

CUSTODY AND MAINTENANCE LAW ACROSS STATE LINES

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A child of divorced parents may find his interests affected by that body of law known as the Conflict of Laws whenever a question involving his custody or support arises in a state other than one in which he and both of his parents are domiciled, resident, and physically present, and in which all previous judicial determinations, if any, respecting his custody or support were made. In these days of mobility the opportunity for legal contacts of this sort is not at all rare.

Of the three general types of problem that may arise in a conflicts case—jurisdiction, foreign judgments, and choice of law—only the first two are of consequence here, since the applicable internal laws of the several states of the United States do not differ enough to create problems of choice of law. The most difficult and apparently unsettled questions are those relating to jurisdiction over custody and the effect of a previous custody order of a court of another state. A discussion of these will be undertaken first and will comprise the bulk of this article.

At the outset it may be observed that a picture drawn solely from the reported cases as a model is necessarily incomplete and may be somewhat distorted. A large number of interstate custody tangles are straightened out through the cooperation of probation officers and welfare agencies at distant points or at informal, off-the-record hearings by juvenile courts,¹ and of the residue that result in actual litigation only a small and hard-fought percentage reach the appellate courts. It is to this small percentage, however, that judges and enforcement officers must look for the "law" by which unwilling parents and others may be coerced when persuasion fails, and the cases are sufficiently numerous to have induced more than one investigator to hazard his conclusions based on their collective strength.² While the present

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¹ This rather obvious statement has been verified by consultations with officials in Durham, N. C., and Knoxville, Tenn. The proximity of the former place to large army posts and of the latter to extensive wartime industrial developments have created many long-distance custodial problems. No records are kept of extra-judicial settlements, and frequently the correspondence is destroyed, in keeping with general policy in the administration of juvenile affairs.

² BEALE, *CONFLICT OF LAWS* (1935) 716-720; GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) 358; STUMBERG, *CONFLICT OF LAWS* (1937) 297; Beale, *The Status of the Child and the Conflict of Laws* (1933) 1 U. OF CHI. L. REV. 13, 21; Goodrich, *Custody of Children in Divorce Suits: The Conflict of Laws Problem* (1921) 7 CORN. L. Q. 1; Stumberg, *The Status of Children in the Conflict of Laws* (1940) 8 U. OF CHI. L. REV. 970; Notes (1933) 81 U. OF PA. L. REV. 970, (1940) 29 KY. L. J. 101. See RESTATEMENT, *CONFLICT OF LAWS* (1934) secs. 117, 118, 144-148.

offering can contain little that is wholly new, it is hoped that recent additions to the available case law and an attempt at classification on a somewhat different basis than has yet come to the writer's attention may justify an article rather than a paragraph of footnote references to the works of others. It is as well to begin in the traditional manner by an examination and criticism of what purports to be orthodox doctrine in the field.

According to the Restatement of Conflict of Laws,³ "a state can exercise through its courts jurisdiction to determine the custody of children . . . only if the domicile of the person placed under custody . . . is within the state." Beale⁴ and Goodrich⁵ are in accord, but since a very substantial number of American courts are not, the theoretical and practical foundations of the Restatement rule invite inspection. Why should domicile be determinative of jurisdiction over the custody of children?

The reason ordinarily given is that custody is a kind of status; that jurisdiction to determine matters of status depends upon the domicile of the person whose status is in question, and that this is because of the "social interest [of a state] in the personality of its domiciliaries and . . . in such of their domestic relations as have to do with the procreation and nurture of citizens."⁶ If any understandable meaning is to be given to the word "status," it is difficult to see how custody can be brought within it. The relationships of husband and wife and of parent and child, and the variations of the latter relationship depending upon legitimacy, legitimation and adoption, all carry with them important legal rights and duties as between the parties themselves, and materially affect rights of succession upon death. This is not true of custody. A child whose custody is awarded to his mother is still his father's child; the father is still under a duty of support,⁷ and the child's right of inheritance is in no way altered. The relationship between custodian and child is in its essence a physical rather than a legal one;⁸ it is temporary in its nature, and about the only attribute of status which it possesses is the parties' lack of power to terminate it at their will.⁹

This, however, may of itself be nothing but a quibble over words. If the nature of custody is such that the state of the child's domicile has an exclusive or paramount interest in the disposition of the question, it matters little whether or not it is properly placed in the category of status. There is no principle of natural law, or con-

³ RESTATEMENT, CONFLICT OF LAWS (1934) sec. 117. Cf. sec. 148.

⁴ BEALE, CONFLICT OF LAWS (1935) 717.

⁵ GOODRICH, CONFLICT OF LAWS (2d ed. 1938) 358. Compare the same author's earlier statement that this "is not an open and shut proposition." (1921) 7 CORN. L. Q., *supra* note 2, at 2.

⁶ RESTATEMENT, CONFLICT OF LAWS (1934) sec. 119, Comment c.

⁷ MADDEN, DOMESTIC RELATIONS (1931) 388, noting a minority view *contra*.

⁸ GOODRICH, CONFLICT OF LAWS (2d ed. 1938) at 358 suggests that an award of custody to one parent makes it unnecessary to secure the other's consent to an adoption, citing Note, ANN. CAS. 1914A, 223. The source cited is, however, careful to state that this consequence follows only "by statute in some jurisdictions."

⁹ "In the Restatement of this subject, a 'status' means a legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned." RESTATEMENT, CONFLICT OF LAWS (1934) sec. 119.

stitutional law, or international law, that inexorably connects "domicil" with "status" or separates it from things that are not status.¹⁰ But in view of the artificial nature of the domicil concept as applied to children of divorced or otherwise separated parents, it is not only possible but it often happens that the technical domicil has little or no practical concern with the child's fate, while some other state may be confronted with an immediate and pressing problem. It is worth while to elaborate on this proposition by inquiring into what constitutes a child's domicil and just what concern a state may have in the custody of a child.

