, it declined to promulgate a standard for how trial courts were to adjudicate such motions in the future. Id. at 758.

The Court of Appeals' decision in the present case requires a comparison of Minnesota child relocation jurisprudence with the 2006 amendments to Minn. Stat. §

518.175, subd. 3. A fair review of the applicable authorities necessitates a conclusion that the Court of Appeals' attempt to salvage Auge is in contravention of the Legislature's intent to completely overrule Auge with the enactment of the 2006 amendments to Minn. Stat. § 518.175, subd. 3.

A. THE AUGE PRESUMPTION HAS BEEN UNDERMINED BY SUBSEQUENT CASE LAW.

In Auge v. Auge, 334 N.W.2d 393, 399 (Minn. 1983), the Minnesota Supreme Court established a policy in favor of a custodial parent's ability to relocate a child's residence to another state. Subsequent case law, which provided exceptions and qualifications to the presumption, undermined the holding in Auge.

In Auge v. Auge, 334 N.W.2d 393, 399 (Minn. 1983), the Minnesota Supreme Court interpreted Minn. Stat. § 518.175, subd. 3 (1982)¹¹ to provide that a custodial parent's motion to remove a child's residence to another state should be granted unless the party opposing the motion established by a preponderance of the evidence that the move was not in the best interests of the child. The Auge court held that the motion could be granted without an evidentiary hearing unless the party opposing the motion

¹¹ The 1982 version of Minn. Stat. § 518.175, subd. 3, provided as follows: "A custodial parent shall not move the residence of the child to another state except upon order of the court or with the consent of the noncustodial parent, when the noncustodial parent has been given visitation rights by the decree. If the purpose of the move is to interfere with visitation rights given to the noncustodial parent by the decree, the court shall not permit the child's residence to be moved to another state." Minn. Stat. § 518.175, subd. 3 (1982). The foregoing statutory provision is now codified as Minn. Stat. § 518.175, subd. 3 (a), and reads as follows: "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 the 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."

made a prima facie showing against removal. Id. By the same token, the Auge court held that a motion for removal could not be denied without an evidentiary hearing if denial of the motion would effect a modification of custody. Id. In that event, the trial court was required to consider the negative effects of separating the child from the custodial parent. Id. Although the Auge court did not specify what constituted a prima facie showing against removal, it suggested that a custodial parent's decision as to a child's residence should not "be second guessed" unless the decision posed a "clear danger to the child's well-being." Id. [quoting Note: Residence Restrictions on Custodial Parents: Implications for the Right to Travel, 12 Rutgers L.J. 341, 363 (1981)]. The Auge court reasoned that Minn. Stat. § 518.18 (d), which required a non-custodial parent to show endangerment in order to achieve a modification of custody, established an implicit presumption in favor of removal since denying permission to remove would effect a change in custody in many cases. Auge, supra, at 396 - 97. The Auge court declared that a presumption in favor of removal would tend to maintain the child in the family unit to which the child currently belongs and minimize judicial interference with decisions affecting that family unit. Id. at 399.

In Gordon v. Gordon, 339 N.W.2d 269, 271 (Minn. 1983), this Court extended the Auge presumption to situations in which the movant had sole physical custody but the parents shared joint legal custody. In Hegerle v. Hegerle, 355 N.W.2d 726, 731 (Minn. App. 1984), the Minnesota Court of Appeals declined to apply the Auge presumption to a case where the parents shared joint physical custody and were equally involved in the child's care. Moreover, the Court of Appeals opined that joint physical custody did not

