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Domestic Relations

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DOMESTIC RELATIONS

Modification of Child Custody Awards—Jurisdictional Requirements. In 1946, the Washington Supreme Court took the position that the courts of this state would not consider modifying custody awards of sister states granted in divorce proceedings until such time as the children became domiciliaries of the State of Washington.[1] In the recent case of *Guy v. Guy*,[2] the court appears to have silently backed away from this narrow ground, and seemingly in the proper circumstances will accept physical presence of the children as an adequate basis of jurisdiction.

In the *Guy* case, the Washington court was asked to review the trial court's refusal to hear the merits of the mother's cross-petition for modification of an Indiana custody award to the father. Mr. and Mrs. Guy and their son were residents and domiciliaries of the State of Indiana in November of 1957 when Guy started divorce proceedings in the superior court of Marion County of that state. In June of 1958, before a decree had been granted, Mrs. Guy moved to Washington taking the child with her. At that time Mr. Guy had not made an appearance in the divorce proceedings and had filed no pleadings or cross-complaints. Later, a cross-complaint was filed by Mr. Guy, and the Indiana court, in a hearing at which Mrs. Guy did not appear, entered a decree awarding Mr. Guy a final divorce and complete custody of the child.

Mr. Guy, armed with his Indiana custody award, petitioned for a writ of habeas corpus in the superior court of King County, seeking to obtain possession of the child. Mrs. Guy cross-petitioned for a modification of the Indiana decree, alleging that there had been a change of conditions with respect to her circumstances and those of her ex-husband, and that in order to benefit the child the Indiana decree should be modified. The trial court sustained Mr. Guy's demurrer to the cross-petition, heard testimony concerning the validity

publicly known and allegations publicly heard, as a form of reference from which the grand jury should begin its investigation." 155 Wash. Dec. at 572, 349 P.2d at 391.

"Where the prosecutor is properly in attendance during the examination of witnesses, [in grand jury proceedings] we find a significant lack of precedents concerning judicial review or control of his conduct of such examinations. The conclusion must be that the examination of witnesses before a grand jury has never been intended to be a matter of judicial control as in the examination of witnesses before a petit jury." 155 Wash. Dec. at 574, 349 P.2d at 392.

Does the cumulative effect of state action in the *Beck* case violate the dictates of reason?

[1] *In re* Mullins, 26 Wn.2d 419, 174 P.2d 790 (1946).

[2] 55 Wn.2d 571, 348 P.2d 657 (1960).

of the Indiana decree, and concluded that the decree of the Indiana court should be given full faith and credit: that Mr. Guy was entitled to immediate and absolute custody of the child. The effective date of the order was delayed in order to give Mrs. Guy opportunity to have the action reviewed by writ of certiorari.

On review, the Washington Supreme Court resolved the question before it by application of the full faith and credit clause, as interpreted in *People ex rel. Halvey v. Halvey*.[3] The Washington court held that the *Halvey* case was controlling in the disposition of the review, and as the Indiana court had jurisdiction to modify its own decree, and could do so upon a showing of a change of conditions and circumstances of the parties occurring after entry of the original award,[4] the Washington court also could modify the decree. The court further observed:

> The King County superior court had the child and both parents before it as did the New York court in the *Halvey* case. The facts are clear, as admitted by the petitioner's demurrer to the relator's cross-petition, that there has been a change in condition and circumstances since the entry of the decree on March 3, 1959. Under the full faith and credit clause, Art. IV, § 1, of the United States Constitution, as construed in the *Halvey* case, *supra*, the Washington court had at least the same right to modify this decree as did the Indiana court.[5]

The case was sent back to the trial court for a hearing on the merits of the wife's petition for a modification of the Indiana custody award.