First, as to domicil. A determination of the domicil of a man or an unmarried woman, adult and *sui juris*, ordinarily follows a realistic search for actual home ties.¹¹ The traditional insistence upon a single domicil causes trouble, of course, in the case of the individual with two or more "residences,"¹² but in any event his domicil will be located at some place where he actually lives. It is only the homeless wanderer whose domicil is likely to be found in a place which he has long forgotten or has never seen, and no better solution of his problem has been suggested than to assign to him his domicil of origin.¹³ The domicil of a married woman is still under some circumstances surrounded by an aura of unreality, as when she marries a man domiciled in a state in which she has not yet set foot,¹⁴ but for the most part domicil and actual residence coincide in her case as in that of her husband. Her power to acquire a separate domicil of choice regardless of motive or fault, now acknowledged by the United States Supreme Court for purposes of full faith and credit in divorce,¹⁵ will probably be recognized by state courts for all purposes as rapidly as occasions arise.¹⁶ Where, as in these cases, domicil and "home in fact" are practically synonymous, the significance of domicil in settling questions of marriage, divorce, adoption and other permanent family relations may be conceded.

An unemancipated minor child cannot, however, acquire a domicil of choice; he is assigned a domicil "by operation of law." Where family life is normal this may be well enough, for the child is given his father's domicil,¹⁷ the factual connection with which is the same in the case of both father and child. But complications arise when the parents separate, and the more complicated cases are precisely the ones that breed litigation over custody involving problems of jurisdiction. If the mother takes the child with her and establishes an independent domicil for herself, some authorities declare that the child still retains his father's domicil,¹⁸ although

¹⁰ Compare COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) Ch. I.

¹¹ RESTATEMENT, CONFLICT OF LAWS (1934) secs. 12, 13, 15, 19.

¹² *In re Dorrance's Estate*, 309 Pa. 151, 163 Atl. 303 (1932); *Texas v. Florida*, 306 U. S. 398 (1939).

¹³ RESTATEMENT, CONFLICT OF LAWS (1934) sec. 14.

¹⁴ *Id.* sec. 27, Illustration 1. This situation is unusually common today as a consequence of numerous war marriages in this country and abroad.

¹⁵ *Williams v. North Carolina*, 317 U. S. 287 (1942).

¹⁶ This view had already been adopted in some states. *Younger v. Gianotti*, 176 Tenn. 139, 138 S. W. (2d) 448 (1940); *Commonwealth v. Rutherford*, 160 Va. 524, 169 S. E. 909, 90 A. L. R. 348 (1933).

¹⁷ RESTATEMENT, CONFLICT OF LAWS (1934) sec. 30.

¹⁸ *Glass v. Glass*, 260 Mass. 562, 157 N. E. 621, 53 A. L. R. 1157 (1927).

the "correct modern view" is said to be that he takes his mother's domicile if the separation was through the father's fault.¹⁹ If relative fault as between the parents is the controlling factor, it would seem that the court must try that question as a prerequisite to assuming jurisdiction over custody. The same problem would arise where there has been a divorce or judicial separation but the decree makes no provision for custody.²⁰ If the decree does provide for custody (assuming that the court has jurisdiction to make a custody order),²¹ the child takes the domicile of the parent to whom custody is awarded.²² This is simple if one parent is given exclusive custody, and the allowance of occasional "visits" to the other parent need not cause concern.²³ But what of the case where the child is given to one parent during the school term and to the other for the summer vacation?²⁴ If in such a case the child takes the domicile of the parent with whom he lives for the greater part of the year, what happens where custody is awarded to the parents alternately for equal periods? Does domicile remain with the father on the ground that no other solution is possible, or does it shift back and forth with the changing custodianship? The latter solution is strangely inconsistent with the fundamental idea of domicile as a permanent home, yet it has been seriously suggested.²⁵ If this is correct, is the shift in domicile governed by the calendar or by the change of custodianship in fact?²⁶ There have even been cases of "joint" custody by decree.²⁷ Where is the child's domicile when the joint custodians live in different states?²⁸ Even if positive answers to all these questions were possible, enough has been said to show that in cases of this sort domicile is an extremely insecure hook upon which to hang any cloak of jurisdiction. That this is peculiarly true of jurisdiction over custody will, it is believed, be apparent when the object and purpose of a judicial determination of custody are considered.

It is universally conceded that the welfare of the child is the paramount consideration in any dispute over custody.²⁹ What state has sufficient "social interest" in the welfare of a particular child to justify its courts in concerning themselves with his custody? The problem may perhaps best be seen by considering a hypo-

¹⁹ BEALE, *CONFLICT OF LAWS* (1935) 215.

²⁰ Except that here the question of fault might in some cases be deemed to have been adjudicated by the decree.

²¹ If the court is without jurisdiction to award custody, the resulting custodianship would seem to be merely a factual one, creating the same problem as if there had been no custody order at all.

²² BEALE, *CONFLICT OF LAWS* (1935) 215; *RESTATEMENT, CONFLICT OF LAWS* (1934) sec. 32.

²³ *Buckman v. Houghton*, 202 Minn. 460, 278 N. W. 908 (1938).

²⁴ See *Foster v. Foster*, 8 Cal. (2d) 719, 68 Pac. (2d) 719 (1937).

²⁵ Note (1940) 29 Ky. L. J. 103.

²⁶ The latter alternative was adopted by the court in *State ex rel. Larson v. Larson*, 190 Minn. 489, 252 N. W. 329 (1934), but the solution was criticized in Note (1940) 29 Ky. L. J. 103. Compare Note (1934) 18 MINN. L. REV. 591.

²⁷ *Ex parte Leu*, 240 Mich. 240, 215 N. W. 384 (1927) (Ohio decree).

²⁸ Under a statute providing for equal rights of custody as between husband and wife, it has been held that the child's domicile is that of the parent with whom he lives. *White v. White*, 77 N. H. 26, 86 Atl. 353 (1913).

