Washington Law Review

Volume 28 | Number 2

5-1-1953

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WASHINGTON LAW REVIEW
AND
STATE BAR JOURNAL

VOLUME 28 MAY, 1953 NUMBER 2

STRATEGY FOR WASHINGTON LAWYERS IN CHILD CUSTODY SUITS INVOLVING CONFLICT OF LAWS

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Assume the following hypothetical: a decree of divorce has been entered in Washington and custody of the children has been awarded to *W* (wife). *W* then takes the children into State *B*. *H* (husband) believing circumstances have changed now desires to secure a change in the custody of the children. The question immediately arises: Where may a suit to secure such change of custody be brought, and where will it be more effective—in a Washington or State *B* court? The choice may bear considerably on the length of time it will take, the cost of the litigation, and the number of courts through which the aggrieved party must go to reach the desired results. A lawyer with this problem would necessarily direct his thoughts first to the requirements of jurisdiction in suits for custody, keeping in mind that various states follow different jurisdictional rules. These rules are:[1] (a) that domicile of the child is the sole basis of jurisdiction, (b) that physical presence of the child in the state is necessary, (c) that physical presence of the spouses is sufficient irrespective of where the child may be, (d) that jurisdiction, once having attached, is continuing, regardless of the domicile or whereabouts of the parties, and (e) that no hard and fast rule is to be applied, but that any of these bases might serve depending upon the circumstances of the particular case. The last mentioned theory presupposes that, while there may be a concurrent jurisdiction in two or more states, a sound discretion on the part of the courts will be exercised in disposing of the particular case.

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[1] See Note, 9 A.L.R. 2d 434 (1949).

Special mention should be made of the last "rule" for it has received closest attention and has gathered a sizable following over the past few years.[2] The writer shall advert to it occasionally for an appraisal of whether it has provided a more satisfactory solution than prior rules.

In recent years, an ever increasing number of cases involving some phase of this problem has come before the appellate courts of the several states. The purpose of this article is to review the law as it presently exists in Washington, to point out the particular problems facing the Washington lawyer handling such a case, and to make suggestions for effective action based upon a survey of end results accomplished by the actual application of one or more of the bases of jurisdiction in other states.[3]

Actual analysis of the law should be prefaced by the note that, although the survey indicated that generally lawyers and courts alike were at loss for solutions in particular cases and felt a need for revision in this field of the law,[4] it also revealed that, wherever practical, suits for custody or change of custody should be brought in the state where the child is physically present, regardless of domicile.[5] In nearly all cases where suit was brought in a state other than that of the child's physical presence, where the decree was adverse to the controlling spouse, such spouse refused to voluntarily return the child to the party awarded custody.[6] This fact has generally resulted in resort to the

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[2] See Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P. 2d 739 (1948); *Ex parte* Kosh, 105 Cal. App. 2d 418, 233 P. 2d 598 (1951); Helton v. Crawley, 241 La. 296, 41 N.W. 2d 60 (1950); Commonwealth *ex rel.* Camp v. Camp, 150 Pa. Super. 649, 29 A. 2d 363 (1942); Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925).

[3] Most of the cases that have arisen in the past few years with factual and legal problems allied to those in the hypothetical case have been traced to their ultimate disposition by correspondence with the attorneys in those cases. The correspondence with the attorneys was had in cases where the child was outside the state of forum; the remainder of the cases being taken directly from the reports. See an earlier article of a general nature which incorporated the results of the survey, Graves, *Strategy for Child Custody Suits Involving Conflict of Laws*, 2 DUKE B. J. 11 (1952).

[4] In Daugherty v. Nelson, 234 S.W. 2d (Mo. App. 1950) the court said: "Several theories have been developed to determine the correct basis of jurisdiction to award custody of a minor child, as a consequence the cases dealing with the question are in considerable confusion."

[5] The exceptions to this proposition are those cases where the controlling spouse is in the state and can be effectively controlled.

