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Conflicting Custody Decrees: In Whose Best Interest?

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Comment

Conflicting Custody Decrees: In Whose Best Interest?

In the little world in which children have their existence, whosoever brings them up, there is nothing so finely perceived and so finely felt, as injustice.[1]

INTRODUCTION

Contemporary legal thought has thus far grappeled unsuccessfully with the problems presented by foreign child custody decrees. Ease of mobility and the transient nature of today's society have compounded the difficulties which arise from conflicts between states attempting to apply their laws to best serve the needs of their citizens. The Full Faith and Credit Clause[2] providing for recognition of foreign judgments has not been considered applicable to amendable decrees,[3] thus resulting in further confusion. The question of what constitutes proper jurisdiction to decide custody cases cannot be answered uniformly in all states. While certainly the high interest which each state must place upon protecting the children within its boundaries should not be diminished by its attempts to cooperate with its neighboring states, neither must the child's welfare be subject to states attempting to exercise their jurisdiction when it is not justified, in order to protect their sovereignty or insure the dignity of their courts.[4] The challenge facing the courts is to achieve

1. C. DICKENS, GREAT EXPECTATIONS 62 (1860-1861).
2. U.S. CONST. art. IV, § 1.
3. New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947). It is arguable that the question is unsettled since the Court reserved decision on several specific issues raised in Halvey. But the decision has generally been interpreted as holding that custody decrees are entitled to only that credit which would be accorded in a subsequent proceeding in the state rendering the original decree. *See* Reese and Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153 (1949); Comment, *Custody Decrees —Full Faith and Credit*, 2 ARK. L. REV. 78 (1947); Note, *Child Custody Decrees—Interstate Recognition*, 49 IOWA L. REV. 1178 (1964).
4. In the assertion of rights, defined by one state, within the territory of another, there is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other. Stumberg, *The Status of Children in The Conflict of Laws*, 8 U. CHI. L. REV. 26, 57 (1940).

the proper method of reaching their own stated goal of providing for the "best interests of the child."

Recently, the Pennsylvania Supreme Court affirmed a contempt citation issued against a father who removed himself and his children from the jurisdiction of the lower court, refusing to comply with an order awarding custody of the children to the mother.[5] The father, in *Brocker v. Brocker*,[6] elected to seek a custody award in the courts of Ohio where he had earlier become a resident and where the children were temporarily residing. It is unfortunate that an earlier hearing date was not scheduled particularly in view of the father's allegations, as the court's decision must have appeared to the father to indicate a lack of faith in the seriousness of his contentions. It is highly probable that the father would have submitted to its jurisdiction had the lower court in Pennsylvania been more prompt in granting the hearing requested. Whatever may be said of the wisdom of the Ohio court's decision to intercede, Brocker solved his quandry by appealing to that forum, obtaining a temporary order and insuring the custody of the children to him until further court determination.[7]

There are innumerable cases in which courts are asked to decide the question of proper custody of children when the basis of their jurisdiction to do so may be in doubt. Pending resolution of these issues, uniformity of decision aimed at promoting the best interest of the child cannot be achieved.

The Nature of Custody

Custody is a concept which courts and text writers have found difficult to define. "In its broadest sense custody refers to the relationship

5. Brocker v. Brocker, 429 Pa. 513, 241 A.2d 336 (1968), *cert. denied*, — U.S. — (1969).

6. *Id.* Appellant and his wife were divorced in October, 1964. Both were residents of Pennsylvania at the time and were personally before the Court. The order incorporated a custody award of the children to the mother, and an agreement of the parties to submit to the continuing jurisdiction of the Court regardless of the residence or domicile of the parties or their children. In June, 1965, the order was amended to permit the father to take the children to Ohio for the summer. They were to be returned five days prior to the beginning of the fall school term. On August 5, 1965, the father petitioned for a modification of the order, alleging the unfitness of the mother and requesting permanent custody. A hearing was set for October 11, 1965, more than a month after the beginning of the school term. The father then instituted proceedings in Ohio seeking a temporary order for custody pending a final determination. On August 5, 1965, the mother requested that the father be held in contempt for his failure to return the children on August 25, per the June, 1965, order. At a hearing on September 6, 1965, a contempt citation was issued against the father.

