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Russell H. McIntosh

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NOTES

DECREES AND JUDGMENTS AWARDING CUSTODY OF CHILDREN IN FLORIDA

I. INTRODUCTION

In a recent case in the Supreme Court of the United States involving a Florida decree of custody, Mr. Justice Frankfurter referred to the "uncertainties of Florida law" in this field.¹ The tremendous increase in the number of divorces in the United States² proportionately increases the problem of determining to whom the custody of the children of those disrupted marriages should be awarded. Since Florida is the third highest state in the number of divorces granted,³ there is a great responsibility placed upon the courts of this state to act wisely in determining to whom custody of the unfortunate offspring of divorced parents should be granted. The archives of America abound with novels and plays about "part-time children." The mental confusion, divided loyalties, and suppression of memories which are inflicted upon every child of divorced parents cannot but produce personality and character maladjustments injurious to society. Thus it is that public policy demands that every award of custody (1) be based upon sound principles, (2) be supported upon a sound jurisdictional basis, and (3) be given extra-territorial effect, except when the welfare of the child requires its modification. It is in consideration of the above three requirements that this study of the Florida law is undertaken.

II. GENERAL PRINCIPLES FOR AWARD OF CUSTODY

At common law the father was the natural guardian of his minor children,⁴ and unless he became unfit to maintain that custody or unless

¹330 U. S. 610, 67 Sup. Ct. 903, 91 L. Ed. 1133 (1947).

²See Davis, *Sociological and Statistical Analysis*, 10 LAW AND CONTEMP. PROB. 700, 710-720; *Marriage and Divorce Statistics in United States, 1906*, 27 VITAL STATISTICS—SPECIAL REPORTS 165 (1947).

³*Marriage and Divorce Statistics in United States, 1906*, 27 VITAL STATISTICS—SPECIAL REPORTS 166 (1947).

⁴State *ex rel.* Rasco v. Rasco, 139 Fla. 349, 190 So. 510 (1939); State *ex rel.* Bonsack v. Campbell, 134 Fla. 809, 184 So. 332 (1938); Hopkins v. Hopkins, 84

the welfare of the child demanded that a change of custody be made,⁵ the rights of the father were protected. The rights of the mother were held in abeyance.⁶ Since the adoption of the Nineteenth Amendment of the United States Constitution⁷ and paralleling the growth of the movement towards the equalizing of the legal status of the sexes,⁸ forty-two states, including Florida, have adopted statutes making the father and mother joint natural guardians of their minor children.⁹ Although the Florida statute was enacted in 1921,¹⁰ it was not until 1941 that the statute was construed as modifying the common law.¹¹ On the contrary, the next year after the passage of the statute, the supreme court held that the statute applied only to "joint rights of parents as natural guardians" and did not apply in a case in which each parent claimed exclusive right to the custody and care of their minor children.¹² Thus, in defiance of the statute, the Supreme Court has, until recently, continued to hold that, when circumstances affecting the welfare of the child do not require an award to the mother¹³ or another,¹⁴ the father is regarded as having a legal right to the custody and care of his minor children unless he is shown to be an improper person to best conserve their welfare.¹⁵ Even when the welfare of the child required that custody be awarded to the mother, the court held that the rights of the father

Fla. 500, 94 So. 157 (1922); *Busbee v. Weeks*, 80 Fla. 323, 85 So. 653 (1920); *Porter v. Porter*, 60 Fla. 407, 53 So. 546 (1910).

⁵*State ex rel. Watland v. Hurley*, 132 Fla. 892, 182 So. 442 (1938); *McCann v. Proskauer*, 93 Fla. 383, 112 So. 621 (1927); *Hopkins v. Hopkins*, 84 Fla. 500, 94 So. 157 (1922); *Miller v. Miller*, 38 Fla. 227, 20 So. 989 (1896).

⁶*Porter v. Porter*, 60 Fla. 407, 53 So. 546 (1910).

⁷U. S. CONST. AMEND. XIX, §1.

⁸Note, *Equalizing the Legal Status of the Sexes*, 7 CORN. L. Q. 139 (1921).

⁹4 VERNIER, AMERICAN FAMILY LAWS §232 (1st ed. 1936).

¹⁰FLA. STAT. 1941, §744.01.

¹¹*Randolph v. Randolph*, 146 Fla. 491, 1 So.2d 480 (1941).

¹²*Hopkins v. Hopkins*, 84 Fla. 500, 94 So. 157 (1922); see *McCann v. Proskauer*, 93 Fla. 383, 387, 112 So. 621, 622 (1927) (concurring opinion).

¹³*Martin v. Martin*, 157 Fla. 456, 26 So.2d 183 (1946); *Fields v. Fields*, 143 Fla. 886, 197 So. 530 (1940); see *Miller v. Miller*, 38 Fla. 227, 20 So. 989 (1896).

¹⁴*Bourn v. Hinsey*, 134 Fla. 404, 183 So. 614 (1938). But the natural parents have a right superior to any guardian's unless the parents' fitness has been adjudicated adversely. *State ex rel. Watland v. Hurley*, 132 Fla. 892, 182 So. 442 (1938); *Frazier v. Frazier*, 109 Fla. 164, 147 So. 464 (1933); *Lee v. Lee*, 67 Fla. 396, 65 So. 585 (1914); *Robertson v. Bass*, 52 Fla. 420, 42 So. 243 (1906).

¹⁵See note 2 *supra*.

must not be abused.¹⁶

Despite the continued recognition of the common-law principle that the father is prima facie entitled to custody of his legitimate children,¹⁷ the court has by indirect means given increasing effect to the equal rights of the mother implied in the joint natural-guardian statute. This modification of the common law has been accomplished by stressing the principle that the welfare¹⁸ of the child is paramount to the rights of the parents,¹⁹ and by giving the chancellor a wide discretion in determining with which parent the welfare of the child will best be served.²⁰ Finally, in *Randolph v. Randolph*,²¹ the Supreme Court overruled the prior construction of the joint natural-guardian statute,²² and stated candidly that "the father has no right of custody superior to that of the mother."

