

Family Law Section

NEWSLETTER

Fall 2004

2004-2005 Family Law Section Council Members

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VIEWS FROM THE CHAIR

By Ann E. Bauer, St. Louis

Greetings of the season! I am not sure what season we are in right now. By the time you receive this newsletter, it will probably be Thanksgiving week. By the time you read this, it may be the Christmas season or after. But as I type, I feel in between seasons. Baseball season is over. The Cardinals disappointed their fans during the World Series, but not during the exciting regular season. The election season seemed never-ending, but fortunately for all of us, it ended. Whether you like the election results or not, you are probably relieved the attack ads are no longer bombarding you as you try to go about your daily life.

Baseball season and post-season were exciting for many of us in St. Louis and beyond. It also seems that more people were energized by this election than ever before. In the weeks before the election, I noticed a spirit in the air I don't usually notice except during the Christmas holiday season. I felt it when I was standing in line in our building's lunch room in the weeks before the election, with so many people talking about the election. I noticed it when I approached any group of two or more in our office during the workday, and realized that they were talking politics. When I called my dad on his 82nd birthday, he talked about the election more than I remember him ever talking about any other. People seemed to truly believe that this was an important election.

I worked for a candidate and as a poll watcher on election day. I was at a poll by 6:00 a.m. with my candidate's literature.



People were lined up more than the length of a block. It was rainy and cold, but everyone seemed to be in great spirits. I think people were there with the attitude "my vote counts," which gave election day a new meaning for many. I worked at a polling place in the City of St. Louis from 4:00 p.m. until the voting ended. Another attorney and I stood at the back of the line at 7:00 p.m. to mark the last voters. It seemed our small part was important. This precinct is in the heart of what you might call "the land of diversity." The large crowd appeared to represent a broad spectrum of people of different ages, races, countries of origin, ethnic groups, socioeconomic classes, and political views. They waited two hours and longer with few complaints.

I had the privilege of helping the feeble (due to age) and disabled get to the front of the line. When someone came in who could

VIEW FROM THE CHAIR

(continued)

not stand in line the entire time, they went to a waiting area where they could sit. My job was to bring them to the front of the line, helping them "cut." I would approach people just as their long wait was about to end, and ask them to wait a little longer while someone else went ahead of them. With the exception of a very tired-looking woman in her 30s who spoke of children at home waiting, everyone smiled and said, "Of course." The people I helped were so happy that we assisted. I was amazed at how much effort it took for some of them to vote.

When I got home after my political work was done, I was tired but excited about what a great day I had. By morning I was not quite so upbeat, since many of my candidates had lost. But my spirit has returned, partly because of the great experience of election day and the people with whom I interacted.

Remember the divided country we kept hearing about during election season? One of my most memorable moments on election day came when I heard a Republican election judge (a white male) tell someone in line that the Democratic judge he was paired with (an African-American female) is the best election judge he has ever worked with, that they have been paired up for years, and he has only the utmost respect for her. He wouldn't want to work an election without her. I believe he meant it. There are other signs that the polarization of our country is not quite as terrible as some say. During the election season, people talked. People listened. People of diverse backgrounds worked together for candidates. People from different political parties came together to ensure a fair voting process. Yes, we disagree in terms of who

should be in office and what is the best approach to local, state, national and international policy. However, each of us has friends, family members, co-workers and neighbors who have different views than we do. I don't want to minimize the issues we are confronting, but I take heart in the positive energy and cooperative spirit I experienced before and on election day.

Now, back to family law, which brings readers of this newsletter together, no matter their loyalty to a baseball team or political party. It is hard work that we do, and it is difficult to feel that we are helping. A friend quoted a judge who commented to the attorneys on a difficult custody case this week, "I don't know how to solve this problem." As family law attorneys, we often feel we can't solve our clients' problems. The work is often draining and the results are not always what we want. Even more often, the results are not what our clients want. We seem to specialize, not in the law, but in conflict. Sometimes we need to gather our energy to do this work away from the practice of law. I am going to look fondly on my election day experiences and take strength from knowing that there are a lot of people who care about their communities, even if they do not share my point of view. Let's try to carry the cooperative spirit and respect for our "opponent" into our most difficult cases. Let's work hard to work together to find solutions to difficult problems.

I hope that we family law attorneys can solve a few problems in the upcoming year...and that we each have some great days between now and the next election. If you want to get involved in the Family Law Section, please contact me.

