

4-1-1984

Legislative and Judicial Approaches to Minors' Contractual Rights in the Entertainment Industry *Shields V. Gross*

Karren R. Boehm

Maria O. Guzman

Follow this and additional works at: <http://repository.law.miami.edu/umeslr>



Part of the [Entertainment and Sports Law Commons](#)

Recommended Citation

Karren R. Boehm and Maria O. Guzman, *Legislative and Judicial Approaches to Minors' Contractual Rights in the Entertainment Industry Shields V. Gross*, 1 U. Miami Ent. & Sports L. Rev. 145 (1984)

Available at: <http://repository.law.miami.edu/umeslr/vol1/iss1/10>

This Notes and Comments is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

LEGISLATIVE AND JUDICIAL APPROACHES TO MINORS' CONTRACTUAL RIGHTS IN THE ENTERTAINMENT INDUSTRY

Shields v. Gross

563 F. Supp. 1253 (S.D.N.Y. 1983)

I. INTRODUCTION — THE PARADOX

Current laws, created legislatively or by judicial fiat fail to adequately represent the best interests of the child entertainer. Recently, the California and New York legislatures have enacted laws which demonstrate an increasing awareness of the need for protection of minors' rights in entertainment contracts. These statutes have required judicially-approved contracts with stipulations for the establishment of trust funds for minors. However, as this article propounds, these enactments are insufficient to afford complete protection to minors. Children deserve extraordinary legal protection because "[they] may be described as the silent minority; they are economically disadvantaged and have no independent financial power; their legal status is essentially passive with the exception of limited state protection."¹ Children are vulnerable to exploitation by an adult-governed culture. This is especially so in the highly commercial realm of entertainment. For example, children can be particularly susceptible to parental aspirations. "It is feared that as an infant he may well be under the complete influence of an adult or may be unable to act in any manner which would allow him to defend his rights and interests."² In addition, the child has no legal power to exercise his or her own free will.

The Institute of Judicial Administration of the American Bar Association's standards relating to minors' rights supports the contention that recently enacted statutes are inadequate.³ The Institute has stated that a new legislative approach to these rights would be welcome; "one that would provide protection only to those minors who may not be able to adequately care for their own financial interests, while providing stability and predictability to adults who must deal with them — this being especially true in the

1. VARDIN & BRODY, CHILDRENS RIGHTS — CONTEMPORARY PERSPECTIVE XV (1979).

2. 28 N.Y. Jur., Infants, §3, pp. 221-22 (1963).

3. Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards, Standards Relating to Minors, Hon. Irving R. Kaufman, Chairman, p. 112-13.

area of minors involved in the entertainment field.”⁴

II. THE COMMON LAW APPROACH AND LEGISLATIVE RESPONSE

Under common law, a minor had the right to disaffirm a contract. A minor could also disaffirm a contract executed by another on his or her behalf. As a general trend, cases relating to the entertainment industry upheld this common law approach with regard to children entering into contracts.

During the early stages of motion picture production, children were often signed to multi-year contracts by the major studios. This was a significant investment of both money and effort since the studios spent a great deal on training and publicity.⁵ Because of the financial commitment undertaken by these studios, they could not risk disaffirmance by minors. Thus, filmmakers contracted with the minor's parents. In 1927, the California legislature provided for a proceeding whereby the superior court could approve the minor's contract and make it non-disaffirmable by the minor.⁶ Section 36 of the California Civil Code was a major legisla-

4. See Vardin & Brody, *supra* note 1.

5. CURRY, THE EMPLOYMENT CONTRACT WITH THE MINOR UNDER CALIFORNIA CIVIL CODE SECTION 36: DOES THE "COOGAN LAW" ADEQUATELY PROTECT THE MINOR? 7 J. JUV. L. 95 (1983).

6. Cal. Civ. Code §§36, 36.1, 36.2 (West 1982). Provision pertaining to judicial approval in minor's contract to render dramatic . . . services:

(1) At the time of the execution of this contract, [artist] represents and warrants to [producer] that [he or she] is a minor pursuant to the provisions of section 25 of the Civil Code of the state of California.

(2) In accordance with the provisions of section 36 of the Civil Code of the state of California, this contract must be approved by the [Superior Court] of the county of [___], where [artist] [resides or is employed]. [If minor neither resides in nor is employed in California, this contract must be approved by the Superior Court in county where any party to contract has its principal office in California for transaction of business].

