Conflict of Laws: What Is the Basis of Jurisdiction to Determine Which Parent Shall Have the Custody of Minor Children Following Divorce?

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CONFLICT OF LAWS: WHAT IS THE BASIS OF JURISDICTION TO DETERMINE WHICH PARENT SHALL HAVE THE CUSTODY OF MINOR CHILDREN FOLLOWING DIVORCE?

Determining which parent shall have the custody of minor children is one of the more difficult problems incident to the process of divorce. A court is faced not only with the repercussions caused by the severing of the domestic relation, but, when petitioned, must provide for the future relation between the child and each parent. In order to make such a determination a court must have jurisdiction to act on the matter. The question most frequently arises from the standpoint of Conflict of Laws in two ways: First, does the court which grants a divorce also have jurisdiction to make an award of custody which will be given extraterritorial effect? Second, does the court of the forum have jurisdiction to alter a decree of custody previously given in another state? It is our purpose to point out the basis of jurisdiction in both instances.

Two bases for jurisdiction to award the custody of minor children upon divorce are to be found in the authorities: Jurisdiction is based on the domicile of the child. Jurisdiction is based on the welfare of the child.

I.

The theory upon which the child's domicile is designated as the proper place for awarding custody is that custody, as a domestic relation, is a status. Questions of status are within the control of the domicile of the person concerned. As Professor Goodrich puts it:

"Matters of status, that is the more or less permanent relations of an individual with other persons which are terminable by law, not merely by his consent are determined as a general rule by the law of the individual's domicile. This rule in Conflict of Laws is based on the proposition that it is the state of his domicile which is most concerned in his personal, as distinguished from his business relations. So it is the law of his domicile and only that law grants him a divorce. Jurisdiction for legitimation and adoption of children likewise depends on domicile.

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 . . ."

1 Vilner v. Gatlin, 143 Ga. 316, 85 N.E. 1045, 1046 (1915); Griffin v. Griffin, 95 Ore. 78, 187 Pac. 593, 604 (1888); Lanning v. Gregory, 100 Tex. 310, 99 S.W. 542, 544 (1907); In Re Groves, 100 Wash. 112, 186 Pac. 300, 301 (1919); II. Beale, The Conflict of Laws, (1935) sec. 144.3.

3 Herbert F. Goodrich, Custody of Children in Divorce Suits, (1921) 7 Corn. L.Q. 1, 2-3.
The courts have applied the test of domicile to both situations pointed out supra. If the parent seeking the divorce and the child are domiciled in the state and are before the court, it is generally held that a court with power to act on the subject matter may award custody of the child, and that such award is entitled to full faith and credit under the Federal Constitution subject to the following limitation. An award of custody by its nature is not conclusive. Upon a change of conditions the court making the original award may modify it or make a new one. Thus, acting upon this basis the courts of another state may so modify upon a change of conditions, if they have jurisdiction.

Most courts are of the opinion that where the child is not domiciled in the state the state generally does not have jurisdiction. Griffin v. Griffin6 illustrates one manner in which such a decree may be given. There, a California mother, upon a decree of divorce, had been awarded custody of the children, and had been forbidden to remove them from the county without permission. She secured permission to take them to Oregon, on condition that she bring back at a certain time. Instead of returning she acquired a domicile in Oregon. As a result of her action the California court modified its decree and awarded custody to the father, who brought habeas corpus in Oregon to obtain the children. The court denied the petition upon two grounds; first, that the best interest of the children demanded that they stay with the mother; second, that at the time of the last California decree the children were domiciled in Oregon and the California court no longer had jurisdiction over the status. The decision adopts the position that domicile confers jurisdiction and that the domicile of the parent to whom custody is given controls the domicile of the child.7 The courts which adhere strictly to the basis of domicile will not entertain an action to alter a custody award previously given in another state even though there is a possibility that conditions may have

4Duryea v. Duryea, 46 Idaho 512, 269 Pac. 987, 988 (1928); "... In most instances the parents, or at least one of them and the children, were before the court making the decree. In this class of cases, some few courts have refused to be bound by a foreign decree. . .

The rule that may be denominated the majority rule recognizes the conclusiveness of the foreign decree and holds that it may be enforced extraterritorially provided no change has taken place in the circumstances."

6People ex. rel. Wagner, 94 Colo. 47, 27 Pac. (2d) 1038 (1933); Re Alderman, 157 N.C. 507, 73 S.E. 126 (1911); Lanning v. Gregory, 100 Tex. 310, 99 S.W. 542 (1907); Beale, op. cit. supra, note 1.

