

1949

CONFLICT OF LAWS-JURISDICTIONAL BASIS FOR AWARDING CUSTODY OF MINOR CHILD

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Recommended Citation

Charles E. Becraft S. Ed., *CONFLICT OF LAWS-JURISDICTIONAL BASIS FOR AWARDING CUSTODY OF MINOR CHILD*, 47 MICH. L. REV. 703 ().

Available at: <https://repository.law.umich.edu/mlr/vol47/iss5/9>

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CONFLICT OF LAWS—JURISDICTIONAL BASIS FOR AWARDING CUSTODY OF MINOR CHILD—Plaintiff and his wife, domiciliaries of California, separated June 3, 1946. On Oct. 25, 1946, the wife took the minor child of the marriage to Nevada where she commenced proceedings to obtain a divorce. On Feb. 4, 1947, a final decree awarded her a divorce and custody of the child. She remarried and

moved to Utah where she and the child have lived ever since. On Jan. 2, 1947, the plaintiff filed a petition in California asking for a divorce and custody of the child. On July 8, 1947, plaintiff applied for an order *pendente lite* to award him custody pending trial in the California action. The wife answered the petition through an attorney and moved to dismiss the application, claiming that the court had no jurisdiction as the child was not in California and had not been in the state at the time the petition was filed. The motion to dismiss was granted. Plaintiff sought a writ of mandamus to compel a hearing on the order. *Held*, mandamus granted. The wife's demurrer to the alternative writ for mandamus constituted an admission of the allegation in plaintiff's petition that the child was domiciled in California. This, along with the state's interest in the welfare of the child, was sufficient to give the California court jurisdiction in the matter of custody. *Sampsell v. Superior Court*, (Cal. 1948) 197 P. (2d) 739.

There is little accord among the states as to the proper basis of jurisdiction to award custody of a minor child.¹ While most courts agree that there can be no jurisdiction if the child is neither physically present nor domiciled within the state,² there is authority supporting the view that a court has jurisdiction to award custody if both parents are before the court.³ This view is premised on the idea that custody is primarily a question of parental right.⁴ More authority can be found supporting the proposition that custody rests on the domicile of the child.⁵ The rationale of this position seems to be that custody is a matter of status and the state to properly determine it is that of domicile.⁶ The weakness of this position is that custody, unlike questions of divorce and adoption, does not fit well into the concept of status, as the court is not creating or dissolving a legal relationship, but is making a determination as to which of two or more contesting parties has the best claim to the child.⁷ Other courts ground jurisdiction on the actual presence or residence of the minor child within the boundaries of the state, reasoning that the state has complete jurisdiction to protect the helpless child.⁸ In these

¹ Stumberg, "The Status of Children in The Conflict of Laws," 8 UNIV. CHI. L. REV. 42 at 59 (1940).

² *Sanders v. Sanders*, 223 Mo. App. 834, 14 S.W. (2d) 458 (1929); 2 BEALE, THE CONFLICT OF LAWS 718 (1935).

³ *Stephens v. Stephens*, 53 Idaho 427, 24 P. (2d) 52 (1933).

⁴ *Anderson v. Anderson*, 74 W.Va. 124, 81 S.E. 706 (1914).

⁵ 2 BEALE, THE CONFLICT OF LAWS 717 (1935); RESTATEMENT OF THE CONFLICTS OF LAW, § 117 (1934); *Duryea v. Duryea*, 46 Idaho 512, 269 P. 987 (1928); *Dorman v. Friendly*, 146 Fla. 732, 1 S. (2d) 734 (1941); *Person v. Person*, 172 La. 740, 135 S. 225 (1931); *Callahan v. Callahan*, 296 Ky. 444, 177 S.W. (2d) 565 (1944).

⁶ *Stansbury*, "Custody and Maintenance Across State Lines," 10 LAW AND CONT. PROB. 819 (1944).

⁷ Stumberg, "The Status of Children in The Conflict of Laws," 8 UNIV. CHI. L. REV. 42 at 55 (1940).

⁸ *White v. White*, 77 N.H. 26, 86 A. 353 (1913); *Steele v. Steele*, 152 Miss. 365, 118 S. 721 (1928); *Durfee v. Durfee*, 293 Mass. 472, 200 N.E. 395 (1936). There is authority that jurisdiction exists even if the child was fraudulently brought into the state for the purpose of conferring jurisdiction on the courts of the state. See *Sheehy v. Sheehy*, 88 N.H. 223, 186 A. 1. (1936).

states, the actual domicile of the parents or child is immaterial.⁹ One author suggests that there may be concurrent jurisdiction in several courts, and this view is recognized by the majority decision in the principal case.¹⁰ Since courts agree that in custody matters the primary consideration should be the best interests of the child,¹¹ it would appear that a view supporting concurrent jurisdiction is unsatisfactory; the best interests of the child would be jeopardized by the possibility of conflicting claims to jurisdiction which could result in long periods of litigation adversely affecting the stability of the child's life.¹² A more realistic approach can be found in basing jurisdiction on the actual presence of the child, since the state in which the child is found has a great interest in protecting the rights and settling the problems of minors found within its borders. Moreover, the court which has the child before it would be in a better position to make a thorough examination of the facts and could effectively carry out the provisions of any decree. It is submitted that this view more satisfactorily protects the best interests of the child than one basing jurisdiction on the highly technical concept of domicile.

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⁹ *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925); *Kenner v. Kenner*, 139 Tenn. 211, 201 S.W. 779 (1918).

¹⁰ Stansbury, "Custody and Maintenance Across State Lines," 10 *LAW AND CONTEMPORARY PROBLEMS* 819 at 831 (1944).

¹¹ MADDEN, *DOMESTIC RELATIONS* 369 (1931); *Sheehy v. Sheehy*, supra, note 8; *People v. Torrence*, 94 Colo. 47, 27 P. (2d) 1038 (1933); *Steele v. Steele*, supra, note 8. It is to be noted that a custody decree is conclusive only where a change of circumstances cannot be shown. GOODRICH, *CONFLICT OF LAWS* 359 (1938). The recognition of custody decrees in sister-states is outside the scope of this note.

¹² See the concurring opinion of Justice Rutledge in *Halvey v. Halvey*, 330 U.S. 610 at 619, 67 S. Ct. 903 (1947).