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CONFLICT OF LAWS-FULL FAITH AND CREDIT-CUSTODY DECREES

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CONFLICT OF LAWS—FULL FAITH AND CREDIT—CUSTODY DECREES—Husband and wife, living in Ohio, were separated in 1945, the only child going to live with the paternal great-grandfather in Pennsylvania. Husband and wife were divorced in Ohio in April 1949. Custody of the child was awarded the wife, but because of the wife's defective vision the child was to remain temporarily with the great-grandfather; it was further provided that the custody question could be relitigated after eighteen months. On October 26, 1949, the wife got a further Ohio decree awarding her sole custody.[1] The great-grandfather refused to surrender the child, and wife filed a petition for habeas corpus in Pennsylvania, November 2, 1949. The Superior Court reversed the trial court

[1] Husband's lawyer appeared and asked for a continuance, which was denied.

and granted the writ.[2] *Held,* reversed, two judges dissenting. The Ohio court did not have jurisdiction to make the custody decree of October 26, and therefore the decree need not be given full faith and credit in Pennsylvania. *Commonwealth ex rel. Graham v. Graham,* 367 Pa. 553, 80 A (2d) 829 (1951).

Custody decrees are entitled to full faith and credit in sister states,[3] unless the court making the award was without jurisdiction.[4] The basic question thus becomes: what is the requisite jurisdictional basis to render a custody decree binding upon other states? Some courts have held that the child must be physically present within the territorial limits of the state making the award;[5] other courts have held that residence of the child in the state is the proper jurisdictional basis.[6] The majority of the courts, and the *Restatement,* hold that only courts of the state of the child's domicile[7] can make a custody award which will be given full faith and credit in sister states.[8] The court in the principal case says that either domicile or residence is a proper basis,[9] but proceeds to base its

[2] Commonwealth ex rel. Graham v. Graham, 167 Pa. Super. 470, 75 A. (2d) 614 (1950).

[3] U.S. CONST., Art. IV, §1. CONFLICT OF LAWS RESTATEMENT §147 (1934); GOODRICH, CONFLICT OF LAWS, 3d ed., 423 (1949); Yarborough v. Yarborough, 290 U.S. 202, 54 S.Ct. 181 (1933); In re Leete, 205 Mo. App. 225, 223 S.W. 962 (1920). Custody decrees may be modified, however, if there has been a change in conditions since the first decree. Halvey v. Halvey, 330 U.S. 610, 67 S.Ct. 903 (1947); Commonwealth ex rel. Rogers v. Daven, 298 Pa. 416, 148 A. 524 (1930); Griffin v. Griffin, 95 Ore. 78, 187 P. 598 (1920). Moreover, the courts often require very little to find a subsequent change in conditions. Mylius v. Cargill, 19 N.M. 278, 142 P. 918 (1914); Gaunt v. Gaunt, 160 Okla. 195, 16 P. (2d) 579 (1932).

[4] Duryea v. Duryea, 46 Idaho 512, 269 P. 987 (1928); Brandon v. Brandon, 154 Ga. 661, 115 S.E. 115 (1922). Cf. Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092 (1945). The court in the principal case says, at 561, that full faith and credit need not be given when the court had "doubtful" jurisdiction, relying on Frankfurter's concurring opinion in Halvey v. Halvey, supra note 3, at 618.

[5] De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345 (1896); Sheehy v. Sheehy, 88 N.H. 223, 186 A. 1 (1936), 107 A.L.R. 635 (1937); Cole v. Cole, 194 Miss. 292, 12 S. (2d) 425 (1943). Stansbury believes that when courts speak of presence they often really mean residence. Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW AND CONTEM. PROB. 819 (1944).

[6] Goldsmith v. Salkey, 131 Tex. 139, 112 S.W. (2d) 165 (1938), 116 A.L.R. 1293 (1938); Titcomb v. Superior Court of Santa Clara County, 220 Cal. 34, 29 P. (2d) 206 (1934). In support of this view, Stumberg, "The Status of Children in the Conflict of Laws," 8 UNIV. CHI. L. REV. 42 (1940).

[7] "Domicil is the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by law." CONFLICT OF LAWS RESTATEMENT §9 (1934). A person may have several residences or no residence, but he always has one domicile. See, GOODRICH, CONFLICT OF LAWS, 3d ed., 50 (1949).

