Washington and Lee Law Review

Volume 18 | Issue 1 Article 9

Spring 3-1-1961

Child Custody Across State Lines

ing upon the parties in other fields of substantive law are not controlling insofar as tax law is concerned. The validity of this statement was shown clearly in *Security-First Nat'l Bank v. United States*[38] when the court stated that "in tax matters the trend in federal courts is to apply the designation fiduciary to many relationships involving trust and confidence, whether they are such under state law or not."[39]

It may therefore be concluded that a trend is appearing in which a relationship may be taxable under the Internal Revenue Code pertaining to trusts even though the party did not intend a trust and equity would not imply one. The rule that no entity will be taxable as a trust unless it would be regarded as such in equity can no longer be considered the law. With the Supreme Court's mandate that the "legislative design is to tax all gain constitutionally taxable unless specifically excluded,"[40] as a starting point, it seems fairly certain that the rule of *United States v. DeBonchamps* will become established doctrine.

JOSEPH E. ULRICH

CHILD CUSTODY ACROSS STATE LINES

The area of child custody which crosses into the domain of conflict of laws is an entangled mass of inconsistent awards, decrees and orders.[1] This lack of uniformity has given rise to custody decree abuses which not only go unreproved, but far too often result in advantage to the recalcitrant. Probably the most prevalent of such violations is the abducting of a child from the custodian by a parent. How and why such conduct is resorted to and often rendered advantageous in subsequent custody actions can be best understood by considering the jurisdictional aspects of such actions.

---

[38]181 F. Supp. 911 (S.D. Cal. 1960).

[39]Id. at 915. See also, Hamby v. St. Paul Mercury Indem. Co., 217 F.2d 78, 80 (4th Cir. 1954); American Nat'l Bank v. Harris, 84 F.2d 181, 182-83 (10th Cir. 1936); Commissioner v. Owens, 78 F.2d 768, 773-74 (10th Cir. 1935); Buckley v. Commissioner, 66 F.2d 394, 396-97 (2d Cir. 1933); Hart v. Commissioner, 54 F.2d 848, 850 (1st Cir. 1932).

[40]General Am. Investors Co. v. Commissioners, 348 U.S. 434, 436 (1955).

[1]Stumberg, The Status of Children in the Conflict of Laws, 8 U. Chi. L. Rev. 42, 59 (1940). See generally, Stansbury, Custody and Maintenance Law Across State Lines, 10 Law & Contemp. Prob. 819 (1944), wherein Stansbury advocates concurrent jurisdiction as a means of uniformity: "May it not be that these jurisdictional clashes could be largely avoided by conceding jurisdiction to the courts of two or more states simultaneously?" 10 Law & Contemp. Prob. at 830.

The recent case of *Lennon v. Lennon*[2] illustrates the type of strategy used in child custody battles. In *Lennon* the defendant-father had an adulterous affair with a married woman. During that time the plaintiff-mother had serious emotional disturbances, became an alcoholic, and received institutional treatment. The two children of the marriage were taken care of by their maternal grandparents. In due course the mother's treatment was completed and she was discharged. She filed suit for divorce, asking for alimony and custody of the children. A temporary restraining order was issued against the father, but the pending suit and restraining order were dismissed because of a subsequent reconciliation of the parties. While resuming cohabitation with his wife, the father did not discontinue his affair. As a result, the mother again resorted to excessive use of alcohol. The father went to Nevada, taking the children with him, without the mother's prior knowledge or consent. In Nevada he obtained an ex parte divorce[3] and was awarded custody of the children. Twenty days later the father and his paramour were married, and thereafter they, with the two children, made thir home in Nevada. About six months later the father allowed the children to visit their mother in North Carolina.[4] The evidence was in conflict as to whether the mother promised to return them to the father. In fact, the mother refused to return the children and instead instituted habeas corpus proceedings to determine custody.[5] The lower court awarded custody to the mother,[6] and the father appealed.

The first question before the North Carolina court was that of

---

[2]252 N.C. 659, 114 S.E.2d 571 (1960).

