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Comments

CUSTODY OF CHILDREN IN CALIFORNIA: JURISDICTIONAL REQUIREMENTS AND CONFLICTS

INTRODUCTION

The increasing instability of the American family, illustrated by the large number of broken homes due to divorce and informal separation, and the extreme mobility of our population have intensified the problems relating to the judicial disposition of the custody of children. In California one of the most important areas in this field is that of jurisdiction to decide questions of custody—that is, the conditions which must exist to give the courts power to make valid orders regulating the right to care for and control a particular child. The problem of custody is unique because, by the nature of their function custody orders must be subject to modification to meet changing conditions. But there are further complications in Califor-

nia arising from the many possibly conflicting methods provided by statute for settling custody problems. Because of the violent emotions they arouse, battles over the custody of a child are often bitter and protracted, resulting in harm to the child. To the extent that uncertainties in jurisdiction allow multiplicity of these proceedings, the welfare of the child suffers further. The purpose of this comment is to analyze the jurisdictional rules in California, to point out the questions left unanswered, and to suggest preferable reconciliations of the conflicts.

"STRICT CUSTODY" (CUSTODY UPON SEPARATION OF PARENTS)

The father and mother of a legitimate unmarried minor have a legally recognized "natural" right to his custody.¹ Upon separation their rights are equal.² If a dispute arises either spouse, without requesting any other relief, may ask the superior court for custody of the offspring of their marriage, and the court may make such order as it feels the case requires, retaining the right to make subsequent modifications.³ A custody decree subject to later change may also be made upon annulment⁴ or divorce.⁵

¹ CAL. CIV. CODE § 197.

² CAL. CIV. CODE § 198.

³ CAL. CIV. CODE § 199: "Without application for a divorce, the husband or the wife may bring an action for the exclusive control of the children of the marriage; and the court may, during the pendency of such action, or at the final hearing thereof, or afterwards, make such order or decree in regard to the support, care, custody, education, and control of the children of the marriage, as may be just . . . and may modify such order or decree, as the natural rights and the interests of the parties, including the children, may require." This method of determining questions of custody is not available to parents who have already been validly divorced. *Northcutt v. Superior Court* (1924) 66 Cal. App. 350, 226 Pac. 25.

CAL. CIV. CODE § 214: "When a husband and wife live in a state of separation, without being divorced, any court of competent jurisdiction, upon application of either, if an inhabitant of this state, may inquire into the custody of any unmarried minor child of the marriage, and may award the custody of such child to either, for such time and under such regulations as the case may require. . . ."

It has been said, in discussing sections 199 and 214, that the latter "is a special provision applicable when the husband and wife 'live in a state of separation' and when the purpose of the proceeding contemplates the 'custody of minor children. . . .'" *Cole v. Superior Court* (1915) 28 Cal. App. 1, 5, 151 Pac. 169, 171. Does that mean that section 199 is appropriate in an action between spouses when they are *not* living separate and apart? Such a construction seems dubious since there would be no reason for awarding custody to one or the other of the parents if they are living together. Some other distinction between section 199 and 214 must be found if their co-existence in the Code is to be rationally explained. Perhaps, although the language of the section suggests a fight between parents, section 199 is available as a remedy to a parent who desires to establish his right to the custody of his child as against a stranger. The parent may want to avoid a guardianship action because the appointment of a parent as the guardian of his child has been held to allow the child, after becoming fourteen years old, to cause the appointment of a stranger as his guardian to replace his parents, without any showing of necessity or convenience for the replacement. See note 54 and text *infra*.

⁴ CAL. CIV. CODE § 34.

⁵ CAL. CIV. CODE § 138.

Although none of the sections relating to "strict custody"—here used to mean custody upon separation of parents, or in divorce or annulment actions—spell out any requirements of domicile or residence of the child in order that a particular superior court have jurisdiction over the subject matter of his custody, it will be seen that the courts insist either on actual residence or on some kind of "legal" residence or domicile of the child within the county. There is no direct authority on the subject, but there seems to be no reason why the same locational requirements for jurisdiction should not apply to all the strict custody code sections.⁶

This raises the question of the domicile of a child. Since a child cannot have the requisite intent, his domicile usually follows that of a parent. Government Code section 244(d), which defines domicile,⁷ provides that "the residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child." Whether that rule should apply when the spouses are separated is questionable, however, since the spouses have an equal right to the child's custody⁸ and the parent entitled to custody has a right to change the child's domicile.⁹ Perhaps in such case the domicile of the parent who actually has the child should control.¹⁰

*Cole v. Superior Court*¹¹ interpreted the term "any court of competent jurisdiction" in Civil Code section 214. It held that the superior court of the county which was the domicile of the plaintiff father was such a court, even though the mother and the child had left the father and at the time of the suit resided elsewhere in the state. The reason given was that the child's domicile in law was that of his father regardless of the separation of the parents, unless the father consented to the child's acquiring another domicile elsewhere, voluntarily relinquished his parental authority over his custody or was otherwise

⁶ See *Titcomb v. Superior Court* (1934) 220 Cal. 34, 41, 29 P.(2d) 206, 210, in which the court made no distinction between the various code sections which concern strict custody.

⁷ *Lowe v. Ruhlman* (1945) 67 Cal. App. (2d) 828, 155 P. (2d) 671.

⁸ CAL. CIV. CODE §§ 197, 198.

⁹ CAL. CIV. CODE § 213.

¹⁰ See the note in *Sampsell v. Superior Court* (1948) 32 Cal. (2d) 763, 773, 197 P. (2d) 739, 746, and *cf.* WELF. & INST. CODE § 17.1: "(a) The residence of the father determines that of the child during the lifetime of the father, unless the father . . . is in fact living separate and apart from the mother of the child; in the latter case the residence of the child is determined by the residence of the parent who has his custody." Welfare and Institutions Code section 17.1 probably controls only cases coming under the Welfare and Institutions Code whereas Government Code section 244, judging by its position in the Government Code, was probably intended to define domicile generally.

¹¹ *Supra* note 3.

legally deprived thereof.¹² The court, however, added a puzzling dictum: "Moreover, in section 214 of the Civil Code there is no such provision as to the residence of the minor as is found in [the guardianship section]."¹³ If this statement was meant to be an intimation that some kind of residential or domiciliary connection of the child with the county of the suit is unnecessary to the court's jurisdiction, it has never been substantiated in a holding and has been denied in an important California Supreme Court case. In *Titcomb v. Superior Court*¹⁴ the mother had obtained an Arizona order awarding her custody of the two children. Later, after both parents had moved to California, the father applied in Santa Clara County for permanent custody of the children under section 214. The children were then residing in Los Angeles County with their mother. The supreme court held that the Santa Clara superior court lacked jurisdiction because there was no showing that the *father himself* was a domiciliary of Santa Clara County. The court did not have to decide, therefore, whether the county of the father's domicile could properly determine a custody or guardianship issue *when the minor child had never lived in that county* but did reside elsewhere in the state. That question is apparently still open.¹⁵ The significant language in this case on the necessity for some kind of residential nexus of the child with the county is as follows:

The statutory provisions as to jurisdiction in guardianship and custody proceedings are legislative enactments of well-settled jurisdictional principles. The requirement as to the child being a resident or inhabitant of the county where the proceeding is instituted is jurisdictional in nature. . . .

