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CHILD CUSTODY IN A FEDERAL SYSTEM

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AMONG the most difficult of judicial functions is the determination of a child's custody after its parents have separated. The difficulties are acute enough when all the parties remain in the same place; when the parties are in different states, an additional perplexing problem arises as to which state should have authority to make the custody decision. This broad question can be resolved into three distinct though interrelated issues: (1) what state may initially determine custody; (2) what state may later modify that determination; (3) to what extent is such a determination binding on other states.

The Constitution allocates judicial authority among the several states primarily through the due process and the full faith and credit clauses. In recent years due process requirements for the exercise of jurisdiction by state courts, as delineated by the Supreme Court, have been concerned not so much with the presence of the parties or the subject matter of the litigation within the territory of the state, as with the fairness to both parties of the place of trial.[1] The full faith and credit directive has functioned to inhibit relitigation of matters once decided and to maintain federal unity through nationwide recognition and enforcement of state judgments.[2]

Distinctive aspects of child custody litigation, however, make the application of these constitutional policies more troublesome in such cases than in suits for money or other property. Custody adjudications always involve the interests of at least three persons; the child, although not formally a party, is vitally affected by the outcome. Pertinent evidence is usually most accessible in the locality of the child's home, and courts frequently use field investigators to unearth it. Custody decrees are modifiable on the basis of a subsequent change in circumstances and in some states on the basis

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1 See EHRENZWEIG, CONFLICT OF LAWS, pt. 1, at 88 (1959); *Symposium, Jurisdiction; Current Problems and Legislative Trends,* 44 IOWA L. REV. 247 (1959); *The Supreme Court, the Due Process Clause, and In Personam Jurisdiction of State Courts: From Pennoyer to Denckla: A Review,* 25 U. CHI. L. REV. 569 (1958).

2 See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 COLUM. L. REV. 1 (1945); articles collected in CHEATHAM, GOODRICH, GRISWOLD & REESE, CONFLICT OF LAWS 250 (1957).

of prior but unconsidered events as well.[3] If the child has left the state issuing the decree, the prevailing parent may have to seek enforcement in the state where the child is physically present. The natural desire for prolonged custody or the acrimony arising from the separation may result in frequent attempts by either parent to place the child out of reach of the other and in repeated litigation.

As a result there is little agreement as to the proper basis for allocation of custody jurisdiction and the extraterritorial effect of a valid decree.[4] The courts have not yet articulated a principle upon which to base workable, jurisdictional rules that satisfy community needs, although such a principle can be derived from those needs.

THE STATE COURT DECISIONS

In some state court cases the legal presence of the defendant provides the basis for initial custody jurisdiction[5] in accordance with the rule of *Pennoyer v. Neff*[6] that a state may exercise authority to decide a case without infringing due process of law when the defendant is domiciled, resident, or personally served there.[7]

But *Pennoyer v. Neff* also recognizes jurisdiction based upon the presence of a disputed "res," and most courts, as well as the first *Restatement*,[8] allocate initial custody jurisdiction to the state of the child's domicile when proceedings are begun, regarding the status of the child as a "res" there present.[9] Since the choice of a home, generally the prime ingredient of domicile, cannot ordinarily be made by a child, the domicile of one of the parents is usually controlling after the separation.[10] Many states consider the child

3 See New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947); Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948); RESTATEMENT (SECOND), CONFLICT OF LAWS § 117(b) (Tent. Draft No. 4, 1957).

4 See Annot., 9 A.L.R.2d 434 (1950); Annot., 4 A.L.R.2d 7 (1949); 53 HARV. L. REV. 1024 (1940); 80 U. PA. L. REV. 712 (1932).

5 See cases collected in Annot., 9 A.L.R.2d 434, 440 n.17 (1950); *cf.* De La Montanya v. De La Montanya, 112 Cal. 100 (1896). See also Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948).

6 95 U.S. 714 (1878).

7 A defendant may also consent to the personal jurisdiction of a court, usually by appearing without objection to jurisdiction, and in some circumstances citizenship may provide the basis for such jurisdiction. See EHRENZWEIG, *op. cit. supra* note 1, at 89; GOODRICH, CONFLICT OF LAWS 195-99 (3d ed. 1949). Adequate notice to the defendant is assumed.

8 RESTATEMENT, CONFLICT OF LAWS §§ 117, 145 (1934).

9 See cases collected in Annot., 9 A.L.R.2d 434, 439 n.15, 442 (1950). See also EHRENZWEIG, *op. cit. supra* note 1, at 275; GOODRICH, *op. cit. supra* note 7, at 421.

10 See GOODRICH, *op. cit. supra* note 7, at 60, 83, 90; RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 9, 15, 30, 32 (Tent. Draft No. 2, 1954). The *Restatement* says that "domicile is the place, generally the home, which the law assigns a person for certain legal pur-

to be domiciled with its father;[11] the *Restatement* prefers the domicile of the parent with whom the child is living.[12] A number of cases, in effect treating the child as the "res," assign custody jurisdiction to the state where the child is physically present, because that state has immediate access to the child and an interest in its welfare.[13]

These rules are not mutually exclusive. Some states have not found it necessary to choose between them and accept jurisdiction on the basis of any of the three.[14] In *Sampsell v. Superior Court*[15] the Supreme Court of California declared that two or more states have concurrent custody jurisdiction when the child's domicile, the child, and the defendant are not in the same place, but that one state may abstain in favor of another with a greater interest in the child. The tentative *Second Restatement* has adopted this position.[16]

The same spectrum of rules is displayed by the state cases dealing with jurisdiction to modify custody decrees,[17] but other factors also provide a basis for the exercise of such authority. Continuing jurisdiction to modify may sometimes be asserted by the court that made the initial decree,[18] and many courts infer jurisdiction to

poses." *Id.* § 9. The meaning of the concept varies with the problems to which it is relevant, such as jurisdiction of a court, the authority of a state to tax, the right of an individual to vote, the proper place for probate. See COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS 194-210 (1942); Reese, *Does Domicile Bear a Single Meaning?*, 55 COLUM. L. REV. 589 (1955).

11 See GOODRICH, *op. cit. supra* note 7, at 90-92; STUMBERG, CONFLICT OF LAWS 42 (3d ed. 1963).

12 RESTATEMENT, CONFLICT OF LAWS § 32 (1934); see RESTATEMENT (SECOND), CONFLICT OF LAWS § 32 (Tent. Draft No. 2, 1954). After a valid custody decree the child takes the domicile of the prevailing parent. See GOODRICH, *op. cit. supra* note 7, at 421-22; STUMBERG, *op. cit. supra* note 11, at 42.

13 See cases collected in Annot., 9 A.L.R.2d 434, 440 (1950); Annot., 4 A.L.R.2d 7, 16 (1949). See also RESTATEMENT (SECOND), CONFLICT OF LAWS § 117 (Tent. Draft No. 4, 1957); Gillman v. Morgan, 158 Fla. 605, 29 So. 2d 372 (1947); Kovacs v. Brewer, 245 N.C. 630, 97 S.E.2d 946 (1957).

14 Sampsell v. Superior Court, 32 Cal. 2d 763, 769, 197 P.2d 739, 743-44 (1948) and cases cited therein; see Stansbury, *Custody and Maintenance Across State Lines*, 10 LAW & CONTEMP. PROB. 819 (1944). Compare domicile jurisdictions collected in Annot., 9 A.L.R.2d 434, 442 (1950), physical presence jurisdictions collected in Annot., 4 A.L.R.2d 7, 16 (1949), and in personam jurisdictions collected in Annot., 9 A.L.R.2d 434, 440 n.17 (1950).

15 32 Cal. 2d 763, 197 P.2d 739 (1948), opinion by Traynor, J. See text accompanying note 139 *infra*.

16 RESTATEMENT (SECOND), CONFLICT OF LAWS § 117 (Tent. Draft No. 4, 1957).

17 See cases collected in Annot., 9 A.L.R.2d 434, 453-57 (1950); Annot., 4 A.L.R.2d 7, 32-35, 41-64, 85-95 (1949).

18 See cases collected in Annot., 9 A.L.R.2d 434, 457-58 (1950); Annot., 4 A.L.R.2d 7, 35-41 (1949); GOODRICH, *op. cit. supra* note 7, at 423-24; Stansbury, *supra* note 14, at 825, 832.

modify an out-of-state decree from jurisdiction to enforce it.[19]

Interstate recognition of valid foreign custody decrees is correspondingly variable. Most states extend full faith and credit or comity to such decrees by enforcing them without relitigating the issues and by considering modification, if requested, only on the basis of subsequent events or prior events not presented to the initial court.[20] But some courts deny full faith and credit to such decrees in proceedings to enforce or modify them, by readjudicating the previously litigated facts.[21] The state where the child is physically present often asserts a predominant interest in the child's welfare as justification for such relitigation,[22] and under the *Sampsell* concurrent jurisdiction rule a state with authority to determine custody is expected to give "respectful consideration" to a valid prior decree but remains free to relitigate the entire matter.[23]

A manifest weakness of the "no full faith and credit" view is avoided by the courts that enforce foreign custody decrees without relitigation or modification when the losing parent holds the child in defiance of the decree and thus lacks "clean hands."[24] Many of these courts, however, improvising a further variation on the theme, allow a winner who has brought the child into the jurisdiction in violation of the loser's visitation rights, to relitigate a subsequent modification by the initial forum giving the loser custody.[25]

THE SUPREME COURT DECISIONS

The foregoing medley of discordant decisions provides neither a consistent set of rules nor an intelligible guide for those who

19 See cases collected in Annot., 4 A.L.R.2d 7, 41-42, 43-47, 93-95 (1949).

20 See cases collected in Annot., 9 A.L.R.2d 434, 454-57 (1950); Annot., 4 A.L.R.2d 7, 41-42, 54 (1949); Annot., 160 A.L.R. 400 (1946); Annot., 116 A.L.R. 1299 (1938); Annot., 72 A.L.R. 441 (1931); Annot., 20 A.L.R. 815 (1922). See GOODRICH, *op. cit. supra* note 7, at 422-23; STUMBERG, *op. cit. supra* note 11, at 322; RESTATEMENT, CONFLICT OF LAWS § 147 (1934); *cf.* EHRENZWEIG, *op. cit. supra* note 1, at 281-93; Stansbury, *supra* note 14, at 828; RESTATEMENT (SECOND), CONFLICT OF LAWS § 117 (Tent. Draft No. 4, 1957).

21 See cases collected in EHRENZWEIG, *op. cit. supra* note 1, at 284-85; Stansbury, *supra* note 14, at 829 n.75; Annot., 4 A.L.R.2d 7, 11 n.2 (1949). A number of cases that permit relitigation of issues previously decided do so on the ground that the previous court lacked jurisdiction to make the decree. See cases collected *id.* at 64-78. None of these cases hold that full faith and credit may be denied a valid foreign custody decree. *Cf.* EHRENZWEIG, *op. cit. supra* note 1, at 283.

22 See cases cited note 21 *supra.*

23 Sampsell v. Superior Court, 32 Cal. 2d 763, 779, 197 P.2d 739, 750 (1948). See Stansbury, *supra* note 14, at 830-31; RESTATEMENT (SECOND), CONFLICT OF LAWS § 117 (Tent. Draft No. 4, 1957).

24 See cases collected in EHRENZWEIG, *op. cit. supra* note 1, at 286-90; Annot., 4 A.L.R.2d 7, 48 (1949); Annot., 107 A.L.R. 642 (1937).

25 See cases collected in EHRENZWEIG, *op. cit. supra* note 1, at 291.

must resort to institutional settlement of custody disputes. Since the issues presented arise under the federal constitution, only the Supreme Court can authoritatively resolve them. That Court has dealt with the interstate child custody problem in four cases, and it seems safe to say that they have not abated the dissonance.

The Assumptions of Halvey

In *New York ex rel. Halvey v. Halvey*[26] the Court declined an opportunity to clarify some of the basic problems of multi-state custody jurisdiction and in the exercise of judicial restraint decided to decide as little as possible. In that case the mother took the child from the family home in New York to Florida and after about a year[27] filed suit there for divorce and custody. The father served by publication, did not answer but took the child back to New York the day before entry of a default decree in favor of the mother.[28] When she claimed the child by habeas corpus, the New York courts modified the Florida decree by giving the father visitation rights and possession of the child during vacations.[29]

The Supreme Court assumed that Florida had initial custody jurisdiction, refused to consider the effect of the full faith and credit clause on custody decrees, and purported to decide only that since Florida law permitted modification on the basis of facts not previously evaluated, New York did not offend full faith and credit by modifying on the basis of the father's evidence, which had not been presented to the Florida court because he did not appear there.

But *Halvey* may have decided more by implication than by explication. The holding that full faith and credit could not prevent New York from modifying in accordance with Florida law implies that New York had due process jurisdiction to modify the decree.[30] The Court, however, said nothing specific about jurisdiction to modify except the following: "In this case the New York court, having the child and both parents before it, had a full hearing and determined that the welfare of the child and the interests of the father warranted a modification of the custody decree."[31] This sentence suggests that the presence of both parents and the

26 330 U.S. 610 (1947).

27 See New York *ex rel.* Halvey v. Halvey, 185 Misc. 52, 55 N.Y.S. 761 (1945).

28 See note 61 *infra.*

29 The New York decree also required a $5,000 bond from the wife to insure compliance. 330 U.S. 610, 612 (1947).

30 See quotation in text accompanying note 170 *infra.*

31 330 U.S. 610, 615 (1947).

child before the New York court gave it modification jurisdiction. But the conclusion is not obvious.

If, after abducting the child, the father had initiated proceedings in New York to modify the Florida decree with service upon the mother in Florida, would the New York court then have had jurisdiction to modify the Florida decree on grounds permitted by Florida law? The opinion does not answer this question, but if the answer is no,[32] should the mother be in a worse position because she must ask for habeas corpus in New York to enforce the Florida decree? True, she invokes the authority of the New York court, but to enforce, not to alter, a valid decree. Can New York compel her to submit to a modification of the decree as a condition to enforcing it? Of course, the mother's removal of the child to Florida from New York without the father's consent raised a question as to Florida's initial jurisdiction and had a bearing upon New York's authority to modify the Florida decree, but the Court did not discuss these matters.[33]

Some such misgivings are reflected in the comment of Justice Rutledge, concurring *dubitante:*

> "The result seems unfortunate in that, apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction between alienated parents. That consequence hardly can be thought conducive to the child's welfare. . . . The effect of the decision may be to set up an unseemly litigious competition between the states and their respective courts as well as between parents. Sometime, somehow, there should be an end to litigation in such matters."[34]

Justice Frankfurter, also concurring, felt that "a court which can actually lay hold of a child" may modify a custody decree but only on the basis of changed circumstances, not by substituting "its own view of what custody would be appropriate."[35] Finding no assurance in the record that Florida had jurisdiction

32 The Supreme Court later gave a negative answer to the question in May v. Anderson, 345 U.S. 528 (1953). See text accompanying note 43 *infra.* Since the child took its mother's domicile after a valid Florida decree in her favor (see note 12 *supra*), the cases resting custody jurisdiction on domicile (see note 9 *supra*) also answer in the negative as, in effect, do the cases that deny relief to an abducting parent because he lacks clean hands. See note 24 *supra.*

33 Justice Jackson, however, concurred in the result on the ground that Florida lacked initial custody jurisdiction. 330 U.S. 610, 616 (1947).

34 330 U.S. 610, 619-20.

