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Conflict of Laws - Custody Decrees - Jurisdiction to Modify and Effect in Sister States

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CONFLICT OF LAWS—CUSTODY DECREES—JURISDICTION TO MODIFY AND EFFECT IN SISTER STATES—Husband and wife were divorced in Wisconsin in 1956 by a judgment which awarded alimony, custody of the children, and support money to *W*. The custody decree provided that *W* be permitted to remove the children to California but that they be allowed to visit *H* each summer. While *H* was visiting California in October 1957, he was served in an action commenced by *W* seeking absolute custody. *H* returned to Wisconsin and on November 5 asked the Wisconsin court to modify its divorce judgment by awarding custody of the children to him. That court set a hearing and issued orders requiring *W* to show cause and restraining her from proceeding in the California action until the hearing, which orders were personally delivered to *W*. On December 12, the California court granted *W* an order which limited *H*'s visiting rights. In January 1958, the Wisconsin court held that it had retained continuing jurisdiction, that it was not bound by the California action, and that *W* had willfully violated the Wisconsin restraining order. The court ordered that, pending *W*'s compliance with the original Wisconsin custody award, the court clerk should not forward to her the alimony paid in by *H*. On appeal, *held*, reversed and dismissed. Both states had jurisdiction over parties and the question of custody, but since the California action had already been commenced the Wisconsin court should have declined to entertain *H*'s application. *Brazy v. Brazy*, 5 Wis. (2d) 352, 92 N.W. (2d) 738 (1958).

The questions of what constitutes jurisdiction to issue or modify child custody decrees and what effect the full faith and credit clause of the United States Constitution¹ requires other states to give such decrees have been extremely troublesome to the courts. The problem underlying both questions is a conflict between the state's concern for the welfare of children domiciled or temporarily present within its borders, and the undesirability of parents going from one jurisdiction to another seeking favorable custody awards.² In resolving this conflict in terms of jurisdiction, the courts have subscribed to one of three different theories.³ Some base jurisdiction over the matter of a child's custody on in personam jurisdiction over the parents, the theory being that when both parties are before the court their legal relations as to the child may be there determined.⁴ Other states regard the question of custody as one of status and, as such, subject only to the control of the state in which the child is domiciled.⁵ According to the third theory the basic problem is to determine what is in the best interest of the child, and, as the state in which the child is physically present is the most qualified to determine this, that state has exclusive, or at least concurrent, jurisdiction to do so.⁶ In the principal case the question of jurisdiction is complicated by an additional factor. There is no doubt

¹ U.S. CONST., art. 4, §1.

² *In re Bort*, 25 Kan. 308 (1881), is the leading case to the effect that a decree of custody is based upon local concern for the best interests of the child. In *Finlay v. Finlay*, 240 N.Y. 429 at 431, 148 N.E. 624 (1925), Justice Cardozo stated the classic principle for balancing the two interests: "The jurisdiction of a state to regulate the custody of infants found within its territory . . . has its origin in the protection that is due to the incompetent or helpless. . . . But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status." Compare CONFLICT OF LAWS RESTATEMENT §148 (1934). In applying the Cardozo principle courts have tended to emphasize one interest or the other. Compare *Aufiero v. Aufiero*, 332 Mass. 149, 123 N.E. (2d) 709 (1955), with *Shippen v. Bailey*, 303 Ky. 10, 196 S.W. (2d) 425 (1946). The type of abuse courts strive to prevent is revealed by the facts of *Weddington v. Weddington*, 243 N.C. 702, 92 S.E. (2d) 71 (1956), and *Allen v. Allen*, 200 Ore. 678, 268 P. (2d) 358 (1954). In the latter case the children had been subjected to seven custodial disputes in nine years. See generally Ehrenzweig, "Interstate Recognition of Custody Decrees," 51 MICH. L. REV. 345 (1953).

³ RESTATEMENT OF THE LAW CONTINUED, CONFLICT OF LAWS §117, p. 55 (Tent. Draft No. 1, 1953).