In the case herein there is no contention that the two minor children were ever actually resident in the sense of being physically present, in Santa Clara County. . . . The jurisdiction of the Santa Clara County court to adjudicate their custody must, if it is to exist, be predicated upon their being legally resident in said county by virtue of the fiction of law that the residence of the father is the residence of the minor child.¹⁶

¹² The court failed to discuss the effect on the child's domicile of the separated parents' equal right to his custody.

¹³ *Supra* note 3 at 6, 151 Pac. at 171. See also the statement in *Dolgo v. Dolgo* (1947) 81 Cal. App. (2d) 146, 153, 183 P. (2d) 380, 384: "It is true that jurisdiction to appoint guardians of minor children, *unlike applications for custody or maintenance of minor children in divorce cases under section 138 of the Civil Code*, ordinarily depends upon the residence or domicile of the children That very distinction has led to much confusion upon that subject." (Italics supplied.)

¹⁴ *Supra* note 6.

¹⁵ The facts of *Cole v. Superior Court*, *supra* note 3, differ from these not only in that the father was a domiciliary of the county, but because the children had actually lived in the county of his domicile.

¹⁶ *Titcomb v. Superior Court*, *supra* note 6 at 42, 29 P. (2d) at 210.

It is important to note that in discussing jurisdiction the supreme court indicated that it regarded strict custody proceedings and guardianship proceedings as substantially identical. It pointed out that:

A decree awarding custody to a parent claiming adversely to the other parent differs only in formal respects from a decree appointing one parent guardian of the person of the child. The effect in either case is to confer upon the party appointed the care and custody of the child.¹⁷

Cases which concern jurisdiction of California courts when the children are physically outside the state throw some light on the nature of "legal" residence which confers subject matter jurisdiction. The important case of *De La Montanya v. De La Montanya*¹⁸ has been cited for many years for the proposition that California courts do not have jurisdiction to award custody of children who are not physically within their territorial jurisdiction when the suit is instituted.¹⁹ The wife, a resident of San Francisco, sued there for divorce and custody. Two days before the action was begun, the husband, obviously with intent to escape this legal battle, had fled California with the children. The California Supreme Court held the custody award to the mother void, rejecting the theory that the admitted domicile of the children in California was a sufficient basis for jurisdiction of the subject matter.²⁰ The court stressed the importance of the physical presence of the child:

If the children are within the jurisdiction, and the defendant is personally served with summons, and perhaps if he is not, the court may award the custody of the children to one of [the parties to the divorce action]. It is a mode of appointing a guardian, which is always a matter of local control, regardless of the legal domicile of the children, if domicile and residence do not coincide.²¹

¹⁷ *Titcomb v. Superior Court*, *supra* note 6 at 41, 29 P. (2d) at 210.

¹⁸ (1896) 112 Cal. 101, 44 Pac. 345.

¹⁹ *Titcomb v. Superior Court*, *supra* note 6; *In re Chandler* (1940) 36 Cal. App. (2d) 583, 585, 97 P. (2d) 1048, 1049; 9 CAL. JUR. 630, 786.

²⁰ Beale criticizes the *De La Montanya* case as unsound on this point and lays down the flat rule that *only* the state of the child's domicile has the jurisdiction to confer custody. Beale, *The Status of the Child and the Conflict of Laws* (1933) 1 U. OF CHI. L. REV. 13, 22. Goodrich favors the same view. Goodrich, *Custody of Children in Divorce Suits* (1921) 7 CORN. L. Q. 1, 2. Cf. Stumberg, *The Status of Children in the Conflict of Laws* (1940) 8 U. OF CHI. L. REV. 42, 62. Since the court was not concerned with inter-county problems, it spoke of domicile within the *state* rather than within a specific county.

²¹ *De La Montanya v. De La Montanya*, *supra* note 18 at 116, 44 Pac. at 348. *Maloney v. Maloney* (1944) 67 Cal. App. (2d) 278, 154 P. (2d) 426, held that physical presence at the time the action is started is sufficient to give jurisdiction under the *De La Montanya* rule, even if the children leave before judgment.

Jurisdiction over the person of the defendant was said also to be necessary under the facts to empower the court to decide the custody matter. Even though he was domiciled in California, constructive service upon him was deemed insufficient to confer that jurisdiction.²² The court, however, failed to make clear on which ground the decision was based.

In *Sampsell v. Superior Court*²³ the California Supreme Court chose to read *De La Montanya* as based only on the lack of personal jurisdiction over the defendant. There was no occasion to review the necessity for personal jurisdiction over both parents since the defendant in *Sampsell* was personally before the court. But the view that power to award custody necessitates the children being physically within the territorial jurisdiction of California courts was definitely repudiated.²⁴ Instead the court held that domicile of the child in California²⁵ when the suit was begun was enough, even though it had been removed to Nevada before the father filed for divorce.

Actual residence of the child within the state (apparently irrespective of personal jurisdiction over its parents) was said to be an alternative ground for jurisdiction in certain circumstances. The origin of this jurisdiction is in the protection due to the incompetent and helpless within the state's borders.

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 adjudicating of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status. . . . Our courts will hold aloof when intervention is unnecessary for the welfare of the child.²⁶

This suggests that jurisdiction is derived from presence of the child only in the kind of action which the juvenile court considers, when the "health, safety or morals" of the child are immediately threatened. But is not the child's welfare also affected when his home is broken by the separation or divorce of his parents? Even though the need

²² Cf. *Millikin v. Meyer* (1940) 311 U. S. 457, holding that if the substituted service is "reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard" it is due process to render a personal judgment against an absentee domiciliary. This rule may be confined to cases in which the defendant has left the state for the purpose of evading personal service.

²³ *Supra* note 10.

²⁴ *Foster v. Foster* (1937) 8 Cal. (2d) 719, 729, 68 P. (2d) 719, 723 had previously remarked that subject matter jurisdiction over the custody of a child was not lost by his temporary absence from the state, when the parents were both domiciliaries of the state and subjected themselves personally to the court's jurisdiction.

²⁵ Here, as in the *De La Montanya* case, the court spoke only of domicile within the state, since it was not faced with inter-county problems.

²⁶ *Sampsell v. Superior Court*, *supra* note 10 at 778-779, 197 P. (2d) at 749, quoting from *Finlay v. Finlay* (1925) 240 N. Y. 429, 431, 148 N. E. 624, 625.

for court protection is not so obvious as if he were neglected or delinquent, it would appear that his well being demands a judicial determination of his custodial status.²⁷ Under this view, residence within the state would uniformly confer jurisdiction over the subject matter of custody upon the appropriate state court. Since a valid guardianship appointment can be based upon the child's presence within the territory of the court,²⁸ the analogy between guardianship and strict custody drawn by *Titcomb v. Supreme Court*²⁹ would reaffirm the view just expressed.

