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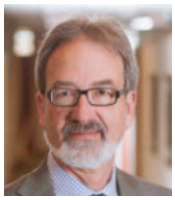
What Type of Hearing is Required When a Parent Wants to Relocate with a Child Outside of Minnesota?

by Alan C. Eidsness and Jaime Driggs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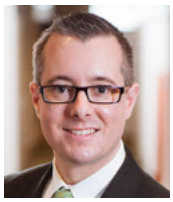
Jaime Driggs

The law governing out-of-state relocation of children changed dramatically in 2006 with the adoption of Minnesota's removal statute, Minn. Stat. § 518.175, subd. 3(b). Before the law took effect, under *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983) and its progeny, the custodial parent was implicitly presumed to be able to relocate unless the noncustodial parent could establish that the move was contrary to the child's best interests and would endanger the child's physical or emotional health or that the move was intended to interfere with parenting time. Unless the noncustodial parent made such a prima facie showing, the custodial parent's motion to relocate could be granted without holding an evidentiary hearing. The removal statute turned this law on its head by replacing the endangerment standard with an eight factor best interest standard. And instead of a presumption in favor of the custodial parent's removal, the removal statute places the burden of proof on the party seeking to relocate.

Although it was clear that the substantive legal standard for deciding removal motions had changed dramatically by 2006's statutory change, what was unclear was the procedure for adjudicating such motions. The removal statute is silent regarding whether an evidentiary hearing is required, which raised the question of whether motions to relocate could be granted or denied without holding an evidentiary hearing. In *Le v. Holter*, No. A12-2011, ___ N.W.2d ___ (Minn. Ct. App. 2013), which was issued on November 4, 2013, the Court of Appeals clarified this ambiguity and held that motions to relocate may be granted or denied without holding an evidentiary hearing.

The parties' 2009 stipulated judgment and decree granted them joint legal custody of their two minor children and granted mother sole physical custody. Father was granted parenting time on alternating weekends and on one mid-week overnight. Three years later, mother brought a motion seeking permission to relocate with the children to San Diego, California or, in the alternative, an evaluation of the children's best interests concerning the move. Mother filed an affidavit in support of her motion explaining her reasons for wanting to move. Father filed a responsive motion and an affidavit seeking denial of mother's motion. Both parties were represented by counsel at the hearing who made oral arguments in support of their respective positions.

The district court denied mother's motions and made findings regarding each of the eight factors in the removal statute. On appeal, in addition to challenging the denial of her motion, mother also argued that the district court had erred by ruling on her motion without holding an evidentiary hearing. Although mother's precise argument is not clear from the Court of Appeals' opinion, her view apparently was that the two-stage hearing process established by *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471 (Minn. 1981) for deciding custody modification motions applied to her motion. According to mother, the district court was required to determine whether she had made a prima facie showing under the eight factors in the removal statute. In making that evaluation, the district court was required to accept the allegations in mother's affidavit as true under *Geibe v. Geibe*, 571 N.W.2d 774 (Minn. Ct. App. 1997). The district court had therefore erred by weighing the evidence instead of accepting her allegations as true.

The Court of Appeals disagreed and addressed at length why no evidentiary hearing was required and why the two-stage *Nice-Peterson* process did not apply to removal motions. First, nothing in the removal statute itself, Minn. Stat. § 518.175, subd. 3(b), required an evidentiary hearing. (Note that the same logic would suggest that evidentiary hearings are not required in custody modification cases because nothing in the modification statute, Minn. Stat. § 518.18, requires evidentiary hearings.) And, except for contempt motions, motions in family cases are adjudicated on affidavits, Minn. R. Gen. Prac.

303.03(d)(1), unless a request for oral testimony is made. Minn. R. Gen. Prac. 303.03(d)(2). Here, mother never requested an evidentiary hearing. Finally, the reason for the two-stage prima facie showing/evidentiary hearing process in custody modification cases—erring on the side of caution by accepting endangerment allegations as true in order to protect children—does not exist in the context of the removal statute which applies an eight factor best interest test rather than the endangerment test. Therefore, the district court did not error in evaluating the evidence and ruling on mother's motion without holding an evidentiary hearing.

Curiously absent from the opinion is any mention of the rationale for holding evidentiary hearings in removal cases. *Auge* reasoned that evidentiary hearings are required because denying a custodial parent's request to relocate would effect a change in custody and custody may not be modified without holding an evidentiary hearing. *Auge*, 334 N.W.2d at 396. In support of this latter proposition, *Auge* cited *Hummel v. Hummel*, 304 N.W.2d 19 (Minn. 1981), which held that modifying custody without an evidentiary hearing was procedurally insufficient. *Hummel*, in turn, relied on *Thompson v. Thompson*, 55 N.W.2d 329 (Minn. 1952), which held that custody modifications required evidentiary hearings in order to safeguard parental rights. Thus, the rationale for evidentiary hearings in custody modifications in *Hummel* and *Thompson* was based upon the notion that custody modifications involved significant reordering of parental rights which warranted the heightened degree of process provided by evidentiary hearings. *Auge* adopted this same rationale in the context of removal cases. Significantly, this rationale has nothing to do with the legal standard for deciding custody modifications. Thus, while evidentiary hearings in custody modification cases are held to error on the side of caution to protect children alleged to be endangered, *Hummel* and *Thompson* show that evidentiary hearings also are held in custody modification cases because they involve a significant reordering of parental rights.

Le overlooked this second rationale for holding evidentiary hearings when it reasoned that evidentiary hearings were not necessary under the removal statute because it applied a best interest standard and not an endangerment standard. However, the opinion in *Le* does not indicate that mother ever made this argument. Even if mother had, the Court of Appeals likely would have rejected it, as it did in an unpublished removal decision from earlier this year, *Laurent v. Laurent*, No. A12-0390, 2013 WL 141666 (Minn. Ct. App. Jan. 14, 2013). In *Laurent*, a mother seeking to relocate argued that *Hummel* required an evidentiary hearing because denial of her motion to relocate would effect a modification of custody. The Court of Appeals disagreed, reasoning that this argument was actually based on *Auge*, which the Supreme Court in *Goldman v. Greenwood*, 748 N.W.2d 279 (Minn. 2008) recognized as having been superseded in its entirety by the removal statute. However, this statement from the *Goldman* opinion comes from a footnote and *Goldman* does not address the issue present in *Laurent* and in *Le*.

As of this writing, the mother in *Le* has filed a petition for review in the Supreme Court. If review is denied, parties litigating removal motions will face uncharted territory. To start with, both parties will need to make a strategic decision about whether to seek an evidentiary hearing, and whether to do so as part of their main motion or on a preliminary basis before making their motions. Parties wanting to move who believe they can persuade the court "on paper" may choose not to request an evidentiary hearing. Since requests to move can come up relatively quickly, seeking an evidentiary hearing may end up becoming a method for the non-moving party to attempt to delay a move. Additionally, *Le* does not address what might constitute "good cause" for holding an evidentiary hearing in removal cases.

Parties attempting to relocate also will need to consider what changes they are seeking to the parenting time schedule in connection with their motion. This adds a complicating dimension to deciding such motions because, depending on the nature of the proposed change, that could become an independent reason to require an evidentiary hearing. The non-relocating party will have an incentive to characterize the proposed change to the parenting time schedule as a restriction on parenting time, which would require proving endangerment and would require holding an evidentiary hearing. *See Lutzi v. Lutzi*, 485 N.W.2d 311, 315-17 (Minn. Ct. App. 1992).

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