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CASES NOTED

CONFLICT OF LAWS — JURISDICTION TO DETERMINE CUSTODY OF CHILDREN BROUGHT ACROSS STATE LINES

In divorce proceedings, plaintiff father was awarded permanent custody of children in Missouri where all the parties were then domiciled. The defendant mother violated the custody decree and took the children into Iowa, where the father brought a habeas corpus proceeding for the custody of the children. *Held,* that the Iowa court had jurisdiction to determine any change of circumstances and to award permanent custody to the mother. Principles of the full faith and credit provision of the Constitution or of comity did not apply. *Helton v. Crawley,* 41 N.W.2d 60 (Iowa 1950).

Full faith and credit does not bar jurisdiction to redetermine child custody since custody decrees are provisional in character and are always subject to revision.[1] A change of circumstances creates a new case which any equity court can adjudicate,[2] and only those facts brought before the court at the time the original decree was rendered are res judicata and conclusive.[3]

The essential question is *whether* jurisdiction should be exercised. There is a conflict as to whether domicile or residence-in-fact is the jurisdictional requirement where a custody decree of a sister state is sought to be modified.

According to the residence-in-fact view, when children have been brought across state lines in violation of a custody decree, jurisdiction has been acquired because of the child's actual presence within the borders of the state.[4] Under the theory of parens patraie the courts can then make a determination of the custody question.[5] The need for establishing the fact of the child's domicile within the state is considered to be immaterial.[6]

Other courts, although in full accord with the parens patraie theory, hold that permanent custody can be awarded only when the requirement of

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1. Barnett v. Blakley, 202 Iowa 1, 209 N.W. 412 (1926); *In re* Leate, 205 Mo. App. 225, 223 S.W. 962 (1920); Stafford v. Stafford, 299 Ill. 438, 132 N.E. 452 (1921). See 41 L.R.A. (n.s.) 564, 603 (1913).

2. Beale, *The Status of the Child and Conflict of Laws,* 1 U. OF CHI. L. REV. 13 (1933).

3. N.Y. v. Halvey, 330 U.S. 610 (1947); Wear v. Wear, 130 Kan. 205, 285 Pac. 606 (1930); Mylius v. Cargill, 19 N.M. 278, 142 Pac. 918 (1914). *But see* Foster v. Foster, 8 Cal.2d 719, 723, 68 P.2d 719, 723 (1937) (where the court said that even change of circumstances is not required for a custody decree to be modified.)

4. Langan v. Langan, 80 U.S. App. D.C. 189, 150 F.2d 979 (1945); see Mollring v. Mollring, 184 Iowa 464, 471, 472, 167 N.W. 524, 527 (1918); *Re* Matter of Bort, 25 Kan. 308, 37 Am. Rep. 255 (1881); *Ex Parte* Badger, 286 Mo. 139, 226 S.W. 936 (1920); People *ex rel.* Van Dyke v. Van Dyke, 33 N.Y.S.2d 766 (Sup. Ct. 1942); Wicks v. Cox, 146 Tex. 489, 208 S.W.2d 876 (1948).

5. Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925); *See* Butler v. Butler, 83 N.H. 413, 143 Atl. 471 (1928).

6. People *ex rel.* Van Dyke v. Van Dyke, *supra* note 4.

domicile has been met.[7] Temporary custody may be awarded as a measure for the protection of the child,[8] but only the court of the child's domiciliary can change his status[9] by an award of permanent custody. It is reasoned that since the domiciliary state has better access to all the parties to the original action, and greater knowledge of the entire case[10] this requirement leads to a more convenient, orderly administration of justice.[11]

Although both views agree that the child's welfare is the primary and only consideration,[12] the reasoning by which this objective is accomplished differs. Courts holding to the residence-in-fact view reason that the misconduct of the parents in their attempts to avoid the effects of the original decree is not a factor to be considered and hence should not be visited upon the child.[13] The courts following the domicile rule say that allowing relitigation of the custody question rewards contempt,[14] places a premium on abduction, and hence does not promote the best interests of the child.[15]

In those cases holding to the residence-in-fact rule the doctrine of comity[16] has been summarily dispensed with as a factor in deciding whether jurisdiction should be involved.[17] The principle of comity must be subordinated to the rights of the ward within the jurisdiction.[18] Cases holding to the domicile rule either imply the doctrine or state positively that comity will not permit the modification of a sister state's decree.[19]

By assuming jurisdiction in the instant case, the court aligned itself with those cases holding to the residence rule.[20] These holdings show a discouraging lack of faith in the original domiciliary state's ability to cope with the problem. Even though a person should not ordinarily benefit from his

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7. McMillin v. McMillin, 114 Colo. 247, 158 P.2d 444 (1945); Wear v. Wear, 130 Kan. 205, 285 Pac. 606 (1930); *In re* Ashley, 113 Ore. 43, 231 Pac. 153 (1934) (by implication); Chapman v. Walker, 144 Okla. 83, 289 Pac. 740 (1930); Peacock v. Bradshaw, 145 Tex. 68, 194 S.W.2d 551 (1946); Lanning v. Gregory, 100 Tex. 310, 99 S.W. 542 (1907); Jones v. McCloud, 19 Wash.2d 314, 142 P.2d 397 (1943); RESTATEMENT, CONFLICT OF LAWS 149 (1934); Goodrich, 7 CORNELL L.Q. 1 (1921).

