Children in Transit: Child Custody and The Conflict of Laws

I. INTRODUCTION

Myrtis Pate and William Pate were divorced in 1948 in De Kalb County, Georgia. Mrs. Pate was given custody of the two children of the marriage, then aged 5 and 2. In December of 1949 the custody arrangement was modified, to the satisfaction of both parents, dividing custody between them. Myrtis Pate remarried and in May of 1950 moved with her new husband and the two children to California. In July of 1951 she instituted an action in the Superior Court of Los Angeles County asserting that changed conditions and the best interests of the children required that she be given exclusive custody of the two children. Upon learning of the action, William Pate traveled to Los Angeles, spoke with his former wife, then took the children for an afternoon ride and kept going until he reached De Kalb County. Myrtis followed him there and instituted a habeas corpus proceeding in the De Kalb County Superior Court for the purpose of having that court determine her right to exclusive custody of the children. But while the Georgia proceeding was still pending, she obtained physical control of the children, and without William's consent, returned to California. Once back in California she attempted to dismiss the habeas corpus proceeding she had begun in Georgia but was unsuccessful, the point being finally decided by the Georgia Supreme Court in February of 1952.[1] In September of 1951, Myrtis filed an amended complaint to her original California action and in October William answered, asserting that the divorce decree and its subsequent modification (dividing custody between them) and the pendency of the habeas corpus proceeding operated as a bar to the California action. He also demanded custody of the children. On May 2, 1952 William obtained a restraining order from De Kalb County enjoining Myrtis from proceeding with the California action. Myrtis then sought a similar injunction against William from the Los Angeles Superior Court which was denied, the court noting however that it had the jurisdiction to render the order. The Los Angeles Court then disregarded the Georgia restraining order and

[1]Stout v. Pate, 208 Ga. 768, 69 S.E. 2d 576 (1952).

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on May 27 awarded exclusive custody to Myrtis plus $50 per month support for each child.

The De Kalb County Superior Court then made final its judgment dividing custody between the parents and stated that it might further modify the decree due to the fact that Myrtis had taken up residence in California. Myrtis then appealed the Georgia order but the Supreme Court of Georgia affirmed.[2] William then appealed the California ruling but it was affirmed in the District Court of Appeals[3] and a hearing denied in the California Supreme Court on December 17, 1953. Each then appealed the respective state Supreme Court rulings but the U.S. Supreme Court denied certiorari.[4]

The above case is illustrative of the chaos that results from disputes between state courts over custody arrangements. The conjunction of the two factors of increased familial and individual mobility, and the growth in the divorce rate,[5] have made a commonplace of a situation that was once thought to be a rarity: the interstate custody dispute. The acute problems this creates for children are manifest in view of the psychiatric imperative demanding an optimum of stability in a child's environment,[6] particularly since litigation over custody is often the battleground on which estranged parents may seek to continue the emotional conflict which led to the breakdown of the marriage.

The basic principle relating to custody decrees is generally said to be that the "best interests of the child" will prevail, yet "historically custody awards have been dictated or controlled by amorphous platitudes or generalizations on the one hand and by rigid absolutes on the other."[7] The law of conflicts in the custody area is no exception to this dichotomy. On the contrary, the gap between the postulated "best interests" rule and the actual fate of children is much wider in interstate law. At this time the ability of a given court in one state to determine a custodial relationship, and be assured of its continuance, is very limited. Even the sanction of criminal penalties for "child

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[2]Stout v. Pate, 209 Ga. 786, 75 S.E. 2d 748 (1953).
[3]Stout v. Pate, 120 Cal. App. 2d 699, 261 P.2d 788 (1953).
[4]Stout v. Pate, *cert. den.* 347 U.S. 968 (1954); Pate v. Stout, *cert. den.*, 347 U.S. 968 (1954).
[5]In California, there were 102,859 final decrees of dissolution in 1971 compared to 62,641 for 1966. For the 9 month period from January to September there were 79,737 decrees in 1972 compared to 47,264 for 1966, representing an increase of approximately 70%. State of California — Department of Mental Health, *Vital Statistics — Marriages and Divorces*, Number 11, November 1972.
[6] WATSON, PSYCHIATRY FOR LAWYERS, 197 (1968). *See generally* Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1970); DESPERT, CHILDREN OF DIVORCE, 202-212 (1953); Ellsworth and Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies*, 4 LAW AND SOCIETY REVIEW 167-233 (1970).
[7]Foster and Freed, *Child Custody (Part I)*, 39 N.Y.U.L REV. 423 (1964).

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stealing"[8] will not usually prevent a losing parent from trying his luck in a foreign forum, where neither the criminal prosecution nor the prior award is likely to have much effect.[9]

It is apparent that the child's interests do not lie in a judicial free-for-all in custody litigation. Yet the present state of the law seems hardly more refined than that. The continuing force and effect of a given custodial arrangement is illusive at best, since jurisdiction and authority to alter that arrangement will attach in a court elsewhere simply by the presence of the child in the new forum.[10] It is the thesis of this article that the child's interests lie not in the continuation or expansion of this authority, but in its restriction.

