

NO. A06-1110

A07-1046

State of Minnesota
 In Supreme Court

OFFICE OF
APPELLATE COURTS

MAY 21 2007

FILED

In Re the Marriage of:

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

Respondent,

vs.

Mark E. Greenwood,

Appellant.

APPELLANT'S REPLY BRIEF

PHILIP ORNER, C.P.A., J.D.

Felipe ("Philip") Orner,

*Admitted pro hac vice*72-29 – 137th Street

Flushing, NY 11367

(718) 575-9600

SUZANNE M. REMINGTON

LAW OFFICE, LTD.

Suzanne M. Remington (#244752)

3300 Edinborough Way, Suite 400

Edina, MN 55435

(952) 767-0020

CLUGG, LINDER, DITTBERNER

& BRYANT, LTD.

Michael D. Dittberner (#158288)

3205 West 76th Street

Edina, MN 55435

(952) 896-1099

*Attorney for Respondent**Attorneys for Appellant*

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. Sole Physical Custodian With A Locale Restricting Conditional Custody Award Should Be Required To Show Endangerment Under Minn. Stat. § 518.18 (D) (iv) When Bringing A Subsequent Motion To Relocate A Minor Child's Residence To Another State	2
II. Respondent Failed To Make A Prima Facie Showing Under Minn. Stat. § 518.175, Subd. 3 And She Should Not Be Entitled To An Evidentiary Hearing	3
III. The 2006 Amendments To Minn. Stat. § 518.175, Subd. 3 Should Be Applied To This Case	7
IV. This Court Should Overrule Auge If It Declines To Apply The 2006 Amendments To Minn. Stat. § 518.175, Subd 3 To This Case	11
V. The 2006 Amendments To Minn. Stat. § 518.175, Subd. 3 Completely Overrule Auge's Shifting Of The Burden Of Proof To Non-Custodial Parents	12
VI. The 2006 Amendments To Minn. Stat. § 518.175, Subd. 3 Completely Overrule Auge's Shifting Of The Burden Of Proof To Non-Custodial Parents	13
CONCLUSION	15

TABLE OF AUTHORITIES

Minnesota Cases

<u>Amaral v. The St. Cloud Hospital,</u> 598 N.W.2d 379 (Minn. 1999)	3
<u>Auge v. Auge,</u> 334 N.W.2d 393 (Minn. 1983)	1, 10, 11, 12, 15
<u>Berndt v. Berndt,</u> 292 N.W.2d 1 (Minn. 1980)	14
<u>Dietrich v. Canadian Pacific Ltd.,</u> 536 N.W.2d 319 (Minn. 1995)	7
<u>Goldman v. Greenwood,</u> 725 N.W.2d 747 (Minn. App. 2007)	2, 7, 8
<u>Holen v. Minneapolis - St. Paul Metropolitan Airports Commission,</u> 250 Minn. 130, 136, 84 N.W.2d 282 (1957)	8
<u>In re the Matter of C.L.L.,</u> 310 N.W.2d 555 (Minn. 1981)	13
<u>Interstate Power Co. v. Nobles Co. Bd.,</u> 617 N.W.2d 566 (Minn. 2000)	8, 9
<u>McClelland v. McClelland,</u> 393 N.W.2d 224 (Minn. App. 1986)	9
<u>Matson v. Matson,</u> 638 N.W.2d 462, (Minn. App. 2002)	7
<u>Maxfield v. Maxfield,</u> 452 N.W.2d 219 (Minn. 1990)	10
<u>Melamed v. Melamed,</u> 286 N.W.2d 716 (Minn. 1979)	8
<u>Nardini v. Nardini,</u> 414 N.W.2d 184 (Minn. 1987)	11

