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# The "Unnecessary" In-state Relocation Standard

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## THE "UNNECESSARY" IN-STATE RELOCATION STANDARD

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I.	INTRODUCTION.....	117
II.	MINNESOTA RELOCATION STANDARD .....	118
	A. <i>The Auge Presumption</i> .....	118
	B. <i>The LaChapelle Locale Restriction</i> .....	121
III.	THE <i>SCHISEL</i> DECISION .....	124
	A. <i>Facts of the Case</i> .....	124
	B. <i>Procedural Posture of the Case</i> .....	125
	C. <i>Issue Raised to Appellate Court</i> .....	125
	D. <i>Appellate Court's Analysis</i> .....	126
	E. <i>Appellate Court's Holding</i> .....	127
IV.	THE "NECESSARY" STANDARD .....	128
	A. <i>The Sefkow Analysis</i> .....	128
	1. <i>Change in Social Science</i> .....	129
	2. <i>Change in Case Law</i> .....	130
	3. <i>Change in Statutory Law</i> .....	130

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2009]	“UNNECESSARY” IN-STATE RELOCATION STANDARD	117
	B. LaChapelle <i>Locale Restrictions</i> .....	132
	C. <i>Other Jurisdictions Use of the Necessary Standard</i> .....	133
V.	CONCLUSION .....	136

## I. INTRODUCTION

Relocation cases . . . present some of the knottiest and most disturbing problems that our courts are called upon to resolve. In these cases, the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents.<sup>1</sup>

One of the thorniest, most difficult areas in family law involves the situation where one parent desires to change the child’s permanent residence to a location a great distance away from the other parent. Traditionally, these cases have involved an out-of-state move, but, as practitioners have long known, an in-state move involving substantial distances can be as traumatic to the family as a short move to a neighboring state.

Minnesota relocation law, like that of many states, requires a different analysis depending on whether the relocation in question is post-decree or in an initial custody determination and whether the relocation is in-state or out-of-state. In 2006, Minnesota’s long-standing statute governing out-of-state moves was amended, overruling ingrained case law. However, no similar statute specifically addresses in-state moves. Therefore, the Minnesota Court of Appeals recently attempted to clarify the in-state relocation issue.

On March 10, 2009, the Minnesota Court of Appeals addressed the notion of in-state relocation in an initial custody determination. In *Schisel v. Schisel*,<sup>2</sup> the court erred by applying a standard without statutory authority, based on archaic social sciences and case law.<sup>3</sup> Although the *Schisel* court correctly determines that the best-interests-of-the-child standard applies, it errs in using an additional

1. Tropea v. Tropea, 665 N.E.2d 145, 148 (N.Y. 1996).

2. 762 N.W.2d 265 (Minn. Ct. App. 2009).

3. See *infra* Part III.

“necessary” standard to determine in-state relocation. In an initial custody determination involving in-state relocation, only the best-interests-of-the-child standard should be applied.

Part two of this note provides a review of the precedent prior to *Schisel*.<sup>4</sup> Part three describes the facts, procedure, and analysis of the *Schisel* opinion.<sup>5</sup> Part four explains how the *Schisel* court erred in applying an additional “necessary” standard.<sup>6</sup> Finally, the note concludes with an analysis of how *Schisel* should have been decided and the future of in-state relocation cases in Minnesota.<sup>7</sup>

## II. MINNESOTA RELOCATION STANDARD

Relocation has been a puzzling and dynamic issue for Minnesota courts over the years; therefore, a proper understanding of the present state of the law in this area requires a review of the precedent. Because little Minnesota case law specifically addresses the notion of in-state relocation, out-of-state relocation case law provides the foundation for its analysis.

### A. *The Auge Presumption*

The most significant case regarding Minnesota relocation law was decided over two decades ago. In *Auge v. Auge*, the mother, who had been awarded sole legal and physical custody, moved the district court to allow her child to accompany her to Hawaii for part of the year.<sup>8</sup> The trial court denied the motion, partially because there was no “deep business *necessity*” for traveling to Hawaii each year.<sup>9</sup> Upon review, the Minnesota Supreme Court held that the custodial parent had the presumptive right to travel,<sup>10</sup> and the parent opposing the move had the burden of showing that removal was not in the best interests of the child and that removal “would endanger the child’s physical or emotional health.”<sup>11</sup> The

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4. See *infra* Part II.

5. See *infra* Part III.

6. See *infra* Part IV.

7. See *infra* Conclusion.

8. *Auge v. Auge*, 334 N.W.2d 393, 395 (Minn. 1983). For a review of Minnesota relocation law prior to *Auge*, see generally Robert E. Oliphant, *Minnesota’s Custody Relocation Doctrine: Is There a Need for Change?*, 28 WM. MITCHELL L. REV. 723, 730–32 (2001).

9. *Auge*, 334 N.W.2d at 395 (emphasis added).

10. *Id.* at 399.

11. *Id.* at 395.

presumptive right to travel was based upon the theory that the minor child and the custodial parent formed a new family-unit, a theory that predominated at the time.<sup>12</sup> The *Auge* court stated,

Given the inadequacy of judicial determinations as to the best interests of the child, and given that one of the few guidelines we have is the fact that continuity and stability in relationships are important for the child, courts should be restricted in their authority to interfere with post-divorce family-unit decision-making. Decisions concerning the welfare of the child should be left to the custodial parent who, by virtue of his or her relationship with the child, is best-equipped to determine the child's needs. The custodial parent should be permitted to decide where he or she and the child will reside . . . .<sup>13</sup>

Two years later, in 1985, the Minnesota Court of Appeals addressed the issue of relocation again.<sup>14</sup> In *Sefkow v. Sefkow*, the district court granted custody of one child to Ms. Sefkow on the condition that she remain "in either Fergus Falls or the Fargo-Moorhead area."<sup>15</sup> The Minnesota Court of Appeals invalidated this provision, stating, "[U]nnecessary limits on movement of the family unit unlawfully interfere with the stable circumstances of a child. Removal will be prohibited if it is shown that it contradicts the best interests of a child . . . ."<sup>16</sup> In its opinion, the Minnesota Court of Appeals gave "unyielding heed to *Auge*."<sup>17</sup> Indeed, courts predominately applied *Sefkow* for years stating that in-state relocation requests at the time of an initial custody determination were contrary to law and impermissible.

