Conflict of Laws -- Custody Awards of Minor Children -- Jurisdictional and Full Faith and Credit Requirements

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that the law in force at the time of the adoptive parent's death determines the right of an adopted child to inherit from his adoptive parent. With this generally accepted rule, together with the legislative intent which may be inferred by the failure to include an express provision making the act of 1949 prospective only, it is submitted that the court should consider the law in effect at the time of the death of the adoptive parent as controlling.

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Where a decree awarding custody of a minor child is made in a state court, and a subsequent modification of that decree is sought in the courts of another state, two difficult questions are presented to the second court before it may decide the case on its merits: Is there jurisdiction to make the custody award, and if so, must full faith and credit be accorded the decree made by the sister state?

These problems were raised by two recent cases decided by the North Carolina Supreme Court. In Sadler v. Sadler, husband and wife, residents of North Carolina, agreed prior to an extra-legal separation that neither would take the two minor children out of the state without notice to the other. The wife took the children to Georgia in breach of this agreement, and resided there with them. The husband sued out a writ of habeas corpus in a Georgia court, seeking custody of the children. On return of the writ, custody was awarded to the wife. Following this, the husband brought an action for divorce and for custody of the children in the North Carolina Superior Court. The wife answered, requesting alimony and support for the children. The Supreme Court reversed the lower court's award of custody to the husband, holding that the North Carolina court did not have jurisdiction to render the decree and that the Georgia decree was entitled to full faith and credit.

Shortly after the decision in the Sadler case, another facet of this

\textsuperscript{38} See Note, 18 A. L. R. 2d 960, 962. But see Blodgett v. Stowell, 189 Mass. 142, 75 N. E. 138 (1905), where it is held that the effect of the adoption is determined by the law in force at the time of the adoption.

\textsuperscript{39} The adoption act of 1949 did not contain a provision similar to that found in the 1941 act that its provisions regarding inheritance applied only to subsequent adoptions. See note \textsuperscript{30} supra.

\textsuperscript{40} See Fairley, Inheritance Rights Consequent to Adoptions, 29 N. C. L. Rev. 227 (1951) who takes the contrary view in interpretation of the present North Carolina statutes. Of course, if the adoptive parent died between 1941 and 1949, then the provisions of N. C. Pub. Laws c. 281, §8 (1941), note 30 supra, would be controlling. See notes 26 and 33 supra.

\textsuperscript{1} 234 N. C. 49, 65 S. E. 2d 345 (1951).

In Gafford v. Phelps, the husband, wife and minor child were residents of North Carolina. Following an extra-legal separation, the wife went to her native state of Alabama, leaving the child with the husband in North Carolina. An agreement was entered into between them whereby each parent was to have custody of the child for a part of each year. This agreement was subsequently made a part of an absolute decree of divorce rendered by an Alabama court. This divorce action was brought by the wife, and the husband was a party, but the child was not in Alabama at the time of the decree nor for three years thereafter. In conformance with the decree, the child went to Alabama for one visit. However, the father refused to allow the mother to take the child when the time arrived for the second visit. The mother brought an action in the North Carolina Superior Court for custody of the child. The Supreme Court, in affirming an award of custody to the father, held that the Alabama decree was not entitled to full faith and credit. The basis for the court's reasoning was that the child was not in Alabama at the time of the decree.

The question of jurisdiction of the North Carolina court was not presented in the Gafford case, as all of the parties were within the jurisdiction of the court, and the father and child were domiciled within the state. The jurisdiction of the Alabama court was in issue, however, as the child was not before the court at the time of the decree. Conversely, in the Sadler case, the jurisdiction of the Georgia court was conceded, as all of the parties were before that court when the habeas corpus writ was returned and the mother and child were domiciled in Georgia, whereas the jurisdiction of the North Carolina Court was in issue because the children were not before that court at the time of the hearing.

