Chapter 10: Conflict of Laws

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CHAPTER 10
Conflict of Laws
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§10.1. Residence and "changed circumstances" in custody jurisdiction. Among the cases decided by the Supreme Judicial Court within the 1955 Survey year only a few contained conflict elements and fewer still can be said to have presented new problems. The most interesting among these is Aufiero v. Aufiero,¹ a controversial decision concerning custody of a minor child.

Problems of custody are, today, among the most perplexing in the field of conflicts. The law itself remains, in many ways, confused, but its application often seems arbitrary well beyond what such confusion would explain. As if the legal parochialism which in the past has made the law of conflicts so slow to emerge were offering its last determined stand here, decisions often seem to have been dictated by one fundamental consideration only — that of keeping the child at all costs within the state of the forum.

Courts, too, tend to favor what is nearer to them and to consider the familiar as being the best: such inclinations are deeply human and they should hardly surprise us. What may be a surprise is how easily, for various reasons, in the field of custody, the courts are able to satisfy these inclinations.

One of the reasons has to do with the basis of jurisdiction in these matters. Custody often being considered a status problem, jurisdiction usually will be said to depend on domicile: the very reason, indeed, for people talking in terms of status is their feeling that the relation in question should come under the domiciliary law. Yet there are particular difficulties in applying domicile as the basis of jurisdiction to custody. It is in its application to minor children that domicile becomes the most technical, and the divorce of the parents of the child as well as the events following it may easily be interpreted as changing these technical prerequisites. The very award determining the child's custody may be instrumental in changing domicile and in thus giving jurisdiction, from then on, to another

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court; the incidental dispositions of the award, like the rights of visitation granted, may easily be interpreted the same way. One sometimes feels as if, in custody matters, it were not jurisdiction which depended on domicile, but domicile on a court having assumed jurisdiction.

Finding domicile an often unsatisfactory criterion, many states have turned to residence as an alternative basis of custody jurisdiction; Massachusetts is one of these states. Whatever otherwise the merits of such a change, the possibility of locally centered decisions certainly is only facilitated thereby: if domicile already could, for this purpose, be manipulated, the manipulation of the term residence appears even easier.

Another source of discretion lies in the conditional character of all custody regulations. They are the result of changing considerations, of evaluating the opposing claims of the parents and of determining the best interests of the child; they must therefore be allowed to change with every material change influencing these factors. What change does, however, qualify as material is presently left entirely to the evaluation of the forum. Some change in every case there always can be found — if nothing else, the change caused by the child’s physical presence within the jurisdiction; any such change, if necessary, the forum might call material and thereby justify the imposition of its own solutions. Full faith and credit probably could be used by the Supreme Court of the United States as imposing some check on the complete liberty the courts in this field now exercise. So far, however, the Supreme Court has not squarely faced this issue.

It is against this background that the Auffiero decision has to be considered. Father and mother and their three-year-old child were domiciled in New York and lived there with the father’s parents when, in 1949, the wife left her husband and returned to the home of her parents in Massachusetts. She left the child with the father and thereafter saw her only occasionally. In 1952 the father obtained a divorce in Nevada, and the Nevada court awarded the custody of the child to the father’s parents with whom at that time she still continued to live. Throughout these Nevada proceedings the wife was represented through attorney. Immediately after the divorce the father returned to live in New York and in May of the same year he remarried. The mother thereupon brought a petition for habeas corpus in the competent court in New York to secure possession of the child. On the day set for hearing, the case was continued until September and a stipulation was signed by the parties and made part of the record to the effect that the mother might take the child with her to Massachusetts for three weeks. When the three-week period expired the mother, in violation both of the stipulation and of the terms of the Nevada decree, did not return the child but brought proceedings in the Probate Court in Massachusetts to obtain custody.

The father and his parents, on their part, brought habeas corpus proceedings in the same court to regain possession of the child.

The Probate Court found that the child was resident in the county where her mother lived, that she had made a happy adjustment to her new home there, and that her happiness and welfare would best be served by giving her custody to the mother. A decree was entered accordingly.

On appeal the Supreme Judicial Court was forced to admit, under the doctrine of *Sherrer v. Sherrer*, that the Nevada divorce of the parents, both parties having been represented there, was entitled to full faith and credit in Massachusetts. It also had to assume that the custody provisions of the decree were valid, the theory of *May v. Anderson* concerning divisible divorce applying only to ex parte proceedings. Nonetheless the Court affirmed the decree of the Probate Court. Though it found it to be plain that the child had no domicile in Massachusetts, it thought that the lower court could have found that it was a resident there and also that there had been a material change in the situation since the Nevada decree. The reasons for the separation of the parents were held by the Court to have been immaterial, as was the misconduct of the mother in failing to return the child to New York.

