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Removal and the Child's Best Interests in Change of Custody Disputes--Galeener v. Black

Floyd T. Norrick

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personal 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

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. 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. He further claimed that Linda was about to

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.4

After considering all relevant factors for child custody, including those specifically enumerated in Missouri Revised Statutes section 452.375,5 the trial court overruled Linda’s motion to increase child support and sustained Russel’s motion to change custody of the child.6 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.7

The guiding principle in custody disputes is the child’s best interests. Missouri Revised Statutes section 452.375 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.9

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.10 In relying heavily on the child’s preference, the Galeener court found the child’s preference to be an informed and reasoned choice.11 To this ex-

4. 606 S.W.2d at 245-46.
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).
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
tent, the decision is similar to other decisions in Missouri when custody was changed because of the child's preference.\textsuperscript{12}

Galeener broke ranks with previous child preference cases, however, by according so much weight to the child’s preference despite the abundant evidence of undue influence by Russel. He had given the child expensive gifts, had taken the child on fun activities, and had told the child of violence in California schools.\textsuperscript{13} Under these circumstances, the child’s preference is not only unreliable and not to be given much weight, but it may “provide the court a reason for denying custody to the parent displaying the attention or exercising the influence.”\textsuperscript{14} The court, however, made little reference to the conflicting evidence.

Missouri generally has not permitted removal of the child from the province of the court because the court that awards custody “assumes a position of guardianship with respect to . . . [the child’s] person and future well being . . . .”\textsuperscript{15} Essentially, there is a presumption that removal is against the child’s best interests. This presumption, however, can be rebutted if the custodial parent clearly shows that removal is in the child’s best interests.\textsuperscript{16} Because

\textit{Missouri Law Review} [Vol. 47]

\begin{itemize}
\item \textsuperscript{12} J. v. E., 417 S.W.2d 199, 204 (Mo. App., Spr. 1967) (when both parents are suitable, forcing child to remain with mother in opposition to his strong desire to live with father would only make bad situation worse, especially when he will soon be of age to make selection himself). But see \textit{In re Campbell}, 599 S.W.2d 256, 259 (Mo. App., S.D. 1980) (fitness of both parents does not mean that best interests of child served equally by either parent as custodian or that child’s preference is dispositive).
\item \textsuperscript{13} See also Pender v. Pender, 598 S.W.2d 554, 556 (Mo. App., W.D. 1980) (not error to fail to interview child when interview not requested by parties and evidence suggested child did not wish to state preference due to feelings of loyalty toward both); Johnson v. Johnson, 526 S.W.2d 33, 35 (Mo. App., St. L. 1975) (children, ages six and four, who were confused about what was happening, lacked capacity to state intelligent preference).
\item \textsuperscript{14} 606 S.W.2d at 250 (Billings, J., dissenting); \textit{id}. at 252 (Prewitt, J., dissenting).
\item \textsuperscript{15} \textit{In re Campbell}, 599 S.W.2d 256, 259 (Mo. App., S.D. 1980); Wells v. Wells, 117 S.W.2d 700, 705 (Mo. App., St. L. 1938). The child’s preference should not be followed if it is inconsistent with his best interests. See, e.g., Schmidt v. Schmidt, 591 S.W.2d 260, 263 (Mo. App., W.D. 1979).
\item \textsuperscript{16} Wald v. Wald, 168 Mo. App. 377, 384, 151 S.W. 786, 788-89 (St. L. 1922).
\end{itemize}
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. 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. 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.

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-
Norrick: Norrick: Removal and the Child's Best Interests in Change of Custody Disputes  

MISSOURI LAW REVIEW [Vol. 47

continuity of personal attachment formed [i.e., the "psychological parent"]...

In one treatise, the authors suggested that placing conditions on the custodial parent relating to how the child should be raised, including legally enforceable visitation rights of the noncustodial parent, is a source of discontinuity. To give proper consideration to the psychological needs of a child, the authors conclude that an award of custody should be final: once a parent has been chosen to have custody of the child, that parent, and not the court, should determine the conditions under which the child will be raised.

The child's need for a stable environment with the psychological parent has been recognized in recent cases. One leading case in this regard is D'Onofrio v. D'Onofrio, wherein the court stated:

The children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. What is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children. Thus, the child's interests often will be served by permitting the custodial parent to pursue economic or marital opportunities. D'Onofrio, however, suggests a balancing test between the advantages of moving, such as the opportunity for a better life style, and the disadvantages of moving, such as fewer visits with the noncustodial parent. When the primary disadvantage

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22. Id. at 38. Missouri recognizes this conclusion to a degree. See MO. REV. STAT. § 452.405 (1978).
23. Schmidt v. Schmidt, 591 S.W.2d 260, 262 (Mo. App., W.D. 1979) (some value in keeping custodial parent as opposed to uprooting her and transplanting her into new home with new custodians); Eastes v. Eastes, 590 S.W.2d 405, 408 (Mo. App., E.D. 1979) (after custody award, custodian presumed to remain suitable). See also MO. REV. STAT. § 452.410 (1978); notes 3 & 6 supra.
25. 144 N.J. Super. at 206, 365 A.2d at 29-30 (emphasis added).
27. The effect on the court's jurisdiction or on the decretal visitation privileges of the noncustodial parent is insufficient alone to deny removal or change custody.
is the effect on visitation privileges, many courts have altered the visitation privileges of the noncustodial parent to alleviate the disadvantage.28

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.29 Legitimate reasons include an advantageous employment opportunity for the custodial parent,30 remarriage,31 advantageous employment opportunity for the custodial parent’s new spouse,32 and the desire to raise the child near family.33 Reasons held in-


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).


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\textsuperscript{34} and the personal convenience of the custodial parent.\textsuperscript{35}

The dissenters in \textit{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.\textsuperscript{36} 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.\textsuperscript{37} Furthermore, they argue that parents’ decisions should not deprive the noncustodial parent of visitation.\textsuperscript{38} The \textit{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.

\textit{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).


35. \textit{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). \textit{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). \textit{But see In re} Burbough, 86 Ill. App. 3d 341, 344, 408 N.E.2d 37, 39 (1980) (\textit{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); \textit{id.} at 251 (Prewitt, J., dissenting); \textit{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), \textit{aff’d per curiam}, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976). \textit{See} note 1 supra.

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.

FLOYD T. NORRICK