(3) It is agreed that should the [Superior Court] fail to approve the contract within [number] days from the date hereof, the [producer] may at its option, cancel the agreement without further liability of any nature to [artist], but without waiving any rights regarding professional services performed by [artist] prior to such cancellation.

§36.1

Contracts for particular services; trust or savings plan; net earnings; taxes:

In any order made by the Superior Court approving a contract of a minor for the purposes mentioned in section 36 of this code, the court shall have power notwithstanding the provisions of any other statute, to require the setting aside and preservation for the benefit of the minor, either in a trust fund or in such other savings plan as the court shall approve, of such portion of the net earnings of the minor, not exceeding one-half thereof, as the court may deem just and proper, and the court may withhold approval of such contract until the parent or parents or guardian, as the case may be, shall execute and file with the court his

tive breakthrough.

The need for §36 was made clear by the case of *Warner Brothers v. Brodel*.⁷ In this case, a minor, seventeen year-old Joan Brodel, entered, with the court's approval, into an agreement to render services as a motion picture actress for a period of fifty-two weeks.⁸ The employer was given options to extend the terms of employment for six additional successive periods of fifty-two weeks each, at a progressively higher salary. When she attained majority, the minor refused to render further services and entered into a contract with other motion picture producers. The court held that the statute precluded disaffirmance not only during minority but also upon attaining majority.⁹

Section 36 of the California Civil Code was expanded as a result of a 1938 case involving child actor Jackie Coogan (who later became the Addams Family's Uncle Fester) and his mother. Coogan's mother spent her son's movie earnings,¹⁰ an action which refutes a popular argument used by many courts that the parents generally enter a contract with the child's best interests in mind. It should be remembered that under common law, parents were granted domain over the child actor's possessions. Jackie Coogan's case, however, was a clear example of a situation in which a court had to intervene in order to protect the child from parental bad judgment.

or her written consent to the making of such order. For the purpose of this section the net earnings of the minor shall be deemed to be the total sum received for the services of the minor pursuant to such contract less the following: All sums required by law to be paid as taxes to any government or governmental agency; reasonable sums expended for the support, care, maintenance, education, and training of the minor; fees and expenses paid in connection with procuring such contract or maintaining the employment of the minor; and the fees of attorneys for services rendered in connection with the contract and other business of the minor.

§36.2

Continuing jurisdiction over, and termination of, minor's trust or savings plan:

The Superior Court shall have continuing jurisdiction over any trust or other savings plan established pursuant to section 36.1 and shall have power at any time upon good cause shown, to order that any such trust or other savings plan shall be amended and terminated, notwithstanding the provisions of any declaration of trust or any other savings plan. Such order shall be made only after such reasonable notice to the beneficiary and to the parent or parents or guardian, if any, as may be fixed by the court, with opportunity to all such parties to appear and be heard.

7. *Warner Brothers Pictures v. Brodel*, 31 Cal.2d 766, 192 P.2d 949, cert. denied, 335 U.S. 844, reh'g denied, 335 U.S. 873 (1948).

8. *Id.* at 950.

9. *Id.* at 951.

10. The work of the 1939 California Legislature, 13 S. CAL. L. REV. 1, 44 (1939).

In 1939, the California legislature added Civil Code §§36.1 and 36.2. Section 36.1 gave the court power to require the establishment of a trust fund for the minor as a prerequisite to the court granting approval of a contract. Section 36.2 gave the court continuing jurisdiction over this fund.¹¹

Today, however, producers are generally not seeking court-approved contracts because the trend is toward short-term contracts and producers are not afraid of disaffirmance.¹² As a result, children's earnings are not being afforded the protection of savings funds. Consequently, children are once again susceptible to exploitation resulting from either bad faith or bad judgment.

III. AN EXAMINATION OF NEW YORK LAW

The 1983 New York case of *Shields v. Gross* provides an examination without resolution of the inherent problems involved in the delicate balancing of children's rights with contract predictability and stability.¹³ Seventeen year-old actress and model Brooke Shields brought an action against photographer Garry Gross seeking damages and injunctive relief to prevent the photographer from using photographs taken when she was ten years old, some of them taken while she posed nude in a bathtub. Teri Shields, Brooke's mother and legal guardian, had consented to the taking of these photographs in a 1975 agreement between Gross and herself.¹⁴ It was intended that these photos would be used in a publication entitled "Portfolio 8" (later renamed "Sugar and Spice").¹⁵ The contract provided in part:

I hereby give the photographer, his legal representatives, and assigns, those for whom the photographer is acting, and those acting with his permission, or his employees, the right and permission to copyright and/or use, reuse and/or publish, and republish photographic pictures or portraits of me, or in which I may be distorted in character, or form, in conjunction with my own or a fictitious name, on reproductions thereof in color, or black and white made through any media by the photographer at his studio or elsewhere, for any purpose whatsoever; including the use of any printed matter in conjunction therewith.