<u>Nice-Peterson v. Nice-Peterson,</u> 310 N.W.2d 471 (Minn. 1981)	12
<u>Oanes v. Allstate Ins. Co.,</u> 617 N.W.2d 401 (Minn. 2000)	12
<u>SooHoo v. Johnson,</u> _____ N.W.2d _____ (Minn. 2007)	7
<u>Swarthout v. Siroki,</u> C9-00-2219, 2001 WL 766870 (Minn. Ct. App. July 10, 2001)	2
<u>Tourville v. Tourville,</u> 292 Minn. 489 490, 198 N.W.2d 138 (Minn. 1972)	14
<u>Van Dyck v. Snidarich,</u> A06 – 442, 2007 WL 509665 (Minn. Ct. App. Feb. 20, 2007)	2
<u>Vangness v. Vangness,</u> 670 N.W.2d 468 (Minn. App. 2000)	10

Foreign Cases

<u>Schwarzkopf v. Sac County Board of Supervisors,</u> 41 N.W.2d 1(Iowa 1983)	9
--	---

Statutes

Minn. Stat. § 480A.08, subd. 3	2
Minn. Stat. § 518.17, subd 1	10
Minn. Stat. § 518.175	15
Minn. Stat. § 518.175, subd. 3 (1982)	10
Minn. Stat. § 518.175, subd. 3	1, 3, 7, 8, 10, 11, 12, 13, 15
Minn. Stat. § 518.175, subd. 3 (b)	3, 6, 12
Minn. Stat. § 518.175, subd. 3 (b) (1)	3
Minn. Stat. § 518.175, subd. 3 (b) (2)	4

Minn. Stat. § 518.175, subd. 3 (b) (3)	4
Minn. Stat. § 518.175, subd. 3 (b) (4)	5
Minn. Stat. § 518.175, subd. 3 (b) (5)	6
Minn. Stat. § 518.175, subd. 3 (c)	10, 13
Minn. Stat. § 518.18 (d).....	1, 2, 3, 11, 15
Minn. Stat. § 518.18 (d) (i).....	3
Minn. Stat. § 518.18 (d) (iv).....	1, 2, 3
Minn. Stat. § 645.02	7

Session Laws

1990 Minn. Laws Ch. 574, § 13	10
2006 Minn. Laws ch. 280 § 14	10

Unenacted Bills

Senate Floor Debate on S. F. No. 266 (April 15, 2003).....	11, 13
--	--------

INTRODUCTION

Appellant is submitting this brief in reply to Respondent's Brief. Appellant will first address Respondent's argument that her motion to relocate should have been adjudicated under Minn. Stat. § 518.175, subd. 3 instead of Minn. Stat. § 518.18 (d) despite the original decree's locale restricting conditional award of custody. Second, Appellant will show that Respondent has failed to make a prima facie showing under Minn. Stat. § 518.175, subd. 3, and that Respondent should not be entitled to an evidentiary hearing. Third, Appellant will respond to Respondent's position that the 2006 amendments to Minn. Stat. § 518.175, subd. 3 should not be applied to this case. Fourth, Appellant will demonstrate that this Court should overrule Auge if it determines that the 2006 amendments do not apply to this case. Fifth, Appellant will review Respondent's contention that Auge v. Auge, 334 N.W.2d 393 (Minn. 1983) superimposes Minn. Stat. § 518.18 (d) (iv)'s endangerment standard on motions to relocate notwithstanding the 2006 amendments to Minn. Stat. § 518.175, subd. 3. Finally, Appellant will discuss the significance of Respondent's claim that the trial court's decision is a violation of her fundamental right to marry.

ARGUMENT

I. A SOLE PHYSICAL CUSTODIAN WITH A LOCALE RESTRICTING CONDITIONAL CUSTODY AWARD SHOULD BE REQUIRED TO SHOW ENDANGERMENT UNDER MINN. STAT. § 518.18 (D) (IV) WHEN BRINGING A SUBSEQUENT MOTION TO RELOCATE A MINOR CHILD'S RESIDENCE TO ANOTHER STATE.