The significant portion of the court's opinion in the *Guy* case is quoted above, that is, the court's contention that the trial court had jurisdiction to hear the petition for modification because it had the parents and the child physically present before it, as did the New York court in the *Halvey* case. In the *Halvey* case the parents were residents of New York until the mother took the child to Florida, established residence there, and subsequently filed for divorce in that state. Service on the father was by publication. On the day before the entry of the Florida decree, which awarded custody to the mother, the father removed the child to New York. The wife then brought habeas corpus proceedings in New York. The husband defended by contending that

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[3] 330 U.S. 610 (1947).

[4] The Washington position is that the jurisdiction of a divorce court is continuing as to the custody of children and support allowances. Lanctot v. Lanctot, 125 Wash. 310, 216 Pac. 356 (1923). The Indiana position is the same. Scott v. Kell, 127 Ind. App. 472, 134 N.E.2d 828 (1956); McDonald v. Short, 190 Ind. 338, 130 N.E. 536 (1921); Stone v. Stone, 158 Ind. 628, 64 N.E. 86 (1902).

[5] Guy v. Guy, 55 Wn.2d 571, 575, 348 P.2d 657, 660 (1960).

the Florida court lacked jurisdiction to make a custody award. The New York court decided that in view of the liberality of affording a mother equal rights with the father concerning the children, and that because the mother and child were domiciliaries of the State of Florida, the Florida decree was entitled to full faith and credit. The New York court, however, feeling that the father was entitled to certain rights, modified the Florida decree and awarded visitation rights to the father,[6] evidently basing its jurisdiction on the physical presence of the parties and the child in New York State. On certiorari, the United States Supreme Court, noting that the New York court had the parties before it, held that since Florida could modify the decree, so could the New York court.[7]

That the Washington court has the power to make modifications of the custody awards of sister states, when those awards can be modified in the awarding state, there is little doubt. As the United States Supreme Court's opinion in the *Halvey* case indicates, as far as full faith and credit is concerned, when one state can modify its own decree, that judgment is not constitutionally entitled to a more conclusive or final effect in the state of the forum than it has in the state where rendered.

Although a state may have power to modify the custody decree of a sister state, most states have seen fit to limit that power by self-imposed restrictions, or more precisely, have specified some relationship between the parties and the state which will give a jurisdictional basis for making such modifications.

There appear to be at least three theories as to the correct basis for courts to assume jurisdiction over custody proceedings when modifying an existing custody decree. A few states feel that jurisdiction to grant a custody decree is dependent upon jurisdiction over the child's parents.[8] Other states take the approach that custody is a question of

[6] Opinion in *Ex Parte* Halvey, 185 Misc. 52, 55 N.Y.S.2d 761 (Sup. Ct. 1945), *aff'd*, 269 App. Div. 1019, 59 N.Y.S.2d 396 (1945), *aff'd.* 295 N.Y. 836, 66 N.E.2d 851 (1946), *aff'd*, 330 U.S. 610 (1947).

[7] The majority in the *Halvey* case, based their decision on the conclusion that if Florida could modify its own decree, the New York court could also modify it. The court did not consider the question of whether the Florida court had jurisdiction to make a custody award concerning the Halvey child. (Under Florida law, the child must be physically present and domiciled in the state, and the domicile of the father is the domicile of the child. Dorman v. Friendly, 146 Fla. 732, 1 So. 2d 734 (1941). Moreover, the father, not domiciled in Florida, had removed the child from the state before the entry of the final decree.) Also, the court did not consider whether the ex parte Florida decree was binding on the father. See May v. Anderson, 345 U.S. 528 (1953).

[8] Anderson v. Anderson, 74 W.Va. 124, 81 S.E. 706 (1914). In Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948), the court held unconstitutional a statute enabling

status, and as such is subject to the control of the state where the child is domiciled.[9] The third theory requires that the child be physically present within the state, on the grounds that the basic problem before the court is to determine what is in the best interest of the child, and the court most qualified to do so is the one having access to the child.[10]

Washington case law prior to 1946 was somewhat inconsistent as to the factors needed before the Washington courts would have jurisdiction to modify a sister state's custody award. Although no attempt will be made to give a complete summary of the Washington law on this point, reference to a few of the more important cases is appropos.

