

APR - 4 2008

STATE OF MINNESOTA
IN SUPREME COURT

FILED

In Re the Marriage of :
DEBORAH A. GOLDMAN
f/k/a DEBORAH A. GREENWOOD

Appellate Court Case
No. A06-1110

Petitioner-Respondent,

-against-

MARK E. GREENWOOD,
Respondent-Appellant

Date of Filing Court of
Supreme Court Decision:
March 27 , 2008

PETITION FOR REHEARING OF DECISION BY SUPREME COURT

TO : The Supreme Court of the State of Minnesota:

The petitioner-respondent, Deborah A. Goldman, f/k/a Deborah A.

Greenwood, respectfully requests a rehearing of the decision of the Supreme Court

of the State of Minnesota dated March 27,2008, upon the following grounds

pursuant to Minn.R.Civ.App.Proc.R. Sec. 140.01:

- I- THE COURT, IN HOLDING THAT THE CONDITIONAL
“LACHAPELLE” LOCALE RESTRICTION IN THE CUSTODY
ARRANGEMENT IS NOT AUTOMATIC OR SELF-EXECUTING
,AND THUS NOT *VOID AB INITIO*, AND THAT SUCH PRESENT
CUSTODY ORDER IMPLIES THAT A HEARING WOULD
PRECEDE A CHANGE OF CUSTODY TO APPELLANT ON
RESPONDENT’S RELOCATION, OVERLOOKED THAT SUCH
HEARING RIGHTS DO NOT APPLY TO RESPONDENT UNDER
THE PRESENT PROVISIONS OF MINN.STAT.SEC. 518.18(d)(iii)
and 518.18(d)(v) (2006).**

The Court in its decision of March 27,2008 has stated that :

“We leave for another day the determination of the validity of a locale restriction that does provide for the automatic transfer of custody upon the sole physical custodian’s relocation”.

Yet, the Court has overlooked the full statutory provisions of Minn.Stat.Sec. 518.18 to the facts of this case including the provisions of Minn.Stat.Sec. 518.18(d)(iii)(2006) and 518.18(d)(v)(2006). The actual conditional award of physical custody, without legal custody for a stated as well as implied reason, to the Respondent was followed by very precise conditional language by stating “ *if for any reason the LaChapelle locale restriction is found wanting, this Court would award sole physical custody to father*”. This Court then concludes that this conditional language “ *...implies that a hearing would precede any subsequent custody transfer*”. Though the Court here now denies the Respondent the right of a hearing on her relocation motion because she is unable to prove the requirement enunciated by Minn.Stat.Sec. 518.18(d)(iv) as to present endangerment, which this Court disclaims then responsibility for a definition on how it could possibly be stated even just on a prima facie basis and declares that the Legislature has failed to provide any guidance on this instance how such term may even be pronounced for the right to be granted a hearing, the Court failed to consider that there is no alternative course of action under Minn.Stat. Sec. 518.18 which provides for the

Respondent to be granted such right of an evidentiary hearing on any subsequent motion under the two possible alternatives left to Respondent after this decision of March 27,2008 by this Court on a change of custody resulting from her relocation.

For, if Respondent would relocate without her son, and leave him to live for a considerable amount of time with the Appellant, hoping to create present endangerment to her child under a subsequent motion to change this conditional custody arrangement, the Respondent would be barred to change the custodial arrangement under Minn.Stat.Sec. 518.18(d)(iii) because the Respondent would show in opposition to the evidentiary hearing motion that “*the child has been integrated into the family of the petitioner with the consent of the other party*” . Hence, the Respondent’s motion for an evidentiary hearing under this possibility of leaving her son behind on the hope to change the custody arrangement subsequently would be non-existent . There is no possibility of another outcome here at all.

On the other hand, if Respondent were to relocate with her son, despite the present holding that she does not have a right to a hearing under the present motion

but she would receive an hearing in a subsequent motion to change custody to the Appellant, the Court has then overlooked Minn.Stat.Sec. 518.18(d)(v)(2006) which states that the prior order of custody arrangement is still valid unless “ *the Court has denied a request of the primary custodial parent to move the residence of the child to another state, and the primary custodial parent has relocated to another state despite the court’s order*”. Hence, the Respondent would not have rights for an evidentiary hearing under this possibility of leaving with her son on the hope to change the custody arrangement subsequently. For the Legislature has clearly stated that individuals who disobey court orders on custody arrangements clearly forfeit their custody rights and Respondent would not have a hearing right on this remaining possibility either.