The following principles in awarding custody of children seem now to be well established in Florida:

¹⁶*Lewis v. Lewis*, 112 Fla. 520, 150 So. 729 (1933).

¹⁷*State ex rel. Watland v. Hurley*, 132 Fla. 892, 182 So. 442 (1938); *McCann v. Proskauer*, 93 Fla. 383, 112 So. 621 (1927); see *State ex rel. Weaver v. Hamans*, 118 Fla. 230, 159 So. 31 (1935). But the mother has a superior right to her minor illegitimate children. *Marshall v. Reams*, 32 Fla. 499, 14 So. 95 (1893).

¹⁸The ultimate test of the child's welfare is its spiritual and moral well-being. *Randolph v. Randolph*, 146 Fla. 491, 1 So.2d 480 (1941). In *Bourn v. Hinsey*, 134 Fla. 404, 183 So. 614 (1938), the court said, "The 'best interest' of a child whose custody is in controversy contemplates training which gives it a keen response to spiritual and moral teachings, makes it self reliant, engenders in it a love of country, a reverence for law, and an appreciation of the truth that all have an equal right to live, breathe, to ply a trade, and enjoy the fruits thereof." Other more practical considerations are age, sex, and health. *Miller v. Miller*, 38 Fla. 227, 20 So. 989 (1896).

¹⁹*State ex rel. Hicks v. Cain*, 36 So.2d 275 (Fla. 1948); *Fields v. Fields*, 143 Fla. 886, 197 So. 530 (1940). If an agreement or stipulation for custody is clear and mutual, permanent custody may be awarded in accord with the desires of the parents, but such agreement must follow the provisions of the statute. FLA. STAT. 1941, §744.01, *State ex rel. Airston v. Bollinger*, 88 Fla. 123, 101 So. 282 (1924).

²⁰*Phillips v. Phillips*, 153 Fla. 133, 13 So.2d 922 (1943); *Penney v. Penney*, 146 Fla. 652, 1 So.2d 883 (1941); *Green v. Green*, 137 Fla. 359, 188 So. 355 (1939); *Frazier v. Frazier*, 109 Fla. 164, 147 So. 464 (1933).

²¹146 Fla. 491, 1 So.2d 480 (1941).

²²See *Hopkins v. Hopkins*, 84 Fla. 500, 94 So. 157 (1922)

1. The welfare of the child is the paramount consideration,²³ and, when the welfare of the child requires, custody may be given to the parent who is the wrong-doer.²⁴

2. The welfare of a child of *tender* years is best served by awarding custody to the mother.²⁵ Thus, regardless of the rights of the father, it has been held reversible error to award a small child to the father without a showing that the mother is morally unfit by way of her conduct or environment to rear the infant properly.²⁶

3. When the welfare of the child would be equally well provided for in the custody of either parent, then the question of

²³Anon., 55 Ala. 428 (1876); Hurst v. Hurst, 158 Fla. 43, 27 So.2d 749 (1946); Pittman v. Pittman, 153 Fla. 434, 14 So.2d 671 (1943); Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734 (1941); Mehaffey v. Mehaffey, 143 Fla. 157, 196 So. 416 (1940); Frazier v. Frazier, 109 Fla. 164, 147 So. 464 (1933); Lindsey v. Lindsey, 14 Ga. 657 (1854); Darnall v. Mullikin, 8 Ind. 152 (1856); Ladd v. Ladd, 188 Iowa 351, 176 N. W. 211 (1920); Shehan v. Shehan, 152 Ky. 191, 153 S. W. 243 (1913); Arix v. Arix, 212 Mich. 438, 180 N. W. 463 (1920); Duncan v. Duncan, 119 Miss. 271, 80 So. 697 (1919); McClain v. McClain, 115 Wash. 237, 197 Pac. 5 (1921).

²⁴Kettelle v. Kettelle, 110 Cal. App. 310, 294 Pac. 453 (1930); Watkins v. Watkins, 221 Ind. 293, 47 N. E.2d 606 (1943); Brandon v. Brandon, 14 Kan. 342 (1879); see KEEZER, LAW OF MARRIAGE AND DIVORCE §719 (3d ed. 1946); cf. Simmons v. Simmons, 122 Fla. 325, 165 So. 45 (1936). *But cf.* Martin v. Martin, 157 Fla. 456, 26 So.2d 183 (1946); Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933).

²⁵See note 10 *supra*. *But cf.* Pittman v. Pittman, 153 Fla. 434, 14 So.2d 671 (1943); Phillips v. Phillips, 153 Fla. 133, 13 So.2d 922 (1943).

Whether change in age of child or other circumstances warrants a modification of the decree to give custody to father is in the discretion of the court. Randolph v. Randolph, 145 Fla. 556, 200 So. 699 (1940), *cross appeal*, 146 Fla. 491, 1 So.2d 480 (1941); Mooty v. Mooty, 131 Fla. 151, 179 So. 155 (1938). However, the chancellor must not abuse this discretion. Gedney v. Gedney, 117 Fla. 686, 158 So. 288 (1934).