35 330 U.S. 610, 617.

to make the initial decree or that the New York modification was not permitted by Florida law, he accepted the validity of the New York judgment.

The Ambiguity of Kovacs

The court's modus operandi in *Kovacs v. Brewer*[36] was a replica of that employed in *Halvey*. The child had lived in North Carolina with its paternal grandparents for three years, pursuant to a valid New York custody decree, when the mother petitioned for modification in New York. After a hearing in which the father and grandfather contested without objection to jurisdiction, the court modified the decree to give the mother custody.[37] The child, however, was kept in North Carolina contrary to the decree, and fourteen months later the mother brought enforcement proceedings there. The North Carolina courts, after considering both subsequent and previously litigated events, decided that the child should remain with the grandparents.

The Supreme Court neither affirmed nor reversed. It held on the authority of *Halvey* that full faith and credit would not foreclose a North Carolina modification based on a subsequent change in circumstances, as permitted by New York law, and remanded to the state court for clarification as to whether the modification rested on both prior and subsequent events or solely on the latter. Left unanswered was the question whether the full faith and credit clause forbade North Carolina to take the prior circumstances into account.[38] Justice Frankfurter, having altered his *Halvey* position, dissented from the implication he found in the majority opinion that the New York decree was entitled to full faith and credit in the absence of changed circumstances and asserted that the state where the child is physically present can decide its custody without being bound by a prior decree.

As in *Halvey*, the *Kovacs* opinion, while purporting to do no more than avoid a definitive statement on the protection afforded custody decrees by the full faith and credit clause, implied without discussion that North Carolina had due process jurisdiction to modify the New York decree in the enforcement proceedings.

[36] 356 U.S. 604 (1958).

[37] Defendants were thus probably foreclosed on two grounds from collaterally attacking jurisdiction: (a) consent (b) res judicata. See Baldwin v. Iowa State Travelling Men's Ass'n, 283 U.S. 522 (1931). *But cf.* Kovacs v. Brewer, 245 N.C. 630, 97 S.E.2d 96 (1957).

[38] See quotation note 170 *infra*.

The Blandness of Ford

A similar pattern was followed in *Ford v. Ford*,[39] which added nothing to the confusion. When the mother removed the children from the family home in North Carolina to Virginia, the father petitioned for custody in the latter state.[40] The parents then reached an agreement giving custody to the father for the school year and to the mother during vacations. On the basis of this arrangement, the Virginia court dismissed the proceedings. Nine months later the mother asked for custody in South Carolina shortly after taking the children there during summer vacation; the father contested without objection to the jurisdiction. The lower court found no change in circumstances but refused to treat the Virginia dismissal as a res judicata order fixing custody in accordance with the agreement and gave the children to the mother for the school year and to the father during vacations. The state supreme court reversed on the ground that the dismissal order was res judicata in Virginia in the absence of changed circumstances and therefore entitled to full faith and credit in South Carolina.

The United States Supreme Court did not have to decide whether the dismissal order would have been entitled to full faith and credit if made res judicata by Virginia law. Noting that private agreements are not controlling in custody proceedings, it concluded that Virginia would not treat the order as res judicata because neither the evidence, the agreement, nor the welfare of the child had been considered by the court and held that South Carolina therefore could make an independent custody determination.[41]

The Court again had no difficulty in avoiding a consideration of the effect of full faith and credit on custody decrees and was

39 371 U.S. 187 (1962).

40 See Ford v. Ford, 239 S.C. 305, 307-08, 123 S.E.2d 33, 34 (1961).

41 South Carolina's enforcement of the Virginia judgment on the basis of the full faith and credit clause presented a federal question reviewable by the Supreme Court on certiorari. See 28 U.S.C. § 1257(3) (1958); ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 15, 16, 59 (2d ed. 1951). In resolving such a question the Court will, when appropriate, independently determine the res judicata effect of the judgment under the law of the state that made it. See Barber v. Barber, 325 U.S. 77, 81 (1944); Adam v. Saenger, 303 U.S. 59, 64 (1938). The South Carolina court cited a number of Virginia cases in support of its conclusion that an agreed-upon dismissal order was res judicata in Virginia, but none of them involved a custody decree (see Ford v. Ford, 239 S.C. 305, 123 S.E.2d 33 (1961)) while other cases suggested that Virginia policy would not permit parents to foreclose by contract an adjudication of custody based upon the child's best interests. Ford v. Ford, 371 U.S. 187, 192-93 (1962); *cf.* Comment, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?*, 73 YALE L.J. 134 (1963).

saved from examining the due process requirements for initial custody jurisdiction by the father's acquiescence in the jurisdiction of the South Carolina court.[42]

The May Coalition

May v. Anderson,[43] which chronologically followed *Halvey*, purported to decide the question of initial custody jurisdiction left open in *Halvey*, but in fact decided very little. After the mother had declared her intention to keep the children in Ohio where she had temporarily taken them, the father obtained a custody decree in Wisconsin, the state of the family home, and retrieved them. The mother, personally served in Ohio, did not appear in the Wisconsin action. Five years later she retained the children after a visit, and the father petitioned in Ohio for habeas corpus, relying on the Wisconsin decree which, under Ohio law, could not be modified in such proceedings. The Ohio courts gave full faith and credit to the Wisconsin decree and returned the children to the father.

The Supreme Court reversed, dividing four ways. "The narrow issue . . . presented," said Justice Burton for a plurality of four, "was noted but not decided in *Halvey* v. *Halvey* . . . . [W]e have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present [*i.e.*, Wisconsin] may cut off her immediate right to the . . . custody . . . of her minor children without having jurisdiction over her *in personam*."[44]

The answer, surely predictable from the tautological question:[45] Wisconsin could not cut off "rights far more precious than property rights"[46] without "in personam" jurisdiction over the wife based upon her domicile, residence, or presence. Necessarily, Ohio owed no full faith and credit to a decree issued without jurisdiction. The domicile of the children, even if with the father, said Justice Burton in closing, "does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order

42 Of course, the prior Supreme Court cases provided no basis for attacking the jurisdiction on due process grounds.

43 345 U.S. 528 (1953).

44 *Id.* at 532-33.

45 Conventionally, the term "in personam jurisdiction" has been equated with the domicile, residence, or service of the defendant in the forum state, in the absence of consent.

46 345 U.S. 528, 533 (1953).

to deprive their mother of her personal right to their immediate possession."[47]

Justice Frankfurter, in a *volte face* from his position in *Halvey*, concurred on the ground that a state having a child "within its borders" may enforce a valid custody decree on comity grounds but is not compelled to give it full faith and credit, because the interest of that state in the welfare of the child overrides the "interest of national unity that underlies the Full Faith and Credit Clause." He undertook, further, to state the true meaning of the Burton opinion, declaring: "What is decided—the only thing the Court decides—is that the Full Faith and Credit Clause does not require Ohio, in disposing of the custody of children in Ohio, to accept, in the circumstances before us, the disposition made by Wisconsin."[48]

But Justice Jackson, dissenting with Justice Reed, viewed the Burton opinion as necessarily holding that Wisconsin lacked due process jurisdiction over the mother. "The Court," he stated, "apparently is holding that the Federal Constitution prohibits Ohio from recognizing the validity of this Wisconsin divorce decree. . . . If Wisconsin has rendered a valid judgment, the Constitution . . . requires every state to give it full faith and credit. The only escape from obedience lies in a holding that the judgment rendered in Wisconsin is void and entitled to no standing even in Wisconsin. It is void only if it denies due process of law."[49]

Expressing fears that "this decision will author new confusions," Justice Jackson insisted that Wisconsin, the children's domicile, was primarily concerned with their welfare and had made a valid decree entitled to full faith and credit. "If our federal system is to maintain separate legal communities," he observed, "there must be some test for determining to which of these a person belongs. If for this purpose there is a better concept than domicile, we have not yet hit upon it." He pointed out that under the plurality holding Wisconsin could not bind the mother and Ohio could not bind the father, emphasized "the claim of the children . . . to have their status determined with reasonable certainty, and to be free from an incessant tug of war between squabbling parents," and he objected to placing the convenience of a departing parent

47 *Id.* at 534.
48 *Id.* at 535.
49 *Id.* at 537.

over a child's welfare. The Frankfurter position, he thought, "reduce[s] the law of custody to a rule of seize-and-run."[50]

In the view of Justice Minton, also dissenting, the mother had challenged the enforceability in Ohio of the Wisconsin decree but not the jurisdiction of the Wisconsin court; he therefore assumed the validity of the decree but, unlike Justice Frankfurter, concluded that it was entitled to full faith and credit. Justice Clark did not participate in the decision.

Despite Justice Frankfurter's exegesis, the plurality opinion appears dedicated to the proposition that custody jurisdiction can be acquired only by a state where the defendant is domiciled, resident, or personally served.[51] Justice Burton defines the "elemental question" not in terms of full faith and credit but in terms of jurisdiction to cut off custody rights—rights more precious than property. A quotation from *Baker v. Baker, Eccles & Co.*[52] attests that "it is now too well settled to be open to further dispute that . . . a judgment *in personam* [is not entitled to full faith and credit if] it was rendered without jurisdiction over the person sought to be bound."[53] *Estin v. Estin*[54] and *Kreiger v. Kreiger*,[55] also cited, denied full faith and credit to alimony provisions in Nevada divorce decrees because Nevada lacked "power" and "jurisdiction" to make a property disposition binding on a nonpresent spouse and relied on *Pennoyer v. Neff*[56] and *New York Life Ins. Co. v. Dunlevy*,[57] both concerned with the due process requirements for jurisdiction over out-of-state defendants.

There remains Justice Burton's curious closing statement that even if Wisconsin were the children's domicile, it would not have, *certainly as against Ohio*, the jurisdiction to deprive the mother of possession. But it is difficult to derive from those four words the new and significant constitutional rule that a custody decree, though meeting due process requirements, need not be given full faith and credit if the defendant was not "present" in the state.

The plurality decision can perhaps be confined on the facts to

50 *Id.* at 539-42.
51 See Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 766-70 (1961); Hazard, *May v. Anderson: Prelude to Family Law Chaos*, 45 VA. L. REV. 379 (1959).
52 242 U.S. 394, 401 (1916).
53 345 U.S. 528, 533 (1953).
54 334 U.S. 541 (1948).
55 334 U.S. 555 (1948).
56 See note 6 *supra*.
57 241 U.S. 518 (1916).

the narrower holding that a state may not adjudicate the custody rights of a defendant parent who is not "present" and has possession of the child,[58] but the language is not so limited. The "right to custody" is declared to be "a personal right entitled to at least as much protection as [the] right to alimony," which a court lacking in personam jurisdiction "is powerless to cut off."[59] No distinction is made between a defendant parent who possesses the child and one who does not. Instead the issue is identified with the question left open in *Halvey* "whether in absence of personal service the Florida decree of custody had any binding effect on the [nonresident] husband,"[60] the child in that case having been in the possession of the plaintiff mother when the custody action was filed.[61]

The ambiguous rationale of the plurality opinion thus apparently limits custody jurisdiction to a state where the defendant is legally present.[62] But only half of the participating Justices took

58 See Hazard, *supra* note 51; *cf.* De La Montanya v. De La Montanya, 112 Cal. 101 (1896).

59 345 U.S. 528, 534 (1953).

60 *Id.* at 532-33.

61 The child was removed by the father the day before the decree (see text accompanying notes 26-28), but it is well settled that custody jurisdiction once obtained cannot be defeated by removal of the child from the state before judgment. See cases collected in Annot., 4 A.L.R.2d 7, 80 (1949). The plurality opinion in *May* makes no reference to the last minute removal of the child in *Halvey* and gives no indication that such removal has any bearing on the jurisdictional issue.

62 Domicile and physical presence of the child appear to be rejected as alternative bases for jurisdiction. Presumably the "no jurisdiction" answer of the plurality opinion would apply to the Florida decree in *Halvey* despite the physical presence of the child in that state when proceedings were begun. See note 61 *supra* & accompanying text. See also Justice Jackson's comment in his *May* dissent that under the plurality opinion "the Wisconsin courts cannot bind the mother and the Ohio courts cannot bind the father." 345 U.S. 528, 539 (1953).

A footnote to the *May* plurality opinion states: "The instant case does not present the special considerations that arise where a parent . . . leaves a jurisdiction for the purpose of escaping process or otherwise evading jurisdiction, and we do not have here the considerations that arise when children are unlawfully or surreptitiously taken by one parent from the other." *Id.* at 535 n.8. No affirmative indication is given as to the effect of such considerations on custody jurisdiction, and no inference in this regard appears warranted, particularly because: (a) The *May* case, itself, seems to have involved a kind of surreptitious removal of the children. As pointed out by Justice Jackson, dissenting: "The Ohio court specifically found that [the mother] brought the children to Ohio with the understanding that if she decided not to go back to Wisconsin the children were to be returned to that state. In spite of the fact that she did decide [in the same month that she left] not to return, she kept the children in Ohio." *Id.* at 538. (b) The *Halvey* case permitted an abducting parent to obtain a modification in the state where the child was taken and *May* cites *Halvey* with apparent approval. (c) Since a parent who departs in the aftermath of a marital dispute can not ordinarily be charged with "escaping process or . . . evading jurisdiction" of a court before a suit is filed, this reference constitutes little more than an affirmation of the well settled rule that the defendant's departure from the state after an action has been filed need not defeat custody jurisdiction. See cases cited in Annot., 9 A.L.R.2d 434, 446-47 (1950); Annot., 4 A.L.R.2d 7, 31-32, 68, 79-85 (1950). (d) Removal of the child before suit is not usually "unlawful" be-

this view. Justices Jackson and Reed rejected it outright. Justice Frankfurter necessarily rejected it by recognizing the due process validity of the Wisconsin decree and the unfettered custody authority of the state where a child is physically present. Justice Minton's assumption was contrary to it. On the issue of whether a valid custody decree is entitled to full faith and credit, three dissenting Justices said yes, one concurring Justice said no, and the plurality of four expressed no discernible opinion.[63]

THE PRINCIPAL POSITIONS ON CUSTODY JURISDICTION

From the Supreme Court cases, the state cases, the *Restatement*, and commentary emerge the following views on the allocation of authority to determine custody.

The Tentative Supreme Court Position. A state where the defendant is domiciled, resident, or personally served may make or modify a custody decree.[64] A decree may also be modified by a state requested to enforce it and perhaps by the state that initially made it. The protection afforded a custody decree by the full faith and credit clause is uncertain.

The First Restatement—Jackson Position. The state of the child's domicile may make or modify a custody decree, the child taking the domicile of the possessing parent at the time of the initial proceedings and of the prevailing parent thereafter.[65] Perhaps a decree may also be modified by a state requested to enforce it[66] or by the state that initially made it.[67] A valid custody decree

cause in most states either parent has a right to possession of the child until a custody order has been made; only a removal in violation of such an order is "unlawful." See 39 AM. JUR. *Parent and Child* § 8 (1942). Therefore, the reference to an unlawful taking probably does not relate to a removal of the child at the outset of the custody dispute; the meaning with regard to an abduction after a decree is obscure in the light of *Halvey*. (e) Whatever the meaning of "surreptitious" in view of the *May* facts and the *Halvey* decision, no basis is provided for reconciling the vague intimations of the footnote with the premise of the opinion that custody jurisdiction depends on the legal presence of the defendant.