Following *Sefkow*, a trio of cases further solidified the prohibition against in-state geographic restrictions. In *Bateman v. Bateman*, the trial court granted the custodial mother joint physical and legal custody of two minor children while requiring her to

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12. Oliphant, *supra* note 8, at 736.

13. *Auge*, 334 N.W.2d at 399 (citing Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, 12 RUTGERS L.J. 341, 363 (1981) (footnote omitted)).

14. *Sefkow v. Sefkow*, 372 N.W.2d 37 (Minn. Ct. App. 1985) *remanded on other grounds*, 374 N.W.2d 733 (Minn. 1985). The *Sefkow* marital dissolution proceeding lasted four years with three separate appeals. The *Schisel* decision relies on the second *Sefkow* appeal. *See infra* Part III.

15. *Sefkow*, 372 N.W.2d at 46.

16. *Id.* (citing *Auge*, 334 N.W.2d at 397, 399) (emphasis added). *See also* *Sefkow v. Sefkow*, 427 N.W.2d 203, 207 (Minn. 1988).

17. *Sefkow*, 372 N.W.2d at 46.

reside in the St. Cloud School District.<sup>18</sup> The Minnesota Court of Appeals reversed, holding that “the trial court’s residential restriction is contrary to law, it is an impermissible limit . . . .”<sup>19</sup>

Again in 1986, the Minnesota Court of Appeals overturned an in-state geographic restriction. In *Ryan v. Ryan*, the trial court mandated that the custodial mother reside in the city of Aitkin as a condition of her receiving sole physical custody.<sup>20</sup> The appellate court found this restriction to be “impermissibly restrictive” and “contrary to the presumption favoring removal.”<sup>21</sup>

Finally, in *Imdieke v. Imdieke*, the Minnesota Court of Appeals once again found an in-state restriction to be impermissible.<sup>22</sup> The court held, “To base custody or care on a parent’s remaining in a certain area is a restrictive condition contrary to Minnesota law.”<sup>23</sup> All three cases relied on the new family-unit theory established by *Auge*. Additionally, all three cases stood for the proposition that in-state geographic restrictions were impermissibly restrictive and contrary to Minnesota law.

In 2006, the Minnesota legislature replaced the *Auge* presumption in favor of removal with the best-interests-of-the-child standard. On May 31, 2006, the Minnesota legislature passed into law Minnesota Statutes section 518.175, subdivision 3.<sup>24</sup> The statute

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18. *Bateman v. Bateman*, 382 N.W.2d 240, 242 (Minn. Ct. App. 1986).

19. *Id.* at 251 (citing *Sefkow*, 372 N.W.2d at 47).

20. *Ryan v. Ryan*, 383 N.W.2d 371, 372 n.1 (Minn. Ct. App. 1986).

21. *Id.* (citing *Sefkow*, 378 N.W.2d at 74; *Bateman*, 382 N.W.2d 240; and *Auge*, 334 N.W.2d 393).

22. *Imdieke v. Imdieke*, 411 N.W.2d 241 (Minn. Ct. App. 1987).

23. *Id.* at 244 (citing *Auge*, 334 N.W.2d 393). *Dailey v. Chermak*, 709 N.W.2d 626, 630 (Minn. Ct. App. 2006), criticizes the proposition stated in *Imdieke* as “dictum and without basis in the law.” However, the *Imdieke* proposition was effectively overruled, as discussed later. See *infra* Part IV.A.

24. In 1971, section 518.175, subdivision 3, was enacted to read, “The custodial parent shall not move the residence of the child to another state except upon order of the court or with the consent of the noncustodial parent, when the noncustodial parent has been given visitation rights by the decree.” 1971 Minn. Laws 352. The section has been amended six times since its enactment. It was first amended in 1978 by adding the phrase “or more than 100 miles within this state” after the word “state.” 1978 Minn. Laws 1078–79. A year later, the phrase was removed. 1979 Minn. Laws 566. The legislature added the sentence “[I]f the purpose of the move is to interfere with visitation rights given to the noncustodial parent by the decree, the court shall not permit the child’s residence to be moved to another state,” to the end of section 518.175. 1982 Minn. Laws 992. In 2000, the words “visitation rights” were replaced with “parenting time.” 2000 Minn. Laws 1001. The 2001 amendment further neutralized the reading of section 518.175, subdivision 3, by omitting the words “custodial” and “noncustodial,” which describe the child’s relationship with each parent, and replacing the words

amended the standard for a custodial parent moving with a child from the state of Minnesota. This change represents a significant departure from prior Minnesota statutory and case law which presumed that a parent with physical custody would be able to move the minor child from the state of Minnesota. The new statute requires the district court to apply a best-interests standard when considering a request of a parent to move the child’s residence from Minnesota.<sup>25</sup> These best-interests factors, which are not the same as the best-interests factors used in initial custody determinations, are contained in section 518.175, subdivision 3, and pertain specifically to cases in which a parent requests to move a child’s residence to another state.<sup>26</sup> The factors, as stated in section 518.175, subdivision 3, are directly related to the circumstances surrounding the move. Furthermore, the current statute places the burden of proof directly upon the parent requesting the move unless that person has been the victim of domestic abuse, in which case the burden shifts to the non-relocating parent.<sup>27</sup>

#### B. *The LaChapelle Locale Restriction*

As opposed to the *Auge* presumption favoring removal, a locale restriction is a grant of custody conditioned upon a custodial parent remaining in a specific geographic area.<sup>28</sup> A locale restriction is included in the custody order by judgment or stipulation of the parties.<sup>29</sup> Therefore, the party requesting relocation must bring an order for modification of custody, which has a higher standard for modification, in post-decree relocation requests.<sup>30</sup>

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with “with whom the child resides” and “other,” respectively. Additionally, the 2001 amendment replaced the word “when” with “if.” 2001 Minn. Laws 146.

