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Constitutional Law - Due Process- Residence Substituted for Domicile as Basis for Divorce Jurisdiction

Paul Gerding S.Ed.
University of Michigan Law School

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CONSTITUTIONAL LAW—DUE PROCESS—RESIDENCE SUBSTITUTED FOR DOMICILE AS BASIS FOR DIVORCE JURISDICTION—Plaintiff husband brought a divorce action under an Arkansas statute, which granted state courts divorce jurisdiction on the basis of residence of one of the parties within Arkansas

for three months,¹ to terminate a marriage performed in another jurisdiction. Defendant wife, domiciled in California, filed a cross complaint for separate maintenance and attacked the court's jurisdiction to grant the divorce. The lower court held the act unconstitutional in eliminating domicile of one of the parties as a jurisdictional requirement in a divorce action, and, finding that the plaintiff was not domiciled in Arkansas, dismissed the suit. On appeal, *held*, reversed, two judges dissenting. The due process clause of the Federal Constitution does not require domicile as a requisite to divorce jurisdiction. *Wheat v. Wheat*, (Ark. 1958) 318 S.W. (2d) 793.

Domicile² of at least one of the parties in the state of the forum is usually a statutory requisite to jurisdiction in a divorce action.³ Only one case, however, has reached the conclusion that domicile is a constitutional necessity for jurisdiction under the due process clause.⁴ The opposite result, reached in the principal case, seems more sound. The initial basis upon which domicile could be asserted as a constitutional requirement is that the divorce action is one in rem and the res, marital status, is located only at the domicile of either party.⁵ If the subject of an in rem action is not within the territory of the court, the court has no jurisdiction to act; a judgment rendered by a court without jurisdiction offends due process.⁶ The basic premise of the argument, however, that the divorce action is one in rem, has been rejected by the courts.⁷ The second basis for regarding domicile as a requirement of due process rests on the alleged co-extensiveness of the jurisdictional requirements for due process and full faith and credit. Since the Supreme Court has held that a divorce decree rendered by a state in which neither of the parties is domiciled is not entitled to full

¹ Ark. Stat. (1957) §34-1208.1.

² Residence can be established by physical presence within a jurisdiction, but domicile requires physical presence plus the intent to make one's home therein. See *Price v. Price*, 156 Pa. 617, 27 A. 291 (1893); *Putnam v. Johnson*, 10 Mass. 488 (1813); *STUMBERG, CONFLICT OF LAWS*, 2d ed., 20 (1951); *STORY, CONFLICT OF LAWS*, 8th ed., §41 (1883); *CONFLICT OF LAWS RESTATEMENT* §9 (1934).

³ *Williams v. North Carolina*, 325 U.S. 226 (1945); *Bell v. Bell*, 181 U.S. 175 (1901); 2 *NELSON, DIVORCE AND ANNULMENT* 619 (1945); *SCHOULER, DIVORCE MANUAL* 21 (1944); *CONFLICT OF LAWS RESTATEMENT* §111 (1934); 27 C.J.S. §71 (1941).

⁴ *Alton v. Alton*, (3d Cir. 1953) 207 F. (2d) 667, three judges dissenting, app. dismissed as moot, 347 U.S. 610 (1954). See also *GOODRICH, CONFLICT OF LAWS*, 3d ed., 55 (1949); note, 67 *HARV. L. REV.* 516 at 517 (1954). But see *Murphy, J.*, concurring in *Williams v. North Carolina*, 325 U.S. 226 at 239 (1945); *Frankfurter, J.*, concurring in *Williams v. North Carolina*, 317 U.S. 287 at 306 (1942); *Wallace v. Wallace*, 63 N.M. 414 at 417, 320 P. (2d) 1020 (1958).

⁵ The common law viewed the "marital entity" as the husband. Hence his domicile was the domicile of the marital entity. With recognition of the wife's independent status courts treated the domicile of the marital entity as that of either the husband or the wife. The possibility of two domiciles of the marital entity has caused much confusion. See generally *Rheinstein, "The Constitutional Bases of Jurisdiction,"* 22 *UNIV. CHI. L. REV.* 775 (1955).

⁶ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁷ *Haddock v. Haddock*, 201 U.S. 562 (1906). *Williams v. North Carolina*, 317 U.S. 287 (1942), overruled *Haddock* but not on this point.

faith and credit,⁸ it is argued that the initial rendering of the decree must violate due process. This general theory of co-extensiveness has little case authority to support it, although there is likewise little authority requiring a contrary result.⁹ But it appears that at least in divorce cases the jurisdictional requirements for due process are not co-extensive with the jurisdictional requirements for full faith and credit. Full faith and credit is denied on jurisdictional grounds to divorce decrees of non-domiciliary states to protect the dominant interest of the domiciliary state in the marital affairs of its citizens.¹⁰ The jurisdictional demands of due process, on the other hand, are designed to preserve fundamental fairness in determining the rights of the parties to the action.¹¹ Since the domiciliary state is not a party to the action, any failure to consider its interests in determining requirements for jurisdiction would not be objectionable on due process grounds.¹² To determine that due process is offended because of the greater interest in the domiciliary state in the marital affairs of its citizens is to reason from considerations unrelated to due process ideas of fundamental fairness.¹³ Although some contact between the rendering state and the marital status may be essential for fundamental fairness several decisions have indicated that contacts other than domicile are sufficient to fulfill the constitution's demands.¹⁴

⁸ *Williams v. North Carolina*, 325 U.S. 226 (1945); *Rice v. Rice*, 336 U.S. 674 (1949).