Whether personal jurisdiction over the defendant, in addition to subject matter jurisdiction, should be required in an action between estranged parents for custody depends upon what the nature of the proceeding is thought to be. The traditional theory is that the court is defining the personal rights of the parents with respect to the child. It is thus a denial of due process to deprive the defendant of his right to custody without personal jurisdiction over him. The juvenile court's authority over a child brought before it does not depend upon personal jurisdiction over its parents. It is based on the necessity to protect a helpless child. If a custody action is also recognized as essentially founded on the concern of the state for the welfare of a child who no longer is under the joint control of his parents, personal jurisdiction over the defendant would likewise seem immaterial. Even when it is a break-up of the home, rather than a direct threat of delinquency or dependency of the child which presents the question of custody to the court, the state's main interest is and should be in the child's welfare. If subject matter jurisdiction can be found, the court should be regarded empowered to adjudicate custody irrespective of personal jurisdiction over the defendant.³⁰

The court in the *Sampsell* case sharply distinguished jurisdiction over custody from the proper *exercise* of that jurisdiction and held only that jurisdiction existed under the facts. It pointed out that if the courts of one state conclude that another state has the more substantial interest in the child, they may refuse to adjudicate custody. It would appear further that if the trial court exercises jurisdiction which it admittedly has because of the child's domicile in this state, the appellate court might reverse because the exercise is improper under the peculiar facts of the case. Consider a case in which the wife with the minor child leaves her California domicile to take up permanent residence in Pennsylvania. While they are en route, the husband sues for permanent custody here. By the time the hearing is held the

²⁷ See Note (1940) 8 DUKE B. A. J. 110.

²⁸ See text *infra* at note 47.

²⁹ See text *supra* at note 17.

³⁰ See 2 NELSON ON DIVORCE 217 (2d ed. 1945).

wife has begun action in Pennsylvania for divorce and custody. Ignoring the possible necessity for personal jurisdiction over the wife, the California court would clearly have jurisdiction to award custody because the child was a domiciliary of this state when the action was instituted.³¹ But the making of a custody order would appear to be an erroneous and reversible exercise of jurisdiction in view of Pennsylvania's more immediate interest in the child who is physically before it.

GUARDIANSHIP

Guardianship proceedings constitute another method whereby the custody of a child may be awarded, as the guardian of the person of the child becomes his legal custodian.³² For the most part, these proceedings are used by persons other than the minor's parents. The essential fact necessary to confer jurisdiction upon the particular superior court is domicile or actual residence of the minor within the county.³³ The other requirements for a valid order prescribed by statute are necessity or convenience for the appointment of a guardian,³⁴ notice to the person having custody of the minor and to its parents,³⁵ and the non-existence of a guardian legally appointed by a court or by will or deed.³⁶ Whether these last three requisites are jurisdictional in the sense that an appointment not based on them may be collaterally attacked has not been decided. The tendency has been to reduce the number of requirements deemed jurisdictional in order to promote the conclusive adjudication of disputes. But since

³¹ Whether jurisdiction can be founded on the California domicile of a child who has never physically been here is in doubt. In the Sampsell opinion the court stated that jurisdiction of California courts over the child was not lost when the state where he temporarily resided made a custody decree because "the state of domicile, *where the child has lived most of its life*, clearly has as substantial an interest in the child's welfare as a state in which the child's presence was merely temporary." (Italics supplied.) Sampsell v. Superior Court, *supra* note 10 at 781, 197 P. (2d) at 751. The court may have been intimating that California domicile is a basis of jurisdiction only if the child had previously actually resided in California. Since the child in the Sampsell case had lived in California, the decision cannot accurately be construed to hold any more than that.

³² CAL. PROB. CODE § 1500.

³³ CAL. PROB. CODE § 1440: "When it appears necessary or convenient, the superior court of the county in which a minor *resides* or is *temporarily domiciled* . . . may appoint a guardian of his person and estate, or person or estate . . ." (Italics supplied.) Former section 1747 of the Code of Civil Procedure, from which Probate Code section 1440 was derived, used the words "who are *inhabitants* or *residents* of the county" rather than the confusing "resides or is temporarily domiciled." The word "domicile" means "legal residence" and it seems unfortunate that it was used to denote temporary actual residence. However, under Probate Code section 2, the new language has been given similar construction as the old.

³⁴ CAL. PROB. CODE §§ 1440, 1405.

³⁵ CAL. PROB. CODE § 1441.

³⁶ CAL. PROB. CODE § 1405.

these may possibly be held jurisdictional their nature should be discussed.

Domicile or Actual Residence

Under Government Code section 244(d) the legitimate minor's domicile is generally that of his father or that of his mother if his father is dead. This imputed domicile is sufficient to give the court jurisdiction to determine guardianship, at least when the child has actually lived in that county.³⁷ If the child is illegitimate its mother is entitled to its custody,³⁸ and she seems to be the one whose domicile determines that of the child.³⁹

The domicile of a child who has been abandoned by the parent entitled to custody is in doubt. The California Supreme Court has twice held that the rule of Government Code section 244(d) does not apply when a minor under fourteen has been abandoned by the father.⁴⁰ In such a case, the parent has forfeited his right to guardianship and can no longer claim custody.⁴¹ Since domicile requires an intent which a minor cannot form, his domicile upon abandonment is where he is removed by those who intend to give him a permanent home. Hence, the superior court in the county of the new home has jurisdiction to issue letters of guardianship even though the child is not physically present in that county when the petition for guardianship is filed.

However, in *County of Los Angeles v. Superior Court*,⁴² a case basically concerned with enforcement of an unmarried mother's duty to support her child,⁴³ dictum by a district court of appeal disproved this analysis on the ground that the cases relied upon for the rule were from states which did not have the equivalent of Government Code section 244(d). The rule was said to be mere dictum on the ground that, when it was announced, the jurisdiction of the courts was properly based on the admitted inhabitancy of the children in the county where the proceedings were commenced. But that argu-

³⁷ See *Titcomb v. Superior Court*, *supra* note 6; *Estate of Taylor* (1900) 131 Cal. 180, 63 Pac. 345; *Guardianship of Sharp* (1940) 41 Cal. App. (2d) 79, 106 P. (2d) 244; *Ricci v. Superior Court* (1930) 107 Cal. App. 395, 290 Pac. 517.

³⁸ CAL. CIV. CODE § 200.

³⁹ CAL. CIV. CODE § 213.

⁴⁰ *In re Hawkins* (1920) 183 Cal. 568, 192 Pac. 30; *In re Vance* (1891) 92 Cal. 195, 28 Pac. 229.

⁴¹ CAL. PROB. CODE § 1409.

⁴² (1933) 128 Cal. App. 522, 18 P. (2d) 112.