²⁶Stewart v. Stewart, 156 Fla. 815, 24 So.2d 529 (1946); Fields v. Fields, 143 Fla. 886, 197 So. 530 (1940); Callaban v. Callahan, 296 Ky. 444, 177 S. W.2d 565 (1944). It is generally held in other jurisdictions that an adulterous mother is not a fit person to have the custody of the children. Kremelberg v. Kremelberg, 52 Md. 553 (1879); Arix v. Arix, 212 Mich. 438, 180 N. W. 463 (1920); Duncan v. Duncan, 119 Miss. 271, 80 So. 697 (1919); Moyer v. Moyer, 75 N. J. Eq. 439, 72 Atl. 965

the relative rights of the parents,²⁷ the desires of the child,²⁸ and the relative financial standing and stability of the parents²⁹ are considered; but the determination of the one to whom custody should be awarded cannot be based on any one of the above factors without regard to the others.³⁰

4. When the circumstances are such that the welfare of the child would not be better with one parent than the other, and both parents are equally entitled to the custody and control of the child, custody is usually divided between the parents. Under such circumstances, the court has granted custody of the child for six months of the year to each parent.³¹ However, if custody must be divided, the better procedure seems to be to award custody to one parent for nine months and to the other for three months in order not to disrupt the school life of the child.³²

(1909); *Cozard v. Cozard*, 48 Wash. 124, 92 Pac. 935 (1907). But an adulterous wife has been given custody of the children in Florida when the husband was guilty of extreme cruelty to the wife. *Simmons v. Simmons*, 122 Fla. 325, 165 So. 45 (1936).

²⁷*Randolph v. Randolph*, 146 Fla. 491, 1 So.2d 480 (1941); *Green v. Green*, 137 Fla. 359, 188 So. 355 (1939); *Frazier v. Frazier*, 109 Fla. 164, 147 So. 464 (1933). Other things being equal, the rights of the father are superior under the common law. *Baker v. Durham*, 95 Ark. 355, 129 S. W. 789 (1910); *Kennedy v. Kennedy*, 182 S. W. 100 (Mo. App. 1916); *Denny v. Denny*, 118 Va. 79, 86 S. E. 835 (1915). But the father may lose the right of custody by his bad conduct or unfitness. *Anderson v. Anderson*, 152 Ky. 773, 154 S. W. 1 (1913); *Lyle v. Lyle*, 86 Tenn. 372, 6 S. W. 878 (1888).

²⁸If the child is of the age of discretion, some weight should be given to the preference of the child as to which parent should be awarded custody, but it should not be the controlling factor. *Williams v. Williams*, 23 Fla. 324, 2 So. 768 (1887); *Horning v. Horning*, 107 Mich. 587, 65 N. W. 555 (1895); *accord*, *Dorsey v. Dorsey*, 52 Utah 73, 172 Pac. 722 (1918); *Pope v. Pope*, 161 Ky. 104, 170 S. W. 504 (1914); *Shallcross v. Shallcross*, 135 Ky. 418, 122 S. W. 223 (1909); *cf.* *State ex rel. Cline v. Cline*, 91 Fla. 300, 107 So. 446 (1926). *Contra*: *Godbey v. Godbey*, 70 Ohio App. 450, 44 N. E.2d 810 (1942); *cf.* *Bourn v. Hinsey*, 134 Fla. 404, 183 So. 614 (1938); *Jones v. Harmon*, 27 Fla. 238, 9 So. 245 (1891) (child of four).

²⁹Relative financial ability of the parents is also a factor in determining the welfare of the child. *Williams v. Williams*, 23 Fla. 324, 2 So. 768 (1887); *cf.* *Fields v. Fields*, 143 Fla. 886, 197 So. 530 (1940); *Bourn v. Hinsey*, 134 Fla. 404, 183 So. 614 (1938); *Frazier v. Frazier*, 109 Fla. 164, 147 So. 464 (1933).

³⁰*Fields v. Fields*, 143 Fla. 886, 197 So. 530 (1940).

³¹*Watson v. Watson*, 153 Fla. 668, 15 So.2d 446 (1943).

³²*Grizzard v. Grizzard*, 146 Fla. 17, 200 So. 209 (1941); *Fields v. Fields*, 143 Fla. 886, 197 So. 530 (1940).

5. The award of custody to the mother or to another does not of itself relieve the father of the duty to support the child.³³

III. JURISDICTIONAL BASIS FOR AWARD OF CUSTODY

Courts of equity have inherent powers to control and protect infants and their property;³⁴ and it is a maxim of long standing that, when a court of equity takes jurisdiction of a case for one purpose, it will proceed with the determination of all matters properly presented and will grant full relief.³⁵ Thus, it would seem that, whenever a court has jurisdiction to grant a divorce, it would have jurisdiction to make an ancillary decree of custody of the children of the parties. A few states have held that jurisdiction to grant a divorce is sufficient to give the court power to make an award of custody ancillary to the divorce, even though the children were neither domiciled in the state nor actually within the state at the time of the suit.³⁶ This doctrine is based upon the theory that the state is acting as an arbiter of the rights of the parents and that the decree of custody is a personal one in which the interest of the state is merely nominal.³⁷ Indeed, from the wording of the Florida statute concerning the power of a court of equity to grant custody of children in a suit for divorce, it would appear that jurisdiction over the parents only is necessary.³⁸ However, the Supreme Court of Florida has held that jurisdiction over the subject-matter, the children themselves, is necessary in order to give the court jurisdiction to award a decree of custody.³⁹ Not only do equity courts have the power to award custody of children, but, when the well-being of the child requires

³³Todd v. Todd, 151 Fla. 134, 9 So.2d 279 (1942); Heckes v. Heckes, 129 Fla. 653, 176 So. 541 (1937); Fekany v. Fekany, 118 Fla. 698, 160 So. 192 (1935); see Futch v. Johnson, 101 Fla. 328, 134 So. 791 (1931); Baker v. Baker, 94 Fla. 1001, 114 So. 661 (1927).

³⁴Duke v. Duke, 109 Fla. 325, 327, 147 So. 588, 589 (1933); Fisher v. Guidy, 106 Fla. 94, 99-100, 142 So. 818, 820-821 (1932); 4 POMEROY'S EQUITY JURISPRUDENCE, §§1304, 1307 (5th ed. 1941).