“require an absolutely equal division of time.” Id. at 731 - 32. In Geiger v. Geiger, 470 N.W.2d 704, 707 (Minn. App. 1991), the Minnesota Court of Appeals held that parties could not stipulate around the Auge presumption by imposing upon a sole physical custodian the burden of proving that the removal of the residence of a child to another state was in the child’s best interests. In Ayers v. Ayers, 508 N.W.2d 515, 520 (Minn. 1993), this Court declined to extend the Auge presumption to a stipulated award of joint physical custody even though the award provided that the children’s “primary residence” was with the mother and the father’s access with the children consisted of alternating weekends during the school year, most of the summer, and alternating major holidays and school vacations. (access schedule noted in Ayers, supra at 517.) The Ayers court stated “[c]ustody provisions in a stipulated decree must be accorded a great deal of deference.” Id. at 520. The Ayers court suggested that parties were free to engage in “careful drafting” to avoid the Auge presumption by stipulating to joint physical custody, and that this would “provide more certainty in resolving future disputes.” Id. In Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996), this Court increased the burden on non-custodial parents opposing a motion for removal by requiring them to show not only that the move was not in the child’s best interest, but also that the move would endanger the child’s health and well-being. In LaChapelle v. Mitten, 607 N.W.2d 151, 162 (Minn. App. 2000), the Minnesota Court of Appeals affirmed the trial court’s award of sole physical custody conditioned upon the sole physical custodian remaining in the State of Minnesota. The Court of Appeals reaffirmed the LaChapelle holding in Dailey v. Chermak, 709 N.W.2d 626, 630 (Minn. App. 2006), in which it held that trial courts are

free to award physical custody on the condition that the custodial parent maintain a specific geographical residence as long as that residence is clearly shown to serve the child's best interests.

By 2006, Minnesota relocation jurisprudence was on a collision course with itself. A sole physical custodian's motion to remove a child to another state was presumed to be in the child's best interests, and a motion to remove was to be granted unless the non-physical custodian could prove that the move endangered the child. Parties, however, were allowed to stipulate around the presumption by agreeing to share joint physical custody, even if there was a significantly unequal allocation of parenting time. Nevertheless, if the arrangement was labeled as sole physical custody, the parties could not stipulate around the Auge presumption by agreeing that the best interests standard would be applied to a future motion for removal. Still, a trial court was free to condition a sole physical custodian's right to maintain custody upon the sole physical custodian's remaining in a particular geographical area. The public policy goal of promoting a child's stability upon which Auge was purportedly based had been undermined by case law favoring the form and title of a custody arrangement over its substance.

B. THE 2006 AMENDMENTS TO MINN. STAT § 518.175, SUBD. 3 ARE CLEARLY INTENDED TO OVERRULE AUGE V. AUGE, 334 N.W. 2d 393 (MINN. 1983) IN ITS ENTIRETY.

The Court of Appeals' opinion minimizes the significance of the 2006 amendments to Minn. Stat. § 518.175, subd. 3, through its suggestion that all the Legislature had accomplished was to eliminate the Auge presumption in favor of removal

by requiring the proponent of a move to show the proponent's reasons for removal.¹² Goldman v. Greenwood, 725 N.W.2d 747, 752 (Minn. App. 2007). Moreover, the Court of Appeals claimed that "portions of the Auge holding remain[ed] intact" because denial of a motion to remove could effect a change in physical custody, thereby implicating the custody modification statute, Minn. Stat. § 518.18 (d). Id. at 757 – 58.

The Court of Appeals' belief that sole physical custodians retain some sort of favored position with respect to motions for removal is at odds with the plain language and legislative history of the 2006 amendments to Minn. Stat. § 518.175, subd. 3.¹³ Minn. Stat. § 518.175, subd. 3 (b) provides that "[t]he court shall apply a best interests standard when considering the request...to move a child to another state," and lists eight separate factors that a court is to consider in determining the child's best interest when deciding a motion for removal. Minn. Stat. § 518.175, subd. 3 (c) provides that "[t]he burden of proof is upon the parent requesting to move the residence of the child to another state," except in cases where the movant has been a victim of domestic abuse by the other parent.