795 Ore. 78, 187 Pac. 598 (1920).

Although at the common law the minor child's domicile followed the domicile of the father, it is now said that the domicile of the child is the domicile of the parent legally entitled to its custody; Toledo Traction Co. v. Cammeron, (C.C.A. 6th Cir.) 127 Fed. 48 (1905); Fox v. Hicks, 81 Minn. 197, 83 N.W. 538 (1900); Beale, The Progress of the Law, (1919) 34 Harv. L. Rev. 50, 69; The Restatement, Conflict of Laws, (1934) Sec. 32.
changed. They say that only the state of domicile has jurisdiction over the status involved.8

II.

In an effort to circumvent the technical difficulties presented by the test of domicile some courts have modified a foreign decree where the child is present within the state without determining the child's domicile.9 The theory is based in the conception that the state is the parens patriae of any child resident within its borders. Thus the courts of the state acquire jurisdiction to regulate the custody of such infants because the prime consideration is the welfare and best interests of the child.

In Re Bort10 is the leading case in support of the doctrine of welfare of the child. In this case the father obtained a divorce in Wisconsin where he was awarded custody of the children, whom the mother then abducted to Kansas. The father sought to enforce the Wisconsin decree in the latter state. The Kansas court took the position that a decree of custody is based upon local concern and that the welfare of the child is paramount. It is important to note that the cases in this group involve jurisdiction to alter a custody decree previously given in another state. Whether they put their decision on changed conditions is immaterial unless it appears from the facts that the child is domiciled within the state.

The comparatively recent case of State ex rel. Larson v. Larson11 presents the situation where the test of welfare would be applied. The state of Iowa awarded custody to the farmer for six months and to the mother for the remaining six months of the year. The mother moved to Minnesota and refused to let the child return to the father upon the expiration of her period of custody. The Minnesota court denied the father a writ of habeas corpus, refusing to recognize the Iowa decree on the ground that the welfare and interest of the child demanded that the mother be given custody, and that the domicile of the child was still in Minnesota although the mother's period of custody had expired. In regard to the latter ground it is submitted that the court assumed the question it was asked to decide. Strictly, the domicile of the child passed instantly to the state of the parent entitled to custody upon expiration of the six month period12 and did not depend upon a

11 190 Minn. 489, 252 N.W. 329 (1934); Commented on: (1934) 18 Minn. L. Rev. 591.
12 See note 7 supra.
physical removal from the state. This placed the domicile of the child back in Iowa with the father before the Minnesota court had an opportunity to deny recognition to the Iowa decree. Therefore, there remains nothing upon which to predicate the jurisdiction exercised by Minnesota except the welfare of the child coupled with its residence within the state.

There are arguments in favor of and arguments against each of the bases discussed. In regard to welfare no one will contend that the best interest of the child should not be paramount in determining custody, but whether it can be the only jurisdictional fact is a different matter. It is an all-inclusive term which will enable a court to deal rather arbitrarily with the society, services, and control of education to which a parent is entitled by virtue of the parent-child relation. Custody of a child is not a one-sided affair but involves interests of the parent as well as those of the child. The welfare of the child has its place in the making of the actual award itself, as distinguished from jurisdiction to make the award.

On the other hand concerning domicile, there is a temptation when dealing with the concept of status, to treat it as something resembling a res and then to localize it in a particular state to the detriment of the child. But a status is an intangible thing composed of a group of legal relations rather than a single res and cannot be given a permanent situs.\(^\text{23}\)

In rationalizing the two bases given one must choose at least three principles from the situations presented. First, the paramount factor in determining who shall have the custody of a minor child following divorce is the welfare and best interests of the child. Second, the state of domicile of the child is interested in more of the sum total of relations making up the status of custody than any other state. Third, the state of the forum may be in a position where, for the actual welfare of the child, it desires to alter a decree previously given in another state although the child is not domiciled within its boundaries. It cannot do so if the test of domicile is applied strictly.

The practical aspects of the problem suggest that the domicile of the child is the fundamental basis of jurisdiction to make an original award of custody which will have extraterritorial effect. This does not lessen the extent to which the welfare of the child is to be considered. It is equally fundamental that the basis for jurisdiction at the forum to alter an award of custody previously given in another state may be the welfare of the child coupled with its residence there. This is essentially the position taken by the Restatement.\(^\text{24}\) It is

\[^{23}\text{Stumberg, op. cit. supra note 4, at 298.}\]

\[^{24}\text{Restatement, Conflict of Laws, Sec. 146; "Upon the legal separation of the parents, by divorce or otherwise, custody of their child can be given to either parent by a court of the state of domicile of the child." Comment (c): "A court granting a divorce or legal separation of the parents cannot award to either the custody of a child unless the child is domiciled in the state, although if the child is physically}\]
interesting to note, however, that the Resatement would not give extraterritorial effect to a decree of the forum when jurisdiction is based on welfare of the child. But the efficacy of such a provision is questionable when read in connection with section 32. The relevant part of this section reads: “The minor child’s domicile, in the case of divorce or judicial separation of its parents is that of the parent to whose custody it has been legally given . . .” If the forum can make a binding award within its borders upon jurisdiction based on welfare, does the child’s domicile not become that of the parent to whom it is given? If it does, the forum is immediately the state of domicile and its award should be given extraterritorial effect.

