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Conflict of Laws - Full Faith and Credit - Foreign Custody Decrees

Theodore J. St. Antoine S.Ed.
University of Michigan Law School

CONFLICT OF LAWS—FULL FAITH AND CREDIT—FOREIGN CUSTODY DECREES — Husband and wife were domiciled in Wisconsin. When marital troubles developed, the parties agreed that the wife should take their children to Ohio and there decide on her future action. Shortly afterward the wife informed the husband she was not returning. The husband secured a divorce in Wisconsin, with the decree purporting to award him custody of the children subject to visitation rights in the wife. Service on the wife was obtained by publication, but she made no appearance in the Wisconsin proceedings. After one of the visits of the children, the wife refused to return them and the husband filed a petition for habeas corpus[1] in Ohio, relying upon the Wisconsin decree. The Ohio intermediate appellate court affirmed the probate court's order that the wife give up the children, holding that Wisconsin had jurisdiction to render a binding decree since it was the children's domicile.[2] The state supreme court dismissed an appeal.[3] On certiorari, the United States Supreme Court *held,* reversed, three justices dissenting. Where a court lacks personal jurisdiction over a parent, its decree cutting off the parent's immediate right to custody of minor children need not be accorded full faith and credit. *May v. Anderson,* 345 U.S. 528, 73 S.Ct. 840 (1953).

The Supreme Court has never squarely decided whether a foreign custody decree is entitled to full faith and credit under the Constitution,[4] and the present case leaves that question still unresolved. However, of the eight participating justices only Justice Frankfurter, concurring, voiced a flat objection to the application of traditional full faith concepts to child custody decrees. To six justices the case presented the familiar issue of what constitutes the requisite jurisdictional basis to render a decree binding on other states.[5] Two of these justices believed that domicile of the child plus that of one parent suffices;[6] while not disputing that domicile of the child is necessary, the other four decided that there must also be personal jurisdiction over the parent sought to be bound.[7] In the instant case that parent had possession of the child outside the jurisdiction purportedly awarding custody, but the Court is not wholly clear about the significance of this fact.[8] The division within the

[1] Under Ohio procedure the writ of habeas corpus "tests only the immediate right to possession of the children." Principal case at 532; In re Corey, 145 Ohio St. 413, 61 N.E. (2d) 892 (1945). In some states the court may determine the future custody of the children in a habeas corpus proceeding. See, e.g., People of State of New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S.Ct. 903 (1947).

[2] Anderson v. May, 91 Ohio App. 557, 107 N.E. (2d) 358 (1951).

[3] Anderson v. May, 157 Ohio St. 436, 105 N.E. (2d) 648 (1952).

[4] U.S. CONST., art. IV, §1. See People of State of New York ex rel. Halvey v. Halvey, note 1 supra; Ehrenzweig, "Interstate Recognition of Custody Decrees," 51 MICH. L. REV. 345 at 356-357 (1953).

[5] Justice Minton, dissenting, thought the jurisdictional question was not properly raised and that the Wisconsin decree was entitled on its face to full faith and credit.

[6] Justices Jackson and Reed, dissenting.

[7] Justice Burton delivered the opinion of the Court, joined in by Chief Justice Vinson and Justices Black and Douglas.

[8] It has been held that where the child is outside the state a court cannot render a

Supreme Court is mirrored in state decisions and textual writing. The *Restatement,* to which the majority of the courts at least pay lip service, declares that only the state of the child's domicile has jurisdiction to make a binding custody award.[9] This view is based on the theory that custody is a matter of status to be controlled by the state of domicile,[10] but it is open to the serious objection that the technical rules of domicile may not provide a realistic determination of the state most interested in the child's welfare.[11] Some courts, emphasizing the claims of the parents, maintain that personal jurisdiction over the parents is sufficient regardless of the domicile or whereabouts of the child.[12] Others stress the position of the state as parens patriae and hold that residence or physical presence of the child within the state confers jurisdiction to award custody.[13] Legal writers have challenged the reliability of these "rules," asserting that a scrutiny of the actual holdings of the cases shows: (1) courts of any states having a substantial interest in the welfare of the child exercise concurrent jurisdiction to determine custody;[14] and (2) although such courts feel free to change custody awards, they will generally enforce a foreign decree where non-enforcement would benefit a parent with "unclean hands."[15] While

binding custody award without personal jurisdiction over both parents. Carter v. Carter, 201 Ga. 850, 41 S.E. (2d) 532 (1947). See May v. May, 233 App. Div. 519, 253 N.Y.S. 606 (1931). In neither of these cases was the court explicit as to the state of the child's domicile. Cf. Weber v. Redding, 200 Ind. 448, 163 N.E. 269 (1928) (award not binding where child was neither domiciled nor present in the jurisdiction).