25. MINN. STAT. § 518.175, subdiv. 3(b) (2009).

26. MINN. STAT. § 518.175, subdiv. 3 (2009).

27. MINN. STAT. § 518.175, subdiv. 3(c) (2009).

28. *LaChapelle v. Mitten*, 607 N.W.2d 151, 162–63 (Minn. Ct. App. 2000).

29. *In re Marriage of Goldman*, 748 N.W.2d 279, 283 (Minn. 2008) (*Goldman II*).

30. *Id.* (stating that “the defining feature of a locale restriction is that it is included in the custody order and thus cannot be eliminated unless a party meets the heightened standard for custody order modification under section 518.18(d)”). When making a motion for modification of custody, the moving party must show endangerment of the child, whereas the best interest of the child standard applies in initial custody determinations. *Id.*

In 2000,<sup>31</sup> the Minnesota Court of Appeals first addressed the notion of locale restrictions. In *LaChapelle v. Mitten*, the biological mother, Mitten, was granted temporary custody and permission to move to Michigan with her child, pending further proceedings.<sup>32</sup> After trial, the court awarded sole physical custody to Mitten on the condition that she provide a permanent residence for her child in Minnesota.<sup>33</sup> Mitten appealed.<sup>34</sup> The court of appeals held that the best-interests-of-the-child standard must be applied in initial custody determination proceedings.<sup>35</sup> The court of appeals also found that “[i]n an initial custody proceeding, a trial court treats a proposed change of residence by a party as one factor to balance in determining custody of a child.”<sup>36</sup> The court held that it was in the best interests of the minor child to live in Minnesota, not Michigan, and affirmed the district court’s conditional custody award.<sup>37</sup> *LaChapelle* represented a significant move away from the new family-unit theory and the *Auge* presumption by no longer presuming that a move with the custodial parent was in the child’s best interests.

The Minnesota Court of Appeals again addressed the issue of conditional custody awards and locale restrictions in 2006. In *Dailey v. Chermak*, the district court granted the custodial mother permission to move her minor child from Minnesota to South Dakota.<sup>38</sup> The initial district court ruling stated, “The [c]ourt’s ruling on physical custody is conditional upon petitioner remaining in the Twin Cities metropolitan area.”<sup>39</sup> The court of appeals held, “[T]here is no absolute prohibition under Minnesota law against awarding child custody on the condition of maintaining a specific geographic residence for the child, as long as that residence is shown clearly and genuinely to serve the child’s best interests.”<sup>40</sup> *Dailey* moved the courts further from the new family-unit theory and the *Auge* presumption.

In 2007, the Minnesota Court of Appeals first addressed the

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31. Thirteen years after *Imdieke*, but six years before section 518.175, subdivision 3 was amended.

32. *LaChapelle*, 607 N.W.2d at 157.

33. *Id.* at 158.

34. *Id.*

35. *Id.* at 162.

36. *Id.*

37. *Id.*

38. *Dailey v. Chermak*, 709 N.W.2d 626, 629 (Minn. Ct. App. 2006).

39. *Id.*

40. *Id.* at 630.



applicability of section 518.175, subdivision 3, to relocation cases.<sup>41</sup> In 2002, Deborah Goldman was awarded sole physical custody of her son on the condition that she remain in the state of Minnesota.<sup>42</sup> Four years later, she moved the district court to relocate to New York City.<sup>43</sup> The district court applied Minnesota Statutes section 518.18(d), which addressed the standard for modification of custody, as opposed to Minnesota Statutes section 518.175, subdivision 3, because the motion involved changes in a “custody order” or a “custody arrangement.”<sup>44</sup> The district court denied Goldman’s motion based on a failure to present a prima facie case of endangerment.<sup>45</sup> The Minnesota Court of Appeals reversed the district court and remanded with instructions to apply the best-interests standard outlined in section 518.175, subdivision 3.<sup>46</sup> Additionally, the Minnesota Court of Appeals held,

*Auge* established a preference because of the importance of a child’s relationship with his primary custodial parent under the scheme of Minnesota’s child custody statutes . . . 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 child’s relationship with the sole custodian.<sup>47</sup>

Upon review, the Minnesota Supreme Court reinstated the district court’s order.<sup>48</sup> The court determined that a motion for removal by a sole physical custodian subject to a locale restriction “falls within the ambit” of section 518.18(d), because the statute applies to modification of “prior custody orders” or “prior custody arrangements.”<sup>49</sup> Therefore, the Minnesota Supreme Court determined that the district court had properly applied the law and “the defining feature of a locale restriction is that it is included in

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41. *In re Marriage of Goldman*, 725 N.W.2d 747, 749 n.1 (Minn. Ct. App. 2007) (*Goldman I*).

42. *Goldman I*, 725 N.W.2d at 749.

43. *Id.* at 750.

44. *Id.* at 752–53.

45. *Id.* at 750. In relevant part, MINN. STAT. § 518.18(d) (2009) states, “[T]he court shall not modify a prior custody order or a parenting plan provision which specifies the child’s primary residence unless it finds . . . (iv) the child’s present environment endangers the child’s physical or emotional health or impairs the child’s emotional development . . . .”

46. *Goldman I*, 725 N.W.2d at 761.

47. *Id.* at 754–55.

48. *Goldman II*, 748 N.W.2d 279, 286 (Minn. 2008).

49. *Id.* at 283.

the custody order and thus cannot be eliminated unless a party meets the heightened standard for custody order modification under section 518.18(d).<sup>50</sup> Further, the court specifically recognized that in circumstances where a custodial parent makes a motion for removal of the minor child from the jurisdiction, and where there is no locale restriction in the custody order, section 518.175, subdivision 3, applies.<sup>51</sup> Finally, the *Goldman* court expressly rejected the *Auge* presumption and the new family-unit theory by stating, “[O]ur ruling in *Auge* has no remaining vitality because it has been superseded in its entirety by statute.”<sup>52</sup>

### III. THE *SCHISEL* DECISION

While not specifically addressing a *LaChapelle* locale restriction, on March 10, 2009, the Minnesota Court of Appeals ruled on an in-state relocation request in an initial custody determination.<sup>53</sup>

#### A. *Facts of the Case*

On July 21, 2006, Kristine Schisel initiated dissolution proceedings against her husband, Daniel Schisel, after eleven years of marriage.<sup>54</sup> The couple had two children together, ages six and eight at the time of the dissolution proceeding.<sup>55</sup> Both children lived in Mankato, Minnesota, their entire lives.<sup>56</sup>

Although the family lived in Mankato, Ms. Schisel worked in downtown Minneapolis as a real estate agent.<sup>57</sup> This entailed more than a three-hour round-trip commute each day, Monday through Thursday.<sup>58</sup> On Fridays, she worked from home.<sup>59</sup> During the divorce proceedings, Ms. Schisel was “adamant” that she be allowed to move the children’s primary residence to Lakeville, Minnesota, approximately seventy miles north of Mankato, to be closer to her

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50. *Id.*

51. *Id.*

52. *Id.* at 283 n.5 (citations omitted).