Respondent should have the burden of showing endangerment pursuant to Minn. Stat. § 518.18 (d) (iv) given her locale restricting conditional award of custody. Respondent disagrees, asserting that Appellant's position "lacks any support of any cited statute" and "lacks basis on any published case." See Respondent's Brief at 21. Appellant concedes that there is no published Minnesota Supreme Court case addressing conditional awards of custody. Thus, this is a case of first impression for this Court.¹ Respondent, however, is incorrect in claiming that Appellant's position is not based on any statutory provision. Minn. Stat. § 518.18 (d) includes within its scope modifications

¹ In her brief, Respondent chides Appellant for citing Swarthout v. Siroki, C9-00-2219, 2001 WL 766870 (Minn. Ct. App. July 10, 2001) (unpublished opinion attached at A.231 – A.236) as persuasive authority, noting the Court of Appeals' criticism of the trial court's reliance on this unpublished opinion. See Respondent's Brief at 24 (referencing Goldman v. Greenwood, 725 N.W.2d 747, 753, n. 4 (Minn. App. 2007)). Respondent's objection is without merit, because Appellant is not citing Swarthout as precedential authority. See Minn. Stat. § 480A.08, subd. 3. Respondent's claim that Swarthout v. Siroki did not involve the application of Minn. Stat. § 518.18 (d) (see Respondent's brief at 25) is also without merit. In Swarthout, the Court of Appeals affirmed a district court's order granting a motion for modification of a locale restricting conditional custody award which expressly relied on Minn. Stat. § 518.18 (d). Respondent is also mistaken in her belief that another unpublished opinion, Van Dyck v. Snidarich, A06 – 442, 2007 WL 509665 (Minn. Ct. App. Feb. 20, 2007), is "on point." See Respondent's brief at 25. Although Van Dyck involved a locale restriction, it did not involve a conditional award of custody.

of a “custody arrangement or² [a] parenting plan provision specifying the child’s primary residence” (emphasis added). Minn. Stat. § 518.18 (d) (i) refers to possible changes in a “custody arrangement or primary residence” (emphasis added). A locale restricting conditional award of custody is a custody arrangement. If either a “custody arrangement” or a “primary residence” can be modified pursuant to Minn. Stat. § 518.18 (d), then the endangerment standard in Minn. Stat. § 518.18 (d) (iv) should be deemed applicable to modifications of locale restricting conditional custody awards.

II. RESPONDENT FAILED TO MAKE A PRIMA FACIE SHOWING UNDER MINN. STAT. § 518.175, SUBD. 3 AND SHE SHOULD NOT BE ENTITLED TO AN EVIDENTIARY HEARING.

Even if it is assumed that Respondent did not have the burden of proving endangerment under Minn. Stat. § 518.18 (d) (iv), Respondent failed to make a prima facie showing pursuant to Minn. Stat. § 518.175, subd. 3, and her motion was properly denied without the need for an evidentiary hearing. In this regard, it is helpful to review and compare certain factors listed in Minn. Stat. § 518.175, subd. 3 (b) with Respondent’s evidence and arguments.

Minn. Stat. § 518.175, subd. 3 (b) (1) provides for the Court to consider “the nature, quality, extent of involvement, and duration of the child’s relationship with the person proposing to relocate and with the non-relocating person, siblings, and other significant persons in the child’s life.” In her Brief, Respondent criticized Appellant’s

² Absent context revealing that the word “or” should be read as conjunctive, this Court generally reads “or” to be disjunctive. Amaral v. The St. Cloud Hospital, 598 N.W.2d 379, 385 (Minn. 1999).

reference to the trial court's 2002 finding that Appellant and the minor child had an emotionally intimate relationship, asserting that the 2006 motion record lacked any evidence of this fact. See Respondent's Brief at 32. However, in her February 27, 2006 Affidavit, Respondent asserted that her motion to relocate, if granted, would allow for a "[c]ontinuing [of Isaac's] intimate relationship with his father." A.101.