11. Cal. Civ. Code, §§36.1, 36.2 (West 1982).

12. Curry, *supra* note 5.

13. *Shields v. Gross*, 448 N.E.2d 108 (N.Y. Ct. App. 1983), *rev'd*, 563 F. Supp. 1253 (S.D.N.Y. 1983).

14. *Id.* at 109.

15. *Id.*

I hereby waive any right to inspect or approve the finished photograph or advertising copy or printed matter that may be used in conjunction therewith or to the eventual use that it might be applied.¹⁶

The New York Court of Appeals held that Brooke Shields could not maintain an action against the photographer where her mother had effectively consented and where the consents were unrestricted as to time and use. The court upheld the consent, stating that a parent who wishes to limit the publicity and exposure of a child need only limit the use authorized in the consent. The court held in effect that an injunction was not permissible because Teri Shields had given *unlimited* consent to the future use of the photographs.¹⁷

The *Shields* case provides insight into the judicial approach used by the New York courts regarding disaffirmance. The Supreme Court, Trial Term of New York County, granted Shields a limited injunction, permanently enjoining the photographer from using or selling the pictures in a pornographic nature. The Supreme Court, Appellate Division, modified this ruling, granting a permanent injunction from any use relating to advertising or trade.¹⁸ The court of appeals held that, despite the fact that Shields' mother's consent was found to be valid by both courts, further release of the photos was restricted. The New York Court of Appeals refused to enjoin Gross's use of the photographs, emphasizing that the only issue of law presented for adjudication was whether the consents given by Teri Shields were valid. Finally, Shields took the case to the United States District Court for the Southern District of New York, filing the complaint on the first business day after the expiration of the state's injunction. She asserted for the first time, that the distribution of the photographs would infringe her federal constitutional right of privacy.¹⁹

The United States district court denied her motion for a preliminary injunction, basing its decision on equitable grounds because "[p]laintiff's counsel has conducted this litigation and timed this application for a preliminary injunctive relief in a manner designed to impose unnecessary unfairness on the defendants."²⁰ In addition, the court stated that the plaintiff failed to satisfy the

16. *Id.*

17. *Id.* at 112.

18. *Id.* at 110.

19. *Shields v. Gross*, 563 F. Supp. at 1254.

20. *Id.* at 1253.

test of irreparable harm necessary for entitlement to preliminary injunctive relief. Another component part of this test requires that the plaintiff "must show either likelihood of success on the merits or serious questions for litigation with the balance of hardships tipping decidedly in her favor."²¹

The court outlined the plaintiff's argument: first, that "the First and other Amendments to the Constitution protect a right of privacy and, second, . . . that the state court's refusal to invalidate the consent is governmental action violating this right."²² The court stated that no decisions supported the existence of a cause of action which would result in "prior restraint of a publication through court censorship" in the guise of first amendment protection.²³

Although Shields claimed that she would suffer irreparable harm, embarrassment and personal distress from the photograph's publication, the court held that the balance of hardships scale did not tip in Shields's favor.²⁴ The court took judicial notice of the fact that there had already been substantial dissemination of these nude photographs. In addition, the court noted that "much of plaintiff's recent commercial activity upon which her fame is based has been far more sexually suggestive than the photographs which have been shown to the court,"²⁵ and therefore, that the plaintiff's claim of harm was diminished by the "development of her career projecting a sexually provocative image."²⁶

Lastly, the district court stated that the:

Defendant's victory in the state courts has been a financial disaster for them. After two years of injunction and one completed lawsuit, plaintiff has not yet shown entitlement to the relief she seeks. Defendants have suffered substantial harm which would be compounded by further interim injunctive relief. They have been unfairly burdened by the litigation strategy of plaintiff's lawyers. I find that the balance of hardship favors the defendants. They are now entitled to be free of court restraint.²⁷

The appellate division strictly construed §§50 and 51 of the New York Civil Rights Law.²⁸ Section 50 is penal and makes it a

21. *Id.* at 1256.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1257.