The question of jurisdiction in custody cases has been the source of much confusion in the state courts and the United States Supreme Court has done little to clear up the problem. The majority of states

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5. A married woman may acquire a domicile separate from her husband. Williamson v. Osenton, 232 U. S. 619 (1913); Haddock v. Haddock, 201 U. S. 562 (1905).
6. Whether the domicile of the child is that of the father or mother is often a difficult problem to decide. The North Carolina Supreme Court has stated that, "Ordinarily the domicile of an unemancipated child, during its minority, follows that of the father. However, where parents are separated by judicial decree or divorce and the custody of a child is awarded to the mother, or where a father abandons the mother and child, the child's domicile follows that of the mother. And it should be kept in mind that a child may reside in one place and its domicile may be in another." Allman v. Register, 233 N. C. 531, 534, 64 S. E. 2d 861, 862 (1951). This problem was not raised by the facts of the Gafford case, but if this statement be applied to the facts of the Sadler case there is some doubt if the domicile of the children ever ceased to be that of the father. Quaere?

6. In Halvey v. Halvey, 330 U. S. 610 (1947), the Supreme Court stated that full faith and credit did not apply if the awarding state had no jurisdiction, but it did not determine the minimum requirements for jurisdiction. Cf. Williams v. Wil-
hold that domicile of the child in the state is necessary to give the court jurisdiction of the cause.\textsuperscript{7} North Carolina,\textsuperscript{8} Georgia\textsuperscript{9} and Alabama\textsuperscript{10} are in this group. The rationale of this rule is that custody is a matter of status, and a person's status may be changed only at his domicile.\textsuperscript{11} However, custody is not a true change in status, although the authorities refer to it as such for lack of a more accurate name. The relationship between custodian and child is more physical than legal; custody awards are subject to modification, whereas a true change in status effects a permanent result.\textsuperscript{12} However, an award of custody does resemble a declaration of status in that it is not terminable at the will of the parties.

A few courts require only the residence of the child if one parent is domiciled in the state;\textsuperscript{13} others base jurisdiction on mere residence without a finding of domicile.\textsuperscript{14} An analysis of these decisions is made difficult by the frequent interchange of the words "residence" and "domicile" by the courts.\textsuperscript{15}

If the state exercises its police power in awarding custody, mere physical presence of the child in the court is held to be sufficient. Thus, when an infant is found in the state neglected or without custodian or
guardian, the state has sufficient interest to award temporary custody.\(^6\)

A substantial number of courts hold that personal jurisdiction over both parents in a divorce suit is sufficient to give the court jurisdiction to award custody of the children.\(^7\) This is true even if the children are not domiciled in the state nor before the court. A theory of parental right forms the basis of these decisions rather than the theory of status.\(^8\)

As the parents are within the court's jurisdiction, the children are also said to be before the court. This view has the practical advantage of avoiding a subsequent suit to determine custody. As the award is based on the best interests of the child, the most convenient time to award custody would seem to be when the parties, whose relative qualities are to be considered, are before the court.

If the court finds that it has jurisdiction to award custody, the second question presented is, would a decree modifying a previous award made by a sister state violate the full faith and credit clause of the Constitution? The Supreme Court has held that full faith and credit is required only to the extent of finality accorded the decree in the awarding state.\(^9\)

A majority of states follow the rule that a custody award is not binding in that state if subsequent events have altered the original circumstances.\(^10\) The award is predicated on the best interest of the child, consequently a subsequent change in circumstances may justify a modification of the original decree.\(^11\) Thus, there is no violation of the full faith and credit requirement when a court of one state, on the basis of altered conditions, modifies the decree of another state which follows this majority rule. A few courts have modified decrees rendered by courts of other states without a showing of a change in circumstances,\(^12\) the theory being that the domicile has sufficient interest in the welfare

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\(^{21}\) These courts have a very liberal interpretation of what constitutes a substantial change. See Stansbury, Custody and Maintenance Across State Lines, 10 LAW AND CONTEMP. PROB. 819 (1944). In Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1 (1910) the court said on this point: "... it follows that the recognition extra-territorially which custody orders will receive or can command is liable to be more theoretical than of great practical importance."

of the child to override any former adjudication of the question in a sister state. If the court has personal jurisdiction over the child, his interests are deemed to be paramount to any claims between the parents. Similarly, a few courts have made a decision on the facts before them, assuming without actually determining, that the facts in the prior case were different.

In some states an award granted in a habeas corpus proceeding is not binding upon a court of that state having jurisdiction of a subsequent divorce suit. Both the Georgia and the North Carolina courts follow this rule, basing their conclusion on the fact that statutes expressly confer jurisdiction to determine custody in divorce proceedings. Habeas corpus is a proper remedy to determine custody only as between husband and wife, therefore the writ is improper when custody is sought in a subsequent divorce suit.

