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Full Faith and Credit for Child Custody Decrees

Robert J. Boylston

educational expenses of a professional singer[45] and a mechanic[46] were disallowed. There is, of course, great doubt as to whether these expenses would still be disallowed under the new regulations and recent case holdings.

In the light of the issuance of the final regulations as they pertain to allowable deductions for voluntarily incurred educational expenses, there seem to be few remaining problems as to their proper allowance if the courts will give a realistic interpretation to T.D. 6291. The *Hill* case could have just as adequately accomplished the same result eight years earlier if the Treasury Department and the Tax Court had not elected to interpret it narrowly.

This is certainly not to imply that there are no remaining issues worthy of litigation. Although the regulations go a long way toward a reasonable and logical matching of costs with the revenues they produce, it has not completely remedied every malady which besets the field of educational expenses particularly or the field of deductions generally.

JAMES L. ADE
THOMAS S. BIGGS, JR.

FULL FAITH AND CREDIT FOR CHILD CUSTODY DECREES

Article IV, section 1, of the United States Constitution as implemented by Congress[1] requires that judicial proceedings of each state shall have the same full faith and credit given to them in every court within the United States that they have in the courts of the state from which they are taken. This note is concerned with the extent to which the requirements of full faith and credit are applicable to child custody proceedings.

Some state courts have held that the full faith and credit clause does not apply to child custody decrees.[2] The Kansas Supreme Court has stated:[3]

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[45]T. F. Driscoll, 4 B.T.A. 1008 (1926).

[46]Knut F. Larson, 15 T.C. 956 (1950).

[1]28 U.S.C. §1738 (1952).

[2]Bachman v. Mejias, 1 N.Y.2d 575, 136 N.E.2d 866 (1956); *In re* Bort, 25 Kan. 215, 37 Am. Rep. 255 (1881) (by implication); State *ex rel.* Rasco v. Rasco, 139 Fla. 349, 352, 190 So. 510, 511 (1939) (dictum).

[3]Wear v. Wear, 130 Kan. 205, 224, 285 Pac. 606, 616 (1930).

> "As between the parents themselves, they may be bound by a former adjudication . . . but the state, in its relation of parens patriae, looks to the welfare of the child at the time the inquiry is being made, and for that purpose former adjudications between parents is [*sic*] evidentiary only and not controlling."

The reasoning is that the duty of the state as parens patriae to provide for the welfare of its citizens supersedes the claim of a child custody decree to full faith and credit. A majority of the state courts, however, hold that the constitutional mandate of full faith and credit does apply to child custody decrees.[4] The United States Supreme Court has not specifically ruled on this point but would probably agree with the majority view.[5]

Assuming the applicability of the full faith and credit clause, two main requirements must be met before this type of decree is entitled to interstate recognition: (1) the court that rendered the decree must have had jurisdiction,[6] and (2) there must have been no change in circumstances sufficient to justify a modification of the decree by the court of the sister state in which enforcement is sought.[7]

Jurisdiction of the Court Rendering the Decree

The first problem to be resolved in determining whether the court that rendered the decree had the necessary jurisdiction is whether a child custody proceeding is an in personam or an in rem action. Many state courts have held that the proceeding is in the nature of an in rem action, the child being the *res* over which the court must have jurisdiction.[8] Others have held that the child need not be within the state; the presence of the parents before the court is sufficient.[9] The United States Supreme Court has held that a court

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[4]*E.g.*, Dake v. Timmons, 283 S.W.2d 378 (Ky. 1955); Parsley v. Parsley, 189 La. 584, 180 So. 417 (1938); Allman v. Register, 233 N.C. 531, 64 S.E.2d 861 (1951); Oldham v. Oldham, 135 S.W.2d 564 (Tex. Civ. App. 1939).

[5]See May v. Anderson, 345 U.S. 528 (1953). *But see* Kovacs v. Brewer, 78 Sup. Ct. 963, 966 (1958) (dissenting opinion).

[6]May v. Anderson, 345 U.S. 528 (1953).

[7]New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

[8]*E.g.*, Duryea v. Duryea, 46 Idaho 512, 269 Pac. 987 (1928); Weddington v. Weddington, 243 N.C. 702, 92 S.E.2d 71 (1956).

[9]James v. James, 64 So.2d 534 (Fla. 1953); May v. May, 233 App. Div. 519, 520, 253 N.Y. Supp. 606, 608 (1st Dep't 1931) (dictum).

must have personal jurisdiction over the parents before it may render a child custody decree that would be entitled to full faith and credit in another state.[10] However, it does not follow from this decision that the Court would hold that jurisdiction over the child is not necessary.

