

Conflict of Laws--Domestic Relations--Jurisdiction to Award Custody Where Child is Temporarily Outside State (Graham v. Graham, 80 A.2d 829 (Pa. 1951))

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courts, perhaps influenced by the fact that a common law right of privacy was denied in New York,¹¹ have been loath to extend a remedy to any situation other than those which fall within the confines of the statute.¹² The decision in the instant case is another indication of that tendency towards restrained judicial interpretation of the statute.



CONFLICT OF LAWS—DOMESTIC RELATIONS—JURISDICTION TO AWARD CUSTODY WHERE CHILD IS TEMPORARILY OUTSIDE STATE.—Plaintiff and defendant were domiciled in Ohio. As a result of *in personam* proceedings instituted in that state, plaintiff was awarded temporary custody of her minor child, ancillary to a final decree of divorce. The child had been sporadically cared for by the paternal great-grandfather in Pennsylvania, and was in fact sent there four days before the divorce action. The Ohio decree provided that the child continue his residence in Pennsylvania, but expressly reserved jurisdiction to subsequently relitigate the issue of custody. Six months later the plaintiff was awarded exclusive custody of the child by the Ohio court. Prior thereto, the defendant had taken up residence with his child in Pennsylvania where the plaintiff now institutes habeas corpus proceedings. The trial court refused to grant custody to the plaintiff in the interest of the child's welfare. The Superior Court reversed, holding that the Ohio decree was entitled to full faith and credit. *Held*, judgment reversed. The decree of the Ohio court need not be accorded full faith and credit since the foreign court had no jurisdiction over the child, who was residing in Pennsylvania at the time the decree was awarded. *Commonwealth ex rel. Graham v. Graham*, 80 A. 2d 829 (Pa. 1951).

There has developed a sharp divergence of judicial opinion concerning the jurisdictional requirements necessary to empower a court to award custody of minor children. Some courts have designated residence of the child within the state as the criterion.¹ It is rea-

691 (Sup. Ct. 1939); *Sarat Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937).

¹¹ *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902).

¹² *Binns v. Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108 (1913); *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. Supp. 752 (1st Dep't 1919); *Wallach v. Bacharach*, 192 Misc. 979, 80 N. Y. S. 2d 37 (Sup. Ct.), *aff'd mem.*, 274 App. Div. 919, 84 N. Y. S. 2d 894 (1st Dep't 1948); *Wilson v. Brown*, 189 Misc. 79, 73 N. Y. S. 2d 587 (Sup. Ct. 1947); *Swacker v. Wright*, 154 Misc. 822, 277 N. Y. Supp. 296 (Sup. Ct. 1935); *Jeffries v. N. Y. Evening Journal Pub. Co.*, 67 Misc. 570, 124 N. Y. Supp. 780 (Sup. Ct. 1910).

¹ *Thrift v. Thrift*, 54 Mont. 463, 171 Pac. 272 (1918); *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624 (1925); *Ritchison v. Ritchison*, 28 Tenn. App. 432, 191 S. W. 2d 188 (1946).

soned that the courts wherein the child is physically present, are better adapted to ascertain present conditions affecting the child's welfare.² However, there is substantial authority adhering to the proposition that the state of the child's domicile may properly exercise its judicial power to award custody, notwithstanding the court's failure to obtain *in personam* jurisdiction over the child.³ Some of these latter authorities may be construed as actually requiring custody proceedings to be brought in the place of the child's domicile.⁴ The theory advanced is that custody being a matter of the child's status, adjudication thereof is a proceeding *in rem*, cognizable only in the state of the child's domicile.⁵ This artificial concept frequently gives rise to the problem of determining the child's domicile at some precise time,⁶ inasmuch as a minor child is incapable of changing his domicile by his own act.⁷

The great weight of the decisions emphasize the inherent power of a court to regulate custody as an incident to a matrimonial action where both litigants have personally submitted themselves to the jurisdiction of the court.⁸ The rule prevails without regard to the technicalities of the child's domicile or residence.⁹ The rationale of these cases seems to be that when a court acquires jurisdiction over the parties and the status of the marriage relation, it necessarily acquires jurisdiction over the status constituted by the relation between the parents and minor children.¹⁰

The New York courts have consistently held the child's residence within the state sufficient,¹¹ and his presence before the court

² *Matter of Meyer*, 209 N. Y. 59, 102 N. E. 606 (1913). Cf. *People ex rel. Noonan v. Wingate*, 376 Ill. 244, 33 N. E. 2d 467 (1941); *Sheehy v. Sheehy*, 88 N. H. 223, 186 Atl. 1 (1936).