Minn. Stat. § 518.175, subd. 3 (b) (2) requires the court to consider "the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration special needs of the child." Respondent's February 27, 2006 Affidavit discussed at some length how moving to New York City would benefit the minor child's practice of Orthodox Judaism. See A.97 – A.101. The trial court gave little weight to these alleged opportunities given the un rebutted fact that the minor child had adjusted very well to living in Minnesota since the parties' divorce. See A.185 – A.186. Indeed, Respondent asserted in her February 27, 2006 Affidavit that Isaac was "very comfortable psychologically," and that he had a "grounded relationship" with both parents.³ A.96.

Minn. Stat. § 518.175, subd. 3 (b) (3) requires the court to consider the "feasibility

³ In her Brief, Respondent ominously claims that Appellant "has continuously sought to thwart [the minor child's] practice of Orthodox Judaism," but provides no specific examples. See Respondent's Brief at 33. Appellant notes with irony Respondent's claim that Appellant never availed himself of the services of the parties' parenting consultant since November of 2003 to address any alleged interference by Respondent with Appellant's visitation rights. See Respondent's Brief at 31. Respondent fails to appreciate that there is also no reference in the record to Respondent ever availing herself of the services of the parenting consultant to address any alleged "thwarting" by Appellant of Isaac's practice of Orthodox Judaism.

of preserving the relationship between the non-relocating person and the child through suitable parenting time arrangements, considering the logistics and financial circumstances of the parties.” In her Brief, Respondent minimizes the impact of her motion to relocate on Appellant’s parenting time with the minor child, asserting that her proposed visitation schedule would afford Appellant 110 ½ days⁴ with the minor child. See Respondent’s Brief at 33 – 34. Approximately one-half of this total, however, is compromised of weekends that Respondent expects Appellant to fly to New York City to spend with the minor child. Respondent does not explain how it would be financially feasible or practical for Appellant to be able to make appropriate travel and lodging arrangements in order to achieve the amount of potential access advertised by Respondent.

Minn. Stat. § 518.175, subd. 3 (b) (4) requires the court to consider “the child’s preference, taking into consideration the age and maturity of the child.” In Appellant’s Brief, he noted that Respondent’s former legal counsel had denied at the March 13, 2006 hearing that Respondent was claiming that Isaac had expressed a preference to relocate to New York City. See Appellant’s Brief at 31. Respondent now asserts that her former counsel’s admission was a “misrepresentation” and “self-contradictory” and reiterates the statements in her February 17, 2006 Affidavit about Isaac expressing an “interest in” and “passion for” New York City. See Respondent’s Brief at 28 – 29. It is Respondent, not

⁴ Respondent engages in creative mathematics to arrive at her total of 110 ½ days by counting two - day weekends of as 2 ½ days and by counting three – day weekends as equaling four days apiece. See Respondent’s Brief at 33.

her former attorney, who is being contradictory.

Minn. Stat. § 518.175, subd. 3 (5) requires a court to consider “whether there is an established pattern of conduct for the person seeking the relocation either to promote or thwart the relationship of the child and the non-relocating person.” In Appellant’s Brief, Appellant noted how the trial court’s September 6, 2001 Memorandum Decision cited a number of examples of Respondent’s interference with Appellant’s relationship with the minor child, and how Respondent’s secretive launching of the present litigation demonstrated that she devalued the minor child’s relationship with Appellant. See Appellant’s Brief at 10, n. 9 and 30, n. 18. In response, Respondent suggests that Appellant’s receipt of the requisite 14 days notice of her motion somehow rebuts Appellant’s claim that the litigation was secretive. See Respondent’s Brief at 31. Respondent misses the point. The November 22, 2005 letter written by the minor child’s former therapist to Respondent (A.107) demonstrates that Respondent planned the present litigation against Appellant for months without informing Appellant that she desired to relocate to New York City. Respondent’s act of giving Appellant the minimum number of days notice prior to the originally scheduled hearing date does not satisfy Respondent’s obligation to engage in reasonable advance consultation with Appellant about such a monumental, life-changing decision as her plan to move Isaac’s residence to New York City.