53. *Schisel v. Schisel*, 762 N.W.2d 265, 267 (Minn. Ct. App. 2009).

54. *Id.*

55. *Id.*

56. Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree at 8, *Schisel v. Schisel*, No. 07-FA-06-3017 (Minn. Dist. Ct. Aug. 17, 2007) [hereinafter Judgment and Decree].

57. Appellant’s Brief, Addendum and Appendix at 7, *Schisel v. Schisel*, 762 N.W.2d 265 (Minn. Ct. App. 2009) (No. A08-0190).

58. *Id.*

59. Judgment and Decree, *supra* note 56, at 6.

family and work.<sup>60</sup>

Mr. Schisel worked as a police commander in Mankato.<sup>61</sup> His schedule required him to work three rotating twelve-hour shifts, beginning at either 6:00 p.m., 3:00 p.m., or 6:00 a.m.<sup>62</sup> The different schedules, however, gave him almost two weeks off each month.<sup>63</sup> In addition, Mr. Schisel was an exempt employee, allowing him to come and go as necessary, as long as there was not an emergency.<sup>64</sup>

#### B. Procedural Posture of the Case

At trial, the district court resolved the remaining issues between the parties, and despite a neutral custody evaluator's recommendation, denied Ms. Schisel's request to relocate.<sup>65</sup> Instead, the district court found that it was in the children's best interests to remain in Mankato “because the children [had] been ingrained in the Mankato community.”<sup>66</sup> Upon a motion for reconsideration, the court amended its findings and conclusions, providing that it was in the children's best interests to reside within Independent School District 77, the Mankato area school district.<sup>67</sup> Ms. Schisel appealed the decision.<sup>68</sup>

#### C. Issue Raised to Appellate Court

On appeal, Ms. Schisel argued that, although there is statutory and case law authority for the district court imposing conditions and restrictions on a child's residence, there is not comparable authority for in-state conditions and restrictions.<sup>69</sup> She went on to cite *Sefkow* for the proposition that “where an in-state relocation [is] requested at the time of an initial custody determination . . . a geographical restriction is contrary to law and impermissible, and

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60. *Schisel*, 762 N.W.2d at 268; Judgment and Decree, *supra* note 56, at 10.

61. Judgment and Decree, *supra* note 56, at 5.

62. *Id.*

63. Respondent's Brief, Addendum and Appendix at 4, *Schisel v. Schisel*, 762 N.W.2d 265 (Minn. Ct. App. 2009) (No. A08-0190).

64. *Id.*

65. *Schisel*, 762 N.W.2d at 271.

66. *Id.*

67. Amended Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree at 3–5, *Schisel v. Schisel*, No. 07-FA-06-3017 (Minn. Dist. Ct. Dec. 18, 2007).

68. *Schisel*, 762 N.W.2d at 267.

69. *Id.* at 268.

requires reversal.”<sup>70</sup> Ms. Schisel further cited *Imdieke*, *Ryan*, and *Bateman* for the same proposition.<sup>71</sup>

*D. Appellate Court's Analysis*

The court of appeals began by rejecting any out-of-state relocation cases as controlling because out-of-state relocation cases raise issues and complications that would not exist if the requested relocation was in-state.<sup>72</sup> “Thus, *Auge*, a case involving a relocation from Minnesota to Hawaii, does not control an in-state relocation.”<sup>73</sup>

The court of appeals then analyzed *Sefkow* as precedent on the issue.<sup>74</sup> The court noted that the *Sefkow* decision “relied on *Auge* for the proposition that ‘unnecessary limits on movement of the family unlawfully interfere with the stable circumstances of a child,’ and held that the ‘residential conditions on the placement of the *Sefkow* children are unnecessary and unlawful.’”<sup>75</sup> In response to this proposition, the court of appeals found that

Nothing in *Sefkow* creates a blanket rule that restrictions on in-state residence are per se unlawful. Rather, *Sefkow* stands for the proposition that such restrictions are unlawful if they are unnecessary . . . . The later cases on which appellant relies [*Bateman*, *Ryan*, and *Imdieke*] have cited *Sefkow* for a proposition that is broader than that for which the case stands. Had the *Sefkow* court intended to create a new rule of law, a categorical prohibition of a restriction on the intrastate residency of minor children in a custody award, it would not have used the qualifier “unnecessary.”<sup>76</sup>

After rejecting any blanket prohibition against in-state relocation restrictions, the court of appeals looked to Minnesota Statutes section 518.17, subdivision 3(a)(2) (2008), the statute giving the district court the “authority to restrict a child’s in-state

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70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* The court of appeals in *Schisel* also previously noted that *Auge* had been superseded by statute as recognized in *Goldman*. *Id.* (“[W]hich cites *Auge*, superseded by statute, Minn. Stat. § 518.175, subd. 3(b), (c) (2006), as recognized in *Goldman v. Greenwood*.”) (citation omitted).

74. *Id.* at 268–69.

75. *Id.* at 269.

