CUSTODY OF CHILDREN IN THE CONFLICT OF LAWS

In recent years appellate courts have witnessed some rather bitter child-custody controversies involving conflict of laws problems. The Iowa Supreme Court alone has heard five such appeals within the last three years. The purpose of this comment is to analyze these recent Iowa cases in the light of similar litigation in other states and to note the areas in this field which may present federal constitutional issues.

The principal conflicts problems which may arise in a child custody case are: (1) The basis for jurisdiction to render a decree awarding custody of a minor child; and (2) the extent to which foreign custody decrees should be recognized under general conflicts principles and the extent to which they must be recognized under the full faith and credit clause of the Constitution.[1] Both issues were dramatically raised in *New York ex rel. Halvey v. Halvey*,[2] decided in 1947, the only United States Supreme Court decision of any consequence to date. In that case, Mrs. Halvey left New York, the domicile of her husband, and established a residence in Florida for the purpose of obtaining a divorce. In the divorce suit the husband was served only by publication and did not enter an appearance. Without Mrs. Halvey's approval, Mr. Halvey took their minor child back to New York the day before the Florida court awarded her a divorce and exclusive custody of the child. In a habeas corpus proceeding brought by Mrs. Halvey in New York, the lower court, re-examining the facts on which the parties claimed the right to custody, decided that custody should remain with the mother but that the father should have rights of visitation in New York during stated vacation periods in each year. Mrs. Halvey was also required to post a bond conditioned on delivering the child to Mr. Halvey in order that he might take the child to New York during the periods he was permitted to have custody. This was affirmed by the New York appellate court, and on certiorari, the Supreme Court held that the full faith and credit clause does not require New York to give greater effect to the custody decree than it would have in Florida itself. Under Florida decisions a custody decree is an adjudication only of the facts *actually before the court*.[3] Since the Florida divorce was *ex parte*, New York was free to make an

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[1] U.S. CONST. Art. IV, 1.

[2] 330 U.S. 610 (1947).

[3] The Court relied on Meadows v. Meadows, 78 Fla. 576, 83 So. 392 (1919) where it was stated ". . . . the proper custody of the minor child is the proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing; if such facts were not presented or considered at a former hearing." See also Frazier v. Frazier, 109 Fla. 164, 169, 147 So. 464, 466 (1933).

independent determination of the facts as a basis for awarding custody. Mr. Justice Douglas, for the majority, raised but expressly reserved for future consideration the following issues:[4] (1) Did Florida at the time of the rendition of the original decree have jurisdiction over the child in view of the fact that the child was domiciled in New York and was not physically present in Florida? (2) Does the Florida decree have any binding effect on the father in the absence of personal jurisdiction over him? (3) Is the power of New York to modify the custody decree greater than Florida's power under the full faith and credit clause? (4) Does a state having jurisdiction over a child have power to make such orders as the welfare of the child may require irrespective of the existence of a foreign custody decree? The Court presumably felt that these questions raise federal constitutional issues either of due process or full faith and credit. Until the Supreme Court gives definitive answers to these problems, the conclusions reached in the state court decisions, discussed below, must not be taken without reservation.

I. JURISDICTION IN ORIGINAL PROCEEDING TO DETERMINE CUSTODY.

The first two caveats raised by Mr. Justice Douglas in the Halvey case stem from the existing conflict in the state courts as to the proper basis for jurisdiction to award custody. The United States Supreme Court, as the final arbiter of federal constitutional issues, has frequently prescribed the minimum standards for jurisdiction under the due process clause of the Fourteenth Amendment.[5] Since it has not had occasion to do so in custody cases, state courts have formulated their own principles.

There are two basic considerations in the problem of jurisdiction. What connecting factors must exist between the child and the forum to give the court jurisdiction? Must both parents be personally before the court? A custody decree affects not only the personal status of the child but the interests of both parents as well. It is common practice to award custody in connection with a divorce which requires for jurisdiction domicile of one spouse in the state and notice to the nonresident spouse by publication or service outside the state.[6] Only rarely have the courts raised the question whether personal jurisdiction over a non-

[4] 330 U.S. 610, 615-616 (1947).