63 The negative argument that the Court need not have decided the jurisdictional issue if the Wisconsin decree were not entitled to full faith and credit is countered by the negative argument that the Court had no need to decide the full faith and credit issue if the Wisconsin court lacked jurisdiction.

64 Consent provides an additional basis for jurisdiction. See also text accompanying notes 58-62 *supra*.

65 See notes 11, 12 *supra*.

66 Justice Jackson concurred only in the result in *Halvey*, on the ground that Florida lacked initial custody jurisdiction. Justice Reed joined the majority in both *Halvey* and *Kovacs*. The first *Restatement* did not deal with this question.

67 See RESTATEMENT, CONFLICT OF LAWS §§ 76, 105 (1934).

is entitled to full faith and credit; matters previously decided may not be relitigated in proceedings to enforce or modify it.[68]

The Frankfurter—Physical Presence Position. The state where the child is physically present has primary authority to make or modify a custody decree, although a state where the child is domiciled[69] or the defendant is legally present may also have due process jurisdiction. The state where the child is present need not give full faith and credit to a foreign custody decree but may enforce it on comity grounds.

The Sampsell—Second Restatement Position. The state where the child is domiciled, the state where the child is physically present, and the state where the defendant is legally present have concurrent authority to make or modify a custody decree, but one state may defer to the authority of another with a more substantial interest. Perhaps the state that initially made a decree may also modify it.[70] The child's domicile at the time of the initial proceedings is probably with either the father or the possessing parent, depending on the law of the forum,[71] and with the prevailing parent thereafter.[72] Custody decrees need not be given full faith and credit, but a state should give respectful consideration to the decision of another state and may enforce it on comity grounds.

THE IMPORTANT OBJECTIVES IN ALLOCATING CUSTODY JURISDICTION

Evaluation of these positions requires a statement of the goals to be achieved by resolution of the interstate custody problem. A meaningful choice cannot be made without a comparison of the social consequences likely to ensue from the alternative solutions. In defining authority to determine custody the following values are significant, though they differ in importance and concomitant attainment of all may not be possible.

First. The place of trial should be fair to the litigants. Fair venue depends upon the accessibility of the tribunal to the parties, the accessibility of the evidence to the tribunal, and the expectations of the parties as to the place of litigation.[73] Since the tribunal

68 *Id.* § 147.

69 The domicile may probably be that of either the father or the possessing parent at the time of the initial proceedings and of the prevailing parent thereafter.

70 RESTATEMENT (SECOND), CONFLICT OF LAWS § 117(b) (Tent. Draft No. 4, 1957).

71 See Sampsell v. Superior Court, 32 Cal. 2d 763, 773-74, 197 P.2d 739, 746-47 (1948).

72 See note 12 *supra.*

73 Accessibility of the tribunal to the parties involves such factors as expense and difficulty of reaching the venue, difficulty of obtaining and communicating with a lawyer

will almost certainly be more accessible to one party than to the other when they are widely separated, its location should not be subject to the arbitrary control of either.

Second. The welfare of the child is the first consideration in determining its custody; the natural desire of the parents to enjoy its society and participate in its upbringing is the second.[74] An effective custody disposition requires an evaluation of the child's physical, emotional, and educational needs and the capacity of each parent to satisfy them. *This determination should, wherever feasible, be made by the court most likely to decide correctly, i.e., by the court having maximum access to the relevant evidence.* A court's access to the relevant evidence is increased when most of the witnesses and pertinent physical locations are in the vicinity of the court and when evidence and arguments are presented on behalf of each party in an adversary proceeding.

Third. Issues resolved in a fair hearing should not be redetermined in another forum. Relitigation is destructive of the emotional and environmental stability important to the child's welfare,[75] wasteful of private and public resources, and inimical to the reasonable expectations of the initially prevailing party. For the same reasons, constant attempts to modify a custody decree should be discouraged.

Fourth. The factors that make repeated litigation undesirable suggest that two courts should not concurrently determine custody. After custody proceedings are initiated in a court with jurisdiction, no other court should exercise such authority.

Fifth. Respect by officials and residents of each state for the authoritative institutional decisions of other states and cooperation between officials in adjusting the rights and obligations of persons living in different states are necessary to the effective adjudication of child custody in a federal system.

at the venue, familiarity with the laws and customs of the venue, and these factors turn upon the nature and extent of the contracts with the venue and activities carried on there by the parties. See McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 347 P.2d 1 (1959). Compare the doctrine of forum non conveniens: Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947); EHRENZWEIG, CONFLICT OF LAWS 120-21 (1959). The requirement of an impartial tribunal is here assumed to be met in all cases.

74 See Frazier v. Frazier, 109 Fla. 164, 169, 347 So. 464, 466 (1933); RESTATEMENT (SECOND), CONFLICT OF LAWS § 117(a) (Tent. Draft No. 4, 1957); STUMBERG, CONFLICT OF LAWS 321 (3d ed. 1963); Rheinstein, *Jurisdiction in Matters of Child Custody*, 26 CONN. B.J. 44, 63-65 (1952).

75 See Stansbury, *Custody and Maintenance Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 829 (1944); STUMBERG, *op. cit. supra* note 74, at 323.

Sixth. Removal of the child by either parent in disregard of the rights of the other and abduction or retention of the child by either parent in violation of a valid decree should be discouraged.

Seventh. In most cases the child should maintain contact with both parents. Visitation rights are important and entitled to protection.

Eighth. Parents should be able to ascertain with a reasonable degree of certainty the tribunals having authority to determine custody.

Ninth. Parents should be encouraged to settle custody disputes without litigation and to respect each other's interests.

Tenth. The state where a child is physically present should have authority to protect it against mistreatment or abuse.

Eleventh. The defendant should have fair notice of custody proceedings. Such notice, whenever possible, should be given by personal service upon the defendant and in any event by that feasible method most likely to come to the defendant's attention.[76] Publication in a newspaper is not sufficient if notice can be sent by mail.[77]

EVALUATION OF THE PRINCIPAL POSITIONS

When measured against these values, none of the positions heretofore discussed offers a satisfactory basis for allocation of custody jurisdiction.

Initial Custody

All four positions encourage resort to self help at the outset of a custody dispute by placing a parent who removes the child to another state in a strong tactical position. Having gained physical custody, such a parent in most instances can either initiate proceedings in the new state or "sit tight," leaving the stay-at-home parent with no recourse other than to litigate in an inconvenient forum far from the relevant evidence or to attempt a recapture of the child.

Under the tentative Supreme Court position not only is a stay-at-home parent's choice of venue pre-empted by the parent who departs with the child;[78] apparently even a parent left with the

[76] See McDonald v. Mabee, 243 U.S. 90 (1917); cases collected in Annot., 4 A.L.R.2d 7, 87 (1949); RESTATEMENT, CONFLICT OF LAWS §§ 74, 109 (1934).

[77] See Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 94 (1952); EHRENZWEIG, *op. cit. supra* note 73, at 82.

[78] The departing parent can *initiate* custody proceedings only where the stay-at-home parent is legally present, but the parent with possession of the child is often in no hurry to go to court.

child must petition for custody where the defendant can be found.[79] The first *Restatement* gives control of the child's domicile, and therefore of the custody venue, to a parent who moves the child permanently to another state. If the father's domicile is controlling, his migration moves the custody venue whether or not he takes the child with him.[80] By placing primary authority in the state where the child is physically present, the Frankfurter position invites removal of the child by a leave-taking parent. If a non-departing parent obtains a custody decree in the home state, he may have to relitigate the entire matter upon seeking enforcement in the state where the child is located.

The *Sampsell—Second Restatement* position produces the same results. Usually no other state has concurrent jurisdiction when a child is taken to a new state by its father, because both are domiciled and physically present there.[81] If the mother leaves with the child, a non-departing father in a father-domicile jurisdiction may obtain a home state decree, but when he petitions for enforcement, the state where the child is present can claim a paramount interest and, after giving the decree respectful consideration, make a de novo custody determination. When divergent parents proceed with separate actions, conflicting decrees may ensue as in *Stout v. Pate* (California)[82] and *Pate v. Stout* (Georgia)[83] where the parties litigated in two states and each decision favored the resident parent; the Supreme Court discreetly folded its tent and silently stole away.[84] But a decree must be enforced in the state where the child is located, and therefore under both the Frankfurter and *Sampsell* positions that state usually has the last word.[85]

79 See text accompanying notes 59-61 *supra; cf.* note 62 *supra.*

80 See STUMBERG, *op. cit. supra* note 74, at 41-42; Pieretti v. Pieretti, 13 N.J. Misc. 98, 176 Atl. 589 (Ch. 1935). If a mother moves the child from a father domicile state to a state that places the child's domicile with the possessing parent, it is not clear which state has jurisdiction on the basis of domicile. If each may apply its own test of domicile, concurrent jurisdiction is the result. Some states apparently assign the child a domicile with the "innocent" parent, thereby requiring an assessment of fault between the spouses as a preliminary to allocation of custody jurisdiction. See Stansbury, *supra* note 75. The Supreme Court has long since abandoned as unworkable such a basis for divorce jurisdiction. See Williams v. North Carolina, 317 U.S. 287 (1942); Haddock v. Haddock, 201 U.S. 562 (1906).

81 The home state would have jurisdiction if the departing father petitioned there for custody—an unlikely procedure.

82 120 Cal. App. 2d 699, 261 P.2d 788 (1953).

83 209 Ga. 786, 75 S.E.2d 748 (1953). See also *Ex parte* Peddicord, 269 Mich. 142, 256 N.W. 333 (1934); Wilson v. Wilson, 136 Va. 643, 118 S.E. 270 (1923).

84 *Cert. denied,* Stout v. Pate, 347 U.S. 968 (1954); *cert. denied,* Pate v. Stout, 347 U.S. 968 (1954).

85 See *Ex parte* Peddicord, 269 Mich. 142, 256 N.W. 333 (1934); Wilson v. Wilson, 136 Va. 643, 118 S.E. 270 (1923). *Sampsell* upheld the custody jurisdiction of California

Of course, the state where a child is physically present has an interest in its welfare—an interest which may be shared by several states.[86] But an interest in the child cannot justify the exercise of custody jurisdiction.[87] The court with fullest access to the pertinent evidence, and therefore best able to safeguard the child's welfare, will not necessarily be in a state where the child is domiciled or present and is not likely to be in a state to which the child has just been taken. The interest of such states in the child may provide a cogent reason for not exercising jurisdiction. No state is interested in providing an unfair or inadequate forum for the determination of child custody. On the contrary, all states are interested in the orderly allocation of jurisdiction to the forum most capable of doing justice.

While every state has authority to protect children there present from mistreatment or abuse, such authority need not imply jurisdiction to bind an out-of-state parent by a custody decree.[88] If the parent present with the child is guilty of mistreatment, the child can be taken from that parent in a proceeding by the state. But a stay-at-home parent should not be compelled to litigate custody in an inconvenient forum that lacks full access to the evidence, simply because the parent with the child is subject to control by that forum.[89] A petition for custody by the possessing parent on the ground that the stay-at-home parent is likely to abuse the child need not be considered by the state where the child is located as long as the child is in no present danger and another forum is better able to make the decision.[90] Nor should the absence of the child seriously inhibit the exercise of jurisdiction by the latter

over a mother and child who went from California to Nevada and then to Utah (see text accompanying note 139 *infra*) but if Utah follows the *Sampsell* rule, the father would probably have been better advised to proceed directly in that state.

86 A state ordinarily has an interest in the custody of a child when the child or one of the persons claiming custody resides there.

87 Comparative state interest is of greater significance in choosing the rules of decision to be applied in a case with multi-state contacts than in allocating jurisdiction to hear it. See note 185 *infra*. However, a state with no interest in the child should seldom exercise custody jurisdiction. See note 115 *infra*.

88 See McMillan v. McMillan, 114 Colo. 247, 158 P.2d 444 (1945); Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 625 (1925); People *ex rel.* McGrath v. Gimler, 600 N.Y.S.2d 622 (1946); GOODRICH, CONFLICT OF LAWS 421 (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS §§ 118, 148 (1934).

89 If the out-of-state parent elects to initiate custody proceedings in the state where the child is located, that state would then be an appropriate venue. See text accompanying notes 117-19 *infra*.

90 See cases cited in note 88 *supra*. Usually, whatever the contentions, both parents are fit to have custody, and the custody determination depends upon which can provide the better care.

forum. If the court wishes to question the child, the possessing parent can be required to bring it to the hearing or suffer an adverse decision.

Modification

In the allocation of initial custody jurisdiction the four principal positions thus do not discourage unilateral removal of the child and in many situations they fail to provide a forum fair to both parents with maximum access to the relevant evidence. Nor do they achieve these goals in allocating jurisdiction to modify custody decrees.

A losing parent is encouraged to remove the child to another state in violation of an initial decree if that decree may be modified in the second state during proceedings brought by the winner to reclaim the child.[91] Even if the second state will modify only on the basis of a subsequent change in circumstances, the loser by these tactics may, without regard to the expectations or convenience of the prevailing parent, obtain a new determination of custody in a forum of his own choosing far removed from the relevant evidence.

Under the Frankfurter and *Sampsell* positions, the loser can also *initiate* a modification petition in the second state. The first *Restatement* position, however, permits such a petition to modify only at the child's domicile with the prevailing parent.[92] In most instances that domicile provides a fair venue near the pertinent evidence, but it may not provide such a venue if the prevailing parent has allowed the child to live with the loser for a long period or has moved the child to another state in violation of the loser's visitation rights, and when a decree divides custody between the parents, both the domicile and physical presence rules may encourage successive attempts at modification as the custody shifts back and forth. Nor is the court that made the original decree per se a desirable venue for modification; after the parties have moved away, that place of trial may be inconvenient and no longer close to the evidence.

91 The modification jurisdiction of an enforcing court is recognized by the tentative Supreme Court position, the Frankfurter position, the *Sampsell* position, and perhaps by the first *Restatement* position. Some enforcing courts, however, refuse to consider modification when the defendant lacks clean hands. See note 24 *supra*. Criminal prosecution for kidnapping is not an appropriate device for dealing with abduction of a child by a parent in violation of a custody decree. Nor have contempt proceedings or surety bond requirements proved effective in deterring such conduct. See Annot., 4 A.L.R.2d 7, 15 (1949).

92 Possibly, modification could also be requested in the state that made the prior decree. See note 18 *supra*.

Enforcement

By according full faith and credit to valid custody decrees, the first *Restatement* position prevents a relitigation of issues in enforcement and modification proceedings and thus makes abduction and repeated litigation after an initial decree less attractive. The Frankfurter and *Sampsell* positions produce the opposite effect by permitting a trial de novo in the state where the loser wrongfully retains the child. If the first ruling is overturned, the second round loser can try for a third decision by using similar tactics to repossess the child.[93] The tentative Supreme Court position, by avoiding the full faith and credit issue, also tends to invite such conduct by the last loser.

The no-full-faith-and-credit rule cannot be rehabilitated by a clean hands exception that bars an abducting loser from relitigating in a second state.[94] In the first place, the exception almost swallows the rule by requiring interstate enforcement of custody decrees in the large number of cases that involve wrongful abduction or retention of children.[95] In the second place, the exception is contrary to the rule's rationale that the state's interest in the child justifies a de novo determination of custody. The clean hands doctrine punishes the wrongdoing parent, but if the "interest" thesis is sound, the court should make an independent custody determination to protect the child regardless of the transgressions of the parents.[96] In the third place, the exception to the exception, that an initially prevailing parent who has moved the child in violation of the loser's visitation rights is not barred from relitigating a modification giving the loser custody,[97] is inconsistent with the clean hands principle unless visitation rights are so unimportant that their impairment is noncontaminating.