76. *Id.*

## 2009] “UNNECESSARY” IN-STATE RELOCATION STANDARD 127

residence.”<sup>77</sup> The statute states, “[I]n a dissolution . . . the court shall make such further order as it deems just and proper concerning . . . [the minor children’s] physical custody and residence.”<sup>78</sup> The court of appeals went on to explain that “[t]his authority is modified by the fundamental requirement” of applying the best-interests-of-the-child standard as codified in Minnesota Statutes section 518.17, subdivision 1 (2008).<sup>79</sup> Citing *Sefkow*, the court finally states that “if there is to be any restriction on the children’s residence, the order further requires the restriction be necessary to serve the children’s best interests.”<sup>80</sup> Therefore, the court of appeals held that “the district court enjoys the authority to restrict the in-state residence of a minor child upon a showing that the restriction is *necessary* to serve the child’s best interests.”<sup>81</sup>

#### E. Appellate Court’s Holding

The Minnesota Court of Appeals found the district court’s finding that “the children have been ingrained into the Mankato community” was “insufficient to demonstrate a *necessity* for a geographical restriction on the children’s primary residence.”<sup>82</sup> The case was remanded for further consideration of the issue.<sup>83</sup>

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 270 (emphasis added). Additionally, the *Schisel* court used THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1535 (3rd ed. 1992) to define “residence” more commonly as a place, or geography, and not with whom the child is to live. *Schisel*, 762 N.W.2d at 269–70.

82. *Id.* at 271 (emphasis added).

83. *Id.* On July 30, 2009, the district court filed an Order on Remand and Amended Judgment and Decree. Order on Remand and Amended Judgment and Decree, *Schisel v. Schisel*, No. 07-FA-06-3017 (Minn. Dist. Ct. July 30, 2009). In the order, the court amended its previous findings of fact in order to show the in-state geographic restriction was “necessary,” although it “believe[d] the appellate court may have misconstrued [its] reliance on the fact that the children had been ‘ingrained’ in the [Mankato] community.” *Id.* at 2, 13. The amended findings of fact stated that the proposed move would “significantly and negatively” impact the children’s relationship with Mr. Schisel. *Id.* at 2. The district court noted that the parties stipulated to joint physical custody. *Id.* at 3. Joint physical custody occurs when “the routine daily care and control and the residence of the child is structured between the parties.” *Id.* The district court stated that, as a police commander with rigid shifts, it is “uniquely difficult” to establish a parenting plan that would give Mr. Schisel “meaningful and frequent interaction with his children.” *Id.* His schedule and the proposed move would make “seeing the children in the evening difficult when an hour or more commute each way is

## IV. THE "NECESSARY" STANDARD

The *Schisel* court applied the *Sefkow* "necessary" standard to determine whether an in-state relocation was in the children's best interests. This standard, however, is misplaced. The "necessary" burden is based upon statutory and case law that had been overruled due to advancements in social sciences. The "necessary" standard therefore reverts to the *Auge* presumption by creating an additional burden on the custodial parent. Such additional burdens skew legislative intent and have little bearing on the suitability of a custodial parent to retain custody.

A. *The Sefkow Analysis*

As previously discussed, *Bateman*, *Ryan*, and *Imdieke* stood for the proposition that in-state geographic restrictions were impermissibly restrictive and contrary to Minnesota law.<sup>84</sup> Therefore, if these cases were still good law, Ms. Schisel would have been presumptively allowed to move her children to Lakeville. However, the *Schisel* court dismisses these cases as being overly broad.<sup>85</sup> In this dismissal, the court does not overrule or distinguish the cases. Instead, the court cites *Sefkow* for the proposition that restrictions on children's residence must be necessary to serve the children's best interests.<sup>86</sup> This reliance on

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necessary." *Id.* Additionally, the children's "relationship with their dad would change drastically because he would no longer be able to 'drop in' at school or games or transport them places during his work hours." *Id.* at 4. However, "if the children remained in Mankato, they could continue to have daily or near-daily interaction with their father," enabling both parents to "effectuate their agreement for joint physical custody." *Id.* at 3-4. The district court also found in an amended findings of fact regarding child support that "[o]n an annualized basis, [Mr. Schisel] will have actual custody of the children 25% of the time and [Mrs. Schisel] will have actual custody of the children 75% of the time." *Id.* at 9.

84. See *Bateman v. Bateman*, 382 N.W.2d 240, 251 (Minn. Ct. App. 1986) ("[T]he trial court's residential restriction is contrary to law, it is an impermissible limit."); *Ryan v. Ryan*, 383 N.W.2d 371, 372 n.1 (Minn. Ct. App. 1986) (holding trial court's mandate that mother reside in city of Aitkin "impermissibly restrictive" and "contrary to the presumption favoring removal"); *Imdieke v. Imdieke*, 411 N.W.2d 241, 244 (Minn. Ct. App. 1987) ("To base custody or care on a parent's remaining in a certain area is a restrictive condition contrary to Minnesota law.").

85. *Schisel*, 762 N.W.2d at 269 ("The later cases on which appellant relies [*Bateman*, *Ryan*, and *Imdieke*] have cited *Sefkow* for a proposition that is broader than that for which the case stands.").

86. *Id.* (citing *Sefkow v. Sefkow*, 372 N.W.2d 37, 46-47 (Minn. Ct. App. 1985)).

*Sefkow* is misplaced, for *Sefkow*, *Bateman*, *Ryan*, and *Imdieke* had all been effectively overruled.

Generally, under the rule of stare decisis, precedent should not be easily overruled.<sup>87</sup> However, this is not an inflexible rule but rather a policy of law.<sup>88</sup> Decisions, therefore, may be effectively overruled when the conditions in society have changed<sup>89</sup> or “the statutory or case law on which the decision rests has been altered so that it no longer is sustained by such decision.”<sup>90</sup>

### 1. *Change in Social Science*

Originally, Minnesota courts adopted social science theory favoring the removal of a child. The *Auge* presumption was based on social science research which promoted the stability of the new family-unit in post-divorce families.<sup>91</sup> Indeed, the *Auge* opinion recognizes the “importance of stability in the child’s post-divorce familial relationships.”<sup>92</sup> The court goes on to state, “[C]ourts should be restricted in their authority to interfere with post-divorce family-unit decision-making. Decisions concerning the welfare of the child should be left to the custodial parent who, by virtue of his or her relationship with the child, is best equipped to determine the child’s needs.”<sup>93</sup>

Over time, advancements in social sciences challenged the new family-unit theory. One commentator found that the research upon which the new family-unit theory and the *Auge* presumption relied “ignored the substantial literature on attachment and loss as well as research indicating that children are likely to be better adjusted when two competent parents are involved in their children’s lives than when the children are raised by single

87. *Johnson v. Chicago, B. & Q. R. Co.*, 66 N.W.2d 763, 770 (Minn. 1954).

