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**DOMESTIC RELATIONS—REMOVAL OF CHILD TO
ANOTHER STATE BY DIVORCED PARENT**

Petitioner was given custody of a child when her husband was awarded a divorce on grounds of desertion. She later petitioned the court for a modification of the decree in order to allow her to remove the child to New York upon her contemplated remarriage. Her prospective husband was an engineer of good financial standing, had purchased a home in New York and was fond of the child. The child's father lived alone in his own home. The court held that a child may be removed from the jurisdiction of the court, out of the state, where it is for the best interests of the child. *Schmidt v. Schmidt*, 346 Ill. App. 436, 105 N.E. 2d 117 (1952).

The *Schmidt* case represents the first Illinois case allowing a parent to take the child from the state where the welfare of the child dictates.

Most states which have considered the question involved predicate their decisions upon the "welfare of the child,"¹ as determined by the particular factual situations. However, previous Illinois cases indicate that Illinois courts formerly had reasoned that removal of children from the state by one parent is contrary to public policy and, therefore, not to be sanctioned.

The leading Illinois case denying removal is *Miner v. Miner*.² The reasoning of this case, which is over one hundred years old, is repudiated by the *Schmidt* case. In the *Miner* case, the court considered a situation wherein the mother intended to take the child out West to a place which, at that time, was inaccessible by railroad. The court held, "This cannot be tolerated, and must be guarded against . . . any attempt on the part of either parent to alienate the affection [of the child] from the other, would be a contempt of Court, . . ."³

In *Seaton v. Seaton*,⁴ the court decided that removal of a child from the state could not be sustained as it was against public policy and inequitable. The court, in *Chase v. Chase*,⁵ awarded custody of a child to the father when it was discovered that it was the admitted intention

¹ *Williams v. Williams*, 110 Colo. 473, 135 P. 2d 1016 (1943); *Roosma v. Moots*, 62 Idaho 450, 112 P. 2d 1000 (1941); *Allen v. Allen*, 239 Ala. 116, 194 So. 153 (1940); *Turner v. Turner*, 86 N.H. 463, 169 Atl. 873 (1934); *Goodrich v. Goodrich*, 209 Iowa 666, 228 N.W. 652 (1930); *Kane v. Kane*, 241 Mich. 96, 216 N.W. 437 (1927); *Waldref v. Waldref*, 135 Minn. 473, 159 N.W. 1068 (1916); *Stone v. Stone*, 158 Ind. 628, 64 N.E. 86 (1902); *Griffin v. Griffin*, 18 Utah 98, 55 Pac. 84 (1898); *Stetson v. Stetson*, 80 Me. 483, 15 Atl. 60 (1888).

² 11 Ill. 43 (1849).

³ *Ibid.*, at 51.

⁴ 337 Ill. App. 651, 86 N.E. 2d 435 (1949).

⁵ 70 Ill. App. 572 (1897).

of the mother to take the child outside of the state. The court stated, in regard to the mother's intention, "This is against the policy of our law, and ought not to be permitted."⁶ The instant case, in analyzing the *Chase* decision, stated, "The court does comment on the fact that the mother intended to take the boy out of the State . . . and stated that this is against the policy of our law. . . . This is *dictum* and does not decide that a minor child cannot be permitted to be taken out of the jurisdiction. . . ."⁷

In the Wisconsin case of *Bennett v. Bennett*,⁸ the court allowed the father to take the children out of the state since the father had an opportunity to change jobs and elevate his financial position. The court stated that for the father to have advantage of this opportunity was found to be consistent with the welfare of the children. On the other hand, two Washington cases, *Ayers v. Ayers*⁹ and *Ostrander v. Ostrander*,¹⁰ denied the permission under their respective facts.

In the *Ayers* case, the father had petitioned for custody since the mother had remarried and moved to California, desiring to take the children. It was stated that the Washington court had consistently held that the welfare of the children was paramount. Important factors in this case were that the mother had remarried, had other ties and duties, and lived in another state. The court, however, did not say that removal would not be allowed under a different factual situation. The *Ostrander* case confronted the court with a situation in which the mother, who had been awarded the custody originally, could not support the child. On the petition of the father the custody was given to the child's grandmother. The father now requested custody and permission to take the child out of the state. The court concluded, "The guiding principle in cases involving the custody of a child of tender years is, of course, the welfare of the child. . . . 'The boy had a good home with his grandmother, . . . and shall be permitted to remain where he is.'"¹¹

Turner v. Turner,¹² a New Hampshire case, and *Goodrich v. Goodrich*,¹³ an Iowa case, both refused to allow the children to be taken from the state. The *Turner* case presented a situation where the mother, after having received custody of the child, shortly thereafter took out passports to France. On the husband's petition, custody was given to the

⁶ *Ibid.*, at 575.

⁷ *Schmidt v. Schmidt*, 346 Ill. App. 436, 442, 105 N.E. 2d 117, 120 (1952).

⁸ 228 Wis. 401, 280 N.W. 363 (1938).

⁹ 188 Wash. 540, 62 P. 2d 1358 (1936).

¹⁰ 176 Wash. 669, 30 P. 2d 658 (1934).

¹¹ *Ibid.*, at 671 and 659.