II. THE JURISDICTIONAL QUESTION

The *First Restatement of Conflict of Laws* took the position that the determination of the child-custodian relationship was the exclusive task of the state of domicile.[11] The view of the child as something of a quasi-chattel created a situation in which the forum state was theoretically impotent to disturb the decree of a sister state if in fact the child's domicile was in the sister state and not in the forum.[12] This doctrine, to the extent it was followed,[13] led to an obvious conflict between a jurisdiction which had "exclusive control" because the "res" (the custodial relationship, or perhaps even the child himself[14]) was a domiciliary, and a jurisdiction which had actual control and perhaps even a moral duty to make a custody determination since the child was actually residing within its borders. A non-domiciliary state would exercise "power without jurisdiction,"[15] in other words, decide on a purely ad hoc basis the fate of a child who was present in the state. This *Restatement* position was widely criticized as early as the 1940's.[16] As Professor Stansbury

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[8]People v. Hyatt, 18 Cal. App. 3d 618, 96 Cal. Rptr. 156 (1971); *Cf.* Brocker v. Brocker, 429 Pa. 513, 241 A. 2d 336 (1968), *cert. denied*, 393 U.S. 1081 (1969).

[9]*In re* Walker, 228 Cal. App. 2d 217, 39 Cal. Rptr. 243 (1964).

[10]Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948). In addition, since all custody decrees are modifiable in the state where rendered, they are similarly modifiable in the courts of the forum. *See* N.Y. *ex rel* Halvey v. Halvey, 330 U.S. 610 (1947) and text accompanying notes 27-42, *infra*.

[11]RESTATEMENT, CONFLICT OF LAWS, § 117 (1934).

[12]Glass v. Glass, 260 Mass. 562, 157 N.E. 621 (1927); Leach v. Leach, 184 Kan. 335, 336 P.2d 425 (1959). See also cases cited at note 105, GOODRICH AND SCOLES, HANDBOOK OF THE CONFLICT OF LAWS, 271 (1964).

[13]*See* note 60, *infra*.

[14]Hoskins v. Currin, 242 N.C. 432, 88 S.E. 2d 228 (1955).

[15]Stansbury, *Custody and Maintanance Across State Lines*, 10 LAW AND CONTEMPORARY PROBLEMS 819, at 826 (1944).

[16]Stansbury, *supra*, note 15; Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953); EHRENZWEIG, TREATISE ON THE

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wryly observed: "With sincere respect to the authors of the *Restatement*, the present writer confesses that to his somewhat earthbound intellect this is a pure abstraction, put forward to make hard facts fit an a priori theory of jurisdiction."[17]

Recognizing the artificiality of the exclusive "domicile" approach, many courts have searched for alternatives.[18] In the landmark case of *Sampsell v. Superior Court*,[19] Justice Traynor laid down three alternative tests of jurisdiction,[20] because "the principal difficulty with each of these theories as exclusive tests of jurisdiction is the difficulty inherent in any attempt to apply hard and fast rules of res judicata and conflict of laws to the issue of child custody."[21]

At issue in the *Sampsell* case was the propriety of the Superior Court's refusal to grant the plaintiff husband a custody order *pendente lite* on the ground of lack of jurisdiction, since the child's domicile was no longer in California. The husband asked for mandamus in the Supreme Court. The point has been made that Justice Traynor need never have tackled the question of whether or not domicile is the sole jurisdictional criterion since the child involved actually was a California domiciliary at the commencement of the action by virtue of the fact that (1) a demurrer admitted the allegation of domicile and (2) the child had never reached his alleged new home in Utah.[22] However the court went further than these narrow grounds, and set a definite tone for the expansion of jurisdiction by stating that:

> in the interest of the child, there is no reason why the state where the child is actually living may not have jurisdiction to act to protect the child's welfare, and there is likewise no reason why other states should not also have jurisdiction. . . . Thus, if the child is living in

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CONFLICT OF LAWS, 281 (1962); Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42 (1940).

[17]Stansbury, *supra*, note 15 at 826.

[18]*In* Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925) Justice Cardozo avoided the jurisdictional question by simply asserting that the state as *parens patriae* had the obligation and necessity to provide for children present within its borders. A similar rule has been adopted by the courts of Kansas. *See* cases cited at note 31, EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS 290 (1962).

It should be noted, however, that what is being discussed here, and throughout this article, is not the power of a state to take temporary or emergency measures to protect neglected or abandoned children under the police power. Rather it is the question of the state's power to determine or alter custodial arrangements where there is no genuine issue of dependency or unfitness.

[19]Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948).

[20]These are: (1) in personam jurisdiction over the parents, (2) the conventional view of custody as status and hence subject to the control of the state of domicile and (3) jurisdiction based on the physical presence of the child.

[21]Sampsell v. Superior Court, 32 Cal. 2d at 777-78, 197 P.2d at 749 (1948).

[22]Currie, *Justice Traynor and the Conflict of Laws*, 13 Stan. L. Rev. 719, at 765 (1961).

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one state but domiciled in another, the courts of both states may have jurisdiction over the question of its custody.[23]

The decision in *Sampsell*, while eliminating the artificiality of the domicile approach, nevertheless left some problems unsolved and created new ones. If jurisdiction is expanded so as to include two or more states concurrently then the questions become: what happens if two states assume jurisdiction simultaneously, and what effect is to be given the decree of a sister state when a petition for modification is made in the forum? The major question, simply stated, is: Does Full Faith and Credit[24] apply to child custody decrees?