88. *Id.*

89. *Id.* at 771.

90. *Foster v. Naftalin*, 74 N.W.2d 249, 264 (Minn. 1956).

91. The *Auge* opinion cites Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, 12 RUTGERS L.J. 341, 361 n.124 (1981); JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 8–11 (1979); and Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 265 (Summer 1975). *Auge v. Auge*, 334 N.W.2d 393, 396 n.3 (Minn. 1983). These law review articles all support the new family-unit proposition.

92. *Auge*, 334 N.W.2d at 396 n.3.

93. *Id.* at 399 (citing Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, 12 RUTGERS L.J. 341, 363 (1981)).

parents.”<sup>94</sup> The new research has been adopted by courts across the country.<sup>95</sup>

### 2. *Change in Case Law*

Minnesota impliedly adopted this new research in *LaChapelle*. In *LaChapelle*, the Minnesota Court of Appeals allowed a conditional custody award despite a “lack of statutory authority.”<sup>96</sup> Instead, the *LaChapelle* court found that a proposed move in an initial custody determination must be treated as one factor to be balanced in determining the best interests of the child.<sup>97</sup> Additionally, the court of appeals in *Dailey* found “no absolute prohibition under Minnesota law against awarding child custody on the condition of maintaining a specific geographic residence for the child, as long as that residence is shown clearly and genuinely to serve the child’s best interests.”<sup>98</sup> Finally, in *Goldman*, the Minnesota Supreme Court noted that *Auge* “has no remaining vitality because it has been superseded in its entirety by statute.”<sup>99</sup> This series of case law adopted the new theory favoring a best-interests analysis free from a presumption favoring the custodial parent. Therefore, the new family-unit theory and the *Auge* presumption were overruled by a change in case law.

### 3. *Change in Statutory Law*

Finally, the legislature also adopted this theory. In 2006, the Minnesota legislature moved away from the new family-unit theory to the best-interests-of-the-child standard in amending section 518.175, subdivision 3.<sup>100</sup> Prior to 2006, the statute governing removal implicitly presumed that removal of the child would be permitted unless the noncustodial parent could show that the move was not in the child’s best interests and that it would endanger the child’s health and well-being.<sup>101</sup> The Senate Counsel Bill Summary

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94. J. Kelly & M. Lamb, *Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How*, 17 J. FAM. PSYCHOL. 2 (2003).

95. Oliphant, *supra* note 8, at 740–45 (noting that Connecticut, Colorado, and New York have adopted neutral approaches to relocation cases).

96. *LaChapelle v. Mitten*, 607 N.W.2d 151, 162–63 (Minn. Ct. App. 2000).

97. *Id.* at 162.

98. *Dailey v. Chermak*, 709 N.W.2d 626, 630 (Minn. Ct. App. 2006).

99. *Goldman II*, 748 N.W.2d 279, 283 n.5 (Minn. 2008).

100. MINN. STAT. § 518.175, subdiv. 3 (2009).

101. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996).



shows the legislature’s intent to replace the *Auge* presumption and the new family-unit theory:

Section 13 (standard for removal of child) amends the general law governing approval of moving the residence of a child to another state [*Auge* presumption and new family-unit theory]. The court must apply a best-interests standard when considering the request of a parent with whom the child resides to move the child’s residence to another state. Factors that must be considered are specified.<sup>102</sup>

This amendment constitutes a change in circumstances, contemplated and voted upon by the legislature. Therefore, the *Auge* presumption and the new family-unit theory were replaced by advancements in social science, expressly overruled by *Goldman*, and superseded by statute.

Because the *Auge* presumption and the new family-unit theory were overruled, all cases that relied on the *Auge* presumption favoring removal were effectively overruled as well. Accordingly, the *Sefkow* opinion, on which *Schisel* relies, gives “unyielding heed to *Auge*.”<sup>103</sup> The *Sefkow* opinion goes on to state, “*Auge* announces two major concepts: First, *unnecessary* limits on movement of the family unit unlawfully interfere with the stable circumstances of a child.”<sup>104</sup>

Additionally, *Bateman* relies on *Sefkow* for its proposition against residential restrictions.<sup>105</sup> *Ryan* cites *Auge*, *Sefkow*, and *Bateman* in its decision.<sup>106</sup> Finally, *Imdieke* applies the *Auge* presumption as well.<sup>107</sup> Thus, the presumption favoring removal in *Auge*, *Sefkow*, *Bateman*, *Ryan*, and *Imdieke* was effectively overruled by section 518.175, subdivision 3.<sup>108</sup> Therefore, *Schisel*, in holding that “if there is to be any restriction on the children’s residence, the order further requires the restriction be necessary to serve the children’s best interest,”<sup>109</sup> incorrectly relies on a past precedent

102. Senate Counsel Bill Summary, S.F. 3199, 84th Leg. § 13 (2006), available at [http://www.senate.leg.state.mn.us/departments/scr/billsumm/summary\\_display.php?ls=84&session=regular&body=Senate&billtype=SF&billnumber=3199&ss\\_year=0](http://www.senate.leg.state.mn.us/departments/scr/billsumm/summary_display.php?ls=84&session=regular&body=Senate&billtype=SF&billnumber=3199&ss_year=0).

103. *Sefkow v. Sefkow*, 372 N.W.2d 37, 46 (Minn. Ct. App. 1985).

104. *Id.* (citing *Auge v. Auge*, 334 N.W.2d 393, 396–97, 399 (Minn. 1983)) (emphasis added).

105. *Bateman v. Bateman*, 382 N.W.2d 240, 251 (Minn. Ct. App. 1986).

106. *Ryan v. Ryan*, 383 N.W.2d 371, 372 n.1 (Minn. Ct. App. 1986).

107. *Imdieke v. Imdieke*, 411 N.W.2d 241, 244 (Minn. Ct. App. 1987).