The above factors cannot be viewed in a vacuum. It should not be sufficient for a relocation movant to merely parrot the language of Minn. Stat. § 518.175, subd. 3 (b) in order to be entitled to an evidentiary hearing. Conclusory allegations should not be

deemed as satisfying the specific factual predicate to a prima facie case. See Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 319, 321 (Minn. 1995). At the very least, movants for relocation should be required to demonstrate how the facts have significantly changed since the time of the original decree.⁵ See Matson v. Matson, 638 N.W.2d 462, 486 (Minn. App. 2002). Moreover, there is no language in Minn. Stat. § 518.175, subd. 3 entitling a relocation movant to an evidentiary hearing even if they have made a prima facie showing. Cf. SooHoo v. Johnson, _____ N.W.2d _____, _____ (Minn. 2007) (holding that evidentiary hearing on the issue of third party visitation is unnecessary where the statute is silent on the need for an evidentiary hearing).⁶

III. THE 2006 AMENDMENTS TO MINN. STAT. § 518.175, SUBD. 3 SHOULD BE APPLIED TO THIS CASE.

The 2006 amendments to Minn. Stat. § 518.175, subd. 3 became effective on August 1, 2006 because the 2006 legislation incorporating the amendments did not mention an effective date for them. See Goldman v. Greenwood, 725 N.W.2d 747, 749 n. 1 (Minn. App. 2007) (citing Minn. Stat. § 645.02 (providing that effective date of law is August 1 following law’s final enactment, unless a different date is specified)). The

⁵ Respondent demonstrates her appreciation with the virtue of requiring a showing of changed circumstances when she argues in her Brief against the “forestalling of best interest analysis...despite changes of circumstances.” See Respondent’s Brief at 57. Respondent, however, failed to show significant changed circumstances in her February 26, 2007 Affidavit. See Appellant’s Brief at 30 – 31.

⁶ It is difficult to conceive of any circumstances where a movant for relocation would be denied an evidentiary hearing if a prima facie showing were deemed sufficient to entitle a relocation movant to an evidentiary hearing and if such a showing could be made without alleging changed circumstances.

of Respondent's appeal.⁷

The Court of Appeals held that the 2006 amendments to Minn. Stat. § 518.175, subd. 3 should be applied to this case because “appellate courts apply the law ‘as it exists at the time they rule on a case.’” Goldman v. Greenwood, 725 N.W.2d 747, 751 (Minn. App. 2007) (quoting Interstate Power Co. v. Nobles Co. Bd., 617 N.W.2d 566, 575 – 76 (Minn. 2000)). Respondent objects to the Court of Appeals’ holding, contending that reliance upon the 2006 amendments would be an improper retroactive application of the law. See Respondent’s Brief at 34 – 45.

Exceptions to the general rule set forth in Interstate Power Co., include cases where: (1) a right affected by the amended law is vested before the change in the law; (2) application of the changed law would produce manifest injustice; or (3) application of the changed law would conflict with statutory direction or legislative history. See Interstate Power Co. v. Nobles Co. Bd., 617 N.W.2d 566, 575 – 76 (Minn. 2000). None of those exceptions are present in this case. Respondent does not have a vested right to the application of relocation law as it existed prior to August 1, 2006. There is no mature or vested right in an existing law or action until a final judgment has been entered. Holen v.