The 2006 amendments to Minn. Stat. § 518.175, subd. 3 are contained in section 13 of chapter 280 of the 2006 Session Laws of the Minnesota State Legislature. See

¹² The suggestion that the 2006 amendments to Minn. Stat. § 518.175, subd. 3 altered Auge only by permitting scrutiny of the proposed reasons for a relocation to another state, is disingenuous because the Auge holding does in fact require examination of the reasons. The Auge court held that a motion to remove "should include a statement of the reasons for the request." Auge v. Auge, 334 N.W.2d 393, 397 (Minn. 1983). In addition, the Auge court stated that removal should not be allowed for "frivolous" reasons. Id. at 398.

¹³ The 2006 amendments to Minn. Stat. § 518.175, subd. 3 are codified as subdivisions (b) and (c) of that statute.

2006 Minn. Laws ch. 280, § 13. A.230. Section 13 of Chapter 280 was originally introduced as section 2 of Senate File No. 266 during the 2003 – 2004 session of the Minnesota State Legislature.¹⁴ A.224 – A.225. During floor debate on Senate File No. 266, Senator Betzold, the chief author, stated as follows:

Mr. President, Senate File 266 is the Family Law Bill that addresses the Minnesota Supreme Court decision from about twenty years ago where the Minnesota Supreme Court decided that if a custodial parent wants to move a child out of state, then the non-custodial parent basically has to prove that the child will be endangered in order to stop the move from happening. We heard in the Judiciary Committee and then the Family Subcommittee quite an extensive testimony on this and the views seemed to be that it just does not work, that the burden ought to be upon the custodial parent who really should have the opportunity to move out of state, but has to be able to establish that to the Court's satisfaction and not require the non-custodial parent to prove a negative.

Senate Floor Debate on S. F. No. 266 (April 15, 2003) (Statement of Sen. Betzold). A.308.

The Court of Appeals' attempt to salvage Auge is at odds with the language and intent of Minn. Stat. §§ 518.175, subd. 3 (b) and (c). These new statutory provisions overrule Auge by providing that courts are to “apply a best interests standard” and by imposing “[t]he burden of proof” upon “the parent requesting to move the residence of the child to another state.” When the language of a statute is plain and unambiguous, it is assumed to manifest legislative intent and must be given effect. Burkstrand v.

¹⁴ Section 2 of Senate File 266, as originally introduced on February 4, 2003, and section 13 of Chapter 280, are almost identical in language except that section 2 initially did not provide for the burden of proof to shift in cases involving domestic abuse. The second engrossment of Senate File 266, which was posted April 15, 2003, reflects a floor amendment to shift the burden of proof to the parent opposing the move if the court found “the existence of domestic abuse between the parents.” A.228. Section 13 of Chapter 280 altered this provision further to limit such burden shifting to cases where the movant has been a victim of domestic abuse by the other parent. A.230.

Burkstrand, 632 N.W.2d 206, 210 (Minn. 2001). Even if Minn. Stat. § 518.175, subd. 3 (b) and (c) were deemed to be ambiguous, the legislative history in the form of Senator Betzold's above statements during floor debate demonstrate a clear intent to overrule Auge in its entirety. See Burkstrand, *supra*, at 610 (stating that appellate courts may ascertain the Legislature's intent by considering the legislative history). Statements made by the sponsor of a bill on the purpose or effect of the legislation are generally entitled to some weight. McKee-Johnson v. Johnson, 444 N.W.2d 259, 263 (Minn. 1989); Handle With Care, Inc. v. Department of Human Services, 406 N.W.2d 518, 522 (Minn. 1987).

The 2006 amendments to Minn. Stat. § 518.175, subd. 3 would be rendered ineffective if a sole physical custodian could avail themselves of Minn. Stat. § 518.18 (d) to avoid the burden of proof set forth in Minn. Stat. § 518.175, subd. 3 (c). It is presumed that the Legislature does not intend a result that is absurd or impossible of execution. Minn. Stat. § 645.17. It is also assumed that the Legislature will not engage in a futile act. Grossman v. Aerial Farm Service, Inc., 384 N.W.2d 488, 489 (Minn. App. 1986) (citing Smith v. Barry, 219 Minn. 182, 187, 17 N.W.2d 324, 327 (1944)).¹⁵