108. MINN. STAT. § 518.175, subdiv. 3 (2009).

109. *Schisel v. Schisel*, 762 N.W.2d 265, 269 (Minn. Ct. App. 2009).

that is no longer good law.

*B. LaChapelle Locale Restrictions*

A grant of custody conditional on maintaining a specific geographic location in an initial custody determination must be based on the best-interests standard free of any presumptions or burdens. A geographic restriction in an initial custody determination represents the first step to a locale restriction. Without an initial geographic restriction, a locale restriction could not exist. Therefore, geographic restrictions in initial custody determinations are per se permissible. As the court in *Goldman* found, “[T]here is no absolute prohibition under Minnesota law against awarding child custody on the condition of maintaining a specific geographic residence for the child, as long as that residence is shown clearly and genuinely to serve the child’s best interests.”<sup>110</sup>

The initial geographic restriction, however, must be based on the best-interests standard. *LaChapelle* states,

In an initial custody proceeding, a trial court treats a proposed change of residence by a party as one factor to be balance in determining custody of a child. A proposed change of residence bears directly on several of the best-interests factors in section 518.17. The factors stressing stability and continuity of care are of particular importance in light of a parent’s proposed move to another state.<sup>111</sup>

*LaChapelle* involved an out-of-state relocation. The *Schisel* court rejects any case involving an out-of-state move as controlling because “[a]n out-of-state move can raise jurisdictional and legal procedural issues, and logistical concerns, such as the retention of new counsel in the foreign state, that will not likely arise in Minnesota.”<sup>112</sup> However, the *Auge* court dismissed this argument over two decades earlier. “In the past, removal was commonly denied because of the potential loss of jurisdiction over custody issues. This concern has largely been met by adoption in 44 states

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110. *Goldman II*, 748 N.W.2d 279, 282 (Minn. 2008); *Dailey v. Chermak*, 709 N.W.2d 626, 630 (Minn. Ct. App. 2006).

111. *LaChapelle v. Mitten*, 607 N.W.2d 151, 162 (Minn. Ct. App. 2000) (citing *Stangel v. Stangel*, 355 N.W.2d 489, 490 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 6, 1985)).

112. *Schisel*, 762 N.W.2d at 267.

of the Uniform Child Custody Jurisdiction Act. Further protection of the rights of both parents is afforded by the Parental Kidnapping Prevention Act of 1980.”<sup>113</sup> Regardless of the distance or location of the move, the district court must employ the best-interests standard free of any additional burdens or presumptions.

The Minnesota Supreme Court recently rejected the *Auge* presumption in relocation cases. In 2007, the court of appeals in *Goldman* found that “[t]he 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 interests of the child are to govern the court’s decision.”<sup>114</sup> However, the court goes on to say that “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 child’s relationship with the sole custodian.”<sup>115</sup>

Upon appeal, the Minnesota Supreme Court refused to adopt the court of appeals’ reasoning. Although not the basis for the Minnesota Supreme Court’s reversal, the court stated, “We note that our ruling in *Auge v. Auge* has no remaining vitality because it has been superseded in its entirety by statute.”<sup>116</sup> The Minnesota Court of Appeals’ application of the modified *Auge* presumption created an additional burden to the non-custodial parent not intended by the legislature. Similarly, the “necessary” standard applied by the *Schisel* court reverts to the *Auge* presumption by creating an additional burden on the custodial parent. The *Schisel* court should have treated the proposed move as simply another factor to balance in determining who should have custody.<sup>117</sup>

### C. Other Jurisdictions Use of the Necessary Standard

Other jurisdictions have rejected the “necessary” standard. In 1996, the California Supreme Court refused to adopt the

113. *Auge v. Auge*, 334 N.W.2d 393, 399 (citation omitted). See generally Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711 (1982).

114. *Goldman I*, 725 N.W.2d 747, 752 (Minn. Ct. App. 2007).

115. *Id.* at 755.

116. *Goldman II*, 748 N.W.2d 279, 283 n.5 (Minn. 2008) (citations omitted).

117. See *Stangel v. Stangel*, 355 N.W.2d 489, 490 (Minn. Ct. App. 1984) (stating that “[t]he court should have treated the proposed move as simply another factor to balance in determining who should have custody under Minn. Stat. § 518.17 (1982) [as opposed to applying the *Auge* presumption]”).

“necessary” standard in *Burgess v. Burgess*.<sup>118</sup> In *Burgess*, the mother and father stipulated that they would share joint legal custody of the children and the mother would retain sole physical custody.<sup>119</sup> During the initial custody determination, the mother contemplated a “career advancing” move from Tehachapi, California, the original primary residence, to Lancaster, California.<sup>120</sup> The move would take the children approximately 40 minutes (of travel time) from their father.<sup>121</sup>

The district court granted the mother’s relocation request, finding the move to be in the children’s best interests.<sup>122</sup> The California Court of Appeals reversed and remanded the order, holding that the district court must determine whether the move was “reasonably necessary,” with “the burden of showing such necessity fall[ing] on the moving parent.”<sup>123</sup> The California Supreme Court granted review.

The California Supreme Court held,

In an initial custody determination, a parent seeking to relocate with the minor children bears no burden of establishing that the move is “necessary.” The trial court must—and here did—consider, among other factors, the effects of relocation on the “best interest” of the minor children, including the health, safety, and welfare of the children and the nature and amount of contact with both parents. We discern no statutory basis, however, for imposing a specific additional burden of persuasion on *either* parent to justify a choice of residence as a condition of custody. . . . More fundamentally, the “necessity” of relocating frequently has little, if any, substantive bearing on the suitability of a parent to retain the role of a custodial parent.<sup>124</sup>

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118. *Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996). The *Burgess* opinion relied in part on social science posed by psychologist Judith Wallerstein. Her *Amica Curiae* Brief first promoted the new family-unit theory. Robert Pasahow, *A Critical Analysis of the First Empirical Research Study on Child Relocation*, 19 J. AM. ACAD. MATRIM. LAW 321, 322–23 (2005). Florida, Georgia, Kansas, Maryland, New Mexico, Rhode Island, and South Carolina have statutes with no presumptions in favor of or against relocation. David M. Cotter, *Relocation of the Custodial Parent: A State-by-State Survey*, 18 NO. 6 DIVORCE LITIG. 89 (2006).