In the Sadler case the court accorded full faith and credit to the Georgia decree, and stated that it was without jurisdiction to make a valid order affecting custody as long as the children were in Georgia. It would seem that no question of full faith and credit was presented, for if the court was without jurisdiction to make any award, full faith and credit is immaterial. If the court had jurisdiction, then full faith and credit is due only to the extent the award was valid in Georgia. As the award would not be binding in Georgia in a subsequent divorce proceeding, the North Carolina court was not required to accord full faith and credit. The court’s decision that it lacked jurisdiction because the children were not domiciled in North Carolina is in accord with prior North Carolina cases. However, the more convenient procedure would seem to be to take jurisdiction and decide the question while both parents are before the court. Thus, had the court followed this rule as to jurisdiction, it could have decided the issue of custody of the children without violating the full faith and credit clause.

On the other hand, the Gafford decision was based upon the lack of jurisdiction of the Alabama court to render a decree of custody as the child was not before that court. Since Alabama follows the majority

The welfare of the child seems to be paramount to any consideration of full faith and credit due a foreign decree. These courts have simply said full faith and credit did not apply in these cases, however such holdings are rare. See Stumberg, supra note 22.

Ex parte Erving, 109 N. J. Eq. 294, 157 Atl. 161 (Ch. 1931), 32 Col. L. Rev. 385 (1932).

Langon v. Langon, 150 F. 2d 979 (D. C. Cir. 1945); Zachry v. Zachry, 40 Ga. 479, 79 S. E. 115; In re King, 66 Kan. 695, 72 Pac. 263 (1903); Comack v. Marshall, 211 Ill. 519, 71 N. E. 1077 (1904); Ex parte Fuller, 58 Tex. Civ. App. 217, 123 S. W. 204 (1909); Note, 34 Geo. L. J. 105 (1945).


See note 26 supra.

See notes 17 and 18 supra.
rule in requiring domicile of the child as a prerequisite to jurisdiction, the decision does no violence to the full faith and credit requirement.\textsuperscript{30} Even if Alabama followed the rule suggested above, not requiring the domicile of the child if both parents are before the court, the result in the \textit{Gafford} case probably would have been the same. The facts indicated sufficient change in condition to have warranted a new custody award.

Thus, in each of these cases the court consistently applies its rule that presence of the child is necessary to jurisdiction for an award of custody, and indicated the limits of the full faith and credit requirement in such cases.

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\section*{Constitutional Law—Use of Stomach Pump—Denial of Due Process}

"Evidence forcibly extracted from the stomach of a prisoner may not be used validly to convict him of a crime, the Supreme Court ruled today. Such procedure, it held, violates the due process clause of the Fourteenth Amendment."\textsuperscript{1} The American public was thus informed by the press of the decision in the case of \textit{Rochin v. People of California}.\textsuperscript{2} Several state law enforcement officers, without a search warrant, forced their way into the room in which the defendant had been sleeping, acting on information that defendant had narcotics in his possession. Upon their entry defendant swallowed two capsules which had been laying on a night stand. Following a struggle in which the officers were unable to force him to expel the evidence they handcuffed the defendant, took him to a hospital and after strapping him to an operating table, forced a stomach pump down his throat and retrieved the capsules. On this evidence defendant was convicted and sentenced, and the California Supreme Court denied certiorari. The United States Supreme Court unanimously reversed the conviction, however, without unanimity of opinion as to the reasons for the reversal. The majority held that through their actions the state officers had denied defendant due process of law. Justices Black and Douglas, concurring in the reversal, felt that this was too nebulous a standard, and that the specific point involved was that the defendant had been forced to give testimony against himself, thus denying him the protection of the Fifth Amendment.\textsuperscript{3}

\textsuperscript{20} See note 10 supra.

\textsuperscript{1} N. Y. Times, Jan. 3, 1952, §1, p. 1, col. 6.

\textsuperscript{2} The Supreme Court struck out today at the forcible use of a stomach pump to get narcotics evidence, denouncing such police methods as akin to the old-time rack and screw." Raleigh (N. C.) News and Observer, Jan. 3, 1952, §1, p. 1, col. 6.


\textsuperscript{72} Sup. Ct. 205 (1952).

\textsuperscript{7} Rochin v. People of California, 72 Sup. Ct. 205, 211 (1952).