

NO. A06-1110

197-1046
State of Minnesota
In Supreme Court

In Re the Marriage of:

DEBORAH A. GOLDMAN,
f/k/a DEBORAH A. GREENWOOD,
Respondent,

-against-

MARK E. GREENWOOD,
Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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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).

TABLE OF CONTENTS

Table of Authorities iv

Standard of Review1

Legal Issues 2

Statement of the Case And Facts..... 11

ARGUMENT :

- I- THE COURT OF APPEALS PROPERLY DETERMINED THAT MIN. STAT. SEC. 518.175 SUB(3) IS THE APPLICABLE STATUTE TO DETERMINE THE RESPONDENT’S RELOCATION MOTION AS A SOLE PHYSICAL CUSTODIAL PARENT OUT-OF-STATE, DESPITE THAT THE INITIAL SOLE PHYSICAL CUSTODY AWARD WAS CONDITIONED ON NON-REMOVAL FROM THE STATE AND WHEN SUCH NON-CUSTODIAL PARENT OPPOSES THE RELOCATION BUT DOES NOT REQUEST CUSTODY WITH SUCH OPPOSITION TO THE MOTION..... 20**

- II- IN ITS CORRECT APPLICATION OF THE STATUTE AS TO THE RELOCATION, SUCH STATUTE MUST BE APPLIED AS IT EXISTED AS OF THE DATE THE TRIAL COURT RENDERED ITS DECISION AND AS OF THE DATE THE APPEAL OF SUCH LOWER COURT HAD BEEN FILED , SPECIALLY WHEN THE AMENDMENTS TO THE STATUTE ARE SUBSTANTIVE IN NATURE AND THE STATUTE DOES NOT PROVIDE FOR ANY RETROACTIVE APPLICATION, AS PER MINN.STAT.SEC. 518.175 & 645.21, WHILE SUCH RETROACTIVE APPLICATION WOULD RESULT IN SIGNIFICANT PREJUDICE TO THE RESPONDENT..... 34**

III- APPELLANT MISTATES THE COURT OF APPEAL'S ORDER AS IT PROVIDES, UNDER THE MINN. STAT. SEC. 518.175 SUB.(3) AS AMENDED IN 2006, THOUGH HERE APPELLANT DID NOT FILE A RESPONSIVE CROSS-MOTION REQUESTING CHANGE OF CUSTODY, THAT THE CASE BE REMANDED ON A TWO TIER EVALUATION HEARING: FIRST ON BEST INTEREST ANALYSIS ONCE A PRIMA FACIE CASE HAS BEEN DETERMINED TO EXIST, AS THE COURT OF APPEALS DID IN THIS CASE, ON THE EIGHT STATUTORY CRITERIA AS TO THE RELOCATION, AND SECOND, IF NEEDED AND RELOCATION IS DENIED, THEN SHIFTING TO AN EVALUATION UNDER MINN. STAT.SEC. 518.18(d) FOR A CHANGE OF CUSTODY ORDER UNDER OVERALL BEST INTERESTS FACTORS..... 45

IV- BEST INTEREST ANALYSIS OF A CHILD IS NOT "FROZEN" FOREVER AT ONE PARTICULAR TIME AND ANY "UNIQUE FACTORS" EXISTING TO CONDITIONAL AWARD OF SOLE PHYSICAL CUSTODY MUST BE REEVALUATED TO REDETERMINE IF SUCH CONDITIONAL AWARD IS STILL VALID , AND WHEN NO ISSUE OF FACTS ARE PRESENT AS TO THE LACK OF EXISTENCE OF SUCH INITIAL UNIQUE CRITERIA, BEST INTEREST ANALYSIS MUST THEREFORE BE REDETERMINED FOR THE CHILD..... 56

V- UNDER AN ABUSE OF DISCRETION REVIEW ANALYSIS, THE TRIAL COURT DISREGARDED APPLICABLE STATUTORY PROVISIONS AS TO CHANGE OF CIRCUMTANCES, ADMITTEDLY SKIPPED BEST INTEREST ANALYSIS ALTOGETHER, AND DISREGARDED KEY AND SIGNIFICANT FACTS, AS APPELLANT DOES ALSO HERE, BY NOT EVEN INCLUDING THE 14 SUBMITTED AFFIDAVITS IN HIS RECORD IN SUPPORT OF THE RESPONDENT'S MOTION TO RELOCATE EVINCING A PRIMA FACIE CASE EVEN UNDER MINN.STAT. SEC. 518.18 SUB,(D).. 59

V- DISTRICT COURT'S IMPOSED BURDENS ON RESPONDENT'S RIGHT TO REMARRY BY REQUIRING HER FUTURE HUSBAND TO COMMUTE 1,000 MILES IN ORDER FOR HER TO MAINTAIN CUSTODY OF THE CHILD IN THIS STATE CONSTITUTES A VIOLATION OF FUNDAMENTAL RIGHTS ENCOMPASSED INTO THE RIGHT OF PRIVACY OF THE DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND SUCH DEPRIVATION, WITHOUT AN EVIDENTIARY HEARING, CONSTITUTES A DENIAL OF DUE PROCESS 64

CONCLUSION 67

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION:

Fourteenth Amendment11,18,64,65

U.S. SUPREME COURT DECISIONS

Fullerton-Krueger Lumber Co. v. Northern Pac Ry Co., 266 U.S. 435, 45 S.Ct., 143, 69 L.Ed. 367 (1925). 42

In Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct., 673, 54 L.Ed.2d 618 (1978)..65

Massachussets Board of Retirement v. Burgia, 427 U.S. 307, 96 S.Ct. 2562, L.Ed. .Ed.2d 520 (1976)..... 65

Loving v. Virginia, 388 U.S.1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) ... 65

Ubel v. State, 547 N.W.2d 366 (Minn.,1996) *cert' den'd* 519 U.S. 1057, 117 S.Ct. 686, 136 L.Ed.2d 610 (1996)..... 41

MINNESOTA STATUTES:

Minn.Stat. Sec. 518.17 44,49

Minn. Stat. Sec. 518.175 2,4,5,6,7,8,10,17,20,21,24,26,34,
35,36,44,45,46,47,48,49,53,56,59,67

Minn. Stat. Sec. 518.18 2,3,4,5,6,8,9,17,18,20,21,22,24,25,34,
45,46,47,48,49,54,59,62,63

Minn.Stat.Sec. 257.025 22

Minn.Stat.Sec. 645.21 3,34,36,42

Minn.Stat.Sec. 645.31 3,36,42

MINNESOTA APPELLATE DECISIONS

Al-Zouhayly v. Al-Zouhayly, 486 N.W.2d 10 (Min.App.,1992) 27,28

Anderson v. Archer, 510 N.W.2d 1 (Minn.App., 1993) 26,

Auge v. Auge, 334 N.W.2d 393 (Minn. 1983) 3,36,46,47,48,50,51,52,
53,67

Ayers v. Ayers, 508 N.W.2d 515 (Minn. 1993) 1,24

Baron v. Lens Crafters , Inc. , 514 N.W.2d 305 (Minn.App,1994)..... 43

Bateman v. Bateman, 382 N.W.2d 240 (Minn.App.1986) 30

Benson v. Benson, 346 N.W.2d 196 (Minn.App., 1984) 58

Braith v. Fishser, 632 N.W.2d 716 (Minn.App.,2001) *rev'd den'd*
Oct.24,2001 27

Danieldson v. Danieldson, 393 N.W.2d 405 (Min.App.1986) 26, 28

Dailey v. Chermak, 709 N.W.2d 626 (Minn.App., 2006) 1,6,37

Davidson v. Gaston, 16 Minn 230 (Minn.,1871)..... 42

Dear v. Minneapolis Fire Dep't. Relief Ass'n, 481 N.W.2d 69, *rev'd*
grant'd, aff'd as modif'd , 485 N.W.2d 145 (Minn.,1992)..... 43

DLH Inc. v. Russ, 566 N.W.2d 60 (Minn.,1997). 37

Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96 (Minn.1999)1

Flint v. Flint, 63 Minn. 187,65 N.W.2d 272 (1895). 24

<u>Geiger v. Geiger</u> , 470 N.W.2d 704 (Minn.App., 1991) <i>rev'd den'd August 1, 1991</i>	26 ,28
<u>Goldman v. Greenwood</u> , 725 N.W.2d 747 (Minn.App.,2007)...	21,23,25,29 30,34,35,37,38,,39,45,46,48,52,53,54,55,57,59,67
<u>Gomon v. Northland Family Physicians Ltd.</u> , 625 N.W.2d 426 , <i>rev'd grant'd , rev'd</i> 645 N.W.2d 413 (Minn.2001)	43
<u>Gordon v. Gordon</u> , 339 N.W.2d 269 (Minn., 1983)	51
<u>Greenbush State Bank v. Stephens</u> , 436 N.W.2d 303 (Minn. App.1990)..	28
<u>Hegerle v. Hegerle</u> , 335 N.W.2d 726 (Minn.App.,2001)	51,52
<u>In Breoles' Estate</u> , 212 N.W.2d 894 (Minn.,1973).	43
<u>Interstate Power Co. v. Nobles Bd.</u> , 617 N.W.2d 566 (Minn.App., 2000)..	39
<u>Johnson v. Johnson</u> , 424 N.W.2d 85 (Minn.App.,1988)	49
<u>LaChapelle v. Mitten</u> , 607 N.W.2d 151 (Minn.App. 2000) ..	1,16,57,65,66
<u>Larson v. Independent School Dist.No.314</u> , 233 N.W.2d 74 (Minn,1975).	41
<u>Lassen v. First Bank Eden Prairie</u> , 514 N.W.2d 831 (Minn.App. 1994) ...	43
<u>Lovegren v. People's Elec.Co.</u> , 380 N.W.2d 791 (Minn,1986).....	43
<u>Lynch v. Turrish</u> , 236 F. 653, <i>aff'd</i> 247 U.S. 221, 38 S.Ct., 537, 262 L.Ed, 1087 (1916).	43
<u>Matson v. Matson</u> , 638 N.W.2d 462 (Minn.App. 2002)	27
<u>McClelland v. McClelland</u> , 393 N.W.2d 224 (Minn.App., 1986)	40
<u>Maxfield v. Maxfield</u> , 452 N.W.2d 219 (Minn,1990)	44,56