The issue has been presented to the U.S. Supreme Court on four separate occasions[25] in the fifteen year period between 1947-1962, but thus far the court has refused to rule squarely on the question. However, the cases have produced an intense debate between Justice Frankfurter and Justice Jackson, setting forth the basic arguments as to the efficacy of both approaches.[26]

At issue in *Halvey v. Halvey*[27] was the validity of a New York Court of Appeals ruling amending a previously rendered Florida custody decree. The parties were originally domiciled in New York, but a year before the Florida decree Mrs. Halvey had left her husband and taken the child to that state. She there petitioned for divorce and served notice on Mr. Halvey by publication. The day before the Florida decree granting a divorce and permanent custody to the wife was entered, the husband "stole" the child and returned with him to New York. Mrs. Halvey followed him there and filed habeas corpus proceedings in the New York Supreme Court, resting her plea on the strength of the prior Florida decree. The lower court in New York returned custody to the mother, but granted visitation rights to the father during vacations and ordered the mother to post a $5,000 bond to assure that the father received the child during the stated periods.[28] The mother appealed, but the decision was affirmed in both the Appellate Division [29] and the Court of Appeals.[30]

Thus the *Halvey* case presented the court with an opportunity to

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[23] Sampsell v. Superior Court, 32 Cal.2d at 778-79, 197 P.2d at 749 (1948)
[24] U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738.
[25] N.Y. *ex rel* Halvey v. Halvey, 330 U.S. 610 (1947). May v. Anderson, 345 U.S. 528 (1953); Kovacs v. Brewer, 356 U.S. 604 (1958); Ford v. Ford, 371 U.S. 187 (1962).
[26] For Justice Jackson's position *see* his concurring opinion in N.Y. *ex rel.* Halvey v. Halvey, 330 U.S. at 616, and his dissent in May v. Anderson, 345 U.S. at 536. For Justice Frankfurter *see* the concurring opinion in N.Y. *ex rel.* Halvey v. Halvey, 330 U.S. at 616, the concurring opinion in May v. Anderson, 345 U.S. at 535, and the dissent in Kovacs v. Brewer, 356 U.S. at 609.
[27] 330 U.S. 610 (1947)
[28] *Ex parte* Halvey, 185 Misc. 52, 55 N.Y.S. 2d 761 (1945).
[29] *Ex parte* Halvey, 269 App. Div. 1019, 59 N.Y.S. 2d 396 (1945).
[30] People *ex rel* Halvey v. Halvey, 259 N.Y. 836, 66 N.E. 2d 851 (1946).

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rule on both aspects of the jurisdictional question since both the jurisdiction of the Florida court and the effect of its decree, if valid, on the courts of New York were in dispute.

Florida law, as is the case with the great majority of states, asserted that the "welfare of the child" is the primary consideration, [31] and that custody decrees can be modified either on a showing of a change in circumstance,[32] or even as to facts existing at the time of the original hearing, if such facts were not presented to the court at the prior hearing.[33] Thus the decree granting custody to Mrs. Halvey would have been freely modifiable if the application had been made in Florida rather than New York. And as the majority opinion of Mr. Justice Douglas stated: "so far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do."[34]

However, the court was not at all sure that Florida even had jurisdiction to render the original decree, since under Florida law a custody issue can only be determined if the child is physically present at the time of the decree[35] or is a domiciliary,[36] and the domicile of the child is that of the father.[37] The majority opinion expressly found it unnecessary to deal with this issue because of the "narrow grounds" upon which the decision was based and went on to reserve for another occasion the paramount issue in the case, "whether the state which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires."[38]

The uncertainty of the majority opinion was matched by the concurrences of three of the justices who agreed only with the result. Mr. Justice Jackson concurred only on the ground that Florida lacked jurisdiction,[39] and not on the broader ground of the effect of the Florida decree in the New York courts. Mr. Justice Frankfurter concurred in the belief that the edict of Full Faith and Credit would only bind the New York courts "if there was legal power in the Florida Court to enter the custodial decree and if in the Florida

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[31] Frazier v. Frazier, 109 Fla. 164, 147 So. 464 (1933); Phillips v. Phillips, 153 Fla. 133, 13 So. 2d 922 (1943); FLA. STATS. 1941, § 65.14 F.S.A.
[32] Frazier v. Frazier, 109 Fla. 164, 147 So. 464 (1933); Meadows v. Meadows, 78 Fla. 576, 83 So. 392 (1919).
[33] Minick v. Minick, 111 Fla. 469, 149 So.. 483 (1933).
[34] N.Y. *ex rel* Halvey v. Halvey, 330 U.S. 610 at 614.
[35] Which he was not in this case, the father having removed him from the state the day before the order was entered.
[36] State *ex rel.* Clark v. Clark, 148 Fla. 452, 4 So.2d 517 (1941).
[37] Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734 (1941); Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933).
[38] N.Y. *ex rel.* Halvey v. Halvey, 330 U.S. 610 at 615-16.
[39] *Id.* at 616.

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courts themselves the decree was not made subject to the kind of modification which New York here made."[40] Mr. Justice Rutledge concurred "dubitante" on the grounds that a judgment not final in Florida should not be made so in New York. Yet his opinion voiced concern that the decision in *Halvey* would make possible "a continuing round of litigation . . . between alienated parents," as well as "unseemly litigious competition between the states and their respective courts."[41]

It is thus difficult, in view of the diverse opinions of the members of the court, and the ambiguity of the majority opinion, to define the exact boundaries established by *Halvey*. No decision was made by the majority as to whether or not Florida lacked jurisdiction to render the original decree, nor was there a final statement concerning the applicability of the Full Faith and Credit Clause to child custody. At most the court said that a decree which is modifiable in the rendering state will be modifiable to the same degree in the forum state. And since all states allow some modification of their child custody decrees, the fear of those who prophesied an increase in "forum-shopping" and continuing vexatious litigation became a reality.[42]

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[40] *Id.* at 618.