³⁵Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734 (1941); Oyama v. Oyama, 138 Fla. 422, 189 So. 418 (1939).

³⁶Duryea v. Duryea, 46 Idaho 512, 269 Pac. 987 (1928); Avery v. Avery, 33 Kan. 1, 5 Pac. 418 (1885); Anderson v. Anderson, 81 S. E. 706 (W. Va. 1914).

³⁷Note, 80 U. OF PA. L. REV. 712 (1932).

³⁸FLA. STAT. 1941, §65.14.

³⁹Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734 (1946).

judicial determination of custody⁴⁰ or when the question is properly submitted to the court in an action for divorce,⁴¹ it is the duty of the court to decide the question. It is not error, however, to refuse to make an order concerning custody when the court does not have jurisdiction over the child.⁴² Once the court has proper jurisdiction to make an award of custody in a divorce action, however, the court may retain jurisdiction to make such an award even though the divorce is denied⁴³ or the suit dismissed as to the divorce.⁴⁴

If the entire family unit should continue to live within the territorial jurisdiction of the court making the original award of custody, there would be no question of conflict of laws and, consequently, no problem of jurisdiction. Such, however, often is not the situation in the United States. Nevertheless, the various states have attempted to determine for themselves when their courts have jurisdiction to render an award of custody. Some states hold that an award of custody is proper when the child is within the state even though one of the parents is outside the state and has not received personal service;⁴⁵ some hold that personal service on both parents is necessary but the child may be outside the state;⁴⁶ others assert that the mere presence of the child within the boundaries of the state gives the state jurisdiction over the child's custody;⁴⁷ while still others contend that the power to serve process on the father is a sufficient basis for making an award of custody.⁴⁸

In 1933 the Supreme Court of Florida, in *Minick v. Minick*,⁴⁹ held that, since the domicile of the child ordinarily is determined by that of the father, if the father is domiciled in the state and brings an action for divorce by constructive service upon the wife, the court has jurisdiction to

⁴⁰*Di Giorgio v. Di Giorgio*, 153 Fla. 24, 13 So.2d 596 (1943).

⁴¹*Martin v. Martin*, 157 Fla. 456, 26 So.2d 183 (1946).

⁴²*Giachetti v. Giachetti*, 157 Fla. 259, 25 So.2d 658 (1946).

⁴³*Stewart v. Stewart*, 156 Fla. 815, 24 So.2d 529 (1946).

⁴⁴*Duke v. Duke*, 109 Fla. 325, 147 So. 588 (1933).

⁴⁵*Black v. Black*, 110 Ohio 392, 144 N. E. 268 (1924); *Kenner v. Kenner*, 130 Tenn. 211, 201 S. W. 779 (1918).

⁴⁶*Wear v. Wear*, 130 Kan. 205, 285 Pac. 606 (1930); *Payton v. Payton*, 29 N. M. 618, 225 Pac. 576 (1924).

⁴⁷*Dorman v. Friendly*, 146 Fla. 732, 1 So.2d 734 (1941); *In re Kernan*, 247 App Div. 664, 288 N. Y. Supp. 329 (1936).

⁴⁸*Rivers v. Mitchell*, 57 Iowa 193, 10 N. W. 626 (1881); *People ex rel. Ludden v. Winston*, 34 Misc. 21, 69 N. Y. Supp. 452 (1901).

⁴⁹111 Fla. 469, 149 So. 483 (1933).

make an award of custody ancillary to the divorce suit even though the child is not within the state. In accordance with the principle that the state of the domicile of the child has jurisdiction to make an award of custody in a divorce action in which the court has jurisdiction over the parents, the Florida Court recognized the decree of custody of a child residing in Florida at the time the decree was made in Mississippi.⁵⁰ The principle concerning jurisdiction to award a decree of custody in a divorce suit, as established in *Minick v. Minick* is clear and specific. However, in 1939, doubt as to whether Florida would continue to follow that principle was raised by the decision of the Supreme Court in *State ex rel. Rasco v. Rasco*,⁵¹ in which the court said: "When a divorce is granted on constructive service, as was the case when the relator's divorce was granted, the defendant and the minor child being without the jurisdiction of the court, the said court has no authority to award custody of the minor child or children to the plaintiff. The minor child or children must, in other words, be in the jurisdiction of the court before their custody will be considered and adjudicated." Did the court mean that *Minick v. Minick* is overruled? The court did not state that it was. Or did the court mean merely that, while Florida will render a decree of custody on such jurisdictional basis, it will not recognize the decree of a sister state based on such jurisdiction? The basic issue of the case was a conflict-of-laws question which was answered by the Florida Court with the statement that "the doctrine of comity plays no part in the adjudication of such cases."⁵² In *Dorman v. Friendly*,⁵³ the court clearly states that, if the child is actually within the jurisdiction of the court although his legal domicile is elsewhere, the court may determine conflicting claims as to his custody. This case does throw some light upon the question as to whether domicile of the child in the state is sufficient to establish jurisdiction if the child is not physically within the state, by paradoxically citing both *Minick v. Minick* and *State ex rel. Rasco v. Rasco* as authority for the statement that a court must not only have jurisdiction of the parties but it must also have jurisdiction over the subject-matter, the children themselves, as well.⁵⁴ The Supreme Court of the United States,

⁵⁰*Bourn v. Hinsey*, 134 Fla. 404, 183 So. 614 (1938) (reversed on rehearing on the grounds that the welfare of the child required that custody be awarded to another).

⁵¹139 Fla. 349, 190 So. 510 (1939).

⁵²*State ex rel. Rasco v. Rasco*, 139 Fla. 349, 190 So. 510 (1939).

⁵³146 Fla. 732, 1 So.2d 734 (1941).

