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Domestic Relations--Parent Having Custody Permitted to Remove Children from State (Freed v. Freed, 309 N.Y. 668 (1955))

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religion is enlarged.[34] It is submitted that a definitive determination of the status of parental religious objections should be written into the Children's Court Act.[35] It may be noted finally that the indoctrination of a child for the purpose of securing his consent to surgery, here ordered to forestall adverse psychological consequences,[36] is a novelty in the reported cases.

DOMESTIC RELATIONS — PARENT HAVING CUSTODY PERMITTED TO REMOVE CHILDREN FROM STATE.—Respondent-mother, who had obtained custody of her two infant children in a habeas corpus proceeding, intended to remarry and remove with them to another state. She petitioned the Court to modify the custody order so as to permit such removal. Appellant-father cross-motioned for the children's custody and to restrain the mother from removing them. The Court of Appeals, without opinion, affirmed a determination of the Supreme Court[1] which *held* that, under the circumstances presented, the mother's petition should be granted, with provisos.[2] *Freed v. Freed,* 309 N.Y. 668, 128 N.E.2d 319 (1955).

The jurisdiction of a state to determine the custody of infants within its territory has its origin in the protection that is due the incompetent or helpless.[3] In England, it was first absorbed by chancery through the delegation by the crown of its prerogative, as *parens patrie,* to care for infants.[4] In the United States, though an original bill in equity may still be brought,[5] statutes have been enacted which

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[34] Religious considerations are more likely to arise in regulating children's conduct than in making a choice of remedy for their physical ills. The methods and recommendations of an individual psychiatrist diagnosing or treating a conduct problem might very well conflict with religious precepts or prohibitions.

[35] A provision based upon conflict with religion (*cf.* N.Y. EDUC. LAW § 3204), and saving the requirements of law as to the control of communicable disease, would seem preferable to a narrower exemption predicated upon preference for religious healing (*cf.* N.Y. PUB. HEALTH LAW § 2583).

[36] Under the interim order, the boy and his father were shown the results obtained in various cases through the treatment proposed and the method of treatment was explained in detail. While they professed themselves impressed, their opposition was not diminished.

[1] Matter of Freed, 133 N.Y.S.2d 849 (Sup. Ct.), *aff'd mem.,* 284 App. Div. 892, 134 N.Y.S.2d 595 (2d Dep't 1954).

[2] The Court provided for a substantial enlargement of the father's custody and visitation rights.

[3] Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 626 (1925) (dictum); see JACOBS AND GOEBEL, DOMESTIC RELATIONS 943 (3d ed. 1952).

[4] See JACOBS AND GOEBEL, *op. cit. supra* note 3, at 943.

[5] Finlay v. Finlay, *supra* note 3 at 433, 148 N.E. at 626 (dictum).

permit the determination of custody by habeas corpus proceedings,[6] or as an incident to actions for annulment, separation or divorce.[7] Where the custody order is incidental to a divorce action, jurisdiction is usually determined by the *domicile* of the parents.[8] However, the *residence* of the *child* suffices in a habeas corpus proceeding or where an original bill is brought in equity.[9]

In addition to the making of initial awards, equity may decree a modification of the original custody order. Thus, visitation rights may be altered,[10] custody transferred,[11] or removal to another jurisdiction permitted.[12] But whether a motion to modify will be entertained depends upon a finding of changed circumstances since the previous order;[13] for, if the condition of the parties has not appreciably altered, the prior award is res judicata in any subsequent proceeding.[14] However, it lies within the sound discretion of the court to determine whether or not there are such changed circumstances.[15] Generally, remarriage by either parent does not of itself constitute changed circumstances sufficient to reopen the question of custody.[16]

Where permission is sought to take a child to another jurisdiction, different views have been taken as to the effect of such removal upon visitation rights and future orders of the court. The objections to removal in various jurisdictions are based on the unenforceability

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[6] *E.g.*, N.Y. DOM. REL. LAW § 70; KAN. GEN. STAT. ANN. § 60-2223 (1949); N.J. STAT. ANN. tit. 9, § 9:2-7 (Supp. 1954).

[7] See 2 VERNIER, AMERICAN FAMILY LAWS §§ 95, 131, 142 (1932). See also N.Y. CIV. PRAC. ACT §§ 1140, 1170, 1170-a.