[6] Little v. Little, 249 Ala. 144, 30 So. 2d 386 (1947); Roberts v. Roberts, 300 Ky. 454, 189 S.W. 2d 691 (1945); Conley v. Conley, 324 Mass. 530, 87 N.E. 2d 153 (1949); Beckmann v. Beckmann, 358 Mo. 1029, 218 S.W. 2d 566 (1949); Hughes v. Hughes, 180 Ore. 575, 178 P. 2d 170 (1947); Commonwalth *ex rel.* Camp v. Camp, 150 Pa. Super. 649, 29 A. 2d 363 (1942) (the child returned but afterward taken and not since found); Clothier v. Clothier, 33 Tenn. App. 352, 232 S.W. 2d 363 (1950); Mills v. Howard, 228 S.W. 2d 906 (Tex. 1950); Peacock v. Bradshaw, 145 Tex. 68, 194 S.W. 2d 551 (1946); Kern v. Linsey, 182 Va. 775, 30 S.E. 2d 707 (1944); Clifton v. Clifton,

courts of a second or third state by the winning spouse,[7] a compromise between the spouses,[8] or resort to self-help to secure the child.[9] Often, of course, financial considerations have prevented any further action.[10]

Aside from the constitutional problem involved in assumption of jurisdiction without the child's domcile's being in the state of the forum, sound argument can be made for the assumption of jurisdiction on the basis of physical presence. The court has the child before it and can render an effective decree. Often the state in which the child is physically present has a greater interest in the welfare of the child and the preservation of the family unit than the state in which the child is technically domiciled. Further, as has been indicated, the parties most often find it necessary in the end to resort to the courts of such state regardless of where the original action was brought. So a direct move into those courts will often save the client money as well as prolonged litigation. Between physical presence and domicile as a sole criterion of choice for jurisdictional grounds (where the two do not concur), it is thought the better argument can generally be made in favor of physical presence. The first problem for the Washington lawyer in each case is: What is the basis of jurisdiction for suits involving custody in this state? Of course, our Supreme Court has long held that the court making the original award of custody has "continuing jurisdiction," regardless of the whereabouts of the child.[11] Where a valid award of custody has been made in another state, however, the answer is more difficult. In re *Mullins*[12] seems to say that our courts may not reconsider such awards unless the child has become domiciled in this state since the original award of custody. And the court in the *Mullins* case made it crystal clear that *physical presence* of the child alone is not sufficient to confer jurisdiction upon our courts to make a redetermination of the award. Although there was

1 D.L.R. 597 (Br. Col. 1949). In a few cases the child was returned voluntarily, but special circumstances may account for this. Coats v. Coats, 161 Kan. 307, 167 P. 2d 290 (1946); Lotz v. Lotz, 327 Mich. 577, 42 N.W. 2d 745 (1950) (child to be returned from California in July each year to Michigan—H to pay expenses for W and child). Information has been obtained in part from attorneys in the above cases.

[7] Hughes v. Hughes, *supra* note 6; Little v. Little, *supra* note 6; Boor v. Boor, 241 Iowa 973, 43 N.W. 2d 155 (1950) to cite only a few.

[8] Clothier v. Clothier, *supra* note 6; Peacock v. Bradshaw, *supra* note 6.

[9] Commonwealth *ex rel.* Camp v. Camp, *supra* note 6 (parties armed only with letter from judge); Mills v. Howard, *supra* note 6; Clifton v. Clifton, *supra* note 6.

[10] Conley v. Conley, *supra* note 6 (letter from attorney L. H. Miller, Brockton, Mass. Miller, Brockton, Mass.)

[11] Harris v. Harris, 71 Wash. 307, 128 Pac. 673 (1912); for a recent case see State *ex rel.* Jiminez v. Superior Court, 24 Wn. 2d 194, 163 P. 2d 610 (1945), and Schaefer v. Schaefer, 36 Wn. 2d 514, 219 P. 2d 114 (1950).