⁵⁴*Dorman v. Friendly*, 146 Fla. 732, 1 So.2d 734 (1941).

in *Halvey v. Halvey*,⁵⁵ cites *Dorman v. Friendly* as authority for the conclusion that jurisdiction is obtained by the Florida courts to make a decree of custody when the child is either actually within the state or is domiciled in the state. It was in this same case, however, that Mr. Justice Frankfurter made his reference to the "uncertainties of Florida law" concerning the jurisdiction of the Florida courts to award custody in divorce cases.⁵⁶

Unless *Minick v. Minick* is held to be overruled, Florida now recognizes two distinct bases for jurisdiction over the subject-matter of a proceeding to determine custody of children: (1) the physical presence of the child within the state; and (2) the domicile of the child in the state. From the general language used throughout the cases since *Rasco v. Rasco*, it seems clear that the Florida Court is tending toward the requirement that the child be present within the state to the exclusion of jurisdiction based solely upon domicile of the child within the state, although there is no direct holding to this effect. However, the cases in which the court states that the child must be in the State of Florida for the courts of this state to exercise jurisdiction are habeas corpus cases.⁵⁷ It is a failure to recognize the distinction between the jurisdictional basis for an award of custody in a divorce suit and in a habeas corpus proceeding that has given impetus toward the requirement that the child be actually within the state before the court has jurisdiction to make an award of custody in a divorce proceeding.

Courts of law as well as of equity are charged with the care and protection of infants within their jurisdiction, and the making of appropriate orders for the protection and welfare of the persons and estates of infants is necessarily an implied incident to the power of making and enforcing judgments affecting infants.⁵⁸ The power of courts of law to make an award of custody in a habeas corpus proceeding does not conflict with the inherent powers of equity to control and protect the welfare of infants within their jurisdiction.⁵⁹

⁵⁵330 U. S. 610, 615 n.2, 67 Sup. Ct. 903, 906 n.2, 91 L. Ed. 1133, 1136 n.2 (1947).

⁵⁶*Halvey v. Halvey*, 330 U. S. 610, 618, 67 Sup. Ct. 903, 908, 91 L. Ed. 1133, 1138 (1947) (concurring opinion).

⁵⁷*E.g.*, *Gilman v. Morgan*, 158 Fla. 605, 29 So.2d 372 (1947); *Di Giorgio v. Di Giorgio*, 153 Fla. 24, 13 So.2d 596 (1943).

⁵⁸*Miller v. Miller*, 38 Fla. 227, 20 So. 989 (1896).

⁵⁹*Porter v. Porter*, 60 Fla. 407, 53 So. 546 (1910); *Maddox v. Barr*, 49 Fla. 182, 38 So. 766 (1905); *In re Stockman*, 71 Mich. 180, 38 N. W. 876 (1888); *State v. Baird*, 18 N. J. Eq. 194 (1867).

The approach to the problem of custody in a suit for divorce is different from that in a habeas corpus proceeding. In a divorce suit the court is not concerned with the *past* rights of the parties to the custody of the children except as a factor in determining to whom the *future* custody of the children should be awarded, while in a habeas corpus proceeding the basic issue is whether the person who is then exercising custody is doing so legally; hence, a determination of the past rights is essential to that decision.⁶⁰ The courts of law have not, however, contented themselves merely with determining the rights between the parties and making the award to the one who has the better right. Rather, they have recognized the principle that, despite the prima facie paramount right of the father,⁶¹ the controlling consideration is the welfare of the child.⁶² Thus, it would be futile to attempt a distinction between the nature of a decree of custody in a divorce action and a judgment concerning custody in a habeas corpus proceeding. Both the decree of custody in a divorce suit and the judgment concerning custody in a habeas corpus proceeding are res judicata of the facts before the court at the time the decree of judgment was made, and both are binding upon the parties until the decree is modified.⁶³

Although the principles governing the award of custody and the nature of the award are the same, there is a fundamental difference in the jurisdictional basis of making such award. In action for divorce the party seeking the divorce must be domiciled or resident for the statutory period within the state,⁶⁴ and the child must either be before the court⁶⁵ or be domiciled within the state⁶⁶ before the court has jurisdiction to make an award of custody. In a proceeding on habeas corpus, however, it is immaterial whether any of the parties, including the child, are domiciled

⁶⁰Porter v. Porter, 60 Fla. 407, 53 So. 546 (1910); Miller v. Miller, 38 Fla. 227, 20 So. 989 (1896); see CRANDALL, FLORIDA COMMON LAW PRACTICE 684 (1928).

⁶¹McCann v. Proskauer, 93 Fla. 323, 112 So. 621 (1927); Busbee v. Weeks, 80 Fla. 323, 85 So. 653 (1920); Porter v. Porter, 60 Fla. 407, 53 So. 546 (1910).

⁶²Di Giorgio v. Di Giorgio, 153 Fla. 24, 13 So.2d 596 (1943); State ex rel. Rasco v. Rasco, 139 Fla. 349, 190 So. 510 (1939); Hopkins v. Hopkins, 84 Fla. 500, 94 So. 157 (1922).

⁶³Weir v. Marley, 99 Mo. 484, 12 S. W. 798 (1890); cf. State ex rel. Watland v. Hurley, 132 Fla. 892, 182 So. 442 (1938).

⁶⁴FLA. STAT. 1941, §65.02.

⁶⁵Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734 (1941).