⁴³ The facts were that a mother, residing in Alameda County, gave her illegitimate daughter to a stranger, who later took her to Los Angeles County. There the juvenile court adjudged the child a ward of the court, found her to be a resident of Alameda County, and ordered her case transferred to its juvenile court. When the Alameda County court refused to take jurisdiction and enforce the mother's duty of support, the County of Los Angeles brought mandamus. The court held that the Los Angeles County juvenile court's finding on domicile was *res judicata*.

ment is not valid, for in at least one case⁴⁴ the children were in another county when the action was begun. The court deciding *County of Los Angeles* believed that an abandonment by the mother of an illegitimate minor could not change its domicile. Its domicile remains that of the mother until another one is gained by some legal means other than mere abandonment.

The criticism of the supreme court rule was made the basis of decision in another district court of appeal case.⁴⁵ There an unmarried mother abandoned her twins, leaving them with her married sister. Both women later settled in San Joaquin County. When the children were three years of age, without the knowledge or consent of her sister, the mother took them to Alameda County and released them to a children's home, which planned their adoption. They had already been placed in a private home when the sister and her husband asked the San Joaquin County court for letters of guardianship. The children's home pleaded lack of jurisdiction of the court. The appellate court held that the San Joaquin court had jurisdiction because the residence of the children was that of their mother notwithstanding her abandonment of them, and she lived in San Joaquin County. Citing *City of Los Angeles v. Superior Court*, the court said: "It therefore appears that the established rule in this state is that the residence of an illegitimate unmarried minor follows that of the mother and so remains until another is legally gained or established by means other than abandonment of the child."⁴⁶ The *County of Los Angeles* dictum may be good law when enforcement of a parent's duty of support is involved, but it seems inapplicable in a guardianship situation when the issue is domicile for jurisdictional purposes. The same result could have been reached by following the supreme court rule on the ground that the legal residence of the children was that of the sister, who also lived in San Joaquin County, because she intended to give them a permanent home. However, the court may have felt impelled to repudiate that reasoning because the children's home attempted to use it by claiming that the children's domicile was controlled by that of their new foster parents, because they too intended to give them a permanent home.

It seems settled that the superior court of the county of which the minor is an *inhabitant*, notwithstanding his domicile elsewhere, has the power to entertain a guardianship proceeding.⁴⁷ And this is so,

⁴⁴ *In re Vance*, *supra* note 40.

⁴⁵ *Guardianship of Sharp*, *supra* note 37.

⁴⁶ *Guardianship of Sharp*, *supra* note 37 at 83, 106 P. (2d) at 246.

⁴⁷ *Titcomb v. Superior Court*, *supra* note 6 at 42, 29 P. (2d) at 210; *Guardianship of Phillips* (1943) 60 Cal. App. (2d) 832, 141 P. (2d) 773; *Ricci v. Superior Court*, *supra* note 37; *In re Green* (1924) 67 Cal. App. 504, 226 Pac. 76; *Collins v. Superior*

it has been held, even though the child has been in the county only eight days at the time the petition is filed and was brought there in violation of a valid custody order by a superior court of another county.⁴⁸ However, the jurisdiction of the court of his domicile is not defeated by the child's temporary absence.⁴⁹ The consequence is that more than one superior court may have concurrent jurisdiction to appoint a guardian. If more than one court exercises its jurisdiction, it has been held that the court in which process is first served has prior jurisdiction although the other suit was first instituted.⁵⁰

Necessity or Convenience

By its nature, the requirement of necessity or convenience for appointing a guardian is addressed to the sound discretion of the trial court. The trial court's exercise of its discretion is always accorded great weight by the appellate court, and never more so than in matters involving family relations. It is not the purpose of this comment to make a thorough examination of the kinds of situations in which the finding as to necessity or convenience is upheld or reversed. However, attention should be called to the peculiar rule applied when a minor over the age of fourteen requests the appointment of a guardian, since it plays a role in the conflict between strict custody and guardianship courts.

In *Guardianship of Kirkman*⁵¹ the supreme court said that a minor over fourteen has the absolute right to replace the guardian appointed by the court when he was under fourteen with one of his own selection,⁵² the court's discretion being exercisable only in determining whether the nominee is a suitable person. The same rule was held to apply in *Estate of Meikeljohn*⁵³ where the original court guardian was one of the minor's parents. The effect is that without a showing of necessity or convenience, the court may appoint the minor's nominee as a replacement if the child is over fourteen and

Court (1921) 52 Cal. App. 579, 199 Pac. 352; *Guardianship of Treadwell* (1883) 3 Coffey's Prob. Dec. 309.

⁴⁸ *Guardianship of Phillips*, *supra* note 47. The court warned the trial court that on remittitur it must consider whether, under the circumstances, it appeared necessary or convenient to appoint a guardian. Necessity was found and the petitioner appointed. See *Guardianship of Phillips* (1945) 27 Cal. (2d) 384, 164 P. (2d) 481.

⁴⁹ *In re Vance*, *supra* note 40; *Guardianship of Danneker* (1885) 67 Cal. 643, 8 Pac. 514.

⁵⁰ *Guardianship of Treadwell*, *supra* note 47.

⁵¹ (1914) 168 Cal. 688, 144 Pac. 745.

⁵² The court was construing the effect of former sections 1748, 1749 and 1750 of the Code of Civil Procedure, the pertinent language of which is now consolidated in Probate Code section 1406: "When a guardian has been appointed for a minor under fourteen years of age, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court."

⁵³ (1915) 171 Cal. 247, 152 Pac. 734.

already has a court guardian.⁵⁴ If the original guardian is a parent this is a repudiation of the oft-repeated superior right of a fit and competent parent to the custody of his child as against a stranger.⁵⁵ Although the rule upholding the preferential right of a parent may be validly criticized as subordinating the importance of the welfare of the child, which should be paramount,⁵⁶ this inroad on that right is not based on the child's welfare. It is submitted that initially it would have been more reasonable for *Guardianship of Kirkman* to construe the guardianship sections as requiring necessity or convenience for the replacement as well as the appointment of a guardian. The extension of the rule in the *Meikeljohn* case, without any discussion of its effect on parental right, is even more questionable.

A different situation is presented when a minor whose custody is awarded to one parent by the divorce court nominates the other parent as his guardian, since the *Meikeljohn* rule applies only to replacement and not to initial appointment of a guardian. It has been said that in such a case necessity or convenience is automatically established if the minor is over fourteen. The court in *Guardianship of Burket* made this statement:

Appellant contends that neither necessity nor convenience was proved by respondent as a basis for his appointment as guardian. While there appears to be some doubt as to the necessity for such proof in view of the language of section 1406 [of the Probate Code] yet the facts in proof definitely establish: (a) the minor had attained the age of fourteen years; (b) he had nominated respondent to be his guardian; (c) he preferred to live with his father; (d) his age was such as to require 'education and preparation for labor and business' Each of the foregoing facts established the necessity for or convenience of the appointment of respondent. (Italics supplied.)⁵⁷

A finding of necessity or convenience from such facts seems the equivalent of dispensing with that requirement entirely. But here

⁵⁴ It follows that in this situation the causes for removing an existing guardian enumerated in Probate Code section 1580 are not controlling. No cause other than the desire of the minor for a replacement need be shown. This rule, if literally applied, makes it dangerous for a parent to be appointed the guardian of the person of his child who is under fourteen. For if, after reaching fourteen, the child finds a more lenient but suitable person willing to be his guardian, the rule would require the court to deprive the parent of the child's custody.