Assuming that a child custody proceeding is in the nature of an in rem action and that the child is the *res* over which the court must have jurisdiction, a further jurisdictional question arises. Is the physical presence of the child in the state all that is necessary? Some courts have so held.[11] Others have held that the domicile of the child must be within the state before custody may be determined.[12] *Domicile* has been defined as the place where a person has voluntarily fixed his habitation with the present intention to make it his permanent home.[13] In reality, however, an infant cannot be said to have voluntarily fixed his home. Thus, difficulties arise in the determination of the domicile of a minor. If the child's parents are living together, the child's domicile is that of his parents.[14] Upon the death of the father, the domicile of the child is with his mother.[15] A minor abandoned by one parent has the domicile of the other parent.[16] In general, when the parents are separated, the domicile of a child is said to be with his father.[17] Thus it may be seen that the domicile of an unemancipated minor is little more than a confused legal fiction, often difficult of determination. The reasoning behind the jurisdictional requirement of domicile is that the domiciliary state is better suited than any other to comprehend and provide for the best interests of its children. A much more realistic approach would be to leave the determination of the custody of children to the states in which they actually reside.

Since different states have different jurisdictional requirements, the question of which state's law governs becomes important. From a literal reading of the full faith and credit clause and the implement-

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[10]May v. Anderson, 345 U.S. 528 (1953).

[11]*E.g.*, Sheehy v. Sheehy, 88 N.H. 223, 186 Atl. 1 (1936); State *ex rel.* Ranken v. Superior Ct., 6 Wash.2d 90, 106 P.2d 1082 (1940).

[12]*E.g.*, Glass v. Glass, 260 Mass. 562, 157 N.E. 621 (1927); Gafford v. Phelps, 235 N.C. 218, 69 S.E.2d 313 (1952).

[13]*In re* Publicker's Estate, 385 Pa. 403, 123 A.2d 655 (1956).

[14]*In re* Krayem, 177 Misc. 842, 32 N.Y.S.2d 70 (Surr. Ct. 1942).

[15]*Ibid.*

[16]Allman v. Register, 233 N.C. 531, 64 S.E.2d 861 (1951).

[17]Glass v. Glass, 260 Mass. 562, 157 N.E. 621 (1927).

ing statute,[18] it would seem that the law of the state in which the decree was rendered would govern. The state in which enforcement is sought is required to give *such* faith and credit to the decree as would be given it in the state from which it emanated. If, under the law of the originating state, its court had jurisdiction and the decree is valid and enforceable in that state, it should enjoy the same respect in other states. On the other hand, it has been stated that a judgment or decree may be enforceable and valid in the state of its origin and at the same time unenforceable in another state on the ground of lack of jurisdiction of the rendering court.[19] If this is accepted, it follows that the law of the state where enforcement is sought might govern as to the jurisdictional requirements. Adoption of this latter proposition would lead to great confusion in the child custody area. The problem would then arise as to which of the several states would recognize and enforce the decree and which would not. This confusion would be avoided by adopting the above reasoning based upon a literal reading of the constitutional provision and the statute. Thus the jurisdictional requirements of the law of the state in which the decree was rendered, limited only by the due process clause of the fourteenth amendment, would determine the question of whether the court had jurisdiction. This view is supported by cases not involving custody decrees.[20] The United States Supreme Court has not as yet resolved this problem in regard specifically to custody matters, but it would probably follow the reasoning of the cases in other fields.

When a party has participated in the proceedings of a court and has been given an opportunity to contest the court's jurisdiction, the requirements of full faith and credit bar him from collaterally attacking the decree on jurisdictional grounds in the courts of a sister state, the question of jurisdiction being res judicata.[21] This doctrine has not yet been applied to custody proceedings, but its applicability seems apparent. The effect of this doctrine on a child custody case may be illustrated by the following example:

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[18]28 U.S.C. §1738 (1952).

[19]Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287, 295 (1890) (dictum); Husband v. Crockett, 195 Ark. 1031, 1038, 115 S.W.2d 882, 886 (1938) (dictum); Bonnet-Brown Sales Serv. v. Utt, 323 Mo. 589, 597, 19 S.W.2d 888, 891 (1929) (dictum).

[20]*E.g.*, Adam v. Saenger, 303 U.S. 59 (1937); Hanson v. Denckla, 78 Sup. Ct. 1228 (1958) (by implication).

[21]Sherrer v. Sherrer, 334 U.S. 343 (1948); Baldwin v. Traveling Men's Ass'n,

> The courts of *X* state hold that it is not necessary for the child to be before the court in order for it to render a valid child custody decree. A mother seeks award of the custody of her child in a proceeding in *X* state. The father appears and contests the award. The child at the time is in *Y* state. The court of *X* state awards the custody to the mother. The mother then goes to *Y* state and seeks to get physical custody of the child, basing her claim on the decree of *X* state. The father resists on the ground that the court of *X* state was without jurisdiction to render the decree. Even though the courts of *Y* state hold that a child custody proceeding is in the nature of an in rem action and that the child must be before the court, the collateral attack by the father should not be allowed, since the question of the jurisdiction of the court in *X* state is res judicata.