26. *Id.*

27. *Id.*

28. Curry, *supra* note 5.

misdeemeanor to use a living person's name, portrait or picture for advertising purposes without prior "written consent."²⁹ Section 51 is remedial and creates a related civil cause of action on behalf of the injured party, permitting relief by injunction or damages.³⁰ The court said that the applicable sections of the Civil Rights Law were in derogation of the common law — that the parents' consent is binding on the infant and no words prohibiting disaffirmance are necessary to effectuate the legislative intent.³¹ The court also dismissed the notion that the consents were void because the contract was not court-approved as is required by §3-105 of the General Obligations Law of New York.³² While doing so, the court drew a distinction between child artists and athletes, and child models, noting that given the sporadic nature of modeling and the relatively minute fees involved (due to the fact that most modeling contracts are short-term), judicial approval of child modeling contracts was inappropriate.³³ The court found that the establishment of a trust fund under these circumstances would be unnecessary.

Finally, the court emphasized that an obvious remedy was available. A parent who wishes to limit the publicity and exposure of his or her child under a contract need only limit the use authorized in the consent. No immunity is extended where consent has been effected.³⁴

The dissent in *Shields* viewed the problem from a different perspective, emphasizing a public policy concern. Judge Jasen argued that at issue was the right of an infant to disaffirm her mother's consent with respect to the future unrestricted use of photographs taken of her. The majority held, in Jasen's view, that once a parent consents to the invasion of "privacy of a child, the child is forever bound by that consent and may never disaffirm the continued invasion of his or her privacy, even where the continued invasion of the child's privacy may cause the child enormous embarrassment, distress and humiliation."³⁵

Jasen believed that the interests of society and the state in protecting its children must be placed above any concern for trade or commercialism, and noted that "the state has the right and in-

29. *Id.* at 110.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Shields v. Gross*, 448 N.E.2d at 111.

34. *Id.* at 112.

35. *Id.*

deed the obligation to afford extraordinary protection to minors."³⁶ He reiterated the common law rule which allowed disaffirmance, and interpreted §50 as not derogating this common law right.³⁷ Jasen believed that the broad right to disaffirm was granted in order to afford the minor as much protection against exploitation as possible.³⁸

Jasen asserted that for a child to be fully protected, it was necessary for him to maintain the right to disaffirm. Jasen argued that this common law right was based on the concept that children cannot be fully aware of the potential ramifications of entering into a contract. Allowing a minor the right to disaffirm a contract is merely one method that common law developed to resolve those inequities and afford children the protection they require to compensate for their immaturity.³⁹

IV. REFORM, NOT REVOLUTION

The conclusions reached by the dissenting opinion appear to be valid. The majority strictly construed the statute and failed to consider the additional areas of potential future concern to those in the entertainment field. The child is thus forever bound by a parent's or guardian's decision even if that decision later appears to be exploitative or detrimental to the child's best interests. Furthermore, the child is absolutely and completely precluded from exercising any self-determination or free will to disaffirm, even after he or she reaches majority.

The parent is the primary guardian of the child's welfare and interest. Should the parent fail, however, the state assumes the role of *parens patriae*, thus standing in the shoes of the parent. Therefore, if over the long run, a parent demonstrates bad judgment, the child should not continue to be haunted by this. Even where embarrassment, distress and humiliation are not shown, a child, upon reaching majority, should be allowed to disaffirm a contract entered into on his or her behalf by another, regardless of whether the child has received any benefit. The California and New York legislatures have acted to extend the protection in recognition of this paradox — contract predictability and stability versus minor's rights. Judge Jasen's view that children were afforded more protection under the common law is correct. A return to the

36. *Id.*

37. *Id.* at 113.

38. *Id.*

39. 28 N.Y. Jur., Infants, §3, pp. 221-22 (1963).

common law is not, however, recommended. Reform, not revolution, is required.

A potential alternative would be to require court approval of all contracts involving child entertainers, regardless of their duration. Court approval exists today as an option. It should exist as a requirement and non-compliance should render the contract void *ab initio*. Another possible modification would be to allow for disaffirmance or reaffirmance upon attaining majority. Public policy considerations demand these reforms because of the societal needs for extraordinary protection of minors and for preserving the fundamental right of self-determination.

Karrin R. Boehm
Maria O. Guzman