To reconcile the punishment premise of clean hands with the interest-in-the-child premise of no-full-faith-and-credit, it has been suggested that the clean hands doctrine works in the child's best interest because "stability of environment . . . in itself is an important factor in the welfare of the child."[98] But this sound observation does not bolster the clean hands exception so much as it undermines the rule denying full faith and credit to custody decrees.[99]

93 See Stout v. Pate, 120 Cal. App. 2d 699, 261 P.2d 788 (1953).
94 See text accompanying note 24 *supra*.
95 See cases cited in note 24 *supra*.
96 See White v. White, 77 N.H. 26, 86 Atl. 353 (1913).
97 See text accompanying note 25 *supra*.
98 EHRENZWEIG, *op. cit. supra* note 73, at 278; Stansbury, *supra* note 75, at 829.
99 See STUMBERG, *op. cit. supra* note 74, at 323; 53 HARV. L. REV. 1024, 1030 (1940).

Current Trends and Constitutional Principles

The position of the *Second Restatement* probably reflects an inclination in the cases and the commentary[100] toward the view that authority to determine custody may rest with several states, each free to accept or decline jurisdiction, to relitigate a prior decision or adopt it on comity grounds. The amorphous concepts of comity and concurrent jurisdiction, however, do not furnish a workable basis for allocation of custody jurisdiction. Since their application depends upon the unpredictable discretion of the courts of each state, they cannot provide a uniform national policy where one is badly needed. They promote continuing uncertainty in the resolution of custody disputes, continuing insecurity in the relationship of the child to its parents, and continuing expense to the individuals and the community. In an area characterized by interminable litigation, the res judicata policy of full faith and credit and the fair venue policy of due process have particular relevancy. Protecting the child's welfare requires not an abandonment of these policies but an intelligent application of them. Such an application should implement the social objectives heretofore discussed.

THE PRINCIPLE OF THE ESTABLISHED HOME

What method of allocating custody jurisdiction would maximize the achievement of those objectives? The court most likely to make a correct decision is the court having greatest access to the relevant evidence, and that court usually will be located in the state where the child has an established home[101]—an established home being the last place where the child has lived with a parent[102] for sufficient time to become integrated into the community. Such integration involves becoming familiar with the physical and cul-

100 See EHRENZWEIG, *op. cit. supra* note 73, at 275; Rheinstein, *supra* note 74, at 44; Stansbury, *supra* note 75.

101 See STUMBERG, *op. cit. supra* note 74, at 321. "If the foreign proceedings have taken place in the state where the child habitually lives, not necessarily where it is technically domiciled, it would seem desirable that other state courts should decline to use their power merely because of the temporary presence of the child." *Id.* at 323.

"In all of [the cases in which the court has disregarded a foreign decree on the ground of a material change in circumstances] which the writer has discovered, an existing family unit in the forum state was affected by the litigation. . . ." Stansbury, *supra* note 75, at 830. See also Langan v. Langan, 150 F.2d 979 (D.C. Cir. 1945); authorities cited in note 103 *infra*.

102 Or with some person acting as parent when a residence for the child is not maintained by either parent.

tural environment, making close personal attachments, and adjusting to an educational pattern.

In the vicinity of such an established home should be found a substantial number of persons who are familiar with the child and its family. A court located there can hear those witnesses and, through a field investigation by court officials, also can examine the environment in which the child has lived.[103]

Initial Custody

In most cases the established home at the outset of custody litigation is at the place where the child last lived with both parents, but after the separation and before legal action a child may acquire a new established home by living with one parent long enough to become integrated into another community. The courts located there are then in the best position to ascertain the present needs of the child and the present capacity of the parent in possession, although facts relating to the capacity of the other parent may be somewhat less accessible.[104]

The established home of the child also provides a venue which in most cases is fair to both parents, not only because the evidence is more readily available but also because that location is probably accessible to both and each may reasonably expect custody to be determined there.[105] As long as one parent resides in the state, the nonresident is not unfairly inconvenienced by being required to litigate where his child has lived for a substantial period and where he can anticipate the custody decision will be made. His participation or his acquiescence in the maintenance of a home for the child provides a significant contact with the state and suggests acceptance of its custody judisdiction.[106]

Jurisdiction at the established home minimizes the advantage to be gained by taking the child to another state at the outset of the custody dispute. Since the non-departing parent may initiate proceedings in the home state, the leave-taker cannot control the venue. Jurisdiction shifts to the second state only when the stay-

103 Taylor v. Jeter, 33 Ga. 195 (1862); *In re* Penner, 161 Wash. 479, 297 Pac. 757 (1931); Annot., 4 A.L.R.2d 7, 13-14 (1949).

104 So, too, after the separation a child might acquire an established home by living for a sufficient time with a person exercising parental supervision.

If a parent moves with the child from one place to another within a state, the state may be considered as the community for established home purposes because its courts will have greatest access to relevant evidence within the state and the local venue may be adjusted on the basis of such access.

105 See note 73 *supra*, and cases cited in note 103 *supra*.

106 See text accompanying notes 148-51 *supra*.

at-home parent fails to take action for a period long enough to permit the child to acquire a new established home.[107]

A stay-at-home parent who does not know where the leave-taker has gone with the child can file a timely action in the home state to establish jurisdiction, deferring personal service until they have been located.[108] However custody authority is allocated, an abductor may try to conceal the location of the child in order to forestall action by the other parent.[109] When the abductor and the child cannot be found until a new established home exists, the goal of providing a venue with maximum access to the evidence conflicts with the goals of providing a fair venue free from the arbitrary control of either party and diminishing the incentives for concealment of the child. But the latter values appear to outweigh the former, especially because substantial evidence usually remains available at the first home. The initial state can probably make a valid custody disposition after published notice when a departing parent has disappeared with the child,[110] but the hearing may well be deferred until the child is found since no decree can be enforced until then.[111]

The concept of the established home thus provides a rational principle for allocation of custody jurisdiction, but application of the principle to specific situations presents additional problems.

(1) While in many cases the established home location will be obvious, in others it may involve a difficult factual determination. The time required for a child to become integrated into a community on the basis of the factors suggested will vary with the

107 The usual time lag between filing the action and trial should not operate to divest jurisdiction once obtained. When the delay is substantial, a prompt preliminary hearing to determine custody pendente lite is usually available.

108 Service should ordinarily be made by manual delivery or registered mail. See notes 76, 77 *supra*. If the absent parent does not retain possession of the child and cannot be located, service on the person with whom the child resides and mailing to the last known address of the absentee would probably satisfy due process.

109 In most cases the stay-at-home parent soon ascertains the whereabouts of the departing parent and the child from statements made by the leavetaker before departure; knowledge about the leavetaker's family, friends, employment, plans, and personal affairs; and subsequent communications from the leavetaker concerning money, property, personal effects, and divorce proceedings.

110 See text accompanying notes 76, 77 *supra*.

111 The state where the child is physically present should enforce the decree without considering modification if the prevailing parent proceeds promptly to obtain and enforce the decree after locating the child. See text accompanying notes 123, 171-76 *infra*.

A default decree based on published notice may be justified if the non-departing parent may thereby obtain the assistance of law enforcement officials in locating the child. See note 121 *infra*.

Any proceedings initiated in the second state by the departing parent after creation of an established home should be dismissed upon proof of the prior pending action.

age and intelligence of the child, the capacity of the parents, and the nature of the environment. After the child has resided for more than a short period with a parent who has removed it to a second state, the identity of the court with custody jurisdiction may become uncertain.[112] Of course, an aura of unpredictability surrounds the judicial application of every rule, and as a basis for jurisdiction the established home concept probably creates no greater uncertainty than domicile and a good deal less than comparative state interest. But the area of uncertainty is reduced if the time necessary to create an established home is defined.

Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable criterion for identifying the established home. While children under two years of age do not usually have close friends or an organized pattern of education and cannot become as familiar with the environment as older children, the doctors, nurses, domestic helpers, baby sitters, neighbors, and visitors likely to become acquainted with a young child and its family during half a year probably constitute the largest source of evidence relating to its custody.

(2) If the child has not lived in any one place long enough to acquire an established home, the place of the child's last non-transient abode with both parents is the most significant source of evidence about the family and provides a venue convenient at least to the stay-at-home parent, free from the arbitrary control of either, and probably consistent with their reasonable expectations.[113]

(3) When parents and child leave the established home state before the separation and do not thereafter return, the appropriate custody venue, until a new established home exists, is probably the state of the last non-transient family abode. Although much of the relevant evidence may remain in the prior home state, more recent evidence about the family is present at the last non-

112 A litigated decision of the jurisdictional question in either state would bind both parties, but contradictory default judgments would produce protracted litigation.

113 If a child born after separation of the parents has no established home when custody proceedings are begun, the place of its residence is probably the venue most nearly in accord with the reasonable expectations of the parents. Although the mother may control the custody venue by removing an unborn child to another state at the outset of the marital dispute, a pregnant mother is not likely to be strongly motivated in her moves by possible future litigation over custody, and no father-child relationship as yet exists to be disrupted by the move. The custody of a new-born child will, of course, almost always be given to the mother, but determination of visitation rights makes the place of trial important to the father.

transient abode and litigation there usually better fits the convenience of the stay-at-home parent and the expectations of both.

(4) But custody should not ordinarily be adjudicated in a state where none of the parties resides at the outset of the litigation, though it be the state of the established home or the last non-transient abode: (a) in most cases that venue is inconvenient to both parents, although occasionally it may remain congenial to a parent in an adjoining state;[114] (b) the accessibility of evidence in that venue is subtantially reduced by the inhibition upon a full adversary presentation that results from the non-residence of all the persons involved in the dispute; (c) that state no longer has any interest in adjusting the relationship of the parties.[115] The non-possessing parent may petition for custody in such a state before departing or while the possessing parent or the child lives there, but when all are gone, the reasonable alternative venue is the place where the child resides when proceedings are begun.[116]

(5) The question remains whether the parties may consent to the exercise of jurisdiction by a court that is not in the established home state. A forum selected by one parent and accepted by the other without objection provides a venue convenient to both in which a full adversary proceeding is likely to occur. Since such an adversary proceeding increases the availability of the evidence and the probabilities of a correct decision, the same values that underlie the established home principle support the jurisdiction of such a forum. Consent has long provided a basis for jurisdiction over person in conventional two-party litigation;[117] in custody

114 The residence of the child would ordinarily be the most convenient venue to the possessing parent, while both of these venues would be inconvenient to a non-possessing parent who had moved a substantial distance from the home state. In any event, a parent who is left with the child in the home state and then moves to a new state probably should not be required to litigate custody in a forum that has become inconvenient.

115 It has previously been suggested that a state's interest in a child does not justify the exercise of custody jurisdiction. See note 87 *supra* and accompanying text. It is here suggested that the *absence* of an interest in the child on the part of a state is a significant reason why that state should not exercise custody jurisdiction. See note 118 *infra*.

116 If the child attends a boarding school or lives temporarily with friends or relatives, jurisdiction should remain with the state where the possessing parent continues to maintain a residence for the child, but if no such residence is maintained, venue should be at the place where the child resides with a person acting as parent.

117 See EHRENZWEIG, *op. cit. supra* note 73, at 89. A court's jurisdiction over the subject matter of litigation (sometimes referred to as the "competency" of the tribunal) is generally derived from the state or federal constitution and statutes. State statutes or constitutional provisions identify the courts that are authorized to decide cases involving the subject matter of child custody. Such subject matter jurisdiction (*i.e.*, competency) cannot ordinarily be conferred on a court by consent of the parties. See RESTATEMENT, JUDGMENTS § 7 (1942); EHRENZWEIG, *op. cit. supra* note 73, at 73 n.6, 74, 89 n.8. The authority of a court to adjudicate rights and obligations relating to a "res" is also sometimes called subject matter jurisdiction. *Id.* at 74; *cf.* note 146 *infra*.

proceedings, too, an effective disposition is likely to result from the decision of a court whose authority is recognized by both claimants.[118]

For the same reasons, the state where the child has been taken by a departing parent may properly exercise jurisdiction when, in order to expedite proceedings, the stay-at-home parent elects to sue there for custody; the venue, being the choice of the plaintiff and not reasonably objectionable to the defendant, is fair and conducive to adversary presentation.[119]

Modification

The established home principle also provides a workable basis for allocating authority to modify custody decrees. Since modifications are based primarily upon events occurring after the initial decree,[120] most of the relevant evidence is likely to be available at an established home acquired by the child subsequent to that decree. The loser cannot automatically change the modification venue by removing the child. Such jurisdiction will shift only if the prevailing parent takes no action until the child has acquired an established home in the second state. When the loser and the child cannot be located in time to prevent the creation of such a home,[121] the second state should resolve the conflict in values[122] by returning the child to the prevailing parent without considering the loser's request for modification if, under the circumstances, the prior home state remains a fair venue for litigating that issue.[123]

118 A forum whose jurisdiction depends on consent of the defendant will almost always have an interest in the child's custody, because the proceedings will almost always be brought in a state where the plaintiff, the defendant, or the child resides. A forum that has no connection with the parties or the litigation may reasonably refuse to exercise jurisdiction despite the consent of the parties. See note 115 *supra*. Compare the doctrine of forum non conveniens pursuant to which a court with jurisdiction may dismiss an action by a nonresident plaintiff against a nonresident individual defendant or a foreign corporate defendant based on events occurring out of the forum. See cases and authorities collected in EHRENZWEIG, *op. cit. supra* note 73, at 120 nn.1 & 2, 121 nn. 5 & 6.

119 In order to obtain a prompt decision the plaintiff might forego suit in the home state because nonresident defendants are usually given a substantially longer time than residents in which to answer a complaint. If suit is brought in the home state, an order by the court fixing custody pendente lite, after fair notice to the defendant, should be given full faith and credit in the state where the child is present. See text accompanying notes 156-59 *infra*.

120 Some states also permit consideration of any facts not presented to the first court.

121 The winner usually knows the loser's last residence and place of employment, and since abduction in violation of a decree is unlawful, law enforcement officials may also assist in locating the child. Criminal prosecution for kidnapping, however, is not an appropriate device for dealing with such abductions. See Annot., 4 A.L.R.2d 7, 15 (1949).

122 See text accompanying notes 109-11 *supra*.

123 See Crocker v. Crocker, 122 Colo. 49, 219 P.2d 311 (1950); *In re* Penner, 161 Wash.

Until the child acquires an established home after the decree, the state of the decree probably remains the fairest venue in which to litigate modification so long as the child resides there or, if the loser has wrongfully removed the child, so long as the prevailing parent resides there.[124] In most cases that state was the established home of the child at the time of the decree; its courts have already considered matters relating to the child's welfare and have substantial access to evidence relating to changed circumstances; its jurisdiction is not subject to divestment by unilateral action, and an absent parent, having previously litigated in the state, is likely to retain adequate contacts there for purposes of litigation. But when the prevailing parent also leaves without taking action after the loser has removed the child, then the state where the child is living appears to provide the most reasonable modification venue.[125]

The state of the decree probably continues to be the fairest venue for modification pending the acquisition of an established home when the prevailing parent takes the child to another state without express authorization in the decree and thereby impairs the visitation rights of a resident loser.[126] Such continuing jurisdiction is supported by the factors mentioned above and prods the prevailing parent into reaching some agreement with the loser, or obtaining a judicial adjustment of competing claims, before moving away with the child.[127] But if the loser does not reside in the state of the decree, his visitation rights are not so seriously affected by such a move, and with all of the parties gone from that state, the new residence of the child and the prevailing parent seems to offer the fairest modification venue.