[12] 26 Wn. 2d 419, 174 P. 2d 790 (1946).

some area for speculation prior to the *Mullins* case as to whether the court might not, upon a proper showing of changed circumstances, assume jurisdiction despite lack of domicile,[13] the doubt seems to have been resolved against such assumption of jurisdiction. In an original proceeding the Washington courts might proceed where both spouses have entered an appearance regardless of the whereabouts of the child.[14] This would not necessarily be true upon petition for modification of a decree of a sister state.[15]

The approach of the Washington Supreme Court assumes that two or more states may have "concurrent jurisdiction," *e.g.*, State *A* may have "continuing jurisdiction" and State *B* jurisdiction dependent upon domicile. In such case the Washington Supreme Court has held (domicile being in Washington) that full faith and credit need not be given the decree of the sister state based upon a continuing jurisdiction.[16] The basis of the doctrine is analogous to that found in the divorce law, *i.e.*, that full faith and credit must be given when the divorce is founded upon the domicile of one of the parties, but that the fact of domicile is open to question. It presupposes that there is no other jurisdictional basis than domicile for making an award of custody—a theory still open to serious question.[17]

The foregoing analysis of the Washington law would seem to leave an impression of the existence of "cut and dried" rules of law, but even with the narrower view adopted by the Washington Court there are still serious problems. Is a decree of a sister state based upon physical presence of the child entitled to full faith and credit where the child is afterward removed to Washington?[18] Is it worthwhile to invoke the continuing jurisdiction of our courts? Where is the domicile of the child when part time custody has been awarded to each spouse?

For a closer view of the problems, the results of the actual survey are set out with particular attention to the result to be anticipated when the case involves Washington law.

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[13] *In re* Mullins, *supra* note 12, seems to clear up any doubt remaining after Jones v. McCloud, 19 Wn. 2d 314, 142 P. 2d 397 (1943) and State *ex rel.* Marthens v. Superior Court, 25 Wn. 2d 125, 169 P. 2d 626 (1946).

[14] State *ex rel.* Ranken v. Superior Court, 6 Wn. 2d 90, 106 P. 2d 1082 (1940).

[15] Since child may not have been awarded to either spouse by the original decree but to some third party and therefore possibly domiciled out of the state.

[16] *In re* Groves, 109 Wash. 112, 186 Pac. 300 (1919), obviously affirmed by *In re* Mullins, *supra* note 12, since that case in the final analysis turned on the domicile of the child.

[17] See Halvey v. Halvey, 330 U.S. 610 (1947).

[18] Under the view that only domicile confers jurisdiction the answer would seem to be that full faith and credit need not be given.

RESULTS WHEN COURT ACCEPTS JURISDICTION ON DOMICILIARY GROUNDS ALTHOUGH CHILD IS OUT OF STATE

In *Sampsell v. Superior Court*,[19] *H*, *W* and child lived in Los Angeles County until 1946 when *W* and child went to Nevada. *W* obtained a Nevada divorce and was awarded custody of the child in 1947. She then moved to Utah and was there remarried. *H* in the meantime had petitioned the Los Angeles County court for divorce and custody of the child claiming *inter alia* that *W* had secured divorce in Nevada by fraudulent representation of domicile there.[20] The court refused to proceed, basing its refusal on jurisdictional grounds. Upon *H*'s petition, a mandamus was issued ordering the exercise of jurisdiction as to the custody on the ground that physical presence of the child was not necessary, and that, following the "concurrent jurisdiction" view, the court might take jurisdiction on the basis of domicile. Prior to the decision by the California Supreme Court, *H* filed suit in a Utah court and was awarded custody during the summer months of each year. On appeal the decision was affirmed by the Utah Supreme Court.[21]

Following the view adopted by the California Supreme Court, *H* might have brought suit in any of three states—California, as the state of domicile; Nevada, which had a continuing jurisdiction (assuming it had original jurisdiction); and Utah because the child and controlling spouse were physically present there. In fact, *H* did go through the chain of courts in two states.[22]

On the surface, it appears *H*'s lawyers would have been wise to resort directly to the Utah courts. The question then is: What advantage, if any, lies in bringing suit in either of the other two states? The case suggests three possible answers: (1) a decree of a California or Nevada court of recent date might have been a powerful weapon in the hands of the plaintiff in the Utah courts;[23] (2) by this delayed

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[19] 32 Cal. 2d 763, 197 P. 2d 739 (1948).

