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PREME COURT

OF THE STATE OF UTAH

LARRY EUGENE PLUMB,

Plaintiff/Respondent

vs. Case No. 14465

PENELOPE JEANNE PLUMB,

Defendant/Appellant.

BRIEF OF APPELLANT

An appeal from a decision of the Third District Court in and for Salt Lake County, State of Utah, the Honorable Gordon R. Hall, presiding.

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FILED

APR 15 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

LARRY EUGENE PLUMB,

Plaintiff/Respondent

vs. Case No. 14465

PENELOPE JEANNE PLUMB,

Defendant/Appellant.

BRIEF OF APPELLANT

NATURE OF CASE

Where the custodial parent and child are residents of a foreign state (South Dakota) and the other parent is a resident of the forum state (Utah), does the forum state have jurisdiction to adjudicate the child's custody?

DISPOSITION IN THE LOWER COURT

Defendant/Appellant specially appeared pursuant to the District Court of Salt Lake County's Order to Show to contest said Court's jurisdiction to adjudicate the custody of her child Scott domiciled in South Dakota. On June 27, 1975, her

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Motion to Dismiss for lack of jurisdiction was denied by Judge Gordon R. Hall (R.51) who later ordered custody to be awarded to Plaintiff/ Respondent (R.62,63).

RELIEF REQUESTED ON APPEAL

Appellant prays that this court set aside Judge Hall's January 13, 1976 Order and dismiss the Order to Show Cause because the District Court of Salt Lake County did not have jurisdiction to hear or decide the custody of Scott Plumb since he and his mother were domiciliaries of South Dakota.

FACTS

On July 26, 1971, Appellant/Defendant Penelope and Respondent/Plaintiff Larry were married in Wilmot, South Dakota (R.1). On April 9, 1974 the parties were granted a Decree of Divorce by the District Court for Salt Lake County, State of Utah (R.8,9,10). Pursuant to said Decree, Penelope was awarded the custody of their minor child Scott (R.8,9,10). Since August, 1974, Penelope and Scott have been domiciled in South Dakota (R.24, 48,49). On August 18, 1975, pursuant to Larry's Motion and Affidavit the District Court for Salt Lake County, State of Utah, entered its Order to appear before said court and show cause why custody of Scott should not be given to Larry (R.31). Penelope was served in South Dakota by mail pursuant to Rule 4(f) of the Utah Rules of Civil Pro-

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cedure (R.23). Penelope appeared in the Utah Court only to contest its jurisdiction over her (R.34,39, 41-51,54,55). On January 16, 1976, Judge Gordon R. Hall entered his Order that the custody of Scott be changed to Larry (R.62,63). Subsequently Larry went to South Dakota and persuaded Penelope to relinquish Scott to him pursuant to the Utah Order. Larry and Scott are currently residing in Salt Lake City, Utah.

ARGUMENT

Section 30-3-5, Utah Code Annotated (1953) states in part that:

> The Court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary.

Section 30-3-5 evidences the legislators' intent that Utah courts hear custody disputes subsequent to divorce decrees. When the child and parent are in a foreign jurisdiction the law prohibits Utah Courts from exercising this continuing jurisdiction. The law is summarized on this point in Restatement of Conflicts of Laws, § 117, P.177 which says, "A state can exercise through its courts jurisdiction to determine the custody of children * * * only if the domicile of the person placed under custody * * * is within the state."

Justice Roger Traynor of the California Supreme Court in the famous case of Sampsell v. Superior Court, 32 Cal.2d 763, 777, 197 P.2d 739, 748, has summarized the various theories

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which courts have espoused for gaining jurisdiction in custody disputes as follows:

> Several theories have been advanced with respect to the correct basis for jurisdiction over the subject matter of a child custody proceeding. According to one theory, jurisdiction over children's custody is based on in personam jurisdiction over the children's parents. Anderson v. Anderson, 74 W.V. 124, 126, 81 S.E. 706.
>
> Another theory regards the question of custody as simply one of status and as such subject to the control of the courts of the state where the child is domiciled. Restatement of Conflicts, 117, 148; see Goodrich Custody of Children, 7 Corn. L.Q. 12; 2 Beale Conflicts of Law, pp. 717; Dorman v. Friendly, 146 Fla. 732, 740, 1 S.2d 734.
>
> A third theory requires the child to be physically present within the state, on the ground that the basic problem before the court is to determine what the best interest of the child is, and the court most qualified to do so is the one having access to the child. See Stunberg, Children and Conflict of Laws, 8 U. of Chicago Law Review 42, 55-56; Stunberg, Conflicts of Laws, pp. 299; Sheehy v. Sheehy, 88 N.H. 223, 225, 186 A. 1, 107 ALR 365.

