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John Watson Cooper

West Virginia University College of Law

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pensating the landowner. Consequently, it was not until the *Rands* decision in 1967 that the Court's position was made concrete. The two cases make it evident that the Court will strictly support the right of the Government to limit just compensation by excluding from fair market value certain property values that are inurements derived from the flow of the river. The dominant servitude of the government is thus extended into the flow of the river, and value imported to riparian property by the flow is not an asset of private ownership in the view of the Court.

Robert Mason Steptoe Jr.

Guardian and Ward—Jurisdiction to Award Custody

Carmella Falco was the sole survivor of an automobile accident which occurred in Virginia, in which her parents, who were New York residents, were killed. The child was hospitalized in Virginia for six weeks. Wallace Grills, an uncle from Tennessee, petitioned a Virginia court to award him custody of the child. Another uncle, Frank Falco of New York, filed a petition to intervene in the proceedings, alleging that he had been appointed guardian of Carmella by a New York court. The Virginia court awarded custody of the child to Grills and the decision was appealed to the Supreme Court of Appeals of Virginia. Held, *affirmed*. The Virginia court has jurisdiction to award the custody of the child and is not required to give full faith and credit to the *ex parte* decree of the New York court which had appointed Falco to be the child's guardian. *Falco v. Grills*, 161 S.E.2d 713 (Va. 1968).

In order for the court in *Falco* to award custody of Carmella, it was first necessary to deal with the prior New York decree. Accordingly, the court first considered the effect of not enforcing the New York decree without violating the full faith and credit clause of the United States Constitution. This was ultimately accomplished by determining that the full faith and credit clause did not apply to custody cases. In so holding, Virginia joined several other states which have reached a similar result.¹

Having determined that full faith and credit was inapplicable, the court in *Falco* then considered whether it had jurisdiction to award

¹ *Eg.*, *Bachman v. Mejias*, 1 N.Y.2d 575, 580, 136 N.E.2d 866, 868 (1956); *In re Burns*, 194 Wash. 293, 304, 77 P.2d 1025, 1029 (1938); *Metz v. Morley*, 289 N.Y.S.2d 364, 367 (1968).

the custody of the child. A court's jurisdiction in custody cases obtains only if there exist certain contacts between the child who is the subject of the custody decree and the state involved. A finding of such contacts, which gives the court jurisdictional power, has been predicated upon various rationales.

American courts generally hold that the power to award custody of a child depends upon whether the child is domiciled in the state.² This view, which is referred to as the "domicile test," has been applied even though the child was absent from the jurisdiction of the court at the time the appointment was made.³ Further, the courts of the state wherein the parents were domiciled at the time of their death have jurisdiction to award custody of a surviving minor.⁴ Professor Ehrenzweig, in his treatise on conflict of laws, considers the problems which the "domicile test" presents to the American courts today:

The domicile test proves particularly inadequate in custody cases in which domicile often depends on the decision of the controversy concerning the child's removal. . . .

Moreover, judicial discretion has been unduly limited by the 'persistent assumption that some one state must have exclusive jurisdiction.'⁵

The jurisdictional power to award custody may derive from sources other than the domicile of the child or of the parents. Some state courts have adopted the "residence theory" which permits the court to act when one of the parents or the child is a resident of that state even though domiciled elsewhere.⁶ The rationale of this theory is that the welfare of the child is the primary concern of the court, and consequently, such matters as the child's preference and his prospective future environment should be considered by the awarding court.⁷ Some states which utilize the "residence theory" have adopted statutes which give their courts the power to award custody of children in cases involving inhabitants or residents.⁸

² See, e.g., *McDowell v. Gould*, 166 Ga. 670, 672, 144 S.E. 206, 208 (1928); for further discussion, see 39 C.J.S. *Guardian and Ward* § 10 (1944).

³ See, e.g., *Chumos v. Chumos*, 105 Kan. 374, 381, 184 P. 736, 739 (1919).

⁴ See, e.g., *State ex rel. Charlson v. Hedberg*, 192 Minn. 193, 198, 256 N.W. 91, 93 (1934); for further discussion, see 39 C.J.S. *Guardian and Ward* § 10 (1944).

⁵ A. EHRENZWEIG, *CONFLICT OF LAWS* § 86 (1959).

⁶ See, e.g., *Kelsey v. Green*, 69 Conn. 291, 301, 37 A. 679, 682 (1897).

⁷ *Sheehy v. Sheehy*, 88 N.H. 223, 225, 186 A. 1, 3 (1936).

