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THE INTERSTATE CHILD AND UNIFORM LEGISLATION: A PLEA FOR EXTRA-LITIGIOUS PROCEEDINGS

Albert A. Ehrenzweig*

MORE than a decade ago I posed the problem of the "interstate child", somewhat dramatically, but I believe realistically, as follows:

After days of bitter contest, a weary judge dissolves the marriage bond and, lacking Solomon's sword, allots the child to his mother. Thus the stage is set for the second act of the tragedy. Craving a new life for herself and her child, the mother moves to another state, and the father, seeing his right of visitation thus put in jeopardy, pleads the mother's removal in the original court which, loyal to the more faithful citizen, now awards custody to him. Should a judge of the mother's new home state heed this change? And again, what should be done if the father, disappointed by the original court, uses the first visit to acquire possession and himself removes the child to another state? What is any judge to do when faced with vivid descriptions of a child's plight caused by the alleged misdeeds of an absent parent or the error of a distant court? Is he to give full faith and credit or comity to the foreign court's decree and refuse to re-examine the merits of the first award, or should he follow his own discretion in caring for the welfare of the child now within his territory?¹

I then proceeded to show that "the courts' answers have been varied, as varied as human facts and needs."² To facilitate prediction, now hampered by the dogmatic language in the *Conflict of Laws Restatement*,³ I suggested that courts have, in fact, always felt free

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1. Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953), revised in SELECTED READINGS ON CONFLICT OF LAWS 822 (Culp ed. 1956). See also Ehrenzweig, *Recognition of Out-of-State Custody Decrees in California*, in FAMILY LAW FOR CALIFORNIA LAWYERS 585-94 (Stumpf, Horwitz & Deal ed. 1956); Ehrenzweig, *Recognition of Custody Decrees Rendered Abroad*, 2 AM. J. COMP. L. 167 (1953); Ehrenzweig, *El reconocimiento de los mandamientos de custodia extranjeros en los Estados Unidos*, CONSEJO GENERAL DE LOS COLEGIOS DE ABOGADOS DE ESPAÑA (1952); Ehrenzweig, *Zur Anerkennung kindrechtlicher Verfügungen im internationalen Privatrecht der Vereinigten Staaten*, 2 EHE UND FAMILIE 84 (1955).

2. Ehrenzweig, *Interstate Recognition of Custody Decrees*, *supra* note 1.

3. RESTATEMENT, CONFLICT OF LAWS §§ 144-47 (1934), provides that a foreign decree which creates "the status of custodianship" will be enforced in the other states if the custody has been awarded by a proper court, *i.e.*, a court of the state of the domicile of the child. In such a case the original award, whose merits cannot be re-examined, can be altered only for reasons which subsequently arise and which are deemed sufficient by the forum court.

either to modify or to disregard a foreign custody decree in order to safeguard the child's interest. They have refrained from such action and chosen to enforce such decrees only in certain typical situations in which refusal to do so would benefit a parent with "unclean hands," except that a foreign decree will even then be disregarded if it has modified a previous award either exclusively or at least primarily for the purpose of punishing disobedience.⁴ I believe that this suggestion still properly reflects current practice.⁵ However, this practice by no means gives a fully satisfactory solution. There remains the fundamental problem of when, if ever, it is justifiable to make the child's welfare depend on his parents' conduct. Moreover, there remains the all-important fact that individual judges differ in their estimate of human frailties and virtues so that even those judges willing to accept, in terms or effect, a "clean-hands" test will often reach different conclusions. Thus, the losing parent may be encouraged to seek relief outside the state of his defeat.

When I originally offered my re-interpretation of prevailing practice, I did not feel that it would be expedient to make suggestions for alternative solutions because I was then convinced that the courts were doing the very best they could with the procedural tools at their disposal and that there was little hope for an improvement of those tools. However, there is such hope now, and the time has come to help in the search for new answers. In the following discussion, I shall comment on two current proposals for uniform and federal legislation and shall attempt to formulate a tentative counter-proposal based primarily on foreign experience.