[20] The California court determined both were domiciled in California.

[21] Sampsell v. Holt, 115 Utah 73, 202 P. 2d 550 (1949). But the court rejected the idea that the lower court could modify the Nevada decree and preferred to rest in its affirmance on "changed circumstances"—here passage of time. Proceedings on the mandamus to the Los Angeles county court were dismissed after this decision.

[22] It is suggested *H* would also have gone through the Nevada courts and at least one more California court if suit had not been filed in Utah when it was, unless, upon the first award of custody, *W* voluntarily returned the child to *H*. This is rarely the case. The reason for the suggestion is that neither California nor Nevada would have been able to enforce their decrees in Utah. For frank admissions that such decrees are unenforceable, *see*: Weber v. Weber, 10 Alaska 214 (1942) and Peacock v. Bradshaw, *supra* note 6.

[23] Since full faith and credit may be given. If the decree is not of recent date there will have been time for changed circumstances to have taken place. In Moloney v.

action in arriving at the court of final disposition *H* has secured a passage of time which may supply the needed "change of circumstances," and (3) a suit in the California court might be more convenient from both a working and financial standpoint, for as between the home court and a foreign court, the former is more likely to favor the plaintiff.[24] Then too, occasionally, the defendant returns the child voluntarily.

While the plaintiff in the *Sampsell* case succeeded in securing a change in a previous award of custody, would the same strategy be desirable in a case where a decree of custody is sought for the first time? In this respect consider *Beckmann v. Beckmann*.[25] In that case *H* suddenly and unexpectedly departed Missouri, the state of domicile, taking the children with him and settling in California. *W* sued for divorce and custody in Missouri. *H* appeared only specially to contest the jurisdiction. The court awarded custody to *W*, and the decree was affirmed by the Missouri Supreme Court. Nevertheless, *W* did not get the children for *H* refused to send them back. *W* has not pursued her remedies in California. The final result suggests that *W* has gained little by the Missouri decree and its affirmance; further prosecution is necessary for effective results. Perhaps the more effective way would have been for *W* to bring habeas corpus in California immediately following the Missouri lower court's decree,[26] if not direct resort to the California courts in the first instance. If the direct method had been used and suit brought before *H* had a chance to settle down, such suit might have resulted in a decree for the plaintiff because of the circumstances under which the children were taken.[27] Possibly then, while in the *Sampsell* type case (where one party has already been awarded custody) resort to the state of domicile may sometimes be desirable, it may be disastrous in such cases as *Beckmann* for financial or other reasons. The recommended strategy would seem to be to prosecute in the courts of the child's "presence" state immediately following the first award of custody in the home state. This is especially true since, when the plaintiff wins a later action in his home

Moloney, 167 Kan. 444, 206 P. 2d 1076 (1949) twenty-four days was sufficient time for changed circumstances.

[24] That this is often the case, *see*: *Ex parte* Brown, 90 Cal. App. 2d 651, 203 P. 2d 799 (1949) where the parties brought suits in different states at approximately the same time and both received awards of custody.

[25] 358 Mo. 1029, 218 S.W. 2d 566 (1949).

[26] This was the method used in Hughes v. Hughes, *supra* note 6, and Little v. Little, *supra* note 6.

[27] Crocker v. Crocker, 122 Colo. 49, 219 P. 2d 311 (1950). *But cf.* Helton v. Crawley, 241 Iowa 290, 41 N.W. 2d 60 (1950).

court, the defendant will generally appeal on grounds of jurisdiction to secure a passage of time and give the child a chance to become familiar with his new surroundings in order that when the plaintiff finally reaches the state where the child is, the defendant can plead "changed circumstances." The method suggested may prevent defendant's strategy from being effective.

When a superior court in Washington assumes jurisdiction upon the basis of domicile and the child is not within the state, there is no reason to expect any better results than have been attained elsewhere. The problem presented is simply to determine the basis of jurisdiction in the asylum state. If that state accepts no other basis than domicile for jurisdiction one should secure the modification in Washington and bring habeas corpus in the asylum state. The same remedy is recommended in like situations where the Washington court has already made an award of custody and the child has not yet had time to become domiciled in the other state. If the asylum state accepts physical presence of the child as a jurisdictional ground then, as already suggested, the more feasible plan is to secure the change of custody there.

