[Washington Law Review](https://digitalcommons.law.uw.edu/wlr)

Volume 31
Number 2 *Washington Case Law - 1955*

6-1-1956

Domestic Relations

David Wayne Gittinger

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Family Law Commons

Recommended Citation

David W. Gittinger, Washington Case Law, *Domestic Relations*, 31 Wash. L. Rev. & St. B.J. 140 (1956).
Available at: https://digitalcommons.law.uw.edu/wlr/vol31/iss2/9

This Washington Case Law is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

DOMESTIC RELATIONS

Divorce—Jurisdiction to Grant Custody. In *Hammond v. Hammond*,[1] the mother of two minor children obtained a decree of divorce in the state of Idaho. The summons and complaint were served upon the father personally in the state of Washington, but he made no appearance and was adjudged to be in default. The decree awarded custody of the children, who were in Idaho, to the mother. A short time thereafter, the father took the children to Washington and refused to return them to her. She brought a writ of habeas corpus in Washington to regain custody. In defense, the father alleged that the Idaho court lacked jurisdiction over the divorce action because the wife had met neither the domicile nor residence requirements. The trial court upheld these contentions and refused to issue the writ.

The supreme court, on appeal, reversed the lower court's ruling. It found that the Idaho court did have jurisdiction to decree divorce, and that the Idaho decree should be given full faith and credit.

The court reiterated the well established principle that domicile is a question of physical presence and intent,[2] and pointed out that the one asserting the lack of jurisdiction on a domicile issue must sustain the burden of proving such an assertion.[3] "We cannot say that it has been affirmatively shown that the facts necessary to give the Idaho court jurisdiction in the divorce action did not exist."[4] Here, as in most cases, the requisite intent is the primary object of proof. Because the testimony of the wife and the surrounding circumstances indicated an intent to establish domicile in Idaho,[5] the supreme court was justified in finding that the evidence presented established that domicile.

The Washington court also reversed the trial court's finding that the Idaho residence requirement went to the jurisdiction of the court. An Idaho statute required residence in Idaho "for six full weeks next preceding the commencement of the action".[6] The issue arose because of a variance of three days between the date the mother alleged and first testified that she went to Idaho and her later testimony on the same subject. The Washington court pointed out that the jurisdiction

[1] 45 Wn.2d 855, 278 P.2d 387 (1954).
[2] Maple v. Maple, 29 Wn.2d 858, 189 P.2d 976 (1948); Williams v. State of North Carolina, 325 U.S. 226 (1944).
[3] Wampler v. Wampler, 25 Wn.2d 258, 170 P.2d 316 (1946).
[4] Hammond v. Hammond, 45 Wn.2d at 358, 278 P.2d at 389.
[5] The evidence and testimony indicated that the mother took the children to Idaho and lived with a maternal aunt. Shortly thereafter, she obtained a job and rented an apartment for herself and the children.
[6] IDAHO CODE, § 32-701.

of the Idaho court in divorce actions is conferred by the constitution of that state.[7] The fact that the Idaho legislature passed an act providing that a divorce should not be granted unless the plaintiff has met that statutory requirement does not in any way diminish the jurisdiction of the court.[8] The court said that even where the fact of residence for a required time has been established by a fraud perpetrated on the court, such fraud is intrinsic and cannot be attacked in a collateral proceeding. In the instant case, the period for appeal had elapsed, and the father's collateral attack on this issue would necessarily fail.[9]

Conceding then that the Washington court was justified in finding that the mother was domiciled in Idaho, and the residence requirement could not be attacked in a collateral proceeding, the result in the *Hammond* case is probably correct in deciding that the Idaho court had jurisdiction over the divorce action. This would indicate that the Idaho divorce decree was entitled to the full faith and credit awarded it by Washington in the habeas corpus proceeding. However, it does not follow that the custody decree should be awarded the same full faith and credit.