In short, since the Court has overlooked the entire application of Minn.Stat.Sec. 518.18 (2006) including Minn.Stat.Sec. 518.18(d)(iii) and (d)(v) to this case, and the Respondent will not enjoy any rights to a hearing on a future change of physical custody on her relocation out-of-state, whichever alternative she chooses, the present conditional award of her physical custody of her 12 year-old son will be effectively automatic, self-executing, and thus void ab initio , as held by the

appellate courts of at least 14 (fourteen) States of the United States of America, as such citations were provided to this Court on the supplemental citations of September 7,2008 and September 13,2008.

II- FOLLOWING POINT "I", AS RESPONDENT IS CONSEQUENTLY DEPRIVED ON AN EVIDENTIARY HEARING BASED ON THE APPLICATION OF MINN.STAT.SEC. 518.18 TO HER ON THE ENSUING CHANGE OF CUSTODY TO APPELLANT DUE TO HER RELOCATION OUT-OF-STATE, THEN THE COURT HAS FAILED TO CONSIDER THE VIOLATION OF HER U.S. CONSTITUTIONAL RIGHTS OF DUE PROCESS OF HER FUNDAMENTAL RIGHTS AS TO HER BEING THE PRIMARY CARE PARENT OF THE CHILD AND HER MOST FUNDAMENTAL RIGHT TO REMARRY WHEN WEIGHED AGAINST THE COMPELLING STATE INTEREST TO OVERRIDE SUCH RIGHTS AS TO HER RELOCATION OF OUT-OF-STATE.

Following the conclusion of Point I above, that there is no possible scenario for the Respondent to receive the right to a future hearing on a change of custody upon her relocation, the Respondent's rights on due process to remain being the primary care parent of her 12 year-old son, who has had no other primary care parent other than the Respondent on his entire live, and to simultaneously enjoy the fundamental right of marriage , recognized by the U.S. Supreme Court, as per the citations and discussion

provided at Respondent's Brief, are being violated here by this decision of this Court. These fundamental rights of the Respondent have been improperly dislodged from the Respondent here without the benefit a proper evidentiary hearing where such rights are weighed against any compelling State's interest to override such rights of hers on her relocation out-of-state. It bears notation that LaChapelle v. Mitten , 607 N.W.2d 151 (Minn.App.,2000) was decided after a full evidentiary hearing and that decision did not involve either events which transpired several years after the conditional award of custody or the fundamental right of marriage.

III- BY ITS RENUNCIATION OF AND ABDICATION TO A DEFINITION OF ENDANGERMENT REQUIREMENTS TO A CONDITIONAL AWARDEE OF PHYSICAL CUSTODY, AS STATED BY THE LEGISLATURE ON MINN.STAT.SEC. 518.18, THIS COURT IS IMPLICITLY STATING THAT THE JUDICIALLY CREATED CONDITIONAL AWARD OF CUSTODY UNDER *LACHAPELLE* IS CONSEQUENTLY NOT WITHIN THE CONFINES OF THE STATUTE AND WHAT THE LEGISLATURE INTENDED FOR.

Despite the conjunctive inferences of this Court on its decision of March 27,2008 as to the words "and" / "or" as to Minn.Stat.Sec. 518.18

and its application to changes to custody arrangements and/or changes in child's primary residence, the Court has misconceived the reading of the entire statute and its application to a parent who already has physical custody and merely seeks to shed the conditional award of such physical award of custody. Minn.Stat.Sec. 518.18(d)(iii) addresses itself as to the petitioner being the movant on the change of the child's primary residence, and in this case the movant is the Respondent who wants to maintain being the parent with whom the child resides primarily reflect a contradiction as to the conclusion that the *LaChapelle* clause removal motion fits under the present existing established legislative language of this statute. If the Judiciary is proactive and creates legal devices such a *LaChapelle* with conditional awards of custody, not just locale restrictions, then the Judiciary may not abdicate the ensuing application of changes to judicially created devices, as this decision of this Court has done here by shifting its responsibility to the Legislative on the application and definition of present endangerment requirements under Minn.Stat.Sec. 518.18(d)(iv).

