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Jurisdiction over Custody of Minor Children as Dependent upon Mother's Domicile

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JURISDICTION OVER CUSTODY OF MINOR CHILDREN AS DEPENDENT UPON MOTHER'S DOMICILE

Plaintiff and defendant were married in the State of Wisconsin and domiciled there up to December, 1946, at which time the defendant took three minor children of the marriage with her to Ohio and, as the court assumed without discussion, established her domicile there. There was evidence of an oral agreement by the defendant to return the children to her husband if she decided to permanently separate from him. In February, 1947, plaintiff obtained a decree of divorce in Wisconsin and the court in the decree awarded the plaintiff custody of the three children, aged 8, 5 and 1½ years. The defendant was served in Ohio by the sheriff, but neither she nor the children appeared in the divorce action. Thereafter, plaintiff brought this habeas corpus proceeding in Ohio to recover custody of the children upon the defendant's refusal to return them to him. *Held,* that the children retained their Wisconsin domicile while temporarily in Ohio, and the Wisconsin court had jurisdiction in the divorce proceeding to award custody of the children to the plaintiff. *Anderson v. May,* 107 N.E.2d 358 (Ohio 1952).

The case is unique with respect to the existence of the agreement by defendant to return the children to her husband in the event that she decided not to come back to him herself. This agreement was basic to the finding that the children were only temporarily in Ohio and still domiciled in Wisconsin.[1] It will be observed, however, that defendant did not violate the terms of the agreement.

The state courts generally agree that a minor child, until emancipated, is not capable of maintaining a separate domicile; nor is an unemancipated minor child capable of independently establishing a new domicile.[2] The theory supporting this proposition is that a minor child is non sui juris, and thus is unable of his own volition to select, acquire, or change his domicile.[3] At common law the domicle of a minor child was that of his father, and even though the child was living with his mother apart from his father, he retained the domicile of his father.[4] This doctrine is based upon the reciprocal rights and duties owing between a father and his child. The Massachusetts court still adheres to this rule, holding that where a minor child is without the state residing with his mother at her domicile, the state of the father's domicile has jurisdiction to award custody of the minor child.[5] But the rule which is accepted by the majority of courts is,

1. The scope of this article does not include the problem of whether mere physical presence of a child in the forum is a sufficient basis of jurisdiction of the forum to enter valid orders concerning the custody of the child. See, for example, People of the State of New York v. Halvey, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947), especially footnote 2 on page 906 of 67 S.Ct.
2. Hiestand and others v. Kuns, 8 Blackf. 345 (Ind. 1847); Yarborough v. Yarborough, 290 U.S. 202, 54 S.Ct. 181, 78 L.Ed. 269, 9 A.L.R. 924 (1933).
3. In re Hall's Guardianship, 235 N.C. 697, 71 S.E.2d 140 (1952).
4. Glass v. Glass, 260 Mass. 562, 157 N.E. 621 (1927).
5. Heard v. Heard, 323 Mass. 357, 82 N.E.2d 219 (1948).

that where the wife and her minor child reside in state X and the wife is a domicilliary of state X, the courts of state Y where the husband is domiciled do not have jurisdiction to award custody of the minor child, where constructive service is had upon the wife and she does not appear in the action.[6] If state Y does award custody of the minor child in the divorce decree under the above facts, the courts of state X will hold that portion of the decree awarding custody of the child to be void.[7]

Since the majority holds that the state of the father's domicile cannot award custody of a child residing with his mother at her domicile,[8] the question left for determination is, "under what circumstances may a wife separate from her husband and, taking her minor child with her, acquire a domicile for herself and her minor child different from that of her husband?"