<u>Melamed v. Melamed</u> , 286 N.W.2d 716 (Minn.App.,1979).....	35,44
<u>Nardini v. Nardini</u> , 414 N.W.2d 184 (Minn.1987)	41
<u>Petersen v. Petersen</u> , 206 N.W.2d 658 (Minn,1973)	23
<u>Pikula v. Pikula</u> , 374 N.W.2d 705 (Minn.1985).....	1,44,45
<u>Prior Lake AM v. Mader</u> , 642 N.W.2d 729 (Minn.App.,2002).....	37
<u>Rooney v. Rooney</u> , 669 N.W.2d 362 (Minn.App,2003)	40
<u>Rural America Bank of Greenwald v. Herickhoff</u> , 485 N.W.2d 702 (Minn.,1992)	41
<u>Silbaugh v. Silbaugh</u> , 543 N.W.2d 639 (Minn. 1996)	1
<u>Sinsabaugh v. Heinerscheid</u> , 428 N.W.2d 476 (Minn.,1988)	1
<u>Spurck v. Civil Service Bd.</u> , 42 N.W.2d 720 (Minn.,1950)	42
<u>Steinke v. Steinke</u> , 428 N.W.2d 579 (Minn.App.,1988)	62
<u>State v. Gilmartin</u> , 535 N.W.2d 650 (Minn.App.,1995) rev'd den'd (Minn,Sept.20,1995)	49
<u>State v. Lilleskov</u> , 658 N..W.2d 906 (Minn.App.,2003)	41
<u>Swarthout v. Swarthout.</u> , 2001 WL 766870 (Minn.App.2001)... ..	25
<u>Tammen v. Tammen</u> , 182 N.W.2d 840 (Minn.1970)	23
<u>Thompson Plumbing Co.Inc. v.McGlynn Companies</u> , 486 N.W.2d 781 (Minn.App., 1992)	43
<u>Van Dyck v. Snidarich</u> , 2007 WL 509665 (Minn.App, 2007) (A06-442, February 20,2007)	25,26,27

Western Union Tel. Co. v. Spaeth, 44 N.W.2d 440 (Minn.,1950) 44

Wopata v. Wopata, 498 N.W.2d 478 (Minn.App., 1993) 1

SESSION LAWS

2006 ch. 280 Sec. 13 & 14 34,36,46,47,48

MINNESOTA SECONDARY AUTHORITIES

Relocation/Removal Law in Minnesota, by *Hon. James T. Swenson and Lisa Bachmeier*, February 16, 2006 (CLE Seminar) 61

Minnesota Lawyer, January 8, 2007 article by Barbara Jones 35,55

STANDARD OF REVIEW

On appeal, the Court's review of decisions concerning the relocation of the child's residence to another state is limited to "*determining whether the trial court abused its discretion by making unsupported findings or improperly applying the law*", Wopata v. Wopata, 498 N.W.2d 478 (Minn.App., 1993), citing Sinsabaugh v. Heinerscheid, 428 N.W. 476 (Minn. App. 1988).

The trial court's findings will be sustained unless clearly erroneous, but the appellate courts need not defer to the trial court in reviewing questions of law., Dailey v. Chermak, 709 N.W.2d 626 (Minn.App., 2006), LaChapelle v. Mitten, 607 N.W.2d 151 (Minn.App., 2000) citing Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985); Silbaugh v. Silbaugh, 543 N.W.2d 639; Ayers v. Ayers, 508 N.W.2d 515 (Minn.,1993). The appellate court views the record in the light most favorable to the trial court's findings, as per Dailey v. Chermak,*supra*. Findings of fact are clearly erroneous, though, if the reviewing court is left with the definite and firm conviction that a mistake has been made, Fletcher v. St.Paul Pioneer Press, 589 N.W.2d 96 (Minn.,1999).

LEGAL ISSUES

1- Whether a motion to relocate out-of-state by a sole physical custodial parent whose award is conditioned on non-removal from the state is determinable under Minn.Stat. Sec. 518.175 Sub (3) or Minn.Stat. Sec. 518.18(d)?

COURT OF APPEALS: held that it is Min.Stat. Sec. 518.175 Sub (3) as that statute deals with issues of changes in parenting visitation rights and changes to those schedules, while keeping the same custodial parent.

TRIAL COURT HELD: that it is Minn.Stat.Sec. 518.18(d) as to changes in custodial parents and the same parent who has custody of the child needs to prove endangerment before the evidentiary hearing on a *prima facie* case as to change of circumstances while keeping the child in this state and would not endanger him while taking him out of this state.

2- Whether an appeals court in its decision as to the relevant law and its review of the trial court order , in this case Minn.Stat. 518.175 Sub (3), applies the statute in effect as of the date the trial court rendered its decision and order and, even, as of the date the appellant filed his/her

notice of appeal, disregarding the subsequently amended statute containing substantive changes to the law, specially when the amendments clearly and unequivocally state the effective date to be subsequent to both the trial court order and the date the notice of appeal had been filed and does not provide for any retroactive application in accordance with Minn.Stat.Sec. 645.21 and 645.31?

COURT OF APPEALS: held that since no vested rights were claimed to be affected by the Appellant, it did not consider the application of the statute prior to the 2006 amendment as to the Appellant , but the court did not provide any analysis or statements as to the vested rights of the Respondent on the Auge presumption (Auge v.Auge, 334 N.W.2d 393 (Minn.,1983) that was in effect before the 2006 substantive amendments became effective on August 1,2006.

3- Whether the trial court , in hearing a post-decree motion for relocation, which was deemed by the trial court to be a modification of a custody order under Minn.Stat. 518.18(d) , erred on the law in its determination of one of the required criteria as to change of circumstances being limited only to the child , even though the statute

clearly states that said criteria relates to change of circumstances of the child or the parties?

COURT OF APPEALS : did not rule on the matter as motion to relocate was held to be determinable first under Minn.Stat.Sec. 518.175 (2006).

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

- 4- Whether the trial court abused its discretion by disregarding the expressed statement of a 10 year old child, as contained on the affidavit of the Respondent, favoring his relocation to New York, and in not finding , together with all other factors present in the underlying motion, sufficient *prima facie* for an evidentiary hearing under Minn.Stat.Sec. 518.175 along with 14 affidavits submitted by Respondent for a change of circumstances and/or endangerment to warrant an evidentiary hearing under Minn.Stat.Sec. 518.18(d), or at least a relocation evaluation where the child's preferences can be verified, and where such statement by the child is not specifically denied

by the Respondent ?

COURT OF APPEALS: held that the child's preference in conjunction with the other 14 affidavits provided *prima facie* as to the best interest of the child for the relocation under Minn.Stat.Sec. 518.175 where the burden would lie with the Respondent as to eight factors enunciated on the 2006 amendment effective August 1,2006, as the first step of evaluation of such motion and remanded for an evidentiary hearing. Only if such hearing under that statute would result in a denial of the relocation would the modification of custody hearing evaluation then be necessary under Minn.Stat.Sec. 518.18(d) with the secondary burden on change of custody being placed with the Appellant

TRIAL COURT HELD: the trial court differentiated between the words "*favours*" [as stated by the respondent on her affidavit] and "*prefers*" [as the required legal term in the trial court's opinion] in its denial of a *prima facie case* on change of circumstances under Minn.Stat.Sec.518.18(d) and based on this factor and does not assume that such statement of the child to be true, though not refuted on the record, and denied any additional proceedings to identify such wishes of this 10 year old child, and dismissed all other 14 submitted affidavits

by respondent as not probative

- 5- Whether the lower court erred in law in its denial of the motion here by failing to analyze the lack of continued existence of initial “*unique criteria*” stated in the 2001 court ordered imposition of conditional geographical physical custody based on the current changes of circumstances in 2006 , as per Dailey v. Chermak,*supra*, and how such changes impact the evaluation of the motion of relocation under the applicable statutes ?

COURT OF APPEALS: found merit on changes of the initially defined “*unique criteria*” but only to justify a finding of *prima facie* case for an evaluation hearing under the 2006 amended Minn.Stat.Sec. 518.175, thus not even addressing the impact on Minn.Stat.Sec. 518.18(d). It did not address the significance of no issue of fact as to such “*unique criteria*” on the motion to relocate because it applied the amended statute and then remanded the case for an evaluation hearing.

TRIAL COURT HELD :The trial court specifically states that it “skipped” all best interest of the child analysis in reaching its decision and that a new undefined higher standard of proof is required by a movant who seeks to modify a conditional geographical award of

physical custody and a mere best interest *de novo* analysis is not appropriate. Furthermore, once “best interest” is established by the trial court, according to its court order, automatic shifting of custody may take place under the old initial court order without the need to reevaluate best interest of the child, and without the need of an evidentiary hearing as all changes stated in the 2006 motion record were foreseen by the trial court in its initial determination in 2001.

- 6- Whether the lower court abused its discretion when it assumed facts not on the 2006 motion record relying instead on fact findings from the 2001 pre-judgment order , and when most of the 2006 facts as presented by 15 (fifteen) affidavits by the Appellant, which should have been assumed to be true under *prima facie* , were mostly ignored by the lower court, and yet such entire analysis of the motion record by the lower court , was still not analyzed based on the best interest of the child ?
- COURT OF APPEALS: provided the appropriate *prima facie* weight to the 15 affidavits submitted by the Respondent and ordered an evidentiary hearing under Minn.Stat.Sec. 518.175 as amended in 2006.

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

- 7- Whether the lower court erred in law by not finding sufficient *prima facie* case in meeting the required threshold on the change of circumstances and in its admitted *skipped* lack of analysis of best interest of the child to grant an evidentiary hearing or at least the requested relocation reevaluation of the child when it determined that such motion would be considered only under Minn.Stat.Sec.518.18(d)?

COURT OF APPEALS : did not address this question as it determined that the relocation motion would be evaluated under Minn.Stat.Sec.518.175

TRIAL COURT HELD: The district court formulates its own rule of law as to *prima facie* case on the relocation and modification application

of a conditional geographical award of custody and in doing so imposes an undefined higher standard of proof the Appellant is held to , which the lower court determines that the Appellant failed to provide here.

8- Whether the lower court ,under its Minn.Stat.Sec. 518.18(d) analysis, abused its discretion on the evaluation of the *prima facie case* as to its finding of no endangerment to the child's physical or emotional health or impairment to his emotional development, where the present environment of the child requires that the custody be *ipso facto* switched to Appellant from the Respondent, who is the only primary care custodial the child has had in his entire 11 year life, upon Respondent's relocation to live with her husband in New York, in spite of 15 (fifteen) affidavits submitted in her behalf on the motion record, all supporting the continuity, stability and best interest of the child based on educational, social and religious grounds for such modification to be granted, and the stated benefits on the motion record associated with such modification outweigh the harm related to such modification ?