I. PROPOSED UNIFORM AND FEDERAL LEGISLATION

Upon the request of the Committee on Child Custody of the Family Law Section of the American Bar Association, Professor Leonard Ratner has drafted a Uniform Child Custody Jurisdiction Act, which he hopes will alleviate some of the evils now prevailing.⁶

4. Ehrenzweig, *Interstate Recognition of Custody Decrees*, *supra* note 1, at 373-74.

5. See, e.g., *State v. Webster*, 151 So. 2d 14 (Fla. Ct. App. 1963), *cert. denied*, 379 U.S. 822 (1964), *petition discharged*, 162 So. 2d 905 (1964); *McDonald v. Burchard*, 357 S.W.2d 583 (Tex. Civ. App. 1962). See also *Burk v. Burk*, 356 S.W.2d 40 (Ky. 1962) (clean hands); *Ex parte Elliott*, 114 Ohio App. 533, 183 N.E.2d 804 (1961); *Short v. Short*, 163 Tex. 287, 354 S.W.2d 933 (1962); *State v. Kern*, 17 Wis. 2d 268, 116 N.W.2d 337 (1962) (full faith and credit). See generally EHRENZWEIG, *CONFLICT OF LAWS* §§ 86-89 (1962) (hereinafter cited as TREATISE); EHRENZWEIG & LOUISELL, *JURISDICTION IN A NUTSHELL* §§ 14, 39 (1964). *But see* RESTATEMENT (SECOND), *CONFLICT OF LAWS* § 151 (Tent. Draft No. 4, 1957).

6. Ratner, *Legislative Resolution of the Interstate Child Custody Problem—A Reply*

His Draft is based on two major theses, both of which are designed to discourage evasive migration: (1) Initial jurisdiction will be reserved primarily to the courts of the state in which the child last resided for at least six consecutive months.⁷ Any other court which acquires jurisdiction on the basis of one of several alternative grounds⁸ will dismiss the action if it considers itself to be an inconvenient forum.⁹ (2) "In proceedings to modify a decree [of a court of a sister state having jurisdiction] the court shall give the decree the res judicata effect that it would have in the court that made it as to the legal and factual issues adjudicated thereby."¹⁰

These proposals, while clarifying the test of jurisdiction, would preserve the assumption borrowed from the *Restatement* that recognition is due to custody decrees of a sister state which "has jurisdiction." With that assumption I have taken issue in my Treatise and several articles;¹¹ I have suggested that according to the prevailing view, as stated by Chief Justice Traynor in *Sampsell v. Superior Court*,¹² several courts concerned with a child's welfare may have concurrent jurisdiction, and that full faith and credit is never due to awards of custody. Brainerd Currie supports this proposition in an article directed against Leonard Ratner's Draft, but goes beyond my suggestions by proposing congressional clarification of the full faith and credit clause "to the effect that no judgment shall preclude the courts of a state having a legitimate interest in the matter from making whatever custodial decree is required in their judgment and discretion, for the welfare of the child."¹³

Ratner has formulated a persuasive counter-argument:

[This] multiple jurisdiction-no full faith and credit solution reflects the inadequacies of its conventional components: unilateral removal of the child is encouraged and the custody decision may be made by a forum that is unfairly inconvenient to the

to Professor Currie and a Proposed Uniform Act, 38 So. CAL. L. REV. 183, 196-205 (1965) (hereinafter referred to as the Draft). See also Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964). For an excellent discussion of the general problem, see Foster & Freed, *Child Custody* (pts. 1 & 2), 39 N.Y.U.L. REV. 422, 615 (1964).

7. Draft, *supra* note 6, §§ 2(20), 4(1).

8. *Id.* § 4(1)-(3).

9. *Id.* § 7.

10. *Id.* § 8.

11. See notes 1 & 5 *supra*.

12. 32 Cal. 2d 763, 197 P.2d 739 (1948). See also *Hentz v. Hentz*, 371 Mich. 335, 123 N.W.2d 757 (1963). *But cf.* *Tompkins v. Garlock*, 189 Kan. 425, 370 P.2d 131 (1962).