7. Ct. of C. P., Div. Dom. Rel., Juv. Div., Mahoning Co., Ohio (Sept. 12, 1966).

which exists between parents and a child in a normal going family."[8] Early authorities considered "custody" a right of the parent incident to his responsibility to nurture and care for the child. At common law the father was entitled to custody, earnings and services which grew out of his obligations to maintain and educate his children.[9] Gradually the emphasis has shifted to focus on the "best interests of the child" and the responsibility of the state to further that "interest."

Historically, jurisdiction to decide custody cases has rested in courts of Equity. Authorities are in dispute as to whether jurisdiction is based upon the obligation of the King to protect and defend his subjects or the notion that a guardianship is a form of trust and therefore the peculiar object of equity.[10] Early cases generally involved the appointment of a third person as guardian for a child who had no parents. More recently, the increase in the number of divorces granted and the custom of providing for maintenance and custody as a part of the decree has resulted in an expansion of the jurisdiction so as to include controversies between parents over custody of their children. Divorce statutes in all states now authorize custody awards as an incident of the divorce decree and some courts have preceeded to a custody determination even though the divorce was denied.[11] Most states also provide for petitions in equity or statutory proceedings relating to dependent or neglected children as methods of determining a custody controversy.[12] Actions under these latter statutes often arise from allegations that neither parent is fit to have custody of the child and the court must decide not only between parents, but also whether the child's best interest might not be benefitted by placement with a third party. This type of decision encompasses factors beyond the scope of this inquiry and for the present only controversies between parents will be discussed.

Consideration of the factors involved in a court's decision to place a child with one parent or the other is essential.[13] In order to achieve

8. H. CLARK, LAW OF DOMESTIC RELATIONS 573 (1968).
9. STRAUSS AND ROME, THE CHILD AND THE LAW IN PENNSYLVANIA 1 (1943).
10. *See* 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 578 (12th ed. 1877), where the author states that ". . . it will scarcely be controverted, that in every civilized state, such a superintendence and protective power does somewhere exist."
11. CLARK, *supra* note 8, at 576 & n.3.
12. *See, e.g.*, PA. STAT. ANN. tit. 12, § 1871 *et seq.* (1967); OHIO STAT. ANN. tit. 27, § 2725.01 *et seq.* (1953).
13. For a detailed discussion, *see* CLARK, *supra* note 8; STRAUSS AND ROME, *supra* note 9; R. LEVY, SELECTED MATERIALS ON FAMILY LAW; CUSTODY, THE UNWED MOTHER, ADOPTION, PARENTAL NEGLECT (1964); ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED ESSAYS ON FAMILY LAW (1950); Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAMILY L. 21 (1965).

some sense of uniformity, it is necessary to define certain general factors which should be considered to some degree in every case presented. The factors considered in granting a custody award can be broadly broken down into four categories: the age and sex of the child; the child's preference; financial and religious considerations; and moral considerations. Admittedly, these four factors are as interrelated as the many elements which combine in a given situation to prove their existence, but they do function as guidlines for a court faced with the difficult decision of making a custody award.

Many courts, when considering the age and sex of the child, have been led to invoke what they have termed the "tender years" doctrine.[14] Whenever a child is of tender years it is deemed prima facia evidence that the mother is entitled to custody.[15] This is especially true when the child is a girl.[16] However, when it is shown that custody by the mother would not be consistent with the child's best interest and welfare the presumption in favor of the mother may be rebutted.[17]

Most authorities doubtlessly would agree that at some point the wishes and preferences of the child must be considered in determining custody.[18] Factors such as the child's age, his intelligence and his maturity[19] must be examined. The child's preference should be based on legitimate reasons and not upon whim or fancy or a desire to avoid parental control.[20]

Religious and economic factors are also important in custody determinations, but they are generally only an aspect of what constitutes the child's best interests.[21] The courts have refused to enforce agreements between parents regarding the raising of a child in a particular religious faith and have held it is more consistent with the best interests of

14. Note, *Measuring the Child's Best Interests—A Study of Incomplete Considerations*, 44 DENVER L.J. 132 (1962); 1 J. FAMILY L. 138 (1961), and cases cited therein.