COURT OF APPEALS: undertook this analysis only as it relates to Minn.Stat.Sec. 518.175 to find a *prima facie* case for a remand to an evaluation hearing.

TRIAL COURT HELD: The trial court, only as to its analysis under Minn.Stat.Sec.518.18(d) in denying the motion here and even an evidentiary hearing held that the endangerment prong was not met on a *prima facie* case by the Respondent , and instead of analyzing all benefits and harms associated with both scenarios of custody on the overwhelmingly evidence presented by the Respondent in 15 (fifteen) affidavits, merely stated that the lack of a daily presence of the respondent in the child's life and the "idolizing" (which is not part of the facts or allegations at the 2006 motion record) of a College bound half-brother in the child's life were benefits that could not be overcome by any scenario presented on the 2006 motion record.

- 9- Whether the imposition of burdens on remarriage of the appellant in requiring the appellant's future husband to commute 1,000 miles daily from New York to Minneapolis, all without an evidentiary hearing,

constitute a deprivation of fundamental rights encompassed into the due clause of the Fourteenth Amendment of the United States Constitution, and as such constitutes a denial of due process ?

COURT OF APPEALS: did not address any constitutional issues.

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

STATEMENT OF THE FACTS AND CASE

The parties were married on January 16,1993 and divorced by decree dated July 11,2002 issued by Hon. James Swenson. (A.72). Since this marriage was a second marriage for the parties, each of the parties had children from their first marriages respectively, as follows: the Respondent had two sons, Joshua Goldman, born May 24,1982 and Samuel Goldman born on September 26,1986, while the Appellant had three children, Heather Greenwood, born July 26,1982, Eleni Greenwood born April 30,1985 and Seth Greenwood born June 2, 1988 (A.75). During their marriage, the parties had one child named Isaac Greenwood born on January 30, 1996 (A.74), who is the subject of these proceedings of relocation to New York

State with the appellant. Respondent has had sole physical custody of Isaac continuously since the issuance of the Order for Temporary Relief of October 6,2000, A.18, and has always admittedly been the primary care parent of this child for his entire 11 years (A.105).

In 2001 the Respondent moved the district court for permission to relocate with Isaac to Boston, and though such relocation application was denied, the Respondent was awarded sole physical custody of Isaac contingent on her remaining in Minnesota for reasons not identified on such order as either findings of facts or conclusions of law, and should she relocate despite the imposition of such conditions, the lower court would then *ipso facto* award physical custody to the Appellant (A.42). The 2002 divorce decree then on Section XVI (A.75) granted sole physical custody to appellant and stated that “*the memorandum decision of this Court dated September 6,2001 is hereby incorporated as if fully set forth herein*” . Yet, there was neither specific mention on the 2002 decree of any findings of fact as to conditions of the physical custody award and conclusions of law on such findings nor a specific reference to the 22 page 2001 order (A.22) where such findings of fact and conclusions of law sections may be

located, as it does not exist. The transcript of the 2002 (A-44) inquest on the settlement of the judgment decree does not include any waiver as to future best interest reconsideration as circumstances change for Isaac's best interest, nor is there any colloquy by the judge asking the Respondent whether she agreed not to bring any such court applications ever again through the period Isaac is a minor, from 2001 through 2014, when he becomes 18 years old.

Five years later , from 2001 to 2006, with new facts and circumstances from the original 2001 court order, the district court acknowledged that Respondent had performed a "*wonderful job*" as the primary care taker of Isaac, A-187,.on the instant April 14, 2006 order by Hon. James Swenson of the Family Court Division-Fourth Judicial District- Hennepin County being appealed . Such order , which needed to be subsequently amended on July 11,2006, see R- 109, denied the respondent's motion to relocate with Isaac to New York upon Respondent's remarriage , to alternatively modify and remove the contingent geographical restriction on her award of sole physical custody without an evidentiary hearing, and, alternatively, if needed, to grant a relocation evaluation by a court appointed

expert followed by an evidentiary hearing (A.173) . The trial court did not rule on *prima facie* case by the Appellant as to either interference of visitation rights or endangerment of the child as a result of the relocation, as such Appellant did not even file a cross-motion for custody as a result of the relocation (R-53) and did not even claim either interference of visitation rights or interference on the pleadings submitted on the motion and appeal record. On such pleadings in 2006, there were no allegations from the Appellant as to any wrongdoing by the Respondent since 2001 as to any conduct detrimental to his relationship with Isaac, any interference or denial of visitation rights, any claim that any of the three children of his previous marriage would be living at home any longer, any allegations from Appellant of any concealment by Respondent as anything relating to Isaac, any allegations as to lack of great success at school by Isaac and enveloping himself on the Orthodox Judaism he is being taught at his school, Torah Academy, and no allegations that such total success and well adjustment by Isaac would somehow not continue if his relocation to New York took place (R-53 to R-69). The only real concern the Appellant states is that the daily phone calls he receives from Isaac are not long enough to his satisfaction (R-

63). Though the Appellant admits on his affidavit that a parenting consultant had been appointed (R-64) he has not availed himself of such parenting consultant in the over 2 ½ years the district court had appointed her in November 4, 2003, see R-110 and did not file any motions or request any relief other than relief that was determined to be moot by the Court of Appeals, as per its order of July 18,2006, see R-106.

For replacement of existing parenting time of the Appellant of about 120 days a year (his claim is that he has 145 days a year,R-65), Respondent has proposed in her motion 110 days a year consisting of every other weekend in New York (where Appellant's sister lives) with three overnights for each weekend , four day weekends for Thanksgiving , Memorial Day, Labor Day in Minnesota, 10 day Winter break in Minnesota, and six weeks summer vacation in Minnesota , except for two optional three day weekends for Respondent, which is approximately 110 days a year.(R-2).

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

Isaac, neighbors and friends of the appellant and Isaac in the community they reside and even those of a Little League coach and Boy Scouts officer where both the appellant took a leading role and Isaac participated as well (R-17 through R-52). In opposition of the motion, the respondent merely filed his own affidavit unsupported by any other affidavit other than that of his own minor son from a previous marriage (R-55 through R-69).

As to change of circumstances, the “*unique criteria*” to continue imposing a LaChapelle type of restriction on her award of sole physical custody were supported by those 15 affidavits and exhibits as not being in existence or valid as of the date of the motion. Furthermore, other changes of circumstances were sworn to by the respondent and the other 14 affiants, most of which were not even denied by the Appellant on his affidavit and that of his son . Appellant’s involvement in Isaac’s educational activities at Torah Academy are admitted to only his secular studies , and not his religious studies as he did not provide any evidence of any parent-teacher conference with any Jewish Studies teacher (R- 70 to R-102) and indeed reflected a cavalier and disrespectful attitude towards the Orthodox Judaism.

Isaac lives and is raised as an Orthodox Jewish child and schools at Torah Academy (R-55 to R-69), the same Orthodox Jewish school Isaac has been attending since the court orders of 2000 and 2001 (R-18) without the Appellant taking any action to refute such education, while Respondent is the only parent fully responsible for the payment of the tuition.

In its denial of the 2006 motion, this same judicial officer who issued all four decisions of 2000, 2001, 2002 and 2006 in this case, made several errors of law in its application of Minn. Sec. 518.18 and 518.175 as well as created unprecedented rules of law without any basis or foundation. The trial court held the Respondent to a higher standard of best interest, though skipping such analysis altogether in its decision and order (A-189 Ftn.#3). The trial court claimed that best interest is basically "frozen" at its initial determination when there is a conditional award on non-removal from the state and enunciated a new theory of law unsupported by any statute or precedent holding the Respondent to. Though not clearly stated, how much more than the 15 submitted affidavits by the Respondent did the trial court need, to prove a *prima facie* case in change of circumstances in the event

Minn.Stat. Sec. 518.18(d) is the appropriate statute for such evaluation, is a puzzling and bizarre question in this case. In addition, serious errors of fact were made where facts were created and assumed by the trial court from its 2001 order to be still valid five years later without even a hearing, and the facts on the record were ignored or disregarded, thus abusing his judicial discretion and displaying a consistent lack of objectivity towards the respondent and making rulings and disparaging statements showing disrespect and disregard of the Orthodox Jewish religion of the appellant, (see 2001 order where he states: "*A trial judge, especially a gentile, is not equipped to make such judgment calls*" [related to custody] A-36) as more detailed in the argument below. And in doing so, this lower court also violated the United States Constitutional protections of the appellant as to fundamental rights and due process encompassed by the Fourteenth Amendment.

After having filed the notice of appeal on a timely basis, the Court of Appeals by court order dated June 23, 2006, R-103, questioned the jurisdiction on the appeal as the court order had not been apparently fully decided, for the trial court had left the issue of the appointment of a

successor parenting consultant open, as it had been requested by the Appellant on his cross-motion. Yet, such open issue had been an error because it was moot since this same judge had ordered per court order of November 4,2003, R-110, that the parenting consultant be changed from Lisa Schlesinger to Gay Rosenthal, and such fact was brought to his attention at the preliminary hearing on March 13,2006, as per the transcript, see A-157 . This incredible “*error*” on his part precluded apparently the appeal from being considered on his erroneous and faulty decision and order on the facts and the law, until the Court of Appeals again intervened to force Hon. Swenson to modify and amend his “*incomplete*” court order on July 11, 2006 , see R-109 and hence, Hon. Swenson’s decision and order as to the parenting consultant was found to be moot and the appeal ordered to proceed with jurisdiction by the Court of Appeals. The Court of Appeals then issued a court order on July 18,2006, see R-106 finding jurisdiction on the appeal as the error on the open item on the court order had been moot all along and the court order amended accordingly. Since the Respondent was the prevailing party on a family law matter at the Court of Appeals, a motion for legal fees filed with the Court of Appeals remains pending based on the outcome of this appeal at this Court in addition to Respondent’s cost request.

I- THE COURT OF APPEALS PROPERLY DETERMINED THAT MIN. STAT. SEC. 518.175 SUB(3) IS THE APPLICABLE STATUTE TO DETERMINE THE RESPONDENT'S OUT-OF-STATE RELOCATION MOTION AS A SOLE PHYSICAL CUSTODIAL PARENT, DESPITE THAT INITIAL SOLE PHYSICAL CUSTODY AWARD WAS CONDITIONED ON NON-REMOVAL FROM THE STATE AND WHEN SUCH NON-CUSTODIAL PARENT OPPOSES THE RELOCATION BUT DOES NOT REQUEST CUSTODY WITH SUCH OPPOSITION TO THE MOTION.