8. Jones v. McCloud, *supra* note 7.

9. See Stansbury, *Custody and Maintenance Across State Lines*, 10 Law and Contemp. Prob. 819 (1944); MINOR, CONFLICT OF LAWS 96 (1901).

10. *Ex Parte* Burns, 194 Wash. 293, 77 P.2d 1025 (1938).

11. *Cf. Ex parte* Mullins, 26 Wash.2d 419, 174 P.2d 790, 804 (1946).

12. See note 41 L.R.A. (n.s.) 564 (1913).

13. People *ex. rel.* Wagner v. Torrence, 94 Colo. 47, 27 P.2d 1038 (1933); Sheehy v. Sheehy, 88 N.H. 253, 186 Atl. 1 (1936); Commonwealth *ex. rel.* McTighe v. Lindsey, 156 Pa. Super. 560, 40 A.2d 881 (1945) (by implication); Langan v. Langan, *supra* note 4.

14. Evans v. Keller, 35 N.M. 659, 6 P.2d 200 (1931).

15. Helton v. Crawley, 41 N.W.2d 60, 80 (Iowa 1950) (dissent).

16. DICEY, CONFLICT OF LAWS 10 (5th ed. 1932). In speaking of comity, the learned writer emphasizes the application of foreign law is not a matter of caprice or option; it does not arise from the desire of (a) . . . sovereign to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants.

17. *In re* Stockman, 71 Mich. 180, 38 N.W. 876 (1888); Finlay v. Finlay, *supra* note 5; De La Montanya v. De La Montanya 12 Cal. 101, 44 Pac. 345 (1896).

18. Hanrahn v. Sears, 72 N.H. 71, 54 Atl. 702 (1903).

19. Chapman v. Walker, *supra* note 7; *Ex Parte* Burns, *supra* note 10.

20. See note 4 *supra*.

own wrong doing, the fact remains that parents have consistently violated custody decrees and been awarded relief in jurisdictions where they have brought the child. As more disappointed parents scurry across state lines with the child that was lawfully awarded to the other parent, the courts would do well, one writer has stated,[21] to examine this maligned doctrine of comity.

Since all agree that the child's welfare is the controlling consideration, theoretically all courts, using that as a basis for decision, would render the same finding in any given factual situation. Why not, then, require that a parent appeal to the court of the child's domicile? The application of the domicile rule operates to make the parent do so and thus has the particular advantage of tending to prevent such acts as were committed by the mother in the instant case.

CONSTITUTIONAL LAW—JURISDICTION OVER FOREIGN APPOINTED EXECUTORS AND ADMINISTRATORS

Plaintiff, a New York resident, was seriously injured in an automobile collision that took place on a New York highway. Deceased, the other participant in the accident and a resident of Indiana, died as a result of the accident before plaintiff brought suit. After serving process as provided in a New York statute,[1] the plaintiff brought suit naming the administrator of the decedent's estate as defendant. The defendant was appointed in Indiana, all of the estate assets were in Indiana, and he had given no actual consent to jurisdiction by the New York courts. *Held*, for plaintiff on a certified question of jurisdiction. By statute, the consent of a non-resident user of state highways to jurisdiction is binding on the foreign-appointed administrator of his estate. *Leighton v. Roper*, 300 N.Y. 434, 91 N.E.2d 877 (1950).

The rendering of a judgment without jurisdiction over the parties is a denial of "due process."[2] But if there is a statute that provides for service of process on an officer of the state as agent for non-resident users of state highways, service under the statute (with proper notice)[3] will give the court jurisdiction over the parties.[4] Such a statute does not allow the substitution of executors of the decedent's estate where the decedent died either before or after service of process on the state officer.[5] However, it has been hinted

21. See note 9 *supra*.

1. N.Y. VEHICLE AND TRAFFIC LAW § 52, a statute allowing service of process on the Secretary of State as agent for a non-resident user of state highways, and in case of death as agent for the executors and administrators of the decedent's estate.
2. U.S. CONST. AMEND. V.; Pennoyer v. Neff, 95 U.S. 714 (1877).
3. Wuchter v. Pizzutti, 276 U.S. 13 (1928).
4. Hess v. Pawloski, 274 U.S. 352 (1927).
5. Warner v. Maddox, 68 F. Supp. 27 (W.D. Va. 1946); Brogan v. Macklin, 126 Conn. 92, 9 A.2d 499 (1939); Dowling v. Winters, 208 N.C. 521, 181 S.E. 751 (1935);