The father's actions indicate that his primary purpose after the divorce decree was granted was to obtain custody of the children, and not to have the divorce declared a nullity. This objective might have been reached if the father's collateral attack had been directed to the jurisdiction of the court with respect to the custody decree alone. The divisibility of divorce decrees is recognized with regard to alimony and property awards.[10] This divisibility doctrine has recently been extended to custody decrees by the Supreme Court of the United States.[11] Assuming that the Washington court would recognize and apply this doctrine, a jurisdictional attack on the Idaho court's right to award

---

[7] "The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law." IDAHO CONST., art. 5, § 13; This section had been interpreted in Fox v. Flynn, 27 Idaho 580, 150 Pac. 44 (1915).

[8] The Idaho supreme court had interpreted the statute and constitutional provision together in Robinson v. Robinson, 70 Idaho 122, 212 P.2d 1031 (1949). In that case the court said that the residence requirement merely prescribed a condition which the plaintiff had to meet to entitle him to a divorce. It said that this requirement does not go to the jurisdiction of the court.

[9] The Washington court has confined collateral attacks in similar situations. For analogy, see Batey v. Batey, 35 Wn.2d 791, 800, 215 P.2d 694, 700 (1950) ("a collateral attack may not be made upon a judgment where the absence of jurisdiction does not appear upon the record"); Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757 (1902); *In re* Higdon, 30 Wn.2d 546, 192 P.2d 744 (1948); Bass v. Smith, 26 Wn.2d 872, 176 P.2d 355 (1947).

[10] Estin v. Estin, 334 U.S. 541 (1948); Kreiger v. Kreiger, 334 U.S. 555 (1948); Esenwein v. Pennsylvania, 325 U.S. 279 (1947).

[11] May v. Anderson, 345 U.S. 528 (1952).

custody in the *Hammond* case might have been successful.

In *May v. Anderson,*[12] the United States Supreme Court recognized the above doctrine and considered whether or not the full faith and credit clause requires one state to follow the child custody order rendered by a sister state which had personal jurisdiction over only one parent. In the *May* case, a father domiciled in Wisconsin sued in that state for a divorce from his wife who had moved to Ohio and expressed her intent not to return. The summons and complaint were served upon the mother personally in Ohio. She made no appearance and the father was awarded a default decree. The decree awarded custody of the children to the father. The mother, who had the children in Ohio when the decree was rendered, surrendered them to him. Four years later, the children visited their mother in Ohio and she refused to return them. The father brought a writ of habeas corpus in an Ohio court, relying on the Wisconsin custody order. The court awarded the Wisconsin decree full faith and credit and ordered the writ to issue. This order was affirmed by the Ohio State supreme court.[13] On appeal, the Supreme Court of the United States reversed the state court and held that the Wisconsin decree, because rendered without personal jurisdiction over the mother, was not entitled to full faith and credit. The court did not squarely decide whether or not the Wisconsin decree violated due process. Rather, the court based its decision on the ground that a parental right to custody of children is a personal right which cannot be cut off by an ex parte decree, at least with a binding affect upon a sister state. After calling attention to the well settled rule that the full faith and credit clause does not entitle a judgment to extraterritorial effect if it was rendered without jurisdiction over the person sought to be bound,[14] the court found that the Wisconsin decree was rendered without such jurisdiction. It rejected the argument based on the domicile and jurisdiction of the children and said that even if the children's domicile was that of the father, personal jurisdiction over the mother was still necessary to terminate her parental right to custody. It is apparent then, that the *May* case establishes one minimum jurisdictional requirement before a custody decree will extraterritorially bind the party whose parental right is being terminated. Whatever other requirements must be met, there must be personal jurisdiction over the parent sought to be bound.

---

[12] *Ibid.*

[13] Anderson v. May, 157 Ohio St. 436, 105 N.E.2d 648 (1952).

[14] Baker v. Baker, Eccles and Co., 242 U.S. 394 (1916); Thompson v. Whitman, U.S. (1873).

The *May* case presents substantially the same situation encountered in the *Hammond* case, where the Idaho custody order was rendered without personal jurisdiction over the father. When the Washington court recognized the decree and issued the writ of habeas corpus, the *May v. Anderson* result was directly contradicted.

