Kentucky Law Journal

Volume 53 | Issue 4 Article 8

1965

Jurisdiction--Custody Cases--Full Faith and Credit--Changed Conditions

John R. Bozeman
University of Kentucky

JURISDICTION—CUSTODY CASES
FULL FAITH AND CREDIT—CHANGED CONDITIONS

The problem of jurisdiction to award custody of a minor child involves a number of complex considerations. This is largely because modern day courts still attempt, in many cases, to hang on to outdated conflict principles.[1] Actually, the custody problem involves more than jurisdiction by itself. It also requires a discussion of interstate recognition, i.e. full faith and credit and choice of law.[2] "Choice of law", however, is not so important since "applicable internal laws of the several states of the United States do not differ enough to create problems of choice of law."[3]

This paper, then, will deal specifically with these two questions:

(1) What are the bases of jurisdiction to render a valid decree awarding custody of a minor child?

(2) To what extent will custody awards receive interstate recognition?

PART I—BASES OF JURISDICTION IN CHILD CUSTODY SUITS

Several authorities can be found for the proposition that there are *three* bases for jurisdiction in child custody suits.[4] These three bases are generally stated as (1) *domicile,* i.e. "the question of custody is one of status and therefore determined by the courts of the state where the child is domiciled"; (2) *presence,* i.e. "in personam jurisdiction over the child's parents"; and (3) *welfare of the child,* i.e. "the child must be physically present within the state because the basic problem before the court is to determine the best interest of the child".[5] This author would minimize, if not eliminate, the value of "presence" as a separate basis of jurisdiction.[6] Nevertheless, all three "bases" will be treated in order to present a full background on the law today.

A. Domicile.[7] Domicile is the traditional conflict of laws doctrine. The technical concept of domicile generally restricted jurisdiction to

---

[1] See generally, Bronson, *Custody on Appeal,* 10 Law and Contemp. Prob. 737 (1944).

[2] See Stansbury, *Custody and Maintenance Law Across State Lines,* 10 Law and Contemp. Prob. 819 (1944).

[3] *Id.* at 819.

[4] See 27B C.J.S. Divorce § 303 (b); also see Swope v. Swope, 125 N.E.2d 336, 337; Wallace v. Wallace, 320 P.2d 1020 at 1024, 63 N.M. 414 (1958); Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948).

[5] Sampsell v. Superior Court, *supra* note 4.

[6] This approach ends up at substantially the same position taken by a number of authorities, i.e. two bases of jurisdiction. Cf. 29 Ky. L.J. 101 (1934).

[7] Stansbury, *op. cit. supra* note 2 at 820. He cites the rule of the Restatement (§ 117); Beale on Conflicts (717) and Goodrich on Conflicts (2d ed. at 358); as being in accord but notes that the United States courts do not agree.

the state where the father of the child was domiciled.[8] Later rules have altered this somewhat.[9] The Restatement takes this position that custody is a matter of "status" to be determined at the place of the domicile of the child.[10] As Goodrich puts it:

> It would seem, though it is not an open and shut proposition, that the award of the custody of children in a divorce suit is an adjudication affecting status and so properly made only where the child is domiciled and where the parent to whom the child is awarded is domiciled . . .[11]

Unfortunately, the concept of domicile which has occupied the courts for so long is an artificial[12] and often non-solving term. Because a person may have several residences,[13] the technical state of domicile may have no relation in fact with the child's interest.[14] Is there any reason why domicile should be a basis of jurisdiction?[15]

> . . . domestic relations concern persons . . . they cannot be localized in any state in the sense in which that is possible as to a tangible thing.[16]

B. Presence.[17] The courts talk about presence of the parents of the child as a basis of jurisdiction[18] and maybe some old cases go on presence alone, but today presence has been refined by "welfare of the child" (to be discussed in the next section). Consequently, it is probably not so important to talk about "presence" as such except for its historical importance.