¹⁵ In justifying its reliance upon Minn. Stat. § 518.18 (d), the Court of Appeals asserted that Minn. Stat. § 518.18 (d) was "materially unchanged" between the date of the Auge decision and the date of its decision in the present case. Goldman v. Greenwood, 725 N.W.2d 747, 757 (Minn. App. 2007). This is not accurate. Prior to 2000, "endangerment" (Minn. Stat. § 518.18 (d) (iv)) along with "agreement" (Minn. Stat. § 518.18 (d) (ii)) and "integration" (Minn. Stat. § 518.18 (d) (iii)), was one of three bases for modification of a physical custody arrangement. In 2000, the Legislature amended Minn. Stat. § 518.18 (d) to allow parties to stipulate to apply the best interests standard to motions for custody modification. See 2000 Minn. Laws ch. 444, art. 1, § 5 codified at Minn. Stat. § 518.18 (d) (i). In 2006, the Minnesota State Legislature amended Minn. Stat. § 518.18 (d) to add a fifth ground for a modification of custody where "the court has denied a request to the primary custodial parent to move the residence of the child to

C. APPROVAL OF THE COURT OF APPEALS' ATTEMPT TO SALVAGE AUGE V. AUGE, 334 N.W. 2D 393 (MINN. 1983) WILL CREATE UNNECESSARY CONFLICT WITH THE MINNESOTA STATE LEGISLATURE.

An approval by this Court of the Court of Appeals' attempt to nullify the 2006 amendments to Minn. Stat. § 518.175, subd. 3, will likely generate a negative response from the Minnesota State Legislature. The Legislature has not been reticent to overrule appellate decisions dealing with child custody with which it disagrees.

In Frauenschuh v. Giese, 599 N.W.2d 153, 158 (Minn. 1999), this Court held that a trial court must apply the endangerment standard of Minn. Stat. § 518.18 (d) to a motion for modification of sole physical custody even where the parties had stipulated in their original decree to the application of the best interests standard to a future custody modification motion. The Frauenschuh court reasoned that the language of Minn. Stat. § 518.18 clearly reflected a legislative intent to “provide a measure of permanent stability to the life of a child who has been the object of a custody dispute.” Id. One year later, the Legislature amended Minn. Stat. § 518.18 (d) to allow parties the ability to agree in writing to apply the best interests standard to a future custody modification motion. See 2000 Minn. Laws ch. 444, art. 1, § 5, codified at Minn. Stat. § 518.18 (d) (i).

A more infamous example of judicial and legislative skirmishing over child custody jurisprudence is found in the Legislature's reaction to this Court's decisions in Pikula v. Pikula, 374 N.W. 2d 705 (Minn. 1985) and Maxfield v. Maxfield, 452 N.W.2d

another state, and the primary custodial parent has relocated to another state despite the court's order.” See Minn. Laws 2006, ch. 280, § 14, codified at Minn. Stat. § 518.18 (d) (v) (2006). These amendments show that the State Legislature does not view the endangerment standard as sacrosanct as the Court of Appeals does.

219 (Minn. 1990). In Pikula v. Pikula, 374 N.W.2d at 712, this Court held that when two parents seek custody of a child too young to express a preference, and one parent has been the primary caretaker of the child, custody should be awarded to the child's primary caretaker absent a showing of unfitness. At the time of the Pikula decision, the "primary caretaker" factor was not one of the nine enumerated best interests factors in Minn. Stat. § 518.17, subd. 1. In 1989, the Legislature amended Minn. Stat. § 518.17, subd. 1 to add the "primary caretaker" factor to the list of best interests factors in Minn. Stat. § 518.17, subd. 1, and it further mandated that none of the statutory factors set forth in Minn. Stat. § 518.17, subd. 1 could be used to the "exclusion of all others." 1989 Minn. Laws ch. 248, § 2. In Maxfield v. Maxfield, *supra*, 452 N.W.2d at 223 (Minn. 1990), this Court minimized the impact of the 1989 amendment to Minn. Stat. § 518.175, subd. 1, by holding that the relationship between the child and the primary parent "should not be disturbed without strong reasons because a young child's relationship with its primary parent is the 'golden thread' running through any best interests analysis." Reaction from the State Legislature was swift. In 1990, the Legislature amended Minn. Stat. § 518.17, subd. 1 further to provide that the "primary caretaker factor may not be used as a presumption in determining the best interests of the child." 1990 Minn. Laws ch. 574, § 13. The comments of Senator Spear and Senator Knaak during floor debate in the Minnesota State Senate regarding the 1990 amendment are instructive:

Senator Spear: I think if I understand this amendment correctly, I think I support it. Last year we redrafted this section of the law and we included – we added the provision that you see on page two lines 11 – 12: 'The court may not use one factor to the exclusion of all others.' Because what had been happening since the Pikula decision was that the primary caretaker

factor seemed to be used to the exclusion of all others.

Now since that time there has been a decision called the Maxfield decision and in that decision the court read what we did last year but didn't seem to believe it and didn't seem to believe that we meant what we said and so I think, Senator Knaak, is this an attempt to give the court another message and to tell them that the Maxfield decision was an incorrect interpretation of what we did last year?

Senator Knaak: Mr. President, Senator Spear – It's in English and I believe the court can read it.

Senate Floor Debate on H.F. 1855 (April 9, 1990) (Statements of Senator Spear and Senator Knaak) quoted in Hon. Gary L. Crippen, Minnesota's Alternatives to Primary Caretaker Placements: Too Much of a Good Thing?, 28 Wm. Mitchell L. Rev. 677, 684, n. 34 (2001).

Judge Crippen, the author of the Court of Appeals' decision in the present case, appears to advocate that the Supreme Court limit "the legislative prerogative to declare what is best for a child, keeping in mind the judicial role in determining equity." Hon. Gary L. Crippen, Minnesota's Alternatives to Primary Caretaker Placements: Too Much of a Good Thing?, 28 Wm. Mitchell L. Rev. 677, 695 (2001). Judge Crippen has urged this Court to reaffirm the "golden thread" analysis and "renew its commitment to promoting the best interests of children, whose deepest bond is with a primary parent." Id. at 694. Judge Crippen's opinion in the present case asserts that the focus of Minnesota custody law, including Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985) and Auge v. Auge, 334 N.W.2d 393 (Minn. 1983), has been to protect the stability of the relationship between a child and the child's primary parent. Goldman v. Greenwood, 725 N.W.2d 747, 754 n. 5 (Minn. App. 2007). This opinion argues that attachment theory, which maintains that a child's ability to form and maintain a healthy and intimate

relationship is dependent upon having had a close and consistent relationship with its mother during infancy and early childhood, is “broadly accepted in child development,” and that there is broad consensus supporting the “central importance of the primary relationship with the custodial parent over that of the visiting relationship.” *Id.* [citing Carol S. Bruch, Sound Research Or Wishful Thinking in Child Custody Cases? Lessons From Relocation Law, 40 Fam. L.Q. 281, 285, 293 (2006)]. Another author, however, notes that the broad consensus of professionals is that children normally develop close relationships with both parents, and do best when they have the opportunity to establish and maintain such attachments. Richard A. Warshak, Social Science and Children’s Best Interests in Relocation Cases: Burgess Revisited, 34 Fam. L. Q. 83, 85 (2003).¹⁶ Kenneth Waldron, Ph.D., a psychologist who reviewed over seventy studies and literature reviews, concluded that the bulk of the findings did not support relocation in most cases. Kenneth Waldron, A Review of Social Science Research in Post Divorce Relocation. 19 J. Am. Acad. Matrim. Law 337, 341 (2005).