15. *See, e.g.*, Commonwealth *ex rel.* Ackerman v. Ackerman, 204 Pa. Super. 403, 205 A.2d 49 (1964).

16. *See, e.g.*, Commonwealth *ex rel.* Horton v. Burke, 190 Pa. Super. 392, 154 A.2d 255 (1959); Commonwealth *ex rel.* Shipps v. Shipps, 209 Pa. Super. 58, 223 A.2d 906 (1966).

17. *See, e.g.*, Commonwealth *ex rel.* Lovell v. Shaw, 202 Pa. Super. 339, 195 A.2d 878 (1963); Commonwealth *ex rel.* Oliver v. Oliver, 165 Pa. Super. 593, 69 A.2d 445 (1945); Commonwealth *ex rel.* Logue v. Logue, 194 Pa. Super. 210, 166 A.2d 60 (1960).

18. *See, e.g.*, CLARK, *supra* note 8; J. SCHOULER, LAW OF DOMESTIC RELATIONS (1905); OSTER, *supra* note 13.

19. Commonwealth *ex rel.* Weber v. Miller, 84 Pa. Super. 409 (1925).

20. CLARK, *supra* note 8; STRAUSS & ROME, *supra* note 9.

21. Note, *Religious Consideration in Awarding Custody of Children*, 61 DICK. L. REV. 87 (1956); Note, *Religion—A Factor in Awarding Custody of Infants?*, 31 S. CAL. L. REV. 313 (1958).

the child that he should observe the faith of the parent in whose custody he has been placed.[22] In like manner, the material and financial benefits which a child may derive from being placed with one parent rather than the other are considered as a part of the general welfare of the child.[23]

The moral fitness of each parent must also be weighed by the court in relation to its effect upon the child.[24] Evidence of unfitness consists of such factors as a parent's emotional instability, frequent immoral acts, or failure to provide adequate parental care and guidance during periods in which the child has been under the parent's control.[25]

In the final analysis, the correctness or incorrectness of any custody award must rest upon the wisdom of the individual judge making the award. Only to the extent that he is able to untangle the conflicting testimony and isolate the truth from emotion-laden responses will the child's best interests be served. The system is one of conflict, and it is a wise judge who is able to maintain his perspective and control his own feelings when confronted with zealous attorneys, adamant parents and heartbroken children.

Jurisdiction and Full Faith and Credit

Jurisdiction

The *Restatement of Conflict of Laws*[26] demonstrates that as recently as 1934 American authorities still accepted the English notion that custody is a status and jurisdiction to determine custody is dependent upon the domicile of the person. Fixed definitions of domicile were prescribed depending upon the possible physical locations of the child and the relationship existing between the parents.[27] The test was mechanical and easy to apply in most cases, probably because of the lack of mobility of citizens between states, and the incomplete evolution of the concept of the child's "best interest" as being more pervasive than "status" in de-

22. 57 Colum. L. Rev. 595 (1957); 59 Colum. L. Rev. 68 (1959).
23. *See* Oster, *supra* note 13.
24. Clark, *supra* note 8; Strauss & Rome, *supra* note 9; 20 Md. L. Rev. 138 (1960).
25. 16 Wash. & Lee L. Rev. 287 (1959); 28 Rocky Mt. L. Rev. 138 (1955).
26. Restatement of Conflict of Laws § 117 (1934), [hereinafter cited as Restatement]. "A state can exercise through its courts jurisdiction to determine the custody of children or to create the status of guardian of the person only if the domicil of the person placed under custody or guardianship is within the state."
27. Restatement § 32. "The minor child's domicil, in the case of divorce or judicial separation of its parents, is that of the parent to whose custody it has been legally given; if there has been no legal fixing of custody, its domicil is that of the parent with whom it lives, but if it lives with neither, it retains the father's domicil."