13. Currie, *Full Faith and Credit, Chiefly to Judgments—A Role for Congress*, in SUPREME COURT REVIEW 89, 115-16 (Kurland ed. 1964).

stay-at-home parent and far from most of the relevant evidence. In addition, litigation may proliferate.¹⁴

I disagree with Currie's proposal on the further ground that it concedes potential applicability of full faith and credit to custody awards and may therefore mislead courts in the highly probable case of congressional inaction. Thus, the issue appears to be joined, and happily so, for in addition to Ratner's and Currie's drafts there are now circulating a number of competing proposals which may ultimately induce the Uniform Law Commissioners to take action in this vital field.¹⁵

In partial opposition to all of these proposals, I should like to submit that any legislation, in order truly to help the interstate child, must be based on something other than traditional procedures. To be sure, such procedures are in general the least likely subject for fundamental reform. It is no coincidence that civil procedure in this country, whose substantive law in most fields can compete in progressive drive and achievement with that of any other country in the world, is still lagging behind last century's great reforms in the civil-law world. Nevertheless, in the area of child custody, if anywhere, we may hope that the profession will be willing, and indeed eager, to avail itself of foreign experience in order to mitigate some of the hardships which the law has added to the unavoidable human plight of the interstate child. Here, it is submitted, a re-examination of the traditional adversary approach, with its concomitant features of jurisdiction and full faith and credit, must be the starting point.

° II. THE NEED FOR NEW TOOLS: EXTRALITIGIOUS (NON-ADVERSARY) PROCEEDINGS

The inadequacy of adversary proceedings in matters involving children and other "wards of the court" has been increasingly recognized. Thus, adoption is now largely carried on under the ex officio supervision of courts and official or semi-official governmental agencies, and lunacy proceedings show signs of a growing emphasis on the state's concern.¹⁶ Most important, the fast-growing

14. Ratner, *Legislative Resolution of the Interstate Child Custody Problem*, *supra* note 6, at 193.

15. See, e.g., David E. Engdahl's memorandum of September 21, 1965, on a proposed Uniform Child Custody Jurisdiction Act for the Legislative Research Center of the University of Michigan Law School. This memorandum also mentions a draft prepared by Professor Henry H. Foster, which does not yet seem to have been made generally accessible.

16. See TREATISE § 26, at 85-88; § 51, at 188-90.

movement for the establishment of family courts¹⁷ would concentrate jurisdiction over all intrafamilial legal problems in one court assisted by experts trained in social work, psychology, and psychiatry, as well as by "law guardians" representing the children.¹⁸ One of the earliest and most distinguished supporters of this movement has properly suggested: "Why can we not ask what is best for this family, diagnose the case, find out what caused the rift, and then apply all the skills of all the professions we can bring to bear on the problem?"¹⁹

This suggestion has been followed to some extent in the Uniform Reciprocal Support of Dependents Act, which has introduced, over initial resistance, a novel procedure securing a limited cooperation between courts of different states for the purpose of safeguarding the interests of deserted wives and children.²⁰ In contrast to the courts following this procedure, which is still hampered by some of the by-products of adversary "jurisdiction,"²¹ the new family courts offer much greater prospects for impartiality and efficiency in the protection of the interstate child. Substitution of extralitigious proceedings in such courts for the adversary process, which tends to "fan the flames"²² of discord instead of soothing them, opens the way for the solution of the interstate problem so predominant in child custody cases.²³ The following flight into what we may hope is not Utopia envisions family courts in each state, with a nationwide jurisdiction conferred by a new Uniform Law.

17. See generally Alexander, *The Family Court—An Obstacle Race?*, 19 U. PITT. L. REV. 602 (1958); Dembitz, *New York Family Court*, 48 CORNELL L.Q. 499 (1963); Goldberg & Sheridan, *Family Courts—An Urgent Need*, 8 J. PUB. L. 337 (1959); Kay, *The Family Court*, in CALIF. ASSEMBLY JUD. INTERIM COMMITTEE HEARINGS ON DOMESTIC RELATIONS, app. C, Aug. 13, 14, 1964; Ralls, *The King County Family Court*, 28 WASH. L. REV. 22 (1953); *Symposium—New York Family Court Act*, 12 BUFFALO L. REV. 409 (1963).

18. N.Y. Sess. Laws 1962, chs. 687, 700, 702, 703. See also note 26 *infra*.

19. Alexander, *The Therapeutic Approach*, Univ. Chicago Law School Conference on Divorce, Conf. Series No. 9 (1952) 51-54. See also Comment, 73 YALE L.J. 151 (1963). For a retrogressive trend concerning the treatment of juvenile delinquents, see, e.g., Handler, *The Juvenile Court and the Adversary System*, 1965 WIS. L. REV. 7; cf. Dembitz, *supra* note 17, at 518. See also note 43 *infra*.

