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Custody tug-of-war: Changing domicile restrictions difficult in Collin County

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The Nov. 4, 1999, divorce agreement between Plano residents Kim and Gary Daniels seemed standard enough.

After negotiations between attorneys and approval in Collin County District Court, it provided the usual joint custody, financial agreements, and visiting rights involving

their three children.

But also contained in the divorce decree was a routine provision that, like the "Alien" nemesis of actress Sigourney Weaver, would gestate and then come to haunt the ex-wife in a way that she may not have expected.

"Never, ever in a million years," said Kim Daniels Giacomello. "I did not want to

sign the divorce decree for the reason of the domicile restriction."

That provision, which is included in almost all joint custody agreements in Texas and elsewhere, requires that the children stay in a specific geographical area, so that both parents have reasonable access to them.

For their children — Lorin

Daniels, 13, Kyle Daniels, 10, and Abigail Daniels, 8 — that means spending most of their time in the Collin County-Dallas area.

So, when Kim Giacomello headed for Arizona with her new husband Peter Giacomello, the role that she once played as "primary possessor" under the divorce decree shifted by law to her

ex-husband.

And the battle has continued ever since.

Before the latest fight ended last week in a suburban Phoenix courtroom, a man's dream of being named Father of the Year in Plano would be shattered. The children would be back in Plano schools, and

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a woman would find that the way people interpret their own actions and the way a court interprets them can be sharply at odds.

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Force of law

Under the original divorce decree, the children spent most of their time with their mother, an educator, at their Plano home. Their father, an MCI Worldcom executive who describes himself as "a level-headed conservative," was granted regular visiting privileges in the joint custody arrangement.

Texas law requires that children in joint custody have a primary physical residence.

The provision is based on a general consensus among judges, mental health professionals, and child psychologists that children's best interests are served best in a stable environment where they have relatively easy and reasonable access to both parents.

There were no allegations of abuse on either side. Kim Daniels cited irreconcilable differences when she petitioned for divorce, which her husband initially opposed.

Her lawyer at the time, Plano's Howard Shapiro, who said he does many Collin County divorces, described the Daniels' agreement and subsequent court decree approved by Judge Nathan E. White as "standard."

"Her divorce was a nothing divorce, until she met a new guy and wanted to move to Arizona," said Shapiro, husband of state Sen. Florence Shapiro, R-Plano. "She herself decided it was more important to move to Arizona than to stay here. She gave in and gave up without even a hearing. She wanted a divorce as quickly and efficiently as possible."

It was only later, when she wanted to move the children to Arizona and the domicile restriction kicked in, that Giacomello reacted with surprise and anger.

Giacomello insisted that, based on Shapiro's advice, she did try to undo the

restriction.

But she ran up against her own voluntary agreement to it, long-standing and widely accepted divorce procedures in Collin County, a lack of case law on domicile restrictions, and a Republican Mormon judge who likes to cite a saying from the Church of Latter-day Saints, "You choose your love and you love your choice."

Giacomello apparently did not know that most courts in the pro-family, Republican-dominated state of Texas have not been friendly to parents who want to change a divorce decree, move to another state, and take the kids with them.

The idea that psychological and material stability in children's environments is important to their upbringing holds great sway in Texas and elsewhere and is backed up by the force of law. Domicile restrictions embody that belief.

A Collin County jury of 12 men held last week that it was in the best interests of a child to remain where he was and for his mother to move on to her new home.

White would not comment directly on the Daniels' case. But, in describing such situations in a general way, he said, "It's like a contract and now you want to charge me after I paid you off."

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A beached marriage

Gary Daniels and Kim Immler were married on Aug. 28, 1987, on a beach in Hawaii.

"It was a company trip that he won for sales at Digital," she said.

Almost 12 years later to the day, on Aug. 30, 1999, Kim Daniels petitioned for divorce on irreconcilable differences. Last week she said she had chafed under financial restraints.

"I had no money, no credit, nothing. I planned on leaving after the second child," she said.

Gary Daniels opposed the divorce petition and asked for counseling for all involved. But the divorce was granted on Nov. 2, 1999, providing for the three children to live mostly with her but allowing him visiting privileges and requiring him to pay child support.

Daniels declined comment

on most aspects of the case but suggested his former wife had been involved with her new husband, Pete Giacomello, before the divorce, and noted that court have favored his position in the dispute.