[8] See 2 VERNIER, *op. cit. supra* note 7, § 82. However, Section 1147 of the New York Civil Practice Act also provides for jurisdiction on grounds other than domicile.

[9] See, *e.g.*, Sheehy v. Sheehy, 88 N.H. 223, 186 Atl. 1 (1936) (habeas corpus); Goldsmith v. Salkey, 131 Tex. 139, 112 S.W.2d 165 (1938) (bill in equity); see Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925).

[10] See, *e.g.*, Karron v. Karron, 239 App. Div. 180, 267 N.Y. Supp. 340 (1st Dep't 1933) (per curiam); Schmidt v. Schmidt, 346 Ill. App. 436, 105 N.E.2d 117 (1952).

[11] See, *e.g.*, Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1 (1910); Futch v. Futch, 299 S.W. 289 (Tex. Civ. App. 1927).

[12] See, *e.g.*, Darnell v. Smith, 211 Ark. 738, 202 S.W.2d 362 (1947); Schmidt v. Schmidt, *supra* note 10.

[13] See Bradstreet v. Bradstreet, 256 App. Div. 1032, 10 N.Y.S.2d 699 (4th Dep't 1939) (per curiam); People *ex rel.* Michael v. Michael, 188 Misc. 901, 69 N.Y.S.2d 694 (Sup. Ct. 1947).

[14] Cormack v. Marshall, 211 Ill. 519, 71 N.E. 1077 (1904); Willis v. Willis, 165 Ind. 332, 75 N.E. 655 (1905); Sheehy v. Sheehy, 88 N.H. 223, 186 Atl. 1 (1936).

[15] Young v. Young, 209 Ga. 711, 75 S.E.2d 433 (1953); Trickey v. Trickey, 158 Ohio St. 9, 106 N.E.2d 772 (1952).

[16] See, *e.g.*, Ansorge v. Armour, 267 N.Y. 492, 196 N.E. 546 (1935); Bradstreet v. Bradstreet, *supra* note 13; Davis v. Davis, 78 Ariz. 174, 277 P.2d 261 (1954); Self v. Self, 222 Ark. 82, 257 S.W.2d 281 (1953); Fennell v. Fennell, 209 Ga. 815, 76 S.E.2d 387 (1953); Freese v. Freese, 237 Iowa 451, 22 N.W.2d 242 (1946); Laughton v. Laughton, 71 Wyo. 506, 259 P.2d 1093 (1953).

of future orders[17] and the impairment of visitation rights.[18] The furnishing of a bond is sometimes required either to secure against removal by the parent in custody,[19] or to insure return where temporary removal is permitted.[20]

On the other hand, the position has been taken that jurisdiction is not lost by permitting the child's removal from the state.[21] The exponents of this view point out that statutes provide for continuing jurisdiction in the court,[22] and that the full faith and credit clause requires that custody decrees be given effect in the several states.[23] New York courts do not consider jurisdiction lost by removal,[24] although they have recognized that effective control of the child is prevented by rendering future orders difficult of enforcement.[25] However, in all jurisdictions the interests and welfare of the child are given paramount consideration in custody proceedings, and they prevail over the rights of parents.[26] Thus, in *Schmidt v. Schmidt*,[27] an Illinois case directly in point with the instant case, removal was permitted on the ground that the child would thereby be afforded a good home with the love and affection of his natural mother.

In New York, the right to remove domiciliary children has been denied in most instances.[28] The principal ground for such denial is

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[17] See Miller v. Miller, 137 N.Y.S.2d 273 (Sup. Ct.), *aff'd mem.*, 284 App. Div. 889, 135 N.Y.S.2d 612 (1st Dep't 1954); Baer v. Baer, 51 S.W.2d 873 (Mo. App. 1932).

[18] See Miller v. Miller, *supra* note 17; Palma v. Palma, 126 N.Y.L.J. 1531, col. 3 (Sup. Ct. Dec. 6, 1951); Whittemore v. Whittemore, 202 Misc. 175, 109 N.Y.S.2d 216 (Sup. Ct. 1951).