It should be noted that in Sampsell the trial court had personal jurisdiction over all parties because the out-of-state parties voluntarily submitted to the jurisdiction of the California court. The only question before the California Supreme Court was whether California was the proper forum to decide this custody dispute. It appears beyond any question that the finding of California jurisdiction in Sampsell was based on the finding of a domicile for the child in California.

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POINT I. THE UTAH COURT DID NOT HAVE PERSONAL JURISDICTION OVER PENNY PLUMB.

None of the conduct complained of in Larry Plumb's Affidavit and Motion for Order to Show Cause and Request for Temporary Custody (R.24-26) alleges any acts or misconduct on the part of Defendant Penny Plumb within the State of Utah which would allow personal jurisdiction via the Utah Long Arm Statute, Section 78-27-24, Utah Code Annotated (1953). It should be noted in Larry Plumb's Affidavit and Motion that the only paragraph which could be construed as indicating acts committed in Utah are contained in paragraph two (2). In 1974 Penny Plumb had legal custody and guardianship of Scott (R.8,9) and thus did not need permission to leave Utah with her child. Therefore, paragraph 2 does not trigger the Utah Long Arm Statute.

If kidnapping was suspected, several jurisdictions would hold that South Dakota was only a temporary domicile and therefore only Utah was Scott's domicile; Ex parte Lorenz, 242 P.2d 200; 4 ALR 2d at page 15; and Ehrenzweig, Conflict of Laws, § 87, P.287 (West Pub. Co. 1962). In August, 1974, Penelope returned with Scott to her home state (R.48,49), where she was raised and married, having been granted the legal custody of Scott by the District Court for Salt Lake County (R.8,9). Larry did not initiate this action until

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April 18, 1975 (R.31). There was no kidnapping.

Penelope Plumb's appearance before this Court on May 28, 1975 at 2:00 p.m. does not give the Court personal jurisdiction over her because she and her counsel made only a special appearance for the sole purpose of contesting this Court's jurisdiction over her. Utah Courts allow out-of-state persons to make special appearances to contest jurisdiction so such persons do not have to gamble that a subsequent Utah Order will not be granted full faith and credit elsewhere because of a jurisdictional defect, but by a special appearance may attack the jurisdictional problem in the initiating court without prejudice to the out-of-state litigant. It should be further noted besides her contest of the Utah Court's jurisdiction the Defendant has not submitted any papers to this Court nor has she called any witnesses.

On May 28, 1975 after Judge Gordon R. Hall assured Penny Plumb's counsel that allowing the Plaintiff to preserve a record would not affect the special appearance status, the testimony of several witnesses was preserved as a courtesy to Plaintiff and the Court.

The Utah Court does not have personal jurisdiction over Penny Plumb.

POINT II. SCOTT PLUMB WAS NOT DOMICILED IN UTAH

It is settled law that minor children whose parents are

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divorced take the domicile of the parent to whose custody they have been legally given. Restatement, Conflicts of Law, Section 32, page 57 (1934). It is also settled law that, "to acquire a domicile of choice, a person must establish a dwelling place with the intention of making it his home . . . . The fact of physical presence at a dwelling place and the intention to make it a home must concur; if they do so even for a moment the change of domicile takes place." Ibid., Section 15, White v. Tennant, 31 W.V. 790, 8 S.E. 596 (1888), Winans v. Winans, 205 Mass. 388, 91 N.E. 391 (1910).

Since August, 1974 Penny and Scott Plumb have been physically present in the State of South Dakota where they have made their home and where they intend to continue maintaining their home.(R.24,48,49). Thus follows the conclusions which are supported by the Restatement and the case law that Penny and Scott Plumb are domiciled in the State of South Dakota and not in Utah.

POINT III. SCOTT PLUMB WAS NOT PHYSICALLY PRESENT IN UTAH.

This is a factual question which must be answered in the negative since all parties admit Scott was in South Dakota (R.24,48,49).

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POINT IV. OTHER STATES FIND NO JURISDICTION IN LIKE CIRCUMSTANCES.