Whatever the merits of the competing public policy positions on relocation, the Legislature has chosen a policy against relocation. If this Court were to ignore the Legislature’s clear intent to overrule Auge, it will be encroaching upon the Legislature’s prerogative to set policy, thereby provoking an unnecessary battle with a coequal branch

¹⁶ Warshak is one of several authors and researchers on the subject of removal whose professionalism Professor Bruch vitriolically attacks in her law review article. See Bruch, supra, at 296 – 312. Professor Bruch is a well known advocate of laws favoring the ability of custodial parents to relocate, and in fact Bruch presented an amicus curiae brief in favor of removal in the California Supreme Court case of In Re Marriage of Burgess, 913 P. 2d 473 (Cal. 1996). See Warshak, supra, at 85.

of government. See State v. Northwest Airlines, 213 Minn. 395, 420, 7 N.W.2d 691, 703 (1942) (J. Streissguth, concurring specially). Judicial interference with the Legislature's policy-setting role runs contrary to the traditional role of the judiciary in interpreting family law legislation because divorce jurisdiction is statutory. See Kiesow v. Kiesow, 270 Minn. 374, 379, 133 N.W.2d 652, 657 (1965). The role of the judiciary in dissolution proceedings is strictly limited to that provided by statute. Melamed v. Melamed, 286 N.W.2d 716, 719 (Minn. 1979). An affirmance of the Court of Appeals' decision will set the stage once again for the Legislature to intervene to protect its prerogative to set public policy on child custody.

II. A TRIAL COURT MAY REQUIRE A SOLE PHYSICAL CUSTODIAN WHO HAS A LOCALE RESTRICTING CONDITIONAL CUSTODY AWARD TO MAKE A PRIMA FACIE SHOWING PURSUANT TO MINN. STAT. § 518.18 (D) (IV) IN ORDER TO BE ENTITLED TO AN EVIDENTIARY HEARING ON A SUBSEQUENT MOTION TO REMOVE THE MINOR CHILD'S RESIDENCE TO ANOTHER STATE.

In the present case, the Court of Appeals disapprovingly characterized the district court's imposition of Minn. Stat. § 518.18 (d)'s burden of proof upon Respondent to show a substantial change of circumstances, as being tantamount to turning "Auge on its head." Goldman v. Greenwood, 725 N.W.2d 747, 754 (Minn. App. 2007). The Court of Appeals concluded that a sole physical custodian should not be required to satisfy a greater burden of proof under Minn. Stat. § 518.18 and should instead be able to proceed pursuant to Minn. Stat. § 518.175, subd 3. Id. at 755. Respondent, in her own February 27, 2006 Affidavit, tacitly acknowledged that she has the burden of proving endangerment by asserting that she has in fact met that burden. A.96. Indeed,

Respondent stipulated to the incorporation of the locale restricting conditional award of custody in two separate conclusions of law and in a finding of fact in the 2002 Decree. A.75, A.78, A.81. A negative treatment of a stipulation for a conditional award of custody would be at odds with this Court's holding in Ayers encouraging the ability of parties to fashion creative custody stipulations. See Ayers, supra, 508 N.W.2d 515, 520. It would also be at odds with the Legislature's express public policy preference of encouraging parties to stipulate to their own standards for future custody modification motions. See Minn. Stat. § 518.18 (d) (i).

Minn. Stat. § 518.18 (d) encompasses more than modification of a child's primary home. The statute provides that a "custody arrangement" or a "primary residence" may be modified. The term "custody arrangement" should be deemed as including locale restricting conditional custody awards. This is especially true in a case such as this one where the trial court conditioned Respondent's physical custody of Isaac to maintain and foster Isaac's relationship with Appellant. The Court of Appeals' unpublished opinion in Swarthout v. Siroki, C9-00-2219 (2001 Minn. App. Lexis 772), is persuasive in its treatment of a proposed modification of a locale restricting conditional award. In Swarthout, the district court granted the mother sole physical custody upon the condition that she reside within the State of Minnesota. A.234. At the time of the decree, the mother resided in New York but later elected to return to Minnesota. A.234. When the mother subsequently filed a motion for permission to move the child's residence to New York, the district court denied her motion, treating it as one for modification of custody. A.234. On appeal, the mother argued that the district court had erred in applying Minn.