In this case, the motion for relocation filed with 15 supporting affidavits and exhibits , R-1 to R-52, by the Respondent as a sole physical custodial parent of I.G. was opposed only to relocation and such opposition did not include a cross-motion, R-53, for change of custody in case the relocation motion would be denied . The Court of Appeals properly determined that when a sole physical custodial parent wants to relocate to another state , the motion is determined by Minn.Stat. Sec. 518.175 Sub.3 because the effect of such relocation is a change in parenting time between the custodial and the non-custodial parent, as per the plain language of said statute, even though the award was conditional on both alternative parenting time and non-removal from the state. In its analysis of Minn. Stat. Sec. 518.18(d) the Court of Appeals noted that “ *historically and currently* ,

addresses a change in placement , a change in physical custody form one household to another”, Goldman v. Greenwood, 725 N.W.2d 747

(Minn.App., 2007). Furthermore, the same physical custodial parent should be retained unless one of the four circumstances detailed by the statute are indicated to exist, as Minn. Stat. Sec. 518.18(d). All of these circumstances relate to changes provisions “*specifying the child’s primary residence*”. Furthermore, in a comprehensive analysis of the entire Minn. Stat. Sec. 518.175 with its various sections, the Court of Appeals concluded any modifications of parenting time are within the bounds of this statute as to the motion for relocation, which otherwise would place “*the relief beyond the reach of sole physical custodians in circumstances such as appellant’s*”.

Appellant’s argument that the Court of Appeals erred in its determination that Minn.Stat.Sec. 518.175 Sub(3) is the correct statute to apply for a determination of a motion to relocate by a sole physical custodian parent whose award of custody includes conditions of alternate parenting time and non-removal from the state (App.Br.Pg. 25-28) lacks any support of any cited statute, lacks basis on any published case and lacks any foundation on legislative history regarding this statute as included on the

Appellant's brief and Appendix.

That Respondent may have "*tacitly acknowledged*" that she has met an even higher standard that is required of her on the statute regarding change of custody of Minn.Stat.Sec. 518.18(d) for a prima facie case of endangerment on the present environment of her own sole physical custody award of IG does not *ipso facto* equate to a concession that Minn.Stat.Sec. 518.18(d), as sought to be imposed on her improperly by the trial court as to the correctness of that statute being applied to her motion to relocate . Indeed, parties are allowed to argue and present evidence on alternate theories, as the Appellant has done on his brief.

Respondent's acceptance of sole physical custody of IG conditional on non-removal from the state on her judgment of divorce of 2002 (A.75,78 & 81) is based on the previous trial court order in 2001 (A.42) already establishing this conditional custody award, and therefore, imposed on her by the trial court . To state that such 2002 order was completely willful and knowingly ignores the previous courts orders of 2000 and 2001 containing such non-removal restriction, with the same judicial officer who presided the 2002 divorce trial, and it is naïve to believe that this same judicial officer

would not have ruled in the same manner in which he had ruled previously in 2000 and 2001. Moreover, such acknowledgement on oral inquest of the 2002 court order, does not include a future forbearance on the Respondent's part to forever "freeze" the best interest of IG at his then tender age of 4 years, based on circumstances then, which even included a statement by respondent that she would never remarry. (A-189 Ft.2) The underlying motion and appeal record is replete with changes of circumstances of the child and Respondent as accurately pointed out in Goldman v. Greenwood,*supra*.

Clearly, Appellant does not argue that best interest analysis can be "skipped" as erroneously admitted to by the trial court (A-189 Ft.3). Furthermore, if it is in the best interest of the child to strike the "no move" provision, courts are allowed to do so, as per Petersen v. Petersen, 206 N.W.2d 658 (Minn,1973) and Tammen v. Tammen, 182 N.W.2d 840 (Minn.1970). Even the child has a vested interest on his best interest analysis, and such cannot be waived or taken away from him by any stipulation, any court order or any other similar disposition; IG has his inalienable right to have his best interest considered here which

the trial court completely trampled over. His best interest is the paramount consideration, as to any court order disposing of his well being and custody determination, as per Flint v. Flint, 63 Minn. 187,65 N.W.2d 272 (1895).

As to Appellant's citing of Ayers v. Ayers, *supra*, he contradicts himself on his brief as to the holding of that case and what it stands for . The substance of Ayers v. Ayers, relates to the application of Minn.Stat.Sec. 518.18(e) , which is not a statute relevant to this appeal, as it relates to a stipulation by the parties as to joint physical custody where form of the agreement entered by the parties will prevail as to the substance of the agreement. Such holding there is totally inapposite to the facts of this case where no joint physical custody has been agreed by the parties or ordered by the court here. Hence, the relocation motion here is properly determinable under Minn.Stat.Sec. 518.175 Sub(3) and not under Minn.Stat.Sec. 518.18 . Appellant fails to point out on his brief where the reader may find an actual court order providing for joint physical custody of IG, and therefore, Ayers v. Ayers, *supra*, does not apply here ; for even on an argument of substance over form, Appellant is still in error for he would argue against the same case he cites and provides that form prevails over substance.

Inexplicably, Appellant cites an unpublished case of Swarthout v. Swarthout, 2001 WL 766870 (Minn.App.2001) without any authoritative source, despite the Court of Appeals in Goldman v. Greenwood,*supra*, that such citation was improper. Moreover, Appellant has improperly and inaccurately described such unpublished case as “*persuasive*” (A-27) where the holding of such case involves Minn.Stat.Sec. 518.18(a) on the proof of endangerment required when the motion to relocate is brought by a party within one year of the final judgment of divorce, which is clearly not the case here. As to any issues on Minn.Stat.Sec. 518.18(d), that unpublished case issued merely *dicta*, because the Court did not even reach the issues of Minn.Stat.Sec. 518.18(d) there, therefore **doubly** not being persuasive for the issues presented on this appeal.

Yet, Appellant shows his inconsistency, self-contradiction, and lack of proper reporting to this Court, when he fails to cite a more recent on point “*persuasive*” precedent on another unpublished case of Van Dyck v. Snidarich, 2007 WL 509665 (Minn.App, 2007) (A06-442, February 20, 2007, unanimous decision as per Hon. Dietzen), (R-113) where the Court

of Appeals , through another panel, **again** held that Minn.Stat.Sec. 518.175 Sub(3) is the applicable statute to determine a relocation motion of a sole physical custodial parent whose award through stipulation also contained a restriction on relocation. In allowing the relocation without holding an evidentiary hearing despite the reduction of weekly visitation, the Court in Van Dyck v. Snidarich,*supra*, citing Danielson v. Danielson, 393 N.W.2d 405 (Min.App.1986), Anderson v. Archer, 510 N.W.2d 1 (Minn.App., 1993) and Geiger v. Geiger, 470 N.W.2d 704 (Minn.App., 1991) *rev'd den'd August 1, 1991*, for their holdings that reduction in visiting time does not constitute a restriction of parenting time and allowed significant modification as to the visitation schedule despite a “no move” provision in the parties stipulation agreement incorporated in their judgment of divorce. The Court also held that such changes are dependent on the reasons for such modification and that the affected elimination of weekday visitation is not significant because the child is either in school or sleeping on such overnight weekly visitations. Here, the relocation is due to the remarriage of IG’s mother (Respondent), who is the only primary care parent he ever had and his present sole physical custodian parent, and due to his attendance at

Torah Academy, a school following a double schedule for secular and Orthodox religious education, his school day does not end until 4:10 P.M. (R-18).

Hence, such reduction in visitation will not impair father and child relationship , as per Van Dyck v. Snidarich, *supra*. Parental visitation rights are not absolute and can be exercised only when the child's best interests are served, as per Al-Zouhayly v. Al-Zouhayly, 486 N.W.2d 10 (Min.App.,1992). Adjustment to visitation does not require an evidentiary hearing if such insubstantial modification or adjustment serves the child's best interest, as per Braith v. Fishser, 632 N.W.2d 716 (Minn.App.,2001) *rev'd den'd Oct.24,2001*, which also held that substantial modifications of visitation rights require an evidentiary hearing when, by affidavit, the moving party makes a prima facie case showing that visitation is likely to endanger the child's physical or emotional well being. Appellant's incorrect reference on this point to Matson v. Matson, 638 N.W.2D 462 (Minn.App.,2002) as standing for the proposition that a "*district court must find changed circumstances in order to reduce a party's parenting time*" is

clearly against Danieldson v. Danieldson,*supra*, Geiger v. Geiger,*supra*, and Al-Zouhayly v. Al-Zouhayly,*supra*.

Appellant's disingenuous argument as to the stated misrepresentation of Respondent's former legal counsel , whose self-contradictory statements against the motion and appeal record appear on the colloquy of the March 13, 2006 preliminary hearing, ignores that the 15 affidavits on the motion and appeal record clearly and unequivocally were never withdrawn, amended or superceded by the Respondent . Such review responsibility of the record should not be diluted by Respondent's former legal counsel oversights or failure to specify issues on oral argument as per Greenbush State Bank v. Stephens, 436 N.W.2d 303 (Minn. App.1990). Appellant's brief falsely states the there is no statement or proof on the appeal record as to the preference by IG to relocate with the Respondent, R-14,15. To the contrary, Respondent's submitted affidavit as to the communication with IG as to her then impending remarriage to a New York state attorney and her relocation to New York specifically state that :

“ Isaac is aware of my engagement to marry Philip”

“He [IG] has expressed interest in NYC, in a larger Orthodox community, attending a larger Orthodox community, attending a larger Orthodox school”.

“Living with me in NYC will be in Isaac's best

interest”.

“ Isaac has frequently expressed a passion for NYC , as it is the cultural center for Orthodox Judaism in the United States, if not the world.”

“ My fiancée , Philip Orner, lives and practices law in NYC.”

“ Isaac has had several opportunities to meet Philip, both in New York City and Minnesota, and Isaac has really enjoyed spending time with Philip and his family”.

On the motion and appeal record, Appellant has failed to provide evidence whether he asked IG what his preference is as to the relocation to NYC when served with the motion papers though he had opportunity to do so over a period of six weeks before the March 13,2006 preliminary hearing at the district court. The trial court did not question the Respondent on her affidavit as to the choice of “*favours*” the relocation, but disingenuously abused its discretion by making a distinction between “*favours*” and “*prefers*”, which is clearly erroneous even just for a *prima facie* evaluation.