When the prevailing parent takes the child to another state pursuant to express authorization in the decree, the loser's visitation rights are not unfairly impaired because they have been de-

479, 297 Pac. 755 (1931). A stay-at-home parent can file an action for initial custody in the home state to establish jurisdiction when a departing parent disappears with the child (see text accompanying note 108 *supra*), but after a decree, the prevailing parent's appropriate remedy against an abducting loser ordinarily is to seek enforcement of the existing decree in the state where the child is located. See text accompanying notes 171-76 *infra*.

124 *Cf.* cases cited in note 18 *supra*.

125 By leaving the state of the decree without taking action the prevailing parent in effect acquiesces in the jurisdiction of the state where the child resides with the loser. See text accompanying note 106 *supra* and notes 148-52 *infra*.

126 *Cf.* cases collected in Annot., 9 A.L.R.2d 434, 457 (1950); Annot., 4 A.L.R.2d 7, 48-49, 93, 95-96 (1949).

127 With such a move impending, the court might award the loser custody for part of the year.

fined with reference to such a move; the convenience and expectations of the parties and the accessibility of evidence as to events occurring after the move then point to the new state as the appropriate forum until an established home has been acquired.[128]

Once an established home exists, the state where it is located should retain jurisdiction to modify until a new one is acquired or until all of the persons involved are gone.[129] In the latter event, the fairest modification venue is probably at the last non-transient abode of the child and the prevailing parent,[130] but if the prevailing parent leaves that state after the loser has removed the child, the place where the child resides should provide the venue.[131]

Divided Custody

When a decree divides custody between the parents,[132] the established home principle will place modification jurisdiction in the state where the child lives for more than half the year unless the parent with the shorter period of custody retains the child for a total of six months without action by the other. Usually a shorter custody period covers school vacations and does not exceed three consecutive months. If the shorter period covers four or five months, however, perhaps in fairness to the primary parent the established home should not change until the child has been retained by the secondary parent at least three months beyond the end of the shorter custody period.

If the decree gives each parent custody for half the time, the established home ordinarily will be not in the state where the child resides but rather in the state where it last resided. Under such circumstances, in order to insure a local venue each parent may be tempted to request modification in his own state after a six-month period of possession and to retain the child pending a decision. This incentive to litigation and wrongful retention can be negated by confining modification jurisdiction in such cases to the state

128 If the prevailing parent thereafter moves with the child to an unauthorized state, the state of the last authorized residence should retain interim authority to modify provided the loser resides there; if he still lives in the state of the decree, that state should retain such authority for the reasons previously given. Otherwise, the new state appears to be the fairest place to litigate modification until an established home is created.

129 *Cf.* cases collected in Annot., 4 A.L.R.2d 7, 85-87 (1949).

130 Or a person acting as parent when the prevailing parent does not continue to maintain a residence for the child.

131 This may be with the losing parent or with a person acting as parent if the loser does not continue to maintain a residence for the child.

132 See Stansbury, *supra* note 75, at 822.

where the defendant parent resides, unless the child has lived with the plaintiff for substantially more than six months. An additional period of three months should give the defendant a reasonable time in which to act before the plaintiff's residence becomes the established home.

When the custody of the child is divided between the parents by agreement rather than by decree, the same jurisdictional principles are applicable if one of the parents thereafter requests a custody adjudication. Private custody agreements are not binding in subsequent judicial proceedings because such arrangements are enforceable only when in the best interests of the child,[133] but parents should be encouraged to make and respect custody agreements, and allocation of jurisdiction on the foregoing basis would discourage facile breach.

AUTHORITATIVE SUPPORT FOR THE ESTABLISHED HOME PRINCIPLE

Although nowhere explicitly adopted, the principle of the established home[134] is implicit in many of the decisions that accept one or another of the conventional bases for custody jurisdiction; in fact, it reconciles to some extent those apparently diverse positions.

In many cases the domicile concept provides a vehicle for preserving jurisdiction in the established home state when the child has been recently removed.[135] On the other hand, the physical presence rule is used by a number of courts as a device for retaining jurisdiction in the state where the child has an established home but not a domicile.[136]

133 See Ford v. Ford, 371 U.S. 187, 190-91 (1962); cases collected in 17A AM. JUR. *Divorce and Separation* § 818 (1942).

134 The established home principle refers to allocation of custody jurisdiction to the established home state or to alternative jurisdictions, as herein discussed.

135 Kugle v. Harpe, 234 Ala. 494, 176 So. 617 (1937); Foster v. Foster, 8 Cal. 2d 719, 68 P.2d 719 (1937); *In re* Simpson, 87 Cal. App. 2d 848, 197 P.2d 820 (1948); McMillin v. McMillin, 114 Colo. 247, 158 P.2d 444 (1945); Breene v. Breene, 51 Colo. 342, 117 Pac. 100 (1911); Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933); Taylor v. Jeter, 33 Ga. 195, (1862); Heard v. Heard, 323 Mass. 357, 82 N.E.2d 219 (1948); Glass v. Glass, 260 Mass. 562, 157 N.E. 621 (1927); Beckman v. Beckman, 218 S.W.2d 566 (Mo. 1949); People *ex rel.* Allen v. Allen, 40 Hun 611 (N.Y. 1886); Chapman v. Walker, 144 Okla. 83, 289 Pac. 740 (1930); Hughes v. Hughes, 180 Ore. 575, 178 P.2d 170 (1947); Commonwealth v. Camp, 150 Pa. Super. 649, 29 A.2d 363 (1942); Commonwealth v. Rahal, 48 Pa. D. & C. 568 (1942); Shaw v. Shaw, 114 S.C. 300, 103 S.E. 526 (1920); Cusack v. Cusack, 107 S.W.2d 1021 (Tex. Civ. App. 1937); State *ex rel.* Marthens v. Superior Court, 25 Wash. 2d 125, 169 P.2d 626 (1946); Jones v. McCloud, 19 Wash. 2d 314, 142 P.2d 397 (1943); *In re* Burns, 194 Wash. 293, 77 P.2d 1025 (1938); Motichka v. Rollands, 144 Wash. 565, 258 Pac. 333 (1927).

136 Slack v. Perrine, 9 App. D.C. 128 (Ct. App. 1896); Kelsey v. Greene, 69 Conn. 291, 37

In most cases denying recognition to a foreign custody decree, the child's established home at the time of the petition and decree was not in the initial forum,[137] while in almost all of the decisions barring a loser with unclean hands from litigating in a second forum the child's established home remained in the first forum.[138]

The decision in *Sampsell* had the effect of allowing the established home state to exercise custody jurisdiction although the child had been permanently removed before proceedings were begun. The father petitioned for custody in California, where the established family home was located, three months after the mother had removed the child to Nevada.[139] The mother then obtained a Nevada divorce and custody decree by default,[140] which she

Atl. 679 (1897); Little v. Franklin, 40 So. 2d 768 (Fla. 1949); White v. White, 214 Ind. 405, 15 N.E.2d 86 (1938); Barnett v. Blakley, 202 Iowa 1, 207 N.W. 412 (1926); Schmidt v. Schmidt, 280 Mass. 216, 182 N.E. 374 (1932); *In re* Stockman, 71 Mich. 180, 38 N.W. 876 (1888); Hanrahan v. Sears, 72 N.H. 71, 54 Atl. 702 (1903); Kovacs v. Brewer, 245 N.C. 630, 97 S.E.2d 96 (1957); *In re* Strininger, 260 Ohio Op. 4, 11 Ohio Supp. 60 (1940); Heide v. Kiskaddon, 79 Okla. 6, 190 Pac. 859 (1920); Commonwealth *ex rel.* Rogers v. Daven, 298 Pa. 416, 148 Atl. 524 (1930); Wilkins' Guardian, 146 Pa. 585, 23 Atl. 325 (1892); Kenner v. Kenner, 139 Tenn. 211, 201 S.W. 779 (1917); Duncan v. Duncan, 197 S.W.2d 229 (Tex. Civ. App. 1946); Re Gay, 59 Ont. L. 40, 3 D.L.R. 349 (1926); see STUMBERG, *op. cit. supra* note 74, at 327 n.20.

137 Langan v. Langan, 150 F.2d 979 (D.C. Cir. 1945); People v. Madden, 104 Colo. 252, 90 P.2d 621 (1939); Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521 (1948); Little v. Franklin, 40 So. 2d 768 (Fla. 1949); Elliott v. Elliott, 181 Ga. 545, 182 S.E. 845 (1935); Brandon v. Brandon, 154 Ga. 661, 115 S.E. 115 (1922); Shorter v. Williams, 74 Ga. 539 (1885); Griffin v. Harmon, 35 Ga. App. 40, 132 S.E. 108 (1926); Duryea v. Duryea, 46 Idaho 512, 269 Pac. 987 (1928); Weber v. Redding, 200 Ind. 448, 163 N.E. 269 (1928); Barnett v. Blakley, 202 Iowa 1, 209 N.W. 412 (1926); Kline v. Kline, 57 Iowa 386, 10 N.W. 825 (1881); Kruse v. Kruse, 150 Kan. 946, 96 P.2d 849 (1939); Woodall v. Alexander, 107 Kan. 632, 193 Pac. 185 (1920); Pinney v. Sulzen, 91 Kan. 407, 137 P. 987 (1914); *In re* Volk, 254 Mich. 25, 235 N.W. 854 (1931); *In re* Stockman, 71 Mich. 180, 38 N.W. 876 (1888); McAdams v. McFerron, 180 Miss. 644, 178 So. 333 (1938); *In re* Reed, 152 Neb. 819, 43 N.W.2d 161 (1950); Brown v. Parsons, 136 N.J. Eq. 493, 42 A.2d 852 (Ct. Err. & App. 1945); *In re* Erving, 109 N.J. Eq. 294, 157 Atl. 161 (Ch. 1931); Casteel v. Casteel, 45 N.J. Super. 338, 132 A.2d 529 (Super. Ct. 1957); People *ex rel.* Herzog v. Morgan, 287 N.Y. 317, 39 N.E.2d 255 (1942); Elkins v. Elkins, 268 App. Div. 938, 51 N.Y.S.2d 277 (1944); Pickle v. Pickle, 215 App. Div. 38, 213 N.Y. Supp. 70 (1925); Black v. Black, 110 Ohio St. 392, 144 N.E. 268 (1924); Heide v. Kiskaddon, 79 Okla. 6, 190 P. 859 (1920); Wilson v. Wilson, 136 Va. 643, 118 S.E. 270 (1923).

138 State v. Black, 239 Ala. 644, 196 So. 713 (1940); Kugle v. Harpe, 234 Ala. 494, 176 So. 617 (1937); Burns v. Shapley, 16 Ala. App. 297, 77 So. 447 (1917); *In re* Simpson, 87 Cal. App. 2d 848, 197 P.2d 820 (1948); Evans v. Evans, 314 P.2d 291 (Colo. 1957); Crocker v. Crocker, 122 Colo. 49, 219 P.2d 311 (1950); McMillin v. McMillin, 114 Colo. 247, 158 P.2d 444 (1945). Taylor v. Jeter, 33 Ga. 195 (1862); Shippen v. Bailey, 303 Ky. 10, 196 S.W.2d 425 (1946); *In re* Hubbard, 82 N.Y. 90 (1880); Chapman v. Walker, 144 Okla. 83, 289 Pac. 740 (1930); Cecil v. State *ex rel.* Cecil, 192 Tenn. 74, 237 S.W.2d 558 (1951); State *ex rel.* French v. French, 182 Tenn. 606, 188 S.W.2d 603 (1945); Wilson v. Elliott, 96 Tex. 472, 75 S.W. 368 (1903); Mauldin v. Buchanan, 198 S.W.2d 469 (Tex. Civ. App. 1946); *In re* Mullins, 26 Wash. 2d 419, 174 P.2d 790 (1946); *In re* Burns, 194 Wash. 293, 77 P.2d 1025 (1938).

139 The mother apparently received notice in Nevada.

140 The father apparently received notice in California.

pleaded as a bar in the California action. Four months later she took the child to Utah and remarried. When the trial court ruled that it lacked jurisdiction to determine custody pendente lite, the father petitioned for mandamus.[141] Assuming the truth of his allegation that the mother and child remained California domiciliaries while in Nevada,[142] the state supreme court held that California was "not deprive[d] . . . of jurisdiction over the child" by the Nevada decree, "for 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."[143]

Although speaking in terms of domicile and comparative state interest, the court thus emphasized the importance of the child's home as a factor in allocating custody jurisdiction. Under the *Restatement* view, apparently followed in California,[144] that a child takes the domicile not of its father but of the possessing parent, the child may in fact have been domiciled in Nevada with its mother when the father petitioned for custody.[145] In that event California's jurisdiction could be supported only on the established home principle.[146]

141 The interlocutory order was not appealable before final judgment and no other adequate remedy was available to test his right to a hearing on the issue of custody pending trial. 32 Cal. 2d 763, 772-73, 197 P.2d 739, 746 (1948).

142 This allegation was made by the father in his petition for custody pendente lite and in his petition for mandamus. The mother demurred to the mandamus petition.

143 32 Cal. 2d 763, 780-81, 197 P.2d 739, 751 (1948). (Emphasis added.)

144 32 Cal. 2d 763, 773-74, 197 P.2d 739, 746-47 (1948).

145 The father alleged that the Nevada domicile was fraudulent and that the mother remained domiciled in California until she arrived in Utah because on leaving she had told him she was going to remarry and live in Utah after obtaining a Nevada divorce. See GOODRICH, *op. cit. supra* note 88, at 60. In fact, she lived in Nevada with the child for about 7½ months, which was substantially longer than the six weeks residence required for the divorce, before remarrying in Utah, and she never returned to California. If she went to Nevada intending to live there until her remarriage at some future time, a court could reasonably find she was domiciled in Nevada until she moved to Utah. *Id.* at 64.

A peremptory writ of mandate was issued by the supreme court directing the trial court to exercise jurisdiction in the custody proceedings, but presumably that court would first determine whether the mother and child in fact remained domiciled in California after going to Nevada.

146 The opinion also states that the mother consented to California's jurisdiction over her person by answering the initial custody petition without objection to jurisdiction but that such consent could not extend to jurisdiction over "subject matter" which was the issue before the court. 32 Cal. 2d 763, 773, 197 P.2d 739, 746 (1948). (Although the mother pleaded the Nevada decree as a bar to the initial petition she did not explicitly urge lack of jurisdiction until the father requested custody pendente lite.) *But cf.* note 117 *supra* and accompanying text; cases indicating that a court with "in personam" jurisdiction over the parents has authority to determine custody of a child neither domiciled nor present in the state, collected in Annot., 9 A.L.R.2d 440 n.17 (1950); Annot., 4 A.L.R.2d 7, 30-31, 64, 78-79, 93-94 (1949). Established home jurisdiction would be reinforced by consent of the mother.

Use of the established home principle to determine custody jurisdiction does not offend previously developed constitutional standards for allocation of "in personam" jurisdiction among the states.