To illustrate the results to be expected where the asylum state accepts no other jurisdictional basis than domicile (as in Washington), see *Allman v. Register*;[28] *H* and *W* were divorced in Henrico County, Virginia, in 1947, and the court then awarded custody of the child to *W* during the school year and to *H* during the summer months. After the summer of 1950 the father, living in North Carolina, refused to return the child to Virginia and *W* brought habeas corpus in Mecklenburg County, North Carolina. That court granted a change of custody in *H*'s favor. On appeal, the decision was reversed by the Supreme Court because, it was said, the lower court was without jurisdiction since the child was not domiciled in North Carolina. On remand, the county court, in accordance with the opinion of the Supreme Court, ordered the child returned to its mother in Virginia. Had the same proceedings been brought in Washington under the same circumstances, an identical result would have been reached under the law of the *Mullins* case, which involves a nearly identical situation.

Results When Suit Is Brought in State Where One or Both Spouses Are Present and Child Is Absent

In this type of case, if the court has the controlling spouse before it, measures can be taken to insure return of the child if the decree is

[28] 233 N.C. 531, 64 S.E. 2d 861 (1951).

adverse to such party. Such measures may include sequestration of the defendant's property in the state,[29] modification of former alimony decrees,[30] and requiring the defendant to post a bond to insure return of the child.[31]

If the court in which such action is brought requires physical presence of the child and accepts no other basis, it would seem it would not take such a case. On the other hand, if the child is domiciled in the state, those courts basing jurisdiction on either domicile, physical presence of the spouses, or the view of "concurrent jurisdiction" would seem to encounter no difficulties. Such would be the case if the proceeding were in Washington.[32]

Often the court has little knowledge of or interest in the child and frankly admits this, but, without too much hesitation, proceeds to award custody.[33] This occurs where the parties go to another state for a divorce and leave the child behind with relatives or friends. But in many cases, for example where either or both spouses have thought it desirable to take the child out of the state until the marital trouble was over, or solely to escape the effect of a decree which will probably be against the spouse in question,[34] the court does have such knowledge and interest. Here the court is generally in an advantageous position to force the party to bring the child within the state and when it has taken such action it has been effective.

In the latter type case it would seem the state's interest in the child's welfare is such that the court should make the custody award. This would not be true where it is the spouses who go out of the state rather than the child.

RESULTS WHEN CHILD AND ONE OR BOTH SPOUSES ARE OUT OF STATE BUT COURT CONSIDERS ITSELF TO HAVE "CONTINUING JURISDICTION"

It goes without saying, the problem here is to a large extent like that of taking original jurisdiction because of domicile where the child

[29] Turney v. Nooney, 9 N.J. Super. 333, 74 A. 2d 356 (1950). See also: Commonwealth *ex rel.* v. Rahal, 48 Pa. D.&C. 568 (1942) (attachment threatened).

[30] Levell v. Levell, 183 Ore. 39, 190 P. 2d 527 (1948). See also Coats v. Coats, 161 Kan. 307, 167 P. 2d 290 (1946).

[31] *Ex parte* Halvey, 185 Misc. 52, 55 N.Y.S. 2d 761 (1945) *aff'd* 269 App. Div. 1019, 59 N.Y.S. 2d 396 (1945) *aff'd sub nom* People *ex rel.* Halvey v. Halvey, 295 N.Y. 836, 66 N.E. 2d 851 (1946), *aff'd on other grounds* 330 U.S. 610 (1947).

[32] State *ex rel.* Ranken v. Superior Court, 6 Wn. 2d 90, 106 P. 2d 1082 (1940).

[33] Wilson v. Wilson, 66 Nev. 405, 212 P. 2d 1066 (1949). New York refused to give effect to such custody award of a Cuban court. Quintana v. Quintana, 101 N.Y.S. 2d 593 (1950).