termining jurisdiction. Story's work on *Conflict of Laws*[28] also serves to point out the early tendency to emphasize the child's domicile as the basis for jurisdiction. Although Story does not deal directly with the concept of custody as embraced by the *Restatement*, his discussion of guardianship[29] aptly illustrates the domicile emphasis. Beale,[30] whose treatise was introduced contemporaneously with the *Restatement*, essentially followed the *Restatement* definition of domicile. However, Beale's definition would seem to be somewhat more stringent in that it fixes the minor child's domicile as that of the father regardless of the actual fact of the child's residence.[31]

While adhering to the orthodox view of domicile as the basis of jurisdiction, the *Restatement* apparently perceived that difficulties may arise from a strict application of the domicile doctrine, for Section 148[32] can be interpreted as suggesting that mere presence in the state provides a basis for jurisdiction if a "custodian" is found unfit.[33]

Regardless of how the *Restatement* is interpreted, it is evident that by the time it was formulated courts had recognized that the "best interest" of the child, rather than the "status" of the parent-child relationship, should govern a determination to exercise its jurisdiction.[34] However, since in cases of separation or divorce of the parents where custody of the child has not been legally fixed, the child's domicile, according to the *Restatement*,[35] is that of the parent with whom he lives, i.e. his presence, the results obtained under a "best interests" analysis have not appeared to be a radical departure from prior decisions.

28. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1852).
29. *Id.* at § 492.
30. J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 30.1 (1935). "A legitimate infant whose father is alive at birth, and continues during minority, the domicil of his father, following that domicil as it changes; and is necessarily referred to that domicile without regard to the actual facts of his residence.
31. *Id.*
32. RESTATEMENT § 148. "In any state into which the child comes, upon proof that the custodian of the child is unfit to have control of the child, the child may be taken from him and given while in the state to another person."
33. RESTATEMENT, Explanatory Note § 148, comment *a* at 213, implies that no extraterritorial effect will be accorded such a custody award. It states, "This action will be effective within the state. If the state is also the state of domicil of the child, the action will change the status and will therefore be effective in every state."
34. Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 625 (1925), provides as follows: The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the 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 whose domicile is elsewhere, nor for the definition of parental rights dependent upon status. . . .
35. RESTATEMENT § 32.

Full Faith and Credit

While most courts today would find presence of the child within their jurisdiction sufficient to act to protect his best interest,[36] the question of recognition of foreign custody decrees is still unsettled.[37] Both the *Restatement*[38] and Professor Beale[39] take the position that once custody has been awarded by the proper court the award will be recognized and enforced by other states. But, such recognition is limited to facts adjudicated at the time of the original decree.[40] Stansbury,[41] surveying the problem in 1944, asserted that while in the cases which he reviewed the courts declared themselves bound by prior determinations, in less than half was the foreign decree enforced.[42] The study further demonstrated the growing majority of cases in which the courts felt free to disregard the prior award on grounds that "a material change of circumstances was found to have occurred since the foreign decree was rendered and those in which the court considered itself free to examine the merits because of an asserted jurisdictional defect or for some other reason."[43]

In *New York ex rel. Halvey v. Halvey*,[44] the United States Supreme Court was asked to decide the full faith and credit issue. Confronted with a New York custody award granted after a determination of custody had previously been made by a Florida court, the Supreme Court found that: the Florida decree was not irrevocable and unchangeable;

36. In RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (Proposed Official Draft, May 2, 1967) this position has been taken:

> A state has power to exercise judicial jurisdiction to determine the custody, or appoint a guardian, of the person of a child or adult
> (a) who is domiciled in the state, or
> (b) who is present in the state, or
> (c) who is neither domiciled nor present in the state, if the controversy is between two or more persons who are personally subject to the jurisdiction of the state.

