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The determination as to which parent shall have the custody of minor children is one of the most difficult problems incident to the legal process of divorce. The court is confronted not only with the possible varying effects of the severance of the marital relation but also, when petitioned by the parties to the action, must declare the future relationship to exist between the child or children and each parent. When a court must decide the rights of contesting parents to the custody of their minor child should the court, after giving full faith and credit to a prior valid decree given in a sister state, invoke a principal-agent relationship to effect an award of care and control to an interested third party even though finding has been made of no change of circumstances since the first decree?

The Montana Supreme Court was faced with such a problem in the recent case of *Talbot v. Talbot.*[1] An action for divorce was filed by the petitioner in Washington upon which personal service was gained on the defendant and to which he appeared by counsel. The parties made a property settlement agreement by the terms of which the petitioner was to have care, custody, and control of the minor child. After filing this action, the petitioner took the child to Washington to live with her. Previously the child, during the father's absence in military service and while the petitioner worked in Seattle, had lived in Montana with the maternal grandmother pursuant to an arrangement between the petitioner and her mother. Before the divorce action was heard and after the child had been in Washington for several weeks, the defendant father took the child and brought her to Montana and placed her with his parents. The Washington court subsequently granted an interlocutory decree in favor of the petitioner. This decree found the petitioner to be a fit and proper person to have the control and custody of the child and awarded custody to the petitioner.

Petitioner came to Montana three months later and filed a writ of habeas corpus seeking custody of the minor child from the father and his parents. The defendant answered alleging he is a fit and proper person to have custody of the child and that the petitioner is not a fit and suitable person to have custody.

1 (1947).....Mont....., 181 P. (2d) 148.

The lower Montana court made findings of fact and conclusions of law that there was no showing of a change of circumstances or conditions since the Washington decree and that the decree was entitled to full faith and credit. The lower court further declared, and the Supreme Court affirmed,

> ". . . that the best interests of the child will best be served by granting the prayer of the petitioner and directing that the child be left by her mother in the care of Mrs. Tidwell."[2] (maternal grandmother).[3]

Accordingly, the lower court order stated

> ". . . until further order by the said Washington court or by this court, the petitioner, Marguerite Jane Talbot, is directed to leave, as she has done in the past, said minor child in the care of Mrs. Charles Tidwell of Ravalli County, Montana."[4]

The defendant, on appeal, attacked such ruling and questions the court's right to take the custody of the child from him and award it to a third person without a showing that he is unfit to have custody. The Supreme Court, in affirming the decision of the lower court, ruled that the argument was fallacious in that

> ". . . the court did not award the custody of the child to the maternal grandmother. The court simply gave full faith and credit to the Washington decree awarding the custody to the mother and directed that the mother should leave the child with Mrs. Tidwell as her agent."[5]

The Court cites two Montana cases as recognizing that the agency proposition may be used in this connection, *In re Thompson*[6] *and Kelly v. Kelly.*[7]

The courts of nearly all states have been confronted at one time or another with custody problems raised by parents bringing an action to modify a previous decree of a sister state which awarded custody. The "full faith and credit" clause of the U. S. Constitution[8] has been invoked to generally sustain the prior valid decree made by a court having jurisdiction, awarding custody of the parties' children, as to all matters up

[2] **Supra,** note 1, ...Mont....., p....., 181 P. (2d) 148, p. 150.
[3] Note inserted for reader's benefit.
[4] **Supra,** note 1,.....Mont....., p....., 181 P. (2d) 148, p. 150.
[5] **Supra,** note 2.
[6] (1926) 77 Mont. 466, 251 P. 163.
[7] (1945) .....Mont....., 157 P. (2d) 780.
[8] **U. S. Const.** Art IV, §1, providing that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

to the time of the rendition of the decree.[9] The practical importance of such a holding is cut down by the generally accepted rule that a finding of change of circumstances is enough to warrant a modification of, or a complete change of, the prior decree.[10] The Connecticut Court in an early case[11] recognized the problem when it laconically stated:

> "As a finding of changed circumstances is one easily made when a court is so inclined, and plausible grounds therefor can quite generally be found, it follows that the recognition extra-territorially which custody orders receive or can command is liable to be more theoretical than of great practical consequence."

As previously stated, the Montana Court cited two earlier Montana cases as precedents for the agency relationship which the court decreed in the principal case. However, it is believed by the writer that each of these cases may be distinguished from the *Talbot* case on the facts. In the *Thompson* case,[12] the father of the child took him from the family home and transported him to the home of the father's sister and her husband in Red Lodge, Montana. After a period of two years had passed, the child's mother instituted habeas corpus proceedings to regain custody of the child, the proceedings being directed against the husband's sister and brother-in-law. The Montana Court, after finding that Mrs. Thompson was not a fit and proper person to have custody, stated,

