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Conflict of Laws - Custody Judgments - Essential Validity - Full Faith and Credit

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CONFLICT OF LAWS—CUSTODY JUDGMENTS—ESSENTIAL VALIDITY—FULL FAITH AND CREDIT

Husband and wife were natives and domiciliaries of Wisconsin; however, the wife left Wisconsin with the children and moved to Ohio, establishing domicile there. Subsequently, the father obtained a divorce in Wisconsin. The mother in Ohio was given notice, but she did not enter an appearance in the suit. The custody of the children was awarded to the father, who then brought them back to Wisconsin. Thereafter he permitted the children to visit their mother in Ohio. When she refused to surrender them, the father petitioned for a writ of habeas corpus. The state courts of Ohio decided that the Wisconsin decree was binding on the mother under the Full Faith and Credit Clause of the Federal Constitution. The mother obtained a reversal from the United States Supreme Court.[1] *May v. Anderson*, 345 U.S. 528 (1953).

Mr. Justice Burton, writing for the majority, which included Chief Justice Vinson and the Justices Black and Douglas, found "it unnecessary to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin, *certainly as against Ohio*, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession."[2] (Italics supplied.) Mr. Justice Frankfurter in a concurring opinion stated exactly what he understood the Court to be deciding and not deciding in the case: that the Full Faith and Credit Clause does not require Ohio to accept the Wisconsin disposition of the children and not that Ohio would be precluded from recognizing it; Ohio could give effect to it without offending due process of law.

Mr. Justice Jackson, joined by Mr. Justice Reed, dissented to the entire theory of the majority and concurring opinions. He contended that the domicile of the children was in Wisconsin and that this fact, plus the domicile of the father, should be

1. The lower courts had based judgment on the following reasons: (1) the county court in Wisconsin in the divorce proceedings on substituted service on the mother had power or control over the children although both mother and children were in Ohio; (2) during the period of time between the filing of the divorce petition and the decree, the children were "domiciled" in Wisconsin; (3) the mother's change of domicile did not affect that of the children although they were with her because domicile of a minor child is that of the father. Anderson v. May, 157 Ohio St. 436, 105 N.E.2d 648 (1952); 91 Ohio App. 557, 107 N.E.2d 358 (1952).

2. 345 U.S. 528, 534 (1953).

sufficient under the theory of *Williams v. North Carolina*[3] to support a custody decree and entitle it to full faith and credit. Mr. Justice Minton in a separate dissent pointed out that the judgment appeared valid on its face, that the mother had not questioned its validity in any of the pleadings, and that therefore Ohio had been bound to give it full faith and credit.[4]

In *Halvey v. Halvey*,[5] the Supreme Court had expressly reserved two questions which, if answered, might go a long way toward clearing up the present dissension as to what constitutes the jurisdictional basis of a custody decree which must be recognized by sister states. The questions were: (1) can a court render a valid custody decree where the child is out of the state with one of its parents at the time the decree is rendered and (2) is the parent who is outside the state bound by the custody decree where there is only constructive service on him? Both of these questions were before the Court in the instant case. The first question remains unanswered, while the second was answered in the negative.

It is submitted that this decision falls short of defining the basis for jurisdiction in custody actions. In turning its attention to the personal rights of the mother, the Court went counter the usual supposition that custody concerns a determination of status, which, under the rules of conflict of laws, is normally reserved to the state of domicile of the party whose status is at issue.

The oldest rule is that the forum for the custody decree is the court of the child's domicile.[6] On the other hand, a recent line of cases has held that "residence" of the child is enough to give the court the power to determine the child's status.[7] Such

3. 317 U.S. 287 (1942).

4. If in the pleas before the Supreme Court, the mother did not question the validity of the decree, it would seem that the court raised the question of its own accord; and as Justice Minton pointed out, the court had no right to question whether the judgment was entitled to full faith and credit.

5. 330 U.S. 610 (1947).

6. Larson v. Larson, 190 Minn. 489, 252 N.W. 329 (1934); Griffin v. Griffin, 95 Ore. 78, 187 Pac. 598 (1920); Goodrich, *Custody of Children in Divorce Suits*, 7 CORN. L.Q. 1 (1921); Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. OF CHI. L. REV. 42 (1940). *Contra:* Stansbury, *Custody and Maintenance Across State Lines*, 10 LAW & CONTEMP. PROB. 819 (1944).