⁴ *Burgo v. Burgo*, (D.C. Alaska 1957) 149 F. Supp. 932; *Krasnow v. Krasnow*, 140 Conn. 254, 99 A. (2d) 104 (1953). *Contra*, *Gafford v. Phelps*, 235 N.C. 218, 69 S.E. (2d) 313 (1952).

⁵ *Griffen v. Griffen*, 95 Ore. 78, 187 P. (2d) 598 (1920); *Application of Enke*, 129 Mont. 353, 287 P. (2d) 19 (1955), cert. den. 350 U.S. 923 (1955); *Rodney v. Adams*, (Ky. 1954) 268 S.W. (2d) 940; 2 BEALE, CONFLICT OF LAWS §144.3 (1935); GOODRICH, CONFLICT OF LAWS, 3d ed., §136 (1949); CONFLICT OF LAWS RESTATEMENT §117 (1934). But see Stumberg, "The Status of Children in the Conflict of Laws," 8 UNIV. CHI. L. REV. 42 (1940); 9 A.L.R. (2d) 434, 439 (1950).

⁶ *Weddington v. Weddington*, note 2 *supra*; *Glasier v. Glasier*, 153 N.Y.S. (2d) 788 (1956); STUMBERG, CONFLICT OF LAWS, 2d ed., 326 (1951); Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW AND CONTEMP. PROB. 819 (1944); note, 47 MICH. L. REV. 703 (1949). See the general discussion in 4 A.L.R. (2d) 7 (1949). No single one of the

that California had jurisdiction as to the matter of custody, since the requirements of all three theories were met. But the Wisconsin court asserted that it too had jurisdiction by virtue of provisions in the original divorce judgment that the rights of the parties were subject to possible further orders⁷ and a state statute providing for subsequent alterations of such judgments.⁸ Most courts subscribe to this concept of continuing jurisdiction, at least insofar as the ability to modify their own judgments is concerned. And usually in order to exercise it no more is demanded than personal jurisdiction over the parents, which often is said to have remained in the court as a consequence of the original proceeding.⁹ If it is conceded that both states had jurisdiction, then the second issue raised by custody awards is presented. What effect should the original Wisconsin judgment have been given by the California court, and what significance should the California change have had in the Wisconsin court? The issue these questions present is different from that of jurisdiction, though the two often are confused, and actually is one for the United States Supreme Court. That Court thus far has refrained from deciding whether a custody judgment is made binding on other states by the full faith and credit clause.¹⁰ However, it has declared that a state may modify a foreign decree

three theories of jurisdiction seems to be completely adequate to allow a court to intervene in every situation in which its action is desirable. See, e.g., *Sampsel v. Superior Court*, 32 Cal. (2d) 763, 197 P. (2d) 739 (1948).

⁷ Principal case at 742.

⁸ 2 Wis. Stat. (1957) §§247.24 to 247.25.

⁹ *Koelsch v. Rone*, 3 Ill. (2d) 483, 121 N.E. (2d) 738 (1954); *Van Grundy v. Van Grundy*, 244 Iowa 488, 56 N.W. (2d) 43 (1953); *Burkhardt v. Bachrack*, (Tex. Civ. App. 1950) 225 S.W. (2d) 1022; CONFLICT OF LAWS RESTATEMENT §76 (1934); RESTATEMENT OF THE LAW, p. 97, comment c, 1948 Supp. (1949). See also *Stansbury*, "Custody and Maintenance Law Across State Lines," 10 LAW AND CONTEMP. PROB. 819 (1944). *Contra*, *Milner v. Gatlin*, (Tex. 1924) 261 S.W. 1003; *Cunningham v. Cunningham*, 166 Ohio St. 203, 141 N.E. (2d) 172 (1957).