20. See TREATISE 188-90.

21. See note 40 *infra*.

22. Alexander, *Legal Science and the Social Sciences—The Family Court*, 21 MO. L. REV. 105, 107 (1956).

23. Professor Ratner has kindly drawn my attention to the fact that the following provisions of his Draft would approach extralitigious proceedings in the sense here suggested: § 3(5) permits any interested party to participate and allows the court to bring in additional parties on its own motion; § 12 provides for cooperation between states in making investigations; and § 8 permits a court to familiarize itself with earlier evidence. *But see* text accompanying note 39 *infra*.

In the field of child custody, I submit that something like the following pattern should be the ultimate aim of legislative reform. In the most frequently arising situation—that of the child from a dissolved marriage—the court pronouncing the divorce, annulment, or separation will, except in “migratory” cases,²⁴ be the court of the child’s “permanent abode”²⁵ and will immediately assume jurisdiction over any child of the dissolved marriage. Subsequently, whenever a petition is filed or information rendered by parents, other relatives, strangers, or government agencies, that court will, as the court of guardianship, take any action it considers appropriate and will also assemble a dossier registering all such actions and all pertinent information. The court will not rely on either parent for the needed initiative in its effort to safeguard the child’s interest, but rather, on its own motion, will appoint a curator²⁶ (preferably but not necessarily with the parents’ consent), who will represent the child in all proceedings under the court’s supervision. This curator need not, and usually should not, be a lawyer but rather a friend of the court willing to serve without compensation.²⁷ If competent, gratuitous services are not available or if a lawyer is required, the expense will be borne either by the parent owing a duty of support or by the state or county. Possibly the local district attorney could be charged with a function in this area similar to his responsibilities in interstate support proceedings.²⁸

A court which has acquired jurisdiction by virtue of “migratory” divorce, separation, annulment, or custody proceedings and thus lacks the proper factual rationale for such jurisdiction (permanent abode) will, *ex officio* or upon motion, seek to ascertain the court which, by virtue of the child’s permanent abode in its

24. See text following note 42 *infra*.

25. This term is tentatively proposed to avoid technical differences between the various domicile concepts which prevail in the several states and which may prove bothersome with respect to the child’s derivative domicile. See TREATISE § 136, at 373. It is to eliminate the corresponding problem on an international level that the Hamburg Draft Convention, *infra* note 45, art. 1, uses the term “ordinarily resident,” and the Hague Convention, *infra* note 29, art. 1, uses the term “habitual residence.”

26. This civil law institution is known in at least four states. See TREATISE § 14, at 45; § 26, at 82; § 51, at 190. If a curator had represented the child in *Yarborough v. Yarborough*, 290 U.S. 202 (1933), the problem of protecting the child against her mother’s independent waiver of future support rights might never have arisen. See also *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441 (1961), where an illegitimate child was deprived of a father and permanent support through her mother’s financial deal. Cf. Ehrenzweig, *The “Bastard” in the Conflict of Laws—A National Disgrace*, 29 U. CHI. L. REV. 498 (1962). See generally TREATISE § 85. See also note 18 *supra*.

27. See Kubie, *Provisions for the Care of Children of Divorced Parents—A New Legal Instrument*, 73 YALE L.J. 1197 (1964).

28. See TREATISE § 82, at 270-71.

territory, can most effectively protect the child's welfare, and transfer to that court the child's dossier, as well as jurisdiction for any future proceedings. A similar transfer may be requested by a competent court of any state to which the child is removed with a view to establishing a permanent abode. The court thus taking permanent jurisdiction will be known as the child's guardianship court.

Such a system has long been in operation between sovereign nations which have fundamentally different legal rules.²⁹ Should it not therefore be feasible between the states of this Union with their closely related legal rules and strong incentives for effective cooperation? It will appear that neither the Draft's advocacy of increased *res judicata* recognition of sister states' decrees³⁰ nor the doctrine of concurrent jurisdiction recognized in the *Sampsell* case³¹ are irreconcilable with this suggested reform.