7. De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345 (1896); Girtman v. Ricketson, 221 La. 691, 60 So.2d 88 (1952), 27 TULANE L. REV. 361 (1953); Haynie v. Hudgins, 122 Miss. 838, 85 So. 99 (1920); Boor v. Boor, 241 Iowa 973, 43 N.W.2d 155 (1950); Sheehy v. Sheehy, 88 N.H. 223, 186 Atl. 1 (1936); Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925); Guardians for Wilkins, 146 Pa. 585, 23 Atl. 325 (1892); Wicks v. Cox, 146 Tex. 489, 208 S.W.2d 876, 4 A.L.R.2d 1 (1948); Note, 24 HARV. L. REV. 142 (1910).

holdings are premised on the rationale that the rules of domicile are too technical, and that in reality the state in which the child is actually present has the greater interest in its welfare. In addition, it has more knowledge of the needs and present living conditions of the child.[8]

The instances in which the courts have focused attention on the rights of the parents comprise a small minority of custody cases.[9] The majority opinion does this, and the result is that under it the custody decree acquires the aspects of a personal judgment against the parent, thus making personal jurisdiction a requirement at least for compelling interstate recognition. The majority, by holding that Wisconsin's decree does not have extraterritorial effect (since Wisconsin did not have personal jurisdiction over the mother when the decree was rendered), seems to say that the decree is valid in Wisconsin, but not recognizable in Ohio. Mr. Justice Frankfurter in his concurring opinion says he understands the majority opinion to mean that Ohio can recognize the Wisconsin decree if it chooses, but that Ohio is not compelled to recognize it. Either interpretation runs counter to the language of the Full Faith and Credit Clause which requires the valid judgments of one state of the union to be accepted by its sister states,[10] and this is the position taken by Mr. Justice Jackson in his dissent. As a valid judgment has been understood to be one which meets the requirements of the Due Process Clause,[11] both the majority opinion and the concurring opinion of Mr. Justice Frankfurter imply an introduction of separate standards for essential validity and for recognition under the Full Faith and Credit Clause. It would seem that Mr. Justice Jackson's position that custody actions can only be brought in the state in which the child is domiciled, if adopted by the Court, would

8. Stansbury, *Custody and Maintenance Across State Lines*, 10 LAW & CONTEMP. PROB. 819 (1944). Therein the author contends that this is the more realistic and workable rule; although the majority of the cases support the domicile rule, in all of those cases except one, the domicile and residence did in fact coincide.

9. Breene v. Breene, 51 Colo. 342, 117 Pac. 1000 (1911); Stephens v. Stephens, 53 Idaho 427, 24 P.2d 52 (1933); Wear v. Wear, 130 Kan. 205, 285 Pac. 606, 72 A.L.R. 425 (1930); May v. May, 233 App. Div. 519, 253 N.Y. Supp. 606 (1st Dep't 1931); Commonwealth v. Rahal, 48 Pa. D. & C. 568, 25 Erie Co. L.J. 241 (1942); Anderson v. Anderson, 74 W.Va. 124, 81 S.E. 706 (1914).

10. Although Mr. Frankfurter stated that the majority was holding that Ohio could recognize the judgment if it wished to, neither he nor the majority cited any authority showing that the terms of the Full Faith and Credit Clause of the Federal Constitution are anything but mandatory.

11. RESTATEMENT, CONFLICT OF LAWS § 429, comment (1934).

furnish the rule most likely to prevent, in his words, the reduction of "the law of custody to a rule of seize-and-run."[12]

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CONFLICT OF LAWS—JURISDICTION OVER NONRESIDENTS—CONSTRUCTIVE SERVICE IN TORT ACTION ARISING OUTSIDE THE STATE

Suit in New York arose out of a death resulting from the crash of an airliner operated by defendant corporation. A New York statute provided that service of process could be made upon the Secretary of State as agent for nonresident owners of aircraft for the purposes of litigation arising out of accidents of any aircraft "which has landed at or departed from any airfield in this state."[1] The airliner was on a scheduled flight from New York to California and crashed in California. Defendant was served with process in New York in accordance with the statute. The application of the statute under these facts was challenged as a violation of due process. The lower court ruled that all the requirements were met.[2] On appeal, *held*, the statute was unconstitutional insofar as it was applied to accidents or collisions which occurred out of state, as the police power of the state may not be projected beyond its territorial boundaries. *Peters v. Robin Airlines*, 281 App. Div. 903, 120 N.Y.S.2d 1 (2d Dep't 1953).

The United States Supreme Court in 1878 in the landmark case of *Pennoyer v. Neff*[3] held that constructive service upon a nonresident defendant is ineffective to support a personal judgment. The court limited the decision by expressly excluding any opinion as to the right of states to require the appointment of agents for service of process by nonresidents "entering into a partnership or association within its limits" for actions arising out of such business.[4] Nevertheless, that case represents the high water mark in protecting nonresident defendants. The principles of *Pennoyer v. Neff* have by necessity undergone modifications.

It has long been well settled that nonresident corporations doing business within a state are subject to the jurisdiction of its

12. 345 U.S. 528, 542 (1953).
1. N.Y. GENERAL BUSINESS LAW § 250 (Cum. Supp. 1952).
2. Peters v. Robin Airlines, 118 N.Y.S.2d 238 (Sup. Ct. 1952).
3. 95 U.S. 714 (1878).
4. *Id.* at 735.