

Winter 1982

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### Recommended Citation

Floyd T. Norrick, *Removal and the Child's Best Interests in Change of Custody Disputes--Galeener v. Black*, 47 MO. L. REV. (1982)  
Available at: <http://scholarship.law.missouri.edu/mlr/vol47/iss1/29>

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sonal injury, death, and property damages resulting from an unreasonably dangerous product. For these losses, the section 402A remedy is appropriate, particularly in light of the different treatment accorded them by the U.C.C. Direct economic loss, which by its nature cannot exceed the purchase price of the product, is far less drastic than personal injury, physical property, and product damages. Given the warranty limitations imposed by the legislature and the absence of special considerations that prompted the adoption of section 402A, direct economic loss should remain a matter of contract.

JOHN WARSHAWSKY

## REMOVAL AND THE CHILD'S BEST INTERESTS IN CHANGE OF CUSTODY DISPUTES

*Galeener v. Black*<sup>1</sup>

Russel and Linda Black were divorced in 1973. The court granted Linda custody of their only child along with child support; it granted Russel reasonable visitation rights. In 1979, Linda filed a motion to modify child support.<sup>2</sup> In his answer, Russel sought a change of custody. He alleged that his son preferred to live with him and that he could provide proper care and supervision for the child.<sup>3</sup> He further claimed that Linda was about to

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1. 606 S.W.2d 245 (Mo. App., S.D. 1980). The *Galeener* court did not discuss the constitutional right to travel, right to privacy, and right to equal protection of the law. Custodial parents have used these rights to attack the requirement that they obtain permission of the court before removing their child from the state. See Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733, 746 (1977); Comment, *Restriction on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions*, 6 U.C.D. L. REV. 181, 190 (1973).

2. 606 S.W.2d at 245.

3. A change of circumstances affecting only the noncustodial parent would not alone, from the plain language of the statute, justify modification of the custody award. See MO. REV. STAT. § 452.390 (1978); note 6 *infra*. The appellate courts are split on this question. See *Eastes v. Eastes*, 590 S.W.2d 405, 408 (Mo. App., E.D. 1979) (admissible only as evidence that custodian could provide acceptable repository for child should court determine it is against child's best interests to remain in custody of his present custodian and is otherwise irrelevant); *Korn v. Korn*, 584 S.W.2d 179, 181 (Mo. App., S.D. 1979) (admissible for consideration as change of circumstances, notwithstanding literal meaning of MO. REV. STAT. § 452.390 (1978); statute merely codifies long-standing decisional law); *Kanady v. Kanady*,

remarry and move to California, where her new husband resided and was employed, and that moving from the state was against the wishes of the child, the wishes of the child's grandparents, and the child's best interests.<sup>4</sup>

After considering all relevant factors for child custody, including those specifically enumerated in Missouri Revised Statutes section 452.375,<sup>5</sup> the trial court overruled Linda's motion to increase child support and sustained Russel's motion to change custody of the child.<sup>6</sup> Russel was awarded child custody, and Linda was granted reasonable visitation rights. The Missouri Court of Appeals for the Southern District affirmed the decision, holding that the modification was based on a substantial change of circumstances and was in the best interests of the child.<sup>7</sup>

The guiding principle in custody disputes is the child's best interests. Missouri Revised Statutes section 452.375<sup>8</sup> directs the court to consider all relevant factors, including:

- (1) The wishes of the child's parents . . . ;
- (2) The wishes of a child . . . ;
- (3) The interaction and interrelationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interests;
- (4) The child's adjustment to his home, school, community; and
- (5) The mental and physical health of all individuals involved.<sup>9</sup>

The *Galeener* court considered the factors in the statute and accorded great weight to the child's preference to remain with his father and to the child's relationship with his parents and others who could significantly affect his interest.<sup>10</sup> In relying heavily on the child's preference, the *Galeener* court found the child's preference to be an informed and reasoned choice.<sup>11</sup> To this ex-

527 S.W.2d 704, 707 (Mo. App., K.C. 1975) (MO. REV. STAT. § 452.390 (Cum. Supp. 1975) merely codifies long-standing case law); J. v. E., 417 S.W.2d 199, 204 (Mo. App., Spr. 1967) (neither passage of time nor remarriage and establishment of home alone is sufficient to sustain motion for change of custody).