See also A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 281 (1962); and H. GOODRICH & E. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS 271 (4th ed. 1962).

37. 49 IOWA L. REV. 1178, 1182 (1964); 80 U. PA. L. REV. 712 (1932); Stumberg, *supra* note 4.

38. RESTATEMENT § 147. "Except as stated in § 148 [see footnote 32 *supra*] when the custody of a child has been awarded by the proper court to either parent, the decree will be enforced in other states."

39. BEALE, *supra* note 30, at § 147.1 (1935). When the custody of a child has been awarded to one parent by a court having jurisdiction so to do, the right of this parent will be recognized by other states. . . . But this estoppel extends only to conditions which existed at the time of the original decree; the second court may examine any facts which have occurred since the original decree which throw light upon the fitness of the parents to have custody of the child.

40. *Id.;* RESTATEMENT § 147 comment *a* at 212.

41. Stansbury, *Custody and Maintenance Law Across State Lines,* 10 LAW & CONTEMP. PROB., 818 (1944).

42. *Id.* at 828.

43. *Id.* at 830.

44. 330 U.S. 610 (1946).

that the Florida courts had the power to modify it where conditions were shown to be altered; that Florida custody decrees were not res judicata in Florida or elsewhere except as to facts before the court at the time of the judgment. The Court held that "so far as the Full Faith and Credit Clause is concerned, what Flordia could do in modifying the decree, New York may do."[45] The Supreme Court specifically reserved decision on questions raised as to Flordia's jurisdiction to award the initial decree; whether New York's power to modify the decree was greater than Florida's; or "whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires."[46]

Mr. Justice Frankfurter, concurring, objected to the "technical" distinction of finality of judgments which the majority implied controlled the applicability of full faith and credit protection.[47] He preferred a more realistic test which looked to providing a solution to the conflicts which arise out of family relationships. In the absence of "changed circumstances affecting the welfare of the child which called for a change in custodial care," Frankfurter maintained that New York would have to respect the Flordia decree so long as "there was legal power in the Flordia Court to enter the custodial decree."[48]

Mr. Justice Rutledge, also concurring, agreed with the "lack of finality" issue held conclusive by the majority, but pointed out that the "distressing result" may make possible a "continuing round of litigation over custody, perhaps also of abduction, between alienated parents."[49]

Since *Halvey*, the United States Supreme Court has issued only three other opinions directed toward answering problems arising out of fact situations similar to *Halvey*. *May v. Anderson*[50] involved a father who attempted to enforce in Ohio a Wisconsin custody decree incident to an ex parte divorce granted while neither the mother nor the children were in Wisconsin. The Court held that Ohio was not required to give full faith and credit to the Wisconsin decree. The decision was based

45. *Id.* at 614. "[A] judgment has no more constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered."
46. *Id.* at 616.
47. *Id.* at 618.
48. *Id.* at 619.
49. *Id.*
50. 345 U.S. 528 (1953). *See also* Hazard, *May v. Anderson, Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959); 15 U. PITT. L. REV. 163 (1953).

upon the premise that regradless of the domicile of the children, Wisconsin did not have the requisite personal jurisdiction over the mother necessary to deprive her of her personal right to possession of her children. The rationale, unfortunately, is inconsistent with the concept of the child's "best interest" as providing a basis for the exercise of jurisdiction. It is reflective of the type of reasoning which might have been expected under the earlier "status" doctrine, and is a departure from the trend which the Court indicated in *Halvey*.

No doubt, in view of their experience with *May v. Anderson*,[51] the Ohio court felt somewhat compelled to exercise jurisdiction when confronted with *Brocker v. Brocker*.[52] Mere presence of the children within the state's boundaries demanded that Ohio act to protect the children's "best interests." But, it is questionable whether the confusion which resulted from the Ohio court's decision to exercise jurisdiction could have been avoided under the present rule or whether the best interests of the children have actually been served.