[5] There are many examples, only a few of which are noted: Milliken v. Meyer, 311 U.S. 457 (1940) (domicile of defendant in the state as a basis for personal jurisdiction); International Shoe Co. v. Washington, 326 U.S. 310 (1945) ("reasonableness" doctrine as a basis for personal jurisdiction over foreign corporations); Hess v. Pawloski, 274 U.S. 352 (1927) (the doing of an act in the state as a basis for personal jurisdiction over nonresident). Moreover, an improper *exercise* of jurisdiction is a violation of due process. McDonald v. Mabee, 243 U.S. 90 (1917); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[6] Williams v. North Carolina, 325 U.S. 226 (1945).

resident parent is necessary to award custody.[7] It is said that the unusual nature of the custody proceeding demands that the welfare of the child be the primary consideration and that the interests of the parents are secondary to the extent that personal jurisdiction over them is not required.[8] On the other hand, there is considerable justification for the view that courts have too easily been led to accept the pat theory that a custody suit involves a res (the status of the child) which is localized in the state because the child is domiciled there.[9] This reasoning is ficticious, and there may well be cases in which a court could with justification refuse to exercise jurisdiction to award final custody unless both parents are before it. It is at least doubtful whether custody is often thoughtfully considered in *ex parte* divorce suits.[10]

The traditional approach, adopted in the Restatement of Conflict of Laws and several texts, is that the state of the child's domicile has exclusive jurisdiction to determine custody.[11] This on the assumption that there is involved a matter of personal status which may best be determined by the state of domicile.[12] It is insisted that confining jurisdiction to the domiciliary state promotes "stability" and discourages the reprehensible practice, occasionally resorted to by a disgruntled parent, of whisking a child

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7 See De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L.R.A. 82, 53 Am. St. Rep. 165 (1896), discussed in STUMBERG, CONFLICT OF LAWS 325 (1950).

8 Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. of Chi. L. Rev. 42, 55 (1940).

9 STUMBERG, *op. cit. supra* note 7, at 326.

10 Occasionally the custody problem is dealt with in an haphazard manner even though all parties are before the court. Boor v. Boor, 241 Iowa 973, 43 N.W.2d 155 (1950) is a good example. There the Indiana divorce decree first awarded custody to the mother and then contradicted itself by providing that "such minors [shall] be in the custody of the parents" of the father. The children had in fact been taken to the grandparents in Iowa two or three days before the divorce action was instituted and remained there throughout this litigation. Three years after the divorce the father sought to modify the Indiana decree in that state. The mother was successful in this hearing and her right to immediate custody was affirmed. A few days later the original decree was corrected by a nunc pro tunc order which recited that through "inadvertence, negligence and misprision of the clerk" the original decree failed to express the judgment of the court. The order changed the original decree to read: "such minors [to] be kept by the parents" of the father. The Indiana nunc pro tunc order was entered 7 days after the mother applied for a writ of habeas corpus in Iowa to obtain the children from the grandparents. The irregularity of the Indiana proceeding may well have influenced the Iowa court to disregard the foreign decrees. Other factors were also involved. See note 31 *infra*.

11 RESTATEMENT, CONFLICT OF LAWS §§ 117, 148 (1934); GOODRICH, CONFLICT OF LAWS 421 (3d ed. 1949); Beale, *The Status of the Child and the Conflict of Laws*, 1 U. of Chi.L.Rev. 13 (1933).

12 It is sometimes questioned whether custody is actually a matter of status. See Stansbury, *Custody and Maintenance Law Across State Lines*, 10 Law and Contemp. Prob. 819, 820 (1944). *Cf*, 2 BEALE, CONFLICT OF LAWS 717, 718 (1935).

from one jurisdiction to another in search of a court which will render a favorable decision.[13] There seems to be judicial support for the domicile theory.[14] It must be observed, however, that these courts will exercise jurisdiction to appoint a temporary guardian where it is necessary to do so if the child is found within the state.[15] Authority is based on the duty of the state under the doctrine of *parens patriae*[16] to act in the best interest of any child in the state. A few recent cases reject domicile as the exclusive basis for jurisdiction to award permanent custody.[17] This is justified on the ground that the state of residence has a legitimate interest in the child's welfare, and that since the concept of domicile as applied to children is traditionally patriarchal, curious technicalities would often govern the decision of the case if domicile were the sole basis for jurisdiction.[18] These courts insist upon at least concurrent jurisdiction if the child has an established residence in the state.