[34] *See*: Commonwealth *ex rel.* v. Rahal, *supra* note 28, and Fagan v. Fagan, 131 Conn. 688, 42 A. 2d 41 (1945).

and one of the spouses are out of the state. Washington courts have often assumed jurisdiction on the basis that they made the original award, and have been upheld.[35] However, such tactics are likely to prove fruitless.

An Oregon case worthy of examination as indicating likely results is *Hughes v. Hughes*.[36] In that case *H* and *W* were divorced by decree of the Multnomah County Court in 1938, and *W* was awarded custody of the child. *H*, feeling circumstances had later changed, desired to secure custody of the child during the summer months. *H* was then domiciled in Washington and *W* in California. The problem would be where to file such a petition. The temptation would be to say California, and, under the "concurrent jurisdiction" view, either California or Oregon would be proper forums. In the actual case, modification of the decree was sought in the court making the original award and that court granted *H* part-time custody. Defendant appealed, and prior to the final decision by the Oregon Supreme Court, plaintiff filed suit in California in the county where the child was. That court adopted the decree of the Oregon court as modified and afterward affirmed. The case suggests that whether one goes to the courts having continuing jurisdiction or not, he will finally end up in the courts of the state where the child is. Even here, the defendant by fleeing to a third state which might also consider itself to have jurisdiction, may finally win, and often has[37]—the inevitable result of allowing the child's presence to confer jurisdiction.

Occasionally though, the court exercising continuing jurisdiction has means to effectively control the absent spouse and child. Such a case is Oregon's *Levell v. Levell*[38] where the court had originally made an award of alimony and custody to the wife and threatened to cut off such alimony unless she heeded the court's orders.

When the spouse granted custody has changed domicile, the new domiciliary state will sometimes deny the jurisdiction of the court claiming continuing jurisdiction and refuse to give extraterritorial effect to any modification by that court.[39] Only those states recognizing

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[35] State *ex rel.* Jiminez v. Superior Court, 24 Wn. 2d 194, 163 P. 2d 610 (1945); Schaefer v. Schaefer, 36 Wn. 2d 514, 219 P. 2d 114 (1950) and *see* Wheeler v. Wheeler, 37 Wn. 2d 159, 222 P. 2d 400 (1950).

[36] 180 Ore. 575, 178 P. 2d 170 (1947).

[37] Little v. Little, 249 Ala. 144, 30 So. 2d 386 (1947) with the final chapter written in Little v. Franklin, 40 So. 2d 768 (Fla. 1949) (letter from Chason & Stone, Bay Minette, Ala.); Boor v. Boor, 241 Iowa 973, 43 N.W. 2d 155 (1950).

[38] *Supra*, note 30.

[39] McMillin v. McMillin, 114 Colo. 247, 158 P. 2d 444 (1945) and Moss v. Ingram,

only domicile or physical presence of the child as the sole jurisdictional basis would be in such category. This is the position of the Washington courts,[40] even though inconsistently they claim to exercise such continuing jurisdiction. Those states taking the "concurrent jurisdiction" view would not be.

Here again, attention should be drawn to the fact that by going to the state having continuing jurisdiction, the plaintiff in the *Hughes* case secured himself a powerful weapon. Theoretically, the decree in both Oregon and California would have been the same, *i.e.*, based on what the child's welfare demanded. Actually the reverse is often true and the plaintiff will get a more favorable reception outside the defendant's home state.

The court has a more difficult task when the plaintiff has secured his "weapon" in the form of a modification by a court of a foreign country. An Ohio court,[41] while recognizing that the foreign (Belgian) court acted on the basis of continuing jurisdiction, nevertheless refused to give its decree effect, because if service of process in the modification proceedings had been made in Ohio it would have been invalid and have conferred no jurisdiction. It is doubtful if this rationale would stand close analysis for the Belgian court already had continuing jurisdiction, needing no acquisition by service of process. This seems to be the first time the courts have been troubled with such a problem except in Washington.[42]

RESULTS WHEN CHILD IS PRESENT BUT NOT DOMICILED IN FORUM STATE

It has already been noted that the prospects of the Washington courts' assuming jurisdiction on the basis of physical presence are slight. However, many states, perhaps the numerical majority, will accept physical presence of the child as adequate grounds for jurisdiction. A few regard this as the sole basis.[43] Thus, when one spouse has fled with a child from Washington and taken asylum in such a state the problem is before the Washington lawyer. Many of the results to

246 Ala. 214, 20 So. 2d 202 (1944) (ignoring a decree of the Mississippi court made while the child was there).

[40] *In re* Groves, 109 Wash. 112, 186 Pac. 300 (1919).