²⁹ MADDEN, *DOMESTIC RELATIONS* (1931) 369.

thetical case, not at all unlikely to occur in real life.³⁰ A husband, H, and his wife, W, are domiciled with their child, C, in State X. A divorce is granted by a court of that state, and the custody of C is awarded alternately to H and W, each for six months out of the year. W leaves, takes up her residence in State Y, and there assumes physical custody of C at the time fixed by the decree. At the end of her period of permissible custody, instead of surrendering the child to H she clandestinely removes him to State Z, where both are subsequently discovered by H. So far as an interest in the "procreation and nurture of citizens" is concerned, the practical claims of States X and Y would seem to be exactly equal. If and when C reaches maturity, he is as likely to settle in one state as the other. And if State Z makes any pretense of righteousness, it must acknowledge at least a humanitarian interest in the welfare of a child found within its borders. Somewhat less altruistic considerations may be found in the interests of State X in compelling obedience to the decrees of its courts, of State Y in discouraging misconduct on the part of its own residents, and of State Z in preserving the peace within its borders. In addition, there is the cold fact that the child and his factual custodian are in State Z where they can be dealt with directly and effectively, while the courts of X and Y may find themselves powerless to enforce any orders they might make. Whether the courts of Y or Z, having assumed jurisdiction, will dispose of the child in accordance with the terms of the previous order of the court in State X or will make an independent investigation, would seem to be another matter. Without "jurisdiction" they can do nothing whatever.³¹

To a judge faced with this intensely practical situation, speculations over the niceties of domicil, of distinctions between jurisdiction *in personam* and *in rem*, and, in the latter case, whether the *res* to be dealt with is the child's status or his corporal person, must seem as irrelevant to the matter in hand as a stratospheric flight to the domestic problems of an earthworm. Yet these are the tools with which he is expected to work. Is it any wonder that the products of his labors often bear the unmistakable imprint of more efficient implements?

Apparently recognizing the inadequacy and impractical nature of the domicil concept as a basis of jurisdiction over custody, a large and rapidly growing body of courts have frankly substituted more realistic and workable tests. The commonest of these substitutes is the actual residence of the child as distinguished from his technical domicil. Thus the New York Court of Appeals has said: "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicil of its parents. It has its origin in the protection that is due to the incompetent or helpless. . . . For this, the residence of the child suffices, though the domicil be elsewhere."³² Similar views have been expressed by

³⁰ Similar situations have occurred in the reported cases. See, for example, *Ex parte Wenman*, 33 Cal. App. 592, 165 Pac. 1024 (1917).

³¹ See p. 825 *infra*.

³² Cardozo, J., in *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624, 40 A. L. R. 937 (1925). The persistent ignoring of this case by text writers is hard to understand. It is not cited by Beale or Goodrich, both of whom offer as representative of the New York view a nineteenth century *nisi prius* decision

a number of other courts.³³ In some cases the physical presence of the child has been treated as the determining factor, for reasons seldom made clear in the opinions,³⁴ and in still others custody proceedings have been considered as having sufficient characteristics of an action *in personam* to require personal jurisdiction over the defendant parent.³⁵

A substantial number—possibly a numerical majority—of courts are still on record in favor of the child's domicile as the sole jurisdictional test in custody cases.³⁶ In practically all of these cases, however, the child's residence-in-fact was found to be his domicile, sometimes by straining slightly the traditional definitions of domicile as applied to unemancipated minors. The one case found in which this was patently not true³⁷ serves, by its very uniqueness, to accentuate the significance of actual residence in the others.

This brief survey of the case law would seem to justify the conclusion that the substitution of residence for domicile as a test of jurisdiction,³⁸ or a re-definition of domicile to make it synonymous with residence when applied to minor children,³⁹ would resolve the apparent conflict in the decisions. But, even if one should be willing to discard as erroneous the decisions in which neither residence nor domicile has been accepted as the decisive factor, and attribute to the ignorance or indolence of counsel a failure to challenge jurisdiction in doubtful cases in which its existence

emphasizing the importance of domicile. *People v. Dewey*, 23 Misc. 267, 50 N. Y. Supp. 1013 (1898). GOODRICH (2d ed., p. 358) also cites *People v. Winston*, 31 App. Div. 121, 52 N. Y. Supp. 814 (1898), but the talk there is of residence and the decision turned on the absence of the child from the state. It is true that the statement quoted in the text above was dictum, but the same can be said of practically all of the pronouncements to the effect that domicile is decisive, and in any event Cardozo's dicta, like Holmes's dissents, have often become accepted law. This particular bit of obiter has been expressly approved in *State v. Black*, 239 Ala. 644, 196 So. 713 (1940); *Wear v. Wear*, 130 Kan. 205, 285 Pac. 606, 72 A. L. R. 425 (1930); *Kartman v. Kartman*, 163 Md. 19, 161 Atl. 269 (1932); *Sheehy v. Sheehy*, 88 N. H. 223, 186 Atl. 1, 107 A. L. R. 635 (1936); *Hachez v. Hachez*, 124 N. J. Eq. 442, 1 A. 2d 845 (1938); *Burrowes v. Burrowes*, 210 N. C. 788, 188 S. E. 648 (1936); *In re Rosenthal*, 103 Pa. Super. 27, 157 Atl. 342 (1931). In some of these cases, too, the proposition had little to do with the matter before the court; but the immediate subject of inquiry is what the courts are saying.

³³In addition to the cases in the preceding note, see *Titcomb v. Superior Court*, 220 Cal. 34, 29 Pac. (2d) 206 (1934); *Durfee v. Durfee*, 293 Mass. 472, 200 N. E. 395 (1936), quoting *Woodworth v. Spring*, 4 Allen 321 (Mass. 1862); *Goldsmith v. Salkey*, 131 Tex. 139, 112 S. W. (2d) 165, 116 A. L. R. 1293 (1938).

³⁴*Ex parte Inman*, 32 Cal. App. (2d) 130, 89 Pac. (2d) 421 (1939); *State ex rel. Clark v. Clark*, 148 Fla. 452, 4 So. (2d) 517 (1941); *Cole v. Cole*, 12 So. (2d) 425 (Miss. 1943); *May v. May*, 233 App. Div. 519, 253 N. Y. Supp. 606 (1931); *Rogers v. Commonwealth*, 176 Va. 355, 11 S. E. (2d) 584 (1940). In some of these cases, at least, the court probably had in mind the child's residence.