⁷ In her Brief, Respondent cites Melamed v. Melamed, 286 N.W.2d 716 (Minn. 1979) for the proposition that statutory amendments may not be applied to a case where an appeal is filed prior to the amendment’s effective date. See Respondent’s Brief at 35. Melamed is distinguishable from the present case because the statutory provision in Melamed had a specified effective date of March 1, 1979. See Melamed, supra, at 717, n. 1 (holding that where effective date of statute is specifically incorporated into an amendment, it represents a clear expression of legislative intent as to whether the old law or new law should be applied).

Minneapolis - St. Paul Metropolitan Airports Commission, 250 Minn. 130, 136, 84 N.W.2d 282, 287 (1957). A right is not vested unless it is something more than a mere expectation, based upon an anticipated continuance of present law. McClelland v. McClelland, 393 N.W.2d 224, 227 (Minn. App. 1986)⁸ (citing Schwarzkopf v. Sac County Board of Supervisors, 341 N.W.2d 1, 8 (Iowa 1983)). A vested right must be a right or interest in property that has become fixed or established, and is not open to doubt or controversy. Id.

If this Court were to accept Respondent's argument that she had a vested right to the application of pre-August 1, 2006 relocation law, it would render children the functional equivalent of chattel. Respondent cannot successfully argue that it would be manifestly unjust to apply a law that favors the best interests of children over the residential living preferences of their adult parents. Finally, there is no indication in the legislative history or the language of the 2006 amendments to suggest that the Legislature

⁸ In McClelland, the Court of Appeals also held that a court is to apply the law in effect at the time of its decision. Id. at 226. This Court cited the McClelland holding with approval in Interstate Power Co. v. Nobles Co. Bd., 617 N.W.2d 566, 576 (Minn. 2000).

intended that the pre-August 1, 2006 law must be applied to pending cases.⁹

By enacting the 2006 amendments to Minn. Stat. § 518.175, subd. 3, the Minnesota State Legislature was correcting what it believed to be an erroneous interpretation of the law. When Auge v. Auge, 334 N.W.2d 393 (Minn. 1983) was originally decided, Minn. Stat. § 518.175, subd. 3 (1982) merely provided that a custodial parent could “not move the residence of the child to another state except upon order of the court or with the consent of the non-custodial parent,” and did not contain any language placing the burden of proof on a non-custodial parent objecting to a motion to relocate. Notwithstanding that lack of statutory language, the Auge court grafted onto Minn. Stat. § 518.175, subd. 3 a presumption in favor of relocation. See Auge, supra, at 399. The 2006 amendments correct the Auge court’s misinterpretation of the statute by placing the burden of proof on the parent moving to relocate. See 2006 Minn. Laws ch. 280 § 14, codified at Minn. Stat. § 518.175, subd. 3 (c). In floor debate, Senator Betzold,

⁹ In her Brief, Respondent erroneously claims that this Court held in Maxfield v. Maxfield, 452 N.W.2d 219 (Minn. 1990) that family law statutes may not be applied retroactively. See Respondent’s Brief at 44. The dissenting opinion in Maxfield claimed that the majority opinion “[s]eemed to hold that, since the statute was not in effect at the time the trial court decided the case, the pre-1989 status of law should apply.” See id. at 224 (J. Yetka, dissenting). The Maxfield minority was alluding to the Maxfield majority’s statement that the 1989 State Legislature “albeit since the trial” had eliminated the primary caretaker presumption from Minn. Stat. § 518.17, subd. 1. See Maxfield, supra, at 222, n. 1. This oblique statement is not tantamount to a pronouncement that family law statutes are not to be applied retroactively. Moreover, Maxfield was legislatively overruled by the 1990 amendment to Minn. Stat. § 518.17, subd. 1. See 1990 Minn. Laws Ch. 574, § 13. See also Vangness v. Vangness, 670 N.W.2d 468, 476 – 77 (Minn. App. 2000) (holding that Legislature in 1990 abandoned primary caretaker presumption “golden thread” analysis for undifferentiated balancing of child’s best interests).

the chief author of the 2006 amendments, demonstrated that he intended to have the Legislature correct the Auge court's interpretation, when he stated that the Auge holding "just does not work, that the burden ought to be on the custodial parent who really should have the opportunity to move out of state, but has to be able to establish to the Court's satisfaction and not require the non-custodial parent to prove a negative." Senate Floor Debate on S. F. No. 266 (April 15, 2003) (Statement of Sen. Betzold). A. 308. Statements by an author of a bill that the bill is intended to correct a judicial interpretation of the statute is compelling evidence that the amendment should be given retrospective application. See Nardini v. Nardini, 414 N.W.2d 184, 196, n. 10 (Minn. 1987).