CONCLUSION

It is submitted that there is not one basis for jurisdiction to determine which parent shall have the custody of minor children following divorce, but two. The domicile of the child is the basis for jurisdiction to make an original award of custody, while the welfare of the child, coupled with its residence, may be the basis for jurisdiction at the forum to alter a decree previously given in another state. The following situations illustrate the result of the foregoing analysis:

(1) Husband, Wife and Child are domiciled in state X. State X grants W a divorce. State X has jurisdiction to award the custody of C.

(2) (a) Husband, Wife and Child are domiciled in state X. H goes to state Y and sues for a divorce, W being at fault. State Y has present in the state at the time, the temporary custody of the child may be given.” Sec. 148 Reads: “In any state into which the child comes, upon proof that the custodian of the child is unfit to have control of the child, the child may be taken from him and given while in the state to another person.”

Comment (a) to Sec. 148: This action will be effective within the state. If the state is also the domicile of the child, the action will change the status and will therefore be effective in every state.”

Restatement, Conflict of Laws (1934) Sec. 32, op. cit. Supra note 9.

Although the conclusion reached here follows Beale and Goodrich in the essential fundamental, domicile, it recognizes a situation where the doctrine of welfare as advocated by Stumberg is the only means by which a desirable result can be reached, i.e., where the forum has the child within its boundaries as a resident but not as a domiciliary. As pointed out, the Restatement recognizes such a situation but limits the solution which it offers by denying extraterritorial effect to the forum’s award. It is believed that the solution of the whole problem necessitates a combining of doctrines as has been attempted in this conclusion.

Stumberg is of the opinion that there can be little doubt that a court has jurisdiction when all the parties concerned are domiciliaries of the state where the divorce is sought. Stumberg, op. cit. supra note 2 at 298.
jurisdiction to grant H a divorce and also has jurisdiction to award the custody of C.

(b) Husband, Wife and Child are domiciled in state X. W goes to state Y and sues for a divorce, H being at fault. H does not appear. State Y does not have jurisdiction to award the custody of C.

(3) Husband, Wife and Child are domiciled in state X. H (or W) obtains a divorce and C is awarded to his (or her) custody. The party not entitled to custody abducts C and flees to state Y, establishing residence. The party entitled to custody brings habeas corpus for possession of C in state Y. State Y has jurisdiction to alter the award previously given upon a showing of changed conditions.

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PROCESS SERVICE ON RESIDENT AGENT OF NON-RESIDENT. IS SEC. 51-6 OF THE KENTUCKY CIVIL CODE CONSTITUTIONAL?

The Kentucky Court of Appeals referred in a recent decision to a prior case which declared that sec. 51-6 of the Civil Code providing for substituted service upon the agent of a nonresident individual or partnership doing business within the state in actions against the nonresident was unconstitutional. The judicial treatment of that section is very interesting, since both the Supreme Court of the United States and the Kentucky Court of Appeals have changed their

Elwood Rosenbaum, Extraterritorial Validity of Ex Parte Divorces, (1940) 28 Ky. L. J. 247, 249.

1Lanning v. Gregory, 100 Tex. 310, 99 S.W. 542, 544 (1907) states that the state which is the domicile of the child and the domicile of the father is the state entitled to award custody. Although the illustration used is composed of somewhat different facts, it is readily seen that the domicile of the child follows the domicile of the father until it has been legally given to the other parent; therefore it is in state Y.

2No case has been found involving this particular point, but by analogy to the cases cited it would seem that C's domicile remained in state X with the father until the mother was entitled legally to its custody. There had been no previous award of custody; therefore the wife must seek her divorce at the domicile of the child if the court awarding the divorce is to have jurisdiction to award the child.

3Kenner v. Kenner, 139 Tenn. 211, 201 S.W. 779 (1917); The significant factor in this situation is that there has been a previous decree in another state and the jurisdiction taken goes only to altering such a decree.

Jones v. Fuller, 280 Ky. 671, 134 S.W. (2d) 240 (1939).


*Ky. Civic Code (Carroll's 1938) sec. 51-6. "In actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action accrued."