Iowa has been cited as following the domicile rule,[19] and some of the early cases seem to support that view.[20] In the recent case of *Pelton v. Halverson*,[21] dealing with jurisdiction in an original custody suit, the domicile rule was expressly rejected. There the father, a domiciliary of California, sought to obtain custody of his twin daughters who were residing with their maternal grandparents in Iowa. With the consent of the father, the grandparents had taken the children from California when the mother died a few weeks after their birth and had cared for them in Iowa for

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[13] Note, 9 A.L.R.2d 434, 441 (1950).

[14] The following cases are frequently cited as authority for the "domicile rule": Duryea v. Duryea, 46 Idaho 512, 269 Pac. 987 (1928); Wear v. Wear, 130 Kan. 205, 285 Pac. 606, 72 A.L.R. 425 (1930); State ex rel. Larson v. Larson, 190 Minn. 489, 252 N.W. 329 (1930).

[15] Woodworth v. Spring, 4 Allen (Mass.) 321 (1862); RESTATEMENT, CONFLICT OF LAWS §§ 118, 150 (1934); 30 Minn. L. Rev. 397 (1946).

[16] See discussion by Bliss, J., in Helton v. Crawley, 241 Iowa 296, 312, 41 N.W.2d 60, 70 (1950).

[17] Sheehy v. Sheehy, 88 N.H. 223, 186 Atl. 1 (1936); Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 40 A.L.R. 937 (1925); Kenner v. Kenner, 139 Tenn. 211, 201 S.W. 779, L.R.A. 1918E 587 (1917), *rehearing denied*, 139 Tenn. 700, 202 S.W. 723 (1917); Wicks v Cox, 146 Tex. 489, 208 S.W.2d 876, 4 A.L.R.2d 1 (1949).

[18] See Note, 53 Harv. L. Rev. 1024, 1025 (1940); Note, 9 A.L.R.2d 434, 441-442 (1950).

[19] PATTON AND DAUM, IOWA ANNOTATIONS TO THE RESTATEMENT OF CONFLICT OF LAWS 96-97 (1935).

[20] A custody decree of the state of the child's domicile will be recognized in the absence of any showing of circumstances explaining the child's presence in the state. Wakefield v. Ives, 35 Iowa 238 (1872). Conversely, if the child was domiciled and residing in Iowa at the time the foreign decree was rendered, the decree is not entitled to recognition. Kline v. Kline, 57 Iowa 386, 10 N.W. 825 (1881); *cf.* Barnett v. Blakley, 202 Iowa 1, 20 N.W. 412 (1926). The Iowa court has jurisdiction if the child is domiciled in, although temporarily absent from, the state. In re Guardianship of Johnson, 87 Iowa 130, 54 N.W. 69 (1893); see Jenkins v. Clark, 71 Iowa 552, 32 N.W. 504 (1887).

[21] 240 Iowa 184, 35 N.W.2d 759 (1949).

ten years. It was held that Iowa had jurisdiction to determine the matter of permanent custody even though the children's domicile remained with the father in California.[22] The Court implied, however, that if the children had been only temporarily present in the state, jurisdiction would not have been exercised.[23] This is manifestly a reasonable solution of this type of case. A state where the children have resided for ten years has such a substantial interest in their welfare that it should not feel constrained to defer the question of their custody to the foreign domiciliary state where they had lived only briefly. A recent Iowa case appears to go so far as to take jurisdiction where the child is temporarily in the state. This case is considered in the following section in connection with the recognition of foreign custody decrees.[24]

If jurisdiction exists under either the domicile or residence theory and a custody award has been made, does the jurisdiction of the court continue after the child has left the state? If the child is only temporarily absent, it is reasonable to permit the forum to continue to exercise jurisdiction.[25] However, where a new domicile has been acquired, the better view is that jurisdiction of the state of original domicile ceases.[26] The same would probably be true where the child has become a resident of another state although his domicile has not changed.

II. RECOGNITION OF FOREIGN CUSTODY DECREES.

The most perplexing conflicts questions arise when the forum (F-2) is called upon to recognize or enforce a foreign (sister state) decree (F-1). Under the *Halvey* decision,[27] the foreign decree is entitled to recognition under the full faith and credit clause, but F-2 need not give the F-1 decree greater faith and credit than it would have in the state of rendition. Whether the constitutional mandate may occasionally permit F-2 greater powers of modification than F-1 had is Mr. Justice Douglas' third caveat in the *Halvey* case. His last caveat raises the possibility that custody decrees are of purely local concern and that the existence of a

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[22] *But cf.* In re Skinner's Guardianship, 230 Iowa 1016, 300 N.W. 1, 136 A.L.R. 907 (1941).