IV. THIS COURT SHOULD OVERRULE AUGE IF IT DECLINES TO APPLY THE 2006 AMENDMENTS TO MINN. STAT. § 518.175, SUBD 3 TO THIS CASE.

In his Brief, Appellant argued that the Auge presumption had been undermined by subsequent case law which provided exceptions and qualifications to the Auge presumption. See Appellant's Brief at 14 – 17. Respondent, however, argues that subsequent case law "strengthened and enlarged the Auge presumption," noting that Auge has been cited approvingly by over "100 other authorities" since it was issued. See Respondent's Brief at 50 – 51. The fact that subsequent appellate opinions have relied upon Auge is not evidence of the continued soundness of Auge's core holding. Auge superimposed the endangerment standard of Minn. Stat. § 518.18 (d) onto Minn. Stat. § 518.175, subd. 3 in order to create a presumption in favor of motions to relocate brought by sole physical custodians. See Auge, supra at 399. This holding represented a

deviation from the customary practice of placing the burden of proof on a modification movant. See Nice-Peterson v. Nice-Peterson, 310 N.W.2d 471, 472 (Minn. 1981). The Auge court justified its novel approach to the burden of proof by assuming that a child's best interests were aligned with the interests of the child's sole physical custodian, and by claiming that a presumption in favor of removal would maintain the child in the family unit to which the child currently belonged, thereby providing the child with continuity and stability. See Auge, *supra* at 399. Subsequent decisions which allowed exceptions to the Auge presumption and which favored the form and title of a custody arrangement over its substance, conflict with Auge's professed rationale of promoting continuity and stability. Thus, the philosophical underpinnings behind Auge had already been substantially weakened by the date Respondent filed her motion to relocate. *Stare decisis* does not bind this Court to unsound principles. Oanes v. Allstate Ins. Co., 617 N.W.2d 401, 406 (Minn. 2000). This Court would therefore be justified in overruling Auge in the event it is deemed that the 2006 amendments to Minn. Stat. § 518.175, subd. 3 do not apply to this case.

V. THE 2006 AMENDMENTS TO MINN. STAT. § 518.175, SUBD. 3 COMPLETELY OVERRULE AUGE'S SHIFTING OF THE BURDEN OF PROOF TO NON-CUSTODIAL PARENTS.

As a fallback position, Respondent argues that the 2006 amendments to Minn. Stat. § 518.175, subd. 3 overrule Auge only by shifting the "initial burden of proof" to a sole physical custodian moving to relocate, and that the burden of proof to show endangerment shifts back to the non-custodial parent once the sole physical custodian has made a prima facie showing of the factors set forth in Minn. Stat. § 518.175, subd. 3 (b).

See Respondent's Brief at 47 – 48. Neither the language of the 2006 amendments nor their legislative history support such an interpretation. A.230, A.308 – A.312. Senator Betzold's statements during floor debate are a clear indication that the Legislature intended to place the entire burden of proof on relocation movants notwithstanding their status as sole physical custodians. Senate Floor Debate on S. F. No. 266 (April 15, 2003) (Statement of Sen. Betzold). A.308. Any other interpretation would render the Legislature's amendment of Minn. Stat. § 518.175, subd. 3 a futile exercise.¹⁰