[41] *In re* Vanderborght, 91 N.E. 2d 47 (Cuyahoga Com. Pl., Ohio, 1950).

[42] *In re* Groves, *supra* note 40, denying validity of substituted service in such a case.

[43] See for example Boor v. Boor, 241 Iowa 973, 43 N.W. 2d 155 (1950) (defendant fled two or three days before institution of proceedings in Indiana. The Iowa court said the Indiana court was without jurisdiction to award custody to the plaintiff because the child was in Iowa at the time of judgment.)

be expected here have already been indicated, and as suggested earlier, whenever practical, suit should be brought in the state where the child is physically present. However, careful planning on the part of the attorney is necessary. He should learn the jurisdictional ground in the domiciliary state, and in the state where the child is, what weight the latter state will give to the decrees of his client's state, and how prone the courts of the second state are to find "changed circumstances."

In those states which accept physical presence of the child as sufficient grounds for assuming jurisdiction, the usual holding is that full faith and credit will be given to the decrees of other states,[44] and that as to facts occurring before the date of the foreign decree, they are res judicata.[45] There appears to be a wide split on the last question, some courts holding that such decrees are only res judicata as to facts actually before the court at the time of judgment.[46] It would seem if the foreign court so considers its own decrees, then a like consideration would prevail as to the decrees of the sister state.[47] As to facts subsequent to the foreign decree, a determination on the merits is made, and if "changed circumstances" indicate its desirability, the court will change the custody. In other words, the mere fact of "concurrent jurisdiction" does not generally mean a redetermination of all the facts.

More complications enter the picture where both spouses file suits in different states at approximately the same time and the courts award custody to opposite parties. In one such case the California Supreme Court held[48] that the decree of the other state (Nevada) would govern because it was made several days earlier. Furthermore, when Nevada handed down its decree the parties were then divorced and the later California decree of divorce was inoperative, and since the custody award was merely incidental thereto and did not purport

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[44] *See*: Scott v. Scott, 227 Ind. 396, 86 N.E. 2d 533 (1949); STUMBERG, CONFLICT OF LAWS 327 (2d ed. 1951).

[45] McMillin v. McMillin, 114 Colo. 247, 158 P. 2d 444 (1945); Lofts v. Lofts, 222 S.W. 2d 101 (Mo. App. 1949).

[46] Ferguson v. Ferguson, 251 Ala. 645, 38 So. 2d 853 (1949). The court there said: "Such changed conditions to which the authorities refer is not necessarily confined to subsequent events but may include matter that was discovered though not disclosed when the original decree was entered." *Accord; Ex parte* State *ex rel.* McLaughlin, 250 Ala. 579, 25 So. 2d 507 (1948). *But cf.* Dotsch v. Grimes, 75 Cal. App. 2d 418, 171 P. 2d 506 (1946) (holding that a showing of changed circumstances was not necessary since the welfare of the child was paramount) and *Application of* Reed, 152 Nebr. 819, 43 N.W. 2d 161 (1950) to same effect.

[47] *See* Barber v. Barber, 323 U.S. 77 (1944) and Halvey v. Halvey, 330 U.S. 610 (1947).

[48] *In re* Brown, 90 Cal. App. 2d 651, 203 P. 2d 799 (1949).

to be a modification of the earlier Nevada decree, it would also be ineffective. If those were the real reasons, the moral for the attorney might be to file his petition in the court having the shortest docket. Actually, the court was probably adhering to that salutary policy of using the judicial discretion which is part and parcel of the "concurrent jurisdiction" theory adopted in the *Sampsell* case.

If there are no prior decrees before the court, and the child is present in the state, little trouble is to be anticipated, unless, as in Washington, the state is one which recognizes no ground of jurisdiction other than domicile.