One may readily admit that the residence of the child within the jurisdiction, if established, will be a good basis for exercising custody jurisdiction, and similarly that full faith and credit does not necessarily require the giving of full effect to the previous decree. One may perhaps also admit that the welfare of the child is so important a consideration that, if it is secured, an illegal act bringing about its presence may well be overlooked. Yet one still must be perturbed by the decision because of the artificial factual evaluations which underlie the application of these principles.

In justifying the finding of the child's Massachusetts residence, the Court held that she was not merely a traveler passing through the territory, not a usual temporary visitor, but one living “in a relationship which those in actual control of her intended to make permanent if they could.” Hardly could there be a predication of “residence” on thinner ground, unless residence is simply equated with presence. As a practical matter, the argument does equate the two, because the additional requirement of the intention on the part of those in actual control is but another way of saying that these people were asking for the custody of the child.

Nor is the Court's findings of intervening changes very convincing unless one is prepared to accept the change of its physical presence into Massachusetts as one which in itself is material enough. The child now lives, relates the Court, “in a modest, well-kept house of five

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4 345 U.S. 528, 73 Sup. Ct. 840, 97 L. Ed. 1221 (1953).
rooms in a neighborhood of small houses"; in New York "she would be obliged to live in the city in an apartment or tenement located in a large building of many stories composed of similar apartments or tenements." This argument seems rather inconclusive. It could, with the appropriate change in embellishing adjectives, just as well be used the other way round. In Massachusetts, the Court continues, the child will live with her mother and the parents of the mother, while it is problematical how much attention the father would pay to the child in New York and how often she could see him, he having meanwhile remarried and living no longer with his parents. The father's remarriage may constitute a significant change, but possibly more as an additional argument upholding the original decree than one against it. He may have remarried in order to provide the child with a home more suitable and with one of his own. In any case its evaluation would better be left to the courts of New York.

The decision seems, from every point of view, highly unsatisfactory. Custody was awarded to the mother in spite of the fact that it was she who, for years, had abandoned father and child, that the divorce was awarded to the husband, that in the proceedings resulting in the original custody decree both parties were represented, and in spite of the fact that the retention of the child was against the express provisions of the stipulation entered into a few weeks earlier by the mother. The case was decided on the basis of factual findings, both as to residence and as to changed circumstances, which seem unconvincing and purely formal. In effect the decision seems to mean that custody problems between the states will be solved on the basis of local interest and power. It reminds one of what Justices Jackson and Reed said in their dissent in May v. Anderson of possession apparently being, in custody cases, not merely nine points of the law but all of them and of self-help being therefore the ultimate authority in these matters.

The consequence of the decision will be to make courts of other states reluctant to allow children under local custody to be taken, even temporarily, into Massachusetts, as no safeguard can be devised which could guarantee their return. It will thus penalize the Massachusetts parent of such a child in cutting down his visiting rights. But it will also penalize the child himself. The decision, though directed toward achieving the child's welfare and happiness, seems to ignore the most important need the child may have, the need for stability. Stability in these matters, within the framework of the Union, can be achieved only through some acceptance of full faith and credit. With the determinations of the state courts concerning domicile or residence the Supreme Court probably can do nothing; but it could insist on standards which, under full faith and credit, it will require in order to accept the materiality of a change.

§10.2. The Sherrer doctrine: Full faith and credit and divorce decrees. The doctrine of Sherrer v. Sherrer came up, with some slight...
variations, in another case during the 1955 Survey year. In *Chittick v. Chittick*\(^1\) petitioner asked for separate support under G.L., c. 209, §32, and the defense was a decree of divorce awarded to her against respondent by the District Court of the Virgin Islands in 1952. Granting that petitioner could not maintain this proceeding if she was not the wife of respondent, the judge of probate nonetheless entered a decree for her support. He ruled the divorce to be void because neither of the parties had acquired a domicile in the Virgin Islands and because the divorce was the result of “fraud and collusion” between them.

On appeal the Supreme Judicial Court reversed. Though it found that the evidence before the judge of probate supported his finding as to domicile, it held that under the *Sherrer* doctrine the judge was not free to find as he did. The present petitioner appeared in person before the Virgin Islands court and the present respondent was represented there by his attorney; the findings therefore of that court that plaintiff was domiciled in the Virgin Islands became binding upon both parties and the decision can no longer, under full faith and credit, collaterally be attacked on jurisdictional grounds. Whether the allegations of fraud and collusion refer to jurisdiction or to the merits of the divorce, they are of no avail to the parties: their participation in the proceedings precludes an attack on jurisdiction and the fact that they thus cannot deny the jurisdiction of the Virgin Islands court also precludes an attack on the merits.

