January 1921

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G. E. O.
West Virginia University College of Law

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Recommended Citation
G. E. O., Jurisdiction to Award the Custody of a Child After Divorce, 27 W. Va. L. Rev. (1921).
Available at: https://researchrepository.wvu.edu/wvlr/vol27/iss2/8

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Jurisdiction to Award the Custody of a Child After Divorce.

Two theories as to the basis of jurisdiction to award custody of a child are advanced. One is that the court of the sovereign of the child's domicile shall pass upon the question. The other is that the court of the sovereign of the child is inferior to the court of the domiciliary state.

—Clifford Snider

The grant of such power carries with it the implication that the states must aid in carrying it out. The power to declare war and to raise and maintain armies was granted to the Federal Government of which they are each a part. The power to maintain laws to that effect in the execution of the Federal Government is that of the states. As there is a duty owed by each citizen to that state, there is a duty owed by each citizen to the state in time of peril of defending the nation. It would seem that the power of the Federal Government to defend the nation, otherwise there could be no duty.

It is submitted that the Council of Defense acts do not violate the 13th and 14th Amendments to the Constitution, that whether the power required to enforce same is war power, emergency power, or some other power, it must exist for the preservation of the states, and that it is the province of the legislatures rather than of the courts to determine when its exercise is necessary for the common good.

O. JURISDICTION TO AWARD THE CUSTODY OF A CHILD AFTER DIVORCE.

1. Federal Laws. The Federal Government is the source of power to regulate the affairs of the individual states. The Federal Government has the power to regulate the affairs of the individual states in order to preserve the Union. The Federal Government has the power to declare war, to raise and to maintain an army. The Federal Government has the power to regulate interstate commerce. The Federal Government has the power to regulate the affairs of the individual states in order to preserve the Union.

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2. State Laws. The Federal Government has the power to regulate the affairs of the individual states in order to preserve the Union. The Federal Government has the power to regulate the affairs of the individual states in order to preserve the Union. The Federal Government has the power to regulate the affairs of the individual states in order to preserve the Union.

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3. Judicial Review. The Federal Government has the power to regulate the affairs of the individual states in order to preserve the Union. The Federal Government has the power to regulate the affairs of the individual states in order to preserve the Union. The Federal Government has the power to regulate the affairs of the individual states in order to preserve the Union.

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that the court of the sovereign of the territory where the child is found shall determine the child’s status. If both of these doctrines stand, obvious difficulties may arise. If the same person be appointed guardian at the child’s domicile and also where the child is found he will be subject to two masters. If they issue conflicting orders which will he obey? If the only true doctrine is that the court of the place where the child is has the control over his status as a ward, then every change of residence will involve, potentially at least, the appointment of a new custodian, subject to the control of a different court. Since one very important element in the status of guardianship is permanence and continuity, such a theory is open to serious criticism. If, on the other hand, the court of the child’s domicile alone is able to appoint validly a custodian of the child’s person, there are still objections to be answered. There is the practical difficulty of being compelled to travel to the state


There are several cases where the court awarded custody to the domiciliary guardian, not because of any absolute right in him, but because it was for the welfare of the children. People ex rel. Allen v. Allen, 105 N. Y. 625, 11 N. E. 143 (1887) ; Re Davis, 25 Ont. Rep. 572 ; Re Alderman, 157 N. C. 507, 73 S. E. 126 (1911) ; Grimes v. Butch, 142 Ind. 113, 41 N. E. 328 (1895).

In Anderson v. Anderson, 74 W. Va. 124, 81 S. E. 706 (1914), the father and child were present in West Virginia when a decree of divorce and an order granting custody of the child to the mother were given in Indiana. It was not clear where the father's domicile was at the time, but apparently it was in Indiana. The West Virginia court held the Indiana decree binding.

There is authority that the court which has awarded custody validly to one person retains jurisdiction to modify its decree later even though that person has since removed from the jurisdiction with the child and obtained a domicile elsewhere. State ex rel. Nipp v. District Court, 46 Mont. 425, 128 Pac. 590 (1912) ; Morrill v. Morrill, 83 Conn. 479, 77 Atl. 11 (1910) ; Stetson v. Stetson, 80 Me. 483, 15 Atl. 60 (1888). In the last two cases, though the court originally awarding custody apparently was not the court of the domicile, yet the basis of the decision would apply with equal or greater force where it was the domiciliary court that had made the original award.


The result in Kenner v. Kenner, supra, and Mylius v. Cargill, supra, may be supported on the ground that the courts then deciding the question in those cases were courts of domicile of the child at the time they rendered their decisions.