[41] *Id.* at 619, 620.

[42] Recently a New York "parental rights" decision has resulted in another conflict between the courts of Florida and New York in the *Baby Lenore* case: People *ex rel* Scarpetta v. Spence-Chapin Adoption Service, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S. 2d 65 (1971), *discussed in* Foster, *Adoption and Child Custody: Best Interests of the Child?* 22 BUFFALO L. REV. 1 (1972). In *Baby Lenore* a New York court returned a child to her natural mother after the mother had relinquished the child to an adoption agency. Subsequent to the decree, but prior to its affirmance in the Court of Appeals, the adoptive parents took the child to Florida. The New York court held the adoptive parents in contempt. The Florida courts, upon a habeas corpus action brought by the natural mother, refused to give Full Faith and Credit to the New York decree and relitigated the case on the merits, eventually ruling in favor of the adoptive parents. Professor Foster seems to indicate that the Florida courts were acting within their authority in refusing to recognize the New York decree, stating: "In declining to recognize New York's decree in the *Baby Lenore* case, Florida violated no ideal principle of reciprocity, for in the famous *Halvey* case, New York had rejected a prior Florida award." *Id.* at 14. However, there would seem to be a qualitative difference between refusing to recognize a *modifiable* custody arrangement of a sister state (as in *Halvey*), and refusing to recognize a *final* order determining parental rights as between a natural mother and an adoption agency. It was the very modifiability of the Florida custody decree in *Halvey* which led the Supreme Court to find that New York could refuse to respect it. Furthermore, there was no doubt that the New York court had jurisdiction to decide the issue of parental rights in *Baby Lenore*, whereas in *Halvey*, the connections with Florida were tenuous at best, and there was considerable doubt as to whether even under Florida law, Florida had jurisdiction to render the original custody decree. *See supra* notes 32-38 and accompanying text.

The tendency to equate adoption decrees and custody decrees seems to be a general one. *See, e.g.*, Comment, *The Adoption of Baby Lenore: Two Interpretations of a Child's Best Interests*, 11 J. OF FAM. L. 285 at 302-303 (1971), in

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Five years after *Halvey* the Supreme Court was again presented with the question of the interstate effect of a custody decree in *May v. Anderson.*[43] This time the issue was the effect on the Ohio courts of an *ex parte* divorce and custody decree rendered in the Wisconsin courts. The parties were originally domiciled in Wisconsin, and the mother left with the children for Ohio following marital difficulties. The husband filed for divorce and custody in Wisconsin, the wife was served with a copy of the summons in Ohio, and the Wisconsin courts granted the husband a divorce and full custody. Armed with the decree and with the aid of a policeman he secured the custody of his children in Ohio and returned with them to Wisconsin for four years.[44] On a subsequent visit, however, the mother refused to give up custody and the father initiated habeas corpus proceedings in the Ohio Courts, a procedure which under Ohio law only establishes the "immediate" right to custody rather than "future" rights as in *Halvey.*[45] The Ohio Probate Court felt itself bound by the dictates of Full Faith and Credit and directed the child to be returned to the father, a decision that was affirmed in both the Court of Appeals[46] and the Supreme Court[47] of Ohio.

When the case reached the U.S. Supreme Court it squarely presented a question which it had been unnecessary to decide in *Halvey*, namely the power of a court to cut off a parent's right to custody without in personam jurisdiction. By analogizing to the rights of property, relying principally on authority gleaned from cases involving divisible divorce,[48] and expressly avoiding any discussion of the "best interests" of the child,[49] the court held that in personam

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which the author uses *Halvey, May, Bachman v. Mejias* 136 N.E.2d 866 (N.Y. 1956) (the leading New York case on modifiable custody decrees) and Professor Ehrenzweig's article on the interstate recognition of custody decrees (note 16 *supra*) to support the propositions that (1) in adoption proceedings most jurisdictions adhere to the concept of modifiable decrees, (2) it is common for courts to reexamine a foreign adoption decree based on a change in circumstance, and (3) even in the absence of change of circumstance courts do not feel themselves bound by full faith and credit in adoption proceedings. However, as noted, this is a misconception. Adoption decrees are final orders, nonmodifiable in the rendering state and fully entitled to full faith and credit in the courts of the forum.

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

[44] *Id.* at 530.

[45] *In re* Corey, 145 Ohio St. 413, 61 N.E.2d 892 (1945).

[46] Anderson v. May, 91 Ohio App. 557, 107 N.E.2d 358 (1952).

[47] Anderson v. May, 157 Ohio St. 436, 105 N.E.2d 648 (1952).

[48] Estin v. Estin, 334 U.S. 541 (1948); Kreiger v. Kreiger, 334 U.S. 555 (1948), holding that an *ex parte* dovorce and alimony judgment in Nevada was valid only insofar as it terminated the marital relationship, but could not determine the alimony issue without personal jurisdiction over both parties.