[8] CONFLICT OF LAWS RESTATEMENT §117 (1934); 2 BEALE, CONFLICT OF LAWS §144.3 (1935); Callahan v. Callahan, 296 Ky. 444, 177 S.W. (2d) 565 (1944); Jones v. McCloud, 19 Wash. (2d) 314, 142 P. (2d) 397 (1943); Larson v. Larson, 190 Minn. 489, 252 N.W. 329 (1934). For a discussion of the various views, 47 MICH. L. REV. 703 (1949).

[9] Principal case at 559. This language is in accord with Pennsylvania decisions. Teitelbaum v. Teitelbaum, 160 Pa. Super. 286, 50 A. (2d) 713 (1947); Camp v. Camp,

decision on the tenuous finding of fact that neither the domicile nor residence of the child was in Ohio at time of the decree.[10] The theory behind the majority view is that custody is a status, and jurisdiction to determine matters of status is in the state of domicile of the person whose status is being affected.[11] It has been objected, however, that custody is more of a physical than a legal relationship, and thus is not truly a status.[12] But there is a more fundamental objection to the majority view: because of the artificial rules determining domicile of children,[13] a child may never have been present in the state of his domicile, and the state may have no interest in him.[14] Welfare of the child, the first principle in custody cases,[15] is thus subverted. The writer feels that the conflict in the decisions can be explained as an attempt by the courts to avoid such subversion.[16] Unfortunately, the avoidance devices adopted by the courts are not satisfactory. Neither presence nor residence within the state is a desirable jurisdictional basis; both raise the risk of allowing a state, where the child happens to be temporarily resident or present, to pass on the custody question and bind a sister state which has a much greater interest in the child, and where, perhaps, reside all the persons qualified to testify in the custody litigation. On the other hand, for the courts to circumvent the force of the full faith and credit clause by superficial findings of no jurisdiction in the court making the decree is to set the stage for never ending custody litigations, from state to state, with consequent detrimental effects on the child. It is submitted that jurisdiction to render

150 Pa. Super. 649, 29 A. (2d) 363 (1942). See, Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW AND CONTEM. PROB. 819 (1944), in support of concurrent jurisdiction for custody decrees.

[10] As pointed out by the dissenting opinion in the principal case at 571.

[11] CONFLICT OF LAWS RESTATEMENT §119 (1934); Goodrich, "Custody of Children in Divorce Suits," 7 CORN. L.Q. 1 at 3 (1921).

[12] Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW AND CONTEM. PROB. 819 at 820 (1944).

[13] As a general rule, a legitimate child takes the domicile of his father. CONFLICT OF LAWS RESTATEMENT §30 (1934); GOODRICH, CONFLICT OF LAWS, 3d ed., 83 (1949); Brandon v. Brandon, supra note 4. After a custody decree, the child's domicile is that of the person awarded custody. CONFLICT OF LAWS RESTATEMENT §32 (1934); In re Volk, 254 Mich. 25, 235 N.W. 854 (1931). If the father abandons the wife and child, the child takes the domicile of the mother. RESTATEMENT, §33; Elliott v. Elliott, 181 Ga. 545, 182 S.E. 845 (1935).

[14] Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW AND CONTEM. PROB. 819 at 820-823 (1944).

[15] MADDEN, DOMESTIC RELATIONS 369 (1931); In re Rosenthal, 103 Pa. Super. 27, 157 A. 342 (1931); In re Leu, 240 Mich. 240, 215 N.W. 384 (1927).

[16] Note the tenuous finding of the principal case, supra note 10. Also see, Ex parte Peddicord, 269 Mich. 142, 256 N.W. 833 (1934); Elliott v. Elliott, supra note 13; Titcomb v. Superior Court of Santa Clara County, supra note 6; In re Leu, supra note 15. If the child's welfare will be protected under the majority rule, the court will not depart from it. Ex parte Inman, 32 Cal. App. (2d) 130, 89 P. (2d) 421 (1939); Kruse v. Kruse, 150 Kan. 946, 96 P. (2d) 849 (1939); Brandon v. Brandon, supra note 4; People ex rel. Wagner v. Torrence, 94 Colo. 47, 27 P. (2d) 1038 (1933).

a custody decree binding on sister states should be solely in the state having the greatest and closest connections with the child;[17] that state would be the one best qualified to determine the custody question, and presumably the one having the greatest interest in the child's welfare. With such a jurisdictional basis, it should follow that sister states would no longer hesitate to accord full faith and credit to custody awards, and they will have a degree of stability which they have not yet enjoyed. The suggested approach would accomplish the primary objective of the law in custody cases—securing the best interests of the child.[18]

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[17] This state will usually be the state of the child's domicile, but not always. Supra note 7.

[18] See, 81 UNIV. PA. L. REV. 970 at 971 (1933).