

CHILD CUSTODY

Unsuitability vs. best interests

By Larry G. McQuain

Generally in litigation involving custody of children between a biological parent and a non-parent, a finding of unsuitability against the biological parent(s) is required before the non-parent can obtain custody. However, when the custody dispute originates in a divorce, the need for a finding of unsuitability against the biological parents before awarding custody to a non-parent relative is less clear. Once a custody determination has been made, future modification of the custody order requires a best interest of the child analysis, regardless of where the case originated.¹

The unsuitability standard applies in custody litigation between a biological parent and an individual who is not the child's parent. Unsuitability is the preliminary finding that the trial court must make against the parent to enable the non-parent to receive custody of the minor child. Unsuitability can be shown through abandonment of the child by a parent; contractual release of custody by a parent; incapability of a parent to support or care for the child; or detriment would befall the child if an award of custody is made to a parent.²

In the parentage case *Gorslone v Hockstok*,³ the maternal grandparents of the minor child obtained temporary legal custody of the minor child through an agreement with the mother which was made a temporary order of the court. Subsequently, the mother had not provided an acceptable living arrangement for the child, and another agreed temporary order was entered with the same terms as the prior temporary order to allow the mother more time to provide acceptable living arrangements. The mother and maternal grandparents filed cross motions for legal custody. The trial court applied the best interest standard and gave custody to the maternal grandparents. No determination of unsuitability against mother was made by the trial court. Mother did not appeal.

Subsequently, mother filed a motion for reallocation of parental rights. The trial court denied mother's motion after again applying the best interest standard of R.C. sec. 3109.04(E)(1)(a). This time mother appealed.

On appeal, the Supreme Court of Ohio in *Hockstok* found that the trial court should have first applied the unsuitability standard. An initial finding of unsuitability is required. Once custody is given to a non-parent after an initial unsuitability finding, then for subsequent modification, the best interest of the child standard applies.⁴

It is important to note that the Supreme Court of Ohio distinguished its prior case of *Boyer v. Boyer*⁵ within the *Hockstok* decision. "*Boyer* is a child custody dispute between parents and non-parents, but it originated from a divorce proceeding and, therefore, this court applied R.C. sec. 3109.04(D)(2), which allows a court to grant custody of a child to a non-parent relative if the court finds that it is not in the best interest of the child for either parent to retain custody." The Court went on to note that *Hockstok* did not originate from a divorce proceeding and therefore R.C. sec. 3109.04(D)(2) did not apply and *Boyer* was not controlling.



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R.C. sec. 3109.04(D)(2) states: "If the court finds, with respect to any child under eighteen years of age, that it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child, it may commit the child to a relative of the child or certify a copy of its findings, together with as much of the record and the further information, in narrative form or otherwise, that it considers necessary or as the juvenile court requests, to the juvenile court for further proceedings, and, upon the certification, the juvenile court has exclusive jurisdiction."

So it appears the initial unsuitability determination must be made in cases arising between a parent and a non-parent outside of a divorce proceeding. The Supreme Court of Ohio in *Hockstok* only distinguished *Boyer* which probably controls in the divorce setting, although it pre-dates *Perales* and *Hockstok*. Some appellate court case law immediately prior to *Hockstok* indicates that despite the pure "best interests" language of R.C. sec. 3109.04, some type of unsuitability test must be applied in the divorce setting.

R.C. § 3109.04 governs custody disputes between parents and non-parents which arise as part of a divorce. Ohio's courts have been reaching a general consensus that, despite the pure "best interests" language, some type of *Perales* "parental unsuitability" test must be applied in custody disputes between a parent and a non-parent before custody may be awarded to a non-parent.⁶

At least one Ohio appellate district has found R.C. sec. 3109.04(D)(2) violates the Fourteenth Amendment to the United States Constitution because the Due Process clause does not permit a state to infringe on the fundamental right of parents to make child rearing decisions when a court believes better decisions could be made.⁷

The limited scope of this article necessitates brevity in analysis, but a review of the relevant case law sheds some light on the current status of custody litigation between a parent and a non-parent in Ohio. Outside of a custody dispute originating in the context of a divorce, an unsuitability finding against the parents is usually required before a non-parent can receive custody. After the initial unsuitability finding and custody award, for future modification of the custody order, the best interest of the child standard applies.