VI. RESPONDENT'S CONSTITUTIONAL CLAIM, WHICH SHOULD NOT BE HEARD, REVEALS THE WEAKNESS OF HER POSITION.

Respondent's original pleadings did not cite her impending marriage to her current husband as one of her four alleged changes in circumstances. A.96 – A.102. In fact, Respondent devoted only six sentences in her February 17, 2006 Affidavit to a discussion of her and the minor child's relationship with her husband. A.104 – A.105. Respondent now devotes 2 ½ pages of argument in her Brief to decrying how the trial court has allegedly encroached on her fundamental right to marry. See Respondent's Brief at 64 – 66. Respondent failed to raise this constitutional argument before the trial court and thus should be barred from raising this issue on appeal. A party cannot for the first time on appeal, raise constitutional issues that were not raised in the trial court. In re the Matter

¹⁰ Additional evidence that the State Legislature did not intend to shift the burden of proof to non-custodial parents once a custodial parent made a prima facie case for relocation is found in Minn. Stat. § 518,175, subd. 3 (c)'s exception which shifts the burden of proof to the non-movant where "the person requesting permission to move has been a victim of domestic abuse by the other parent." If the Legislature intended to have any other exceptions it would have placed them in the statute.

of C.L.L., 310 N.W.2d 555, 557 (Minn. 1981). The Minnesota Supreme Court will not consider questions which were not presented to or decided by the lower court. Tourville v. Tourville, 292 Minn. 489 490, 198 N.W.2d 138, 139 (Minn. 1972).¹¹

A more practical problem with Respondent's argument is that it assumes that the minor child's relationship with Appellant is less deserving of constitutional protection than Respondent's relationship, albeit romantic, with another adult. To this day, Appellant does not know how Respondent and her husband met, or how long they knew or dated each other prior to Respondent's filing of her motion to relocate. A.131. What is obvious is that Respondent chose to pursue a relationship with a resident of another state notwithstanding the minor child's strong ties to Appellant and to the State of Minnesota and notwithstanding Respondent's knowledge that she had a locale restricting conditional award of custody. The ultimate test in all custody cases is the best interest of the child. Berndt v. Berndt, 292 N.W.2d 1, 2 (Minn. 1980). Minnesota custody law would be turned on its head if the personal choices of adults are allowed to take precedence over the best interests of children. Taken to its logical conclusion, Respondent's position would support a presumption in favor of relocation even where the sole physical custodian's marriage to the non-resident is the product of a sudden, internet romance. A child's interest in preserving a relationship with both parents is not well served when that interest is subordinated to the personal, romantic choices of one of the child's parents.

¹¹ This Court did not grant review to Respondent of her constitutional claim. A.222.

CONCLUSION

The trial court properly placed the burden of proof upon Respondent of proving endangerment pursuant to Minn. Stat. § 518.18 (d) given the original decree's locale restricting conditional custody award. Even if Respondent's burden of proof is analyzed under Minn. Stat. § 518.175, subd. 3 instead of Minn. Stat. § 518.18 (d), Respondent should be deemed as having failed to make a prima facie case and she should not be entitled to an evidentiary hearing. The 2006 amendments to Minn. Stat. § 518.175 should be applied to this case. If not, Auge v. Auge, 334 N.W.2d 393 (Minn. 1983) should be overruled by this Court. Respondent's constitutional claim, which should not be heard by this Court, reveals the weakness of her position. The Court of Appeals should be reversed, and the decision of the district court should be reinstated.

Respectfully submitted,

Date: 5-17-07

By: Michael D. Dittberner
Suzanne M. Remington Law Office, Ltd.
Suzanne M. Remington (#244752)
3300 Edinborough Way, Suite 400
Edina, MN 55435
(952) 767-0020

Clugg, Linder, Dittberner & Bryant, Ltd.
Michael D. Dittberner (#158288)
3205 West 76th Street
Edina, MN 55435
(952) 896-1099

Attorneys for Appellant