This decision by this Court on the impossibility of application of

present endangerment overlooks Min.Stat. Sec. 645.17 that prohibits application of statutes where there is an impossibility of satisfying the requirements of the applied statute and the Legislature does not intend a result that is absurd or impossible of execution, such as requiring the Respondent to show prima facie of present endangerment on the conditional award while the child is still under her physical custody. This is re-enforced by the more specific statute Minn.Stat. 518.175 (2006), recently amended and reflecting the Legislature's intent to rely on best interest analysis and not endangerment in such evaluations, which deals with all relocations of parents with custody and does not state an exclusion for parents , such as the Respondent, who has a conditional award of physical custody. For a "custody arrangement" could refer to any custody order, whether it has a conditional award or not, and then, Minn.Stat 518.175 would be negated in its totality, which has an absurd result, since it would need to defer to Minn.Stat. 518.18 even for those custody arrangements without a conditional award. There has not been any evidence or intention shown on this record that custody arrangement was meant by the Legislature to include or define conditional awards, and

this Court is presently by its decision of March 27,2008 is misconstruing the clear and stated mandates of both statutes. Consequently, this decision is unconstitutional and in violation of the division of powers enunciated by the Constitution of the State of Minnesota.

IV- THE COURT HAS OVERLOOKED FACTUAL INDICATIONS ON THE TRANSCRIPT BY THE TRIAL COURT AND ADMISSIONS ON THE BRIEF AND ON ORAL ARGUMENT BY APPELLANT THAT THE CONDITIONAL AWARD OF CUSTODY RESULTS HERE IN AN AUTOMATIC SELF-EXECUTING CHANGE OF CUSTODY ONCE THE RESPONDENT RELOCATES WITHOUT COURT'S PERMISSION.

Factually, the Court has overlooked the Apellant's admission and concession at the oral argument on September 11,2007 at rebuttal time, on a question by Justice Paul Anderson , that had Respondent physically left the State and relocated in spite of the court order appealed, the child would automatically been with the Appellant based on the terms of the conditional award of physical custody between the parties as incorporated into the divorce decree.

Furthermore, the Court has overlooked the transcript of March

13,2006, where the trial court discussed the conditional award ordered in 2001 and as stated on the record (A-164) as prompted by trial counsel for the Respondent as to “*having the Court review whether it continues..*” to which the trial court replied “*Mine was a little bit more, I think was stronger than just LaChapelle””*she gets custody if she stays here*”. [underlying added for emphasis]. This trial court then on its order being appealed herein endorsed the remedy of automatic switch of custody of a mother who would fail to abide to the conditional award of custody of an unreported case cited now in this Court’s decision (A-177). By upholding this decision, this Court is creating a LaChapelle presumption, as advocate by the trial court, as also enunciated on A-180, when it stated on the order under review that:*

“ There is no need for a presumption herein in order to address the locale question because the initial custody decision already determined (over six years ago) , based on specific circumstances [over six years ago] at hand, that removing Isaac from Minnesota [when he was 4 years old] would be inconsistent with his best interests.”

and thus “...*the Court already determined that Respondent [Appellant] is best suited to have physical custody of Isaac if Petitioner [Respondent] leaves the State” (A-179).*

And on footnote #2 of that March 13,2006, the trial court stated “ *this no doubt will be a very unfortunate situation for Petitioner ..*” as to relocating without Isaac and automatically shifting custody to the Appellant here upon

the relocation. Hence, the Court has unequivocally overlooked the record and the record is clear that the trial court would have automatically granted the Appellant the physical custody of Isaac to the Appellant in this case if the Respondent had relocated with Isaac after the March 13,2006 decision denying her motion to relocate. Yet , in clearly overruling Auge and its presumption, the Court in this decision of March 27,2008, is also upholding a LaChapelle presumption and that “*parents seeking to remove locale restrictions should be required to meet a greater burden of proof than a simple de novo best interest burden*”. Where and how such conclusion of law by the trial court, upheld now by this Court in its decision, is based on is clearly unsubstantiated by any precedent and/or statutory basis.