This doctrine does not apply if the decree is subject to collateral attack in the rendering state;[22] in that case it would likewise be subject to attack in the courts of a sister state.

CHANGED CIRCUMSTANCES

The mandates of full faith and credit do not require that a sister state give a more conclusive or final effect to a judgment than the state in which it was rendered.[23] Most states have statutes that allow their courts to modify custody decrees that they have rendered.[24] Therefore, since the courts of the state that rendered the decree could themselves modify it, the courts of a sister state in which enforcement is sought can do the same on the basis of significant facts not presented or considered at the original hearings.[25] These facts will most frequently take the form of changed circumstances arising after the original decree was entered.

There is no fixed standard by which to determine what constitutes a change in circumstances sufficient to warrant modification of a prior custody decree.[26] It is often stated that the altered conditions

283 U.S. 522 (1931).

[22]Sherrer v. Sherrer, 334 U.S. 343 (1948).

[23]New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

[24]*E.g.*, IDAHO CODE ANN. §32-705 (1948); MINN. STAT. §518.18 (1957); N.Y. CIV. PRAC. ACT §1170.

[25]New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

[26]Elders v. Elders, 206 Ga. 297, 57 S.E.2d 83 (1950).

must be of such a substantial and significant nature as to affect materially the welfare of the child involved.[27] However, courts have sometimes modified custody decrees on the basis of "changed circumstances" that seem of little significance. For instance, one court granted modification on the basis of a lapse of eight months.[28]

The danger exists that courts will use the "changed circumstances rule" merely as a tool enabling them to refuse to give full faith and credit to the decrees of sister states. One court warns of this danger:[29]

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

Even though this danger exists, the "changed circumstances rule" is necessary in order that stale and outdated decrees may be re-examined.

CONCLUSION

Courts generally agree that the prime consideration in child custody cases is the welfare of the child.[30] The best interests of the child require that some finality be given to custody decrees. As one writer has stated, "stability of environment . . . in itself is an important factor in the welfare of the child."[31] To allow each state to determine the custody of children regardless of previous determinations in other states would be to create a highly dangerous situation. It would then be possible that a child's custody would be constantly redetermined, and that the child would be forced to move around like a pawn in a chess game. The losing party in a custody case might be tempted to "kidnap" the child and take him to another state in order to gain another and possibly more favorable determination.

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[27]Heavrin v. Spicer, 265 Fed. 977 (D.C. Cir. 1920); Bennett v. Bennett, 73 So.2d 274 (Fla. 1954).

[28]People *ex rel.* Brown v. Schiff, 49 N.Y.S.2d 300 (Sup. Ct. 1944).

[29]Morrill v. Morrill, 83 Conn. 479, 492, 77 Atl. 1, 6 (1910).

[30]*E.g.*, Bennett v. Bennett, 73 So.2d 274 (Fla. 1954); Pugh v. Pugh, 133 W. Va. 501, 56 S.E.2d 901 (1949).

[31]Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 829 (1944).

The area of full faith and credit in regard to child custody decrees is filled with confusion. The various states insist that there are different jurisdictional requirements that must be met before courts may render valid decrees. Further, there is no minimum standard for the sufficiency of changed circumstances that justifies a sister state in modifying a custody decree. Professor Ehrenzweig has suggested a possible solution:[32]

> "What in other countries has come to be known as *'extralitigious' proceedings,* instituted and prosecuted by the state as parens patriae without regard to the cooperation or the resistance of feuding parties, should perhaps be studied with a view to eventual adoption by uniform legislative action. Under such a procedure all courts in the United States would, on their own initiative, cooperate in child custody cases, exchanging freely both information and assistance. Under such a scheme there would be no doubt but that, while 'full faith and credit' or comity is due in cases of attempted evasion, otherwise any court must fully cooperate in any scrutiny to which its decree may be subjected in any sister state."

This interesting suggestion, however, is probably impractical as an immediate solution of the problem. To be effective, the legislative action would have to be truly uniform, and its success would depend upon how many states would be willing to adopt it. It has been suggested that an amendment to the Constitution giving Congress the power to deal with the subject of marriage and divorce is perhaps the only real solution of the problem of divergent state policies in regard to divorce.[33] This suggestion could also be applied to child custody matters. However, even assuming that such an amendment could be passed, this, too, is a long-range solution and would be ineffective as an immediate measure.

The problem of interstate recognition of child custody decrees is principally a problem of the twentieth century. Formerly, when divorces were few in number and difficult to obtain, the question of enforcement of a child custody decree in a sister state rarely arose. But today, with our increasing divorce rate, the problem is becoming of more and more significance. Because of the important constitutional

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[32]*Interstate Recognition of Custody Decrees,* 51 MICH. L. REV. 345, 372 (1953).
[33]Lorenzen, *Haddock v. Haddock Overruled,* 52 YALE L.J. 341 (1943).