¹⁰ *Kovacs v. Brewer*, 356 U.S. 604 (1958), concerned a holding by North Carolina that when the children became domiciled in that state after their custody had been awarded to *H* by New York, a New York modification awarding custody to *W* was not entitled to full faith and credit. The Supreme Court remanded for a determination of whether the holding was based upon a change in circumstances after the New York modification. It refused to decide whether in the absence of such change full faith and credit would be required. The state courts have taken various positions on the question. Some hold that in the interest of the welfare of any child physically present within the state they can examine all the pertinent facts including those upon which the original judgment was based. In *re Bort*, note 2 *supra*. See generally *Reese and Johnson*, "The Scope of Full Faith and Credit to Judgments," 49 COL. L. REV. 153 at 171 (1949); 72 A.L.R. 441 (1931). Other states rule that a foreign decree is *res judicata* as to the facts upon which it was based but that they can change the award upon a showing of a change in circumstances. *White v. White*, 160 Kan. 32, 159 P. (2d) 461 (1945); *Miller v. Schneider*, (Tex. Civ. App. 1943) 170 S.W. (2d) 301. See CONFLICT OF LAWS RESTATEMENT §147, comment a (1934). But see RESTATEMENT OF THE LAW SECOND, CONFLICT OF LAWS §§144-144 (a), pp. 142-145 (Tent. Draft No. 4, 1957). Occasionally a court decides it cannot as a foreign court alter a properly rendered custody decree at all, or at least not beyond making temporary provisions effective only within the state. *Butts v. Collins*, 129 Mont. 440, 289 P. (2d) 949 (1955). Cf. *Light v. Light*, 12 Ill. (2d) 502, 147 N.E. (2d) 34 (1957).

where the rendering state had the right to modify its own order, although only under the same conditions under which the original state could act.¹¹ Since Wisconsin courts can modify their custody judgments on a showing of substantial change in circumstances,¹² the California court had the power to alter the award as it did in the principal case, since such a change apparently was shown by *W*. Thus the Wisconsin court was confronted with the question of what effect to give the properly rendered California decree. Wisconsin has indicated its willingness to alter foreign decrees if changed circumstances are present,¹³ but *H* had not attempted to show there were such changes since the California action. Thus by its own rules the court could not but hold as it did, although the decision seemingly was based on principles of comity. While the opinion will be of little assistance to lower courts and attorneys in Wisconsin,¹⁴ the outcome is both realistic and desirable. The children were in California, and in such situations that state has not felt constrained to honor decrees such as the Wisconsin trial court had issued.¹⁵ Also, the California court was in a better position to investigate what was best for the children's welfare and whether their interests were being furthered by their mother's custody. While the Wisconsin court here arrived at a satisfactory solution to the problem that is posed when two states have issued conflicting awards, the problem itself remains to perplex. It is unreasonable to expect that fifty courts will independently arrive at an identical solution, but the problem will remain until they do or until the United States Supreme Court resolves at least the full faith and credit aspect of it. In the meantime, regardless of jurisdictional theories, it is hoped that courts will strive to reach results as ultimately sensible as those of the Wisconsin court.¹⁶

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¹¹ *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947). The Court also has held that when a court lacks personal jurisdiction over a parent its decree cutting off the parent's immediate right to custody of children need not be accorded full faith and credit. *May v. Anderson*, 345 U.S. 528 (1953), noted, 52 MICH. L. REV. 594 (1954).

¹² *Application of Rattel*, 244 Wis. 261, 12 N.W. (2d) 135 (1943). See also *Pollock v. Pollock*, 273 Wis. 233, 77 N.W. (2d) 485 (1956). And see generally 28 Wis. Stat. Ann. (1957) p. 477, n. 46 and p. 480, n. 2.

¹³ *State ex rel. Hannon v. Eisler*, 270 Wis. 469, 71 N.W. (2d) 376 (1955).

¹⁴ It is difficult to determine which statements by the court may be considered dicta in later cases.

¹⁵ *Re Lee's Guardianship*, 123 Cal. App. (2d) 882, 267 P. (2d) 847 (1954); *Stout v. Pate*, 120 Cal. App. (2d) 699, 261 P. (2d) 788 (1953) (situation similar to that in the principal case).

¹⁶ See the similar result in *Remick v. Remick*, 204 Okla. 345, 229 P. (2d) 600 (1951).