The usual case cited for this basis of jurisdiction is *Anderson v. Anderson.*[19] The mother got a judgment on a writ of habeas corpus awarding custody to her. The Supreme Court of Appeals of West Virginia affirmed saying "that the children may not have been within the jurisdiction of the court . . . is immaterial, since the parties litigant were father and mother .. . and the court had full jurisdiction over them . . ."[20]

Another case which is often cited for this approach is *Wallace v.*

---

[8] 73 Yale L.J. 134, n. 5 (1963).
[9] See I Beale on Conflict of Laws 215 (1935).
[10] See Restatement, Conflict of Laws, §§ 30, 32, 117, 144 (1934).
[11] Goodrich, *Custody of Children in Dovorce Suits,* 7 Corn. L.Q. 1, 2-3 (1921).
[12] Stansbury, *op. cit. supra* note 2, at 820.
[13] *Ibid.*
[14] Stumberg, Principles of Conflict of Laws 327 (2d ed. 1951).
[15] G. C. Haggard, Jr. maintains that the views that domicile is a sufficient and exclusive basis of jurisdiction have been "repudiated, if indeed they were ever fully accepted." 45 Va. L. Rev. 379, n. 13 (1959).
[16] Stumberg, *op. cit. supra* at 299.
[17] "This theory is based on the premise that custody is primarily a question of parental rights." Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958).
[18] See note 4 *supra.*
[19] 74 W.Va. 124, 81 S.E. 706 (1914).
[20] The court cited Webb v. Ritter, 60 W.Va. 193, 54 S.E. 484 (1906).

Wallace,[21] where the court held that there was valid jurisdiction to award custody since the district court had in personam jurisdiction over the husband and wife.[22]

Because of the modern trend toward consideration of the "welfare of the child", it is doubtful that a court today would base a decision on presence of the parents alone.

C. Welfare of the Child.[23] The modern trend, as alluded to in the preceding section, is toward basing jurisdiction on the residence of the child[24] on the theory that a state is "parens patriae" of any child residing within its borders[25] and thus responsible for the welfare and best interests of such a child.[26] To put it another way: every state has an interest in the welfare of children within its confines.[27]

Actually, this "best interest" view was stated as early as 1881 in *Chapsky v. Wood*,[29] and gradually has come to enjoy the prominence it now receives.[30] In fact, some courts[31] extend this view even to the point of ignoring the procedural incidents of trial, refusing to allow technical considerations to impede their determination of the best interests of the child.

A leading case on this "best interests" view is that of *Finlay v. Finlay*,[32] where the New York Court of Appeals said:

> The jurisdiction of a state to regulate the custody of infants found within its territory does not depend on the domicile of its parents. It

---

[21] *Supra* note 17.

[22] However, both children were present on the facts of this case. See also, Smith v. Smith, 83 S.E.2d 923 (1954) where the court held that it had continuing jurisdiction over the absent children because of the prior divorce suit; and see Stephens v. Stephens, 53 Idaho 427, 24 P.2d 52 (1933) and Burgo v. Burgo, 149 F. Supp. 932 (D.C. Cir. 1957).

[23] "While ordinarily the relation . . . is governed by the law of the domicile of the parent having custody, any state in which a minor child is found has jurisdiction to determine questions of custody and control in the interest of the child." 14 C.J.S. Conflict of Laws § 14 (d). See 67 C.J.S. *Parent and Child* § 12 (a) on the welfare of the child generally.

[24] See Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. Chic. L. Rev. 42, 55 (1940).

[25] See Matthews, *What is the Basis of Jurisdiction to Determine Which Parent Shall Have the Custody of Minor Children Following Divorce?* 29 Ky. L. J. 101, 103 (1934).

[26] In re Bort, 25 Kan. 215, 37 Am. Rep. 255 (1881) is a leading case on this proposition.

[27] The general standard for this basis of jurisdiction is stated in Kovacs v. Brewer 356 U.S. 604, 613-614 (1958).

[29] 25 Kan. 650 (1881).

[30] See Sayre, *Awarding Custody of Children*, 9 U. Chic. L. Rev. 672-677 (1941). This article also contains a thorough discussion of Chapsky v. Wood.

[31] See for example: Stokowski v. Lumet, 19 N.Y.S.2d 617 (1959) where the court said ". . . even though the father's petition may fail to establish any basis for court action, the issue as to what should be done in the interest of (the children's) health and welfare is before the court, and must be determined. The proceedings are not technical." *Id.* at 619.