> ". . . At the time that the father placed the child with the Bruckerts, in order that he might have a home and be properly cared for, the father's custody of the child was legal. His arrangement with the Bruckerts for the care and maintenance of his son was authorized, and their custody and control of the child under such arrangement were lawful. They became, in fact, the agents of the father in caring for the child. When the petitioner made an attempt to take the child from them, as such agents, they were warranted in resisting, and it was competent for the court to permit an investigation into any facts which would have been available to the father if the attempt had been made to take the child from him,

[9]State v. Giroux (1897) 19 Mont. 149, 47 P. 798; State ex rel. Nipp v. District Court (1912) 46 Mont. 425, 128 P. 590, Ann. Cas. 1916 B, 256; Delanoy v. Delanoy (1932) 216 Cal. 27, 13 P. (2d) 719, 86 A.L.R. 1321; Miller v. Miller (1926) 200 Iowa 1193, 206 N.W. 262; Griffin v. Griffin (1920) 95 Or. 78, 187 P. 598; Sate v. Rhoades (1902) 29 Wash. 61, 69 P. 389.

[10]Foster v. Foster (1937) 8 Cal. (2d) 719, 68 P. (2d) 719; McMillan v. McMillan (1945) .....Colo....., 158 P. (2d) 444; White v. White (1945) 160 Kan. 32, 159 P. (2d) 461; Mylius v. Cargill (1914) 19 N. M. 278, 142 P. 918, L.R.A. 1915 B, 154, Ann. Cas. 1916 B, 941; Gaunt v Gaunt (1933) 160 Okl. 195, 16 P. (2d) 579.

[11]Morrill v. Morrill (1910) 83 Conn. 479, 77 A. 1.

[12]**Supra,** note 6.

since, under such circumstances, the contest was in reality one between the petitioner and the father."[13]

The other Montana case relied on by the Court is *Kelly v. Kelly.*[14] The parties' two children were placed by the mother in the care of friends in 1938 at a time when the father was wilfully neglecting to provide for them and the wife. In 1939, the wife secured a divorce, the court awarding her the custody of the two boys. The children remained at the home of the friends for the entire time until this action for modification of the divorce decree was commenced by the now re-married father. The Supreme Court in reversing the lower court's modification of the divorce decree stated simply,

". . . Although living at the David ranch they were nevertheless in the custody of the mother and the decree recognized her right to such custody. . . ."[15]

Both of the cases cited can be distinguished from the *Talbot* case in the fact that the court is merely giving effect to an agency relationship already voluntarily set up by the parties themselves. In the instant case, from the facts, the voluntary agency was terminated by the action of Mrs. Talbot in taking the child to Seattle from Mrs. Tidwell's care in Ravalli County. The court, in effect, by its decree in the *Talbot* case, is creating an agency for the parties as contrasted with the other two cases where the court merely recognizes an already existing relationship. Under the general rules governing the principal-agent relationship an agency is based either on a contract between the parties[16] or may be implied from the acts or omissions of the principal[17] from which the agency relationship may be inferred. Here there is no showing of a contract between the parties nor is there any act on which to predicate the agency.

The Montana Court says very clearly in its opinion that the Washington decree was valid, the Washington court having jurisdiction of the original action and parties, and, as a result, the lower Montana court was

[13]**Supra,** note 6, 77 Mont. 466, p. 475, 251 P. 163, p. 166.

[14]**Supra,** note 7.

[15]**Supra,** note 7, ...Mont....., p....., 157 P. (2d) 780, p. 782.

[16]Brand v. Mantor (1935) 6 Cal. App. (2d) 126, 44 P (2d) 390; Thompson v. Cedar Rapids National Bank (1929) 207 Iowa 786, 223 N.W. 517; Dobbs v. Zink (1927) 290 Pa. 243, 138 A. 758; Newell v. Halloran (1926) 68 Utah 407, 250 P. 986.

[17]McMurry v. Pacific Ready-Cut Homes (1931) 111 Cal. App. 341, 295 P. 542; Chamberlain v. Amalgamated Sugar Company (1926) 42 Idaho 604, 247 P. 12; Dobbs v. Zink (1927) 290 Pa. 243, 138 A. 758; Ross v. Johnson (1933) 171 Wash. 658, 19 P. (2d) 101.

affirmed in its action of giving to the Washington decree "full faith and credit" in Montana. "Full faith and credit" means that such decree will be accorded the same faith and credit it had in the state of its origin.[18] However, the Montana Court, it is submitted, did not give full faith and credit to the Washington decree because the Montana court modified that decree to make it possible that Mrs. Tidwell could act as agent to care for the child. The court has merely rendered lip service to the full faith and credit clause of the U. S. Constitution and then re-settled the actual custody, though it is not termed custody by the court, of the child as the court sees fit to best serve the interests of the child involved. Further, the Montana holding can not be sustained on the ground that the conditions have changed since the rendition of the Washington order. The court expressly declared as a conclusion of law

> ". . . that there has been no change in the circumstances or conditions of either party since the entry of that decree; . . ."[19]

The clear weight of authority position is that a subsequent change of conditions or circumstances since the declaration of the original decree will warrant a court's action of modification or change.[20]

Most jurisdictions also recognize that it is proper to take custody of children from the parents where the best interests of the child will be subserved, generally upon a showing of unfitness in morals and character of the contesting parties.[21] The "best interests" doctrine is a nebulous thing, to be decided by the lower court from the facts as they find them and the resulting decision will not be overthrown on appeal except

[18]Swift and Company v. Weston (1930) 88 Mont. 40, 289 P. 1035; First National Bank v. Terry (1930) 103 Ca. App. 501, 285 P. 336; Schuler v. Ford (1905) 10 Idaho 739, 80 P. 219, 109 Am. St. Rep. 233, 3 Ann. Cas. 336; Bartholmae Oil Corporation v. Booth (1934) 146 Or. 154, 28 P. (2d) 1083.