³⁵*Marts v. Marts*, 15 Cal. App. (2d) 224, 59 Pac. (2d) 170 (1936); *Anderson v. Anderson*, 74 W. Va. 124, 81 S. E. 706 (1914).

³⁶*Elliott v. Elliott*, 181 Ga. 545, 182 S. E. 845 (1935); *Duryea v. Duryea*, 46 Idaho 512, 269 Pac. 987 (1928); *Callahan v. Callahan*, 296 Ky. 444, 177 S. W. (2d) 565 (1944); *Person v. Person*, 172 La. 740, 135 So. 225 (1931); *Glass v. Glass*, 260 Mass. 562, 157 N. E. 621 (1927) (applying a statute); *In re Volk*, 254 Mich. 25, 235 N. W. 854 (1931); *State ex rel. Larson v. Larson*, 190 Minn. 489, 252 N. W. 329 (1934); *McAdams v. McFerron*, 180 Miss. 644, 178 So. 333 (1938); *Pieretti v. Pieretti*, 13 N. J. Misc. 98, 176 Atl. 589 (1935); *Chapman v. Walker*, 144 Okla. 83, 289 Pac. 740 (1930); *Barnes v. Lee*, 128 Ore. 655, 275 Pac. 661 (1929); *Jones v. McCloud*, 142 Pac. (2d) 397 (Wash. 1943).

³⁷*Pieretti v. Pieretti*, 13 N. J. Misc. 98, 176 Atl. 589 (1935), discussed *infra*, p. 827.

³⁸Stumberg, *The Status of Children in the Conflict of Laws* (1940) 8 U. CHI. L. REV. 42, 62.

³⁹Note (1932) 81 U. OF PA. L. REV. 970, 978.

has been taken for granted,⁴⁰ two important and closely related groups of cases would remain unexplained. These may be briefly noted at this point and examined in more detail somewhat later.

First, there are the cases involving the problem of continuing jurisdiction. Does a court that has once made a valid custody order have authority to modify it after the child has been removed to another state and acquired a new residence and domicile? Yes, says the court that made the order.⁴¹ No, says the court of the state to which the child has removed.⁴² Theoretical arguments on either side are equally persuasive, and have not succeeded in solving the dilemma.⁴³

Second, there is the large and important group of cases in which a court of one state is asked to lend its aid in carrying out a custody order of a court of another state. Here the accepted formula is a simple one and carries on its face no implication of a jurisdictional problem. If the court issuing the order had jurisdiction, the order will be respected by the courts of other states as conclusive with respect to all matters up to the time of its rendition, and will be disregarded only upon a showing of changed circumstances justifying a change in custody.⁴⁴ The "jurisdiction" of the second court is generally assumed without question, although occasionally where the child is not domiciled or resident in the state the court will decline to consider a change in custody even on a showing of changed conditions, on the ground that jurisdiction to make such an alteration in custody is elsewhere.⁴⁵

In this type of case the elusive nature of "jurisdiction" is strikingly illustrated. In the example given earlier in this article, of the child found in State Z after a clandestine removal from State Y contrary to the order of the court of State X, it must be conceded that a court of Z has the power (and one that will be recognized elsewhere)⁴⁶ to do *something*, if it is only to rubber-stamp the decree of X and give to its administrative officers the job of enforcing it. But suppose there is no previous order to be rubber-stamped. Must the courts of Z sit with their hands folded and watch the warring parents seize the child from each other in unguarded moments? Of course not. They can, and probably will, investigate the relative fitness of the parents and make such disposition of the child as his own best interests seem to dictate. If this is not "jurisdiction" over "custody," what is it? And is the juristic nature of the transaction altered by the fact that the court of Z disposes of the child in accordance with a previous order from a court of X? If it is permissible to draw an analogy from the comparatively understandable field of jurisdiction over

⁴⁰ See *Stafford v. Stafford*, 299 Ill. 438, 132 N. E. 452, 20 A. L. R. 827 (1921); *White v. White*, 214 Ind. 405, 15 N. E. (2d) 86 (1938); *Cooke v. Cooke*, 67 Utah 371, 248 Pac. 83 (1926).

⁴¹ Note (1931) 70 A. L. R. 526.

⁴² *Ex parte Inman*, 32 Cal. App. (2d) 130, 89 Pac. (2d) 421 (1939); *Barnes v. Lee*, 128 Ore. 655, 275 Pac. 661 (1929).

⁴³ Professor (now Judge) Goodrich solved it, with confessed hesitation, in favor of the first state. Goodrich, *Custody of Children in Divorce Suits* (1921) 7 CORN. L. Q. 1.

⁴⁴ Notes (1922) 20 A. L. R. 815, (1931) 72 A. L. R. 441, (1938) 116 A. L. R. 1299.

⁴⁵ *Jones v. McCloud*, 142 Pac. (2d) 397 (Wash. 1943).

⁴⁶ That this is essential to constitute jurisdiction, see RESTATEMENT, CONFLICT OF LAWS (1934) secs. 42, 74, and Comments under the latter section.

the person, consider an action in State Z to recover on a money judgment from a court of X. Jurisdiction of the defendant's person by the court of Z is just as essential to a valid judgment here as it would be if the suit were founded on an independent cause of action.⁴⁷ The former judgment may be *res judicata*; it may carry the constitutional guaranty of full faith and credit; but this will not be a substitute for jurisdiction in the court that is asked to enforce it. Is it any more reasonable to say that a custody decree rendered in one state may be enforced in another unless the courts of the latter state have jurisdiction?

Answers to the questions posed above may, it will probably be said, be found in the Restatement, which recognizes the power of "any state into which the child comes" to appoint a temporary guardian or take the child from an unfit custodian and give him "while in the state" to another person.⁴⁸ And why is this not an exercise of "jurisdiction"? Because it is only "effective within the state" unless the state is also the child's domicile, in which case "the action will affect the status and will therefore be effective in every state."⁴⁹ With sincere respect to the scholarly authors of the Restatement, the present writer confesses that to his somewhat earth-bound intellect this is a pure abstraction, put forward to make hard facts fit an *a priori* theory of jurisdiction. Conceding that one or two rarely-claimed and therefore ordinarily immaterial legal relations may be dependent upon custody, and so give it a flavor of "status" when occasion demands,⁵⁰ in ninety-nine out of a hundred cases the only relation that the parties expect the court to do anything about is a purely physical one.⁵¹ Judicial action in a state "into which the child comes" controls this physical relation just as effectively as does like action at his domicile. A distinction between jurisdiction in the one case and power without jurisdiction in the other,⁵² on the ground that "status" is affected in the former and not in the latter, serves no useful purpose and therefore has no place in the law.