⁵⁵ *Roche v. Roche* (1944) 25 Cal. (2d) 141, 152 P. (2d) 999; *Stever v. Stever* (1936) 6 Cal. (2d) 166, 56 P. (2d) 1229; *Newby v. Newby* (1921) 55 Cal. App. 114, 202 Pac. 891.

⁵⁶ See dissent, *Roche v. Roche*, *supra* note 55 at 144, 152 P. (2d) at 1000; Comment (1945) 33 CALIF. L. REV. 306.

⁵⁷ *Guardianship of Burket* (1943) 58 Cal. App. (2d) 726, 728, 137 P. (2d) 475, 477.

there is no objection that parental right is being ignored, for the battle is between two parents.⁵⁸

Notice to Custodians and Parents

Since 1921⁵⁹ it has been necessary to give notice of the hearing in guardianship proceedings to the person having the minor's custody, and also to the parents of the minor whether or not they are in the state,⁶⁰ or that proof be made that the parents' addresses are unknown or that for other reasons such notice can not be given.⁶¹ The parent must be allowed a reasonable time to arrange for an appearance.⁶² Failure to comply with notice requirements makes the appointment subject to being vacated by the court granting it at any time upon the petition of the aggrieved parent.⁶³

No Existing Guardian

A court is not authorized to appoint a second guardian until the first has been removed by the court or his appointment vacated by death or otherwise. Probate Code section 1405 specifically provides that no guardian may be appointed by the court if one has been appointed by the parent's will or deed and qualified by giving bond, and an order violating this rule is a nullity.⁶⁴ The omission of reference to an existing guardian appointed by the court seems merely an oversight. In *re Lundberg*⁶⁵ held that the right of a guardian to custody

⁵⁸ In *Guardianship of Gianoli* (1943) 60 Cal. App. (2d) 504, 140 P. (2d) 987, a widower had allowed his daughter to live with her aunt and uncle for seven years. When she was in her second year of high school he proposed to take her away against her will and move to another county. The nomination by the girl, now over fourteen, of her aunt and uncle as her guardians was approved by the court over the father's objection. The *Burket* case language as to the elements of "necessity or convenience" was cited, but on its facts the *Gianoli* case does not seem to be authority for the proposition that merely because the nominating minor is over fourteen there is necessity or convenience when the minor is dissatisfied with her parent-custodian and wants to live with a stranger. Genuine necessity for appointing a guardian can easily be found in this particular case, although the decision does deny the fit and competent father his preferential right to custody.

See *Estate of McSwain* (1917) 176 Cal. 287, 168 Pac. 117, in which the court was able to avoid deciding whether the trial court had erred in appointing a stranger as guardian of the person of a minor over fourteen, who had nominated the stranger, when the surviving parent was not found unfit, because the minor became of age after the appeal was taken but before it was submitted.

⁵⁹ Cal. Stats. 1921, p. 138, amending section 1747 of the Code of Civil Procedure.

⁶⁰ *Adoption of McDonnell* (1947) 77 Cal. App. (2d) 805, 176 P. (2d) 778.

⁶¹ *In re Pryor* (1924) 68 Cal. App. 312, 229 Pac. 60; *In re Dahnke* (1923) 64 Cal. App. 555, 222 Pac. 381. These requirements are carried over into Probate Code section 1441 which replaced Code of Civil Procedure section 1747 in 1931.

⁶² *Adoption of McDonnell*, *supra* note 60.

⁶³ *Guardianship of Kerns* (1946) 74 Cal. App. (2d) 862, 169 P. (2d) 975.

⁶⁴ *Murphy v. Superior Court* (1890) 84 Cal. 592, 24 Pac. 310. See *In re Campbell* (1900) 130 Cal. 380, 383, 62 Pac. 613, 614.

⁶⁵ (1904) 143 Cal. 402, 77 Pac. 156.

of a minor can be attacked collaterally only upon the ground of want of jurisdiction. Appointment of a second guardian without removing the first, even if he had been appointed by a court rather than by will or deed, would seem to be a collateral attack. Besides, it is doubtful if there is the requisite necessity or convenience for the appointment of a guardian when there already is one validly appointed.

Removal of Guardians

Although the California Supreme Court has specifically declined to decide the question,⁶⁶ the causes for removal specified in Probate Code section 1580⁶⁷ are probably exclusive.⁶⁸ It is therefore doubtful that a court could remove an existing guardian and appoint another in his place solely on the ground that the new guardian was better qualified. Probate Code section 1580(8) does authorize the *termination* by the court of a guardianship by a stranger if a parent is found fit to take the custody of the child.⁶⁹ Since a parent is the natural guardian of the person of his child, a guardianship is no longer necessary.

Probate Code section 1580 provides that: "A guardian appointed . . . by *the* court may be removed by *the* court for any of the following causes. . . ." (Italics supplied.) Does that mean that only the court of appointment may terminate the guardianship even though the guardian and ward have moved permanently to another county? Although there is no case directly deciding the question, *Browne v. Superior Court* seemed to answer it affirmatively.⁷⁰ However, as a matter of policy, the petitioner should not be forced to return to the county

⁶⁶ Guardianship of Howard (1933) 218 Cal. 607, 24 P. (2d) 486.

⁶⁷ CAL. PROB. CODE § 1580: "A guardian appointed by will or deed or by the court may be removed by the court for any of the following causes: (1) For waste or mismanagement of the estate, or abuse of his trust; (2) For failure to file an inventory or to render an account within the time allowed by law, or for continued failure to perform his duties; (3) For incapacity to perform his duties suitably; (4) For gross immorality; (5) For having an interest adverse to the faithful performance of his duties; (6) For removal from the state; (7) In case of a guardian of the property, for insolvency; or, (8) When it is no longer necessary that the ward should be under guardianship."

⁶⁸ Guardianship of Sherman (1940) 42 Cal. App. (2d) 251, 253, 108 P. (2d) 717, 718; Guardianship of Sturges (1939) 30 Cal. App. (2d) 477, 86 P. (2d) 905. However, a minor of fourteen has been held to have the absolute right to replace an existing guardian with one of his own choice. See text at note 52.

⁶⁹ Guardianship of White (1948) 84 Cal. App. (2d) 624, 191 P. (2d) 466.