The tentative Supreme Court position, as manifested by the *May* plurality opinion, is a rudimentary application of *Pennoyer v. Neff* to child custody cases, the parent-child relationship being treated as a disputed claim resolvable where the defendant is "present" rather than as a "res" disposable at the child's domicile. But the underlying premise of *Pennoyer*, that a state lacks power to impose personal obligations upon someone neither domiciled, resident, nor served within its boundaries,[147] is not consistent with the structure of the federal system. A state does have power to determine the personal obligations of an individual not there "present" if the Constitution, backed by federal authority, makes the determination binding throughout the country. In *International Shoe*,[148] unmentioned in *May*, the Supreme Court declared that a state could exercise jurisdiction over an absent defendant who had "minimum contacts" with it sufficient to satisfy "traditional notions of fair play and substantial justice." Other Supreme Court decisions ignored by *May* had held that a nonresident motorist[149] and a nonresident securities dealer[150] who were neither domiciled, resident, nor served in the forum state could be personally subject to its jurisdiction in litigation arising out of activities which they had carried on there, in the latter case through agents. More recently the Court has applied the principle to a mail order insurance company whose agents were never in the forum state.[151]

A child's residence at an established home constitutes a kind of parental "activity" in that state probably sufficient to provide the minimum contact necessary to subject an absent parent to its custody jurisdiction without offending traditional notions of fair play and substantial justice. These notions are particularized in the due process values heretofore discussed, and a defendant necessarily has an adequate contact with a venue that substantially implements them. Conventional jurisdictional rules requiring a plaintiff to sue where the defendant is located often reflect a sound policy of inhibiting unfounded nuisance suits, easily filed at the plaintiff's residence, but that policy has little relevance to initial

147 Assuming no consent to the jurisdiction.
148 International Shoe Co. v. Washington, 326 U.S. 310, 316, 320 (1945).
149 Hess v. Pawloski, 274 U.S. 352 (1927).
150 Doherty & Co. v. Goodman, 294 U.S. 623 (1935).
151 McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

custody litigation, and the plaintiff gains no unfair advantage from an established home forum.

Jurisdiction based upon the established home principle is no less consistent with due process of law than jurisdiction based upon the domicile or the physical presence of the child. The evanescent "res" that appears to hover at the domicile or to permeate the child may also be found to frequent the established home by a sensitive judicial medium. If the "res" will not materialize and concepts of fairness and justice must be substituted as the due process test of jurisdiction, a state where the child is domiciled or physically present cannot be said to provide a fairer venue for a nonresident parent than the state of the child's established home.

The Supreme Court, in delineating constitutional requirements for divorce jurisdiction, has declared that "judicial power to grant a divorce . . . is founded on domicile."[152] The established home concept can perform a similar function in child custody litigation. The six-month test for acquisition of an established home may suggest a legislative solution, perhaps in the form of a uniform act or even a congressional statute,[153] but the derivation of such a jurisdictional formula is not beyond the judicial capacity. By limiting divorce jurisdiction to the "matrimonial" domicile, the Supreme Court of an earlier day made the fault of the spouses a jurisdictional criterion.[154] More recently a federal court of appeals has discerned a due process objection to divorce jurisdiction based upon domicile presumed from a short residence.[155] The vagueness of these jurisdictional limitations, when compared to a six-month residence requirement for the creation of an established home, does not make the latter a less appropriate judicial norm.

152 See Rice v. Rice, 336 U.S. 674 (1949); Williams v. North Carolina, 325 U.S. 226 (1945); Williams v. North Carolina, 317 U.S. 287 (1942); Haddock v. Haddock, 201 U.S. 562 (1906); Andrews v. Andrews, 188 U.S. 14 (1903); Bell v. Bell, 181 U.S. 175 (1901); Atherton v. Atherton, 181 U.S. 155 (1901).

153 Since the due process clause of the fourteenth amendment provides a limitation upon the exercise of state judicial authority, Congress, pursuant to its power to enforce by appropriate legislation the provisions of that amendment, could probably specify such a requirement for the exercise of state custody jurisdiction over nonresidents. Congress, acting pursuant to its power under article IV, § 1, to prescribe the effect in each state of the properly proved judicial proceedings of other states, could probably specify full faith and credit protection for judgments meeting such a jurisdictional requirement.

154 Haddock v. Haddock, 201 U.S. 562 (1906); Atherton v. Atherton, 181 U.S. 155 (1901). See Williams v. North Carolina, 317 U.S. 287 (1942); RESTATEMENT, CONFLICT OF LAWS § 113 (1934).

155 Alton v. Alton, 207 F.2d 667 (3d Cir. 1953). See also Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948).

INTERSTATE RECOGNITION OF CUSTODY DECREES

The Application of Full Faith and Credit

The custody decree of a court whose jurisdiction is supported by the established home principle[156] ought to receive the protection of the full faith and credit clause. That clause compels interstate recognition of a divorce decreed by the plaintiff's domiciliary state,[157] the finding of domicile being as binding in other jurisdictions as it is in the forum upon a defendant who participated in the proceedings.[158] Surely the constitutional policies of res judicata and interstate respect are significant in the adjustment of the parent-child relationship as well as the dissolution of the marital relationship. To discourage abduction, to limit the waste in individual and social resources involved in relitigation, to provide greater psychological stability for the child, to protect the reasonable expectations of the prevailing parent, and to promote federal cohesion, each state should accept and enforce the valid custody determinations of every other state without readjudicating previously decided issues.[159]

156 See note 134 *supra.*

157 Williams v. North Carolina, 317 U.S. 287 (1942). See cases cited in note 158 *infra.*

158 Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948); Davis v. Davis, 305 U.S. 32 (1938). Such a decree, including the finding of domicile, also has the same immunity in other states from attack by *third persons* that it has in the forum. Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muelberger, 340 U.S. 581 (1951). In Williams v. North Carolina, 325 U.S. 226 (1945), the finding of domicile was held subject to attack by a state in a bigamy prosecution against a plaintiff who had returned and remarried after obtaining a divorce elsewhere, but the decree was by default, and the jurisdictional issue was therefore not res judicata. Whether such a prosecuting state could attack the jurisdictional finding of domicile by the divorce forum when the defending spouse had appeared in the divorce proceedings remains uncertain. Allocation of divorce jurisdiction resolves the question of choice of law as well as of fair venue, because the forum usually applies its own grounds for divorce. The interest of the state of the marital residence in specifying the grounds for dissolution of the marriage may be of sufficient dimension to justify an independent canvass of the domicile issue in a bigamy prosecution, but the security of status provided by recognition in all proceedings of non-default divorce decrees is of such importance to the parties, their subsequent spouses, their children, and the community as probably to limit the scope of the criminal sanction. No equivalent choice of law issue arises in child custody litigation. See note 185 *infra. But cf.* Comment, 73 YALE L.J. 134 (1963).

159 See text accompanying notes 75, 81-85, 91-100 *supra.*

Issues that can be relitigated in the initial forum may be relitigated by a court having modification jurisdiction without violating full faith and credit. See Kovacs v. Brewer, 356 U.S. 604 (1958). But most jurisdictions apply res judicata principles to their own custody decrees. See GOODRICH, CONFLICT OF LAWS 422-23 (3d ed. 1949). Sampsell v. Superior Court, 32 Cal. 2d 763, 779, 197 P.2d 739, 750 (1948).

The finding of jurisdiction should be res judicata in other states if the defendant participated in the initial proceedings. See Sherrer v. Sherrer, 334 U.S. 343 (1948); Baldwin v. Iowa State Travelling Men's Ass'n, 283 U.S. 522 (1931). The jurisdictional finding in a default decree is subject to attack in the enforcing state. See Pennoyer v. Neff, 95 U.S. 714 (1878); Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1874).

Although a court with jurisdiction to modify a decree necessarily has a broad discretion, application of the full faith and credit-res judicata principle in such proceedings gives the prevailing parent the benefit of the previous findings, narrows the area of litigation, and imposes upon the petitioner the burden of proving a change in circumstances sufficient to overturn the prior adjudication.

The Finality Problem

A half-century ago the Supreme Court decided that the full faith and credit clause did not compel recognition and enforcement of prospectively modifiable foreign alimony decrees nor of alimony accrued under retroactively modifiable decrees, because they were not "final" judgments; only accrued installments not subject to further change could command full faith and credit enforcement.[160] But the chief consequence of the finality requirement was evasion of support obligations, and in 1944 the Court indicated in *Barber v. Barber*[161] that the application of full faith and credit to modifiable alimony decrees was still an open question, stating:

> "[I]t is unnecessary to consider whether a decree or judgment for alimony already accrued, which is subject to modification or recall in the forum which granted it, but is not yet so modified, is entitled to full faith and credit until such time as it is modified."

Justice Jackson, concurring, declared:

> "[T]he judgment . . . was entitled to faith and credit . . . even if it was not a final one. . . . Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments. . . . Both require that full faith and credit be given to 'judicial proceedings' without limitation as to finality. . . . If a later decree is made which modifies or amends the judgment, that modification or amendment will also be entiled to faith and credit. . . ."[162]

In none of the child custody cases, all decided after *Barber*, did the Court determine whether lack of finality was an obstacle to full

160 Sistare v. Sistare, 218 U.S. 1 (1910); Lynde v. Lynde, 181 U.S. 183 (1901); Barber v. Barber, 62 U.S. (21 How.) 582 (1858).

161 323 U.S. 77, 81 (1944). The Court held that full faith and credit was due a presumably non-modifiable judgment for alimony accrued under a retroactively modifiable decree.

162 323 U.S. 77, 86-87 (1944). See also Justice Rutledge dissenting in Griffin v. Griffin, 327 U.S. 220, 246-47 (1946). *But cf.* Rutledge concurring in Halvey v. Halvey, 330 U.S. 610, 620-21 (1947).

faith and credit enforcement of custody decrees. Any definitive statement as to the effect of the full faith and credit clause on such decrees was studiously avoided in *Halvey*, *Kovacs*, and *Ford*. In *May* the dissenters, by approving full faith and credit enforcement in Ohio of the Wisconsin decree, necessarily rejected the finality requirement; the plurality opinion may have tacitly done so to the extent that it supported full faith and credit enforcement of custody decrees based on conventional "in personam" jurisdiction.

As suggested by Justice Jackson, finality is not a sensible full faith and credit requirement. When a judgment is subject to modification, it should be enforceable until modified. Present rights are not ordinarily denied recognition because they may be altered by future judicial action. If a later modification occurs, new rights will then supersede the old ones, but the possibility of such an adjudication should not vitiate existing rights before they are changed.[163]

The real issue raised by enforcement of modifiable judgments is the fairness under due process standards of leaving a defendant with a perhaps uncollectible claim for recoupment if he is required to satisfy an obligation that is later judicially negated. Any unfairness, however, can be remedied without denying full faith and credit to the judgment by permitting the defendant to assert his modification claim in the enforcement proceedings, *provided the forum is a fair venue for litigating that issue.*

Jurisdiction To Enforce v. Jurisdiction To Modify

Two years after undermining the finality doctrine in *Barber* the Supreme Court held in *Griffin v. Griffin*[164] that due process requires the defendant be given an opportunity to request modification during proceedings in the original forum to enforce collection of accrued but retroactively modifiable alimony installments. The Court also suggested that the installments were enforceable by that procedure in other jurisdictions but did

163 When a plaintiff seeks to enforce a foreign judgment while an appeal is pending, perhaps by asserting it as a cross claim in an action brought by the defendant in another state, the most efficacious procedure is to stay the new proceedings until the appeal is decided. Talk about finality largely obscures the problem. See Annot., 9 A.L.R.2d 984 (1950); Note, 41 COLUM. L. REV. 878 (1941). Likewise, if modification proceedings are pending in the initial jurisdiction, a foreign court may stay the enforcement of a custody decree to await the outcome. Even after appeal judgments may not be finally final because subject to collateral attack but are generally enforceable subject to defenses available in the initial forum. See 30A AM. JUR. *Judgments* §§ 935, 939 (1958); *cf.* Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866); Levin v. Gladstein, 142 N.C. 482, 55 S.E. 371 (1906).

164 327 U.S. 220 (1945).

not specify whether such enforcement is compelled by full faith and credit.[165] Thereafter the Supreme Court of Illinois held that full faith and credit requires recognition and enforcement of prospectively modifiable foreign alimony decrees,[166] and the Supreme Court of California declared such decrees, whether prospectively or retroactively modifiable, enforceable on comity grounds provided claims for modification are first considered.[167]

The enforcing state is clearly a fair venue for litigating modification of a foreign alimony decree when both parties reside there. It may, however, be unfair to require a nonresident plaintiff to litigate modification where she finds the defaulting defendant, because that issue usually involves a far more extensive contest than does enforcement of the decree. In such situations, upon plaintiff's objection to the modification jurisdiction of the enforcing court, perhaps that court should stay the proceedings until the defendant has had a reasonable time in which to request modification in a venue fair to plaintiff.[168] Litigating in another forum is, of course, inconvenient for defendant, but a defendant in default under a valid decree should not be able, by his act of default, to control the modification venue to the prejudice of the plaintiff. The burden should be his to seek modification in an appropriate forum if he desires to change his duly adjudicated obligations.[169]

Griffin implies that authority to enforce a retroactively modifiable foreign alimony decree necessarily includes authority to modify it. In *Halvey* and *Kovacs* the Supreme Court used language suggesting the same rule applies to child custody decrees without considering the differences between custody and alimony. Speaking in terms of full faith and credit rather than due process the Court stated in *Halvey*:

165 In a New York ex parte proceeding the plaintiff obtained a money judgment for accrued alimony installments preliminary to execution. The Supreme Court held that failure to give the defendant notice and an opportunity to request permissible modification violated due process, making the ex parte judgment unenforceable in the District of Columbia, but suggested the accrued installments might be enforceable pursuant to the original New York alimony decree if the defendant's claim for modification were heard by the District of Columbia court.

166 Light v. Light, 12 Ill. 2d 502, 147 N.E.2d 35 (1957).

167 Worthley v. Worthley, 44 Cal. 2d 465, 283 P.2d 19 (1955). See also UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT.

168 Since such a stay necessarily involves delay in enforcement of at least part of the defendant's alimony obligation, plaintiff may choose not to object to the modification jurisdiction of the enforcing court.

169 Justice Frankfurter, dissenting in *Griffin*, referred to the possibility of abstention by the enforcing court pending modification in the initial jurisdiction. 327 U.S. 220, 250 (1946).

> "So far as full faith and credit is concerned, what Florida could do in modifying the decree, New York may do. . . . It is clear that the state of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."[170]

The protection that full faith and credit can afford child custody decrees is minimal if jurisdiction to modify such decrees automatically accompanies authority to enforce them. If a loser who withholds the child may request modification of the decree when the winner petitions to enforce it, application of the res judicata principle does not so significantly inhibit abduction and repeated litigation. While explicit redetermination of old issues is foreclosed, implicit reconsideration of the entire controversy may occur in the guise of an evaluation of subsequent or previously unlitigated events.[171] Even if the res judicata policy were everywhere scrupulously observed, the opportunity to seek modification in a new jurisdiction by taking the child there would remain inviting.

Jurisdiction to modify a foreign custody decree is not a necessary concomitant of authority to enforce the decree. Jurisdiction to modify is limited by due process requirements; those requirements, implementing the social objectives previously discussed, indicate that the venue for modification should, whenever possible, be at the child's established home. Although both parties are before the enforcing court, it is not usually a convenient forum to the prevailing parent for litigating the more complex issue of modification, and by initiating enforcement proceedings there that parent ordinarily does not intend consent to its modification jurisdiction. Consent implies voluntary acceptance of the authority of a court,[172] and the plaintiff seeks only to enforce the decree in ac-

170 330 U.S. 610, 614 (1947). In *Kovacs* the Court stated: "Whatever effect the Full Faith and Credit Clause may have with respect to custody decrees, it is clear, as the Court stated in Halvey, 'that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.' " 356 U.S. 604, 607 (1958).