This, like the question of whether custody is status at all,⁵³ may be only a matter of words, but words have been the chief trouble-makers in this field, and if it can be established that a non-domiciliary court may have "jurisdiction" over custody, the path is cleared for a new approach to the whole problem. Space will not permit a fuller demonstration, and the matter will be left to whatever persuasive force there may be in the observations already made. An inquiry into what the courts have actually done when confronted with particular fact situations, with only incidental regard to their expressed reasons for doing it, is next in order.

⁴⁷ Yntema, *The Enforcement of Judgments in Anglo-American Law* (1935) 33 MICH. L. REV. 1129, 1165.

⁴⁸ RESTATEMENT, CONFLICT OF LAWS (1934) secs. 118, 147, 148.

⁴⁹ *Id.*, sec. 148, Comment.

⁵⁰ This is not a jibe at parental love. The emotional relations which the parent desires must be worked out between him and the child after the physical relation has been assured by the action of the court.

⁵¹ RESTATEMENT, CONFLICT OF LAWS (1934) sec. 74, Comment *b*. A plea of *nolo contendere* is here entered in advance to a charge of assault upon the whole Restatement theory of jurisdiction. The point made in the text seems valid whether that theory be accepted or not.

⁵² See p. 820 *supra*.

So far as the reported cases indicate, the court that is first appealed to for a determination of the custody of a particular child rarely refuses to assume jurisdiction if the forum has any substantial connection with the case. The connecting factor may be the child's domicil,⁵⁴ or his residence,⁵⁵ or his mere physical presence in the state;⁵⁶ or the pendency of divorce proceedings to which the question of custody is incidental,⁵⁷ or jurisdiction over the person of the defending parent may be deemed sufficient.⁵⁸ If no reasonable connection is apparent, of course jurisdiction will be disclaimed.⁵⁹ In the few cases in which such a connection appeared to exist but the court nevertheless declined to act, it was obvious either that some other state had a substantially greater interest which it was in a position to protect,⁶⁰ or that the court was impotent to enforce any orders it might make. The last-named situation was the one that confronted the California court in the much-cited case of *De la Montanya v. De la Montanya*,⁶¹ which has been criticized because of its failure to recognize the domicil of the child as a basis of jurisdiction.⁶² There the defendant husband, before service of process in his wife's divorce action, took the children out of the state, and by the time of the hearing had settled down with them permanently in France. An order awarding custody to the wife would have been a futile gesture, which the court can scarcely be blamed for refusing to make. An illuminating contrast may be found in the New Jersey case of *Pieretti v. Pieretti*,⁶³ where the court assumed jurisdiction on the ground that the child's domicil was in the state with his father, although the child was born in Italy, had remained there with his mother since birth, and had never seen his father. Here the only relief sought was a support order against the father, resident in New Jersey and before the court, and jurisdiction to award custody to the mother was thought to be needed as a prop for that order.

Having once taken jurisdiction and awarded custody to one party or the other, the courts almost without exception regard their own jurisdiction as a continuing one, giving them power to modify as changed circumstances may dictate, though some or all of the persons concerned may have removed from the state.⁶⁴ The decision may be put on the ground that the removal did not effect a change in domicil,⁶⁵ or that the parents, having been before the court originally, are personally bound by the order and any modifications thereof,⁶⁶ or that jurisdiction over the

⁵⁴ *Minick v. Minick*, 111 Fla. 469, 149 So. 483 (1933); *Pieretti v. Pieretti*, 13 N. J. Misc. 98, 176 Atl. 589 (1935).

⁵⁵ Compare cases cited in notes 32 and 33, *supra*.

⁵⁶ *Di Giorgio v. Di Giorgio*, 13 So. (2d) 596 (Fla. 1943); *Rogers v. Commonwealth*, 176 Va. 355, 11 S. E. (2d) 584 (1940).

⁵⁷ *Hatch v. Hatch*, 15 N. J. Misc. 461, 192 Atl. 241 (1937).

⁵⁸ *Conrad v. Conrad*, 296 S. W. 196 (Mo. App. 1927).

⁵⁹ *Burrowes v. Burrowes*, 210 N. C. 788, 188 S. E. 648 (1936).

⁶⁰ *State ex rel. Clark v. Clark*, 148 Fla. 452, 4 So. (2d) 517 (1941); *May v. May*, 233 App. Div. 519, 253 N. Y. S. 606 (1931); *Lanning v. Gregory*, 100 Tex. 310, 99 S. W. 542 (1907).

⁶¹ 112 Cal. 101, 44 Pac. 345 (1896).

⁶² BEALE, CONFLICT OF LAWS (1935) 718, n. 1.

⁶³ 13 N. J. Misc. 98, 176 Atl. 589 (1935).

⁶⁴ Note (1931) 70 A. L. R. 526.

⁶⁵ *Person v. Person*, 172 La. 740, 135 So. 225 (1931).