This inconsistency is understandable since the pleadings in the *Hammond* case attacked only the jurisdictional question with regard to the marital status of the parties. Jurisdiction to deprive the father of his parental rights was never put directly into issue in the case, and the Washington court had no occasion to consider the *May* case until a petition for rehearing was filed. However, should such a case arise again in Washington, and the party is interested in custody of the children only, a stronger argument would seem to lie along the lines of the *May* case approach.

Alimony in Washington. In *Loomis v. Loomis,*[15] the Washington Supreme Court chose to bridge a gap in the 1949 Divorce Act. In that case the court interpreted RCW 26.08.110 as conferring upon it the power to award alimony in the case of an absolute divorce involving no minor or dependent children. The court decided that the "disposition of property" section included the power to award future alimony payments as well as the power to effect a present division of property. The provision granting the judiciary the power to modify alimony awards was also relied upon as necessarily implying that the court had the power to award alimony in the first instance. Though the latter ground is tenuous in some respects,[16] the former had been the basis for alimony awards under previous divorce statutes.[17]

The significance of the decision is twofold. First, the Washington court has for the first time expressly recognized that it has no inherent power to award alimony in the case of an absolute divorce where there are no minor or dependent children involved. Inherent power of this nature has traditionally been limited to fields where there are comparable common law and equitable counterparts. Second, and more important, the supreme court has indicated its willingness to qualify

[15] 147 Wash. Dec. 417, 288 P.2d 235 (1955).

[16] This provision could just as logically mean that the court should have the power to modify existing alimony awards prior to the 1933 amendment, or to modify alimony awards of other states. For analysis of this possibility, see Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063 (1917).

[17] For a collection and analysis of these cases, see Comment, *Alimony in Washington: A Note to the Legislature,* 26 WASH. L. REV. 135 (1950).

this traditional view to some extent by liberally construing legislation in this field.

Though the *Loomis* case is by no means startling, the reasoning in it may lead to more surprising results in other areas of domestic relations. These more surprising results may soon be forthcoming. The case of *Jones v. Jones*[18] is now pending before the supreme court. Essentially it involves an appeal from an alimony award by the Superior Court of King County. The award was granted in a decree of nullity under RCW 26.08.030 and RCW 26.08.050. The husband has appealed on the ground that there can be no alimony awarded in an action declaring the non-existence of a marriage. It is apparent from a literal reading of RCW 26.08.110,[19] that if the *Loomis* case reasoning is strictly adhered to, the alimony award could be sustained. The words "divorce" and "annulment" are used together throughout the entire statute. The conjunction "and" would seem to indicate that the same "disposition of property" provision that applies to one would naturally apply to the other proceeding. Upon this reasoning the court could logically find that if the power to award alimony in the case of divorce exists, it must necessarily exist in the case of an annulment. Such a result would be without precedent in Washington. Legislative clarification may be desirable if the statute is to lend itself to this interpretation.[20]*

DAVID WAYNE GITTINGER

---

[18] Docket No. 33113, argued Jan., 1956.

[19] The pertinent provisions of RCW 26.08.110 are as follows:

"* * * * If the court determines that either party, or both, is entitled to a divorce or annulment, judgment shall be entered accordingly, granting the party in whose favor the court decides a decree of full and complete divorce or annulment, and making such disposition of the property of the parties, either community or separate, as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by such divorce or annulment, to the party through whom the property was acquired, and to the burdens imposed upon it for the benefits of the children, and shall make provisions for costs, and for the custody, support and education of the minor children of such marriage. Such decree as to alimony and the care, custody, support and education of the children may be modified, altered and revised by the court from time to time as circumstances may require. Such decree, however, as to the dissolution of the marital relation and to the custody, management and division of the property shall be final and conclusive upon both parties subject only to the right to appeal as in civil cases. * * * *"

[20] It is interesting to note that this result was called to the attention of the legislature and the court five years preceding the Loomis case. See Comment, *Alimony in Washington: A Note to the Legislature,* 26 WASH. L. REV. 135 (1950).

* Since this article has gone to press, the court has affirmed the alimony award in Jones v. Jones, basing its decision on the Loomis case approach, three judges dissenting. [Ed.]