In its determination of Respondent’s motion to remove child to NYC , the lower court was required to consider in the best interest analysis of the child, the impact on the child what could functionally be a modification of custody on the second step analysis of such evaluation, as it was possible that respondent would move to NYC without child, as per Goldman v. Greenwood,*supra*. Reasons for Respondent’s planned move to NYC had an

impact on the best interest analysis of her child and thus trial court was required to consider these reasons when considering her post-divorce motion for removal of the child; Respondent was IG's sole custodian, and statutes and case law protected the child's best interest by guarding his established relationship with the sole physical custodial and only primary caretaker IG has had in his entire, now, 11 years of life , as per Goldman v. Greenwood,*supra*.

A de facto joint legal custody on rotation based on specified events was deemed *a de facto* joint legal custody , and as such it was nullified , as per Bateman v. Bateman, 382 N.W.2d 240 (Minn.App.,1986).

On such prima facie best interest analysis, Appellant again misstates the facts as to the findings of fact in the present 2006 motion and appeal record based on findings of facts in the 2001 court order as to alleged interference by Respondent over six years ago on Appellant's relationships with IG (App.Br.Fn.18). These false claims on the 2006 record are belied by the lack of any such claims in the Appellant's submissions on the 2006 relocation motion and his opposition to such motion as to his affidavit and that of his own son, as per R-55 to R-69.. This conclusion on the

falsehood of Appellant's brief claims on this point is corroborated by the lack of Appellant to avail himself of the services of the parenting consultant appointed in November 2003 (Gay Rosenthal) , see R-110, for over 2 ½ years, to March 13, 2006, if indeed such interference of his visitation rights were affected ,asserted by Appellant on his briefs, but not on the motion and appeal record. .

Appellant's incredulous statements on that same footnote # 18 continue when he alleges that "*Respondent's continued devaluing of Isaac's close relationship*" is not supported by any reference to the appeal record. Finally, Appellant reaches a plateau on non-sense of unsupported statements when Appellant states that "*respondent actions are evidenced by her secretive launching of the present litigation*". Yet, Appellant does not claim that he did not receive the proper notice of the motion with the required prior advanced 14 days notice, and therefore does not justify or explain how this litigation is "*secretive*". Nor does Appellant in his attempts to mislead this Court explain that the initial return of the motion as set by the district court for February 23,2006 was adjourned on request of Appellant's legal counsel

to March 13,2006, as per A-91, as per such legal counsel's claim of unavailability.

Again misstating the 2006 motion and appeal record, Appellant without any reference to such record states that "*minor child ,who was found to have a more emotionally intimate relationship with Appellant, has an interest in having that relationship safeguarded*". Yet, the 2006 motion record when IG is 10 years old lacks any such finding of fact or even such allegation by the Appellant, and belies the conclusion that the Respondent is the only primary care parent IG has had in his now 11 years of life, and for the last 7 years of his life, the Respondent has become even more prevalent on his life as 2/3 of IG's days and nights are spent under the Respondent's care. (A-187, R-4 to R-52).

Appellant misleads this Court to overstate his level of contact with IG, which his exhibits to his affidavit in opposition to the motion clearly limit them to specified secular parenting meetings but **no religious meeting of any of IG's teachers at Torah Academy ever to appraise himself of IG's Orthodox Jewish education from Kindergarten through 5th Grade** when IG was already 10 years of age (as of the motion and appeal record) . See R-70 to R-102. Appellant's conduct as to IG's best interest cannot be

protected and advanced through the court records and proceedings in 2000, 2001, 2002 and 2006, as he has continuously sought to thwart IG's practice of Orthodox Judaism on one hand (R-55 to R-69), but has not opposed IG receiving such Orthodox Jewish education with private tuition being fully paid by the Respondent. Appellant instead denominates himself as Reform, which beliefs and religious practices are drastically different from Orthodox Judaism, which permeate the entire life of IG, as per the 15 affidavits submitted in support of the motion, and which Appellant somehow and improperly excluded from his Appendix, see R- 17 to R-52.

Indeed, the approximate 120 days (or even 143 days as Appellant claims on his affidavit, which includes the claimed 5 overnights in 14 nights, where 3 of such overnights constitute one weekend and 2 other overnights constitute the midweek overnight visitation) of visitation Appellant presently enjoys with IG would not be substantially modified in total under the motion by the Respondent, as per R-2, (2 weekends per month (less other winter, summer and holiday weekends= 21 weekends x 2 ½ days = 52 1/2 days, plus 3 weekends with 4 days each= 12 days, plus winter break of 10 days and plus summer break of 6 weeks totaling 42 days less 2 three-

days visits for Respondent within such 6 weeks, or 6 days = 36 days, for a grand total of 110 ½ days). Consequently, Goldman v. Greenwood,*supra*. Minn. Stat. Sec. 518.175 is the proper statute to be applied to this motion of relocation and the motion of relocation by the Respondent should be granted in its entirety and the cross-motion denied in its entirety without further proceedings.

II- IN ITS CORRECT APPLICATION OF THE STATUTE AS TO THE RELOCATION, SUCH STATUTE MUST BE APPLIED AS IT EXISTED AS OF THE DATE THE TRIAL COURT RENDERED ITS DECISION AND AS OF THE DATE THE APPEAL OF SUCH LOWER COURT HAD BEEN FILED , SPECIALLY WHEN THE AMENDMENTS TO THE STATUTE ARE SUBSTANTIVE IN NATURE AND THE STATUTE DOES NOT PROVIDE FOR ANY RETROACTIVE APPLICATION, AS PER MINN.STAT.SEC. 518.175 & 645.21, WHILE SUCH RETROACTIVE APPLICATION WOULD RESULT IN SIGNIFICANT PREJUDICE TO THE RESPONDENT

At the time the relocation motion by the Respondent as a sole physical custodial parent of I.G., a then 10 year old child, to New York upon her remarriage to a New York attorney was decided on April 13,2006 by the trial court, 2006 Minn. Law ch. 280 Sec. 13 & 14 containing the substantive amendments to Minn. Stat. Sec. 518.175 and Minn. Stat. Sec. 518.18 was

still being conferenced for a final bill. By the time such court order had been appealed to the Court of Appeals on June 14,2006, this bill had still not been effective on its application date. By the time the lower court appealed had been supplemented and finalized to reflect the error in leaving the provision as to the appointing of a successor parenting consultant in this case on July 11,2006, the provisions of the amendments were still not in effect (August 1,2006) . **Even Appellant’s legal counsel conceded publicly that “...the Court of Appeals did not even need to consider the new statute because it was not effective when the trial court ruled”.** (Minn.Lawyer,Jan.8,2007), R-112.

The Court of Appeals in Goldman v. Greenwood,*supra*, thus erred in applying the 2006 amended Minn.Stat.Sec. 518.175 effective August 1,2006 to this case and such part of the decision should be modified and reversed. As per Melamed v. Melamed, 286 N.W.2d 716 (Minn.App.,1979), a case cited by the Appellant, statutory amendments are not applied to a case if such amendment is effective after the appeal is filed. In that case, the Court upheld the trial court’s decision to consider marital fault in the distribution of the couple’s assets and did not apply the amendment of the statute eliminating marital fault in the evaluation of distribution of the assets

because the appeal had been filed prior to March 1,1979, the effective date of the amendment. Here too, the instant appeal was filed on June 14, 2006 and was held by the Court of Appeals to be valid and proper with jurisdiction by court order of July 18,2006, as per R-106, which is before the effective date of the amendment of the statute of August 1,2006.

Consequently, there is an error in applying the amended statute to the instant appeal and such error should be reversed and the motion by Respondent granted in its entirety without further proceedings.

Minn. Stat. Sec. 645.21 states that :

“No law should be construed to be retroactive unless clearly and manifestly so intended to by the legislature ”.

Furthermore, Minn. Stat. Sec. 645.31 sub.(1) states that:

“the new provisions shall be construed as effective only from the date when the amendment became effective”.

Here, Minn.Stat.Sec. 518.175 Sub(3) was already in existence as of the date the appeal had been filed in this action and its amendment through 2006 Minn. Law ch. 280 Sec. 13 & 14 did not become effective until a subsequent date , August 1,2006. Consequently, the provisions of this statute , as in effect prior to the amendment, and as interpreted by Auge and its long list of subsequent cases following such decision should have been followed by the

Court of Appeals on its reversal of January 2,2007 in Goldman v. Greenwood,*supra*, without requiring a remand. Thus, the motion for relocation should have been granted on the reversal specially since there was no cross-motion filed by the Appellant requesting custody of IG and in view that the “*unique facts*” as per Daily v. Chermak, *supra*, to continue imposing a non-removal from the state on the sole physical custody award to the Respondent are no longer present here, with no issue of fact existing as to this point. Such is a question of law which this Court can review *de novo* as per Prior Lake AM v. Mader, 642 N.W.2d 729 (Minn.App.,2002). A genuine issue of material fact does not exist “*when the record taken as a whole could not lead a rational trier of fact to find for the non-moving party*”, as per DLH Inc. v. Russ, 566 N.W.2d 60 (Minn.,1997).

Though in Dailey v. Chermak,*supra*, the Court of Appeals held that there is no prohibition against awards of child custody conditioned on maintaining a specific geographic residence , as long as that residence is shown clearly and genuinely to serve the child’s best interests, such prohibition was limited to “*the unique facts of LaChapelle*” and because :

“.....*of the availability in that location [where the geographical restriction of residence the child is limited to] of special health or educational services that the child particularly needs and that are not readily available o inexpensively obtained elsewhere*”.

There is no issue of fact that there are no unique facts justifying the keeping of the geographical residence restriction of IG to this state as of the date the motion on the appeal record was filed and the motion record shows the lack of any issues of facts on the removal of such conditional physical award of custody to the Respondent. None of the "criteria" stated on the September 6,2001 order justifying the condition of non-removal from the state exist in 2006 or constitute "unique" criteria. Moreover, Appellant, does not argue otherwise in his brief, to override IG's best interest in 2006 . As such criteria were identified in Goldman v. Greenwood,*supra*, A-196-197, IG is no longer of tender age in 2006 (he was 4 years old in 2001 and could not communicate his preference of custodial parent , and he is now 11 years old), there has not been any need for psychological counseling for several years now, for either IG or the parties, and there have been no issues regarding any alleged interference of visitation for father-Appellant, as he himself has not claimed so on the motion record for this appeal and has clearly not availed himself of the court ordered parenting consultant from November 13,2003, the date the present parenting consultant was appointed through stipulation of the parties, see R- 110, through the date the motion was heard on March 11,2006 (a period of over

2 ½ years). As to any additional factors stated by the 2001 district court order on a footnote, A-42, which is not truly part of the unique criteria regardless, none of IG's three half-siblings reside with Appellant anymore, as all 3 such half-siblings have been emancipated and live outside Appellant's home, 2 being out-of-state and 1 residing in a local College dormitory (A-149,A-153).