⁶⁶ *Conrad v. Conrad*, 296 S. W. 196 (Mo. App. 1927).

person of the defending parent at the time of the modification is enough;⁶⁷ but oftener than not the court justifies its action on the simple ground that jurisdiction once attached is not defeated by a removal even though it effects a change in domicil.⁶⁸

A court may, however, refrain from exercising a jurisdiction which it regards itself as possessing, and decline to act when the interests of another state have become paramount or exclusive since the making of the original order. As the New Jersey Chancery Court has said,⁶⁹ the continuing jurisdiction is a discretionary one, and where all the parties concerned have become resident and domiciled in another state "practical considerations, as well as principles of propriety and comity, require that this court keep hands off."⁷⁰ A failure to exercise this commendable self-restraint has sometimes led to rebuke by another court when asked to lend its aid in enforcing an order made after the focal point of the family problem has moved elsewhere.⁷¹

A majority of the custody cases in the Conflicts field have to do with the respect which the courts of one state will pay to previous judicial determinations in another state. Here, as we have seen,⁷² the courts with almost unanimous accord assert that they consider themselves bound by the prior determination if made by a court having jurisdiction and if there is no showing of a change in conditions justifying a corresponding change in custody. One hesitates to believe that these courts do not really mean what they say, but doubts are bound to arise when it is found that, out of sixty-odd cases selected with a view to discovering what the courts are actually doing and with no idea of justifying a pre-formed opinion, in substantially less than half did the court actually enforce the provisions of the previous order. The other and larger group of cases is about evenly divided between those in which a material change in circumstances was found to have occurred since the foreign decree was rendered, and those in which the court considered itself free to examine the merits from the beginning because of an asserted jurisdictional defect or for some other reason.

On finding the decisions in this apparently inconclusive state, one is prompted to suggest that the cases stand for certain propositions quite different from the announced *ratio decidendi*, rather than to leave the area in its present deceptively charted condition. Certain facts, for instance, strikingly stand out. Looking first at the cases in which the custody orders of the foreign court were respected and

⁶⁷ *Marts v. Marts*, 15 Cal. App. (2d) 224, 59 Pac. (2d) 170 (1936).

⁶⁸ *Morrill v. Morrill*, 83 Conn. 479, 77 Atl. 1 (1910); *Roosma v. Moots*, 62 Idaho 450, 112 Pac. (2d) 1000 (1941); *Stafford v. Stafford*, 299 Ill. 438, 132 N. E. 452, 20 A. L. R. 827 (1921); *White v. Shalit*, 136 Me. 65, 1 A. (2d) 765 (1938); *Hersey v. Hersey*, 271 Mass. 545, 171 N. E. 815, 70 A. L. R. 518 (1930); *Tinker v. Tinker*, 144 Okla. 97, 290 Pac. 185 (1930).

⁶⁹ *Hatch v. Hatch*, 15 N. J. Misc. 461, 192 Atl. 241 (1937).

⁷⁰ See also *Berry v. Berry*, 60 N. Dak. 353, 234 N. W. 520 (1931); *Dorman v. Friendly*, 146 Fla. 732, 1 So. (2d) 734 (1941).

⁷¹ *People ex rel. Wagner v. Torrence*, 94 Colo. 47, 27 Pac. (2d) 1038 (1933).

⁷² See p. 725 *supra*.

carried out, one is impressed by the large proportion of them in which the child had been abducted from the complaining parent or had been brought into the forum in defiance of the orders of the court of a sister state.⁷³ When to these are added the instances of casual visits or health pilgrimages to the forum, followed by a refusal on the part of the resident parent or host to relinquish custody,⁷⁴ more than half of the decisions enforcing the foreign decree are accounted for. It is at least arguable that these adjudications were based not on the compulsion of full faith and credit, but rather on the exercise of a sound judicial discretion taking into account the manifestly superior interest of the other state and the convenience and propriety of allowing conflicting claims to be settled there. Sometimes the court in which the second proceedings are had examines the facts for itself and agrees with the earlier disposition on the basis of the child's welfare.⁷⁵ If the matter is in doubt, viewed independently, acquiescence in the prior order will often promote that stability of environment which in itself is an important factor in the welfare of the child.⁷⁶ As might be expected, there are cases in which the facts as reported disclose no reason for the decision other than a disposition to accord full faith and credit to the previous decree;⁷⁷ but the case is rare in which this is done in the face of an express disapproval of the adjudication already made.⁷⁸

Equally striking facts are disclosed by an examination of the cases in which the court, without requiring a showing of changed circumstances, refused to carry out the orders of the foreign tribunal. The bulk of the cases in this group involve one of two fact situations: either the foreign court has attempted to modify its own previous order by taking the child from the lawful custodian who meanwhile had become a good-faith resident of the forum,⁷⁹ or the order sought to be enforced was incidental to a divorce secured at a newly acquired domicile of one of the parents and purported to change the custody of a child who had continued to be a resident of the forum.⁸⁰ To recognize the foreign decree under either of these circumstances

⁷³ *Burns v. Shapley*, 16 Ala. App. 297, 77 So. 447 (1917); *State v. Black*, 239 Ala. 644, 196 So. 713 (1940); *Ex parte Livingston*, 292 Pac. 285 (Cal. App. 1930); *Drake v. Drake*, 187 Ga. 423, 1 S. E. (2d) 573 (1939); *Stafford v. Stafford*, 287 Ky. 804, 155 S. W. (2d) 220 (1941); *Evens v. Keller*, 35 N. Mex. 658, 6 Pac. (2d) 200 (1931); *Chapman v. Walker*, 144 Okla. 83, 289 Pac. 740 (1930); *Jones v. McCloud*, 142 Pac. (2d) 397 (Wash. 1943).

⁷⁴ *Foster v. Foster*, 8 Cal. (2d) 719, 68 Pac. (2d) 719 (1937); *Wear v. Wear*, 130 Kans. 205, 285 Pac. 606, 72 A. L. R. 425 (1930); *Hachez v. Hachez*, 124 N. J. Eq. 442, 1 A. (2d) 845 (1938); *Kenner v. Kenner*, 139 Tenn. 211, 201 S. W. 779 (1918).

⁷⁵ *People ex rel. Herzog v. Morgan*, 287 N. Y. 317, 39 N. E. (2d) 255 (1942); *Cooke v. Cooke*, 67 Utah 371, 248 Pac. 83 (1926); *Ex parte Burns*, 194 Wash. 293, 77 Pac. (2d) 1025 (1938).

⁷⁶ *Foster v. Foster*, 8 Cal. (2d) 719, 68 Pac. (2d) 719 (1937). See *Stumberg, The Status of Children in the Conflict of Laws* (1940) 8 U. OF CHI. L. REV. 42, 57.