*SPEER v.
COLON:*
SIGNIFICANT
DEVELOP-
MENTS IN THE
LAW OF
CUSTODY
AND
VISITATION
MODIFICA-
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By Susan S. Jensen

In a departure from its previous holdings on the issue, the Missouri Court of Appeals for the Southern District established a new analysis for custody and visitation modification law in *Speer v. Colon*, slip op. 25685 (Mo. App. S.D., August 31, 2004). In *Speer*, the law concerning the standards of proof necessary in a custody or visitation modification action is explored in a majority opinion written by Judge Garrison.

The original custody order in the case was entered in 1996 and later modified in 1999. The 1999 modification awarded joint physical and legal custody of J.A.S. to the parties, and named mother as the primary physical custodian. Both the original custody order and the modification included an option for father to have J.A.S. while mother was working.

The judgment that was the subject of this appeal was entered in 2003. It granted joint legal custody to mother and father and primary physical custody to mother. Father was granted "liberal and specific visitation." The custody and visitation terms of the 2003 modification differed from the 1999 modification in the following ways: 1) any award of "joint physical custody" was omitted; 2) father's summer visitation was increased from three weeks to five weeks; and 3) father no longer had the option of having J.A.S. while mother worked.

Father's complaint on appeal is that the court erred in modifying custody from joint legal and physical custody to joint legal with primary physical custody to mother. Father alleged several grounds for error in that portion of the judgment.

It was first necessary for the court to determine whether the judgment was a modification of child custody or a change in visitation. The answer to that question would dictate the proof required in the case. If it was a modification of custody, then the trial court would need to find facts that arose since the prior decree, or facts that were unknown to the court in the prior proceeding, evidencing a change of circumstances for the child or the child's custodian, such that the modification was necessary to serve the child's best interests. § 452.410.1, RSMo. 2000.

Conversely, if the pleadings sought a change in visitation, then the standard is the best interests of the child and a finding of a change in circumstances is not needed. § 452.400.2, RSMo. 2000.

In answering this initial question of whether there was a change of custody or visitation, the court noted that the Western District case of *Timmerman v. Timmerman*, No. 62002 (Mo. App. W.D., July 27, 2004), is authority for the proposition that the elimination of "joint physical custody" is a modification of custody. In *Timmerman*, the Western District set forth a bright line test for determining the standard of proof required in modifying custody versus visitation. It states that if the original decree awarded joint physical custody, any attempt to modify that custody would come under § 452.410.1, and would, therefore, require a showing of a change of circumstances. If the original custody arrangement was sole physical custody with visitation, then an attempt to modify visitation only requires a showing of the best interests of the child under § 452.400.2. An attempt to modify a sole physical custody arrangement so as to switch that sole custody to the other parent, or to change it to a joint physical custody arrangement, would require a showing of a change of circumstances and best interests.

The *Speer* Court also recognized precedent (including its own case of *Baker v. Welborn*, 77 S.W.3d 711 (Mo. App. S.D. 1998)) that holds the label chosen by the trial court ("custody" or "visitation") is not determinative of whether the matter involves a change of custody or one of visitation. The majority opinion states, "Rather, it is the substance of the finding that controls whether we are dealing with custody or visitation." The court explained that there is often little or no practical distinction between an award characterized as joint physical custody and one characterized as primary physical custody to a mother with liberal visitation to a father. The court acknowledged, albeit in a footnote early in the opinion, the Eastern District case of *LaRocca v. LaRocca*, 135 S.W.3d 522 (Mo. App. E.D. 2004), which noted that Missouri statutes do not recognize the term "primary physical custody." Rather, § 452.375.1

SPEER v. COLON:
SIGNIFICANT DEVELOPMENTS IN THE LAW OF CUSTODY AND VISITATION MODIFICATIONS

(Continued)

defines “custody” as “joint legal custody, sole legal custody, joint physical custody or sole physical custody or any combination thereof.” Following this logic, the majority opinion found that the parents were effectively awarded joint physical custody, regardless of the label attached by the trial court.

The court next examined the definition of “modification” to determine whether there was a “modification of custody.” In defining “modification,” the majority states it is “to ‘change somewhat the form or qualities of; to alter somewhat’ and by its definition implies something in existence to be changed or altered.” The court then found that the changes made to the custody provisions constitute a “modification” invoking the requirements of § 452.410.1.

The court does not explain which change or alteration results in this finding. Because the court found that the omission of “joint physical custody” from the latest judgment was meaningless and that the parties, in effect, had joint physical custody, the change or alteration that resulted in their finding a change of custody rather than visitation must have been the two-week increase in summer visitation and the deletion of father’s ability to have the minor child while mother was working.¹

This analysis resulted in the filing of four separate opinions in *Speer*. One of those, authored by Judge Parrish, the author of *Baker v. Welborn*, concurred in full with the majority’s view. Three others disagreed with at least part of Judge Garrison’s analysis.