"I have been in three courts in the last three weeks and have won every time," he noted.

Kim Giacomello asked White, in March, 2000, to lift the domicile restriction so that she could move to Arizona with the children. Daniels asked the court to keep the restriction intact.

In court papers, Giacomello asserted that she had only agreed to the restriction because Plano schools were about to open, and she could not get the judge to act in time to bring the children to Arizona for school.

"I started this process in March of 2000," she said. "I thought that this would be enough time to do everything legally."

But the process dragged on. She could not get a court date. A new pregnancy interfered. Attorneys tried unsuccessfully to resolve it in the hall outside White's courtroom.

During the 2000 Christmas holidays, the children visited their mother in Phoenix under the custody agreement. They returned to Texas on Dec. 31, as scheduled.

The school year ended, and they spent this past summer vacation in Phoenix. But when Plano schools prepared to reopen on Aug. 2, they were still in Phoenix, refusing, their mother claimed, to board the return flight, even though she said she encouraged them to do so.

Across the country, with divorce rates as high as they are, legions of minor children are making these kinds of trips. When summer vacation ends and school re-opens, they must return to their primary physical residence. These returns are usually stressful.

In Daniels' view, however, it was not so much the children's reluctance to return, but their mother's interference — in a desperate bid to keep them in Arizona — that caused the problem.

And four days later, she was served with court papers

charging that she had "illegally restrained" the children and ordering her to produce them so they could return to Texas.

Late last week, Gary Daniels and his three children drove from Phoenix to Plano, where the children have resumed their schooling.

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Law changes slowly

Giacomello has written White, the judge in her case, several times. But, based on White's general comments last week, even though they were not directed at her case, she probably does not have much hope in his courtroom.

Parents coming into his court can expect to have domicile restrictions enforced. Such restrictions are now virtually equated with the best interests of the child.

"You can't let a 3-, or 5-, or 8-year-old tell you they're not going to get on an airplane," he said. "I never buy the argument that the child didn't want to do such and such because then you have a parent who is not being a parent."

The Arizona judge, who last week lifted a protective order sought by Giacomello against her ex-husband, did not allow the children to appear as witnesses before she ruled.

White criticized the "selfishness" of parents who want to change domicile restrictions so that they can move and still have access to children.

He also pointed out that as children age, they are less inclined to move because of friendships, activities, and extended family relationships.

White, said Shapiro, is not the kind of judge likely to approve long-distance moves by antagonistic parents who signed joint custody agreements.

"Of all the Collin County judges, Nathan White is the strictest on domicile restrictions," he said.

Case law on domicile restrictions is thin, but developing. Case law is used by courts as the basis for other rulings and only develops on appeal.

Family courts have relied on a presumption in favor of domicile restrictions because case law has been lacking. But

raised questions.

In *Jenkins v. Jenkins*, the Dallas Court of Appeals said domicile restrictions should be imposed only on a case-by-case basis and that the best interests of the child may not be injured in a move.

"The primary caretaker parent should not be restricted from moving with the child when the proposed move would not impair the well-being of the child," the court said in a somewhat vaguely-worded decision earlier this year.

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The question of how relocations affect children in custody disputes remains unresolved, but the current consensus generally favors stability in children's environments.

"Children do best under stable conditions," said Richard Warshak, Ph.D., an author, therapist and clinical psychology professor at University of Texas Southwestern Medical Center in Dallas.

This reasoning, he argued, should not necessarily favor one parent over the other, although, as San Antonio psychotherapist Peg Armstrong pointed out, "empathy is usually with the mother because the children

see the pain of the mother and because the mother is usually more emotive than the father."

"I usually recommend to couples that they agree not to move the children out of state," Armstrong said.

"To assume that the mother's and the child's interests are the same is totally ludicrous," said Warshak, whose new book, *"Divorce Poison: Protecting the Parent-Child Bond from a Vindictive Ex"* (ReganBooks), is due out this fall.

"The literature supports the idea of a continuing relationship with each parent," he said, pointing to a study of 900 parents that found 81 percent with joint custody did not move in the first three years of the agreement.

Determining what "continuing" means is at the center of many custody disputes. Is a nine-month school year interspersed with a few holiday contacts equivalent to a full-time summer vacation with the other long-distance parent?

Children caught up in these conflicts tend to suffer, said Warshak.

"The results are almost always bad," he said.

"I agree with that," said Giacomello.