[49] In the majority opinion Mr. Justice Burton stated:

> Separated as our issue is from that of the future interests of the children, we have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present,

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jurisdiction is necessary to cut off a mother's right to custody since "a mother's right to custody is entitled to at least as much protection as her right to alimony."[50]

This ruling has been widely criticized.[51] However its practical importance is diminished by the fact that today long-arm statutes may assist in obtaining personal jurisdiction over the other parent,[52] or the court in question may have continuing jurisdiction over the "subject matter," in which case notice alone suffices.[53]

The *May* case did, however, produce two clear statements of the competing policy considerations in the concurring opinion of Justice Frankfurter and the dissent of Justice Jackson. Frankfurter's opinion is usually quoted with approval by those writers who take the position that the Full Faith and Credit clause is inapplicable to the child custody situation, because each court should have as much leeway as possible in deciding the fate of children within its borders, without being hampered by prior adjudications in sister states. In a much quoted passage Frankfurter states categorically that "the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at

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> may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her in personam. Rights far more precious to appellant than property rights will be cut off if she is bound by the Wisconsin award of custody. 345 U.S. 528 at 533.

[50] May v. Anderson, 345 U.S. 528 at 534.

[51] The case has long been a target of criticism by law review and text writers. Some of the more important criticisms are CLARK, THE LAW OF DOMESTIC RELATIONS, 523-26, stating that "the case of May v. Anderson is an aberration which ought to be overruled at the earliest opportunity"; Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings*, 64 MICH. L. REV. 1 at 9, n. 42 stating that "[w]e may hope that *May v. Anderson* which could be interpreted as requiring such jurisdiction in custody cases, will remain limited to its facts"; Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, THE SUPREME COURT REVIEW 89, 113 (1964) stating "My own belief is that the decision is narrowly limited by the circumstances of the case." *See also* Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959).

[52] See People *ex rel* Loeser v. Loeser, 51 Ill. 2d 567, 283 N.E.2d 884 (1972) *cert. den.* __U.S.__, 93 S. Ct. 436 (1972) holding that compliance with an Indiana long-arm statute was sufficient to bind the mother, who was living in Illinois after having left the matrimonial home in Indiana, in an *ex parte* divorce and custody proceeding in Indiana. *Cf.*, Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289, 307-317 (1973); WEINTRAUB, COMMENTARIES ON THE CONFLICT OF LAWS, 131-33.

[53] Forslund v. Forslund, 225 Cal. App. 2d 476; 37 Cal. Rptr. 489 (1956) which held that since California had continuing jurisdiction to modify the subject custody order, the plaintiff could not avoid such jurisdiction by reason of his having left the state. Jurisdiction over his person in subsequent modification proceedings could be obtained simply by service of notice. *Cf.*, Comment, *The Puzzle of Jurisdiction in Child Custody Actions*, 38 COLO. L. REV. 541 at 543-45 (1966); RESTATEMENT (SECOND), CONFLICT OF LAWS § 26 (1969).

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another time."[54] The dissent of Justice Jackson, on the other hand, has been frequently cited by those who wish to restrict the authority of subsequent forums to relitigate custody matters already decided in the first state. After admitting that the strict concept of domicile is inadequate in a highly mobile society, Jackson attacked the open-ended jurisdictional views of Frankfurter,[55] and pointed out the dangers of "a state of the law such as this, where possession is not merely nine points of the law but all of them and self-help the ultimate authority."[56]

The issue of interstate custody disputes reached the High Court on two additional occasions following *May*, in *Kovacs v. Brewer*[57] and *Ford v. Ford.*[58] Yet the decisions, both written by Justice Black, added little to the rulings in *Halvey* and *May* except a further clarification of Justice Frankfurter's views in an extensive dissent in *Kovacs.*[59]

It may be that the doctrines established by *Sampsell* and the Supreme Court cases discussed above did little more than place a legal foundation beneath actual court practice.[60] But whether or not the twin theories permitting a proliferation of custody jurisdiction, and a great freedom of modification resulted from or preceded these cases, it is evident that any indication of finality in a child custody decree is an illusion. Even the doctrine of "change of circumstance" has seemed to have little practical effect, being simply "a manner of speech supporting a preconceived result."[61]

It is obvious that this is antithetical to the principle of the "best interests of the child," since modern psychiatric evidence is overwhelming in the assertion that a child's best interests lie in stability of environment. Even a less than desirable home, if a constant one, is preferable to ever shifting domiciles based on various courts' individual interpretations of a child's interests.[62] In addition, the spectre

[54]May v. Anderson, 345 U.S. at 356.
[55]In a reference to Frankfurter's opinion, Justice Jackson stated that: "The interpretive concurrence, if it be a true interpretation, seems to reduce the law of custody to a rule of seize and run." *Id.* at 542.
[56]*Id.* at 539.
[57]356 U.S. 604 (1957).
[58]371 U.S. 187 (1962). For a critical appraisal of the Ford case *see* Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?* 73 YALE L. J. 134 (1964).
[59]Kovacs v. Brewer, 356 U.S. 604, 609-16 (1957).
[60]Ehrenzweig, *Interstate Recognition of Custody Decrees,* 51 MICH L. REV. 345 (1953) (hereinafter cited as Ehrenzweig); Stansbury, *Custody and Maintenance Across State Lines,* 10 LAW AND CONTEMPORARY PROBLEMS 819 (1944); Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. CHI. L. REV. 42 (1940).
[61]Ehrenzweig, *supra* note 60 at 352.
[62]As Professor Clark states: "One of the things that the child's welfare certainly demands is stability and regularity. If he is continuously being transferred from

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of home town chauvinism, so evident in other aspects of custody disputes,[63] lends itself particularly well to the dilemma of the interstate child, since "there is always the suspicion that even a judge will be a little more sympathetic with a constituent."[64] It is clear that some additional limitations will have to be placed on the authority of courts to modify or disregard the prior decrees of sister states, since existing legal tools are woefully inadequate.