We search in vain for a theory which will vest the Utah Court with the power to adjudicate this custody dispute. Justice Traynor mentioned theory number one which is in personam jurisdiction over the child's parents and theory number three which is the child's physical presence within the State, but, the weight of the authority and the better theory is number two which requires the child to be domiciled in the forum state. See Kruse v. Kruse, 150 Kan. 946, 96 P.2d 849; In re Hughes, 73 Ariz. 97, 237 P.2d 1009; Elliot v. Elliot, 181 Ga. 545, 182 S.E. 845; In re Erving, 109 N.J.Eq. 294, 157 A.161; State ex rel Larson v. Larson, 190 Minn. 489, 252 N.W. 329; Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734; Gilman v. Morgan, 158 Fla. 605, 29 So.2d 372; Duryea v. Duryea, 46 Idaho 512, 269 P. 987; McAdams v. McFerron, 180 Miss. 644, 178 So. 333; Lake v. Lake, 63 Wyo. 375, 409 to 413, 182 P.2d 824; Callahan v. Callahan, 296 Ky. 444, 177 S.W. 2d 565; Commonwealth ex rel Graham v. Graham, 367 Pa. 553, 80 A.2d 829; Commonwealth ex rel Freed v. Freed, 172 Pa. Super. 276, 93 A.2d 863; In re Alderman, 157 N.C. 507, 73 S.E. 126; 2 Beale, Conflicts of Laws, Ch. 5, § 144.3, pp. 717 to 719; 2 Nelson, Divorce and Annulment (2d Ed.), Ch. 15, § 15.32, pp. 216, 217; 43 C.J.S., Infants, § 5, pp. 52, 53; 31 C.J., Infants, § 6, pp. 988, 989; 17 Am.Jur., Divorce and Separation, § 689, pp. 524.

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Typical of the above cited cases and annotations is the 1959 decision by the Supreme Court of Kansas in the case of Leach v. Leach, 184 Kan. 335, 336 Pl2d 425, 428, which arose out of an effort by the mother of a child divorced in Kansas to obtain a modification of the custody order concerning the child who was physically with his father in the State of New Mexico. The Court held that the father and child had changed their domicile to New Mexico, thereby divesting the Kansas Court of jurisdiction. The Court said,

> . . . This continuing jurisdiction is to obtain as long as the children are domiciled in Kansas, but the Court can have no extra territorial jurisdiction which conflicts with the jurisdiction of the courts of another state where the children may have become domiciled subsequent to the custody orders entered by the courts of Kansas. Any attempt on the part of our courts to assert continuing jurisdiction over children domiciled in sister states would be unseemly, and such orders would not be entitled to full faith and credit in the courts of any state . . . ."

This is but typical of the language employed by the many courts who have been unable to find jurisdiction when the custodial parent and the child are domiciled in a foreign jurisdiction.

Application of Enke, 287 P.2d 19, 129 Mont. 353, cert denied 350 U S 923, 100 L.ed 808, 76 S Ct 212 (1955) states the majority view that a minor child's domicile is the state with jurisdiction to decide his custody. In Enke the parents were married in Montana, divorced in California, with the two minor children returning to Montana with their mother who was awarded their custody in the California Decree. Later the father

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had the original Decree modified in California and armed with an Order went to Montana where he sought enforcement by a writ of habeas corpus with the above cited opinion resulting. The Montana Court held that California did not have jurisdiction to modify its own Decree because the custodial parent and the children were domiciled in Montana citing the Restatement of Conflicts §§ 146,32, 117 and Montana cases.

The Enke court analyzed the landmark Sampsell case as has been done herein, and several other leading cases to buttress the court's holding. From this authority the Montana court reasoned that children are recognized as distinct entitys by the law apart from their parents which the court calls at least a "res" and is the real party in interest. Thus, to decide its best interests the "res" needs to be before the court or there is no jurisdiction even if both parents are properly before the court. The Enke court then maintains that authority to the contrary appears in the dictum of Stetson v. Stetson, 80 Me. 483, 15 A.60, and Meredith v. Krauthoff, 191 Mo. App. 149, 187, 177 S.W. 1112.

In Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 625, 40 ALR 937, 938, decided in 1925, Judge Cardozo used the following language:

> "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the

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> parents. It has its origin in the protection that is due to the incompetent or helpless. * * * For this, the residence of the child suffices, though the domicile be elsewhere. * * * But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status."

In Johnson v. Johnson, 105 Ariz. 233, 462 P.2d 782 (1969), the custodial parent (mother) and son were domiciled in California while the father initiated custody litigation in Arizona. The Arizona court had original jurisdiction in the matter but held they had no continuing jurisdiction when the child was later domiciled in California.