In this regard, Goldman v. Greenwood,*supra*, on the issue of retroactive application of the substantive amendment of Minn.Stat.Sec. 518.175 Sub(3) is in direct contravention of Minn. Stat. Sec. 645.21 and 645.31 as well as existing case law and rules of law prohibiting such retroactive application.

The Court of Appeals ruling in Goldman v. Greenwood,*supra*, on this issue that “ *generally appellate courts apply the law as it exists at the time they rule on a case...* ” citing Interstate Power Co. v. Nobles Bd., 617 N.W.2d 566 (Minn.App., 2000) unless rights affected by the law vested before the change in the law or application of law would manifest injustice or conflict with statutory direction or legislative history ignores said exception altogether for the Respondent and fails to address whether

Respondent (Appellant below) did possess vested rights affected by the amendment, whether such amendment are clarifying or substantive in nature, whether the amended statutory provision eliminating the Auge presumption did state a clear and unequivocal effective date of August 1,2006 for its application and whether injustice would result against Respondent causing great prejudice against her by such retroactive application as presently mandated by the Court of Appeals.

In Rooney v. Rooney, 669 N.W.2d 362 (Minn.App,2003) , in a divided court decision, the Court held that on remand, the lower court may apply the amended statute to include the definition of payor of funds for purposes of enforcing withholdings on a parent who owed child support payments because such amendment merely added clarifying language that the previous statute lacked. In such determination, the Court there evaluated the “*well recognized exception*” enunciated by McClelland v. McClelland, 393 N.W.2d 224 (Minn.App., 1986) that on remand a district court must execute a reviewing court’s mandate strictly, according to its terms and lacks power to alter, amend, or modify that mandate. The Court there in applying the clarification amendment held that such application of the amended

statute on remand neither altered rights that had matured or become unconditional, nor did it impose new or unanticipated obligation on the payor of funds , nor did it work some other injustice because the amendment there only clarified a definition on the term “*payor of funds*”, and the results should have been the same under either version of the statute. Hence, the Court found no prejudice whatsoever on the payor of funds for the payment of withheld wages to pay for child support payments due.

Though some precedents hold that amendments to statutes may be applied retroactively when such amendments are either procedural or for clarification of existing terms on the amended statute, as per State v. Lilleskov, 658 N.W.2d 906 (Minn.App.,2003) , Larson v. Independent School Dist.No.314, 233 N.W.2d 74 (Minn,1975), Ubel v. State, 547 N.W.2d 366 (Minn.,1996) *cert' den'd* 519 U.S. 1057, 117 S.Ct. 686, 136 L.Ed.2d 610 (1996), Rural America Bank of Greenwald v. Herickhoff , 485 N.W.2d 702 (Minn.,1992) and Nardini v. Nardini, 414 N.W.2d 184 (Minn.1987), there is **no precedent** holding that such amendments may be applied retroactively when such amendment is substantive in nature and deals with private matters. On the contrary, case law indicates that the

application of Minn.Stat.Sec. 645.21 & 645.31 must be strictly adhered to on the prohibition to apply such substantive amendments retroactively unless the amendments so specifically provide. This Court in Spurck v. Civil Service Bd., 42 N.W.2d 720 (Minn.,1950) held that statute that changed provisions to a 1939 law relating to appeals by permanent civil service employees after discharge , removal or suspension , were substantive in nature and the provisions of the statute before the amendment must be applied. This holding follows the long standing rule of law that statutes which take away or impair any vested right acquired under existing laws, create a new obligation , impose a new duty, or attach a new disability in respect to transactions already past, are not to be deemed retrospective unless such is clearly the intention of the legislative, as per Davidson v. Gaston, 16 Minn 230 (Minn.,1871).

Presumptively, a statute is not retroactive , as per Fullerton-Krueger Lumber Co. v. Northern Pac Ry Co., 266 U.S. 435, 45 S.Ct., 143, 69 L.Ed. 367 (1925). Words in statutes ought not to receive a retroactive operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature cannot be otherwise

satisfied, as per Lynch v. Turrish, 236 F. 653, *aff'd* 247 U.S. 221, 38 S.Ct., 537, 262 L.Ed, 1087 (1916). Statutes are presumptively viewed as having only prospective effect, as per Gomon v. Northland Family Physicians Ltd., 625 N.W.2d 426 , *rev'd grant'd* , *rev'd* 645 N.W.2d 413 (Minn.2001) and Dear v. Minneapolis Fire Dep't. Relief Ass'n, 481 N.W.2d 69, *rev'd grant'd*, *aff'd as modif'd* , 485 N.W.2d 145 (Minn.,1992). Before an amendment can be applied retroactively there must be clear and manifest evidence of legislative intent , as per Lassen v. First Bank Eden Prairie, 514 N.W.2d 831 (Minn.App. 1994) and Baron v. Lens Crafters , Inc. , 514 N.W.2d 305 (Minn.App,1994). For this determination, there must be clear intent of the legislature , as per In Breoles' Estate, 212 N.W.2d 894 (Minn.,1973). The legislative history must be unambiguous as per Thompson Plumbing Co.Inc. v.McGlynn Companies, 486 N.W.2d 781 (Minn.App., 1992) and Lovegren v. People's Elec.Co., 380 N.W.2d 791 (Minn,1986). When the legislature amends a statute by changing the wording of the original version , it is presumed that the legislature intends to effect a change in the law rather than a clarification of the law , as per Thompson Plumbing Co.Inc. v.McGlynn Companies, *supra*, and per

Western Union Tel. Co. v. Spaeth, 44 N.W.2d 440 (Minn.,1950) .

Even Appellant's citation of Maxfield v. Maxfield, 452 N.W.2d 219 (Minn,1990) further corroborates this point on behalf of Respondent as to the application of Minn.Stat.518.175 as it existed at the trial court determination and not its amended 2006 version effective August 1,2006 . That court on a divided 4-3 decision did not involve either a modification of custody or relocation motion but instead it dealt with an initial determination on a divorce action . Furthermore, such case cited by the Appellant ratifies the weight of the preference of a 10 year old as to custody and therefore the Supreme Court affirmed the remand for an evaluation of the 10 year old preference on an initial divorce determination. Following Melamed v. Melamed,*supra*, the Court in Maxfield v Maxfield,*supra*, held that statutes on family law matters may not be applied retroactively since that case dealt with an amendment to Minn.Stat.Sec. 518.17, as stated by Hon.Yetka in dissent as to his reference to the majority's decision:

“In May of 1989, the legislative attempted to clarify the law by amending Minn Stat.Sec. 518.17 sub(1) effective August 1,1989 to provide that the child's primary caretaker, as determined by the Pikula analysis, is only one factor to be considered in awarding custody and that the Court may not use one factor to the exclusion of all others: se Act of May 25,1989,Ch. 248 Sec 2 198 Minn Law 834,835,836. The

majority seems to hold that since the statute was not in effect at the time the trial court decided this case, the pre-1989 status of the law should apply , in which case the presumption of Pikula applies.”

“That this decision was subsequently modified by the legislature in 1990 by an additional amendment to Minn.Stat.Sec. 518.17 does not proscribe or in any way proscribe the future decision and action by this Court on its powers vested by the Minnesota State Constitution , and Appellant fails to cite any authority for the advancement of such unsupported theory based on any statute , rule or precedent anywhere”.

III- APPELLANT MISTATES THE COURT OF APPEAL’S ORDER AS IT PROVIDES, UNDER THE MINN. STAT. SEC. 518.175 SUB.(3) AS AMENDED IN 2006, THOUGH HERE APPELLANT DID NOT FILE A RESPONSIVE CROSS-MOTION REQUESTING CHANGE OF CUSTODY, THAT THE CASE BE REMANDED ON A TWO TIER EVALUATION HEARING: FIRST ON BEST INTEREST ANALYSIS ONCE A PRIMA FACIE CASE HAS BEEN DETERMINED TO EXIST, AS THE COURT OF APPEALS DID IN THIS CASE, ON THE EIGHT STATUTORY CRITERIA AS TO THE RELOCATION, AND SECOND, IF NEEDED AND RELOCATION IS DENIED, THEN SHIFTING TO AN EVALUATION UNDER MINN. STAT.SEC. 518.18(d) FOR A CHANGE OF CUSTODY ORDER UNDER OVERALL BEST INTEREST FACTORS

Though the Appellant acknowledges that the Court of Appeals in Goldman v. Greenwood,*supra*, states that “ *the 2006 amendment of*

Min.Stat.Sec.518.175 eliminates the so called Auge presumption”, Appellant fails to acknowledge that the Court of Appeals also stated that although Minn.Stat.Sec. 518.18(d) was also amended in 2006 , such later amended statute does not contain any language asserting that a removal motion would not be first evaluated under Minn.Stat.Sec. 518.175 (2006). The Court of Appeals further stated A-207-208,211 that :

“And the legislature, although it has modified the laws to remove a presumption in favor of the custodian’s proposed removal, it has not altered the statutory scheme that prompted the Auge court to protect the relationship with the sole custodian”.

“ Because this presumption was eliminated by statute, the need for attention to the custodian’s reasons for relocation is resurrected, a conclusion put beyond question by the legislature’s express inclusion of this topic among those the Court must address”.

Contrary to the misstatements by Appellant, the Court of Appeals acknowledges the effect of the 2006 amendment to the statute as contained on 2006 Minn. Law Ch. 280 Sec. 13 when it states in Goldman .

Greenwood, *supra*, A-201 that :

“ The 2006 amendment of Section 518.175 eliminates the so called Auge presumption, establishing that the proponent now must show cause for a removal but that the best interest of the child are to govern the court’s decision”... But the language of Minn. Stat. Sec. 518.18(d)(2006) on the proposition of changing custody to the other parent , which no longer prompts a presumption for removal, also fails to diminish the reality that Minn. Stat. Sec. 518.175 (2006) governs the

standards and burden of proof for the proponent of removal”.