In *Kovocks v. Brewer*,[53] the Supreme Court remanded the case to the North Carolina courts "for clarification, and, if they have not already decided, so they may have an opportunity to determine the issue of changed circumstances."[54] The problem arose when a mother sought to enforce in North Carolina a New York decree which modified an earlier New York decree. When the first decree was rendered, all of the parties were before the court and custody of the child was granted to the paternal grandfather, a resident of North Carolina. Nearly four years later, the mother asked the New York court to amend the order and award custody of the child to her, which they did. North Carolina refused to give the decree effect in that state and, upon independent investigation, found that it would be in the best interest of the child if she were to remain with her grandfather. The United States Supreme Court reserved opinion upon the question of New York's jurisdiction to amend the decree and seemingly applied the rule which Frankfurter had suggested in his concurring opinion in *Halvey*.[55] However, Frankfurter dissented in this opinion, expressing the view that the constitutional command of full faith and credit does not apply to custody decrees, impliedly abandoning his earlier opinion that some form of full

51. 345 U.S. 528 (1953).
52. Ct. of C.P., Div. Dom. Rel., Juv. Div., Mahoning Co., Ohio (Sept. 12, 1966).
53. 356 U.S. 604 (1958); discussed in 44 A.B.A.J. 772 (1958).
54. 356 U.S. at 608.
55. 330 U.S. at 619.

faith and credit is required in the absence of "changed circumstances."[56]

The next case to reach the Court was *Ford v. Ford*.[57] The problem arose when the mother sought full custody of her children in South Carolina. Previously, a Virginia court had dismissed a habeas corpus petition by the father when the parties reached an agreement as to the custody of the children. The Supreme Court of South Carolina held that since a judgment entered in a Virginia court by consent or agreement would be res judicata in Virginia, it is res judicata and entitled to full faith and credit in South Carolina. Once again, the United States Supreme Court reserved decision on whether the South Carolina court's interpretation of the Full Faith and Credit Clause was correct. The case was remanded for a determination of "changed circumstances" on grounds that South Carolina's interpretation that the judgment was res judicata in Virginia was incorrect and therefore no full faith and credit issue could arise.

In light of the preceding analysis of the Supreme Court's decisions, any attempt to set down a hard and fast rule as to the applicability of full faith and credit to foreign custody decrees would be speculative. Regardless of the rule, it seems apparent that states would have little difficulty in circumventing the application of full faith and credit by basing their decisions to disregard the prior decree upon a "change of circumstances."[58]

Analysis

It seems apparent that to date the courts and text writers alike, although ably illuminating the problem, have grappled with the solution somewhat unsuccessfully. The question might be asked: who should lay down the rule and what should the rule be?

It seems unlikely that Congress will act to establish a standard to guide the states in deciding the extraterritorial effect to be given custody decrees. While the Full Faith and Credit Clause[59] provides that Congress may enact legislation in implementation thereof, Congress has

56. 356 U.S. at 614. *Compare* Kovacks v. Brewer, 356 U.S. 604 (1958), *with* May v. Anderson, 345 U.S. 528 (1953).

57. 371 U.S. 187 (1962).

58. Stumberg, *supra* note 4, at 57. "[U]nfortunately, the term 'change of conditions' is sufficiently broad to make it possible for a court to escape what it might otherwise feel to be an obligation to recognize an earlier award as still effective through resort to the simple expedient of requiring little evidence of change."

59. U.S. Const. art. IV, § 1.

generally been content merely to restate the rule and defer to the Court's interpretation of the Clause.[60] Admitting that such legislation falls within the authority of Congress, the particular nature of the problem might dictate the wisdom of their decision to refrain from acting in an area so inherently related to local internal policy of the states.