[23] 240 Iowa 184, 190, 35 N.W.2d 759, 762-763 (1949). Furthermore, the court felt that apart from the jurisdiction question, the best interests of the children in this case demanded that their permanent custody be given to the grandparents. As an alternative holding, the court found that there was an implied waiver of the father's right to custody.

[24] See note 33 *infra*.

[25] See McKee v. Murrow, 241 Iowa 434, 439, 40 N.W.2d 924 (1950); see note 20 *supra*.

[26] State ex rel. Larson v. Larson, 190 Minn. 489, 252 N.W. 329 (1930); *cf.* Wakefield v. Ives, 35 Iowa 238 (1872).

[27] New York ex rel. Halvey v. Halvey, 330 U.S. 610 (1947).

foreign decree is immaterial to the decision.[28] This would be tantamount to withdrawing completely the protection of the full faith and credit clause from custody decrees.

In fixing the scope of the credit to be given a foreign custody decree, most courts have adopted the following approach:[29] (1) If F-1 lacked jurisdiction, its decree is not entitled to recognition, and F-2 may re-examine the merits and determine for itself which parent is entitled to custody. (2) If F-1 had jurisdiction, its decree represents at most a final adjudication of the facts existing at the time the decree was rendered. If there has been a change of circumstances, F-2 may modify the foreign decree to the extent necessary.

Lack of jurisdiction in the foreign court as a basis for refusing full faith and credit is discussed in the recent Iowa case of *Boor v. Boor*.[30] In that case, both parents who had previously been divorced appeared before an Indiana court and litigated the question of the custody of the children. Despite the fact that the children and both parents were domiciled in Indiana, the Iowa court held that Indiana had no jurisdiction because the children were residing in Iowa at the time the foreign decree was rendered.[31] If this case means that the state where the children reside has exclusive jurisdiction, it appears to be out of line with other authorities. While the state of residence may have concurrent jurisdiction with the state of domicile, it is not generally held that a prior decree in the domiciliary state is without jurisdictional basis. The decision in the *Boor* case is particularly difficult to explain in view of the fact that the custody question was litigated by the foreign court only three days before the Iowa proceeding was commenced. Certainly the objecting parent had already had his day in court.

The "change of circumstances" rule as a basis for modifying a valid foreign decree has also recently been examined at length by the Iowa court. In *Helton v. Crawley*,[32] it appeared that a

[28] This approach was taken in In re Bort, 25 Kan. 308, 37 Am. Rep. 255 (1881). This decision was modified in White v. White, 160 Kan. 32, 159 P.2d 461 (1945). In his concurring opinion in the Halvey case, Rutledge, J., indicated that since the controlling consideration is the best interests of the child, general policies of full faith and credit are of secondary importance. 330 U.S. at 620.

[29] See dissenting opinion of Stone, J., in Yarborough v. Yarborough, 290 U.S. 202, fn. 19, 223 (1933).

[30] 241 Iowa 973, 43 N.W.2d 155 (1950).

[31] Despite the fact that the mother was given custody by the Indiana court, the children for some unknown reason at all times during the five-year period of litigation stayed with the paternal grandparents in Iowa. They were 5 and 3 years of age at the time the grandparents received them. In refusing to return them to Indiana, the Iowa court perhaps reached a just result although the theory of the case is doubtful. The grandparents had provided the children with a good home for 5 years and the court was reluctant again to permit the pattern of their lives to be disrupted. See note 10 *supra*.

[32] 241 Iowa 296, 41 N.W.2d 60 (1950).

Missouri court on May 3, 1948 had granted a divorce to the father and had given temporary custody to the maternal grandparents. Both parents were before the court. On June 21, the father was awarded permanent custody. On October 29, the mother, who had since remarried and was living in Iowa, wrongfully brought the children from Missouri into the state of Iowa. On November 18, the father petitioned for a writ of habeas corpus. One month later the mother was awarded custody by the Iowa court. The decree was affirmed by the Supreme Court. In sweeping language, the Iowa court declared that it possessed jurisdiction because the children were physically within the territorial limits of the state.[33] This might have been a sufficient basis for appointing a temporary guardian, but since the case involved permanent custody,[34] it would seem to be an unwarranted extension of the "residence theory" adopted in *Pelton v. Halverson.*[35] The court then directed its consideration to the question whether, as a matter of comity, the Iowa court should refuse to exercise jurisdiction in this case. It was held that while the facts relied upon by the lower court as a basis for a change of circumstances were not in the appellate record, it did not appear that the lower court had abused its power to determine that there had been a change.