[19]**Supra,** note 1, p. 150.

[20]Nearly all states have statutes to allow such modification or have declared such rule. RCM 1935, §5770.

[21]Stever v. Stever (1936) 6 Cal. 166, 56 P. (2d) 1229; Eddlemon v. Eddlemon (1938) 27 Cal. App. (2d) 343, 80 P. (2d) 1009; Roche v. Roche (1944) 25 Cal. (2d) 141, 152 P. (2d 999; Robertson v. Robertson 1945) .....Ca. App....., 164 P. (2d) 52; Fertig v. Fertig (1927) 218 Ky. 370, 291 S.W. 715; Campbell v. Campbell (1930) 233 Ky. 423, 25 S.W. (2d) 1013; O'Dwyer v. Natal (1932) 173 La. 1075, 139 S. 486; Abel v. Ingram (1930) 223 Mo. App. 1087, 24 S.W. (2d) 1048; Kenworthy v. Kenworthy (1946) 197 Okl. 697, 174 P. (2d) 587; Schorno v. Schorno (1946) .....Wash....., 172 P. (2d) 474.

upon a showing of abuse of discretion.[22] Many considerations enter into the "best interests" doctrine: the mental malady of the mother at the time of the divorce;[23] where the evidence shows the husband is temperamentally unfit to rear children or had no definite plan for caring for them;[25] where an award to the wife would practically be an award to the wife's mother because the wife was required to be out of town for long periods of time on business;[26] where the husband could furnish a proper home and the wife was not prepared to care for the child.[27] These are some of the considerations which courts have specifically mentioned. The Washington Supreme Court in 1935 adopted the following rule, "The question of custody is to be determined chiefly by what is best for the child's welfare, and each case must be judged by its own facts."[28]

Even though the Montana Court's holding seemingly can be assailed since, as shown, it did not give "full faith and credit" to the Washington decree and, as a result, the court is forced to adopt a doubtful agency basis to effectuate justice, the court's decision can be commended when considered from other standpoints. The parties to the original action in Washington, the innocent child, and the capable and fit grandmother were all, for the first time, before the court in Montana, even though not as necessary parties to the action. The court found

> ". . . that the child by her actions and words in open court demonstrated her strong and unusual affection for her maternal grandmother and constantly sought her company in preference to all others; that Mrs. Charles Tidwell is a well-qualified and fit and proper person to care for the child as she has done in the past and expressed her willingness to care for her."[29]

[22]Damm v. Damm (1928) 82 Mont. 239, 266 P. 410; Van der Vliet v. Van der Vliet (1927) 200 Cal. 72, 254 P. 945; Barrett v. Barret (1930) 210 Cal. 559, 292 P. 622; Miller v. Miller (1926) 79 Colo. 608, 247 P. 567; Kirkpatrick v. Kirkpatrick (1932) 52 Idaho 27, 10 P. (2d) 1057; Peterson v. Peterson (1931) 164 Wash. 573, 3 P. (2d) 1007; Walker v. Walker (1930) 109 W. Va. 662, 155 S.E. 903.

[23]Gardner v. Gardner (1927) 239 Mich 309, 214 N.W. 133.

[24]Fannett v. Tompkins (1932) .....Tex. Civ. App....., 49 S.W. (2d) 895.

[25]Suder v. Suder (1932) 112 W. Va. 664, 166 S.E. 385.

[26]Hofmann v. Hofmann (1928) 224 App. Div. 28, 229 N. Y. S. 489.

[27]Ferguson v. Ferguson (1925) .....Mo. App....., 279 S.W. 189.

[28]Pressey v. Pressey (1935) 184 Wash. 191, 50 P. (2d) 891.

[29]**Supra,** note 1.

Under the peculiar circumstances of the case and with all the parties before the lower Montana court, the actual result of the decision, while apparently a distinct innovation from the usual rules of child custody, stands as a tribute to a court determined to do right by the innocent child of a marriage terminated by legal decree. The court realized a responsibility to the child here involved and from a sociological basis, it can be said that the correct result was reached.

However important, though, the result may be for the future welfare and interests of this particular child, it appears that a decision of this nature does little to help the present confused state of divorce law. To the contrary, the opinion written in the *Talbot* case can only serve to weaken one phase of the law which has been relatively well settled.

Arthur J. Aune.