4. 606 S.W.2d at 245-46.

5. (1978). See note 9 and accompanying text *infra*.

6. 606 S.W.2d at 246. Missouri requires proof of a substantial change of circumstances that affects the welfare of the child such that a change of custody will substantially benefit the child. MO. REV. STAT. § 452.410 (1978).

7. 606 S.W.2d at 248. MO. SUP. CT. R. 73.01(3) governs the standard of review for appellate review of cases tried without a jury or of an equitable nature. For an interpretation of this rule, see *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. En Banc 1976).

8. (1978).

9. MO. REV. STAT. § 452.375 (1978).

10. 606 S.W.2d at 247.

11. *Id.* In Missouri, if the child is mature enough to form and express an intelligent preference of custodial arrangements based on promoting his welfare, the trial court should permit him to do so. *Kanady v. Kanady*, 527 S.W.2d 704, 707



of the presumption, courts do not weight the statutory factors equally. Those that militate against removal are weighted more than the others, a practice that has been criticized.<sup>17</sup> The *Galeener* majority may have begun with the presumption and then relied heavily on factors that supported a denial of removal.

The *Galeener* court gave much weight to the relationship of the child with his parents and others who significantly affected his best interests. The court compared the relationship between the child and his grandparents, teachers, friends, and pastor with the relationships between the child and his stepfather and stepbrothers. It concluded the former was substantially better for the child.<sup>18</sup> There are inherent difficulties with this comparison. The court assumed that the relationship of the child with each of his parents deserved equal weight. It compared a relationship that had had many years to develop, the relationship between the child and his father and grandparents, with one that had not begun, the relationship between the child and his stepfather and stepbrothers. Furthermore, the majority did not consider alternative forms of visitation that could have permitted these important relationships, between the child and his grandparents and father, to continue and perhaps to improve.<sup>19</sup>

Psychologists and legal scholars have suggested that the law emphasizes the nonfinality of custody decisions at the expense of the "first and foremost needs of children for stability of home environment and constancy and con-

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factor to be considered. *Durbin v. Durbin*, 573 S.W.2d 146, 148-49 (Mo. App., K.C. 1978) (when decree silent on removal, custodial parent may lawfully remove); *Middleton v. Tozer*, 258 S.W.2d 80, 86-88 (Mo. App., St. L. 1953) (nothing in Missouri's policy on removal requires custodial parent to request and receive permission before removal). *Contra, In re Szamocki*, 47 Cal. App. 3d 812, 818, 121 Cal. Rptr. 231, 234 (1975) (removal from state is not approved even though not specifically prohibited by decree).

17. *Butler v. Butler*, 83 N.H. 413, 416, 143 A. 471, 473 (1928) (no justification for any court to assume itself superior in dealing with state wards as state wherein child currently resides may be trusted to safeguard welfare of child). Unfortunately, the principles of comity have proven insufficient as courts have shown a willingness to modify other states' custody decisions. This willingness gave rise to a serious problem: child-snatching. *See generally Abduction of Child by Noncustodial Parent: Damages for Custodial Parent's Mental Distress*, 46 MO. L. REV. 829 (1981).

The full faith and credit clause provides no solution to this problem because the United States Supreme Court's view has been that a custody order is no more permanent in a sister state than it is in the state in which it was rendered. *See generally Hudak, Seize, Run, and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts*, 39 MO. L. REV. 521, 528-33 (1974).

The problem is being addressed now by legislation on the state and federal level with, among other things, at least thirty-eight states adopting the UNIFORM CHILD CUSTODY JURISDICTION ACT. Missouri's version is at MO. REV. STAT. §§ 452.440-.550 (1978).