III. THE CLEAN HANDS DOCTRINE: APPLICATIONS IN CALIFORNIA

One of the means of assuring that a particular forum will not be asked to assume jurisdiction "unjustly" is the clean hands doctrine: jurisdiction will not attach if the child has been brought to the forum in violation of the decree of a sister state. This doctrine is principally designed to remove the danger of judicially sanctioned kidnapping, the possibility of what Justice Jackson called the "rule of seize and run." However, as will be seen, the doctrine, at least in California, is not always available in situations where the petitioner's hands, while technically "clean," are sufficiently soiled to warrant the denial of relief.[65]

According to Professor Ehrenzweig, the fact that the petitioner has brought the child to the forum in violation of a foreign decree has been of predominant significance in those cases in which the forum state has respected a foreign custody decree. Similarly, "clean hands" has been evident in those cases where the forum refused recognition without a showing of changed circumstances, usually because a foreign decree had altered a previously issued valid forum decree, to the detriment of a forum resident or a forum child.[66] Thus, in the latter case, *F-1* might refuse to recognize a modification which *F-2* had made subsequent to an *F-1* decree, even though there

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one parent to the other by conflicting court decrees, he may be a great deal worse off than if left with one parent, even though as an original proposition some better provision could have been made for him." H. CLARK, THE LAW OF DOMESTIC RELATIONS, 326 (1968).

[63] The most glaring example of ideological and geographical chauvinism is still probably the famous victory of Iowa farm life over Berkeley intellectuality in Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966), in which an Iowa court awarded permanent custody to the maternal grandparents whose farm life showed promise of providing the child with a "stable, dependable, middleclass, middlewest background," while the natural father, a Sausalito photographer, could only provide a life which would be "unconventional, arty, Bohemian, and probably intellectually stimulating."

[64] Address by Justice Fairchild of the Wisconsin Supreme Court, *Conference of Chief Justices*, August 1961.

[65] *See* Titus v. Superior Court, 23 Cal. App. 3d 792, 100 Cal. Rptr. 477 (1972), discussed *infra* at notes 71-76.

[66] EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS, § 88 (1962).

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had been no change of circumstance since the rendering of the *F-2* decree.

In California the situation is similar in that a petitioner with unclean hands will usually be denied relief.[67] The basic case on this point is *Leathers v. Leathers*[68] decided in 1958.

At issue in *Leathers* was the validity of a *pendente lite* order of the Los Angeles Superior Court giving custody to the mother, after the mother had "by fraud and deceit" obtained the children from the father in Illinois after promising to return them the next day. The subsequent Illinois divorce and custody order had found the mother guilty of "perpetrating a fraud on the court," and of being a woman of such an "adulterous disposition, bad moral character, irresponsible and reckless in her conduct" that "she is totally unfit to be permitted the care, custody or control of the minor children, or even to be permitted visitation with them, except upon such terms and conditions as will assure their being protected."[69] Against such a background it was fairly easy for the court to determine that the petitioner's hands were unclean and to rule that the Illinois decree would be upheld without a reexamination of the merits and regardless of a showing of change of circumstance.[70]

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[67]The cases go back beyond Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P.2d 853 (1958) which is usually cited as the case containing the California clean hands doctrine. Some of the representative decisions are: *In re* Wenman, 33 Cal. App. 592, 165 P. 1024 (1917) in which the court relied on the doctrine of comity to deny a petition for modification by the mother who had brought the child to California in violation of a Connecticut decree giving custody to the father; *Ex parte* Livingston, 108 Cal. App. 716, 292 P. 285 (1930) denying relief to a mother who had retained the child after a Wisconsin court, on a petition for modification from the father, had granted him custody. Decided on the basis of comity, the court noted that the result might have been different if the mother had been able to show a change in circumstance. *In re* Cameron's Guardianship, 66 Cal. App. 2d 884, 153 P.2d 385 (1944) reversing the lower court and giving custody to the father after the mother had violated a Colorado decree. *See also In re* Marshall, 100 Cal. App. 284, 279 P. 834 (1929); *In re* Kyle, 77 Cal. App. 2d 634, 176 P.2d 96 (1947); *Ex parte* Memmi, 80 Cal. App. 2d 295, 181 P.2d 885 (1947). However these cases are not strictly of the clean hands variety which declines to assume jurisdiction in cases where the petitioner has acted in violation of a legitimate foreign decree. Change of circumstance would be irrelevant under a strict application of the doctrine since the court would refuse to reexamine the merits.

[68]Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P.2d 853 (1958). Prior to the recognition of the clean hands doctrine in *Leathers*, California decisions were based on the basic case of Foster v. Foster, 8 Cal. 2d 719, 68 P.2d 719 (1937) which held that a given custody decree was non-modifiable without a showing of change of circumstances. Consequently the importance of *Leathers* was that it expressly based its denial of relief upon the petitioner's unclean hands rather than the fact that the petitioner had failed to make a showing of change of circumstance.

[69]Leathers v. Leathers, 162 Cal. App. 2d at 771, 328 P.2d at 856 (1958).