A. *Res Judicata*

One conflict in this regard between the Draft, its critics, and the proposed solution disappears once we draw the needed distinction between the full faith and credit requirement as applied to the custody award itself and to the adjudication of individual facts and issues. We may safely assume, although this assumption should be verified by the draftsmen of new legislation, that there is no state in the Union which does not treat custody decrees as modifiable upon proof of changed circumstances or which, in other words, does not treat every new petition as a new cause of action. Thus, since the full faith and credit accorded to the judicial decree of a sister

29. See, e.g., Austrian Jurisdiktionsnorm § 111 (Aug. 1, 1895, RGBl. 111): "If this seems indicated in the interest of a ward and particularly if there is expected therefrom the promotion of an effective exercise of the ward's protection, the competent guardianship court may on its own motion or upon petition, transfer in whole or in part its jurisdiction over the ward's person. . . ." (Author's translation.) Section 185 of the Austrian Code on Extralittigious Proceedings (Aug. 9, 1854, RGBl. 208) provides in part: "The [guardianship] court may in its discretion, in important or doubtful cases, prior to any decision upon petition by the guardian or curator, hear the ward's available close relatives or the ward himself. . . ." (Author's translation.)

The primary, continuing difficulty as between the countries of the civil-law orbit is caused by competing nationality and domicile principles. See TREATISE § 136. Thus, this is the principal object to which international agreements have so far been directed. See The 9th Hague Conference on Private International Law, Draft Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, *Report*, 9 AM. J. COMP. L. 708 (1960). See also Müller-Freienfels, *Legal Equality of Husband and Wife and the Child's Welfare in Private International Law*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 595-648 (1962); Voskuil, *DE INTERNATIONALE BEVOEGDHEID VAN DE NEDERLANDSE RECHTER* (1962); Marín López, *Los conflictos de leyes en materia de tutela*, 13 REV. ESP. DER. INT. 413 (1960).

30. Draft, *supra* note 6, § 8.

31. *Sampsell v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (1948).

state never exceeds the effect that the issuing state would give to it, full faith and credit to the custody award as such is *never* required.³² However, the fact of that award—the adjudication of the right to custody as of the time the determination was made—is as clearly entitled to recognition under the full faith and credit clause as is the adjudication of any fact or issue fully litigated in the proceedings underlying the award.³³ Collateral estoppel precludes re-litigation of such facts and issues in the same manner as it does in tax cases involving two different taxable years,³⁴ and is here endowed with full faith and credit as it is in workmen's compensation cases litigated under the statutes of two different states.³⁵ The decree of a sister state is denied full faith and credit in so far as it purports directly to affect title to forum land. The custody decree of a sister state is similarly denied full faith and credit in so far as it purports to affect a child's custody. However, such a decree is, by virtue of the full faith and credit clause, "entitled in [the forum] court to the force and effect of record evidence of the equities therein determined, unless it be impeached by fraud."³⁶ If the Draft provision concerning *res judicata*³⁷ is thus understood, it is hardly open to objection.

This result will offer relief to a parent if an attempt is made by the other to relitigate such incidental issues as paternity, validity of a marriage, ownership of certain property, or the status of certain employment. Nevertheless, this result will, and of course should, leave great leeway concerning those issues as to which a "change of circumstances" is asserted. Since the adjudication of such changes is often a matter of individual value judgments, the temptation to seek a change of venue remains great, particularly under the *Sampsell-Currie* thesis of concurrent jurisdiction.³⁸ Does the Draft do enough to counter the temptation? I do not think so.

To be sure, the Draft provides that the second court "*may* famil-

32. See *Bachman v. Meijas*, 1 N.Y.2d 575, 136 N.E.2d 866 (1956); TREATISE § 87, at 290-91; Comment, 49 IOWA L. REV. 1178 (1964). Regarding international equivalents, see, e.g., Gamillscheg, *Herausgabe eines Schweizer Kindes*, 23 RABELS ZEITSCHRIFT 145, 148 (1958). See generally KEGEL, INTERNATIONALES PRIVATRECHT 346-53 (2d ed. 1964); Webb, *Wardship of Court and the Conflict of Laws*, 14 INT. & COMP. L.Q. 663 (1965).