In *McClain v. McClain,*[11] the father brought the child to Washington in violation of a Texas custody decree. The mother upon locating the father and child brought habeas corpus proceedings. The Washington Supreme Court in its first hearing on the matter concluded that the Texas decree should be modified, and custody of the child should remain with the father. On rehearing, the court reversed its position, upheld the Texas decree, and returned the child to its mother. The court stated that if it had been of the opinion that it was in the best interests of the child that it remain with the father, it would have so ordered. No mention was made of any requirement that the child be a domiciliary of the state in order for the Washington court to modify the Texas decree.

In *Motichka v. Rollands,*[12] the father, who had been awarded custoday of the child by a Montana divorce decree, permitted it to visit the mother, then residing in Washington. At the appointed time, the mother refused to return the child, and the father brought habeas corpus proceedings. The mother defended by contending that the Washington court had jurisdiction of the child and that it could determine a modification of the Montana custody award. The trial court upheld the mother's contention, and awarded custody to the mother. The Washington Supreme Court in reversing said that the Montana decree must be given full faith and credit and must be recognized as final in the Washington courts until such time as the child ceased to be

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the courts of Alabama to grant divorces with only personal jurisdiction over the parties.

[9] Dorman v. Friendly, 146 Fla. 732, 1 So. 2d 734 (1941); Goodrich, *Custody of Children in Divorce Suits,* 7 Cornell L.Q. 1 (1921).

[10] Sheehy v. Sheehy, 88 N.H. 223, 186 Atl. 1 (1936).

[11] 115 Wash. 237, 197 Pac. 5, *rev'd on rehearing,* 115 Wash. 237, 202 Pac. 173 (1921).

[12] 144 Wash. 565, 258 Pac. 333 (1927).

domiciled in the State of Montana, and that a state may not assume general guardianship over a minor temporarily sojourning in that state who has a residence or domicile elsewhere.

In *In re Penner*,[13] the custody of the children was awarded to the father in a Montana divorce decree. The mother, dissatisfied with the award, petitioned for modification, and in violation of a court order removed the children to Washington and secreted them from the father for a period of three years. The father upon finding the children brought habeas corpus proceedings. The trial court heard testimony by both parties, and dismissed the husband's petition. The husband appealed contending that the trial court erred in hearing testimony on the merits and in refusing to recognize the Montana decree as controlling. The Washington Supreme Court ruled that the trial court was justified in hearing the question of custody on the merits (evidently the question was put in issue by the wife's answer to the husband's petition), since in such cases the welfare of the children was the chief consideration, but that the court should have upheld the Montana custody decree as the mother had failed to show sufficient reasons to support a modification. The court did not pass upon the question of domicile as a basis for the trial court's jurisdiction to hear the controversy on the merits.

In *Jones v. McCloud*,[14] an Oregon divorce decree granted custody of the child to the father, the mother to have possession of the child during the summer months. The mother took the child to Washington and refused to return him to the father, who thereupon brought an action to recover custody. The trial court awarded custody to the mother. The Washington Supreme Court, in reversing, stated that it was of the opinion that there had been no such change in the condition of the parties as to warrant the modification of the Oregon decree; and as the mother had obtained only temporary possession of the child, with no permission to remove it from the state of Oregon, the child never became a resident or domiciliary of Washington.

In 1946, the court in *In re Mullins*[15] refused to hear the merits of the wife's petition for modification of an Ohio divorce decree, on the grounds that although the child had been brought into Washington legally, it had been detained here in violation of a valid Ohio custody decree, and that under the concepts of fair play and justice, one acting

[13] 161 Wash. 479, 297 Pac. 757 (1931).
[14] 19 Wn.2d 314, 142 P.2d 397 (1943).
[15] 26 Wn.2d 419, 174 P.2d 790 (1946).