[3]With regard to the validity of such a divorce, see Williams v. North Carolina II, 325 U.S. 226 (1945), affirming 224 N.C. 193, 29 S.E.2d 744 (1944). Williams v. North Carolina I, 317 U.S. 287 (1942), reversing 220 N.C. 445, 17 S.E.2d 769 (1941).

[4]North Carolina was the mother's domicile and the matrimonial domicile of the parties. 114 S.E.2d at 576.

[5]N.C. Gen. Stats. § 17-39.1 (Supp. 1959). Prior to 1957, habeas corpus could not be used to determine the right to custody of children whose parents had been divorced; but under § 17-39.1 the marital status of parents is no longer a factor in determining whether habeas corpus is proper procedure to obtain custody of a child. Cleeland v. Cleeland, 249 N.C. 16, 105 S.E.2d 114 (1958).

[6]The lower court's decree was entered in favor of the plaintiff-mother upon condition that she and the children continue to reside in her parents' home, and upon the further condition that she totally abstain from the use of alcoholic beverages. 114 S.E.2d at 547. It is interesting to speculate as to the mother's status should she remarry. Query as to whether she and the children would be required to remain living with the mother's parents. What if the mother had a "social drink," would she lose custody of the children? From the language used in the decree it appears that any contact whatever with alcohol would be a violation of the court's order. Are decrees with such conditions desirable? Are such conditions conducive to a proper state of mind in rearing children?

jurisdiction to determine custody. There were three broad approaches available. First, the court could have followed prior North Carolina precedents indicating that North Carolina will not assume jurisdiction unless the child is both domiciled and physically present in the state. Second, the court could have undertaken to resolve the problem by following the rationale of *May v. Anderson*,[7] which propounds the rule that personal jurisdiction over both parents is the jurisdictional test in child custody actions. Third, the court could have sought a resolution of the case in accordance with both North Carolina precedents and *May v. Anderson*. The latter approach was taken and the lower court's holding was affirmed.

North Carolina precedents are based on the theory that a court's determination of custody is an adjudication of the domestic status of the child, thus the action is considered an in rem proceeding.[8] But the action differs from other in rem proceedings in that the foremost purpose must be the determination of what course is in the best interests of the child, and not the settlement of the rights of two contending parties.[9] Even so, there is a difficulty. The res may be the child itself,[10] so that jurisdiction is based on the physical presence of the child.[11] On the other hand, the res may be thought of as the domicile of the child. Therefore, domicile becomes the jurisdictional

---

[7]345 U.S. 528 (1953). See generally, annot., 55 A.L.R.2d 673, 677 (1957); Annot., 13 A.L.R.2d 306 (1950); Annot., 9 A.L.R.2d 623 (1950); Annot., 4 A.L.R.2d 7 (1949).

[8]Coble v. Coble, 229 N.C. 81, 47 S.E.2d 798, 800 (1948) (dictum); Goodrich, Custody of Children in Divoce Suits, 7 Cornell L.Q. 1 (1921). But see Stumberg, The Status of Chilren in the Conflict of Laws, 8 U. Chi. L. Rev. 42, 56 (1940).

[9]Stumberg, The Status of Children in the Conflict of Laws, 8. U. Chi. L. Rev. 42, 56 (1940).

[10]Duryea v. Duryea, 46 Idaho 512, 269 Pac. 987 (1928); Weddington v. Weddington, 243 N.C. 702, 92 S.E.2d 71 (1956); Coble v. Coble, 229 N.C. 81, 47 S.E.2d 798, 800 (1948) (dictum).