Appellant’s inclusion and reference to portions of prior legislative history to 2006 Minn. Law Ch. 280 Sec. 13 , as it was argued in prior years at the legislature, vis-à-vis the final form as incorporated in Minn.Stat.Sec. 518.175, only refers to the initial burden of proof being shifted from the non-moving non-custodial parent to the moving-custodial parent on eight defined factors, as best interest analysis is defined on Minn.Stat.Sec. 518.175 and limited for purposes to assess the relocation motion. Such partial legislative history included by Appellant does not address any discussion in the legislature as to the consequences of a denial of such removal motion. Therefore, Auge still remains intact for the consideration of maintaining the primary care relationship of the child unless the endangerment analysis under Minn.Stat Sec. 518.18 changes the custodial parent of the child when proven by the non-custodial parent at the subsequent analysis. Only then , would secondary analysis need to “*address added factors*” in case “*if denial of the motion will likely result in a modification of custody, the district court must consider the negative effects of separating the child and the primary caretaker*”, A-212,213, per

Goldman v. Greenwood,*supra*, citing Auge v. Auge,*supra* . Hence , the holding in Goldman v. Greenwood,*supra*, provides that “*but when the district court denies a proposal to remove that prompts a change in the physical custody of the child, portions of the Auge holding remain intact*”. This conclusion is valid and Appellant’s statement that a conclusion on a “fair review” of his cited authorities and the included legislative history of predecessor bills to 2006 Minn. Law ch. 280 Sec. 13 & 14 do not support his theory that “*legislature’s intent to completely overrule Auge with the 2006 amendments to the statutes falls very short of such goal.*

Appellant further misstates the two stepped evaluation held to be needed in this case on remand in case the motion to relocate after an evaluation hearing under Minn. Stat. Sec. 518.175 is denied and a second evaluation is needed based on Minn. Stat. Sec. 518.18(d) to change custodial parents. Appellant misleads and misstates when he states that in such eventuality the Court of Appeals “*declined to promulgate a standard for how trials courts were to adjudicate such motions in the future*”, App.Br. Pg.13. For the Court of Appeals instead stated A-214 :

‘Before remand, without an evidentiary hearing record [underlying added for emphasis], we have no occasion to specify more particularly how Minn.Stat.Sec. 518.18(d) is implicated by the prospect of a change in the child’s primary caretaking arrangement. This Court will not exercise the

Supreme Court's prerogative to prescribe a standard to guide the district court on this question before the district court has considered the issue, see State v. Gilmartin, 535 N.W.2d 650 (Minn.App.,1995) rev'd den'd (Minn,Sept.20,1995)"

"..... as an intermediate appellate court, we decline to exercise supervisory powers reserved for this State's Supreme Court".

A- PRIMA FACIE CASE ON MINN.STAT.SEC. 518.175 SUB(3)

Should Minn.Stat.Sec. 518.175 Sub.(3) as amended in 2006 be applied to this case , the Court of Appeals properly determined that Respondent has met her prima facie burden (A-219) as per the detail analysis and discussion submitted by the Respondent on the motion and appeal record and by her briefs , including the Reply Brief,see R-118-230:

"There is merit in appellant's [respondent here] suggestion that her affidavits establish prima facie proof on questions of the child's preference and interests in a move " .

" The child's religion is now a prominent consideration in shaping his best interests. See Minn.Stat.Sec.518.17 Sub.1(a)(10)(2004) (providing that religious consideration are part of a best interest analysis) Johnson v. Johnson, 424 N.W.2d 85 (Minn.App.,1988) (finding that the district court by failing to consider the parties' ability to raise the children in the Catholic faith)".

Hence, Respondent's affidavits stated a prima facie case of an 11

year old child's preference to move from Minnesota to NYC with his mother-Respondent , such that Respondent, who had filed motion for removal , was entitled to a determination of IG's best interest at a hearing in which the court was required to determine IG's preference as well as the impact of the proposed move to NYC, including enhancement's to IG's general quality of life; affidavits stated that IG had been enveloped in the Orthodox Judaism way of life and the Orthodox tradition had become a way of life for IG , that IG had expressed a passion for NYC and that NYC offered a greater opportunity for advanced Jewish studies , see R- 4 to R- 52, specially since in two years hence, in 2009, (he is currently completing 6th Grade English and Math as advanced 6th Grade Talmudic Jewish Studies) , IG would have to embark on such studies outside of Minnesota (R-18,19)

B- SUBSEQUENT CASE LAW ONLY STRENGTHENED AND ENLARGED THE AUGE PRESUMPTION THROUGH 2006

Appellant's contention that "*the Auge presumption has been undermined by subsequent case law*" in the 23 years elapsed the Court's

decision through the 2006 amendment effective August 1,2006 belies the citation as a reference of that court's decision by over 100 other authorities that have cited Auge approvingly with only a handful of distinguishing cases as per West Law- Keycite .

In one of such of a handful of cases cited by Appellant as distinguishing, Hegerle v. Hegerle, 335 N.W.2d 726 (Minn.App.,2001), Appellant neglects to state that the joint custody of the child was totally equal (7 days for one parent followed by 7 days for the other parent) and that the physical custody of the child was joint as well , and the stated reason for the relocation by the custodial parent was that she wanted to pursue her career in Oklahoma. Distinguishing from Auge v.Auge,supra, and Gordon v. Gordon,supra, noting that such cases involved only one parent having sole physical custody, the Court in Hegerle v. Hegerle, *supra*, stated that:

“This is not one of those “many” cases encompassed by the Auge decision where a custodial parent wishes to remove a child from the state and the principles of Auge and Gordon should not be further extended to cases where parents have joint legal and physical custody and where, as here, both parents are equally involved with the child's care. To extend the Auge presumption in favor of removal in this instance would completely abrogate the concept of joint physical custody; thus we decline to apply that presumption here”.

It bears notation that the panel of the Court of Appeals in Hegerle v. Hegerle, *supra*, which declined to extend the Auge presumption to cases of joint physical custody did include Hon. Judge Crippen, who is the subject of criticism by the Appellant in his brief for having declined in Goldman v. Greenwood, *supra*, as the author of an unanimous decision , to conclude that the premises that formed Auge as to preserving the relationship between the primary care custodial parent and the child are not fully superceded by the amended provisions of Minn.Stat.Sec. 518.175 and 518.18..

Hence, Appellant's conclusion on its brief, Pg. 17, that "*Minnesota relocation jurisprudence was on a collision course with itself [over Auge]*" is therefore false and not based on any cited cases by Appellant. Cases cited and explained clearly did not extend the Auge presumption to joint physical custody arrangements, where form prevailed over substance , as courts must follow prior stipulations by the parties entered into open court, unless they are modified by subsequent change of circumstances evincing a change on the best interest analysis of the child. To that extent, in this case where there is a conditional sole physical custody award with alternate parenting time and that such party wished to relocate because of change of circumstances

and there is a lack in the 2006 motion of any remaining “*unique criteria*” initially determined to exist by the trial court in 2001, this case decides the issue on the motion to relocate on a first instance and there is no “*collision course*” with Auge v. Auge, supra.

C- APPELLANT PROVIDES NO EVIDENCE THAT AUGE WAS INTENDED TO BE OVERRULED IN ITS ENTIRETY

On this point Appellant again fails to provide any evidence on legislative history or otherwise, that Minn Stat. Sec. 518.175 (2006) intended to overrule Auge v. Auge, supra, in its entirety. The only legislative history on this point whether the presumption on the relocation exists on the custodial parent and which parent has the burden to go forward on the motion to relocate. All other aspects and foundations or premises on which Auge v. Auge, supra, was based are not affected by any review of the appeal record or the Appellant’s brief and his appendix.

Furthermore, Appellant misstates (in its footnote # 15) the position of the court in Goldman v. Greenwood, supra, on the endangerment criteria of

Minn.Statute Sec. 518.18(d) as Appellant self-labeled it as “*sacrosanct*”.

There is no such conclusion, statement or implication in the entire decision and order of Goldman v. Greenwood , *supra*.

In utter hypocrisy as to the Appellant’s interpretation that Minn.Stat.Sec. 645.17 that “*legislature does not intend a result that is absurd or impossible of execution*”, Appellant, on one side , contends that endangerment of Minn.Stat.Sec. 518.18(d) is sarcastically “sacrosanct” according to the decision of Goldman v. Greenwood , *supra* , if he were required to prove it on a subsequent change of custody , in case the motion to relocate under Minn.Stat.Sec. 518.175 were to be denied on remand , with additional best interest factors (other than the eight factors detailed on Minn.Stat.Sec. 518.175) then considered under Minn.Stat.Sec. 518.18 on endangerment , while on the other hand, Appellant advocates the absurd result that he expects Respondent to be on her motion to relocate only under a Minn.Stat.Sec. 518.18(d) basis to prove endangerment to IG while he is both in her sole physical custody, whether in a form with non-removal from the state condition vis-à-vis outside the state without the non-removal provision , and even though Appellant has not even requested on a cross-motion the

award of custody of IG, see R-53.

D- APPELLANT'S ATTEMPT TO INTIMIDATE THIS COURT WITH
ADDITIONAL LEGISLATIVE ACTION IS MISPLACED AND
IMPROPER

Appellant's contention that the judiciary is usurping legislative powers if Appellant were not to be determined successful in this appeal, thus reversing Goldman v. Greenwood,*supra*, would indeed result in an improper surrender of the judiciary's obligation to interpret the law as per the plain language of the statute and in case of ambiguity with an analysis of clear and unequivocal interpretation of legislative history.

The lack of credence of such position by Appellant lies in the public statements published on behalf of Appellant's legal counsel in the Minnesota Lawyer, January 8, 2007, where the issues of this appeal were misstated and Appellant has failed to recruit any *amicus curiae* to join in this appeal, though the Minnesota Bar Association would have surely been contacted if legal counsel for Appellant's statements are to be believed , see R-112.

There is no support on the plain reading of the amended statutes , nor

is there any support on the supplied portions of prior legislative history included by the Appellant on his brief, see A-224 to A-229 as to the conclusion by Appellant (App.Br.Pg.24) , that “*whatever the merits of the competing public policy positions on relocation, the legislature has chosen a policy against relocation*”. The only proof provided by the Appellant with the inclusion of the partial Senate floor debates is what we already know from the plain reading of the statute : the burden of proof to go forward has been shifted from the non-moving/non-custodial parent to the moving/custodial parent on eight defined statutory criteria listed on Minn.Stat.Sec. 518.175 Sub(3) and that is all there is on either that statute or the legislative history as to what the legislature intended with this statute. On this point , the previous cited Maxfield v Maxfield,*supra*, with the quotation provided on Point II is much more appropriate conclusion here as well.