18. 606 S.W.2d at 248.

19. *See* note 28 and accompanying text *infra*.



is the effect on visitation privileges, many courts have altered the visitation privileges of the noncustodial parent to alleviate the disadvantage.<sup>28</sup>

Following this approach, removal should be permitted when the custodial parent has a legitimate reason for moving from the state and there are no counterbalancing reasons against it.<sup>29</sup> Legitimate reasons include an advantageous employment opportunity for the custodial parent,<sup>30</sup> remarriage,<sup>31</sup> advantageous employment opportunity for the custodial parent's new spouse,<sup>32</sup> and the desire to raise the child near family.<sup>33</sup> Reasons held in-

*See* Dozier v. Dozier, 167 Cal. App. 2d 714, 719, 334 P.2d 957, 961 (1959); *In re* Ortiz, 541 P.2d 1266, 1267 (Colo. App. 1975); Bozzi v. Bozzi, 177 Conn. 232, —, 413 A.2d 834, 838 (1979); *In re* Burgham, 86 Ill. App. 3d 341, 346, 408 N.E.2d 37, 40-41 (1980); *In re* Bard, 603 S.W.2d 108, 109 (Mo. App., W.D. 1980) (per curiam); Hahn v. Hahn, 569 S.W.2d 775, 777 (Mo. App., St. L. 1978); Girvin v. Girvin, 471 S.W.2d 683, 685 (Mo. App., St. L. 1971); *In re* Padbury, 46 Or. App. 533, —, 612 P.2d 321, 323 (1980). *Contra*, Becker v. Becker, 75 A.D.2d 814, 814, 427 N.Y.S.2d 492, 492 (1980) (mem.).

28. For example, courts have allowed longer visits or temporary custody during the summer, which serve the parent-child relationship better by requiring the noncustodial parent to exercise parental responsibility. *See, e.g.*, D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 207, 365 A.2d 27, 30 (Ch. Div.), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976).

29. *See* Pender v. Pender, 598 S.W.2d 554, 556 (Mo. App., W.D. 1980). If the child's preference in *Galeener* were given less weight, *Galeener* would be very similar to Girvin v. Girvin, 471 S.W.2d 683 (Mo. App., St. L. 1971). In *Girvin*, pleading and proving remarriage, past custody, a need to move from the state, and the tender age of the child were sufficient to allow removal.

30. *See In re* Arquilla, 85 Ill. App. 3d 1090, 407 N.E.2d 948 (1980) (custodial parent's efforts to enhance standard of living serves best interest of both); *In re* Lower, 269 N.W.2d 822 (Iowa 1978) (relocation offered beneficial possibilities or at least lack of detriment); Jafari v. Jafari, 204 Neb. 622, 284 N.W.2d 554 (1979) (employment opportunity necessary for advancement, offered better salary, and no evidence that children would suffer disadvantage); Middlekauff v. Middlekauff, 161 N.J. Super. 84, 390 A.2d 1202 (App. Div. 1978) (settlement agreement required custodial parent to obtain employment within two years and graduate studies necessary for employment; same is best for post-divorce family unit and in best interest of children).

31. *See* Pattison v. Pattison, 208 So. 2d 395, 396 (La. App. 1968).

32. *See* Pender v. Pender, 598 S.W.2d 554, 556 (Mo. App., W.D. 1980) (husband had permanent employment in Colorado; climate and recreation better in Colorado for family); Good v. Good, 384 S.W.2d 98, 100-01 (Mo. App., St. L. 1965) (husband transferred involuntarily; noncustodial parent opposed removal but offered no alternatives; court left with expectation that denying removal might divide married couple or cause custodial parent to abandon children). *But see* Stuessi v. Stuessi, 307 S.W.2d 380, 382 (Mo. App., K.C. 1957) (permission to remove denied although husband had accepted new employment in Tennessee, based on speculative nature of move).