⁷⁰ (1940) 16 Cal. (2d) 593, 598, 107 P. (2d) 1, 3. Discussing the jurisdiction of the guardianship court during the performance by the guardian of his duties, the court declared: ". . . the matter is not concluded until the discharge of the guardian. In carrying out his duties of administration he acts under the authority and supervision of the court which appointed him . . . and is subject to liability or removal for misconduct. The jurisdiction of the court in this respect is a continuing one, and though no motion, petition or other such incidental proceeding may be pending at any particular time, the court still has jurisdiction over the guardianship. No other court, we believe, has power to interfere with that continuing control over the guardian. . . ."

of original appointment to secure a removal. If jurisdiction in guardianship is local,⁷¹ the superior court of the county of present domicile or inhabitancy should be the proper one to remove the guardian as well as appoint him.⁷²

RELATIONSHIP BETWEEN STRICT CUSTODY AND GUARDIANSHIP

The Problem

The court which awards the custody of a child on divorce⁷³ or annulment⁷⁴ or when there is merely a dispute over custody⁷⁵ retains continuing jurisdiction to modify its disposition as changing conditions may require. In 1872 and 1905, when the sections so providing were passed, the legislature probably did not foresee a mobile population and the consequent need for jurisdiction to modify elsewhere in the state. The general American rule is that the jurisdiction of the divorce court is not only continuing, but also exclusive in the sense that it forecloses any other court in the same state from thereafter acquiring or exercising jurisdiction over custody.⁷⁶ In California, the general rule is applied.⁷⁷ However, if the divorce court orders a transfer to another court in the state based on appropriate grounds,⁷⁸ the transferee court has the power to modify the existing custody order.⁷⁹ It should be noted, though, that insofar as strict custody orders alone are concerned, there can be no conflicting jurisdiction. It would seem to be a good policy for courts of continuing jurisdiction to use this right to transfer control whenever the child and the custodial parent have moved permanently to another county. There does not appear to be any sound reason for the original court to retain jurisdiction when the parties and the witnesses necessary to the consideration of a modification are elsewhere.

⁷¹ *Titcomb v. Superior Court*, *supra* note 6 at 42, 29 P. (2d) at 210; *De La Montanya v. De La Montanya*, *supra* note 18.

⁷² See *In re Raynor* (1887) 74 Cal. 421, 16 Pac. 229, in which the court held that the Superior Court of Alameda County, where the minor had resided for more than three years, had jurisdiction to appoint a new guardian to replace one who had died, over the objection that the Superior Court of San Francisco, which had appointed the former guardian, was the only one with the power to appoint a successor as long as the minor was within the state.

⁷³ CAL. CIV. CODE § 138.

⁷⁴ CAL. CIV. CODE § 84.

⁷⁵ CAL. CIV. CODE §§ 199, 214.

⁷⁶ See note (1943) 146 A.L.R. 1153; 9 R.C.L. 477.

⁷⁷ "Section 138 of the Civil Code provides that in divorce actions the court may modify an order for custody of children. And it has been said that the court which makes the original custody order is the proper one to determine an application for modification of such order. . . . That is true. . . ." *Cooney v. Cooney* (1944) 25 Cal. (2d) 202, 205, 153 P. (2d) 334, 336.

⁷⁸ As, for example, convenience of the parties and witnesses under Code of Civil Procedure section 397.

⁷⁹ *Cooney v. Cooney*, *supra* note 77.

It is when the impact of guardianship upon strict custody proceedings is considered that confusion arises. The earliest cited case on the subject stated the simple rule that a probate court had no jurisdiction to appoint a guardian for a child who had been awarded to a parent in a divorce proceeding when the divorce court retained the right to control the custody of the child in the future.⁸⁰ Later cases, however, seem to have established that the continuing jurisdiction of the divorce court does not extinguish the authority specifically given the probate court to appoint guardians of the persons of minors if the jurisdictional requirements for guardianship are met.⁸¹ *Guardianship of Burket and Collins v. Superior Court*⁸² involved children over fourteen who nominated as guardian their other parent in preference to the parent awarded their custody by the divorce court, and therefore may be explained merely as upholding the absolute right of the minor over fourteen to appoint his own guardian as between his parents. In *Guardianship of Phillips*⁸³ the divorce court in Kern County had awarded custody of the two year old child to the mother, but left its immediate physical care and control in the maternal grandmother.⁸⁴ The district court of appeal held that the Superior Court of San Francisco County, where the mother had taken the child, had jurisdiction to appoint the mother, who was already the legal custodian, as guardian. In *Guardianship of Kerr*⁸⁵ the mother had been awarded custody of her four year old child by the divorce court. When the minor was eighteen she nominated a stranger as guardian. The jurisdiction of the probate court to make such a person guardian, after finding that the mother was unfit, was upheld on the authority of the *Collins* case. There are no cases of the appointment of a stranger or of a non-custodial parent as guardian for children under fourteen, although the language in the cases reported would seem to cover that kind of situation also.

The result is that the guardianship appointment serves as a method of changing the custody disposition of a minor without returning to the divorce court. The effect of this complication upon the continuing jurisdiction of the divorce court has been considered in only one reported case.⁸⁶ The Yuba County Superior Court granted a

⁸⁰ *Guardianship of Murphy* (1885) 1 Coffey's Prob. Dec. 107.

⁸¹ *Guardianship of Phillips*, *supra* note 47; *Guardianship of Burket*, *supra* note 57; *In re Guardianship of Kerr* (1938) 29 Cal. App. (2d) 439, 85 P. (2d) 145; *Collins v. Superior Court*, *supra* note 47.

⁸² *Guardianship of Burket*, *supra* note 57; *Collins v. Superior Court*, *supra* note 47.

⁸³ *Supra* note 81.

⁸⁴ See *Roche v. Roche*, *supra* note 55, which criticized the "artifice" of separating legal and physical custody, since the essence of legal custody is the right to physical control.

⁸⁵ *Supra* note 81.

⁸⁶ *Smith v. Smith* (1939) 31 Cal. App. (2d) 272, 87 P. (2d) 863.

divorce and ultimately gave custody of the infant child to the mother. In contemplation of the child's inheriting a small estate the mother petitioned for and was awarded guardianship of the child's *person and estate* by the Superior Court of Alameda County. Four years later, upon petition of the father, the divorce court modified the existing custody order and awarded the child to an aunt, over the objection of the mother that the intervening guardianship appointment deprived the divorce court of such power. The judgment was affirmed by the district court of appeal with this comment:

With respect to the right to appoint a guardian of a minor child in spite of the previous award of the minor to the custody of another person by the terms of a final decree of divorce, all that our Supreme Court has said is that the divorce court does not have *exclusive jurisdiction* over the child. No case which has been called to our attention holds that the probate court has paramount jurisdiction over the person of a minor in preference to that of the divorce court, or that an order appointing a petitioner guardian of the person and estate of a minor who was formerly awarded in a divorce proceeding to the custody of another person thereby ousts the divorce court of jurisdiction and prevents it from thereafter modifying the final decree for the welfare of the child.⁸⁷

On its peculiar facts, the case seems correctly decided, but it is not strong authority for the general proposition that the divorce court retains jurisdiction to modify its custody order irrespective of an intervening guardianship appointment. The guardianship appointment did not alter the custodial disposition by the divorce court since the mother was already the legal custodian by order of the divorce court. Further, the designation of the mother as guardian of the *person* of the child was surplusage; the real purpose of the petition was to provide for the control of property which it was expected would be forthcoming to the child.⁸⁸ The rule announced seems at variance with *In re Lundberg*,⁸⁹ which said that the right of the guardian to the custody of the minor can be attacked collaterally only on the ground of want of jurisdiction.