[32] 240 N.Y. 429, 148 N.E. 624 (1925). See also Kenner v. Kenner, 139 Tenn. 211, 201 S.W. 779 (1917).

> has its origin in th eprotection that is due to the incompetent or helpless . . . For this, the residence of the child suffices, though the domicile be elsewhere. Cardozo, J.[33]

Summary

It is doubtful that any court today would deny that the consideration of the welfare of the child is paramount in a custody case. Very often the "technical concepts of jurisdiction . . . are far removed from the child's welfare".[34] Under the domicile view, where the domicile is not the "home-in-fact", ". . . it frequently happens that the child's technical domicile has little or no practical concern with the child's fate".[35] The technical structure of the Restatement which supports domicile is undercut by Sec. 148, which gives jurisdiction to a state where the child resides if the custodian is unfit[36] (however, a decree under such circumstances is not entitled to extra-territorial effect).[37]

The three views thus far considered seem to be based on the questionable assumption that jurisdiction must belong to one given court at one given time.

> From a standpoint of expediency and of achieving socially desirable ends, there seems to be only one argument in favor of confining jurisdiction to a single state; that it will produce stability and discourage the crossing of state lines to avoid the effect of unpalatable custody decrees.[38]

Certainly the welfare of the child is not best served by this view.[39] In the case of *Sampsell v. Superior Court,*[40] the court noted the fact that since custody decrees are not final in the "rendering states", there seems to be no reason to attempt to arrive at a basis of jurisdiction that will be final and accepted in all states. It should be a sufficient basis of jurisdiction that the state "has a substantial interest in the welfare of the child or in the preservation of the family unit of which he is a part . . ."[41] This view would permit concurrent jurisdiction as long as the paramount consideration is the best interests of the child.[42]

---

[33] *Id.* 148 N.E. at 625.

[34] Stumberg, *op. cit. supra* note 24, at 62.

[35] Wallace v. Wallace, *op. cit. supra* note 17, at 1024. The court cites Stansbury, *op. cit. supra* note 2.

[36] *Op. cit. supra* note 8.

[37] Matthews, *op. cit. supra* note 25 notes that Sec. 32 of the Restatement makes this questionable. See his comment, p. 105.

[38] Stansbury, *op. cit. supra* note 2, at 830.

[39] *Op. cit. supra* note 4.

[40] Sampsell v. Superior Court, *supra* note 4, at 750.

[41] Stansbury, *op. cit. supra* note 2, at 831.

[42] The court in Wallace v. Wallace, *supra* note 17, said that there may be alternative bases of jurisdiction as well as concurrent jurisdiction as long as a court has "sufficient social interest" in the Welfare of the child, citing 287 Ky. 804, 155 S.W.2d 220 (1941).

PART II—INTERSTATE RECOGNITION OF CUSTODY DECREES[43]

The second half of this paper will deal with the extent to which custody decrees will receive interstate recognition or "full faith and credit."[44] Many of the cases on this point seem to follow the Restatement rule[45] which provides that a foreign decree creating "the status of custodianship" is to receive full faith and credit if the custody has been awarded by a court in the state of domicile of the child.[46] This statement is not so accurate in the face of case law.[47] Courts have long since exercised their "free discretion in the paramount interest of the child's welfare."[48] In a foreign custody decree case the court must balance the interests of (a) full faith and credit; (b) interstate comity; and (c) finality of litigation. This is further complicated by (1) uncertainty as to the finality and modifiability of the prior custody decree in the granting state; (2) the technical issues of jurisdiction and conflict of laws; and (3) by an overriding concern for the welfare of the child.[49]

A. The Doctrine of Changed Circumstances[50]

The fact that the custody decree was granted in a foreign state will not usually prevent a court so disposed from modifying the decree if there has been a change of circumstances since the prior decree.[51] Because of the subjective nature of the "best interests" doctrine, trial judges are possessed with a wide scope of discretion as to whether to modify the prior decree or not.[52] In order to limit this discretion, appellate courts have developed the doctrine of changed circum-

---

[43] U.S. Const. art. IV, § 1, states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

[44] See Ehrenzweig, Conflict of Laws, § 87 (1959).