The absence of the child from the state has been held to defeat jurisdiction of a court to award custody even though the domicile of the father (and hence that of the child) was within the jurisdiction. Kline v. Kline, 57 Ia. 386, 10 N. W. 825 (1881) ; Rodgers v. Rodgers, 56 Kan. 483, 45 Pac. 779 (1896).

A court of a state in which the child is neither domiciled nor present cannot decree custody. Harris v. Harris, 115 N. C. 587, 20 S. E. 187 (1894).

The reasoning of some courts would indicate they thought the fact that a decree awarding custody may be modified from time to time gave any court jurisdiction to modify a prior decree. This reasoning is erroneous. The fundamental question still remains as to what sovereign’s courts have jurisdiction to modify the decree.


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of the child's domicile in order to have any change of guardianship made, or to prevent a change being made. Again, if this is the sole test of jurisdiction to appoint or remove custodians of the person, it would seem to follow that the sovereign of the state where the child is would be powerless to protect him. Such a proposition is opposed to fundamental principles as to the nature of a sovereign's jurisdiction.

Instead of saying that either or both of these doctrines are absolute, however, it is common to attempt to reconcile them. The compromise generally urged is that, although the state where the child is does have power to award custody, in comity it will give great weight to the domiciliary appointment. To those who seek a principle of law to determine conflicts of this sort between rival jurisdictions, and who are unwilling that their settlement should rest upon the ever uncertain comity between states, such a solution is unsatisfactory.

There is another possible theory which is well stated in the following quotation: "If a Turkish or Hindoo husband were travelling in this country with his wife, or temporarily resident here, we should, without hesitation, acknowledge the relation of husband and wife between them; but the legal pre-eminence of the husband as to acts done here would be admitted only to the extent that the marital rights are recognized by our laws, and not as they are recognized by the law of his domicile. If a Roman father, or a father from any country which had adopted the Roman law of paternal power, were travelling in this country with a minor child, we should acknowledge the relation of parent and child, but we should admit, I presume, as a general rule, the exercise of the paternal power no further than as it is authorized by our own law." So, too, the validity of the static right of slavery depends upon the law of the slave's domicile, though the protection to be afforded that right depends upon the jurisdiction where the slave is.

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4 In a Pennsylvania case the court held that though the law of the domicile of the child should control, yet the courts of Pennsylvania were quite competent to apply that law. Sage v. Sage, 160 Pa. 389, 28 Atl. 563 (1894). Sed quare: Is this a question of what law shall apply or of what sovereign's court has jurisdiction? It is believed it is the latter.


6 "But notwithstanding that a foreign guardian has no absolute rights as such in a foreign jurisdiction, the fact that he is such is entitled to great weight in the courts of another State, when called upon to determine, in their discretion, to whose custody a minor child shall be committed." Story, Conflict of Laws, 7 ed., § 499. See Lamar v. Micou, 112 U. S. 462, 470 (1884); Woodworth v. Spring, supra. See also, Minor, Conflict of Laws, § 115.

7 Polydore v. Prince, Ware 402, 405 (U. S. 1837)

8 Polydore v. Prince, supra.
EDITORIAL NOTES

It is submitted that the principle just stated is the one which should determine the jurisdiction to award custody of a child after the divorce of its parents. The court of the domicile alone should have the right to create the static right by appointing a custodian. When, later, the child is in another state that state has full power to determine what incidents it will give to the relationship so long as the child is within its boundaries. For the welfare of the child it may appoint another person as guardian for so long as it remains within that jurisdiction. It has been held that, where the welfare of the child demands it, it may refuse to allow the domiciliary custodian to take the child back to the state of the domicile. Such a rule would seem to be doubtful, at least if the domiciliary guardian were not shown to be entirely unfit. In a leading English case an Austrian domiciliary guardian's right to take the child out of England was recognized even though an English guardian had been appointed and it was clearly for the best interests of the child to remain in England.