⁷⁷ *Cole v. Cole*, 12 So. (2d) 425 (Miss. 1943); *State ex rel. Nipp v. District Court*, 46 Mont. 425, 128 Pac. 590 (1912); *In re Jiranek*, 267 App. Div. 607, 47 N. Y. S. (2d) 625 (1944).

⁷⁸ *In re Leete*, 205 Mo. App. 225, 223 S. W. 962 (1920), is such a case.

⁷⁹ *Ex parte Inman*, 32 Cal. App. (2d) 130, 89 Pac. (2d) 421 (1939); *People ex rel. Wagner v. Torrence*, 94 Colo. 47, 27 Pac. (2d) 1038 (1933); *Duryea v. Duryea*, 46 Idaho 512, 269 Pac. 987 (1928); *Kruse v. Kruse*, 150 Kans. 946, 96 Pac. (2d) 849 (1940); *Ex parte Peddicord*, 269 Mich. 142, 256 N. W. 833 (1934); *Goldsmith v. Salkey*, 131 Tex. 139, 112 S. W. (2d) 165, 116 A. L. R. 1293 (1938).

⁸⁰ *Elliott v. Elliott*, 181 Ga. 545, 182 S. E. 845 (1935); *MacNeill v. McElroy*, 193 Ga. 55, 17 S. E. (2d) 169 (1941); *McAdams v. McFerron*, 180 Miss. 644, 178 So. 333 (1938); cf. *Bourn v. Hinsey*, 134 Fla. 404, 183 So. 614 (1938).

would result in upsetting a working family arrangement in the forum state, a result which the courts of that state would not care to reach without mature consideration of all relevant facts, unfettered by the previous determination of another court which never had, or has ceased to have, any substantial interest in the affair.

It is hard to draw satisfactory conclusions from the cases in which the court has disregarded the foreign decree on the ground of a material change in circumstances.⁸¹ In some of them the significance of the change is not perceptible to an impartial eye,⁸² while in others it is obvious.⁸³ In some the court could have found ample theoretical justification for ignoring the previous determination even on the facts then existing;⁸⁴ in others this would not have been so easy.⁸⁵ But in all of them which the writer has discovered, an existing family unit in the forum state was affected by the litigation,⁸⁶ and in all common sense this ought to be enough justification for deciding the issue on the basis of an independent investigation of the facts.

May it not be that these jurisdictional clashes could be largely avoided by conceding jurisdiction to the courts of two or more states simultaneously? There is nothing impossible or even unusual about this in the case of jurisdiction over the person. Thus the courts of three states may at the same instant have jurisdiction of an individual defendant in a suit on a single promissory note: one because he is present there, another because he is domiciled there, and the third because he has consented to be sued there.⁸⁷ So in that most familiar example of jurisdiction over status—jurisdiction to divorce—the domicils of both parties are on an equal footing.⁸⁸

Running through the custody cases, however, is a persistent assumption that some one state must have exclusive jurisdiction to determine the custody of a child at a given time.⁸⁹ This is the Restatement view,⁹⁰ and it is understandable if custody is "status" and if status in turn is within the sole jurisdiction of the courts of the domicile—a line of reasoning that has already been subjected to questioning. From a standpoint of expediency and of achieving socially desirable ends, there

⁸¹ Stumberg, *supra* note 76.

⁸² Gaunt v. Gaunt, 160 Okla. 195, 16 Pac. (2d) 579 (1932); cf. Sheehy v. Sheehy, 88 N. H. 223, 186 Atl. 1, 107 A. L. R. 635 (1936).

⁸³ Hamilton v. Anderson, 176 Ark. 76, 2 S. W. (2d) 673 (1928); State *ex rel.* Aldridge v. Aldridge, 163 Minn. 435, 204 N. W. 324 (1925). In Knipkamp v. Richards, 192 Ga. 509, 16 S. E. (2d) 24 (1941), the husband's pro-German tendencies, although existing at the time of the previous decree, had taken on a new significance in the light of international developments.

⁸⁴ Gaunt v. Gaunt, 160 Okla. 195, 16 Pac. (2d) 579 (1932); Miller v. Schneider, 170 S. W. (2d) 301 (Tex. Civ. App. 1943).

⁸⁵ White v. White, 214 Ind. 405, 15 N. E. (2d) 86 (1938).

⁸⁶ Cases are collected in Notes (1922) 20 A. L. R. 815, (1931) 72 A. L. R. 441, (1938) 116 A. L. R. 1299.

⁸⁷ RESTATEMENT, CONFLICT OF LAWS (1934) sec. 77.

⁸⁸ This at any rate is the conception of the moment. Williams v. North Carolina, 317 U. S. 287 (1942).

⁸⁹ *Ex parte* Inman, 32 Cal. App. (2d) 130, 89 Pac. (2d) 421 (1939); Elliott v. Elliott, 181 Ga. 545, 182 S. E. 845 (1935); Kruse v. Kruse, 150 Kans. 946, 96 Pac. (2d) 849 (1940); *In re* Volk, 254 Mich. 25, 235 N. W. 854 (1931); Hatch v. Hatch, 15 N. J. Misc. 461, 192 Atl. 241 (1937).

⁹⁰ RESTATEMENT, CONFLICT OF LAWS (1934) sec. 117, quoted *supra*, p. 820.

seems to be only one argument in favor of confining jurisdiction to a single state: that it will produce stability, and discourage the crossing of state lines to avoid the effect of unpalatable custody decrees. One writer sees a unique and deplorable situation here, and suggests as the only remedy a rigid observance of full faith and credit.⁹¹ Both the seriousness of the evil and the efficacy of the proposed cure may, however, be questioned. It is at least not a matter of common knowledge that custody orders are disobeyed in this manner any more than, for example, orders in bankruptcy proceedings, and in the very case chosen by the writer in question to illustrate the point⁹² the original custody decree *was* given full faith and credit by the courts of two states in succession, the second of which followed it up by citing the defendant's sister for contempt⁹³ after the defendant had departed for a fourth state, taking the child with her.