[45] Restatement, Conflict of Laws, § 144, comment *a* and Restatement (Second), Conflict of Laws, § 20 (Tent. Draft No. 4, 1957).

[46] *Id.* §§ 145, 146, 147. In such a case the award cannot be re-examined but can be altered because of conditions arising after the prior award. See § 147, comment *a*. In Restatement (Second), Conflict of Laws § 144 (Tent. Draft No. 4, 1957), the original view seems to have been abandoned. See § 144 a, comment *c*.

[47] Ehrenzweig, *op. cit. supra* note 44.

[48] *Id.* at 282. See also Stansbury, *op. cit. supra* note 2, at 828.

[49] See generally, *Ford v. Ford; Full Faith and Credit to Child Custody Decrees*, 73 Yale L.J. 134 ff. (1963).

[50] A good statement of this doctrine can be found in Gantner v. Gantner, 246 P.2d 923, 927 (1952). "The rule is stated to be that to justify a modification there must be a change of circumstances arising after the original decree was entered, or at least a showing that the facts were unknown to the party urging them at the time of the prior order, and could not with due diligence have been ascertained."

[51] See generally, *The Changed Circumstances Rule in Child Custody Modification Proceedings*, 47 N.W. L. Rev. 543, 552-53.

[52] See Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 Mich. L. Rev. 345, 352 (1953). The use of the test of changed conditions is "rarely more than a manner of speech supporting a preconceived result."

stances.[53] Depending on the attitude of the court, however, this limitation may be largely theoretical.[54]

> As a finding of changed conditions is one easily made when a court is so inclined, and plausible grounds therefor can quite generally be found, it follows that the recognition extraterritorially which custody orders will receive or can commend is liable to be more theoretical than of great practical consequence.[55]

Nevertheless, the doctrine of changed circumstances as a limit on the conclusiveness of former decrees has received universal recognition by the courts.[56]

B. The Doctrine of Complete Judicial Discretion[57]

Some courts have abandoned any pretenses of finding changed conditions and have maintained that there should be complete judicial discretion limited only by considerations of the welfare of the child.[58] Some courts have noted an important exception to this rule of full discretion in cases where the other parent, dissatisfied with the decree, takes the child to another state to seek redetermination of the issue.[59] In such cases a deviation from the rule is obviously necessary to protect the interests of the child and of justice.[60]

C. The Requirement of Presence of Parents and/or Child

Several notable decisions allowing modification of prior custody decrees have turned not on changed conditions or full discretion, but on the requirement that both parents and (in most cases) the child be before the modifying court.[61] In *May v. Anderson*,[62] the Supreme

---

[53] Kubie, *Provisions for Care of Children of Divorced Parents: A New Legal Instrument*, 73 Yale L.J. 1197, 1206 (1953).

[54] Trial courts can almost always find changed conditions. See Bernstein v. Bernstein, 183 P.2d 43 (1947) where the court notes that the age of the child is a changed condition.

[55] Morrill v. Morrill, 77 Atl. 1, 6 (1910).

[56] *Op. cit. supra* note 51.

[57] The Supreme Court in Kovacs v. Brewer 356 U.S. 604, 608 (1958), states: "There is some indication that in New York a local custody decree may be modified whenever the best interest of the child demands, whether there have been changed circumstances or not." Citing authorities. See also Boardman v. Boardmanman 135 Conn. 124, 62A.2d 521 (1948) (dictum).

[58] Ehrenzweig, *op. cit. supra* note 44, at 283.

[59] *Id.* and note 30. See also Ehrenzweig, *op. cit. supra* note 52, at 353, where the author states that there can be no doubt that full freedom in the examination of foreign custody decrees is still the rule in Kansas, relying on In re Bort, *op. cit. supra* note 26 and Wear v. Wear, 285 P. 606, 616 (1930). The Kansas view is approved in Mayes v. Mayes,, 171 Kan. 495, 233 P.2d 711 (1951).

