

CURRENT DEVELOPMENTS IN MISSOURI CHILD CUSTODY LAW

by

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What follows is a synopsis of the most significant child custody cases in Missouri since January 1, 1992:

I. DISSOLUTION OF MARRIAGE PROCEEDINGS

Appeal- standard of review-

custody award of trial court will not be disturbed on appeal unless manifestly erroneous and the child's welfare requires a different disposition. Foster v. Foster, 843 S.W. 2d 404 Mo. App. W.D. 1992). Appellate court is especially unlikely to alter a custody award PDL. The trial court's determination in a custody case is given greater deference than in any other type of case. Where the evidence on the issue of child custody does not clearly preponderate in favor of either parent, court of appeals will reverse trial court only when there has been an abuse of discretion. Gulley v. Gulley, 852 S.W. 2D 874, (Mo. App. ED 1993).

Contempt - denial of visitation - good cause allowed -

A parent who denies visitation is in contempt only if the Court finds an absence of good cause for the denial. In re Marriage of S.G., 824 SW 2d 109 (ED MO 1992). Apparently distinguishing A.G. v. R.M.D., 730 SW 2d 543 (Mo. banc 1987).

Emergency jurisdiction- UCCJA-

UCCJA Emergency or Parens Patriae Jurisdiction- emergency jurisdiction under Sec. 452.450.1(3)(a) & (b) requires actual abandonment AND that the neglect be an actual emergency. Such parens patriae jurisdiction is reserved for extraordinary circumstances and is usually exercised by a juvenile court to protect a child physically present within its bounds regardless of the child's actual domicile. When there is child neglect without emergency or abandonment, jurisdiction cannot be based on these statutory paragraphs. Such parens patriae jurisdiction is only temporary, in order to preserve the status quo for such limited time as will enable the petitioner to apply for permanent custody in the state with regular jurisdiction under the UCCJA. Additionally, The court's decree must be made under factual circumstances meeting the jurisdictional standards of the UCCJA. The court may enter orders for travel expenses and attorneys fees against the party who commenced the proceedings, citing Sec. 452.470 RSMO. Piedemonte v. Nissen, 817 S.W. 2d 260 (WD MO 1991).

Guardians ad Litem- mandatory appointment- when--

The trial court must appoint a GAL in all child custody proceedings where a party alleges abuse or neglect of a minor child whose custody, visitation, or support is a contested issue. Johnson v. Johnson, 812 SW 2d 176 (WD MO 1991), citing Sec. 452.423.1 RSMo Supp. 1990, and Leonard v. Leonard, 783 SW 2d 514 (Mo. App. 1990). Failure to appoint a guardian in these circumstances warrants remand. It is the allegation, not the proof, which triggers the mandated appointment. Frazier v. Frazier, 845 S.W. 2d 130 (Mo. App. W.D. 1993).

Guardians ad litem-- judicial immunity-

GAL entitled to judicial immunity for discretionary functions performed as the guardian. This immunity extends to those serving in a quasi-judicial function. State ex rel. John Bird v. Weinstock, 864 S.W. 2d 376 (Mo. App. E.D. 1993).

Guardians ad litem--specificity of neglect allegation--

language in a petition stating the minor child was "...exposed to conditions which could or would possibly endanger the child's physical health..." was held to be too vague and ambiguous to require the appointment of a guardian ad litem. Renfro v. Fehrmann, 817 S.W.2d 592 (WD Mo 1991).

Guardians ad litem-- failure to appoint--

a parent may not protest the non-appointment of a GAL under 452.423.1 on the basis that the parent's interests were harmed, when no harm to the child is shown. Osmun v. Osmun, 842 S.W. 2d 932 (E.D. Mo.1992), citing Van Pelt v. Van Pelt, 824 S.W. 2d 135 (Mo.App. 1992).

Guardians ad litem--

allegations of abuse or neglect--mandatory duty to appoint a GAL per 452.423.1 RSMo (Supp 1991). Even if not requested by the parties, it is error not to appoint a GAL if an appointment is warranted upon the evidence. "Abuse" and "neglect" are as defined in Chapter 210.110(1)-(5) RSMo. Osmun v. Osmun, 842 S.W. 2d 932 (Mo. App. E.D. 1992).