Despite their broad language, neither *Halvey* nor *Kovacs* definitively holds that an enforcing state may always modify, in accordance with the law of the initial jurisdiction, a foreign custody decree. The basic issue of due process jurisdiction to modify passed virtually unnoticed in both, and in *Kovacs* the enforcing and modifying state, where the child had been living for over four years, was the established home. See text accompanying notes 26, 36 *supra*.

171 See Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1 (1910); EHRENZWEIG, CONFLICT OF LAWS 283-84 (1959); Stansbury, *Custody and Maintenance Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 830 (1944).

172 See RESTATEMENT, CONFLICT OF LAWS § 81 (1934).

cordance with constitutional requirements, not to change it.[173] The full faith and credit clause need not authorize an enforcing state to modify a decree when due process factors suggest that determination should be made by another forum.[174]

Due process does not require that the losing parent be allowed to request modification during enforcement proceedings because, in contrast to the alimony cases, the loser is not unfairly prejudiced by a decree ordering the child returned to the winner pending a request for modification in a more appropriate forum. A custody decree is necessarily subject only to prospective modification; a child cannot be removed retroactively from the possession of a parent. Judicially compelled compliance with an existing decree thus does not involve enforcement of rights which may later be invalidated. The prevailing parent is entitled to possession of the child until the decree is modified. Enforcement without modification preserves the rights of the winner and works no unfair hardship on the loser, who is free to request modification in a court having jurisdiction.[175]

The enforcing court retains authority to protect the child against mistreatment or abuse, but authority to modify is not needed to provide such protection.[176] Upon a substantial showing by the defendant that the child may suffer serious harm if returned to the prevailing parent, the court can stay the enforcement proceedings until the defendant has had a reasonable time in which to petition for modification in a proper forum.

Perhaps, however, a plaintiff may be subjected to the modification jurisdiction of an enforcing state as a condition to initiating enforcement proceedings there. The Supreme Court said in *Adams v. Saenger:*

> "There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment in personam may be rendered in a cross-action against a plain-

173 As to the authority of an enforcing state to require submission to its modification jurisdiction as a condition of enforcement, see text accompanying notes 177-82 *infra.*

174 See text accompanying notes 91, 171 *supra* and note 182 *infra.* If, however, plaintiff does not object to litigating the modification issue in the enforcing court, the jurisdiction of that tribunal to modify, being soundly based upon consent, accords with due process requirements.

175 See Crocker v. Crocker, 122 Colo. 49, 219 P.2d 311 (1950); French v. French, 182 Tenn. 606, 188 S.W.2d 603 (1945); Marthens v. Superior Court, 25 Wash. 2d 125, 169 P.2d 626 (1946); Jones v. McCloud, 19 Wash. 2d 314, 142 P.2d 397 (1943); *In re* Burns, 194 Wash. 293, 77 P.2d 1025 (1938); Motichka v. Rollands, 144 Wash. 565, 258 Pac. 333 (1927).

176 See note 88 *supra.*

> tiff in its courts, upon service of process or of appropriate pleadings upon his attorney. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff. . . ."[177]

This language recognizes a broad authority in each state to subject a nonresident plaintiff to its jurisdiction on a cross-action by the defendant, but the authority is not unlimited. Such a condition may be imposed upon the plaintiff "for all purposes for which justice to the defendant requires his presence." If justice to the defendant does not require that the cross-claim be then litigated, the condition does not meet the *Adams* test.

In *Adams* plaintiff's unadjudicated claim for money was countered by defendant's unadjudicated claim for money. As in the case of retroactively modifiable alimony, there is an element of unfairness in compelling a defendant to pay money without asserting his cross-claim for money, because a later judgment on the cross-claim obtained at the plaintiff's residence may be then uncollectible. Furthermore, the accessibility of the evidence is usually about the same at either residence, and the forum is not likely to be more inconvenient to plaintiff for litigating one claim than the other. Even if the claims arise from different occurrences, there may well be an overlapping of issues, and the account between the parties can probably be settled in the one lawsuit. A requirement that offsetting monetary claims be litigated together, therefore, does justice to the defendant and is not unfair to the plaintiff.[178] On the other hand, in custody disputes as previously pointed out, justice to the losing parent seldom requires that modification be litigated in an enforcing court while justice to the prevailing parent, as well as to the child, often prescribes a different forum for the trial of that issue.

Adams did not deal with a cross-claim in response to an action on a valid foreign judgment. In such cases the plaintiff's claim is reinforced by the duty of the forum to give full faith and credit to the prior decision. A state may not avoid that constitutional man-

177 303 U.S. 59, 67-68 (1938).

178 If plaintiff is unable to prove his case after bringing the action, it is not unreasonable to permit an affirmative recovery by defendant on the cross complaint.

date by limiting the jurisdiction of its courts,[179] nor by any unreasonable condition.[180] Necessarily, therefore, a state may subject a nonresident plaintiff to a cross-claim by the defendant as a condition to the full faith and credit enforcement of a foreign judgment only if the forum constitutes a fair venue for trial of defendant's claim in accordance with due process requirements. Consequently, unless custody decrees are in a less favored category, a prevailing parent cannot be subjected to modification jurisdiction as a condition to enforcement of a valid custody decree when due process considerations indicate the issue should be decided elsewhere.[181]

The policy of full faith and credit can operate effectively to protect custody decrees if authority to enforce such decrees does not imply jurisdiction to modify them.[182] Valid decrees would then be enforceable without change in every state except those having modification jurisdiction. Such jurisdiction, if based on the established home concept, would provide a venue fair to both parties in a court with optimum access to the relevant evidence, and adher-

179 Kenney v. Supreme Lodge, 252 U.S. 411 (1920).

180 See Union Nat'l Bank v. Lamb, 337 U.S. 38 (1949); Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935); Roche v. McDonald, 275 U.S. 449 (1928); Kentucky Finance Corp. v. Paramount Auto Exch., 262 U.S. 544 (1923); Kenney v. Supreme Lodge, *supra* note 179; Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914); Fauntleroy v. Lum, 210 U.S. 230 (1908); *cf.* Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954). See also First Nat'l Bank v. United Airlines, 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609 (1951).

181 Of doubtful present vitality is the anomalous case of York v. Texas, 137 U.S. 15 (1890) upholding the Texas statutory rule that a defendant waives his due process objection to the jurisdiction of the forum by appearing there specially to make the objection. See also Western Life Indem. Co. v. Rupp, 235 U.S. 261 (1914). See Blair, *Constructive General Appearance and Due Process*, 23 ILL. L. REV. 119, 121-27 (1928); Hearon, *Non-Resident Defendants and the Special Appearance in Texas*, 32 TEXAS L. REV. 78, 96-100 (1953); 5 UTAH L. REV. 406 (1957). The decision in effect compelled a nonresident defendant sued in Texas to give up either his constitutional right to object to the due process jurisdiction of the court or his constitutional right to contest on the merits. See Jardine v. Superior Court, 213 Cal. 301, 304-05, 2 P.2d 756, 757 (1931). The state was thus permitted to condition the exercise of one federal right on the waiver of another. This curious result was justified on the ground that the entry of a default judgment by a court without due process jurisdiction violates no constitutional rights of the defendant. Only when enforcement of the judgment is sought are the defendant's rights threatened and full protection is then available through a collateral attack on jurisdictional grounds, thought the majority, thus assuming the success of the attack and ignoring the loss of a defense on the merits. Overlooked was the effect of an unsatisfied judgment on a defendant's business reputation, credit rating, opportunities for employment, and title to real property later acquired in the forum. See Blair, *supra*. The fair solution is the rule adopted in the federal courts and many states permitting a defendant to contest on the merits without waiving jurisdictional objections after they have been urged and overruled. FED. R. CIV. P. 12(b); N.Y. CIV. PRAC. ACT § 237a; N.J. SUP. CT. R. 3:12-2; Preston v. Legard, 160 Va. 364, 168 S.E. 445 (1933); see Jardine v. Superior Court, 213 Cal. 301-05, 2 P.2d 756-58 (1931).

182 See text accompanying notes 91, 171, 174 *supra*.

ence to the res judicata principle would foreclose redetermination of previously decided issues.

Consideration of Prior Unadjudicated Events

The Supreme Court in *Halvey* and *Kovacs* carefully avoided deciding whether the full faith and credit clause inhibits the modification of custody decrees on the basis of facts not admissible in the initial jurisdiction. While modification may everywhere be grounded upon events occurring subsequent to the decree, some states, as heretofore indicated, also permit consideration of prior but unlitigated events.[183] When such prior events are no longer admissible in the initial state, perhaps a modifying court whose jurisdiction rests upon the established home principle should be free to apply its own rule in the exercise of a broad authority to safeguard the child's welfare. The policy of full faith and credit ought to make the antecedent decree res judicata as to all litigated issues but need not forestall evaluation of matters not previously considered, whatever the rule in the first forum.

In *Yarborough v. Yarborough*[184] a seven-to-two majority of the Supreme Court decided that a *non-modifiable* child support decree was res judicata as to the extent of the father's support obligation and that the state of the child's later residence could not impose on the nonresident father an additional support obligation arising from subsequent events. But whatever its soundness as to non-modifiable support decrees, the *Yarborough* holding does not control the basis for revision of modifiable custody decrees. A judgment that purports to be a final determination of the rights and obligations of the parties may foreclose all future litigation on the matter, but the res judicata effect of a decree that is subject to later change in other jurisdictions is less sweeping; the second forum may be bound by the findings of the first but not necessarily by its rules for modification.

The modifying court has the responsibility of allocating custody in accordance with the present needs of the child. So long as that court does not relitigate what has already been decided, there appears to be no constitutional reason why the admissibility of evidence pertinent to the performance of its difficult task should be controlled by the prior forum.[185]

183 See note 3 *supra.*

184 290 U.S. 202 (1933).

185 The substantive custody rules of all the states rest upon general equitable principles relating to the welfare of the child and the natural desire of the parents to enjoy

While the congressional full faith and credit statute requires that a judgment receive the "same" faith and credit in every state as in the state where rendered,[186] the effect of a judicial decision cannot always be exactly the same in every state. A judgment that "closes the doors" of the forum to a plaintiff without deciding the merits of the claim will foreclose further action in the forum but not in other jurisdictions.[187] Interpreted in the context of the constitutional policy against relitigation, the full faith and credit statute can reasonably be construed as requiring a modifying court to accept the decision of the prior jurisdiction but not its grounds for modification.

POSTSCRIPT: THE PROBLEM OF CHILD SUPPORT

Common sense suggests that the extent of a father's obligation for child support should be resolved at the time of the custody adjudication, and most of the values heretofore discussed confirm the established home principle as a sound basis for allocation of authority to determine both issues. Application of that principle will usually provide a forum for the trial of the support question that is fair to both parties and free from the arbitrary control of either. A mother left at home with the child can sue a departing father in the home state for both custody and support; if the father leaves with the child, she may seek such relief in that venue until the

its society and participate in its upbringing (see note 74 *supra*). However, the procedures involved in making the custody determination are varied. See KEEZER, MARRIAGE AND DIVORCE 715 (3d ed. 1946); Chute, *Divorce and the Family Court*, 18 LAW & CONTEMP. PROB. 49 (1953); Lemkin, *Orphans of Living Parents, a Comparative Legal and Sociological View*, 10 LAW & CONTEMP. PROB. 834 (1943); Comment, *Ford v. Ford; Full Faith and Credit to Child Custody Decrees*, 73 YALE L.J. 134 (1963); Comment, *Use of Extra Record Information in Custody Cases*, 24 U. CHI. L. REV. 349 (1959). The most significant choice of law problem concerns the consideration in modification proceedings of prior but unlitigated occurrences. (The issue may be posed as a conflict between the res judicata policy of the initial forum, foreclosing future consideration of past events, and the authority of the modifying forum to define the basis for a subsequent change in custody.) The established home state probably bears the primary responsibility for providing the substantive rules to regulate the child's custody. Should there be a conflict between the substantive custody rules of that state and a forum whose jurisdiction rests on consent, the former ought to prevail, at least in the absence of an express legislative directive in the forum as to the proper choice of law. But the forum has the primary responsibility for making a correct adjudication on the basis of the applicable substantive rules and should not be restricted in its consideration of evidence that is unadjudicated and unprivileged.

As to the significance of comparative state interest in allocating jurisdiction, rather than choosing the appropriate rules of decision, see notes 87, 115 *supra*.

186 28 U.S.C. § 1738 (1958).

187 For example, a judgment for defendant based upon the statute of limitations or a special procedural rule of the forum. See Warner v. Buffalo Drydock Co., 67 F.2d 540 (2d Cir. 1933).

child acquires an established home elsewhere. A mother who departs with the child must proceed in the state that she left to obtain custody and support from the father until a new established home exists, and within that time the father may request the same forum to determine his custody rights and support obligations.[188] Such a venue will usually provide maximum access to evidence relating to the needs of the child and the financial capacity of the resident parent, although evidence concerning the resources of the nonresident parent may in some cases be more readily available in another forum.[189]

The *Pennoyer v. Neff* doctrine,[190] that authority to issue a money judgment depends upon the "presence" of the defendant or his property, has been apparently confirmed by the Supreme Court as the constitutional test for alimony jurisdiction in language broad enough to encompass child support litigation.[191] But an

188 In addition, a defendant may consent to jurisdiction by appearing without objection, and a plaintiff may elect to proceed at the defendant's residence. See text accompanying notes 117-19 *supra*. In lieu of venue in an established home state the alternatives heretofore discussed are applicable. See text accompanying notes 113-16 *supra*.

189 *Cf.* text accompanying notes 103-06 *supra*. In most cases the established home principle probably facilitates the litigation of divorce, custody, and child support in the same forum. Usually a stay-at-home parent has lived in the home state long enough to petition there for divorce, as well as for a determination of custody and child support, before the child has acquired a new established home with the departing parent. In the absence of such proceedings by the stay-at-home parent, the departing parent can probably petition for divorce, custody, and child support in the same forum after satisfying the required period of residence for divorce, which in most states is at least six months. When a departing parent petitions for divorce within six months in a state having a short residence requirement, the forum will usually lack jurisdiction to adjudicate either custody or child support in the absence of a voluntary appearance by the stay-at-home parent, but such a default divorce is of questionable validity if the plaintiff leaves the forum shortly after the decree. See Rice v. Rice, 336 U.S. 674 (1949); Williams v. North Carolina, 325 U.S. 226 (1945). A court with jurisdiction to adjudicate divorce, custody, and child support could reasonably be considered an appropriate forum for the litigation of alimony, as well. Of course, either parent may wish to sue for custody and/or a determination of child support, but not divorce, and variations in grounds and residence requirements for divorce will often inhibit litigation of all issues in the same forum.