Stat. § 518.18 to her motion for modification rather than Minn. Stat. § 518.175, subd. 3. A.234. The Minnesota Court of Appeals affirmed, holding that the district court correctly considered the mother's motion as a request for modification of the physical custody term in the original order. A.235. The Court of Appeals further held that the district court correctly denied her motion without an evidentiary hearing, because she presented no evidence of present endangerment. A.235 – A.236.

The Court of Appeals' approach in this case ignores the nuanced weighing of equities employed by trial courts in making custody determinations. In the present case, the district court viewed the minor child's relationship with his non-custodial parent to be so important that it deemed preservation of that relationship to take precedence over the child's custodial placement with Respondent if Respondent were to move to another state. The district court made this determination even though it deemed it best for the child to primarily reside with Respondent as long as Respondent continued to reside in Minnesota. The minor child, who was found to have a more emotionally intimate relationship with Appellant, has an interest in having that relationship safeguarded. The minor child spends 5 out of 14 overnights at Appellant's home, even though Respondent is deemed to have sole physical custody. It would be unreasonable to afford this relationship less protection than the relationship in Ayers v. Ayers, supra, where the father had school year visitation with the minor child on alternating weekends.¹⁷ See

¹⁷ Dr. Waldron notes that the degree of involvement of a non-custodial parent can vary enormously: "One non-custodial parent might have physical placement of the child four to five days every two weeks, might attend sporting and school events, might be actively involved with teachers, counselors, and the child's peers and so on. Another non-

Ayers, 508 N.W.2d at 517. Contemplative judicial consideration of specific custody situations should take precedence over abstract reasoning about attachment theory. In cases such as this one, where the district court has issued a locale restricting award of custody which it has also found to be in the child's best interests, a sole physical custodian should be required to establish a significant change of circumstances endangering the minor child before prevailing on a subsequent motion to change the child's residence to another state.

III. RESPONDENT FAILED TO MAKE A PRIMA FACIE SHOWING ENTITLING HER TO AN EVIDENTIARY HEARING ON HER MOTION TO REMOVE THE MINOR CHILD'S RESIDENCE TO NEW YORK.

Respondent should not be entitled to an evidentiary hearing. She has failed to make a prima facie case under either Minn. Stat. § 518.18 (d) or Minn. Stat. § 518.175, subd. 3.

A. RESPONDENT FAILED TO MAKE A PRIMA FACIE SHOWING UNDER MINN. STAT. § 518.18 (D) (IV).

A trial court is required to deny a motion for modification of custody unless the accompanying affidavits set forth sufficient justification for modification. Nice-Peterson v. Nice-Peterson, 310 N.W.2d 471, 472 (Minn. 1981). If the movant's affidavits do not establish a change in circumstances sufficient to justify a modification, there is no reason to require further litigation in the form of an evidentiary hearing. See Hegerle v. Hegerle, 355 N.W.2d 726, 731 (Minn. App. 1984) (equating denial of motion for modification of

custodial parent might passively have the children two to four days each month and have little participation in the child's life outside the home. These are very different fact situations." Waldron, supra, at 342.

custody sans evidentiary hearing due to lack of changed circumstances, with dismissal of civil proceeding for failure to state a claim). If a party alleges changed circumstances, they must further allege that the changed circumstances endanger the child's physical or emotional health. See Silbaugh v. Silbaugh, 543 N.W.2d 639, 642 (Minn. 1996) (citing Minn. Stat. § 518.18 (d)).

In the present case, Respondent made a conclusory claim of endangerment in her affidavit but failed to set forth specific facts evincing endangerment. A.96. In fact, Respondent characterized the minor child's relationship with both her and Appellant as good, and noted that the minor child had adjusted well to his living situation since the parties' divorce. A.96, A.101, A.102. As such, the trial court did not err in denying Respondent's motion without affording her an evidentiary hearing.