33. *See In re* McGee, 613 P.2d 345 (Colo. App. 1980) (removal to Switzerland where parents resided); *In re* Young, 529 P. 2d 344 (Colo. App. 1974) (all grand-

sufficient include the custodial parent's belief that there are employment opportunities in another state when no particular employment opportunity has been offered<sup>34</sup> and the personal convenience of the custodial parent.<sup>35</sup>

The dissenters in *Galeener, D'Onofrio*, and similar cases have recognized two important factors. First, children need a stable relationship with a parent; they are not as adaptable to a change of custodians as once thought.<sup>36</sup> Second, since society is highly mobile, equity demands that custodians and non-custodians be free to travel where their opportunities may be found and to have their families with them.<sup>37</sup> Furthermore, they argue that parents' decisions should not deprive the noncustodial parent of visitation.<sup>38</sup> The *Galeener* court, however, gave greater weight to other factors, perhaps due to the parochial view that the child's best interests are served by remaining within this state.

*Galeener* stands as a warning to custodial parents who wish to leave Missouri. The difference of opinion between the majority and the dissenters, however, illustrates the disagreement on the strength of the presumption

parents lived in Minnesota, where parent sought to move); *Bozzi v. Bozzi*, 177 Conn. 232, 413 A.2d 834 (1979) (removal to Holland); *Lucy K.H. v. Carl W.H.*, 415 A.2d 510 (Del. Fam. Ct. 1979) (not unnatural for mother to decide it was in child's best interest to be raised in mother's home town; Delaware statute authorizes custodial parent to determine child's residence); *Markam v. Markam*, 429 S.W.2d 320 (Mo. App., K.C. 1968) (maternal grandmother's home offered more desirable surroundings).

34. See *Dupree v. Dupree*, 357 S.W.2d 241 (Mo. App., St. L. 1962); *Weiss v. Weiss*, 76 A.D.2d 863, 428 N.Y.S.2d 506 (1980) (mem.), *aff'd*, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981).

35. See *Baer v. Baer*, 51 S.W.2d 873, 877 (Mo. App., St. L. 1932) (court's decision influenced by wife's desire to move to avoid embarrassment of ex-husband's remarriage). See also *Quirin v. Quirin*, 50 Ill. App. 3d 785, 789, 365 N.E.2d 226, 228 (1977) (desire to satisfy new husband's hunting and fishing interests insufficient). But see *In re Burgham*, 86 Ill. App. 3d 341, 344, 408 N.E.2d 37, 39 (1980) (*Quirin* did not hold that court could not give any weight to personal desires of custodial parent).

36. 606 S.W.2d at 251 (Prewitt, J., dissenting); *Korn v. Korn*, 584 S.W.2d 179, 181 (Mo. App., S.D. 1979); *Hahn v. Hahn*, 569 S.W.2d 775, 777 (Mo. App., St. L. 1978); *Clouse v. Clouse*, 545 S.W.2d 402, 407-08 (Mo. App., K.C. 1976).

37. 606 S.W.2d at 249 (Billings, J., dissenting); *id.* at 251 (Prewitt, J., dissenting); *In re Bard*, 603 S.W.2d 108, 109 (Mo. App., W.D. 1980); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 207-08, 365 A.2d 27, 30-33 (Ch. Div.) (by implication), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976). See note 1 *supra*.

38. *Gray v. Gray*, 57 Ill. App. 2d 1, 6, 372 N.E.2d 909, 913 (1978); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 207-08, 365 A.2d 27, 30 (Ch. Div.), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976). While at one time, removal may have denied visitation, today's greater mobility minimizes travel problems.

against removal. Unless the custodian overcomes the presumption that removal from Missouri is not in the child's best interests, the court will be willing to force him to choose between his children and moving. The mobility of today's society requires that the court permit removal when the custodian has a legitimate reason for leaving. When the custodian seeks removal and the noncustodian seeks a change of custody, the court should carefully consider the child's need for stability in his family unit along with alternative forms of visitation. If the court considers the child's wishes, it should not allow the presumption against removal to blind it to undue influence by the noncustodian.

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