[11]Sheehy v. Sheehy, 88 N.H. 223, 186 Atl. 1 (1936); State ex rel. Ranken v. Superior Court, 6 Wash. 2d 90, 106 P.2d 1082 (1940). See Henn v. Children's Agency, 204 Fed. 766 (9th Cir. 1913) (juvenile dependency and deliquency); Kelsey v. Green, 69 Conn. 291, 37 Atl. 679 (1897) (guardianship); State ex rel. Rasco v. Rasco, 139 Fla. 349, 190 So. 510 (1939) (divorce); Schmidt v. Schmidt, 280 Mass. 216, 182 N.E. 374 (1932) (petition for custody); Ex parte Peddicord, 269 Mich. 142, 256 N.W. 833 (1934) (habeas corpus); In re Pratt, 219 Minn. 414, 18 N.W.2d 147 (1945) (guardianship); Ex parte Olcott, 141 N.J. Eq. 8, 55 A.2d 820 (1947) (juvenile dependency and delinquency); In re Williams, 77 N.J. Eq. 478, 77 Atl 350 (1910) (habeas corpus); Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925) (bill in equity); In re Stringer, 26 Ohio Op. 4, 11 Ohio Supp. 60 (1940) (adoption); Rogers v. Commonwealth, 176 Va. 355, 11 S.E.2d 584 (1940) (juvenile dependency and delinquency). There is authority, however, that it is of no avail to the court's jurisdiction to bring a non-resident child into the state unlawfully. Shippen v. Bailey, 303 Ky. 10, 196 S.W.2d 425 (1946) (habeas corpus); In re Hubbard, 82 N.Y. 90 (1880) (guardianship).

requirement for the determination of child custody even though the child may be physically without the state.[12] The reason behind using domicile as the jurisdictional test is that the domiciliary state is better suited than any other to understand and provide for the best interests of its children. This denotes a complete departure from the early common-law rule that the father had absolute authority over his family.

Because custody actions adjudicate so-called status, domicile of the child as well as his presence within the geographic bounds of the court's authority is essential to give jurisdiction in the majority of states.[13] This is generally considered the rule in North Carolina.[14] North Carolina further holds that a prior court's custody award has no binding force in a new state of domicile.[15] Hence, had the court assumed jurisdiction, using North Carolina precedents as the sole jurisdictional criterion in *Lennon,* it might have resulted in a conflict with the doctrine of *May v. Anderson.*[16] Also, to follow exclusively the North Carolina precedents on *Lennon's* facts would have been to deny jurisdiction since the majority and general rule is that when the parents are separated a child's domicile follows that of his legal custodian,[17] or in the absence of a custody decree, that of his father.[18]

The North Carolina court could have rested its decision in *Len-*

---

[12]Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948); Breene v. People ex rel. Breene, 51 Colo. 342, 117 Pac. 1000 (1911); Moody v. Moody, 193 Ga. 699, 19 S.E.2d 504 (1942); Stephens v. Stephens, 53 Idaho 427, 24 P.2d 52 (1933); Heard v. Heard, 323 Mass. 357, 82 N.E.2d 219 (1948); Beckmann v. Beckmann, 358 Mo. 1029, 218 S.W.2d 566 (1949); White v. White, 77 N.H. 26, 86 Atl. 353 (1913); Hatch v. Hatch, 15 N.J. Misc. 461, 192 Atl. 241 (1937); Robinson v. Robinson, 254 App. Div. 696, 3 N.Y.S.2d 882 (2d Dep't 1938); Hughes v. Hughes, 180 Ore. 575, 178 P.2d 170 (1947); Commonwealth ex rel. Camp v. Camp, 150 Pa. Super. 649, 29 A.2d 363 (1942); Peacock v. Bradshaw, 145 Tex. 68, 194 S.W.2d 551 (1946); Re McGibbon, 13 Alta. 196, 39 D.L.R. 177 (1918) See Restatement, Conflict of Laws § 145 (1934); Goodrich, Conflict of Laws §§ 36-40 (3d ed. 1949); Beale, The Status of Children in the Conflict of Laws, 1 U. Chi. L. Rev. 13, 22 (1933). See also Goodrich, Custody of Children in Divorce Suits, 7 Cornell L.Q. 1, 5 (1921).

[13]2 Beale, Conflict of Laws § 144.3 (1935). But see annot., 9 A.L.R.2d 434, 442 (1950).

[14]Richter v. Harmon, 243 N.C. 373, 90 S.E.2d 744 (1956); Hoskins v. Curin, 242 N.C. 432, 88 S.E.2d 228 (1955); Gafford v. Phelps, 235 N.C. 218, 69 S.E.2d 313 (1952); Allman v. Register, 233 N.C. 531, 64 S.E.2d 861 (1951).

[15]Ex parte Alderman, 157 N.C. 507, 73 S.E. 126 (1911).