Except for the fact that here the defendant to the divorce proceeding did not appear in person but was represented by his attorney, the case is on all fours with *Coe v. Coe*.\(^2\) The Massachusetts Court therefore followed that decision, though it expressed its disapproval of having to accept even the Virgin Islands “as fully accredited to engage in the business of interfering with domestic relations in all the other jurisdictions throughout this great country.”

**§10.3. Service of process on foreign businesses.** Concerning the legislative activity of the year covered, one amendment should be mentioned. Section 5 of Chapter 227 of the General Laws provides that every individual not an inhabitant of Massachusetts and every partnership composed of persons who are not such inhabitants, having a usual place of business in the Commonwealth or engaged there in certain types of construction business shall, before doing business in the Commonwealth, appoint in writing a resident to be its agent for the purpose of receiving service of process and shall file a copy of such power of attorney in the office of the State Secretary. In case of such individual or partnership neglecting or refusing to appoint such an agent, the last sentence of Section 5 provided that the State Secretary should notify it of the requirements of this section and

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that any person acting as its agent after such notification should be liable to a daily fine.

This last sentence of Section 5 has now been amended\(^1\) to the effect that if such an individual or partnership shall fail to appoint an agent for the purpose of receiving service of process and, nonetheless, does business within the Commonwealth, service of process may be made upon the State Secretary, who will then give proper notice to the defendant of the action.

These being cases where the jurisdiction of the Massachusetts courts would not be based upon personal service but upon contact through pursuing activities of a certain type, and the requirement of notice being adequately taken care of, the amendment does not seem to violate any standards of due process required by the Supreme Court.

§10.4. The Erie doctrine and the manner of determination of state law. To the matters we have been discussing, we may add an interesting point raised in Lee-Wilson, Inc. v. General Electric Co.,\(^1\) a recent decision of the United States Court of Appeals for the First Circuit. It is an interpretation of the Erie doctrine and as such of importance in every field of the law, including the law of conflicts. The case came up on appeal from the United States District Court for the District of Massachusetts which in a diversity case granted an application for preliminary injunction enjoining the selling of certain merchandise at less than the minimum "fair trade" prices established pursuant to the Massachusetts Fair Trade Law (G.L., c. 93, §§14A-14D). Holding that the District Court did not commit an abuse of discretion in refusing to withhold a preliminary injunction on the ground that the state statute was probably in violation of the Declaration of Rights in the Massachusetts Constitution, the Court of Appeals added: "In the absence of a decision on this matter of state law by the highest court of the state, decisions of the state superior court upholding the constitutionality of the law are binding on a federal court in litigation based upon diversity of citizenship." No citation of any such Superior Court decision was given, and it was not explained in what context the constitutionality of the statute might have come up.

Two things are remarkable about this statement. Being trial courts of county-wide jurisdiction only, and courts the opinions of which are not published and often not even written, the Massachusetts Superior Courts seem to be the kind of courts the decisions of which the Supreme Court in King v. Order of United Commercial Travelers\(^2\) expressly held not to be controlling upon the federal courts. The Supreme Court there based its decision partly on the ground that

§10.3. \(^1\) Acts of 1955, c. 360.

§10.4. \(^1\) 222 F.2d 850 (1st Cir. 1955).

courts of this kind do not appear to have such importance within the state's own judicial system as to make their decisions authoritative expressions of the state's "law," and partly on the great practical significance of the difficulty of locating their decisions.

Even more unusual in Judge Magruder's treatment of this matter is the lack of reference to any concrete decision of these Superior Courts. The *Erie* doctrine imposes a heavy enough limitation by making of the federal courts, in diversity cases, oracles of a foreign deity; this argument leads still further and would make of these courts oracles of a deity unknown.

3 The King decision has recently been followed as regards the Courts of Common Pleas in Pennsylvania in two decisions of the Third Circuit. See Kimmel v. Yankee Lines, 224 F.2d 644 (1955), and Eckman v. Baker, 224 F.2d 954 (1955).

4 333 U.S. at 160, 68 Sup. Ct. at 493, 92 L. Ed. at 612, wherein the Supreme Court noted that the decisions of the South Carolina Courts of Common Pleas were not published or digested, but filed only in the counties where the cases are tried, the sole index being by the parties' names.