B. RESPONDENT FAILED TO MAKE A PRIMA FACIE SHOWING UNDER MINN. STAT § 518.175, SUBD. 3 (2006).

Even if Minn. Stat. § 518.175, subd. 3 were applied to the facts of this case, Respondent should be deemed as failing to making a prima facie showing entitling her to an evidentiary hearing. Minn. Stat. § 518.175, subd. 3 (b) lists eight factors for a court to consider when adjudicating a motion for removal of a child's residence to another state.

They are:

- (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, developmental state, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into

- consideration 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 preference, taking into consideration the age and maturity of the child;
 - (5) whether there is an established pattern of conduct of the person seeking the relocation either to promote or thwart the relationship of the child and the nonrelocating person;¹⁸
 - (6) whether the relocation of the child will enhance the general quality of the life for both the custodial parent seeking the relocation and 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 518B.01.

The above factors should be considered in conjunction with the changes in circumstances alleged by Respondent. A district court must find changed circumstances in order to reduce a party's parenting time. Matson v. Matson, 638 N.W.2d 462, 468 (Minn. App. 2002). None of the four changes in circumstances alleged by Respondent in

¹⁸ Of particular relevance to this case, is Minn. Stat. § 518.175, subd. 3 (c) (5)'s consideration of "whether there is an established pattern of conduct of the person seeking relocation either to promote or thwart the relationship of the child and a non-relocating person." The district court's September 6, 2001 Memorandum Decision recites a number of examples of Respondent's interference with Appellant's relationship with the minor child and her attempted exclusion of Appellant from parental decision making. A.25, A.30, A.31. Respondent's continued devaluing of Isaac's close, intimate relationship with Appellant is evidenced by her secretive launching of the present litigation.

her February 27, 2006 Affidavit suffice to make a prima facie case. The advanced age and college education plans of Isaac's older siblings were foreseeable at the time of the divorce. Isaac's successful adjustment since the divorce is not a change but rather a continuation of the improvement in his psychological well-being that was already underway at the time of the decree. The fact that Isaac might have a greater ability to practice his faith as an Orthodox Jew in New York City is not a change but an opportunity. Respondent's allegation that Isaac would continue to be able to have an intimate relationship with Appellant despite living in New York City is not a change, but an allegedly mitigating factor.

Notably, Respondent did not expressly allege that Isaac preferred to live in New York City as opposed to Minnesota. Her statements that Isaac "expressed a passion" for New York City and had "expressed interest" in living in New York City are too tentative and ambiguous to constitute an express change in residential preference. In fact, Respondent's own attorney denied that Isaac had signified a preference to live in New York City instead of Minnesota:

The issue is whether it's in Isaac's best interests, not necessarily what Isaac wants. As we know, children want things all the time. I'm not saying he does or he doesn't want that. I don't believe that my client said that in her pleadings specifically. I think she said he loves this life. He loves the idea. He's met my client's fiancé and his family. He's intrigued by the idea of living in New York."

A.156.

The Court of Appeals, however, held that Respondent's Affidavits "establish[ed] prima facie proof on the questions of the child's preference and interests in a move."

Goldman v. Greenwood, 725 N.W.2d 747, 761 (Minn. App. 2007). In so doing, the Court of Appeals substituted its own judgment for that of the trial court, which had found that it could not “find, even for prima facie purposes, that Isaac ha[d] expressed a custodial preference.” A.183. The Court of Appeals had no basis for concluding that Respondent had presented prima facie proof of a change in Isaac’s residential preference. An appellate court usurps the role of the trial court when it reweighs the evidence and finds its own facts. Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988).

CONCLUSION

The Court of Appeals' decision should be reversed and the district court's order denying Respondent's motion should be reinstated. The Legislature's overruling of the Auge presumption should be honored. Parents who seek to relocate a child's residence to another state should be required to demonstrate that the move is in the child's best interests regardless of whether the parent is a sole physical custodian. If a parent has a locale restricting conditional award of custody, the parent also should be required to demonstrate changed circumstances endangering the child's physical or emotional health before being entitled to an evidentiary hearing on their motion.

Respectfully submitted,

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