³ *Wear v. Wear*, 130 Kan. 205, 285 Pac. 606 (1930); *State ex rel. Larson v. Larson*, 190 Minn. 489, 252 N. W. 329 (1934).

⁴ RESTATEMENT, CONFLICT OF LAWS § 117 (1934). "A state can exercise through its courts jurisdiction to determine the custody of children . . . only if the domicil of the person placed under custody . . . is within the state."

⁵ *Forkner v. Forkner*, 215 P. 2d 482 (Cal. 1950); *Person v. Person*, 172 La. 740, 135 So. 225 (1931); *Daugherty v. Nelson*, 234 S. W. 2d 353 (Mo. 1950).

⁶ RESTATEMENT, CONFLICT OF LAWS § 30 (1934). "... a minor child has the same domicil as that of its father." *Id.* § 32. "The minor child's domicil, in case of divorce or judicial separation of its parents, is that of the parent to whose custody it has been legally given; if there has been no legal fixing of custody, its domicil is that of the parent with whom it lives, but if it lives with neither it retains the father's domicil."

⁷ *Yarborough v. Yarborough*, 290 U. S. 202 (1933).

⁸ *Dolgoff v. Dolgoff*, 80 Cal. App. 887, 183 P. 2d 380 (1947); *Talbot v. Talbot*, 120 Mont. 167, 181 P. 2d 148 (1947); *State v. Rhoades*, 29 Wash. 61, 69 Pac. 389 (1902).

⁹ See note 8 *supra*.

¹⁰ *State v. Rhoades*, *supra* note 8; *Anderson v. Anderson*, 74 W. Va. 124, 81 S. E. 706 (1914); see note 2 *supra*.

¹¹ *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624 (1925); *Forbell v. Forbell*, 276 App. Div. 785, 93 N. Y. S. 2d 1 (2d Dep't 1949); *People ex rel. Billotti v. New York Juvenile Asylum*, 57 App. Div. 383, 68 N. Y. Supp. 279 (1st Dep't 1901).

requisite,¹² to the court's assumption of jurisdiction to award custody. The domicile of the parents¹³ or of the child¹⁴ are not controlling factors, for the court may act as *parens patriae* to do that which is best for the child's interests.¹⁵ In New York, the issue of custody may be raised as an incident to a divorce action,¹⁶ by a petition to a court of equity,¹⁷ or by a separated spouse in a habeas corpus action.¹⁸

Perhaps the most controversial phase of custody awards concerns their finality, and the related problem of their extra-territorial effect. Cognizant of the universal principle that the ultimate concern is the child's welfare,¹⁹ the numerical weight of the decisions consider a custody award interlocutory in nature, and *res judicata* only as long as the conditions upon which it was predicated have not changed.²⁰ If the child's welfare demands, the court, in exercising its inherent power may modify its initial decree relating to custody, despite the fact that the parent or the child may have subsequently removed themselves from its territorial jurisdiction.²¹

The Supreme Court of the United States has recently been called upon to determine to what extent, if any, the full faith and credit clause of the Constitution²² requires recognition of custody decrees of sister states. In the leading case of *New York ex rel. Halvey v.*

¹² *People ex rel. Winston v. Winston*, 31 App. Div. 121, 52 N. Y. Supp. 814 (1st Dep't 1898); *cf. Matter of Meyer*, 209 N. Y. 59, 68, 102 N. E. 606, 609 (1913). "If an order relating to custody of an infant is to be of any value the infant must be within the power and control of the court."

¹³ *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624 (1925).

¹⁴ *Forbell v. Forbell*, 276 App. Div. 785, 93 N. Y. S. 2d 1 (2d Dep't 1949).