If the divorce court can upset the effect of a guardianship appointment by exercising its continuing jurisdiction over the child's custody,

⁸⁷ *Id.* at 277, 87 P. (2d) at 866.

⁸⁸ There seems to be no valid reason for appointing a parent, who is the natural guardian of his child or legal custodian by virtue of a custody order, the guardian of the person of his minor child. Quite often, as here, the order is for appointment as guardian of the person and estate rather than as guardian of the estate alone merely because of careless draftsmanship of petitions and orders by attorneys who follow stationery forms without considering the purpose of the action. Such an oversight may later allow the child to choose a stranger to replace his parent as guardian, under the Meikeljohn rule. See text at note 54.

⁸⁹ *Supra* note 65.

the jurisdiction of the probate court in guardianship matters is of little significance in this kind of case. Is it the rule that the guardianship appointment modifies the custody order and is effective unless and until the divorce court exercises its continuing jurisdiction, whereupon the guardianship order is superseded? Can the guardianship court then make another appointment or reaffirm its original appointment to effect a further modification of the altered custody decree? There is an obvious conflict between strict custody and guardianship jurisdiction which requires reconciliatory interpretation of the statutes⁹⁰ or legislative action.

A Suggested Solution

The best solution would be statutory revision of strict custody and guardianship clearly establishing that modification of a custody order can be requested from a local court without returning to the original custody court, and making guardianship appointments unavailable to parents because no longer necessary to provide a method for modifying custody orders close at home. However, pending such legislation, the existing law can be construed to make good sense and good policy.

From the standpoint of jurisdictional certainty it may be a reasonable view that there is no necessity or convenience for the appointment of either parent as guardian of the person of a minor under fourteen when one has been given his custody by a decree which may be modified by the court which issued it. The petitioning parent either has legal custody or can get it, if he deserves it, by going back to the court which made the custody order. But that is scant comfort to a non-custodial parent who lacks the economic means to travel to a distant part of the state and institute a modification proceeding there. If the parties, the child, and the necessary witnesses reside in another county in the state, the custody court should order a transfer to the court of the more convenient county.⁹¹ However, it may refuse to do so. And even if it will so order, there still may be prohibitive expense and inconvenience to the petitioner in beginning his modification action far away from home. Hence, in the absence of legislative revision in this field, it seems a good policy for the court to find it convenient to appoint a non-custodial parent as guardian when the facts would entitle him to custody and it would be inconvenient for him to return to the court of continuing jurisdiction. The latter's jurisdiction should thereupon be suspended. This appointment is actually a sub-

⁹⁰ CAL. PROB. CODE §§ 1405, 1440; CAL. CIV. CODE §§ 84, 138, 199, 214.

⁹¹ CAL. CODE CIV. PROC. § 397: "The court may, on motion, change the place of trial in the following cases: . . . 3. When the convenience of witnesses and the ends of justice would be promoted by the change"

stitute for modification in the custody court. Consequently a procedure for further modification, possibly returning the child to the original custodial parent, as would be available in a custodial court, ought to be provided. For this purpose alone, Probate Code section 1580(3) which authorizes the removal of a guardian "for incapacity to perform his duties suitably" should be construed as enabling removal not only on the ground that the existing guardian is positively unfit, but on the ground that, due to changing circumstances, the other parent is better suited to have custody.

If the child is over fourteen and desires to replace one parent, who has been designated legal custodian by a court in a strict custody action, with the other parent, there seems to be the requisite necessity or convenience to give a probate court jurisdiction to appoint a guardian.⁸² As a matter of policy, it may be reasonable that a child over fourteen should be empowered to decide for himself which of two fit and competent parents he should live with. If so, the continuing jurisdiction of the custody court must be deemed terminated, or the minor's absolute right to designate which parent should be his guardian might be frustrated. However, the child should have only one opportunity after he is fourteen to make his choice. Otherwise, by threatening to replace his guardians when displeased, he might be able to destroy effective parental control.

If the guardianship petition is filed by a stranger, in the light of California's strong emphasis on parental right, necessity or convenience for the appointment other than the minor's desire for a change of custody should be required, even if the minor is over fourteen and requests the appointment of the petitioner. If necessity or convenience exist, the probate court's exercise of its jurisdiction by the appointment of a guardian should, under Civil Code section 204 and the rule of *In re Lundberg*,⁸³ suspend the custody court's continuing jurisdiction so long as the guardianship appointment is in effect.

To facilitate a wise handling of custody matters, the local court properly taking jurisdiction should have the right to demand the complete file regarding previous dispositions from the court whose jurisdiction has been replaced. Thereafter, until the parties move again, the court possessing the file will be the court of continuing jurisdiction.

HABEAS CORPUS

A person entitled to the custody of a minor but denied physical possession may secure it by applying to a superior court, to a district court of appeal, or to the state supreme court for a writ of habeas

⁸² Guardianship of Burket, *supra* note 57; Guardianship of Kerr, *supra* note 81; Collins v. Superior Court, *supra* note 47.

⁸³ *Supra* note 65.

corpus alleging the unlawful retention of the child by another.⁹⁴ The territorial jurisdiction of these courts in habeas corpus proceedings is confined to the boundaries of their respective districts.

The main purpose of the writ of habeas corpus in this field is to provide a speedy method of inquiring into the legality of the child's restraint. Since it is an extraordinary remedy the granting of the writ is for the most part discretionary. It may be denied a parent who is relying for his right to custody solely upon his status of parenthood if for a period of years he has indicated a lack of interest in the child and the child has become attached to those who are caring for it.⁹⁵ Because of its summary nature, the proceeding is ill-adapted to a protracted controversy on the merits of the right to custody. Hence the court may feel that the issue of the fitness of the applicant as a custodian should first be adjudicated in the kind of proceeding designed to decide that question, such as a guardianship action⁹⁶ or a strict custody proceeding. But the court does not lack jurisdiction to hear a habeas corpus petition, if it so desires, merely because a guardianship contest has not been finally determined.⁹⁷ The court is compelled to issue the writ only if the petitioner has already established his legal right to custody in an appropriate proceeding, and habeas corpus remains the sole method available for enforcing that right.⁹⁸

Under the doctrine of comity, a foreign custody award by a divorce court having jurisdiction will be given full force and effect in the absence of changed circumstances. This rule is followed in California.⁹⁹ So, even if the right to custody was duly established in a sister state, rather than in California, if conditions have not since changed, our courts will enforce by habeas corpus, whether the right was established in the original action¹⁰⁰ or by a modification order.¹⁰¹ However, if there is a doubt as to the validity of the foreign proceeding, the court will deny the writ and leave the petitioner to establish his right by an action on the merits in the superior court.¹⁰²

A previous denial of a writ of habeas corpus is *res judicata* in an-

⁹⁴ CAL. CONST. Art. VI, §§ 4, 4b, 5. This comment discusses habeas corpus in California only as it relates to the custody of children. See Comment (1948) 36 CALIF. L. REV. 420 for a discussion of habeas corpus in criminal cases.