⁶⁶Halvey v. Halvey, 330 U. S. 610, 615 n.2, 67 Sup. Ct. 903, 906 n.2, 91 L. Ed. 1133, 1136 n.2 (1947); Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933).

in the state,⁶⁷ but the child must be physically within the state.⁶⁸ A Louisiana court issued a writ of habeas corpus to the mother to bring back into Louisiana children sent out of the state by the mother; however, the Supreme Court of Louisiana issued a writ of prohibition against the enforcement of the writ until the proper custody of the child was adjudicated.⁶⁹ It is well settled in Florida⁷⁰ and other jurisdictions⁷¹ that a writ will not be issued unless the child is within the state. The reason for the requirement that the child be within the state before the court has jurisdiction to grant a writ of habeas corpus is that the general scope of a writ of habeas corpus is to compel production of a person detained by the one in whose custody he is detained, and the writ ought not to issue where it appears to be impossible that it should be obeyed.⁷² This principle is not applicable, however, in the awarding of custody ancillary to a suit of divorce, because jurisdiction over the status of the child may follow the domicile of the child, on the one hand, or the actual presence of the child within the state, on the other.

There is a great deal of authority for the view that a state can exercise jurisdiction to determine the custody of children only if the domicile of the person placed under custody is within the state.⁷³ This view is supported by the argument that the primary consideration in the award of custody is the welfare of the child and that the determination of the child's welfare can best be made in the state of the domicile of the child.⁷⁴ There are two major objections, however, to the requirement that the domicile of the person placed under custody be in the state

⁶⁷*Di Giorgio v. Di Giorgio*, 153 Fla. 24, 13 So.2d 596 (1943); *Bourn v. Hinsey*, 134 Fla. 404, 183 So. 614 (1938).

⁶⁸*State ex rel. Clark v. Clark*, 148 Fla. 452, 4 So.2d 517 (1941); *accord*, *People ex rel. Winston v. Winston*, 31 App. Div. 121, 52 N. Y. Supp. 814 (1898)

⁶⁹*Tate v. Tate*, 163 La. 1047, 113 So. 370 (1927) (indicating that the writ may issue if custody is awarded to father).

⁷⁰*State ex rel. Clark v. Clark*, 148 Fla. 452, 4 So.2d 517 (1941).

⁷¹*In re Jackson*, 15 Mich. 416, 418 (1867); *People ex rel. Winston v. Winston*, 31 App. Div. 121, 52 N. Y. Supp. 814, 816 (1898).

⁷²*Regina v. Barnardo*, 24 Q. B. D. 283 (1890).

⁷³*Callahan v. Callahan*, 296 Ky. 444, 177 S. W.2d 565 (1944); *Milner v. Gatlin*, 139 Ga. 109, 76 S. E. 860 (1912); *Duryea v. Duryea*, 46 Idaho 512, 269 Pac. 987 (1928); *Person v. Person*, 172 La. 740, 135 So. 225 (1931); *State ex rel. Larson v. Larson*, 190 Minn. 489, 252 N. W. 329 (1934); *Lanning v. Gregory*, 100 Tex. 310, 99 S. W. 542 (1907); see RESTATEMENT, CONFLICT OF LAWS §117 (1934); RESTATEMENT, JUDGMENTS §33, comment *a* (1942).

⁷⁴*Goodrich, Custody of Children in Divorce Suits*, 7 CORN. L. Q. 1 (1921).

making the award: (1) A state is not only empowered but is charged with a duty to regulate the custody of infants within its borders,⁷⁵ since the infant is a ward of the state in which he is physically located; and (2) since at common law the domicile of the child is ordinarily that of the father, and the mother is incapable of changing the domicile of the minor even if she acquires a new domicile and takes the child with her,⁷⁶ it would be unfair to a mother who has been deserted or driven from her home to be compelled to bring her suit for divorce in the state in which the husband is domiciled, in order to have an adjudication of custody of the children.

Since the enactment of the joint natural-guardian statutes by the vast majority of states,⁷⁷ it has been held that the common-law rule that the domicile of the child is determined by that of the father is no longer applicable and that now the domicile of the child is that of the parent with whom the child resides.⁷⁸ However, this interpretation of the statute has not been universally applied.

The question of the effect of the Florida statute upon the domicile of a child living with the mother who has established a separate domicile from the father has never been before the Supreme Court of Florida, although the statute has been in effect since 1921.⁷⁹ However, the same result, so far as jurisdiction to award custody of children is concerned, is reached by recognition of the jurisdiction of the courts of Florida to award custody whenever the child is physically within the state and the court has jurisdiction over the parties.⁸⁰

The argument that the custody of children can be determined only by the state in which the child is domiciled seems unconvincing, especially since an award of custody is necessarily temporary and is generally *res judicata* only as to the facts actually before the court at the time the award of custody is made.⁸¹ However, by accepting the double aspect

⁷⁵*Di Giorgio v. Di Giorgio*, 153 Fla. 24, 13 So.2d 596 (1943).

⁷⁶*Hunt v. Hunt*, 94 Ga. 257 (1893); *Van Hoffman v. Ward*, 4 Redf. 244 (N. Y. 1880); *In re Cannon's Estate*, 15 Pa. Co. Ct. 312 (1894).

⁷⁷4 VERNIER, *AMERICAN FAMILY LAWS* §232 (1936).

⁷⁸*White v. White*, 77 N. H. 26 (1913); RESTATEMENT, *CONFLICT OF LAWS* §32, comment *a* (1934); see GOODRICH, *HANDBOOK ON CONFLICT OF LAWS* §37 (2d ed. 1938); 5 VERNIER, *AMERICAN FAMILY LAWS* §281, p. 27 (1938).

⁷⁹Florida Laws 1921, c. 8478, §1.

⁸⁰*But see Little v. Little*, 30 So.2d 386, 389 (Ala. 1947); *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624, 625 (1925).

⁸¹*Minick v. Minick*, 111 Fla. 469, 490-491, 149 So. 483, 492 (1933); *Frazier v.*

of jurisdiction—the presence of the child within the state, on the one hand, or the existence of domicile of the child in the state, upon the other—it is possible for two states to have jurisdiction to award custody at the same instance. Such a situation was presented in *State ex rel. Rasco v. Rasco*,⁸² wherein the Florida court had to choose between the two bases of jurisdiction or be placed in the position of refusing to recognize an award of custody based upon a type of jurisdiction which Florida recognizes as valid. From the general language used in later cases it is difficult to determine what choice was made.