So long as he is living, or until another person has been properly appointed to displace him, the father is recognized as the natural guardian of his child. Since this is so, is it necessary for the court of the domicile of the child (assuming it is the proper court to award the custody of the child) to have jurisdiction over the father as well as the child? It has been so held. If this is correct, it would follow that after a guardian has been appointed in place of the father, that the status thus created cannot be affected by any court except one which, in addition to being the court of the child's domicile, has personal jurisdiction over the

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10 Nugent v. Vezera, supra. "Every nation has an exclusive right to regulate persons and property within its jurisdiction according to its own laws, and the principles of public policy on which its own government is founded." Woodworth v. Spring, supra, 32. See Beale, "Progress of the Law: Conflict of Laws," supra.
11 "The legal situs of the ward being his domicile, the guardian appointed there is regarded as having peculiar powers with respect to the ward's person. Although the status is not a permanent one, and other guardians, upon occasion, may be appointed in other states where the ward may have his actual situs . . . yet the authority of such a guardian is always local only. He has no general authority over the ward's person which will be recognized in other states." MINOR, CONFLICT OF LAWS, § 115.
12 Johnstone v. Beatle, supra; Re Bort, supra; Jones v. Bowman, supra; Ex parte Boyd, supra; Kelsey v. Green, supra. See Hanrahan v. Sears, supra.
14 Nugent v. Vezera, supra.
15 See MINOR, CONFLICT OF LAWS, § 37.
16 De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345 (1896). Conversely, if both parents have been properly served and the child is present, even though domiciled elsewhere, the court may decree custody. State v. Rhoades, 29 Wash. 61, 69, Pac. 389 (1902); Re Vetterlein's Petition, 4 R. I. 378 (1884). Contra, Lanning v. Gregory, supra.
new guardian.16 Though it is not safe to argue from controverted
theories of jurisdiction to grant divorce, it may be pointed out
that the relation of guardian and ward is a double one just as is
that of husband and wife. It is not within the scope of this note
to inquire into the question whether a divorce decree is a decree
in rem operating upon the marriage status as the res;17 or whether
it is a decree in personam, requiring jurisdiction of both parties
to be valid.18 It may be suggested, however, that whatever is the
sound theory as to jurisdiction for divorce is the sound theory as to
jurisdiction to award custody of a child after divorce. If per-
sonal jurisdiction of both parties is necessary to grant a divorce,
personal jurisdiction of the father (or of the appointed guardian)
must exist in order that there may be jurisdiction to affect the
static right to custody of a child. If, however, the court of the
domicile can act upon the marriage status as a res, without per-
sonal jurisdiction of both parties, the same principle would apply
to the status of guardianship.

The case of Griffin v. Griffin19 has raised recently the problems
here under discussion. A court of California where all the par-
ties were domiciled awarded custody of the children, after a di-
vorce decree, to the mother, with the restriction that she should not
take them out of the jurisdiction without permission. She obtain-
ed permission to take them to Oregon, but on condition that she
bring them back. She did not do so. The father brought an ac-
tion in the California court to have the first order altered, serving
the mother in Oregon by publication. This service was insuffi-
cient to confer jurisdiction. The California court, however, then
modified its original order and gave custody to the father, who
brought habeas corpus in Oregon to obtain the children. The Ore-
gon court denied the petition on three grounds: 1. The welfare
of the children who were in Oregon would be served best by hav-
ing them remain with the mother, although the father was not
shown to be unfit. 2. The service on the mother was ineffective

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16 Note the doctrine that the court which appoints a custodian of the person of a
child retains personal jurisdiction over the custodian to modify the decree even though
he has departed from the jurisdiction with the child and established a new domicile
elsewhere. See cases cited in note 1, supra.
17 See MINOR, CONFLICT OF LAWS, § 92; WHARTON, CONFLICT OF LAWS, 3 ed.,
§ 237a.
18 See MINOR, CONFLICT OF LAWS, § 93; WHARTON, CONFLICT OF LAWS, 3 ed.,
§ 237a.
19 The cases holding that mere presence of the child plus personal jurisdiction of both
parents will give a court jurisdiction to award custody would indicate that the courts
were there applying the in personam theory of jurisdiction. Note 15, supra.
18 187 Pac. 598 (Ore. 1920).
and therefore the California court did not have jurisdiction of the mother, who was then guardian of the children. 3. At the time of the modification of the decree in California the mother had acquired a domicile in Oregon; hence the domicile of the children was with her in Oregon and the California court no longer had any jurisdiction.