33. *Ogletree v. Crates*, 363 S.W.2d 431 (Tex. 1963); *Mitchell v. Mitchell*, 369 S.W.2d 684, 687 (Tex. Civ. App. 1963) (mother's use of intoxicants). See also Foster & Freed, *Child Custody*, 39 N.Y.U.L. REV. 423, 615, 625 (1964).

34. *Commissioner v. Sunnen*, 353 U.S. 591 (1948).

35. See, e.g., *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961).

36. *Redwood Inv. Co. v. Exley*, 64 Cal. App. 455, 221 Pac. 973, 975 (1923), approved in *Rozan v. Rozan*, 49 Cal. 2d 322, 317 P.2d 11 (1957) (Traynor, J.).

37. Draft, *supra* note 6, § 8.

38. See notes 12, 13, 31 *supra* and accompanying text.

iarize itself with evidence presented in the prior proceedings by reading a transcript of such evidence or a summary agreed to by the parties or approved by the judge who heard it. . . ."³⁹ Unfortunately, this provision continues to follow the pattern of adversary proceedings, which is so clearly inappropriate in this area. As was suggested earlier, any judge intent on doing justice to the interstate child *must*, whenever feasible, avail himself of all the evidence bearing on his crucial decision, and no transcript of adversary proceedings, let alone a "summary agreed to by the parties," will do for this purpose. The judge has to try to learn all there is to know about the entire situation.

B. Jurisdiction

Once the courts' independence and interdependence are thus established in relation to prior proceedings in a sister state, it becomes all the more important to ascertain the forum in which the new proceedings can be properly entertained.

A concept of jurisdiction which has been developed entirely for purposes of adversary processes has hampered the recognition of what have long been recognized abroad as the exigencies of a separate category of extralitigious proceedings in which the state, through its judicial and administrative agencies, acts, with the parties' assistance, as *parens patriae*. It is particularly in conflicts cases that the adversary concept of jurisdiction is responsible for much of the difficulty. Thus, even under the new Uniform Support Act, support duties can still be imposed only by the deserter's responding state, although it is the dependent's initiating state which is usually more familiar with the latter's needs and thus more able to exercise a centralized control over his affairs.⁴⁰ In the interstate law of child custody we are similarly threatened with that obsolete scheme of personal jurisdiction which even in adversary proceedings is quickly losing both meaning and effect,⁴¹ and which in *parens patriae* proceedings lacks both foundation and purpose.⁴²

39. Draft, *supra* note 6, § 8. (Emphasis added.)

40. For a proposal that would, within the newly emerging system of a near-nationwide jurisdiction, shift the decision to the dependent's state, see TREATISE § 84, at 278-79; Ehrenzweig, *Interstate Recognition of Support Duties*, 42 CALIF. L. REV. 382, 396-99 (1954); Lyman, *Proposed Amendments of the California Reciprocal Enforcement of Support Act*, 42 CALIF. L. REV. 400 (1954).

41. See TREATISE §§ 27-33; Ehrenzweig, *The Transient Rule of Personal Jurisdiction—The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

42. We may hope that *May v. Anderson*, 315 U.S. 428 (1953), which could be interpreted as requiring such jurisdiction in custody cases, will remain limited to its facts. See TREATISE § 87, at 292. However, abolition of the adversary approach should not,

I submit that there is a fundamental need for concentrating the responsibility for the interstate child at any one time in one court—the “guardianship court” in the parlance of other countries. As suggested earlier, this ordinarily exclusive jurisdiction should probably be in the state of the child’s permanent abode, which, except in migratory cases, will usually coincide with the state in which the marriage dissolution or separation was obtained. It is that court which will have to make ultimate decisions and which will, for that purpose, keep the child’s dossier containing all information obtained by any means, not only in adversary proceedings between the parents but also through welfare agencies, court investigators, or the police.⁴³ Other courts exercising temporary jurisdiction by virtue of the child’s transient presence or by virtue of nondomiciliary or pseudo-domiciliary divorce proceedings may be authorized to take emergency measures,⁴⁴ but such courts should at any time yield to the guardianship court of the child’s permanent abode, which is in a better position to supervise his welfare. The *Sampsell* rule of an altruistically exercised concurrent jurisdiction would thus prevail over both the Draft’s complex attempt to adapt unadaptable adversary concepts and Currie’s anarchic jurisdiction of all states with a “legitimate interest.”