III. MODIFICATION AND EXTRATERRITORIAL EFFECT OF CUSTODY AWARDS

Decrees respecting custody of children are necessarily provisional and temporary and ordinarily are not *res judicata* in the same court except as to facts before the court at the time of the judgment.⁸³ The custody of a child is a proper subject for the chancellor at any time,⁸⁴ even if the facts in issue could have been considered at a previous hearing when they were not presented or considered.⁸⁵ However, the court must have jurisdiction over the parties and subject-matter at the time of the modification or must have retained jurisdiction in the original proceeding.⁸⁶ When neither the child nor the parties to a divorce suit in which custody was awarded are domiciled within the state, and the court has not reserved jurisdiction to modify the custody award, the court cannot modify custody, although the court did retain jurisdiction to modify the terms of the divorce.⁸⁷ The failure of the lower court to retain jurisdiction to modify the original decree of custody and maintenance of the child has been held

Frazier, 109 Fla. 164, 147 So. 464 (1933); *Meadows v. Meadows*, 78 Fla. 576, 83 So. 392 (1919).

⁸²139 Fla. 349, 190 So. 510 (1939).

⁸³FLA. STAT. 1941, §65.14; C. G. L. 1927, §4993; *Minick v. Minick*, 111 Fla. 469, 149 So. 483 (1933); see BISHOP, MARRIAGE, DIVORCE, AND SEPARATION §1187 (1891).

⁸⁴*Mehaffey v. Mehaffey*, 143 Fla. 157, 196 So. 416 (1940); *Frazier v. Frazier*, 109 Fla. 164, 147 So. 464 (1933). However, the court may not allow the husband or wife suit-money, including attorney's fee, whenever, subsequent to the rendition of an absolute divorce decree, either party thereafter prosecutes or defends further proceedings respecting children's custody. *Chiapetta v. Jordan*, 153 Fla. 788, 16 So.2d 641 (1944).

⁸⁵*Jones v. Jones*, 156 Fla. 524, 23 So.2d 623 (1945); *Phillips v. Phillips*, 153 Fla. 133, 13 So.2d 922 (1943); *Meadows v. Meadows*, 78 Fla. 576, 83 So. 392 (1919).

⁸⁶*Dorman v. Friendly*, 146 Fla. 732, 1 So.2d 734 (1941).

⁸⁷*Ibid.*

to constitute reversible error in Florida.⁸⁸ When the court has retained jurisdiction to modify the decree, either party may petition for modification when the welfare of the child requires or when the circumstances have so changed as to make modification just, fair, and equitable.⁸⁹ The chancellor does not have as wide discretion in making a modification as in making the original decree, and the facts must show that the change is for the benefit of the child rather than for the benefit of one or both of the parties.⁹⁰ The modification must not be made as a punishment for one of the parties,⁹¹ nor may a decree of custody be modified at the request of one of the parties without notice to the other party.⁹²

The relation of the full-faith-and-credit clause⁹³ of the United States Constitution to non-pecuniary decrees or judgments is still unsettled in the federal courts,⁹⁴ but a recent decision in the Supreme Court of the United States indicates that full faith and credit must be accorded to the decree of custody rendered by a sister state if the state making the original award had competent jurisdiction to render the decree.⁹⁵ The trend of the recent state decisions has been toward extraterritorial recognition of decrees or judgments either as a matter of comity⁹⁶ or as a matter of constitutional necessity.⁹⁷ The general holding is that the court granting the original decree may modify the decree as long as the court

⁸⁸*Turner v. Turner*, 158 Fla. 330, 28 So.2d 325 (1947); *Heckes v. Heckes*, 129 Fla. 653, 176 So. 541 (1937).

⁸⁹*Phillips v. Phillips*, 153 Fla. 133, 13 So.2d 922 (1943); *Randolph v. Randolph*, 145 Fla. 556, 200 So. 699 (1940), cross-appeal, 146 Fla. 491, 1 So.2d 480 (1941); *Davis v. Davis*, 143 Fla. 282, 196 So. 614 (1940); *Gratz v. Gratz*, 137 Fla. 709, 188 So. 580 (1939); *Mooty v. Mooty*, 131 Fla. 151, 179 So. 155 (1938).

⁹⁰*Belford v. Belford*, 32 So.2d. 312 (Fla. 1947).

⁹¹*Edmundson v. Edmundson*, 133 Fla. 703, 182 So. 824 (1938); *Gedney v. Gedney*, 117 Fla. 686, 158 So. 288 (1934).

⁹²*Benjamin v. Benjamin*, 78 Fla. 14, 82 So. 597 (1919); *accord*, *Griffin v. Griffin*, 95 Ore. 78, 187 Pac. 598 (1920). *But cf.* *Morrill v. Morrill*, 83 Conn. 479, 77 Atl. 1 (1910) (notice held not necessary but in fairness should be given).

⁹³U. S. Const. Art. IV, §1.

⁹⁴*See* *Yarbrough v. Yarbrough*, 290 U. S. 202, 214, 54 Sup. Ct. 181, 185, 78 L. Ed. 269, 276 (1933) (dissenting opinion); GOODRICH, *CONFLICT OF LAWS* §214 (2d ed. 1938).

⁹⁵*Halvey v. Halvey*, 330 U. S. 610, 67 Sup. Ct. 903, 91 L. Ed. 1133 (1947).

⁹⁶*Ex parte Wenman*, 33 Cal. App. 592, 165 Pac. 1024 (1917); *In re Davis*, 25 Ont. 579 (1894); *cf.* *Wear v. Wear*, 130 Kan. 205, 285 Pac. 606 (1930).