¹² 86 N.H. 463, 169 Atl. 873 (1934).

¹³ 209 Iowa 666, 228 N.W. 652 (1930).

wife's mother. The wife then requested the court's permission to take the child to France for the summer under any terms the court deemed fit. In denying the mother's request, the court said:

The fact that the libelee has already attempted to take her son to France without leave of court cannot but cast doubt upon her professed willingness to conform to such terms and conditions as the court may now impose. The libelant's right to have access to his son is an important right and should not be jeopardized except for reasons touching the welfare of the child.¹⁴

In the *Goodrich* case, the wife had purchased property in Kansas City and desired to move there with the children. The facts showed that her income would not be increased substantially by such a move. It was decided that the evidence failed to disclose any change in conditions, since the granting of the original decree, which would persuade the court to believe that the welfare of the children would be promoted by a removal to Kansas City.

Those cases which have permitted removal of children from the state have allowed the facts to control their decisions. *Kane v. Kane*¹⁵ is an example. There the husband had been arrested for non-support in Canada and while under bail, he fled to Michigan. Some years later, he sued for divorce and the wife appeared voluntarily. She requested custody and was granted permission to take the children back to Canada. In *Kirby v. Kirby*,¹⁶ the wife was granted a modification of the divorce decree, which prohibited taking the child without the state, on the grounds that her new husband had an opportunity for a more beneficial position in New York. The wife, in *Griffin v. Griffin*,¹⁷ was given a divorce because of her husband's desertion, physical cruelty, and adultery. She desired, and was allowed to take the children to Iowa, where her parents resided. *In re Krauthoff*¹⁸ presented a situation in which the mother had been previously awarded custody; the facts now showed that the child was being turned against his father. The father was granted the right to take the child out of the state.

In allowing removal, the cases discussed above considered the "welfare of the children" rather than any question of public policy.

It would seem that the *Schmidt* case, which will not be appealed, has opened the courts of Illinois to a more realistic view—a consideration of the facts of the case and the welfare of the children. Stressing public policy, regardless of the factual situation, may often force the children of divorced parents into a life of penury and result in punishment.

¹⁴ 86 N.H. 463, 465, 169 Atl. 873, 874 (1934).

¹⁵ 241 Mich. 96, 216 N.W. 437 (1927).

¹⁶ 126 Wash. 530, 219 Pac. 27 (1923).

¹⁷ 18 Utah 98, 55 Pac. 84 (1898).

¹⁸ 191 Mo. App. 149, 177 S.W. 1112 (1935).

The decided weight of authority supports the *Schmidt* case. Prior to the instant case, those cases denying removal, on grounds of public policy, seem to have been restricted to Illinois.¹⁹

CONSTITUTIONAL LAW—"RELEASED TIME" PROGRAM HELD CONSTITUTIONAL

Petitioner seeks to test the constitutionality of the action of the Board of Education of the City of New York, whereby defendants established a "released time" program to enable public school children to obtain religious instruction during hours otherwise demanded for secular studies by the New York Compulsory Education Law.¹ The United States Supreme Court, in affirming the decision of the Court of Appeals of New York,² held that the statute, providing for the release of public school children from classes, was constitutional. *Zorach v. Clauson*, 343 U.S. 306 (1952).

Prior to the *Clauson* case, the Supreme Court had reviewed only one "released time" program, that of the City of Champaign, Illinois,³ in the case of *McCullum v. Board of Education*.⁴ The Champaign program was held unconstitutional. Now, after "released time" systems of one form or another have existed in this country for nearly thirty years⁵ without the benefit of a Supreme Court ruling on their constitutionality, one such program has been struck down and another sustained on the basis of differences which have been called "trivial"⁶ and of "no significance."⁷

The problem in the *Clauson* case is, of course, basically the same as that presented in the *McCullum* case, i.e., "Whether this system has prohibited the 'free exercise' of religion or is a law 'respecting an establishment of religion' within the meaning of the First Amendment."⁸ The factual situations presented by the two cases, however, disclose several seemingly fundamental differences.

The most apparent of these lies in the fact that in Champaign, the classes in religious instruction were conducted in the public school build-

¹⁹ *Miner v. Miner*, 11 Ill. 43 (1849); *Seaton v. Seaton*, 337 Ill. App. 651, 86 N.E. 2d 435 (1949); *Chase v. Chase*, 70 Ill. App. 572 (1897).

¹ 16 McKinney's Consolidated Laws of New York (1940) Part 1, Art. 65, § 3202.

² *Zorach v. Clauson*, 303 N.Y. 161, 100 N.E. 2d 463 (1951).

³ There was no underlying state enabling act involved.

⁴ 333 U.S. 203 (1948).

⁵ An informative outline of the history and development of "released time" programs is given by Frankfurter, J., in his separate concurring opinion in *McCullum v. Board of Education*, 333 U.S. 203, 225 (1948).

⁶ Jackson, J., dissenting in *Zorach v. Clauson*, 343 U.S. 306 (1952).

⁷ Black, J., dissenting in *Zorach v. Clauson*, 343 U.S. 306 (1952).

⁸ *Zorach v. Clauson*, 343 U.S. 306, 310 (1952).