119. *Burgess*, 913 P.2d at 476.

120. *Id.* at 477.

121. *Id.*

122. *Id.*

123. *Id.* at 477–78.

124. *Id.* at 479, 481.

Also in 1996, the New York Supreme Court failed to acknowledge the “necessary” standard. In *Tropea v. Tropea*, two cases with similar facts were combined.<sup>125</sup> In each case, the mother was granted sole custody of the minor children in the initial custody determination.<sup>126</sup> Prior to the decision, New York district courts applied a three-step analysis in relocation motions. The three-step analysis required looking to the deprivation of the non-custodial parent and a shifting presumption to the custodial parent to demonstrate “exceptional circumstances” to justify the move.<sup>127</sup> The third step looked to the best interests of the child.<sup>128</sup>

In response to this three-step approach, the New York Supreme Court found, “The distorting effect of such a mechanical approach may be amplified where the courts require a showing of economic necessity or health-related compulsion to establish the requisite ‘exceptional circumstances.’”<sup>129</sup> The court went on to hold,

[I]t serves neither the interests of the children nor the ends of justice to view relocation cases through the prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another. Rather, we hold that, in all cases, the courts should be free to consider and give appropriate weight to all of the factors that may be relevant to the determination.<sup>130</sup>

Similarly, the “necessary” standard applied by the *Schisel* court creates an additional burden on the custodial parent. As the California Supreme Court noted, the additional “necessity” burden “has little, if any, substantive bearing on the suitability of a parent to retain the role of a custodial parent.”<sup>131</sup> As the New York Supreme Court noted, such presumptions or burdens do not serve the children’s best interests or the ends of justice.<sup>132</sup> Indeed, each initial custody determination should be decided based upon the best-interests-of-the-child standard without an additional “necessary” standard.<sup>133</sup>

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125. *Tropea v. Tropea*, 665 N.E.2d 145, 146 (N.Y. 1996).

126. *Id.*

127. *Id.* at 149.

128. *Id.*

129. *Id.* at 150.

130. *Id.* at 151.

131. *Burgess v. Burgess*, 913 P.2d 473, 481 (Cal. 1996).

132. *See Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996).

133. *Id.*

Additional burdens or presumptions create confusion and uncertainty. Although the *Schisel* opinion defines “residence,”<sup>134</sup> it creates uncertainty by adding the term “necessary.”<sup>135</sup> *Dailey* discusses a medical or educational necessity.<sup>136</sup> *Auge* mentions an economic or business necessity.<sup>137</sup> Or, as the *Schisel* court notes in defining “residence,” “[w]hen no special or technical definition of a term is provided in a statute, we are to construe the term according to its common meaning and usage.”<sup>138</sup> Not only is there no statutory basis for the term “necessary,” it is not even mentioned in section 518.17.<sup>139</sup> Accordingly, *The American Heritage Dictionary of the English Language* defines necessary as “absolutely essential.”<sup>140</sup> The mincing of definitions creates confusion and uncertainty for the district courts.

Therefore, the additional “necessary” burden does not serve the child’s best interests. The burden does not have any bearing on the suitability of the custodial parent. The “necessary” requirement has no statutory basis and fosters confusion and uncertainty for the district courts.

## V. CONCLUSION

The *Schisel* court erred in applying an additional “necessary” standard.<sup>141</sup> The “necessary” standard is misplaced because it was based on inappropriate statutory law, case law, and social sciences.<sup>142</sup> Additionally, relevant case law dictates that the best-interests-of-the-child standard must be applied in relocation cases, and a potential removal must be viewed as one factor to consider in determining custody.<sup>143</sup> Finally, other jurisdictions have rejected the “necessary” standard because it skews the prisms of justice and

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134. *Schisel v. Schisel*, 762 N.W.2d 265, 269–70 (Minn. Ct. App. 2009).

135. *Id.* at 270.

136. *Dailey v. Chermak*, 709 N.W.2d 626, 630 (Minn. Ct. App. 2006) (stating that “it is conceivable that a custody award might be properly conditioned on maintaining a certain residence because of the availability in that location of special health or educational services that the child particularly needs and that are not readily or inexpensively obtainable elsewhere”).

137. *Auge v. Auge*, 334 N.W.2d 393, 395, 400 (Minn. 1983).

138. *Schisel*, 762 N.W.2d at 269.

139. MINN. STAT. § 518.17 (2009).

140. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1175 (4th ed. 2000).

141. *See supra* Part III.

142. *See supra* Part III.A.1–3.

143. *See supra* Part I.A–B.

## 2009] “UNNECESSARY” IN-STATE RELOCATION STANDARD 137

has little bearing on the suitability of a parent to retain custody.<sup>144</sup>

Therefore, the best-interests factors of section 518.17 must be the only consideration when determining custody and relocation in an initial custody determination.<sup>145</sup> The “necessary” standard creates an additional burden on the custodial parent.<sup>146</sup> The additional burden may prevent a custodial parent from being able to relocate with his or her child while the same custodial parent would be permitted to relocate under a best-interests analysis. A district court may also be inclined to place too much weight on the alleged “necessity” of the move, essentially allowing a move to occur that is contrary to the best interests of the child under a straight-forward best-interests-of-the-child analysis. Despite the Minnesota Court of Appeals’ error in the *Schisel* decision, the misapplication was not prejudicial.<sup>147</sup> Had the court relied solely on section 518.17, it could have found that the district court’s findings were conclusory and demanded further consideration. The new “necessary” standard, however, may skew future decisions by creating results not contemplated by the legislature.<sup>148</sup>

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144. See *supra* Part III.C.

145. See *supra* Part III.

146. See *supra* Part III.

147. See *Stangel v. Stangel*, 355 N.W.2d 489, 490 (Minn. Ct. App. 1984). “The court should have treated the proposed move as simply another factor to balance in determining who should have custody under Minn. Stat. § 518.17 (1982). However, the court’s application of the *Auge* presumption was not prejudicial in this case. The record clearly supports the trial court’s decision to award the mother custody and to permit her to move with the child from the state.” *Id.*

148. See *supra* Part III.