[60] *Id.*

[61] See May v. Anderson 345 U.S. 528 (1953) (issue and holding are at 528-29); Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521 (1948); White v. White, 138 Conn. 1, 81 A.2d 450 (discussed in 26 Conn. B.J. 48, 52 (1952); Beckman v. Beckman, 359 Mo. 1029, 218 S.W.2d 566, 569; Dahlke v. Dahlke 97 So. 2d 16 (1957) (personal jurisdiction required for full faith and credit).

[62] May v. Anderson, *supra* note 61.

Court held that a parent may not be deprived of his (or her) right to custody unless the court has personal jurisdiction over such parent.[63] This same view has been taken by the Connecticut court in *Boardman v. Boardman,*[64] and by other courts although the position has been severely criticized.[65]

D. The Supreme Court and Full Faith and Credit

The Supreme Court has failed to give a solution to the full faith and credit issue in each of the four cases before the court to date. In the 1947 case of *New York ex rel Halvey v. Halvey,*[66] the court affirmed a New York order modifying a Florida custody award on the narrow ground that Florida law would permit modification and "what Florida could do . . . , New York could do also".[67] The Court expressly reserved opinion on the issue of full faith and credit.[68] In the 1953 case of *May v. Anderson,*[69] the court confused the impact of its decision by an extended consideration of parental rights with the result that it is not clear whether the decision turns on full faith and credit or on due process.[70] In the 1958 case of *Kovacs v. Brewer,*[71] the court again avoided the constitutional issue and remanded the case for clarification.[72] Finally, in 1962, in the case of *Ford v. Ford,*[73] the court unanimously reversed both South Carolina lower courts on their interpretation of the finality of "dismissed-agreed" orders under Virginia law and again avoided the constitutional issue.[74] Just what interpretation of Virginia decisions.
disposition the court would make of the real issue remains to be seen.

Conclusion

Foreign custody decrees should always be modifiable as the welfare of the child concerned requires. The limitation of requiring changed conditions is probably no more than a fiction. The better approach is to allow the reviewing court full discretion to review the circumstances which have arisen since the prior decree strictly confined

---

[63] Ehrenzweig, *op. cit. supra* note 44, § 86, at 276.
[64] Boardman v. Boardman, *op. cit. supra* note 61.
[65] See 45 Va. L. Rev. 379 (1959) *op. cit. supra* note 15, at 386. See notes 29 and 30 and note discussion of "instability" at 390-391.
[66] 330 U.S. 610, 67 S. Ct. 903 (1947).
[67] *Id.* at 614.
[68] *Id.* And see generally: 45 Va. L. Rev. 379, 392-3 (1959) for criticism of Halvey decision.
[69] 345 U.S. 528 (1953).
[70] *Id.* at 534; and see 45 Va. L. Rev. 379 (1959) *op. cit. supra* note 68.
[71] 356 U.S. 604 (1958).
[72] *Id.* at 607 (postponement of constitutional issue). See p. 609 for Frankfurter's view.
[73] 371 U.S. 187 (1962).
[74] *Id.* at 190-194. Note that the Ford decision is questionable because of its

to a consideration of the best interests of the child involved.[75] The one exception to this would be in cases where the complaining parent is not acting in good faith in seeking judicial disposition.[76] The firm application of full faith and credit might be persuasive if child custody proceedings were uniformly of high standards and based on thorough investigation; however, this is notoriously not the case.[77] The trend in the law[78] will probably be to eventually abandon considerations of comity and full faith and credit in custody proceedings in favor of a more exhaustive look into the welfare of the child through "extra-litigious"[79] custody courts, i.e. family courts.

John R. Bozeman

[78] This is the view taken by Ehrenzweig, *op. cit. supra* note 44, at 277. Cf. Goodrich, *Custody of Children in Divorce Suits*, 7 Corn. L. G. 1, 10 (1921).

---

[75] See Ehrenzweig, *op. cit. supra* note 44, § 88, at 286.

[76] *Ibid.*

[77] See 81 U. Pa. L. Rev. 970 (1933) on the effect of a custody decree in a foreign state.

[79] See Ehrenzweig, *op. cit. supra* note 44, at 293, and see 73 Yale L.J. 1197 *op. cit. supra* note 53, at 1197.