[16]See note 20 infra and accompanying text.

[17]Restatement, Conflict of Laws § 32 (1934); Beale, Conflict of Laws § 32.1 (1935).

[18]Glass v. Glass, 260 Mass. 562, 157 N.E. 621 (1927). The modern view is said to be that the child takes his mother's domicile if the separation was through the father's fault. Beale, Conflict of Laws § 32.1 (1935). See Stansbury, Custody and Maintenance Law Across State Lines, 10 Law & Contemp. Prob. 819, 821-22 (1944).

non squarely on *May v. Anderson. May* holds that personal jurisdiction over both parents is indispensable to jurisdiction in a child custody proceeding. Under this rule a parent may not be deprived of the custody of his child unless the parent is personally served with process within the forum or appears generally in the proceeding, either in person or by attorney. It would not seem, however, that the Court in *May* held that personal jurisdiction over the parents is the exclusive jurisdictional test in custody proceedings, but merely that such is a necessary requirement in order for a custody decree to be entitled to full faith and credit.[19] Nevertheless, had the *Lennon* court taken the *May* approach it would have overruled, at least by implication, its prior precedents as it would not have looked at the children's status, but only at the parents' status.[20]

The majority in *May v. Anderson,* however, disclaimed that its decision was applicable where one parent abducts the child and removes him from a state which had jurisdiction.[21] Thus, the inference is that the state from which the child was removed retains jurisdiction over both the abducting *parent* and the *child.* By finding that the parent in *Lennon* wrongfully removed the children from North Carolina, the court found common ground with *May v. Anderson.*[22] At the same time, because the children were physically present in North Carolina, it was not necessary to render a decision that would con-

[19]"We find it unnecessary to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin [the state to which the children were removed], certainly as against Ohio [the mother's domicile] the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession." 345 U.S. at 534. See Hazard, May v. Anderson: Preamble to Family Law Chaos, 45 Va. L. Rev. 379, 383-84, 390-91 (1959).

[20]The court's reasoning would have been: since the defendant father has been personally served with process within the state of North Carolina, and is now personally and generally before the North Carolina court, we have personal jurisdiction over him. The plaintiff-mother who instituted this action is also before the court generally. Therefore, based on May v. Anderson, we need look no further as we have valid jurisdiction over the parties.

[21]"The instant case does not present the special considerations that arise where a parent, with or without minor children, leaves a jurisdiction for the purpose of escaping process or otherwise evading jurisdiction, and we do not have here the considerations that arise when children are unlawfully or surreptitiously taken by one parent from the other." 345 U.S. at 534-35 n.8.

[22]See note 21 supra. The inference from Justice Burton's majority opinion in May is that the state from which the children were removed (North Carolina) retains jurisdiction over both the abducting parent and the child when the parent takes such action to deprive that state of jurisdiction. It is essential to re-emphasize this point in evaluating Lennon. See Stansbury, Custody and Maintenance Law Across State Lines, 10 Law & Contemp. Prob. 819, 832 (1944); Hazard, May v. Anderson: Preamble to Family Law Chaos, 45 Va. L. Rev. 379, 383 (1959).

flict with the past North Carolina precedents. Unfortunately, the question of the children's domicile could not be so readily resolved.[23]

In seeking to find common ground with *May v. Anderson* and past North Carolina precedents, the *Lennon* court used rather questionable language in regard to jurisdiction. The basic problem to be resolved is the fundamental conflict between in rem jurisdiction and in personam jurisdiction: domicile plus physical presence equals valid jurisdiction to determine child custody under North Carolina case law; personal jurisdiction over both parents equals valid jurisdiction to determine child custody under the United States Supreme Court decision of *May v. Anderson*. The North Carolina court sought to reconcile these two approaches, but its basis for doing so is not entirely clear.