Perhaps issue can be joined most easily and effectively if the new beginning urged in these pages is formulated as a proposed rival Draft Uniform Act.

III. COUNTER-PROPOSAL FOR A UNIFORM INTERSTATE CUSTODY ACT⁴⁵

Article 1. *Permanent Jurisdiction: The Guardianship Court*

a. At any one time there shall be only one guardianship court for any child whose custody requires judicial action owing to the lack of, abuse or neglect by, or conflict between natural parents.

of course, deprive parents of their natural right to participate in the proceedings whenever possible.

43. Ex officio jurisdiction is of course not foreign to the Anglo-American legal system. The entire concept of Chancery process determined by the “King’s conscience” supports this institution. On the history and relative merits of ex officio and adversary proceedings in the supervision of trusts, see, e.g., Fratcher, *Fiduciary Administration in England*, 40 N.Y.U.L. Rev. 12 (1965). See also note 20 *supra*.

44. See, e.g., Dölle, *Über einige Kernprobleme des internationalen Rechts der freiwilligen Gerichtsbarkeit*, 27 RABELS ZEITSCHRIFT 201, 220-25 (1962).

45. This proposal is patterned in part on Professor Ratner’s Draft, *supra* note 6, and in part on the Hamburg Draft Convention of the Recognition of Orders on the Custody of Infants, 49th Conference of the International Law Association, 1960. See *Document*, 9 AM. J. COMP. L. 519-21 (1960). For another draft, see Kegel, *Zur Reform des deutschen internationalen Vormundschafts—und Pflegschaftsrechts*, in 2 VOM DEUTSCHEN ZUM EUROPÄISCHEN RECHT (FESTSCHRIFT FÜR DÖLLE) 217, 241-56 (1963).

Such court shall have exclusive jurisdiction to issue a permanent custody decree and establish and maintain a dossier containing all pertinent facts and proceedings.

b. If no other court has previously acted as a guardianship court, the guardianship court shall be that court in whose territory the child has his permanent abode and has been present for at least six months. Otherwise, such jurisdiction shall be acquired only through transfer. While the guardianship court shall make every effort to secure personal jurisdiction over all natural and adoptive parents, such jurisdiction shall not be required.

Article 2. *Temporary Jurisdiction*

a. Any court in whose territory the child is present shall in cases of urgent need have temporary jurisdiction to issue a temporary custody decree and shall advise the guardianship court of any action taken. Such jurisdiction may also be assumed by any court in which proceedings for divorce, annulment, or separation are commenced. Upon the completion of six months of presence and the acquisition of a permanent abode by any child within the territory of the court thus exercising temporary jurisdiction, the court exercising such jurisdiction shall request the guardianship court for a transfer of its jurisdiction and of the child's dossier. The guardianship court shall comply with such request if it finds the child's presence and change of permanent abode established to its satisfaction.

b. If no court has yet acted as the guardianship court, the court of temporary jurisdiction shall assume jurisdiction as the guardianship court upon the completion of six months of presence and the acquisition of a permanent abode by the child within its territory.

Article 3. *Jurisdiction To Rescind or Modify*

Any court having permanent or temporary jurisdiction may rescind or modify a (previous) decree after having secured such records, transcripts and other information as may be available in the court which has made such decree or elsewhere; provided that a prior decree shall have the res judicata effect that it would have in the court that made it as to the legal and factual issues adjudicated thereby; and provided further that if the child has been removed in an attempt to seek a change of custody in disobedience to such decree, only the guardianship court shall order such rescission or modification.

IV. CONCLUSION

This Draft Uniform Act is of course offered merely as a starting point for further discussion and as an illustration of the need for and the potential value of examining foreign legal systems and thoughts.

The American Bar Association has had the courage and the foresight to initiate the preparation of a Uniform Act. For many years it has also repeatedly and consistently stressed the overriding importance and promise of international cooperation. Would it be amiss then to suggest that the Association and other draftsmen of uniform legislation should, before taking the final steps toward the adoption of a Uniform Interstate Custody Act, engage in a thorough study of solutions developed elsewhere during the past century for problems which are identical with ours in both legal and human terms?