190 See text accompanying note 6 *supra*.

191 Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Kreiger v. Kreiger, 334 U.S. 555 (1948); Estin v. Estin, 334 U.S. 541 (1948). The Uniform Reciprocal Enforcement of Support Act, designed to facilitate collection of child support from deserting fathers, rests upon this premise; it permits a support adjudication against a father only where he or his property is "present." The result is a cumbersome, bifurcated proceeding for the determination of initial child support: a complaint filed by the mother in the initiating state, where she and the child reside, is forwarded to a court of the responding state, where the father resides, which determines the custody obligation after considering his evidence and a transcipt of the mother's testimony also forwarded by the initiating state. See UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 9; CHEATHAM, GOODRICH, GRISWOLD & REESE, CONFLICT OF LAWS 849 (1957). The procedures of the act are perhaps more useful in enforcing existing decrees against departed fathers. Enforcement by execution or contempt citation generally requires a judgment of the state where the defendant or his property is located, but such a judgment need not readjudicate the substantive support issues.

adjudication by the established home state of a nonresident father's support obligation would not appear to be more offensive to "traditional notions of fair play and substantial justice" than a custody determination.[192] Not only does an absent father have a "minimum contact" with the state where his child habitually resides, but his failure to support the child may well constitute a kind of tortious activity sufficiently carried on in that state to make it a fair venue for enforcing the obligation.[193]

Jurisdiction to modify a child support decree involves additional considerations. A father should petition for reduced support in the state where the child has an established home with the mother, but a mother who may petition in that state for increased support can subject a nonresident father to frequent litigation in an inconvenient forum. The importance of inhibiting repeated litigation and of providing a fair venue for the father may justify the allocation of jurisdiction to the state of his residence when the mother requests such modification.[194]

When the mother sues at the father's residence to collect support payments accrued under a retroactively modifiable decree, due process requires that the father be heard on the modification issue before payment is enforced,[195] but due process does not require that a defaulting father be allowed to compel litigation of this issue in a forum of his choosing.[196] Upon objection to its modification jurisdiction by a nonresident mother, the enforcing court can stay the proceedings until the father has had sufficient time to request modification in a venue fair to her.[197] If she has also petitioned for enforcement of prospective support payments as they

192 See text accompanying notes 148-51 *supra*.

193 *Ibid.*; see WSAZ Inc. v. Lyons, 254 F.2d 242 (6th Cir. 1958); Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); EHRENZWEIG, *op. cit. supra* note 171, at 264-65 n.9. The significant differences in the substantive rules of the various states concerning the parental obligation to support a legitimate minor child relate to the age at which the obligation terminates and the extent to which the mother shares the obligation with the father. See Commissioner's Prefatory Note, UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9C UNIFORM LAWS ANNOTATED 10-11 (1957). Because of its interest in the maintenance of the child, the established home state may reasonably control these limitations, although the presence of other dependents at the father's residence increases the interest of that state in the apportionment of his income. *Cf.* note 185 *supra*. As to the significance of comparative state interest in allocating jurisdiction, see notes 87, 115 *supra*.

194 As to modification (a) before creation of an established home, see text accompanying notes 124-28 *supra*, (b) after creation of an established home, see text accompanying notes 120-23, 129-31 *supra*, (c) when custody is divided, see text accompanying notes 132-33 *supra*.

195 See text accompanying note 164 *supra*.

196 See text accompanying notes 168, 177-81 *supra*.

197 See note 168 *supra*.

accrue, the enforcing court may order reasonable support pending final determination of the modification issue.

THE FUNCTION OF THE SUPREME COURT IN ALLOCATING JURISDICTION

The foregoing discussion suggests that in order to develop workable rules for the allocation of child custody jurisdiction the Supreme Court must articulate the values to be implemented by such allocation and apply to each situation principles derived from those values. Substantive common-law rules are developed by a similar process, but values, principles, and rules formulated by the Supreme Court in defining state judicial authority and the extraterritorial effect of judgments must be consistent with the constitutional text.

Obviously, the Court can give meaning to the phrases "due process of law" and "full faith and credit" only by identifying the values it considers implicit in the language. The broad policies of fundamental fairness and national unity suggested by these clauses become functional guides for allocation of jurisdiction when translated in terms of the well-being of the persons affected by the litigation, the convenience of the venue, the accessibility of the evidence, the consequences of repeated litigation, the reasonable expectations of litigants, and the importance of interstate cooperation and respect. As stated by Justice Rutledge, concurring in *Halvey*,[198] ". . . the controlling consideration should be the best interests of the child, not only for disposing of such cases as a matter of local policy . . . but also for formulating federal policies of full faith and credit as well as of jurisdiction and due process in relation to such dispositions. . . ."

APPENDIX

A Restatement of Rules for Custody Jurisdiction Derived From the Established Home Principle

(1) Jurisdiction to make an initial decree regulating the custody of a child may be exercised by the state where the child's established home is located at the time proceedings are begun, provided the child or one of the parties claiming custody resides there.

(2) A child has an established home at the last place where it resided for at least six months with a parent or a person acting as a parent.

(3) If the child has no established home, or if neither the child nor any

198 330 U.S. 610, 620 (1947).

person claiming custody resides in the established home state when proceedings are brought, initial custody jurisdiction may be exercised by the state where the child's last non-transient abode with both parents is located, provided the child or one of the parties claiming custody resides there; if they do not, initial custody jurisdiction may be exercised by the state where the child resides with a parent, or a person acting as parent,[199] at the time the proceedings are begun.

(4) Jurisdiction to modify a custody decree may be exercised by the state that issued it until the child acquires an established home elsewhere, provided the child or the prevailing parent resides there, or the non-prevailing parent resides there and the prevailing parent has removed the child to another state without express court authorization.

(5) Pending the acquisition of an established home, jurisdiction to modify a custody decree may be exercised by the state to which the prevailing parent has taken the child after the decree if the move was expressly authorized by the court or if the non-prevailing parent does not reside in the state of the decree. After the prevailing parent has moved the child first to an authorized state and then to an unauthorized state, but before the creation of an established home, the authorized state may exercise modification jurisdiction if the non-prevailing parent resides there, and the state of the decree may exercise jurisdiction if the non-prevailing parent resides there; otherwise the unauthorized state may exercise jurisdiction.

(6) Jurisdiction to modify a custody decree may be exercised by the state where the last established home acquired by the child subsequent to the decree is located, provided the child or a party claiming custody resides there.

(7) If each parent is given custody for a part of the year by decree or agreement, the child may acquire an established home with the parent having the shorter period of custody by continuing to live in the same place with that parent for three months after the end of the shorter period, and for a total of at least six months, without action by the other parent. If each parent is given custody for approximately half the year by decree or agreement, jurisdiction to modify the decree or to make an initial disposition should be exercised by the state in which the child has been residing with the petitioning parent for at least nine months without action by the defending parent.

(8) If the non-prevailing parent removes a child in violation of the decree and the prevailing parent cannot locate them in time to prevent the creation of an established home in a second state, upon a petition to enforce the decree that state should return the child to the prevailing parent without considering modification if, under the circumstances, the prior home state remains a fair venue for litigating the issue.

[199] See note 102 *supra* and note 200 *infra*.

(9) If neither parent nor the child[200] resides in the established home state when modification proceedings are begun, jurisdiction to modify may be exercised by the state where the last non-transient abode of the child and the prevailing parent is located, provided the child or the prevailing parent resides there; if they do not, modification jurisdiction may be exercised by the state where the child then resides.[201]

(10) Jurisdiction to make or modify a custody decree may be exercised by a state with the consent of the parties claiming custody or by a state in which the child resides with one of the persons claiming custody when proceedings are initiated there by the nonresident claimant.

(11) No state may exercise jurisdiction to make or modify a custody decree if a prior action is pending in a court with jurisdiction.

(12) A valid custody decree is entitled to full faith and credit enforcement in every state. An enforcing court has jurisdiction to modify the decree at the request of the defendant only if the above-stated requirements for modification jurisdiction are met.

(13) A modifying court is required by the full faith and credit clause to accept the prior decree as res judicata on all previously adjudicated issues but may decide for itself whether to consider evidence of events occurring before the decree but not presented to the initial court, as well as evidence of subsequent events.

(14) The state where a child is physically present may remove the child from the possession of any person who is mistreating or abusing it. If, in proceedings to enforce a foreign custody decree, the defendant makes a substantial showing that the child may suffer serious harm if returned to the plaintiff, the court may stay the proceedings until the defendant has had a reasonable time in which to petition for modification in a court with jurisdiction.

Application of Rules to Typical Situations

In every situation it is assumed that: (1) the defendant has received fair notice, (2) a state has jurisdiction when one parent petitions there for custody and the other is a resident or appears wihout objecting to the jurisdiction, (3) a state does not have jurisdiction if a prior action is pending in a foreign court with jurisdiction.

Case A

After the parents have lived with the child for more than six months in state *X*, one parent removes the child to state *Y:*

(1) Until the child has lived in *Y* for six months, *X* has jurisdiction to determine custody.

200 The child's residence may be with a person acting as parent if neither parent maintains a residence for the child.

201 This residence may be with the losing parent.

(2) *Y* has jurisdiction to determine custody if: (a) the child has lived there for at least six months, or (b) the stay-at-home parent has left *X*.

Case B

After the parents have lived with the child for more than six months in state *W* and then for two months in state *X*, one parent removes the child to state *Y:*

(1) Until the child has lived in *Y* for six months, *X* has jurisdiction to determine custody provided the stay-at-home parent resides there.

(2) *Y* has jurisdiction to determine custody if (a) the child has lived there for at least six months, or (b) the stay-at-home parent has left *X* but has not returned to *W*.

(3) Until the child has lived in *Y* for six months *W* has jurisdiction to determine custody if the stay-at-home parent has returned there.

Case C

After the parents have lived with the child for more than six months in state *X* and then for two months in state *Y*, one parent returns with the child to state *X:*

(1) *X* has jurisdiction to determine custody.

Case D

One parent removes the child from its home in state *X* to state *Y* and permits the child to live for extended periods in a boarding school or with relatives in state *Z:*

(1) *Y* has jurisdiction to determine custody after six months or after the stay-at-home parent has left *X* if the child regularly returns to the residence of the parent in *Y*.

(2) If the parent in *Y* does not maintain a residence for the child but permits the child to remain indefinitely at the school or with the relatives, *Z* has jurisdiction after six months or after the stay-at-home parent has left *X*.

(3) Until the child has lived in *Y* or *Z* for six months, *X* has jurisdiction to determine custody provided the stay-at-home parent resides there.

Case E

The losing parent, in violation of a valid custody decree of state *X*, removes the child from state *X* to state *Y*. The winner brings habeas corpus proceedings in *Y* to enforce the decree. The loser then requests modification on the basis of events occurring after the decree and events occurring before the decree but not presented to the court because previously unknown. In *X* modification may not be based on prior events.

(1) *Y* should give full faith and credit to the *X* decree by enforcing it without relitigating any issues.

(2) *Y* has jurisdiction to modify the decree if the child has lived there for six months. In that event *Y* may decide for itself whether to consider the previously unadjudicated events.

(3) Until the child has lived in *Y* for six months, *X* has jurisdiction to modify the decree provided the winner still resides there.

(4) Upon a substantial showing by the loser that the child may suffer serious harm if returned to the winner, *Y*, if it lacks jurisdiction to modify, may stay the enforcement proceedings until the loser has had a reasonable time in which to petition for modification in *X*.

Case F

Shortly after a valid custody decree in state *X*, the winner takes the child to state *Y* and three months later to state *Z*:

(1) *X* has jurisdiction to modify until the child has lived in *Z* for six months provided the loser lives in *X* and the moves to *Y* and *Z* were without court authorization.

(2) *Y* has jurisdiction to modify until the child has lived in *Z* for six months provided the loser lives in *Y*, the move to *Y* was authorized, and the move to *Z* was not authorized.

(3) *Z* has jurisdiction to modify if the move to *Z* was authorized or the child has lived there for six months or the loser no longer lives in *X*, nor in *Y* if the move to *Y* was authorized.

Case G

After a valid custody decree in state *W*, the winner takes the child to state *X* for over six months and then to state *Y* for three months. The child then visits the loser in state *Z* and is retained there in violation of the decree. After three months the winner brings habeas corpus proceedings in *Z* and the loser requests modification:

(1) *Z* has jurisdiction to modify if the winner no longer resides in *X* or *Y*.

(2) *Y* has jurisdiction to modify if the winner still resides there.

(3) *X* has jurisdiction to modify if the winner now resides there.

Case H

A valid decree of state *X* gives the mother custody in *X* for eight months of the year and the father custody in *Y* for four months. After the father has retained the child in *Y* for a total of seven months, he requests and obtains a modification in *Y*, over the mother's objection to the jurisdiction, giving each parent custody for half the year. After the mother has retained the child in *X* for seven months the father brings habeas corpus proceedings there. The mother claims the modification was made without jurisdiction and also asks further modification.

(1) *Y* had jurisdiction to modify, and the *Y* decree is entitled to full faith and credit enforcement in *X*.

(2) *X* has no jurisdiction to modify except at the request of the father. *Y* has jurisdiction to modify at the request of the mother.

Application to Supreme Court Cases

Had these rules been applied in the Supreme Court cases previously discussed, the results would have been as follows:

In *May v. Anderson*,[202] Wisconsin, the long-established family home, had jurisdiction to award custody of the children to the stay-at-home father who petitioned promptly after the mother had removed them to Ohio. Ohio properly gave full faith and credit to the Wisconsin decree and ordered the children returned to the father when the mother retained them in Ohio in violation of the decree. Since the established home of the children after the decree remained in Wisconsin, Ohio did not have jurisdiction to modify the decree in the enforcement proceedings had it offered a procedure for doing so.

In *Halvey v. Halvey*,[203] Florida was the established home and had initial custody jurisdiction, because the child had been living there with its mother for almost a year when she petitioned for custody. Service on the father, however, was by "publication";[204] unless such service included delivery of notice to him or to his home, it violated due process requirements for fair notice and the Florida custody decree was invalid. New York lacked jurisdiction to make or modify a custody decree, because when the father retook the child, its established home was still in Florida where the mother continued to reside. If the father did receive fair notice of the Florida proceedings, New York should have given full faith and credit to the Florida decree without modification and ordered the child returned to the mother. If the father did not receive fair notice, New York should have declared the decree invalid, but might then have proceeded to determine custody if the mother thereupon requested such an adjudication.

In *Kovacs v. Brewer*,[205] New York did not per se have jurisdiction to modify, in favor of the mother, its prior decree, because the child's established home was in North Carolina at the time of the request for modification, but the father and grandfather consented to New York's jurisdiction by contesting without objection to it. The child reacquired an established home in North Carolina after the modification by living there another fourteen months before the mother petitioned for enforcement. That state therefore had jurisdiction to modify on the basis of both subsequent events and prior, unlitigated events but could not redetermine facts previously adjudicated. Since evidence of previously litigated as well as of subsequent events had been introduced at the hearing, a remand was necessary to per-

202 See note 43 *supra*.
203 See note 26 *supra*.
204 The opinion does not elucidate this term.
205 See note 36 *supra*.

mit a resolution of the modification issue by the North Carolina court solely on the basis of the subsequent events.

In *Ford v. Ford*[206] the full faith and credit clause did not require South Carolina to accept as a binding custody decision the Virginia dismissal order based on an agreement of the parents favoring the father, because the order had decided nothing and was not res judicata under Virginia law. The stay-at-home father, however, apparently continued to maintain an established home in North Carolina for the children, who had been taken to South Carolina by their mother during the summer, and he could have soundly objected to the jurisdiction of the South Carolina court. Instead he chose to litigate on the merits and was therefore bound by the decree.

[206] See note 39 *supra*.