Guardians ad litem-- not mandatory in contempt--

Court of Appeals agreed with the trial judge, finding the appointment of a GAL was not needed where father filed a motion for contempt against the mother for refusing visitation, even though mother countered by claiming the father had hit the child. Contempt motion is not a "custody proceeding" warranting a GAL appointment, per §452.423 RSMo. The preliminary writ issued against the action of the trial judge was dissolved. State ex rel. Scott v. Goeke, 864 SW 2d 411 (Mo. App. E.D. 1993).

Guardians ad litem-- paternity-

when the pleadings or the evidence in the case show that the paternity of a child is in issue, a guardian ad litem must be appointed for the child. In Re Meyers, 845 S.W. 2d 621 (S.D. 1992).

Guardians ad litem-- primary obligation is to the court, not the represented child. State ex rel. Bird v. Weinstock, 846 S.W. 2d 376 (Mo. App. E.D. 1993).

Interview in-chambers-

Once the Court elects to conduct the interview of a minor child, it must permit counsel to be present and cause a record of the interview to be made. Osmun v. Osmun, supra, citing Plunkett v. Plunkett, 757 S.W. 2d 286 (Mo. App. 1988).

Joint custody preference-

Legislature has established a public policy preference for joint custody. In Re Barnes, 855 SW 2d 451 (SD Mo 1993).

Joint Custody-

Joint legal custody OR joint physical custody operate to create the existence of "joint custody." So long as both parents have significant periods of temporary custody, (i.e. the noncustodial parent has a Siegenthaler plan variant) the Southern District considers this Joint Custody. Nix v. Nix, 862 S.W. 2d 948 (Mo. App. S.D. 1993) and Johnson v. Johnson, 865 S.W. 2d 412 (Mo. App. S.D. 1993).

Masters- Exceptional Circumstances only--

Special masters should only be appointed in the most exceptional child custody cases because the demeanor and credibility of witnesses in these cases are too important for the court to delegate. In Re S.K.B. v. J.C.B., MLW DW-8043 (W.D. Mo. 12/1/93).

Physician selection-

Court may not designate non-custodial physician parent to select physician to provide medical care absent an agreement between the parents. Ginos v. Bartlett, 862 S.W. 2d 494 (Mo. App. S.D. 1993).

Primary physical custody to father/joint legal custody-- see Gulley v. Gulley, 852 S.W. 2d 874 (Mo. App. ED 1993).

Religion- inquiry by Court-

A Court's inquiry into religious beliefs per se is improper. However, inquiry into matters of child development as impinged upon by religious convictions is permissible. "This finding should not be construed as a basis for other courts to inquire into a parent's religious beliefs without very good reason and concern for the child's best interests. Nor should a court's claim that it is acting in a child's best interest be used as a pretext to award custody to the parent whose religious beliefs are most agreeable to the Court. Edwards v. Edwards, 829 S.W. 2d 91 (Mo. App. E.D. 1992).

Relocation outside state-

where custodial parent demonstrates a need to move from the state to achieve employment and financial betterment which will serve the best interests of the children, permission to move from the state should be granted. Michel v. Michel, 834 S.W. 2d 773 (Mo. App. S.D. 1992).

Relocation outside state-

Denied where trial court found the purpose of the move was primarily to defeat and frustrate other parent's visitation with the child. In Re Marriage of Lowe, 860 S.W. 2d 813 (Mo. App. S.D. 1993).

Relocation within state-

Court may not restrict custodial parent's relocation within the state, nor can the Court provide in its decree for an automatic change in custody upon a change in residence. Michel v. Michel, 834 S.W. 2d 773 (Mo. App. S.D. 1992).

Separation of siblings--

Separation of siblings at divorce is not an abuse of discretion in case in which there was severe sibling rivalry between the children, and they told judge they preferred to be separated. Law v. Law, 833 S.W. 2d 17 (Mo. App. W.D. 1992). For manner of calculating support, see Comments to the new Form 14, effective April 1, 1994.

Third-party intervention re custody rights-

Third-party intervention pursuant to Sec. 452.375.4(3)(b) may only occur within the context of a pending action. Third party may not initiate a proceeding to determine custody or visitation rights under this section. Hastings v. Black, 831 S.W. 2d 214 (WD MO 1992).