The court may be saying that the children are physically present in North Carolina and are now residing there with their mother,[24] therefore it has in rem jurisdiction to determine their custody. And, as the defendant-father has been served with process within North Carolina and both he and the plaintiff-mother have pleaded to the merits, the court below had jurisdiction to issue a custody decree entitled to full faith and credit in the other states. This appears to be correctly applying both North Carolina precedents and *May v. Anderson* to the jurisdictional questions raised in *Lennon*.[25]

However, the thought in *Lennon* could be that North Carolina has a continuing jurisdiction when a parent wrongfully removes a child from North Carolina and establishes domicile outside that state. *May v. Anderson* can be interpreted as holding that its requirement of per-

---

[23]The lower court held as a matter of law that the children were "residents of and domiciled in North Carolina." 114 S.E.2d at 574. The North Carolina Supreme Court made no mention of the children's domicile in its opinion. It is not clear, however, whether the father assigned the lower court's holding as error. If he did not it appears that he should have, as domicile is necessary, according to past North Carolina precedents, for that state to grant jurisdiction in child custody proceedings. See note 14 supra. On the other hand, it can be reasoned that the North Carolina court, by following May v. Anderson, was not required to determine the children's domicile even in light of its past precedents. See note 9 supra. If such be the case, query as to jurisdiction over subject matter under North Carolina law.

[24]Actually the children had been living with their mother in their maternal grandparent's home for the past eleven months. 114 S.E.2d at 577.

[25]See notes 19 and 21 supra. See also Hazard, May v. Anderson: Preamble to Family Law Chaos, 45 Va. L. Rev. 379, 393-94 (1959). This analysis seems correct as the court would be saying North Carolina can determine custody of these children because it has valid jurisdiction over the subject matter (the children) and personal jurisdiction over the parents (plaintiff-mother and defendant-father), and since Nevada did not have such jurisdiction, North Carolina is not required to give full faith and credit to its decree.

sonal jurisdiction over both parents does not apply to the *Lennon* situation; consequently, since *May's* test does not apply, it can be inferred that the state from which the children were removed retains jurisdiction over both the abducting *parent* and the *child.* Such a position is indeed questionable, if not arbitrary, and might be considered unconstitutional if the father did not appear in the North Carolina proceeding.[26]

May v. Anderson has given rise to a great deal of confusion and inconsistency in the area of child custody.[27] Under the majority opinion the court in a second state may ignore the decree of a court in the first state if the parent adversely affected was not a party thereto.[28] On the other hand, it appears that under Justice Frankfurter's concurring opinion a parent could appear in the first proceeding, litigate to the end, and if he loses, simply take the child to some other state and start all over again.[29]

It is disturbing to discover that such an important field of the law is in a state of chaos. What is the answer? Not even the authoritative writers can agree. Beale's *Restatement of Conflicts* says that the child's domicile is not only sufficient, but is the exclusive basis for determining his custody.[30] Goodrich is in accord with Beale.[31] This view has

---

[26]If the defendant-father in Lennon had stayed out of the habeas corpus proceeding, or if he had appeared specially to challenge jurisdiction or the children's domicile, then North Carolina's determination of the children's custody would have violated the May Doctrine. Thus, the defendant-father would have been granted certiorari to the United States Supreme Court, in all probability, as North Carolina's decision would have been unconstitutional in that it had cut off the father's right to his children without personal jurisdiction over him. See Meredith v. Meredith, 226 F.2d 257 (D.C. Cir. 1955).

[27]Hazard, May v. Anderson: Preamble to Family Law Chaos, 45 Va. L. Rev. 379 (1959).

[28]See Meredith v. Meredith, 226 F.2d 257 (D.C. Cir. 1955); Cooper v. Cooper, 318 S.W.2d 587 (Ark. 1958); Dahlke v. Dahlke, 97 So. 2d 16 (Fla. 1957); Aufiero v. Aufiero, 332 Mass. 149, 123 N.E.2d 709 (1955); Hutchins v. Moore, 231 Miss. 772, 97 So. 2d 748 (1957); Guyette v. Haley, 286 App. Div. 451, 145 N.Y.S.2d 493 (Sup. Ct. 1955); Kallet v. Fitzpatrick, 131 N.Y.S.2d 9 (Sup. Ct. 1954); Cunningham v. Cunningham, 166 Ohio St. 203, 141 N.E.2d 172 (1957); Swope v. Swope, 163 Ohio St. 59, 125 N.E.2d 336 (1955). But see Kovacs v. Brewer, 356 U.S. 604, on remand, 248 N.C. 742, 104 S.E.2d 882 (1958).