V- THE COURT’S HOLDING REQUIRES THE RESPONDENT TO DELIBERATELY CAUSE PRESENT HARM TO HER OWN CHILD IN ITS PRESENT ENVIRONMENT BY RELOCATING WITHOUT HIM THUS CREATING AN INCONGROUS AND UNCONSTITUTIONAL VIOLATION OF THE CHILD’S FEDERALLY PROTECTED BEST INTEREST ANALYSIS.

The U.S. Supreme Court has recognized the essence of best interest analysis on decisions regarding the custody of children and though it has stated that it will not generally hear cases regarding Domestic Relations Law

, such general rule has left an exception as to when harm is caused to the child, as per Elk Grove Unified School District and David W. Gordon v. Michael A. Newdow, 542 U.S.1, 124 S. Ct. 2301, 159 L.Ed.2d 98 (2004), and also as it relates to religion, which this Court has overlooked in its decision regarding this Orthodox Jewish child and as to the Appellant and Respondent having different religions. The decision of March 27, 2008 requires in effect the Respondent to cross such threshold to seek intentional infliction of harm to her own child, as the Dissent on this opinion has correctly pointed out, and thus violates the stalwart of best interest analysis and constitutionally protected action. Furthermore, by depriving even a hearing and having no possibility of future hearing on the change of custody, this Court has engendered a dangerous precedent, though initially stipulated by the parties based on two prior court orders that provided such conditional award of physical custody, that Courts will overlook best interest analysis and allow such resulting effects on children, especially, as in this case, where the child himself has not been represented and his rights not been protected judicially. Furthermore, this decision by this Court conflicts and contradicts the holding in Ryg v. Kerkow, 207 N.W.2d 701 (1973) that the overwhelming consideration in a child custody dispute is the child's best interest.

VI- THE COURT HAS MISAPPLIED *DAILEY v. CHERMAK* HERE AND FAILED TO FOLLOW THAT HOLDING , THOUGH IT EMBRACED IT ON ITS DECISION, THAT ON A MOTION FOR CHANGE OF CONDITIONAL CUSTODY WITH A LOCALE RESTRICTION THERE MUST BE A PRESENT ANALYSIS TO SUPPORT THAT THE INITIAL CRITERIA THAT FORMED THE BASIS OF SUCH ORDER STILL CLEARLY AND GENUINELY SERVE THE CHILD'S BEST INTEREST.

The Court in recognizing and upholding Dailey v. Chermak, 709 N.W.2d 626 (Minn.App.,2006) admits to the conditional award of custody based on maintaining a specific location for the residence of the child, and hence , failing that condition, then a reversion to the other parent. Yet, the Court , misapplied the second part of that holding which provides for a continuous evaluation as to whether the initial criteria stated to restrict to “*..that residence is clearly and genuinely to serve the child's best interests*” . In this case, the Respondent provided more than an adequate *prima facie* case on 15 affidavits from individuals of all competencies, such as teachers, physicians, coaches, lawyers and even a psychologist in a private capacity as parent of a classmate of the child, attesting that none of the initial criteria conditioning the Respondent's award of physical custody in 2001 was still genuinely and clearly to serve

this child's best interest. In advancing LaChapelle v. Mitten,*supra*, and Dailey v. Chermak,*supra*, the Court is respectfully requested to seize this judicial opportunity to formulate a subsequent review policy of the criteria that limited the best interest analysis to just the criteria enunciated on the initial conditional geographical award of custody and limit the best interest analysis as to changes of those factors only, if an overall best interest analysis de novo is rejected in these situations. Hence, "*the unique facts of LaChapelle*," the Court of Appeals in Dailey v. Chermak,*supra*, must be reevaluated when it states that:

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

Consequently, this Court in failing to require the trial court to reevaluate the stated the stated needs for the initial *LaChapelle* restriction to the Respondent when there is ample prima facie evidence of change of circumstances as to those needs stated over six years ago, this Court has misconceived and misapplied Dailey v. Chermak,*supra* to this case.