Judge Rahmeyer disagreed with his finding that the elimination of the term “joint physical custody” would not, in itself, establish that there had been a modification of custody. However, because she believed that the change in terms constituted a modification of custody, she concurred with Judge Garrison’s principal opinion.

Judge Prewitt disagreed that a change of custody occurred, and believed that only visitation had been modified. His separate opinion began with the observation that any matter involving children needs to be put to an end as soon as possible for the best interest of the children. Specifically rejecting the analysis of *Timmerman*, Judge Prewitt believed there is no practical distinction between the current

judgment and the previous modification. As the parties effectively had joint physical custody, then no change of custody occurred and only the best interest of the child need be proven.

Finally, Judge Shrum agreed that the child custody provision of the judgment should be reversed. His basis for reversal was that domestic violence had been an issue in the case, but the court did not make specific findings to show which custody arrangement best protected the child pursuant to § 452.375.13. As for whether there was a modification of custody, Judge Shrum did not agree that it was necessary to prove a change of circumstances in this case. He stated that where the parties had a joint custody arrangement, and continue to have one after the current cause of action, then no modification of child custody has occurred as contemplated by the current law. He relies upon *Bell v. Bell*, 125 S.W.3d 899 (Mo. App.W.D. 2004), wherein the court held that when the trial court was concerned with the provisions of a parenting plan under a joint legal custody decree, there is no need to prove a change of circumstances. He admitted that no statute or court rule expressly authorizes his position, given that *Bell* did not address changes to a physical custody plan. However, Judge Shrum also relied upon the court’s inherent power to do what is necessary with respect to a child’s welfare once jurisdiction is invoked.

As summarized by Judge Prewitt, it is evident that “the law is in disarray” concerning modifications of custody and visitation. Although the Western District and Southern District have attempted to dispel some of that confusion, the Supreme Court of Missouri now has the opportunity to speak on the issue, as *Speer* was transferred to the Supreme Court in September 2004.²

The ramifications of *Speer* are thought provoking. For example, if primary physical custody does not exist, and primary physical custody with liberal visitation to father is often the same thing as joint physical custody, then which parent is the “custodian of the child” for purposes of showing a change of circumstances? It is often assumed that the child’s “custodian” is the parent who has custody of the child for most of the time.

SPEER V. COLON:
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(Continued)

Following the analysis outlined above may lead to the result that one may prove a change of circumstances of either parent when there is joint physical custody, whether it is called that or not. *Timmerman* may answer this question, in that it finds that when parents have joint physical custody, each parent is the custodian. Similarly, in his separate opinion, Judge Shrum wondered how, in a joint physical custody arrangement, a parent can have “joint physical custody” and “visitation” at the same time. *Timmerman* seems to answer this when it states that a joint physical custodian does not have visitation rights. Rather, they both have rights to custody. Thus, it found that a court is never modifying “visitation” when it is changing the provisions within what has always been a joint custody arrangement.

If this reasoning is correct, then only sole physical custody modifications would come under the purview of § 452.400.2, and all joint physical custody modifications would fall under § 452.375. As § 452.375 has the higher standard of requiring a showing of change of circumstances as well as the best interests of the child, one may wonder why joint custody parents should have that higher burden of proof; or, put another way, why should it be easier for parents who do not have physical custody to modify their time with their children than those with joint custody? Does this different treatment abide by the cardinal rule in issuing a judgment dealing with children – that it be in the child’s best interests? This is especially intriguing given the clear mandate that it is Missouri’s public policy that joint custody is the best arrangement for a child.³ Why would the question of whether a change of circumstances occurred be a more appropriate question in a joint custodial situation than a sole physical custody one? Perhaps the change of circumstances question should actually be only another relevant factor in determining what is in the child’s best interests. The *Timmerman* court acknowledges this problem by stating, “Perhaps, the most illogical result under this approach is that a joint custodial parent who seeks only a slight modification of his parenting time would have

to prove a change in circumstances while a parent with visitation could obtain drastic changes in his parenting time after proving only ‘best interests.’” The court seems to resolve this dilemma by believing the benefits to its bright-line test outweigh this illogical result.

What is evident is that under the current law in the Southern and Western Districts, it is more difficult to change joint physical custody awards, i.e., where both parties have frequent, meaningful, and continuing contact with the child. If both parents have that type of contact, a change of circumstances must be proven before any changes can take place in the contact schedule. Given the state of “disarray” on the topic, it will be interesting to watch how the Supreme Court of Missouri decides the issue. Family law practitioners in the state need to follow *Speer* and its development closely.