The cases on this precise point are few but most of the existing authorities support the proposition that though a wife is separated from her husband, her domicile remains that of her husband unless it has become necessary and proper for her to acquire a new domicile, and only then may she acquire a domicile different from that of her husband.[9] Thus, where the husband unjustifiably refuses to live with his wife and she takes the children to another state and establishes her domicile there, the husband cannot assert a fictional unity of domicile which will give the court jurisdiction over his wife and children, for he has severed this fictional unty by his own acts.[10] Ordinarily, where the husband does not consent to any change in the domicile of his wife and child, there can be no change.[11] If the wife separates from her husband for causes which would be sufficient grounds for divorce, she can establish a domicile separate from that of her husband.[12]

The Connecticut court in *Boardman v. Boardman*,[13] a case standing by itself, extended the last mentioned rule further than any court had been willing to go before where the custody of a minor child was involved. It was held that if the state where the litigation arises has a "joint guardianship law,"[14] this statute alters the common law conception[15] and gives the mother equal rights to the custody of her children with the father; therefore, under this rule, the domicile of a minor child is that of his mother

6. Kline v. Kline, 57 Iowa 386, 10 N.W. 825 (1881); Weber v. Redding, 200 Ind. 448, 163 N.E. 269 (1928); Hanson v. Hanson, 150 Neb. 337, 34 N.W.2d 388 (1948); Byers et al. v. Superior Court for Yavapia County et al., 61 Ariz. 284, 148 P.2d 999 (1944); Sanders v. Sanders, 223 Mo. App. 834, 14 S.W.2d 458 (1929); Seely v. Seely, 30 App. Cas. (D.C.) 191, 12 Ann. Cas. 1058 (1907).
7. Kline v. Kline, supra; Weber v. Redding, supra; Hanson v. Hanson, supra; Sanders v. Sanders, supra.
8. See note 6, supra.
9. Cheever v. Wilson, 9 Wall. 123, 6 D.C. 149, 19 L.Ed. 604 (1869); Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933).
10. Coble v. Coble, 229 N.C. 81, 47 S.E.2d 798 (1948).
11. Minick v. Minick, supra.
12. Sneed v. Sneed, 14 Ariz. 17, 123 Pac. 312 (1912).
13. 135 Conn. 276, 62 A.2d 521 (1948).
14. Gen. Stat. of Conn. (Rev. 1949), sec. 6850.
15. See note 4, supra.

with whom he is residing, and the mother may acquire a domicile apart from her husband *regardless* of her reasons for separating from him.[16] Professor Harper, in his recent book on *Problems of the Family*[17] has well summarized the changing attitudes of courts on this problem. The Restatement of Conflict of Laws, Section 32, supports the view of the Connecticut Court in the *Boardman* case stating, "the minor child's domicil . . . is that of the parent to whose custody it has been legally given; if there has been no legal fixing of custody, its domicil is that of the parent with whom it lives, but if it lives with neither, it retains the father's domicil." In Comment (a) to this Section it is stated that "by statute in several states the father and mother are constituted 'joint guardians' of their minor children and are equally entitled to their custody. Where that is the case, if the father and mother have separate domicils, a minor child takes the domicil of the parent with whom it lives in fact. If it lives with neither, its domicil is that of of the father unless it is abandoned by him."

Changing social conditions indicate that the *Boardman* case and the Restatement probably point the direction which the courts will travel on this point of law in the future. It is well to note here that neither the majority rule nor the rule of the *Boardman* case would have any bearing upon the decision in *Anderson v. May*. The decision in that case, as pointed out previously, rests upon an agreement between the plaintiff and defendant from which the court determined that the minor children retained their Wisconsin domicile while temporarily in Ohio.

Wyoming has a joint guardianship law[18] which is similar but not identical to the Connecticut statute. The Wyoming statute gives every married woman the same rights and powers as her husband regarding custody of her children, but it does not impose any duties upon the wife as the Connecticut statute does. This slight difference is rendered insignificant when it is remembered that the progress of this phase of the law has been toward the rule of the *Boardman* case. Further, a strict construction of the phrase, "the same rights and powers . . . regarding custody of her children" leads inevitably to the conclusion that any powers which the husband had regarding custody of his children have been given equally to his wife. Thus, where the husband had the power to establish a domicile for himself and his minor child which would enable a court to award custody of the child, the wife now has this same power. Though no case involving custody of minor children has been decided in Wyoming, it seems apparent that Wyoming's joint guardianship law should be a strong inducement to our courts to follow the rule of the *Boardman* case and hold that a married woman may acquire a domicil separate from that of her husband regardless of her reasons for separating from him and this domicile would become the domicile of her minor child who resides with her.

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16. See note 13, supra.
17. Harper, Problems of The Family, 425 f.n. (1st ed. 1952).
18. Wyo. Comp. Stat. 1945, sec. 7-105.