⁹⁷*Drake v. Drake*, 187 Ga. 423, 1 S. E.2d 573 (1939); *Parsley v. Parsley*, 189 La. 584, 180 So. 417 (1938); *Oldham v. Oldham*, 135 S. W.2d 564 (Tex. Civ. App. 1939).

has actual jurisdiction over the parties and the subject-matter or has retained jurisdiction in the original decree.⁹⁸ The state making the original award does not lose jurisdiction if the child is taken into another state in violation of the original decree of judgment.⁹⁹ However, when the person having legal custody of the child takes the child into another state and establishes domicile in the other state, that state may modify the original award, but only upon the showing that the conditions affecting the welfare of the child have changed since the original decree.¹⁰⁰ If the state making the original award of custody reserves jurisdiction to modify the decree as to custody, then a sister state having jurisdiction over the parties and the subject-matter may also modify the decree.¹⁰¹ In other words, the decree is no more final in a sister state than in the state rendering the original decree.

Decrees of custody are necessarily provisional, and the granting of full faith and credit to such decrees or the recognizing of them through comity by the courts of another state is effective only as to the facts before the court of original jurisdiction and may be modified as the welfare of the child or changing conditions of the parties may make necessary and just.¹⁰² Thus, the courts of one state may recognize by way of comity or may grant full faith and credit to the award of another state and proceed forthwith to modify or nullify the award by "discovering" new facts or circumstances that warrant the modification of the decree or judgment.

The several states have proved to be jealous mistresses of their decrees, and this has led to the adoption of various devices to prevent their defeat by action in another state. Some courts have required a bond to prevent the removal of children from the jurisdiction of the court

⁹⁸*Dorman v. Friendly*, 146 Fla. 732, 1 So.2d 734 (1941); see Note, *Effect of Custody Decree in a State Other Than Where Rendered*, 81 U. OF PA. L. REV. 970 (1933).

⁹⁹*Burns v. Shapley*, 16 Ala. App. 297, 77 So. 447 (1918); cf. *Wakefield v. Ives*, 35 Iowa 238 (1872); *Chapman v. Walker*, 144 Okla. 83, 289 Pac. 740 (1930).

¹⁰⁰*Halvey v. Halvey*, 330 U. S. 610, 67 Sup. Ct. 903, 91 L. Ed. 1133 (1947); *Jackson v. Jackson*, 205 S. W.2d 471 (Ark. 1947); *Chapman v. Walker*, 144 Okla. 83, 289 Pac. 740 (1930); see *Titcomb v. Santa Clara Co.*, 220 Cal. 34, 29 P.2d 206 (1934)

¹⁰¹*Halvey v. Halvey*, 330 U. S. 610, 67 Sup. Ct. 903, 91 L. Ed. 1133 (1947).

¹⁰²*Halvey v. Halvey*, 330 U. S. 610, 67 Sup. Ct. 903, 91 L. E. 1133 (1947); *Jones v. Jones*, 156 Fla. 524, 23 So.2d 623 (1945); *Minick v. Minick*, 111 Fla. 469, 149 So. 483 (1933); *Frazier v. Frazier*, 109 Fla. 164, 147 So. 464 (1933); *Meadows v. Meadows*, 78 Fla. 576, 83 So. 392 (1919)

granting custody;¹⁰³ some have permitted children to be removed from the state but required a bond for their proper return at the end of the custodial period;¹⁰⁴ if the mother is the offending party, the father has been permitted to withhold alimony or maintenance money.¹⁰⁵ Colorado has gone to the extreme of punishing for statutory kidnapping a father who, in defiance of an award of custody of his three-year-old child to the mother, took the child out of the state.¹⁰⁶ The court held that the decree of custody to the mother had cut off the father's natural right to the control of the child, and that, therefore, the plea that defendant was the father of the child would not defeat the charge of statutory kidnapping proved against him. However, a father who takes his minor child from the custody of its mother, when the custody has not been placed in the mother by the decree of a court of competent jurisdiction, is not guilty of kidnapping.¹⁰⁷

V. CONCLUSION

In a society where clans exist, the problem of custody is simple. Upon the dissolution of marriages there is no decision to be made concerning the custody of children. The child belongs to the father if the clan is patriarchal and to the mother if the clan is matriarchal.¹⁰⁸ However, in Florida, especially since the father has been deprived of his prima facie right to the custody of his minor children, the child may be awarded to the father or the mother, or to another. The decision is left to the court. The only rules established by law for the guidance of the court in making an award of custody are such indefinite principles as "right and justice" and "the welfare of the child." Age, sex, health, educational opportunities, financial position, character, temperament, philosophical and religious background are key words, but they depend upon special

¹⁰³*Compare* *Miner v. Miner*, 11 Ill. 43 (1849) *with* *Parrish v. Parrish*, 116 Va. 476, 82 S. E. 119 (1914).

¹⁰⁴*People ex rel. Paulding v. Paulding*, 15 How. Pr. 167 (N. Y. 1857).

¹⁰⁵*Cole v. Addison*, 153 Ore. 688, 58 P.2d 1013 (1936). *Contra*: *Smith v. Smith*, 255 App. Div. 652, 9 N. Y. S.2d 188 (1939).

¹⁰⁶*Lee v. People*, 53 Colo. 507, 127 Pac. 1023 (1912); *cf.* *Hard v. Splain*, 45 App. D. C. 1 (1916); *In re Marceau*, 32 Misc. 217, 65 N. Y. Supp. 717 (1900).

¹⁰⁷*State v. Angel*, 42 Kan. 216, 21 Pac. 1075 (1889); *Burns v. Commonwealth*, 129 Pa. 138, 18 Atl. 756 (1889); *John v. State*, 6 Wyo. 203, 44 Pac. 51 (1896).

¹⁰⁸*Davis, Sociological and Statistical Analysis*, 10 LAW AND CONTEMP. PROB. 705 (1944).