[19] See, *e.g.*, Matter of Pinell's Guardianship, 52 Cal. App. 177, 198 Pac. 215 (1921); Clegg v. Clegg, 186 N.C. 28, 118 S.E. 824 (1923).

[20] See, *e.g.*, Roley v. Reeves, 256 Ala. 82, 53 So.2d 366 (1951); Good v. Good, 205 Ga. 112, 52 S.E.2d 610 (1949); Commonwealth *ex rel.* Moore v. Moore, 172 Pa. Super. 255, 94 A.2d 93 (1953).

[21] See, *e.g.*, Stetson v. Stetson, 80 Me. 483, 15 Atl. 60 (1888); *accord*, Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1 (1910); Matter of Krauthoff, 191 Mo. App. 149, 177 S.W. 1112 (1915); Edwards v. Edwards, 8 N.J. Super. 547, 73 A.2d 759 (Ch. 1950).

[22] *E.g.*, N.Y. CIV. PRAC. ACT § 1170, Grenier v. Grenier, 175 Misc. 406, 23 N.Y.S.2d 594 (Sup. Ct. 1940), *aff'd mem.*, 261 App. Div. 1043, 27 N.Y.S.2d 449 (4th Dep't 1941); MASS. LAWS ANN. c. 208, § 20 (1955).

[23] U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the . . . Judicial Proceedings of every other State." See Stetson v. Stetson, *supra* note 21.

[24] See Freund v. Burns, 268 App. Div. 989, 51 N.Y.S.2d 642 (2d Dep't 1944); Grenier v. Grenier, *supra* note 22.

[25] See Matter of Meyer, 209 N.Y. 59, 102 N.E. 606 (1913); Miller v. Miller, 137 N.Y.S.2d 273 (Sup. Ct.), *aff'd mem.*, 284 App. Div. 889, 135 N.Y.S.2d 612 (1st Dep't 1954).

[26] See, *e.g.*, Berry v. Berry, 21 Ala. 403, 122 So. 615 (1929); Wilson v. Mitchell, 48 Colo. 454, 111 Pac. 21 (1910); Witt v. Burford, 84 Fla. 201, 93 So. 186 (1922); Pierce v. Jeffries, 103 W. Va. 410, 137 S.E. 651 (1927).

[27] 346 Ill. App. 436, 105 N.E.2d 117 (1952).

[28] See Miller v. Miller, *supra* note 25; Bulloch v. Zam, 134 N.Y.S.2d 232 (Sup. Ct. 1954); Palma v. Palma, 126 N.Y.L.J. 1531, col. 3 (Sup. Ct. Dec. 6,

that removal to any great distance would render illusory the visitation rights of the residing parent.[29] Thus in *Whittemore v. Whittemore,*[30] where a Florida resident petitioned a New York court for the custody of her children and permission to remove them to her home, the court denied her custody on the ground that no exceptional reasons were presented which would warrant the impairment of the father's visitation rights. But the rule which denies the right of removal does not appear to be absolute;[31] for where the residing parent is an unfit person, the courts will not deny custody to the parent who intends to remove.[32] Divergence from the settled rule is further evidenced in *Nash v. Nash*[33] and *Karron v. Karron.*[34] The principle evolved from these cases is that where special circumstances exist, bearing on the question of *the best interests of the child,* removal will be permitted. In the *Nash* case temporary removal to California was permitted where it appeared that the health of the child necessitated the change in residence. In the *Karron* case, the petitioner had removed with her child to her parents' home outside the state because she had no other means of support. The court, acquiescing in this removal, granted a petition to modify the father's visitation rights.

Thus, the general rule in New York appears to be that a permanent removal of a domiciliary child will not be permitted where it will render rights of visitation illusory.[35] However, where special circumstances exist, bearing on the question of the child's best interests, permission will be granted. Previous application of this exception has been made where the health[36] of the child was involved. The instant case represents an additional application of the exception to the general rule. It is not clear from the opinion what *circumstances* led the Court to grant the wife's petition. If based solely on her intended marriage to a non-resident, the decision seems unjustified because it is difficult to see how this fact alone bears on the question

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1951); Whittemore v. Whittemore, 202 Misc. 175, 109 N.Y.S.2d 216 (Sup. Ct. 1951); Thompson v. Thompson, 60 N.Y.S.2d 359 (Sup. Ct. 1946).