in disobedience to an order of court cannot secure a new domicile for his children. The court recognized that there was no single rule that would reconcile all of the prior Washington case law on the subject, and stated that the decrees of a court of a sister state must be given full faith and credit in cases in which the court of the sister state had jurisdiction, and that Washington courts would not consider changing the custody of children whose custody had been determined by such a decree until the children became domiciled in this state. The case has since been cited as authority for this proposition.[16]

Subsequent to the *Mullins* decision, then, the law of Washington was apparently clear: Washington courts would not consider the question of the modification of a valid custody decree entered by a sister state unless the child in question was a domiciliary of this state and there was a real and substantial change in circumstances of the parties since the entry of the original decree. It would seem, then, that the initial question for the court to have decided in the *Guy* case was whether the child was a domiciliary of the State of Washington.[17]

The court could have found that the Guy child was a domiciliary of the State of Washington, since under Washington law a mother has equal rights with the father in regards to children,[18] and questions of domicile are decided by the law of the forum.[19] Mrs. Guy's position was distinguishable from that of the parents seeking custody modifications in the cases discussed above, as she was not acting in violation of a sister state's custody decree by bringing the child into this state and keeping it here (at least for the period of time prior to the entry of the Indiana decree). The question of the child's domicile is of course not without complications. Since Mrs. Guy had initiated the Indiana divorce proceedings, she could not avoid the jurisdiction of the Indiana courts by removing the child from that state;[20] as a result she was bound by the Indiana decree. Mrs. Guy was faced with the obstacle of convincing the Washington court that her secretive removal of the child from the State of Indiana in the face of a pending Indiana divorce proceedings, and her wrongful detention of the child in Washington after the entry of the custody award to the father, did not violate the concepts of fair play and justice that motivated the court in the *Mullins*

[16] Sherwood v. Sherwood 48 Wn.2d 128, 291 P.2d 674 (1955).
[17] Both the petitioner and respondent, relying on the *Mullins* case, argued the question of domicile.
[18] RCW 26.16.125.
[19] GOODRICH, CONFLICTS OF LAW, 21 (3d ed. 1949).
[20] Maloney v. Maloney. 67 Cal. App. 2d 278, 154 P.2d 426 (1944); State v. Rhoades, 29 Wash. 61, 69 Pac. 389 (1902).

case to decide that the mother could not establish a new domicile for her child.

The court avoided the problems of resolving the child's domicile by deciding that the trial court had the jurisdictional basis to modify the Indiana custody decree on the same grounds that the New York court did in the *Halvey* case, *i.e.*, that the parties and child were physically present in the state and before the court.

As the brief summary of the Washington law above indicates, a finding that the court, acting in the best interest of the child, has a jurisdictional basis for considering the modification of a sister state's custody award when the court has the parties and the child present in the state, is not without precedent in Washington law. Considering the United States Supreme Court's decision in the *Halvey* case, physical presence of the parties in the state is sufficient contact between the parties and the state to assure that the reviewing court will not be acting in violation of constitutional provisions. But although the court may be on firm grounds constitutionally, a finding that the child was a domiciliary of Washington would be necessary to make its decision in the *Guy* case consistent with its apparently controlling decision in the *Mullins* case.

The result in the *Guy* case may be indicative of the Washington court's adoption of a more flexible position in the matter: when the parent has brought the child into this state in good faith, the court will entertain a petition for modification of the foreign custody decree, but when the parent brings the child here in violation of a valid custody award, the court will, relying on the *Mullins* case, refuse to hear the parent's petition for modification.[21]

It is possible that a Washington court's modification of a custody award, in order to serve the best interests of the child who is physically present in this state, will have the effect of settling the matter between the parties. Where this result can be achieved, with the accompanying reduction in traveling and legal expenses to the parties, it seems desirable that each case should be heard on its own merits to determine if there has been a material change in the circumstances of the parties.

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[21] In Chandler v. Chandler, 156 Wash. Dec. 414, 353 P.2d 417 (1960), decided after the *Guy* case, the court refused to hear the father's petition for modification of an Arkansas custody award to the mother, where the father had removed the children to Washington in violation of that decree. The court referred to the *Mullins* case for its authority.