In a custody dispute arising in a divorce action between a parent and a non-parent relative, a finding of unsuitability may not be required under R.C. sec. 3109.04(D)(2) and *Boyer*. According to *Lewis v. Lewis*,⁸ prior to 1974 the Revised Code required a suitability test before a relative could be awarded custody. "However, in 1974, the General Assembly amended R.C. sec. 3109.04 to allow a court to grant custody to another relative if the court finds that custody to neither parent is in the best interest of the child." *Boyer* interpreted the revised version of R.C. sec. 3109.04, which did not contain the suitability test. So in custody litigation arising from a divorce, which involves a non-parent relative, the pure best interest standard appears to apply both for the initial custody award and subsequently for future modifications. The Supreme Court of Ohio specifically distinguished in *Hockstok* the divorce setting of *Boyer* from the juvenile court private custody battle. However, it seems somewhat inconsistent to apply one standard (unsuitability) in one court and another standard (pure best interests) in another court. Appellate district courts have picked up on this alleged inconsistency and criticized *Boyer*, with at least one district finding R.C. sec. 3109.04(D)(2) unconstitutional because of no unsuitability requirement.

Although currently pending cases are often not perfectly made to fit within precedents of prior cases, it would be the safer route for practitioners and courts to make an unsuitability argument or finding, when possible, before awarding custody to a non-parent, regardless of whether the case arises in divorce court or in a private custody dispute in juvenile court or elsewhere. Fortunately, it is an extreme situation for a non-parent to receive custody over a parent, even when only a pure best interest standard is used from the outset. The outcome in many cases may be the same regardless of whether an explicit unsuitability finding is made. Isn't there an implicit or tacit finding of unsuitability even when an initial best interest analysis is used? Almost certainly some form of *Perales* "detriment" analysis would be utilized to justify not awarding custody to a parent in a pure best interest analysis.⁹

Although the safer route may be for courts to make an unsuitability finding whenever possible in parent/non-parent custody battles, even in cases arising between parents and a non-parent relative within a divorce action, this writer would not be surprised if someday the Ohio Supreme Court clarifies its position in *Boyer* without overruling *Boyer* or declaring R.C. sec. 3109.04(D)(2) unconstitutional. The Supreme Court of Ohio seems to draw distinctions in divorces in that competing parental rights in a divorce action cancel each other out and that awarding custody to a non-parent relative may be less of an assault on parental rights than an award to a non-parent non-relative.

Thus, when a case arises in juvenile court from a private custody battle between parents and a non-parent, unsuitability comes to the forefront. See *Perales*. However, when the custody battle is between divorcing parents and a non-parent relative, a best interest standard may suffice because R.C. sec. 3109.04(D)(2) provides a best interest statutory analysis, when it used to provide a suitability test. See, *Lewis* analysis. Plus, an inclination seems to exist that giving custody to a relative in a divorce proceeding may not be such an assault on parental rights as giving custody to a non-parent non-relative in a juvenile court private custody battle. Certainly, given the above cases, some confusion still exists on whether or not a suitability standard should be in place for parent/non-parent relative cases originating in divorces, as well as, parent/non-parent private custody cases in juvenile court.

³ *In Re Hockstok (nka Gorslene v Hockstok)*, 98 Ohio St.3d 238, 781 N.E.2d 971 (2002)

⁴ R.C. sec. 3109.04(B)(1). See also, *Domestic Relations Journal of Ohio*, Volume 15, Issue 3 (May/June 2003), Pamela J. MacAdams.

⁵ *Boyer v. Boyer*, 46 Ohio St.2d 83, 346 N.E.2d 286 (1976),

⁶ *Baker v. Baker* (1996), 113 Ohio App.3d 805, 812, 682 N.E.2d 661 (Ninth District) (a finding that the parents are unsuitable is implicit when custody is awarded to non-parent); affirmed in *Comstock v. Comstock* (Mar. 1, 2000), 9th Dist. No. 99 CA007339, 2000 Ohio App. LEXIS 726; *Lewis v. Lewis*, 7th Dist. No. 99- JE-6, 2001 Ohio 3167 (in which this Court essentially adopts the holding in *Baker and Comstock*); *Gorslene v. Huck*, 5th Dist. No. 01 CA40, 2001 Ohio 1680; *Esch v. Esch* (Feb. 23, 2001), 2nd Dist. No. 18489, 2001 Ohio App. LEXIS 679; *In re Pryor* (1993), 86 Ohio App.3d 327, 334, 620 N.E.2d 973 (Fourth District); *In re Dunn* (1992), 79 Ohio App.3d 268, 271, 607 N.E.2d 81 (Third District).

⁷ *Esch v. Esch* 2001 Ohio App. LEXIS 679, 2d Dist. No. 18489, (Feb. 23, 2001), citing *Troxel v Granville*, (2000), 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49.

⁸ *Lewis v. Lewis*, 2001 Ohio 3167, 2001 Ohio App. LEXIS 381.

⁹ *Schneeberger v. Baker*, 113 Ohio App. 3d 805, 682 N.E.2d 661, 9th App. Dist., Summit Cty. (1996).



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¹ *In Re Hockstok (nka Gorslene v Hockstok)*, 98 Ohio St.3d 238, 781 N.E.2d 971 (2002), citing 3109.04(B)(1).

² See, *In Re: Perales*, 52 Ohio St.2d 89, 369 N.E.2d 1047 (1977).