[70]*Id.* at 774, 328 P.2d at 859. While the change of circumstance rule ennunciated in *Foster* remains the basic California law it should be noted that the courts will on occasion disregard the absence of changed circumstances and modify a

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However there are times in California when the clean hands doctrine is inapplicable, as when the petitioner applies for modification during a period of legal visitation. The recent case of *Titus v. Superior Court*[71] decided in the First District in 1972, is illustrative of the inequities that occur when a strict showing of either force or fraudulent misrepresentation is required before the clean hands doctrine will be applied. The parties in *Titus* had previously been divorced in Massachusetts where the decree had granted custody to the father on weekdays and the mother on weekends with the proviso that the children were not to be taken from the jurisdiction without the consent of the court or the other party. The mother subsequently remarried and moved to California. In May of 1971 the parties entered into a detailed written agreement under which the children were to visit the mother during the summer vacation, and specifically providing that they were to be returned to Massachusetts at the end of August. However before the end of the legal visitation period the mother petitioned for modification in the California courts and requested child support and attorneys' fees. The mother also obtained an *ex parte* custody order *pendente lite* and an order restraining the parties from removing the children from Contra Costa County.

In approving the order of the Superior Court the Court of Appeals noted that on the basis of the *Sampsell* rule[72] the courts of California have jurisdiction to determine a custody issue if the child is either a domiciliary or physically present within the state.[73] However, the courts may refuse to exercise this jurisdiction if the basis of that jurisdiction, i.e., the physical presence of the child, was obtained by force or fraud. Since neither force nor fraud was evident in this case because of the "voluntary agreement," then the clean hands limitation was inapplicable and jurisdiction would attach.[74]

The principal difficulty with this technically correct line of reasoning is the obvious effect it will have on a parent's desire to allow the child to visit a non-custodial parent in another jurisdiction. Visitation with both parents should be one of the principal goals of any custodial arrangement, absent factors which would make such visits detrimental to the interests of the child. However by sanctioning breach of contract by the petitioner on the theory that no "force or fraud" is involved, the courts are in effect penalyzing a parent who is attempting in good faith to allow the child the benefits of contact

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foreign decree if the interests of the child so require. *See* Dotsch v. Grimes, 75 Cal. App. 2d 418, 171 P.2d 506 (1946).

[71] 23 Cal. App. 3d 792, 100 Cal. Rptr. 477 (1972).

[72] *See supra* notes 19-24 and accompanying text.

[73] Titus v. Superior Court, 23 Cal. App. 3d at 797, 100 Cal Rptr. at 782 (1972).

[74] *Id.* at 798, 100 Cal. Rptr. at 793 (1972).

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with both parents.[75] By refusing to respect the decree of another forum when the petition is made during a period of legal visitation, the courts are eliminating much of the practical effectiveness of the clean hands doctrine. Thus some expansion of the doctrine is definitely called for in this area. Courts should require that petitions for modification in situations like *Titus* be made in the forum where the original decree was entered, since it is there, and not where a child is present only temporarily, that a court would have the greatest access to all the relevant facts respecting the child's welfare. At minimum the courts of California should regard clearly anticipated breaches of visitation agreements as removing the legal basis for the child's presence within the state, thus placing the child in the forum in violation of a foreign decree and thus allowing the clean hands doctrine to attach. This would not, of course, effect the power of the California courts to take any steps of an emergency nature which would be necessary to protect children within the borders of the state,[76] but these are measures under the police power and unrelated to permanent changes in the custodial arrangement.

IV. SOME POSSIBLE SOLUTIONS AND RECOMMENDATIONS

At present there is no lack of recommended solutions for the problem of the interstate child, in fact, the complexity of the problem is rivaled only by the intricacies of some of the cures. Basically the proposed alternatives fall into three categories: (1) a legislative remedy by Congress under its authority under the Full Faith and Credit Caluse;[77] (2) a judicial case by case resolution by the Supreme Court similar to its action as overseer of state practices in the criminal field;[78] and (3) a Uniform Jurisdiction Act passed by the states.[79] In addition there is Professor Ehrenzweig's suggestion of extralitigious proceedings modeled on the practices of some foreign

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[75] As the court in Bergen v. Bergen, 439 F.2d 1008 (3d Cir. 1971) stated:

> . . . a parent with whom a child is visiting in another jurisdiction ordinarily should not be permitted, except in clearly compelling circumstances, to use the occasion to seek to divest the other parent of a judicially decreed right of custody. To permit this would place a premium on the abuse of the right of visitation and make it difficult for parties to agree on the free movement of the child from one parent to the other. *Id.* at 1015.

[76] *See* CAL. WELF. & INST. CODE § 600 (West 1971).

[77] Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, THE SUPREME COURT REVIEW, 89 (1964).

[78] Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?* 73 YALE L. J. 134, 148-150 (1964); *Cf.* Comment, *Conflicting Custody Decrees: In Whose Best Interest?* 7 DUQUESNE L. REV. 262, 275 (1969).

[79] UNIFORM CHILD CUSTODY JURISDICTION ACT, approved by the American Bar Association, August 1968. To date only one state has codified the act, *see* NORTH DAKOTA CENTURY CODE 14-14-01 *et seq.* However, the Act has been introduced to the California legislature as AB 1220 (1973).