VII- THIS COURT'S DECISION HAS MISAPPLIED MIN.STAT.SEC. 518.18(d)(iv) IN RAISING THE PRIMA FACIE REQUIREMENT AS TO BENEFITS AND HARM ANALYSIS OF THE CHANGE DUE TO RELOCATION DUE TO AN ALARMING HIGH STANDARD OF PROFFERING COMPETENT OPINION AND HAS THUS DISREGARDED THE AFFIDAVITS OF 15 INDIVIDUALS WHO ARE PHYSICIANS, EDUCATORS SUCH AS PRINCIPALS AND TEACHERS OF THE SAME RELIGIOUS SCHOOL THE CHILD ATTENDS, SPORTS COACHES, ATTORNEYS, NEIGHBORS WHO ARE PROFESSIONALS THEMSELVES SUCH AS LICENSED PSYCHOLOGISTS.

These 15 affidavits disregarded by the Court here are of the most competent nature that could possibly be proffered in that they are all individuals who are all involved in the daily life of the child, and the Court has misconceived thus the requirements of Minn.Stat.Sec 518.18(d)(iv) in concluding that they are not competent. These individuals signed sworn statements supporting the Respondent's application for relocation with the child and implicitly weighed all the advantages to the child on the relocation vis-à-vis his leaving them and this State. These affidavits do state the benefits, and it is implicit in these affidavits, that the week-to-week relationship with the Appellant would not be the same, but in its significance in such reduction is not as perceived, because the number of annual days the Appellant would spend with the child is not reduced by more than 15% in the total number of days , as stated and explained on the Brief. The Court

has read in this statute a requirement not stated on the statute. The prima facie case is not required to be supported by psychological evaluations or reports, or reports by social workers, who at the end , are merely strangers to the child anyways. Again, the Court misconceives the requirements and raises the bar to show prima facie where such requirement is not statutorily stated to be of professionals on their professional evaluations of a child, as per a plain reading of Minn.Stat.Sec. 518(d)(iv). It is the responsibility of the trial court in evaluating best interest analysis changes of custody to undertake the weighting of benefits vis-à-vis the harm on the change based on the motion record, and here the trial court has failed to undertake such analysis despite the ample proof provided on the prima facie case, and where neither the trial court nor this Court have provided an opportunity to this 12 year old child to be heard as to his own future, and such is the tragedy of this misconceived decision by this Court , and hopefully a rehearing will be granted to rectify these misapplications, misconceptions, and unfair and unjust decision of this Court dated March 27,2008 , which stands all alone amongst all appellate courts in the United States of America and has transgressed on best interest analysis where no previous reported appellate court decision has been found to be published in present time.

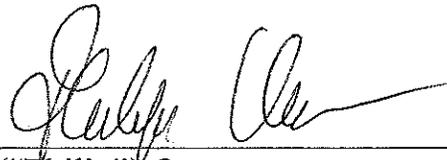
By this decision, the Court is also overruling Harkema v. Harkema, 470 N.W.2d 10 (Minn.App.,1991) and In re Weber, 653 N.W.2d 804 (Minn.App.,2002) which promote and encourage the holding of evidentiary hearings when there is a dispute as to whether the present endangerment of the child exists **after a finding** by the Court that there is a change of circumstances and a best interest modification in the present is required as this litigation has taken over 2 years to decide from February 2006 to March 2008, and application to a religious Orthodox Jewish High School out-of-state for this child is less than 2 years from this date for a decision and evaluation which is presently needed .

In raising the bar on the requirements for a prima facie case, the Court is also overruling Geibe v. Geibe, 571 N.W.2d 774 (Minn.App.,1997) , Lewis-Miller v. Ross, 669 N.W.2d 9 (Minn.App.,2005) and Matson v. Matson, 638 N.W.2d 462 (Minn.App.2002) to require proof at the setting of prima facie case as to present endangerment and “*competent*” sworn affidavits from professionals to support the granting of an evidentiary hearing, and even disregarding and not allowing a 12 year old child to express his preference in court to satisfy such requirements .

CONCLUSION

For all of the above reasons, the Respondent respectfully requests that her petition for a rehearing of the decision and order of this Court of March 27, 2008 be fully granted.

Dated: April 3, 2008
Flushing, New York



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