State courts have exhibited little uniformity in arriving at a rule as to jurisdiction initially or to the effect they will give prior extraterritorial decrees.[61] Some courts may well have used the "best interests" of the child as a basis for exercising a jurisdiction which is not in the "best interests" of the child at all. The problem presented in *Brocker* certainly suggests that the Pennsylvania court, because of its past association with the parties and its geographic accessibility to information necessary for resolution of the specific issues, was in a superior position to determine the validity of the father's allegations which supposedly constituted "changed circumstances." In view of the fact that the children were under an existing order, and therefore, presumably the control and supervision of one court which stood ready to protect their interests, the Ohio court's action clearly seem premature.[62]

At the other extreme, some courts have found themselves in the position of having to refuse aid because of a parochial concept of domicile which deprives them of jurisdiction.[63] Had the Ohio court followed the domicile doctrine as postulated by the *Restatement*, they could have deferred to the Pennsylvania court, achieving what may have been the more desirable result. However, the limitation of such a technical approach appears obvious when considered in relation to a fact situation which demands action to protect children from immediate emotional or physical harm.

With respect to full faith and credit, a few states, have indicated that the prior decree is entitled to no effect, while the majority express the view which the decisions of the Supreme Court infer; that in the absence of "changed circumstances" a prior decree is res judicata as to those elements adjudicated at the time of the decree and entitled to full

60. 28 U.S.C. §§ 1738-1742 (1964).

61. Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 349-352 (1953).

62. *See* STUMBERG, *supra* note 4, at 58, suggesting that the disturbing effect implicit in a resort to new judicial proceedings may be alleviated by requiring convincing proof that conditions have actually changed.

63. 5 WILLIAMETTE L.J. 171 (1968).

faith and credit.[64] As the cases have illustrated, the results do not necessarily conform to the statement of the rule.

In the so called "legal kidnapping" cases there is a split of opinion as to whether or not the state into which the child has been brought should lend its aid to the parent seeking custody. In *Brocker* the father held the children in Ohio legally under an existing order but the distinction is of little significance. His purpose in seeking the aid of the Ohio court was to avoid what he felt to be an adverse decision. A few courts have applied the concept of "continuing jurisdiction" combined with the notion that another state is perhaps in a better position to give equal justice as a basis for refusing jurisdiction in this type of case.[65] The merit of this position is the flexibility which it offers when combined with a "changed circumstances" application of full faith and credit. But if it is rigidly applied in every case, the danger exists that a child who realistically needs the protection of the court may be deprived thereof.

It is also the practice in some states to require a bond of a parent who wishes to remove a child from the state.[66] Under such a requirement it would seem that the offending parent's presence before the court could be assured, thus enabling the court by contempt proceedings to obtain the return of the children. This procedure may have been particularly applicable in the *Brocker* case since the Pennsylvania court found itself with no means of enforcing its contempt citation. However, the availability of the contempt proceeding as a coercive power rests in all the states and a situation could conceivably arise in which a litigant under an order from two states would be unable to conform to the order of either state without incurring a contempt violation in the opposing state.[67]

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64. R. LEFLAR, AMERICAN CONFLICTS LAW § 246 (1968); EHRENZWEIG, *supra* note 36, at 291; 49 IOWA L. REV. 1178 (1964).

65. 12 LOYOLA L. REV. 147, 151 (1965). "When two or more state courts exercising concurrent jurisdiction reach conflicting results, it is suggested that the *dominant contacts* or *substantial interests* criteria . . . should be resorted to in order to settle the conflict. When it is recalled that the child's best interest is the paramount consideration in custody cases, the problem of conflicting or contradictory judgments loses much of its significance (emphasis in original)." *See also* 5 WILLIAMETTE L.J. 171 (1968).

66. This procedure was employed by the New York court to ensure the mother's compliance with their decree. New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1946).