UCCJA- Emergency jurisdiction-

UCCJA Emergency or Parens Patriae Jurisdiction- emergency jurisdiction under Sec. 452.450.1(3)(a) & (b) requires actual abandonment AND that the neglect be an actual emergency. Such parens patriae jurisdiction is reserved for extraordinary circumstances and is usually exercised by a juvenile court to protect a child physically present within its bounds regardless of the child's actual domicile. When there is child neglect without emergency or abandonment, jurisdiction cannot be based on these statutory paragraphs. Such parens patriae jurisdiction is only temporary, in order to preserve the status quo for such limited time as will enable the petitioner to apply for permanent custody in the state with regular jurisdiction under the UCCJA. Additionally, The court's decree must be made under factual circumstances meeting the jurisdictional standards of the UCCJA. The court may enter orders for travel expenses and attorneys fees against the party who commenced the proceedings, citing Sec. 452.470 RSMO. Piedemonte v. Nissen, 817 S.W. 2d 260 (WD MO 1991).

II. MODIFICATION OF CHILD CUSTODY

Conflict of laws- Modification jurisdiction-

Missouri decree- where one parent continues to reside in Missouri after dissolution decree was entered in this state, Missouri continues to have preferential jurisdiction to hear subsequent custody and visitation matters even if the child and parent have moved to another jurisdiction (so long as one parent remains). Dobbs v. Dobbs, 838 S.W. 2d 502 (Mo. App. E.D. 1992); Lydic v. Manker, 789 S.W. 2d 129 (Mo. App. 1990). Newton v. Newton, 811 S. W. 2d 868 (Mo. App. E. D. 1991); but see Glanzer v. Glanzer, 835 S.W. 2d 386 (Mo. App. E.D. 1992) which may be at odds with these cases.

Change of Custody- factors-

Factors to be considered in a proceeding for change of custody include the increased age of the child, the deteriorated nature of the relationship with the custodial parent, and performance at school while living with the custodial parent. In re Marriage of Lowe, 860 S.W. 2d 813 (Mo. App. S.D. 1993).

Change of residence- "another state,"--

within meaning of Missouri statute Sec. 452.411 RSMo 1986 which provides that if either parent changes residence to "another state," such change of residence shall be deemed change of circumstance allowing modification of prior custody decree, does not mean only states other than Missouri, but also includes Missouri. LaFon v. LaFon, 811 SW 2d 360 (Mo banc. 1991).

Joint Custody- terminated-

Trial court was justified in terminating joint custody in a modification proceeding, where the parties had demonstrated an inability to agree upon essential decisions affecting the child. Anderson v. Anderson, 854 S.W. 2d 32 (WD Mo 1993). See also Massman v. Massman.

Joint Custody- not terminated-

Joint custody plan may not be terminated in modification proceeding just because one parent says it is not working. The Court must make a determination, and where substantial evidence exists in the record that the parents have

the ability and the professed desire to deal with each other concerning the raising of their child, it is error to terminate the arrangement. Luther v. Vogel, 863 S.W. 2d 902 (Mo App. E.D. 1993).

Moral fitness of parent--

Court, in a custody case, can consider the moral fitness of a person seeking custody. "Courts have consistently condemned exposure of children to adulterous and immoral conduct."

In this case, the court considered the fact that the father frequently had his girlfriend stay overnight with him, when the children were home. Brotherton v. Lowe, 819 S.W. 2d 74 (S.D. Mo 1991).

Modification of Visitation vs. Custody-

Under 452.400, a reduction or modification of visitation is not a restriction per the statute unless it poses some extraordinary burden such as supervision or complete denial.

Otherwise, it is not necessary for court to find impairment of emotional development before permitting modification. The best interest of the child is the sole determinant. In Re Marriage of Amos, 843 S.W. 2d 946 (S.D. 1992), following Winters v. Winters, 617 S.W. 2d 585 (Mo. App. 1991), and Gayman v. Gayman, 559 S.W. 2d 617 (Mo. App. 1977).

Modification of Visitation vs. Custody-

Different standard for each recognized- Modification of custody governed by 452.410 and requires change in circumstances of child or custodian. Modification of visitation governed by 452.400 and requires only that best interests of the child be considered. James v. James, S.D. Mo. slip op. 18304, filed May 17, 1993.

Presumption of Fitness-

After child custody has been adjudicated in a dissolution of marriage proceeding, the custodian of the children is presumed suitable and the party seeking to change the custody has the burden of showing a substantial change of conditions mandating the requested change to further the best interests of the child. Hoefler v. Hoefler, 860 S.W. 2d 376 (W.D. Mo. 1993).

Relocation outside state-

Denied where trial court found the purpose of the move was primarily to defeat and frustrate other parent's

visitation with the child. In Re Marriage of Lowe, 860 S.W. 2d
813 (Mo. App. S.D. 1993).

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