⁸ CAL. PROBATE CODE § 1440 (West 1959); IDAHO CODE ANN. ch. 18, § 15-801 (1948); for further discussion, see Paulsen and Best, *Appointment of a Guardian in the Conflict of Laws*, 45 IOWA L. REV. 212, 214 (1960).

Other states follow the "presence theory"⁹ — that mere presence within the borders of the state will afford a basis for exercising custody jurisdiction over the child in its unfortunate and helpless condition because of the child's inability to care for itself.¹⁰ The Ohio court in a 1958 decision extended the "residence theory" to state that if the facts of a case are such that the best interests of the child are involved, then the state may assume jurisdiction over the case.¹¹ At least one state has enacted a statute which extends the "residence theory" to provide that mere presence may be sufficient "under extraordinary circumstances requiring medical aid or prevention of harm to his [child's] person or property found in the county."¹²

There would be little difficulty with the application of the three traditional approaches to establishing jurisdiction so long as every state employed the same test. But, the same tests are not employed and the result is that in many circumstances two or more courts may claim jurisdiction. For example, a child may be present in one state, domiciled in another and yet reside in a third. Consequently, three different courts utilizing the various rationales could each claim jurisdiction. After discussing the merits and weaknesses of each of the jurisdictional theories, the California court observed:

It is a sufficient basis for jurisdiction that the state 'has a substantial interest in the welfare of the child or in the preservation of the family unit of which he is a part . . . and this jurisdiction may exist in two or more states at the same time.'¹³

In the last several years multi-state jurisdiction in custody cases has been recognized,¹⁴ and the commentators have advocated the adoption of such an approach. The reasoning is that by making the jurisdictional question one in which courts would use discretion in deciding whether to exercise jurisdiction, the courts would discipline themselves through judicial respect: "If there is a place anywhere in the law for that much-criticized word 'comity,' it is surely here."¹⁵

⁹ *In re Pratt*, 219 Minn. 414, 422, 18 N.W.2d 147, 152 (1945); *In re Smith*, 147 Cal. App. 2d 686, 691, 306 P.2d 86, 89 (1956).

¹⁰ *In re Pratt*, 219 Minn. 414, 422, 18 N.W.2d 147, 152 (1945).

¹¹ *In re Fore*, 168 Ohio St. 363, 368, 155 N.E.2d 194, 198 (1958).

¹² WIS. STAT. § 319.03 (1958).

¹³ *Sampsell v. Super. Ct.*, 32 Cal. 2d 763, 780, 197 P.2d 739, 750 (1948).

¹⁴ Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 351 (1953).

¹⁵ Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW AND CONTEMP. PROB. 819, 831 (1944).

In the *Falco* case the court relied heavily upon a Virginia statute to justify its position.¹⁶ The Virginia Legislature has empowered the court to go beyond the "domicile" or "residence" requirements to include any custody case where the child is physically within the state and whose welfare demands adjudication.¹⁷ The welfare of the child "is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children."¹⁸ In *Falco*, the mere presence of the child within the territorial jurisdiction of Virginia was held to be the contact with the state which was necessary to allow the court to act. This is in line with the modern trend of American decisions, although the "domicile theory" is still prevalent.

John Watson Cooper

Judicial Review—Selective Service Classifications

Thomas H. Warner failed to respond to the classification questionnaire sent to him by his local draft board. He was unanimously classified I-A, *i.e.*, available for military service, and declared delinquent. The registrant then appeared at the board to request Form No. 150 (Special Form for Conscientious Objectors) which was completed and returned to the board. The registrant's entire file was reviewed by the board members who determined that defendant was not entitled to reclassification. At various times in the proceeding, the registrant's stepfather supplied the draft board with information unfavorable to his stepson. The defendant was ordered to report for induction and, after reporting, refused to submit to induction. Warner was prosecuted for willful failure to submit to induc-

¹⁶ "[E]ach juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction . . . over all cases, matters and proceedings involving:

- (1) The custody, support, control or disposition of a child:
 - (a) Whose parent or other person legally responsible for the care and support of such child is unable . . . so to do, to provide proper or necessary support, education as required by law, or medical, surgical or other care necessary for his well being;
 - (b) Who is without proper parental care, custody, or other guardianship;
 - (j) Whose condition or situation is alleged to be such that his welfare demands adjudication as to his disposition, control and custody" VA. CODE § 16.1-158 (1960 Repl. Vol.).

¹⁷ *Id.*

¹⁸ *Muller v. Muller*, 188 Va. 259, 269, 49 S.E.2d 349, 354 (1948).