⁹ See *Alton v. Alton*, note 4 *supra*, at 684; Stumberg, "Jurisdiction To Divorce," 24 *TEX. L. REV.* 119 at 123-124 (1946); Stimson, "Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory," 42 *A.B.A.J.* 222 at 224-225 (1956).

¹⁰ The interest of the domiciliary state in the marital affairs of its citizens is considered paramount over all other states; to avoid the determinative effect of the rendering state's judgment, the conclusion is reached that the court was without jurisdiction, and therefore its judgment is not entitled to full faith and credit. See *Williams v. North Carolina*, 325 U.S. 226 (1945); *Williams v. North Carolina*, 317 U.S. 287 at 298 (1942); Stumberg, "Jurisdiction To Divorce," 24 *TEX. L. REV.* 119 at 130-131 (1946). But see Rodman, "Bases of Divorce Jurisdiction," 39 *ILL. L. REV.* 343 at 362-363 (1945).

¹¹ See *Palko v. Connecticut*, 302 U.S. 319 (1937); *Adamson v. California*, 332 U.S. 46 (1947).

¹² The Alton court concluded due process was offended by divorce jurisdiction without domicile because the real state of domicile would be deprived of its control over the marital status. Yet the protection of the Fourteenth Amendment is limited to persons. The wording itself indicates this: "No person shall be deprived of. . ." See Clark, J., dissenting in *Granville-Smith v. Granville-Smith*, 349 U.S. 1 at 16 (1955); Lorenzen, "Haddock v. Haddock Overruled," 52 *YALE L.J.* 341 at 352 (1943); note, 54 *COL. L. REV.* 415 at 419 (1954).

¹³ The domicile requirement, not a traditional requirement of fairness, stems from the nineteenth century judicial notions of comity among the states. See Costas, "Divorce and Domicile: Where Confusion Reigns Supreme," 5 *SYRACUSE L. REV.* 219 (1954); Griswold, "Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study," 65 *HARV. L. REV.* 193 (1951); Cook, "Is Haddock v. Haddock Overruled?" 18 *IND. L.J.* 165 (1943). See also Rheinstein, "The Constitutional Bases of Jurisdiction," 22 *UNIV. CHI. LAW REV.* 775 (1955).

¹⁴ See *Wallace v. Wallace*, note 4 *supra* (one year's residence); *David-Zieseniss v. Zieseniss*, 205 *Misc.* 336, 129 *N.Y.S.* (2d) 649 (1954) (parties married in the state); *Craig v. Craig*, 143 *Kan.* 624, 56 *P.* (2d) 464 (1936) (domiciliary test eliminated for servicemen stationed in the state). But see *Jennings v. Jennings*, 251 *Ala.* 73, 36 *S.* (2d) 236 (1948) (residence alone held insufficient for jurisdiction).

Domicile is a jurisdictional requirement for full faith and credit purposes primarily to protect the interest of states having predominant interests in the marital relation.¹⁵ Such protection may be desirable, but a far more sound means of accomplishing this end would be to compel the rendering state to apply the laws of the state determined to have the predominant interest in the marital relation.¹⁶ Rather than regarding domicile as a jurisdictional requirement, predominant interest should merely indicate the choice of law to be used. Yet, such a conclusion would create problems of divorce law replacing current jurisdictional problems. Most of the difficulty in the area today stems from the subjectivity inherent in the domiciliary concept. Although marriage may import public interest, and although a particular state may have a predominant interest in the marital relation which justifies giving its marital policies controlling importance, to define predominant interest in terms of domicile is fraught with difficulty.¹⁷ A more stable, realistic, and objective test is needed. Residence or marital domicile are two alternative possibilities.¹⁸ Physical presence or place of marriage are easily discernible; intent is not. Rejecting the domiciliary test in favor of a more objective test for applicable divorce law and determining that predominant interest is merely important as a choice of law problem rather than a jurisdictional one would eliminate much of the incongruity in existing divorce law.

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¹⁵ See note 10 *supra*. However, the protection afforded the interests of the state of predominant factual concern by the domicile requirement may be lost if the defendant actually litigates the question of domicile. In such circumstances the finding of domicile is unassailable. See *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

¹⁶ See *Hastie, J.*, dissenting in *Alton v. Alton*, note 4 *supra*, at 684-685.

¹⁷ One such difficulty is the likelihood that parties will perjure themselves to fulfill the domicile requirement. See the discussion of this question in the principal case at 795.

¹⁸ On marital domicile, or where the parties were married, see the persuasive argument in *David-Zieseniss v. Zieseniss*, note 14 *supra*.