67. In many States, intervention by a third party on behalf of a child is authorized. *See, e.g.*, PA. STAT. ANN. tit. 12, § 1871 *et seq.* (1967); OHIO STAT. ANN. tit. 27, § 2725.01 *et seq.* (1953). In Brocker v. Brocker, 429 Pa. 513, 241 A.2d 336 (1968), *cert. denied*, — U.S. — (1969), had a third party filed a petition for habeas corpus in Ohio, seeking to restrain the father from returning the children to the mother, and the Court, acting in the "best interest" of the children, had issued such an order, the father, in complying with the Pennsylvania order, would have been in contempt of the Ohio court.

The best solution is for the United States Supreme Court to squarely face the issue and establish standards which would lend themselves to enable the states to resolve their conflicting interests in a manner compatible with their own, the parents' and the child's best interest. Since generally, state courts require some "change of circumstances" before they will amend a prior custody award granted by their own courts, it should not be too difficult to incorporate the concept totally into interstate conflict situations. As has been demonstrated, the majority of states have probably already done so. The merit of the "changed circumstance" rule is the flexibility necessary to allow each state to act when the child's "best interests" demand, and further, it should provide the courts with the impetus for an extremely thorough investigation of all relevant factors thus precluding cursory evaluations and wrong decisions. Ultimately, the conclusion should be reached that the question of whether a "change of circumstances" has actually occurred can best be determined by one court rather than the other, depending upon the type of "change of circumstances" is alleged to have occurred.[68] For example, in *Brocker* the "change of circumstances" alleged was the misconduct of the mother who had continuously been a resident of Pennsylvania. Clearly the facilities of the Pennsylvania court were more adequate to decide the validity of the father's allegations than those of the Ohio court.

The necessity exists for the Supreme Court to clearly state that full faith and credit will be required in the absence of "changed circumstance," and to establish the burden of proof required to show a "change of circumstance." Because of the ease with which state courts have found "changed circumstances" in the past the Supreme Court should enunciate a rule which requires clear and convincing proof by the moving party that an actual change of circumstances has occurred, and that the aid sought is not an attempt to evade the jurisdiction of another state which has the knowledge and investigatory facilities to best decide what the best interests of the child require. Enunciation of the rule prescribing full faith and credit and the burden of proof necessary to establish a "change of circumstances" lies within the traditional function of the Court. The suggestion that the determination of "changed

68. Stumberg, *supra* note 4, at 56. "It would seem, then, that demarcation of the lines which would limit permissible exercise of judicial power in custody proceedings should . . . be drawn from the point of view of the ability of the court entertaining them to make such an investigation of the facts as will enable it to act for the best interests of the child."

circumstances" could more validly be made by one court rather than another may not fall within this traditional function. It seems to imply a federal forum non convenience rule which would be binding upon the states. However, the Court can reach this objective without abdicating its traditional function by requiring clear and convincing proof, making it necessary for the moving parent to seek relief in the forum where proof of "changed circumstances" is most readily accessible. Under this rule, decisions altering prior custody awards, regardless of the forum, will in reality conform to the concept of the child's "best interest."

Conclusion

It is apparent that some form of full faith and credit for foreign custody awards is necessary to insure the stability of environment so essential to the well-being of every child confronted with the conflict of divorce. At the same time, flexibility to make adjustments in those cases where the "best interests" of the child demand a change in custody must be preserved. But it must be recognized that not all courts stand in an equal position to decide what is actually in the "best interests" of the child. Establishing a standard which requires full faith and credit in the absence of a clear showing of "changed circumstances" should accomplish the objectives of stability and flexibility. The strong burden of proof required should dictate that the state in the best position to determine the child's "best interests", i.e., whether a "change of circumstances" has occurred, is the appropriate forum to settle the controversy.

It is the function of the United States Supreme Court to resolve conflict among the states. Until the Supreme Court announces the "rule" and stands ready to enforce its application, the confusion will continue to exist. The Court should act now to eliminate this confusion and stimulate increased cooperation between the states to develop a stable system of protecting the rights of parents, diminshing conflicts, and most importanly, best serving the needs of those unfortunate children affected by the tragedy of parental separation and divorce.

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