[29]Aufiero v. Aufiero, 332 Mass. 149, 123 N.E.2d 709 (1955); Casteel v. Casteel, 45 N.J. Super. 338, 132 A.2d 529 (App. Div. 1957); Commonwealth ex rel. Gregory v. Gregory, 188 Pa. Super. 350, 146 A.2d 624 (1958). Cf. Bachman v. Mejias, 1 N.Y.2d 575, 136 N.E.2d 866 (1956) (holding that full faith and credit does not apply to custody decrees).

[30]Restatement, Conflict of Laws §§ 117, 146, 148 (1934). But see id. at §§ 118, 150.

[31]Goodrich, Conflict of Laws § 136 (3d ed. 1949). Compare the same author's earlier statement that this "is not an open and shut proposition...." Goodrich, Custody of Children in Divorce Suits, 7 Cornell L.Q. 1, 2 (1921).

generally been repudiated by the other writers who essentially agree that considerations of comity and full faith and credit should be abandoned, with consideration for the welfare of the child established as the criterion.[32] The best solution may be to utilize the constitutional grant of jurisdiction to the federal courts in *diversity* cases to obtain decrees binding on parties domiciled in different states.[33] Of course, this means that the statute requiring a jurisdictional amount in diversity cases would have to be changed so as not to apply to custody proceedings. The most important feature of the federal court's determination would be that its finding would be conclusive and binding on both parties as the court would have personal jurisdiction over both parties.[34]

At present no court can enter a binding custody decree, as the conclusive effect only relates to the conditions that existed at the time the decree was entered.[35] Surely it must be conceded that the

---

[32]1 Ehrenzweig, Conflict of Laws 277 (1959); Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich L. Rev. 345, 374 (1953); Hazard, May v. Anderson: Preamble to Family Law Chaos, 45 Va. L. Rev. 379, 383 (1959); Stansbury, Custody and Maintenance Law Across State Lines, 10 Law & Contemp. Prob. 819, 822 (1944). Cf. Stumberg, The Status of Children in the Conflict of Laws, 8 U. Chi. L. Rev. 42, 57-58 (1940).

[33]Ritz, Migratory Alimony: A Constitutional Dilemma in the Exercise of in Personam Jurisdiction, 29 Fordham L. Rev. 83, 101-04 (1960). Although Professor Ritz's theory applies to use of the federal courts for a determination of jurisdiction in alimony proceedings it would appear to operate just as satisfactorily in custody proceedings.

[34]29 Fordham L. Rev. at 102-03.

[35]The mandates of full faith and credit do not require that a sister state give a more conclusive or final effect to a judgment than the state in which it was rendered. New York ex rel. Halvey v. Halvey, 330 U.S. 610 (1947). Most states have statutes that allow their courts to modify custody decrees that they have rendered. Therefore, since the courts of the state that rendered the decree could themselves modify it, the courts of another state in which enforcement is sought can do the same on the basis of significant facts not presented or considered at the original proceedings. Ibid. These facts will most frequently take the form of changed circumstances arising after the original decree was entered.

There is no fixed standard by which to determine what constitutes a change in circumstances sufficient to warrant modification of a prior custody decree. Elders v. Elders, 206 Ga. 297, 57 S.E.2d 83, 85 (1950). It is often stated that altered conditions must be such a substantial and significant nature as to affect materially the welfare of the child involved. Heavrin v. Spicer, 265 Fed. 977, 980-81 (D.C. Cir. 1920); Bennett v. Bennett, 73 So. 2d 247 (Fla. 1954). However, courts have sometimes modified custody decrees on the basis of changed circumstances that seem of little significance. For instance, one court granted modification on the basis of a lapse of eight months since the rendering of the decree. People ex rel. Brown v. Schiff, 49 N.Y.S.2d 300 (Sup. Ct. 1944).

The danger exists that courts will use the changed circumstances rule merely as a tool enabling them to refuse to give full faith and credit to the decrees of other states. One court warns of this danger: "As a finding of changed conditions is one