The correctness of the first two grounds of the decision has been covered by the discussion above. Whether the third is sound depends upon whether the domicile of the children followed that of the mother.20 There is authority that an appointed guardian cannot change the domicile of the child to another state from the state in which he has been appointed.21 Where the guardian appointed is also the natural guardian it seems that he may change the ward’s domicile.22 It has been argued that if the father, after divorce, were awarded custody, he could change the child’s domicile because he is its natural guardian, but that if the mother were awarded custody, after divorce, she is, like any appointed guardian, limited to the one jurisdiction in her control over the child’s domicile.23 However, what little authority there is holds that the mother may change the child’s domicile in such a case.24 It is believed that this is more in accord with present day ideas. If this be so, the case clearly can be supported on the ground that Oregon, because it was the jurisdiction of the children’s domicile at the

20 “That the California court cannot by its order constrain an adult person, not a wrongdoer, to remain in the state, and cannot prevent his acquiring a new domicile for himself is certain. Beale “Progress of the Law: Conflict of Laws,” supra 59.
21 See MINOR, CONFLICT OF LAWS, 58.
22 “Should the question ever arise, it will possibly be held that a guardian cannot change the domicile of his ward, and almost certainly that he cannot do this unless the ward’s residence is, as a matter of fact that of the guardian.” DICEY, CONFLICT OF LAWS, 2 ed., 129. See MINOR, CONFLICT OF LAWS, 58; 1 WHARTON, CONFLICT OF LAWS, 3 ed., § 42a. See also 24 HABY, L. REV. 144. The law, however, is not definitely settled. Distinctions between testamentary guardians and those appointed by courts have been suggested but have not found favor. See MINOR, CONFLICT OF LAWS, 59. “It is clear that a guardian appointed in a state in which the ward is not domiciled, but is temporarily residing, cannot change the latter’s permanent domicile.” 1 WHARTON, CONFLICT OF LAWS, 3 ed., 102.

Where the ward is a member of the guardian’s family and actually removes with him there is authority to uphold the intimation by Dicey, supra, that his domicile will change with that of the guardian. White v. Howard, 52 Barb. 294 (N. Y. 1868); Wheeler v. Hollis, 19 Tex. 522 (1857). Contra, Mears v. Sinclair, 1 W. Va. 185 (testamentary guardian).
23 24 HABY, L. REV. 144.

In Wilson v. Elliott, supra, and People ex rel. Hickey v. Hickey, supra, (headnote), the courts assumed that the mother could change the domicile of the children by removing them to another state even though the children had been given into the custody of the father by the domiciliary court. This seems to be going too far.
time of the modified California decree, was the only one with power to affect the status of the children.\textsuperscript{25}

\textit{\textit{—G. E. O.}}

\textbf{STATE REGULATION OF INTERSTATE TRANSMISSION OF NATURAL GAS AND ELECTRICITY.}—Much confusion still exists in the cases as to what are the correct criteria of the extent of a state's power to regulate interstate commerce.\textsuperscript{1} Doubtless the problem is one which, because of the vast diversity of interests involved, may not be solved by fixed rules.\textsuperscript{2} At any rate as the cases undoubtedly establish the fact that the states can, under some circumstances, directly regulate interstate commerce,\textsuperscript{3} it seems certain that sooner or later the courts must discard the commonly-asserted "doctrine that the state cannot under any guise impose direct burdens upon interstate commerce."\textsuperscript{4} Of course, it is generally laid down along with the above-mentioned doctrine that

"As to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act."\textsuperscript{5}

But considerable confusion has arisen in applying these criteria because, among other reasons, in working out the constitutionality or unconstitutionality of a given state regulation, it is common to start with the tacit assumption that the power of Congress to regulate interstate commerce is \textit{prima facie} exclusive, thus rendering any state regulation of interstate commerce \textit{prima facie} unconstitutional. Such a method of approaching the problem, however, seems misleading and conducive to erroneous conclusions. The states had power to regulate interstate commerce before Congress

\textsuperscript{25} The case is supported by Professor Beale on this ground. See Beale, "Progress of the Law: Conflict of Laws," supra, 59.

\textsuperscript{1} U. S. Constitution, Art I, § 8: "The Congress shall have power. . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

\textsuperscript{2} Cf. In re Pennsylvania Gas Co., 225 N. Y. 397, 122 N. E. 260 (1919): "No general formula can tell us in advance where the line is to be drawn."

\textsuperscript{3} Some of the leading cases in point are discussed in this note and cited in footnotes 14, 16, 18 and 23, infra.

\textsuperscript{4} See e. g., The Minnesota Rate Cases, 230 U. S. 352, 400, 33 Sûp. Ct. Rep. 729 (1913), per Mr. Justice Hughes.

\textsuperscript{5} \textit{Ibid.}, 399. This form of statement has been commonly followed since the leading case of Cooley \textit{v. Board of Wardens}, 12 How. 299 (U. S. 1851). See one of the latest statements of these criteria in Pennsylvania Gas Co. \textit{v. Public Service Commission}, U. S. Adv. Ops. 1919-20, 306.