The Johnson court analyzed some of the conflicting views on this point but concluded that all the courts were most interested in the child's welfare and that the state where the child is domiciled is in a much better position to inquire into the child's condition and in fact has a duty to look out for the children domiciled therein. The court noted that an impecunious custodial parent may be an ideal parent but lack the funds to travel to a foreign jurisdiction and present this fact through counsel, witness, etc. because of poverty. The court then cited its former decisions and Griffen v. Griffen, 95 Or 78, 187 P 598, and Ex Parte Lorenz, 242 P.2d 200 as precedents for its holding in Johnson.

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Hoefer v. Hoefer, 353 P.2d 1066, 67 N.M. 180 (1960) followed the majority of states requiring the child to be domiciled within the state to allow the state's courts to litigate the child's custody. In Hoefer the custodial parent and child were in New Mexico and the father was seeking to enforce a custody order entered in Kansas subsequent to the parties' Kansas divorce. The New Mexico court cited Kansas case law to the effect that the state where the child is domiciled is the proper court to decide custody. Then the court quotes with approval Joseph H. Beale's Treatise on Conflicts of Laws (1935), Sec. 144.3 which says,

> "If after a divorce the party to whom custody was given removes with the child to another state, this would seem to give the second state jurisdiction over the custody, and put an end to the jurisdiction of the first state, for after the divorce each party may change domicile at will, and the child's domicile changes with that of the parent in whose custody he has been placed."

The New Mexico Court also cited the sections of the Restatement of Conflicts 117 and 32 as supporting their holding. In candor the court noted there were differing opinions on the question.

For other opinions following the rationale outlined herein please see the Colorado Supreme Courts opinions in People ex rel. Wagner v. Torrence, 94 Colo. 47, 27 P.2d 1038; Hodgen v. Byrne, 98 P.2d 1000 (1940), Ohio's Heiney v. Heiney, 321 N.E. 2d 611

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(Oh. App. 1973); Washington's Ehrich v. Ehrich, 499 P.2d 216 (Wash App. 1972); Groves v. Burto, 186 P.2d 300, 109 Wash 112; and Georgia's Von Gorder v. Von Gorder, 179 S.E.2d 750 (Ga. 1971); and Fernandez v. Fernandez, 208 S.E.2d 498 (Ga. 1974).

CONCLUSION

The rationale behind the decisions requiring the child to be domiciled in the forum state lies in the hardship a finding of jurisdiction would have upon impecunious people like Penelope Plumb (R.67). The hardship is that any time the former spouse wishes he may initiate a new custody petition, have it served by mailing and thereby require the out-of-state spouse with custody to return to the forum state to defend the action. Conversely, if this Court does not find jurisdiction in the instant case the Utah parent, Larry Plumb, may claim there is a hardship imposed on him in being forced to travel to the foreign state to initiate his cause of action. This hardship is not unjustified since only the initiator of the custody action knows the merit of his cause. Therefore, it is logical that he be the one to travel to the distant jurisdiction and not the custodial parent. Most importantly, the jurisdiction where the child resides will have far greater access to expert testimony as to how the child has been cared for since the last order. In subsequent custody disputes the only issue is whether there

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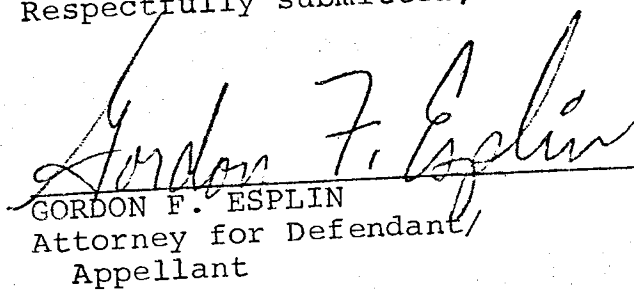
exists changed circumstances since the last order. Obviously the jurisdiction where the child is domiciled will be in a much better position to adjudicate this issue because the child's physician, records, neighbors, social worker, etc., will be in that jurisdiction.

According to the better rule and the weight of authority the child, Scott Plumb, needs to be a domiciliary of Utah before this Court can exercise jurisdiction in the matter before it.

Scott Plumb is not domiciled in the State of Utah but in the State of South Dakota, therefore Judge Gordon R. Hall's January 13, 1976, Order should be set aside and the Order to Show Cause dismissed for lack of jurisdiction.

DATED this 15th day of April, 1976.

Respectfully submitted,



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