¹⁵ *Hill v. Hill*, 104 N. Y. S. 2d 755 (Sup. Ct. 1951).

¹⁶ N. Y. CIV. PRAC. ACT § 1140. "If a marriage be declared a nullity or annulled, the court, . . . must give such direction for the custody and care of any child of the marriage, . . . as justice requires."

¹⁷ N. Y. DOM. REL. LAW § 70. "A husband or wife, being an inhabitant of this state, living in a state of separation, without being divorced, who has a minor child, may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of the child to either parent . . ."

¹⁸ *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624 (1925).

¹⁹ *Cassell v. Cassell*, 52 So. 2d 918 (Miss. 1951); *State ex rel. Day v. Parker*, 55 N. M. 227, 230 P. 2d 252 (1950); *Sandfort v. Sandfort*, 105 N. Y. S. 2d 343 (App. Div. 1st Dep't 1951).

²⁰ *In re Leete*, 205 Mo. App. 225, 223 S. W. 962 (1920); *Talbot v. Talbot*, 120 Mont. 167, 181 P. 2d 148 (1947); *State ex rel. Nipp v. District Court of 10th Judicial District*, 46 Mont. 425, 128 Pac. 590 (1912).

²¹ *Baily v. Schrader*, 34 Ind. 260 (1870); *Stetson v. Stetson*, 80 Me. 483, 15 Atl. 60 (1888); *Hersey v. Hersey*, 271 Mass. 545, 171 N. E. 815 (1930); N. Y. CIV. PRAC. ACT § 1140.

²² U. S. CONST. Art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." 62 STAT. 947, 28 U. S. C. § 687 (1948) provides: "Such Acts, records and judicial proceedings . . . shall have such faith and credit given to them in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

Halvey,²³ the Court emphatically sustained the applicability of the full faith and credit clause to foreign custody awards. It stressed the view, however, that subsequent modifications thereof by the court of the forum, based on changed conditions affecting the child's welfare, would not necessarily violate the constitutional provision.²⁴

The court, in the instant case, was constrained to effectuate the Ohio decree unless changed conditions affecting the welfare of the child since the date of its rendition obviated its modification.²⁵ The refusal to recognize the decree of a court having *in personam* jurisdiction over the litigants, in the state of the parties' domicile, was contrary to the weight of authority.²⁶



CONFLICT OF LAWS — PUBLIC POLICY — ENFORCING FOREIGN WRONGFUL DEATH STATUTE.—Decedent, a resident of Wisconsin, was fatally injured in an automobile accident in Illinois. Plaintiff administrator brought an action in Wisconsin predicated upon the Illinois wrongful death statute.¹ The complaint was dismissed on the ground that Wisconsin's own wrongful death act² announced a public policy against the trial of causes based on the death acts of other states. Plaintiff contended that this construction of the Wisconsin statute violated the "full faith and credit" clause of the Federal Constitution.³ *Held*, reversed and remanded. The Supreme Court is the final arbiter, in each case, of competing public policies. Wisconsin's statutory policy must give way to national policy as expressed in the "full faith and credit" clause. *Hughes v. Fetter*, 71 Sup. Ct. 980 (1951).⁴

The mandate of the "full faith and credit" clause has felt the effect of a number of important judicial limitations. Ordinarily, a state is not required to enforce the law of a sister state if it is penal

²³ 330 U. S. 610 (1947).

²⁴ Since the court rendering the original decree has the power to modify its decree on the finding of changed conditions, the court of the forum, by its modification on the same basis, would not be doing anything the original court could not do.

²⁵ The reason for this rule is made apparent in the light of the possible harm to the child and to the prestige of Courts of Justice resulting from any other rule.

²⁶ See notes 7, 8 *supra*.

¹ ILL. REV. STAT. c. 70, §§ 1, 2 (1949).

² This statute, textually similar to many wrongful death acts, concludes: "Provided, that such action shall be brought for a death caused in this state." WIS. STAT. § 331.03.

³ U. S. CONST. Art IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State."

⁴ *Reversing Hughes v. Fetter*, 257 Wis. 35, 42 N. W. 2d 452 (1950).