

DOMICILE NOT PREREQUISITE TO CUSTODY AWARD

In re Fore,
168 Ohio St. 163,
155 N.E.2d 194 (1958)

Custody of Donald Peter Fore, a minor, had been given to his maternal aunt, respondent in this action, by a United States Army officer after Donald's parents had been killed in an automobile accident in France where Donald's father had been stationed. About one week after the return of Donald and his aunt to Ohio, she was awarded permanent custody by the probate court in Cleveland.

Subsequently, the boy's paternal grandmother, a resident of Louisiana, sought and obtained "tutorship" [guardianship] from a court of that state. Armed with this order, she then instituted this action in habeas corpus in the Court of Appeals for Cuyahoga County. Her petition was granted, the court declaring there was a lack of jurisdiction in the probate court to award custody where the domicile of the minor was outside Ohio, and that the subsequent Louisiana award of custody must therefore be accorded full faith and credit. This decision was reversed by the Ohio Supreme Court.

The supreme court did not decide whether Ohio or Louisiana was the proper state of domicile. Moreover, it declared that the requirement that a minor be domiciled in Ohio is not a condition precedent to an award of custody by an Ohio court.¹ By so ruling, the supreme court has aligned itself with the great majority of states which have ruled on this issue.² The underlying theory seems to be that the courts, acting on behalf of the state as *parens patriae*, in furtherance of the welfare of the child, derive power to make such award from the presence of the child within the state.³ There is contrary authority, however, to the effect that mere presence in the state of a child whose domicile is elsewhere, will not confer jurisdiction.⁴

A further problem was presented by the petitioner's contention that Ohio Revised Code Section 2111.02 limited the inherent jurisdiction of the probate court when applied to these facts. That section provides that a guardian of a minor may be appointed "provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement therein." The petitioner asserted that the intention of the legislature was to have *resident* interpreted as synonymous with *domicile*. The court ruled otherwise.

¹ *In re Fore*, 168 Ohio St. 163, 155 N.E.2d 194 (1958).

² Annot., 4 A.L.R.2d 16 (1949).

³ *People ex rel. Noonan v. Wingate*, 376 Ill. 244, 33 N.E.2d 467 (1941); *Finlay v. Finlay*, 240 N. Y. 429, 148 N.E. 624 (1925).

⁴ *In re Skinner*, 230 Iowa 1016, 300 N.W. 1 (1941).

With few exceptions, courts speak of *domicile* while statutes refer instead to *residence*.⁵ Frequently treated as referring to domicile are statutes which call for the appointment of guardian at the residence of the ward,⁶ and statutes which provide for the adoption of a minor at the place of his residence.⁷ Ohio lower court decisions have not been consistent on this point.⁸

Although the supreme court, in deciding the *Fore* case, said it was not holding that mere presence in Ohio gave jurisdiction to the state courts, the minor, Donald, has been in the state only eight days when custody was awarded. Thus, the court did not provide a clear definition of "residence." It seems possible that if future decisions do not clarify this ambiguity, Ohio may become one of those states which condone the abduction of minors for the purpose of evading the jurisdiction of the minor's domicile.⁹ There is authority that jurisdiction will not be awarded if a child is brought into the state unlawfully,¹⁰ and it would be well for the court to distinguish any future cases where this situation arises.

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⁵ Reese and Green, *That Elusive Word Residence*, 6 VAND. L. REV. 561 (1953).

⁶ *In re Cameron*, 158 Fla. 91, 28 So. 2d 110 (1946); *Sudler v. Sudler*, 121 Md. 46, 88 Atl. 26 (1913); *but cf.* *Martin v. Gardiner*, 240 Mass. 350, 134 N.E. 380 (1922).

⁷ *Hughes v. Industrial Comm'n*, 69 Ariz. 193, 211 P.2d 463 (1949); *Johnson v. Smith*, 94 Ind. App. 619, 180 N.E. 188 (1932); *Krakow v. Dep't. of Public Welfare*, 326 Mass. 452, 95 N.E.2d 184 (1950); *In re Adoption of (name omitted)*, 22 N.J. Misc. 181, 37 A.2d 645 (1944); *Greene v. Willis*, 47 R.I. 375, 133 Atl. 651 (1926); *Cribbs v. Floyd*, 188 S.C. 443, 199 S.E. 677 (1938).

⁸ The following cases were decided under previous Ohio statutes all of which required "residence" of the minor in the county. Domicile is not a requirement for jurisdiction: *Langan v. Kessinger*, 23 Ohio L. Abs. 392 (App. 1936); *In re Strininger*, 26 Ohio Op. 4 (P. Ct. 1940). *Contra*, *In re Clayton*, 61 Wkly. Law Bull. 355 (Ohio P. Ct. 1916); *In re Murray*, 4 Ohio N.P. (n.s.) 233 (C.P. 1906).

⁹ See, e.g., *DiGiorgio v. DiGiorgio*, 153 Fla. 24, 13 So. 2d 596 (1943); *Wicks v. Cox*, 146 Tex. 489, 208 S.W.2d 876 (1948).

¹⁰ *Shippen v. Bailey*, 303 Ky. 10, 196 S.W.2d 425 (1946).