⁹⁵ *In re Britt* (1917) 176 Cal. 177, 167 Pac. 863; *In re Gates* (1892) 95 Cal. 461, 30 Pac. 596; *In re De Leon* (1943) 59 Cal. App. (2d) 510, 139 P. (2d) 109; *Matter of Application of Bell* (1915) 28 Cal. App. 547, 153 Pac. 240.

⁹⁶ *In re Matthews* (1917) 176 Cal. 156, 158, 167 Pac. 873, 874; *In re Martin* (1947) 79 Cal. App. (2d) 584, 180 P. (2d) 383; *In re Green*, *supra* note 47.

⁹⁷ *Derrer v. Superior Court* (1933) 129 Cal. App. 154, 18 P. (2d) 371.

⁹⁸ *In re Matthews*, *supra* note 96.

⁹⁹ *Foster v. Foster*, *supra* note 24.

¹⁰⁰ *In re Kyle* (1947) 77 Cal. App. (2d) 634, 176 P. (2d) 96.

¹⁰¹ *In re Livingston* (1930) 108 Cal. App. 716, 292 Pac. 285.

¹⁰² *In re Inman* (1939) 32 Cal. App. (2d) 130, 89 P. (2d) 421; *In re Dowell* (1935) 4 Cal. App. (2d) 688, 41 P. (2d) 896; *In re Culp* (1905) 2 Cal. App. 70, 83 Pac. 89.

other habeas corpus proceeding brought by the same petitioner, as to all the facts existing at the time of the first proceeding.¹⁰³ The judgment in a habeas corpus action is interlocutory only. It does not supplant actions to decide the right to custody on the merits. The res judicata effect is limited to subsequent habeas corpus proceedings, and an unfavorable result does not prejudice the petitioner's rights in a later guardianship or strict custody suit.¹⁰⁴

As a summary remedy, habeas corpus would lose its beneficent effect if its result could be delayed by appeal or rehearing. Consequently, neither is available.¹⁰⁵

ADOPTION

A discussion of the prerequisites for adoption jurisdiction is omitted here since there is no problem of conflict between the jurisdiction of a superior court properly authorizing the adoption of a minor on the one hand and a superior court which is asked to issue letters of guardianship or make a custody order on the other hand. Adoption terminates the jurisdiction of all other courts over the custody of the child. A minor may be adopted, if the requirements of the Civil Code¹⁰⁶ are met, without securing the consent of the guardian of his person. The adopting parents acquire the paramount right to the custody of the child since they now occupy the position of parents. If they are fit persons to have custody, as they must be to adopt the child, there is no further need for a guardian, and he must be removed by the superior court under the authority of Probate Code section 1580(8).¹⁰⁷ The valid adoption of a child entirely removes it from the jurisdiction of the court which has divorced or is considering the divorce of its parents because by adoption the child ceases to "belong" legally to the parents. It is only because of the child's relationship to them that the court which settles their marital dispute has the power to decide the child's custodial disposition.¹⁰⁸ The same rule probably would apply to annulment or to custody actions without divorce.

JUVENILE COURT PROCEEDINGS

The jurisdiction of the juvenile court to make custody dispositions of minors will be considered here only insofar as it may conflict with

¹⁰³ *In re Martin*, *supra* note 96; *In re Marshall* (1929) 100 Cal. App. 284, 279 Pac. 834; *In re McDaniel* (1928) 90 Cal. App. 307, 265 Pac. 884; *In re Gille* (1924) 65 Cal. App. 617, 224 Pac. 784; *In re Frazier* (1920) 50 Cal. App. 45, 194 Pac. 510.

¹⁰⁴ *Guardianship of DeBrath* (1937) 18 Cal. App. (2d) 697, 64 P. (2d) 968.

¹⁰⁵ *In re Bruegger* (1928) 204 Cal. 169, 267 Pac. 101; *In re Livingston*, *supra* note 101.

¹⁰⁶ CAL. CIV. CODE §§ 221-229.

¹⁰⁷ *In re Santos* (1921) 185 Cal. 127, 195 Pac. 1055; *Guardianship of Case* (1943) 57 Cal. App. (2d) 844, 135 P. (2d) 681.

¹⁰⁸ *Younger v. Younger* (1895) 106 Cal. 377, 39 Pac. 779; *In re DeLeon* (1924) 70 Cal. App. 1, 232 Pac. 738.

that of the superior court exercising its statutory powers in strict custody proceedings or its probate power to appoint a guardian.

By the Juvenile Court Law,¹⁰⁹ the State of California has designated its superior courts as juvenile courts and authorized them to provide for the protection and rehabilitation of children who are or may become delinquent or dependent. If a child falls within any one of the classes listed in Welfare and Institutions Code section 700,¹¹⁰ a petition calling attention to that fact and asking the juvenile court to make the minor a ward of the court will give the juvenile court jurisdiction.¹¹¹ If the allegations of the petition are found to be true, and the minor is made a ward of the court, the juvenile court then has the power to order such custody arrangements as will best combat the evil conditions and aid the child in becoming a healthy, useful adult.¹¹² This jurisdiction continues at least during the ward's minority or until sooner released by an appropriate order.¹¹³ The child may be turned over to a state or county institution, placed in a foster home, returned to his own home, or given to a parent who has not previously had his custody. The decision should be governed solely by what the child's welfare requires. Parental right has no place in the determination, except that no ward of the juvenile court may be taken from the custody of his parents or legal guardian without their consent unless the court makes a specific finding of one of the facts listed in Welfare and Institutions Code section 739, which relates to the need for such action.¹¹⁴ It is not surprising, then, that this power can be exercised even though there is an existing custody order made pursuant to a divorce action.¹¹⁵ Although a decision of the question has been avoided,¹¹⁶ there would seem to be little doubt that if there were a conflict between the determination of the divorce court and that of

¹⁰⁹ WELF. & INST. CODE §§ 550-911.

¹¹⁰ The kinds of persons covered are minors engaged in begging, vagrancy, immorality, indulgence in drugs or intoxicating liquor, truancy or criminal activity, or those who are destitute, suffering from venereal disease, or are mentally deficient or insane, or who lack a proper home or proper parental control.

¹¹¹ WELF. & INST. CODE §§ 720, 721.

¹¹² WELF. & INST. CODE § 735.

¹¹³ WELF. & INST. CODE § 750.

¹¹⁴ WELF. & INST. CODE § 739: "... no ward of the juvenile court shall be taken from the custody of his parent or legal guardian without the consent of the parent or guardian, unless the court finds one of the following facts:

(a) That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education of the person.

(b) That the person has been tried on probation in such custody and has failed to reform.

(c) That the person has been convicted of crime by a jury.

(d) That the welfare of the person requires that his custody be taken from his parent or guardian.

¹¹⁵ *Dupes v. Superior Court* (1917) 176 Cal. 440, 168 Pac. 888.

¹¹⁶ *Id.* at 442, 168 Pac. at 889.