There is an occasional recognition that the courts of two or more states may have concurrent jurisdiction over the custody of one child,⁹⁴ and it is believed that a general acceptance of this proposition would tend to put the solution of interstate problems on a more realistic and satisfactory basis. Apparently the courts do assume jurisdiction whenever the welfare of the particular child is a matter of real concern to the forum, at the same time paying respectful consideration to the prior determinations of other courts similarly concerned. Respect for other courts' judgments is a judicial habit which would scarcely be broken by acknowledging a multiple jurisdiction and removing the compulsion of full faith and credit in this one small field. Indeed it is not unreasonable to imagine that that respect would be increased and made more wholesome by placing it on a frankly discretionary basis and avoiding the necessity of indulging in jurisdictional quibbles and a search for dubious changes in circumstances as an excuse for disregarding a decree which the court feels that it cannot in good conscience enforce. As the Texas Court of Civil Appeals said, in answer to a suggestion that it ought not to allow the child in question to be taken to Illinois: "The proper attitude for both the Texas and Illinois courts to take is to assume with confidence that the courts of the other jurisdiction will act with wisdom and sincerity in all matters pertaining to the welfare of this child."⁹⁵ If there is a place anywhere in the law for that much-criticized word "comity," it is surely here.

It is believed, despite language and analyses sometimes announced in reported decisions, that the present state of the decisions justifies the following conclusions:

1. A court of any state that has a substantial interest in the welfare of the child or in the preservation of the family unit of which he is a part, has jurisdiction to

⁹¹ Note (1933) 81 U. OF PA. L. REV. 970.

⁹² *Evens v. Keller*, 35 N. Mex. 659, 6 Pac. (2d) 200 (1931).

⁹³ *State v. Keller*, 36 N. Mex. 81, 8 Pac. (2d) 786 (1932).

⁹⁴ *Stafford v. Stafford*, 287 Ky. 804, 155 S. W. (2d) 220 (1941); *White v. Shalit*, 136 Me. 65, 1 A. (2d) 765 (1938); *Goldsmith v. Salkey*, 131 Tex. 139, 112 S. W. (2d) 165, 116 A. L. R. 1293 (1938).

⁹⁵ *Miller v. Schneider*, 170 S. W. (2d) 301 (Tex. Civ. App. 1943).

determine his custody, and this jurisdiction may exist in two or more states at the same time.

2. Jurisdiction once obtained is not lost by a removal of the child, even though the removal results in the establishment of a new residence or domicil.

3. Jurisdiction, although existing, need not and probably will not be exercised where the court is not in a position to enforce its decree, or where a state other than the forum has at the same time a more substantial interest which it is in a position to protect.

4. A judicial determination of custody in one state is not binding on the courts of a second state, but where conditions have not materially changed it will be adopted as a matter of policy unless the interests of the second state are deemed superior to those of the first state and the court of the second state is convinced that the welfare of the child demands a different disposition.

Questions raised by the support cases, although not altogether free from difficulty, are relatively simple and will be disposed of briefly with a warning that statements offered as generalizations may have to give way in unusual situations. The *in personam* nature of a judgment or order for support is obvious, and it is everywhere agreed that personal jurisdiction over the defendant parent, or jurisdiction over property of his subject to attachment, is essential.⁹⁶ Whether anything more than that is required is doubtful.⁹⁷ Some of the opinions proceed on the theory that the child must be domiciled at the forum, but this reasoning is employed in a roundabout way to uphold the jurisdiction of the court at the domicil rather than to defeat the jurisdiction of a non-domiciliary court.⁹⁸ It is unreasonable to suppose that a father can escape the duty of supporting his child simply by keeping away from the child's domicil, or that to enforce the duty the mother should be compelled to follow the father about and establish a domicil for herself and the child in a state where the father can be found.⁹⁹

If a court at the common domicil of father and child decrees the payment of a lump sum in satisfaction of the father's future duty of support, and the decree is complied with, the requirement of full faith and credit precludes the imposition of any further obligation by a state in which the child later acquires a domicil, at least unless that state becomes the father's domicil also. This appears to be the extent of the holding of the United States Supreme Court in *Yarborough v. Yarborough*,¹⁰⁰ and the decision is therefore of limited significance. A divorce decree of one state which makes no provision for support is not a bar to the enforcement

⁹⁶ STUMBERG, *CONFLICT OF LAWS* (1937) 314.

⁹⁷ See BEALE, *CONFLICT OF LAWS* (1935) 1432.

⁹⁸ *Schneider v. Schneider*, 141 F. (2d) 542 (D. C. App. 1944); *Pieretti v. Pieretti*, 13 N. J. Misc. 98, 176 Atl. 589 (1935).

⁹⁹ *Geary v. Geary*, 102 Neb. 511, 167 N. W. 778, 20 A. L. R. 809 (1918).

¹⁰⁰ 290 U. S. 202 (1933), noted (1934) 34 COL. L. REV. 164, 19 CORN. L. Q. 466, 47 HARV. L. REV. 712, 11 N. Y. U. L. Q. REV. 464, 18 MINN. L. REV. 593, 82 U. OF PA. L. REV. 534, 43 YALE L. J. 648.

by another state of the father's continuing duty to support.¹⁰¹ Even if provision is made for support, according to the almost universal practice¹⁰² it is based only on existing conditions and, being subject to modification by the court which rendered it, is not a bar to future judicial action in another state.¹⁰³ As in the alimony cases,¹⁰⁴ suit may be maintained in one state to recover past-due instalments which have become a fixed obligation, but not to enforce the payment of future instalments which were subject to modification by the court rendering the decree.¹⁰⁵

¹⁰¹ *Geary v Geary*, 102 Neb. 511, 167 N. W. 778, 20 A. L. R. 809 (1918).

¹⁰² Georgia appears to be the only exception. VERNIER, *AMERICAN FAMILY LAWS* (1932) sec. 95.

¹⁰³ Notes (1922) 20 A. L. R. 826, (1931) 72 A. L. R. 449, (1938) 116 A. L. R. 1310.

¹⁰⁴ *Sistare v. Sistare*, 218 U. S. 1 (1910); GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) 364.

¹⁰⁵ *Glanton v. Renner*, 285 Ky. 808, 149 S. W. (2d) 748 (1941).