Footnotes

¹ The court presented a detailed analysis of the findings made in this case by the trial court and analyzed whether they were appropriate under Missouri law. It concluded by holding that when the parties do not agree on a custodial arrangement, the court must make detailed findings concerning the specific relevant factors that were relied on in determining that its custody decision was in the child’s best interests and, in doing so, should acknowledge it considered all factors listed in § 452.375.2. While this also is a clarification of the law on the issue, this aspect of the case is beyond the scope of this article.

² The case is assigned Supreme Court number SC86321.

³ Section 452.375.4 states that the public policy of the state is that frequent, continuing, and meaningful contact with both parents is in the best interest of the child unless a court specifically finds otherwise. It is stated in the definition of “joint physical custody” (found in § 452.375.1) that it shall occur so as to assure the child frequent, continuing and meaningful contact with both parents.

PRACTICE
TIP: ADDING
LANGUAGE
REGARDING
NOTIFICATION
REQUIRE-
MENTS
FOR
CHILDREN IN
COLLEGE

As most family law practitioners are aware, § 452.340.5, RSMo, provides that child support may continue after a child reaches age 18 or graduates from high school under certain circumstances. For child support to continue, the **child** is required to do certain things:

To remain eligible for such continued parental support, at the beginning of each semester the child shall submit to each parent a transcript or similar official document provided by the institution . . . which includes the courses the child is enrolled in and has completed for each term, the grades and credits received for each such course, and an official document from the institution listing the courses which the child is enrolled in for the upcoming term and the number of credits for each such course.

Section 452.340.5, RSMo. Non-compliance results in an abatement of child support for that semester. *In re Marriage of Kohring*, 999 S.W.2d 228, 233-34 (Mo. banc 1999). Emancipation does not result from non-compliance with these notice requirements so long as the child is complying with the other requirements of the statute. *Id.* If the technical requirements of the statute are not being followed, abatement occurs, even if the paying parent had actual knowledge of the child's enrollment and grades. *See Morton v. Myers*, 21 S.W.3d 99 (Mo. App.W.D. 2000).

Two major problems with this statute exist. First, more often than not, the custodial parent is not aware of this requirement. Second, because the child is not a party to the divorce, he or she would have no way of knowing about this requirement, even if the language of this statute were included in the judgment. Abating child support for non-compliance with a requirement the child or the parent receiving child support knew nothing about seems to be a harsh and unfair result.

One solution to the problem that has been proposed is to amend the statutory language so that the child is required to submit the information only upon a written request, by certified mail, by the parent obligated to pay child support. Requiring the parent to request this information from the child in writing would give the child an opportunity to comply with the statute before child support is cut off. Obviously, however, any statutory change has to come from the legislature.

In the meantime, another solution would be to include the language of this statute in the judgment of dissolution or parenting plan and any later modifications thereof, thereby putting both parents on notice of these requirements. This would be similar to the relocation notice required by § 452.377.11. Inserting the language in the judgment or parenting plan would at least give the custodial parent a "heads up" on this issue. Conversely, it would benefit non-custodial parents to know what the requirements are concerning payment of the support if they are receiving no information concerning their child's post-high school education. The benefit to non-custodial parents of knowing the requirements is especially important because payments made during this period of non-compliance cannot be recovered, unless the child is actually emancipated. *See Jansen v. Westrich*, 95 S.W.3d 21, 220 (Mo. App. S.D. 2003). Making parties aware of the statutory requirements affecting them should be a goal of good representation.

The following language is an example of what could be added to parenting plans to put the parties on notice of the statutory scheme:

Notice of Obligations to Continue Child Support. Missouri law § 452.340 currently contains certain requirements for a child to remain eligible for continued parental support when that child has graduated from high school and is attending an institution of vocational or higher learning. The

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parties need to remain aware of those requirements as they exist at the time the minor child has graduated from high school so as to assure compliance with current Missouri law regarding the payment of child support if the minor child plans to attend an institution of vocational or higher learning. The parties should be aware that child support may be abated for any semester in which the child does not send to each parent a transcript or similar official document provided by the institution of higher learning which includes the courses the child is enrolled in and has completed for each term, the grades and credits

received for each such course, and an official document from the institution listing the courses which the child is enrolled in for the upcoming term and the number of credits for each such course.

Alternatively, a copy of the statute can be attached to the parenting plan with the following language:

The parties acknowledge receipt of § 452.340, RSMo, attached hereto, regarding the need for the child to provide grades and course information to the parent obligated to pay child support.

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