In considering whether the changed circumstances are such as to make it advisable to modify the foreign decree, all courts purport to be guided by what would really be for the best interests of the child. All too frequently courts appear to use the "change of circumstances" rule to justify a relitigation of the entire case. It has been recommended that courts should not modify foreign custody decrees unless new facts make it clearly

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[33] *Id.* at 318, 41 N.W.2d at 73: "Keeping in mind the dominant fact that it is the best interests and the welfare of infants and minor children that is the supreme concern and consideration of the State, as against which all other claims, rights, relations, and persons sink into insignificance, it becomes clear that their domicile is not the essential factor which calls for the exercise of the sovereign protection, care, control, and custody of them, but all that is necessary is the *presence* of the infants in the State—*that they are within its borders.*"

[34] The word "permanent" is used to distinguish the proceeding from an application for temporary guardianship. The Court apparently misunderstood the trial court's use of this word and feeling that the word "permanent" here meant absolutely unalterable, hastened to add that no custody decrees are immune to change when the welfare of the wards demands it. *Id.* 305, 41 N.W.2d at 66.

[35] 240 Iowa 184, 35 N.W.2d 759 (1949).

advisable to do so,[36] and that the burden of proving a change of circumstances be on the parent seeking the modification.[37] A vigorous dissenting opinion in the *Helton* case emphasized that the decision encourages interminable interstate bickering over the custody of children and that it is highly doubtful whether this is actually in the best interest of the child.[38] In the *Helton* case, the father who was awarded custody only five months earlier in the foreign court might well have experienced the feeling that he would have been better off if he had employed the same lawless, child-snatching tactics used by his erstwhile spouse. In the three recent Iowa cases involving foreign decrees, the amount of custody litigation was as follows: *McKee I and II*:[39] four trial court hearings and two appeals over a period of four years; *Boor v. Boor*:[40] three trial court hearings, one ex parte motion, and one appeal over a period of five years; *Helton v. Crawley*:[41] four hearings and one appeal over a two-year period. In all three cases, custody was awarded to the parent who had been denied custody by a foreign court which had all parties before it.

"Sometime, somehow, there should be an end to litigation in such matters."[42]

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[36] STUMBERG, *op. cit. supra* note 7, at 329, approving of the approach to the problem in McMillan v. McMillan, 114 Colo. 247, 158 P.2d 444, 160 A.L.R. 396 (1945).

It is interesting to note that the Iowa court has dealt rather strictly with applications to modify local custody decrees on the ground of changed circumstances. See e.g., Scheffers v. Scheffers, 241 Iowa 1217, 47 N.W.2d 157 (1951); Paintin v. Paintin, 241 Iowa 411, 41 N.W.2d 27 (1950). If that is the policy of the state, is a liberal attitude toward modification of foreign decrees consonant with the obligation of the state under the full faith and credit clause?

In Stansbury, *Custody and Maintenance Law Across State Lines*, 10 Law and Contemp. Prob. 819, 828 (1944), the author analyzed some sixty-odd cases involving recognition of foreign decrees and in substantially less than half of them, the court did not enforce the provisions of the earlier decree.

[37] White v. White, 160 Kan. 32, 159 P.2d 461 (1945).

[38] Hays, J., in Helton v. Crawley, 241 Iowa 296, 331-332, 41 N.W.2d 60 (1950): "The rule announced in the majority opinion . . . is an open invitation to divorced parents, who have had their day in a court of competent jurisdiction, to bring by stealth or force into this State, children to whose custody they have been denied and thus avoid the effect of a legal decree. By this rule the status of the child is constantly in doubt, depending upon the views of the court before whom it may happen at the time to be. This is not, in my judgment, conducive to the best interest of the child."

[39] McKee v. McKee, 239 Iowa 1093, 32 N.W.2d 379 (1948); McKee v. McKee, 241 Iowa 434, 40 N.W.2d 924 (1950).

[40] 241 Iowa 973, 43 N.W.2d 155 (1950).

[41] 241 Iowa 296, 41 N.W.2d 60 (1950).

[42] Rutledge, J., concurring in New York ex rel. Halvey v. Halvey, 330 U.S. at 619, 620 (1947).