[9] CONFLICT OF LAWS RESTATEMENT §117 (1934); GOODRICH, CONFLICT OF LAWS, 3d ed., 421 (1949); Duryea v. Duryea, 46 Idaho 512, 269 P. 987 (1928); Callahan v. Callahan, 296 Ky. 444, 177 S.W. (2d) 565 (1944); annotation, 9 A.L.R. (2d) 434 (1950). Generally there is also personal jurisdiction over both parents. But see Minick v. Minick, 111 Fla. 469, 149 S. 483 (1933) (court awarded custody where child domiciled in forum was residing with absent parent).

[10] Goodrich, "Custody of Children in Divorce Suits," 7 CORN. L.Q. 1 at 2-3 (1921).

[11] Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW AND CONTEM. PROB. 819 at 820-823 (1944). In extreme cases the child has never lived in the state of domicile. Pieretti v. Pieretti, 13 N.J. Misc. 98, 176 A. 589 (1935).

[12] Anderson v. Anderson, 74 W.Va. 124, 81 S.E. 706 (1914); May v. May, note 8 supra (dictum).

[13] De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345 (1896); Kenner v. Kenner, 139 Tenn. 211, 201 S.W. 779 (1918) (upholding foreign decree rendered in ex parte proceeding); see Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925); annotation, 4 A.L.R. (2d) 7 (1949). This view finds support in STUMBERG, CONFLICT OF LAWS, 2d ed., 327 (1951).

[14] Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW AND CONTEM. PROB. 819 at 831-832 (1944). See Stafford v. Stafford, 287 Ky. 804, 155 S.W. (2d) 220 (1941); Sampsell v. Superior Court, 32 Cal. (2d) 763, 197 P. (2d) 739 (1948). The substantial interest necessary to support a state's concurrent jurisdiction might be domicile or residence of the child. See 50 MICH. L. REV. 602 (1952); 9 A.L.R. (2d) 434 at 441-442 (1950).

[15] Ehrenzweig, "Interstate Recognition of Custody Decrees," 51 MICH. L. REV. 345 esp. at 357 et seq. (1953). See also McMillin v. McMillin, 114 Colo. 247, 158 P. (2d) 444 (1945); Ex parte Mullins, 26 Wash. (2d) 419, 174 P. (2d) 790 (1946); Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW AND CONTEM. PROB. 819 at 829 (1944). Query as to the import of the Court's reference in the principal case at 535, n. 8, to the "special considerations" that arise when a parent acts in bad faith.

the result of the principal case could be justified on these bases, the reasoning of the Court is unlikely to lessen the confusion in a field sorely in need of clarification. The majority opinion is ambiguous,[16] and seems to uphold the applicability of the full faith and credit clause to child custody decrees through an uncritical acceptance of the authority of cases involving property rights and the marital status.[17] Most regrettably, the Court concerns itself primarily with the claims of the parents rather than with the welfare of the child.[18] It thus ignores what are really the two chief competing policy factors in this area: the need to protect the child from endless litigation over his custody, and the need to enable custody awards by the court most qualified at any given time to determine the child's best interests. Apparently experience has convinced the courts that the second factor is paramount.[19] Since this is so it would seem desirable to limit the possible applicability of the full faith and credit clause in custody cases by making prior adjudications binding only on the parents, leaving the forum state free as parens patriae to look after the welfare of the child.[20] It might be questioned whether this distinction is much more than a verbalism, but at least it may satisfy the Supreme Court's full faith requirements until an ultimate solution is found for the custody problem.[21] Treating the award of a child's custody like a judgment for alimony payments is hardly such a solution.

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[16] Justice Frankfurter thought the Court was deciding that Ohio need not enforce the Wisconsin decree; Justice Jackson, that Ohio must not enforce it.

[17] The state of the plaintiff's domicile may make a binding dissolution of the marriage status, Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207 (1942), but personal jurisdiction over the defendant is necessary to terminate a spouse's right under a prior alimony decree, Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213 (1948). Only Justice Frankfurter deemed a custody decree unique and governed by neither of the foregoing rules.

[18] It is axiomatic that the child's welfare is the principal consideration in custody cases. MADDEN, DOMESTIC RELATIONS 369 (1931). The approach of the Court in the present case may have been influenced by the scope of habeas corpus proceedings in Ohio. See note 1 supra.

[19] See notes 14 and 15 supra. See also State v. Ricketson, 221 La. 691, 60 S. (2d) 88 (1952). Cf. In re Bort, 25 Kan. 308 (1881); Commonwealth ex rel. Rogers v. Daven, 298 Pa. 416, 148 A. 524 (1930) (repudiating full faith doctrines in custody cases so far as the state is concerned). And note the readiness with which the courts find "changed circumstances" in order to circumvent the foreign decree. GOODRICH, CONFLICT OF LAWS, 3d ed., 423 (1949).

[20] In general, this was the view in Wear v. Wear, 130 Kan. 205, 285 P. 606 (1930). But see 81 UNIV. PA. L. REV. 970 (1933).

[21] Uniform legislation providing for interstate cooperation between courts acting on their own initiative has been suggested. Ehrenzweig, "Interstate Recognition of Custody Decrees," 51 MICH. L. REV. 345 at 372-374 (1953).