PROBLEMS OF "DOUBLE" AND "SHIFTING" DOMICILE

Decrees containing part-time custody awards to each of the spouses often give rise to later controversies over the child's domicile. Washington decisions in this area have indicated that the proper preventive may well be to secure a decree providing the basic custody to be in one of the spouses,[49] or making the child a ward of the court.[50] Even then there is no assurance of the desired result since the spouse with temporary control may seek asylum in a state not requiring domicile for jurisdiction. Suppose that *H*, domiciled in Texas, has been awarded custody of the child for three months, and *W*, domiciled in Oklahoma, has been awarded custody for the other nine months of each year. Does the child's domicile shift back and forth as the change of custody takes place, *i.e.*, does the child have a "double domicile"? If so, does the domicile change when the child *is* or *should have been* transferred? The latter is the holding of some courts.[51] In consequence, when the child is with *H* in Texas, *H* can seek a change of custody even though Texas requires domicile for jurisdiction. And if *H* holds the child longer than the three month period, *W* can bring suit in Oklahoma, despite that state's requirement of domicile, since the child now *should be* in Oklahoma. Though this rule is of no importance in a case where the two states will accept jurisdiction on the basis of the child's physical presence, it definitely provides a method of securing a change of custody in the most favorable court where both states require or accept domicile as a basis. But rather than holding the child beyond the custody period and seeking the change when the other

[49] *See* Wheeler v. Wheeler, 37 Wn. 2d 159, 222 P. 2d 400 (1950).
[50] Martin v. Martin, 27 Wn. 2d 308, 178 P. 2d 284 (1947).
[51] Mills v. Howard, 228 S.W. 2d 906 (Tex. 1950); *Ex parte* Miller, 301 Okla. 499, 207 P. 2d 290 (1949).

parent brings habeas corpus, the petition must be brought within the custody period, else domicile has again shifted.

Still another situation arises where *H* and *W* are domiciled in different states and the controlling spouse dies. Suppose for example *W*, who has been awarded custody of the child, is now domiciled in New Mexico where she lives with her parents, and *H* is still domiciled in Texas, the state where the original award was made. If *W* dies, where is the child domiciled? The answer given by one court is that, upon the death of *W*, the child's domicile would automatically shift back to the state of the father's domicile.[52]

In both types of cases one of the two states will generally have a continuing jurisdiction and often would not need to depend upon domicile. Yet there is a noticeable lack of discussion of continuing jurisdiction in the cases—probably because the lawyers have not pushed the point.

It might be noted here that the whole jurisdictional problem is not peculiar to the United States, and the Canadians at least have fared little better.[53]

CONCLUSION

Analyses of the jurisdictional bases and recommendations for remedial action in this field of the law are well-covered eleswhere.[54] Suffice it to say here that there is a tremendous need for uniformity in this area of the law—a need which has not been helped by the recent adoption of the "concurrent jurisdiction" theory in a number of states.

The problem considered here is one of strategy and no definite set of rules can be supplied because of the lack of uniformity among the states. Effective results in each case will be dependent upon a sound knowledge of the jurisdictional rules of the states involved.

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[52] Peacock v. Bradshaw, 145 Tex. 68, 194 S.W. 2d 551 (1946); Note, 136 A.L.R. 914 (1942).

[53] Clifton v. Clifton [1949] 1 D.L.R. 597 (the court awarded *H* custody of the child who was domiciled in British Columbia but living in Alberta with its mother. *H* secured the child by self-help after *W* refused to return him voluntarily.) *But cf.* Cleaver v. Cleaver [1949] 4 D.L.R. 367, where the Ontario court refused to take jurisdiction where the child was out of the province. McKee v. McKee [1951] 1 All. Eng. Rep. 942, is the most recent authority for the Canadians.

[54] Stansbury, *Custody and Maintenance Law Across State Lines,* 10 LAW & CONTEMP. PROB. 819 (1944); Graves, *Strategy for Child Custody Suits Involving Conflict of Laws,* 2 DUKE B.J. 11 (1952).