IV- BEST INTEREST ANALYSIS OF A CHILD IS NOT “FROZEN” FOREVER AT ONE PARTICULAR TIME AND ANY “UNIQUE FACTORS” EXISTING TO CONDITIONAL AWARD OF SOLE PHYSICAL CUSTODY MUST BE REEVALUATED TO REDETERMINE IF SUCH CONDITIONAL AWARD IS STILL VALID, AND WHEN NO ISSUE OF FACTS ARE PRESENT AS TO THE LACK OF EXISTENCE OF SUCH INITIAL UNIQUE CRITERIA, BEST INTEREST ANALYSIS MUST THEREFORE BE REDETERMINED FOR THE CHILD.

The stated intention by the district court in the court order of 2001 as incorporated in the 2002 judgment decree of divorce of the parties to forever “freeze “ best interest analysis as of the date IG was 4 years old and forever prohibit any reevaluation of best interest analysis of IG could not be valid and is therefore *void ab initio*, as per Goldman v. Greenwood,*supra*. To create a switching custody just on relocation without evaluating best interest analysis is inherently against all precedents in this State and cannot be upheld in this Court , as the district court has claimed it has created a restriction stronger than that provided by LaChapelle, see A-164. Appellant fails to provide any citation or any authority for such claim that such forestalling of best interest analysis is valid , despite changes of circumstances and despite what the Appellant claims was foreseen 7 years ago with a crystal ball by the judicial officer, who issued this unprecedented court order.

Appellant’s claim , which is unsupported by the appeal record, that Respondent agreed to waive any future changes and modifying factors affecting the best interest of IG for the rest of IG’s childhood , (between age 5-18 years) , could not be conceivably argued from the 2002 judgment colloquy on the inquest by the judicial officer and such judicial officer

certainly did not inquire as to any such future changes that may occur after 2001, see A-44. Such 2002 transcript of the colloquy on the inquest of the court order, in any event, was not part of the motion record, was not part of the appeal record before the Court of Appeals and its inclusion in this appeal record is therefore improper. Still, such transcript does not evince any waiving as to future rights on future motions as to changes in best interest analysis, and if it had, it would have been against public policy and *void ab initio*. Furthermore, IG's future best interest has not and cannot be waived without IG's own input and representation in the proceedings and no party may waive on behalf of IG his best interest in the future. Any such argument by Appellant is preposterous and is against any sound and solid family rule of law in this State and any other state, for that matter. Appellant again fails to provide any authority for any ridiculous argument. The district court in skipping best interest analysis of IG has neglected IG's rights here and usurped IG's rights in direct opposition and conflict to the long standing precept that the primary concern is the "*paramount welfare of the child*, as per Benson v. Benson, 346 N.W.2d 196 (Minn.App.,1984).

V- UNDER AN ABUSE OF DISCRETION REVIEW ANALYSIS, THE TRIAL COURT DISREGARDED APPLICABLE STATUTORY PROVISIONS AS TO CHANGE OF CIRCUMTANCES, ADMITTEDLY SKIPPED BEST INTEREST ANALYSIS ALTOGETHER, AND DISREGARDED KEY AND SIGNIFICANT FACTS, AS APPELLANT DOES ALSO HERE, BY NOT EVEN INCLUDING THE 14 SUBMITTED AFFIDAVITS IN HIS RECORD IN SUPPORT OF THE RESPONDENT'S MOTION TO RELOCATE EVINCING A PRIMA FACIE CASE EVEN UNDER MINN.STAT. SEC. 518.18 SUB,(D)

In its analysis of the relocation motion by the Respondent under Minn.Stat. Sec. 518.18(d) as a modification of an existing custody order, the trial court clearly abused its discretion by disregarding statutory provisions as to change of circumstances of either the child or the parties (A-186), improperly and admittedly skipping best interest analysis altogether (A-189) , and disregarded 14 (fourteen) submitted affidavits in support of the Respondent's motion (R-4-52). In Goldman v. Greenwood,*supra*, the Court did not undertake such analysis because the motion for relocation was held to be determinable under Minn.Stat.Sec. 518.175 Sub(3). Though the higher standard required by Minn.Stat.Sec. 518.18(d) was held not to be applicable in any event by the Court of Appeals, such standard was more than adequately met by the Respondent as to a prima facie case , should such statute being found to be applicable and an evidentiary hearing required

under these circumstances.

The change of circumstances , as per the Respondent's brief submitted to the Court of Appeals, see R-118, included such change of circumstances as her remarriage to a New York State attorney, where previously she had stated that she would not ever remarry (A-189) , the child now no longer being of the tender age of 4 years, versus then 10 years of age (R-6), and who in 2001 could not even express a preference as to custodial parent, the lack of psychological issues requiring counseling for the child and the parties, and the lack of intervention of a parenting consultant, though one had been in place . The Appellant, though not having filed a cross-motion for custody, see R-53, did not claim either endangerment or interference with his visitation rights. Indeed, Appellant's vague and insubstantial claim is merely though Respondent does place the daily phone calls for IG with the Appellant that such phone calls are not long enough to his satisfaction and that somehow he feels that Respondent monitors or listens to such phone calls, without any corroboration or evidence to such de minimis allegations. Such claims by Respondent are frivolous and baseless based on the requirements of the court order as to the requirement of his full satisfaction

as to the duration of such daily phone calls whereby IG must stay on the phone regardless of whether he has anything further to discuss with the Appellant . Such allegation is totally and unbelievably insignificant and without precedent on any authorities by the Appellant, and in any event moot as of this date, since IG is now 11 years of age and does not need anyone to place phonecalls for him and he calls anyone he wishes.

Furthermore, the district court abused its discretion in finding facts not in evidence on the 2006 motion record when the 2006 court order refers to a non-existing 2006 finding that IG “*idolized*” or “*worshipped*” his College bound half-sibling who formerly resided with Appellant, see A-185.

In addition ,the same judicial officer who issued the court order of this appeal has shown his abuse of discretion when he contradicts himself as to the standards of law to be applied on a relocation motion of a parent who has a custodial restriction, per the written materials of the seminar in which he participated on February 16,2006, Relocation/Removal Law in Minnesota. For on such written materials, this judicial officer advocates that such evaluation of “*endangerment*” “*can be prospective*” and the “*Court need not wait until present manifestation of harm*”. He further noted “ *case law in*

the relocation /removal context seem to ignore this language nuance [on real endangerment] and focuses instead on whether the move itself will endanger the children” and he concludes that “*the disruption and anxiety typically associated with a move is not enough [to deny the relocation]”*. These published opinions and writings of this judicial officer are in stark contrast to the stricter higher standard of proof on present endangerment he held the Respondent to on her 2006 motion to relocate and for the reason he provided for denying such motion to relocate on an analysis of Minn.Stat. Sec. 518.18(d) .

Furthermore , at that February 2006 seminar , this judicial officer indicated that a 10 year old’s preference should be determined as part of the motion, as per Steinke v. Steinke, 428 N.W.2d 579 (Minn.App.,1988), and yet in this case , though the Respondent presented 15 affidavits as to IG’s preferences being an Orthodox Jewish 10 year old child, he disregarded such evidence and proceeded to deny an evidentiary hearing without even asking IG in chambers what his preferences was .

The absurd result in applying Minn.Stat.Sec. 518.18(d) here , as such claim by the Appellant is presented that statutes may not require parties to be

subjected to absurd results as per Minn.Stat.Sec. 645.17, forces then the Respondent to prove endangerment of IG while under her sole physical custody while in this state , with a change of circumstances to yield a result of keeping IG under her same sole physical custody with removal of the conditional in-state award.

The specific facts and evaluation of harm and endangerment of keeping the same created environment by the judgment decree of 2002, contrary to Appellant's false assertion on his brief (App.Br. Pg.29 and A-96), are exhaustively detailed on Respondent's brief- Points I through VI submitted to the Court of Appeals, see R-138 to R-179, and as supported by the 15 submitted affidavits in support of the motion, R-4 to R-52.

There are no cited cases, no statutory provisions, and no legislative history provided by the Appellant on this point either as to the applicability of Minn.Stat.Sec. 518.18(d) to the facts and circumstances of this case involving a sole physical custodial parent whose award contains non-removal from the state and alternative parenting time and files a motion of relocation to change parenting time upon her remarriage.

POINT VI:

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

Though the Appellant does not have day-to-day contact with Isaac, as erroneously and repeatedly suggested by the lower court (A.148,A.152 & A-165) and as when the Appellant himself on his affidavit (R-65) claims that he spends about 145 days of the year with Isaac , the trial court (A.152) remarks that because the Appellant has a "*thriving*" practice in this locality, though no such fact was adduced anywhere on the motion record, he should not have to relocate to New York where the Respondent will relocate upon her upcoming remarriage to a New York State attorney. Instead, the lower court suggests that if the Respondent wants to marry this New York State attorney, then he should be commuting daily between New York and Minneapolis in order for the Respondent to retain custody of Isaac under the conditional geographic limitation placed on her under the 2001-2002 court orders. Such conclusion of law and facts is reached by the lower court

without an evidentiary hearing .

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

Unlike LaChapelle v. Mitten,*supra* which involved constitutional claims to travel, equality and privacy and the Equal Protection Clause in general, this case involves a more fundamental right : the right to marry ;

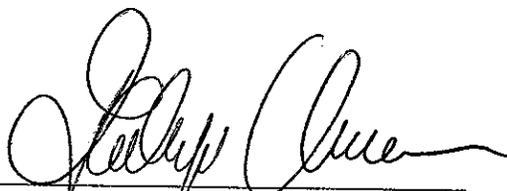
this is the most fundamental right, which that case did not relate to .

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

CONCLUSION

For the aforementioned reasons, the Respondent respectfully requests that the decision and order in Goldman v. Greenwood,*supra*, be affirmed with a modification that Minn.Stat.Sec. 518.175 Sub(3) be applied to this case before its amended version effective August 1,2006 and that the Auge presumption should be applied to Respondent after removal of the conditional award of sole physical custody granting her motion ,with no issue of facts as to the lack of any valid “*unique criteria*” in existence now, in its entirety, to relocate with IG without a requirement of an evidentiary hearing and denying the cross-motion in its entirety, thus providing the modified parenting time for Appellant as provided on the motion. Alternatively, the Respondent then requests that the decision and order in Goldman v. Greenwood,*supra*,be affirmed in its entirety.

May 7 , 2007



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CERTIFICATE OF COMPLIANCE

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

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

Name of Typeface: Times New Roman

Point Size : 14

Line Spacing : Double

The total number of words in this respondent's brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations , proof of service, certificate of compliance or any addendum containing statutes , rules , regulations, etc. and any appendix, is 13,996.



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