[29] *Ibid.*

[30] *Supra* note 28.

[31] See Palma v. Palma, *supra* note 28; Whittemore v. Whittemore, *supra* note 28.

[32] See People *ex rel.* Muller v. Muller, 124 N.Y.S.2d 138 (Sup. Ct. 1953); Palma v. Palma, *supra* note 28 at 1531, col. 4 (dictum).

[33] 236 App. Div. 89, 258 N.Y. Supp. 313 (1st Dep't 1932), *aff'd mem.*, 261 N.Y. 579, 185 N.E. 746 (1933).

[34] 239 App. Div. 180, 267 N.Y. Supp. 340 (1st Dep't 1933) (per curiam).

[35] Miller v. Miller, 137 N.Y.S.2d 273, 274 (Sup. Ct.) (dictum), *aff'd mem.*, 284 App. Div. 889, 135 N.Y.S.2d 612 (1st Dep't 1954); see Bulloch v. Zam, 134 N.Y.S.2d 232 (Sup. Ct. 1954); Palma v. Palma, 126 N.Y.L.J. 1531, col. 3 (Sup. Ct. Dec. 6, 1951); Whittemore v. Whittemore, 202 Misc. 175, 109 N.Y.S.2d 216 (Sup. Ct. 1951); Strnad v. Strnad, 194 Misc. 743, 83 N.Y.S.2d 391 (Sup. Ct. 1948); Thompson v. Thompson, 60 N.Y.S.2d 359 (Sup. Ct. 1946).

[36] Nash v. Nash, 236 App. Div. 89, 258 N.Y. Supp. 313 (1st Dep't 1932), *aff'd mem.*, 261 N.Y. 579, 185 N.E. 746 (1933).

of the best interests of the child. However, in all probability, the Court based its decision on the fact that the mother's intended remarriage would afford her a greater opportunity to provide her children with motherly care.[37] This was the reasoning which the court adopted in the *Schmidt*[38] case under similar circumstances. If this was the rationale of the Court, then, though the decision may work a hardship on the father, nevertheless, it is consonant with the principle that the child's welfare is the paramount consideration in custody litigation. However, the Court did not indicate whether or not it considered that the child's welfare may be affected by moral implications of the mother's intended remarriage. Certainly, in any case where the parent having custody intends to remarry, the courts cannot ignore their duty to weigh these considerations against such advantages as may seem to accrue to a child from the proposed remarriage.

EMINENT DOMAIN — LIMITATIONS ON COMPENSATION FOR A PARTIAL TAKING.—The United States condemned 15.7 acres of appellants' 82 acre farm as part of the site for an air base. The District Court awarded damages for the taking and severance. Appellants sought additional compensation for the diminution in value of their remaining land caused by the particular use to which the land taken was put. The Court of Appeals *held* that there could be no additional recovery, since the land taken was only on the periphery of the air base and was put to no specific use.[1] *Boyd v. United States,* 222 F.2d 493 (8th Cir. 1955).

Eminent domain is the power of the sovereign to take private property for public use without the owner's consent.[2] An entire tract,[3]

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[37] Respondent-mother pointed out in her petition to the Court that her intended remarriage permitted her to resign her position (which she held to support herself and the children), thereby making it possible to devote all her time to the children. Transcript of Record, p. 22, Freed v. Freed, 309 N.Y. 668, 128 N.E.2d 319 (1955).

[38] 346 Ill. App. 436, 105 N.E.2d 117 (1952).

[1] For purposes of brevity the phrase "specific use" will be used in this article to denote the rule ". . . which limits recovery to the damages resulting from the construction and operation of such part of the public works as has been erected on the land taken from the particular owner." 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 56 (2d ed. 1953). See United States v. Grizzard, 219 U.S. 180 (1911).

[2] See 1 NICHOLS, EMINENT DOMAIN § 1.11 (3d ed. 1950).

[3] See Sharp v. United States, 191 U.S. 341 (1903); Iriarte v. United States, 157 F.2d 105 (1st Cir. 1946); United States v. 25.936 Acres Of Land, 153 F.2d 277 (3d Cir. 1946).