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CONFLICT OF LAWS-DOMICILE OF CHILD LIVING WITH MOTHER

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CONFLICT OF LAWS—DOMICILE OF CHILD LIVING WITH MOTHER—Plaintiff and defendant, husband and wife, were domiciled in New York. Because of temporary unemployment, plaintiff took his wife and minor child to Connecticut. He later returned to New York and resided in the apartment the family had formerly occupied. The wife and child did not return to New York, and the court found that she had at all times intended to remain in Connecticut and establish a domicile there. Plaintiff at all times intended to make New York his permanent residence. When defendant would not return to New York, plaintiff brought action for separation in a New York court, defendant being served in Connecticut with a copy of the complaint. Defendant did not appear in the action, and the New York court rendered a decree of separation, awarding custody of the child to each parent for a portion of each year. Plaintiff then sought habeas corpus in Connecticut to obtain custody of the child on the basis of the New York decree. Although the trial court did not find that the husband had committed any fault which would justify the wife in leaving him, it refused to grant the husband custody. *Held*, affirmed. A wife can acquire a separate domicile regardless of fault, and since both Connecticut and New York, by statute,[1] provide for joint guardianship by husband and wife, the domicile of a child living with its mother is the domicile of the mother. Thus the court in New York had no jurisdiction to award custody.[2] *Boardman v. Boardman*, (Conn. 1948) 62 A. (2d) 521.

The common law rule is that the domicile of a minor child is that of its father,[3] and even if the child is living apart from the father, its domicile follows

[1] Conn. Gen. Stat. (1949) §6850; N. Y. Dom. Rel. Law (McKinney, 1941) §81.

[2] A vigorous dissent attacked the position of the majority on the ground that defendant had ample opportunity to defend in the New York action and should not now be heard to complain of the custody decree. See Sherrer v. Sherrer, 334 U.S. 343, 68 S. Ct. 1087 (1948). The dissenting judges also maintained it is incorrect to allow a wife to abandon her husband and thus acquire a domicile for herself and the child in another state, so as to take from the court of the state of previous domicile jurisdiction in custody matters.

[3] STUMBERG, CONFLICT OF LAWS 43 (1937); 53 A.L.R. 1160 (1928).

him.[4] There are exceptions to this rule; if the father forces the wife to leave him[5] or is guilty of parental neglect,[6] he is deemed to have abandoned his right to custody, and the domicile of the child becomes that of the mother. The earlier cases made the acquisition of a separate domicile by the wife depend upon some justification, such as fault of the husband.[7] The fault doctrine has been abandoned,[8] however, and it now seems possible for a wife to acquire a domicile separate from that of her husband whenever she wishes to do so. Applying a strict common law approach to the problem raised in the principal case, the New York courts undoubtedly had jurisdiction, as the domicile of the child would be that of the father.[9] In several states, however, statutes like that relied on in the principal case are found, changing the common law rule and giving equal custody rights to husband and wife.[10] If each spouse is entitled to custody, there would seem to be jurisdiction regarding custody matters in any state where one of the spouses is domiciled. Indeed, the question is raised by the dissenting judges as to the view New York courts would take if the jurisdictional question ever again came before them. In light of judicial statements in other cases, a New York court might well decide that it had jurisdiction at all times.[11] Cases in which the facts were similar to those of the principal case, as well as some text authority, suggest that the child's domicile is the domicile of the parent with whom he lives, concurring with the decision in the instant case.[12] Some of these cases mention fault,[13] while others base jurisdiction on residence of the child and fail to mention domicile.[14] The question of fault should still be

[4] Yarborough v. Yarborough, 290 U.S. 202, 54 S.Ct. 181 (1933); Hunt v. Hunt, 94 Ga. 257, 21 S.E. 515 (1894); Rasco v. Rasco, 139 Fla. 349, 190 S. 510 (1939); Beale, "Domicil of an Infant," 8 CORN. L.Q. 103 (1923).

[5] In re Means, 176 N.C. 307, 97 S.E. 39 (1918).

[6] Elliot v. Elliot, 181 Ga. 545, 182 S.E. 845 (1935). Note that a Georgia statute codifies the common law rights of the father. Ga. Code Ann. (1937) §79-404.

[7] Atherton v. Atherton, 181 U.S. 155, 21 S.Ct. 544 (1901); Haddock v. Haddock, 201 U.S. 562, 26 S. Ct. 525 (1906).

[8] Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207 (1942).

[9] Glass v. Glass, 260 Mass. 562, 157 N.E. 621 (1927).

[10] For example, see Mo. Rev. Stat. Ann. (1942) §1528; Md. Code Ann. (1939) art. 72A, §1; Ind. Stat. Ann. (1934) §8-110; Pa. Stat. Ann. (Purdon, 1930) tit. 48, §91.

[11] White v. White, 77 N.H. 26 at 30, 86 A. 353 (1913): "It follows from what has been said, that as the mother, at the time the child was taken from this state at the instance of the father, was domiciled here and was a joint guardian possessing equal rights with the father to the child's custody, the child's domicile in this state was not lost by her removal to the domicile of the father in Ohio; and the court had jurisdiction . . . to determine the question of custody, and its jurisdiction over the latter question could be invoked in a divorce. . . ."

[12] STUMBERG, CONFLICT OF LAWS 43 (1937); CONFLICT OF LAWS RESTATEMENT §32 (1934); Ex parte Halvey, 185 Misc. 52, 55 N.Y.S. (2d) 761 (1945); and see Callahan v. Callahan, 296 Ky. 444, 177 S.W. (2d) 565 (1944), where the court held that if a wife has the child living with her, they have the same domicile.

[13] Turman v. Turman, (Tex. 1936) 99 S.W. (2d) 947, cert. den., 301 U.S. 698, 57 S.Ct. 933 (1937); Bryant v. Dukehart, 106 Ore. 359, 210 P. 454 (1922).

[14] Rasco v. Rasco, 139 Fla. 349, 190 S. 510 (1939). There is also authority that domicile is completely irrelevant if the child is before the court. Kenner v. Kenner, 139 Tenn. 211, 201 S.W. 779 (1918).

considered, however, and there is authority that even with a joint custody statute, the domicile of the child remains that of the father unless he has acted in such a way as to lose his rights.[15] One cannot criticize holdings that if the father is at fault the child's domicile becomes that of the mother with whom he lives, but it is to be seriously questioned that abrogation of the fault doctrine as to a wife's domicile carries with it the right to found a new domicile for a minor child. If this policy were followed, the statutes would afford an opportunity for a spouse who is admittedly in the wrong to remove the child to another state and greatly inconvenience the innocent spouse in obtaining an adjudication as to custody of the child. There may be merit in allowing a court to claim original jurisdiction or to reopen custody matters, when the child is residing within the borders of the state, on the basis that the best interests of the child will be more adequately protected than in a state where he is not present. However, where courts purport to base jurisdiction on the child's domicile, the equities of the contesting parents should be considered in determining that domicile.

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[15] Bryant v. Dukehart, 106 Ore. 359, 210 P. 454 (1922).