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nations,[80] and Professor Bodenheimer's plea that the California legislature declare that the California courts will respect the continuing jurisdiction of out of state courts in custody proceedings,[81] similar to the method adopted for solving jurisdictional strife on the inter-county level in *Greene v. Superior Court.*[82] Finally there is the practice of the Wisconsin courts which have evolved a strong judicial policy towards returning a custody case to the state which rendered the prior decree.[83] An additional remedy might be the expansion of the clean hands doctrine advocated in Part III of this article.

A. THE UNIFORM CHILD CUSTODY JURISDICTION ACT

The Uniform Child Custody Jurisdiction Act was adopted by the National Conference of Commissioners on Uniform State Laws in July of 1968 and approved by the American Bar Association in August of 1968.[84] A principal purpose of the Act is to reduce the

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[80]Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings,* 64 MICH. L. REV. 1 (1966).

[81]Bodenheimer, *The Multiplicity of Child Custody Proceedings — Problems of California Law,* 23 STAN. L. REV. 703 at 734 (1971). Professor Bodenheimer continues to be of the opinion that the enactment of the Uniform Child Custody Jurisdiction Act is the best solution to an overwhelming problem. *See* her articles, *infra,* note 84. She urges that pending legislative consideration of the Act, some immediate stopgap measures be adopted. One of these measures would be adoption of a firm policy by the courts or the legislature to the effect that the state in question will not, barring an emergency, reopen the custody question when a child is in the state on a visit or for another temporary purpose. Another would be a clear affirmation that the home state or state of matrimonial domicile has jurisdiction to determine custody when the child has been removed from the state before judicial proceedings have been instituted or completed. *Cf.* People *ex rel.* Loeser v. Loeser, 51 Ill. 2d 567, 283 N.E.2d 884 (1972) *cert. den.* __U.S.__, 93 S. Ct. 436 (1972). She does not believe that criminal prosecutions for child stealing offer a solution. Any deterrant effect the penal law might possibly have is outweighed by the enormous increase in hostility and further extra-legal conduct that the use of the criminal law engenders, the inability of states to enforce the law beyond their borders in most instances, and above all the inability of the criminal law to settle the question of where and with whom the child should live. She feels that since self-help is the "ultimate authority" under present procedures, as Justice Jackson predicted in *May,* a person who snatches a child is not automatically or at all unfit to have legal custody of the child. Interview with Professor Brigitte M. Bodenheimer, Professor of Law, University of California, Davis, April 15, 1973.

[82]Greene v. Superior Court, 37 Cal. 2d 307, 231 P.2d 821 (1951).

[83]State *ex rel* Kern v. Kern, 17 Wis. 2d 268, 116 N.W.2d 337 (1962); Brazy v. Brazy, 5 Wis. 2d 352, 92 N.W.2d 738 (1959); Zillmer v. Zillmer, 8 Wis. 2d 657, 100 N.W.2d 564 (1960). *See also* address by Justice Fairchild of the Supreme Court of Wisconsin, *Conference of Chief Justices,* St. Louis, Mo., August 1961.

[84]*See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws,* 22 VANDERBILT LAW REVIEW 1207 (1969) and Bodenheimer, *The Uniform Child Custody Jurisdiction Act,* 3 FAM. L.Q. 304 (1969). *See also* Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act,* 38 S. CAL. L. REV. 183 (1965); Ratner, *Child Custody in a Federal System,* 62 MICH. L. REV. 795 (1964), and Comment, *Legislative*

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discretionary powers of courts to assume jurisdiction if there is only minimal contact between the child and the state. This is done by the use of a novel basis for jurisdiction. A court has jurisdiction under section 3 of the Act if (a) it is located in the "home state" of the child,[85] or (b) had been the home state within six months prior to the action and the child is now absent but a parent remains,[86] or (c) it is in the best interests of the child that the court assume jurisdiction because the child and at least one contestant have a significant contact with the state *and* there is substantial evidence relating to the child's future prospects available in the state.[87] The section further provides that mere presence of the child will not vest jurisdiction, excepting of course a state's power to exercise jurisdiction as *parens patriae* to provide for the needs of neglected or abandoned children within the state.

The key provisions which guarantee the integrity of a given custody decree and provide a measure of stability of the child's environment are sections 13, 14, and 15 dealing with (a) recognition of out of state decrees, (b) modification of out of state decrees and (c) the filing and enforcement of foreign custody decrees. Section 13 makes recognition mandatory in most instances.[88] Section 14 severely limits the power of a court to modify a foreign decree. Under this section the subsequent forum will defer to the continuing jurisdiction of the rendering state if that state continues to have jurisdiction under section 3. If a second state does acquire jurisdiction under section 14, it will give due weight to all transcripts and documents collected in the prior proceeding.[89] This in effect nullifies the extreme discretion given to courts to modify foreign decrees under the *Halvey* doctrine[90] by allowing each state which adopts the act to voluntarily restrict its own power to alter out of state decrees.

Opportunity for Oregon: The Uniform Child Custody Jurisdiction Act, 7 WILLIAMETTE L.J. 498 (1971).

[85]"Home state" is defined in § 2(5) of the Act as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or person acting as a parent for at least six consecutive months . . . "

[86]This is to assure jurisdiction in the state from which a child has been recently removed, whether by "stealing" or other means.

[87]This is the vaguest of the requirements and may in fact allow jurisdiction to exist in two or more states concurrently. But as the Comment to § 3 points out, this type of jurisdiction will only come about when the home state test cannot be met, or as an alternative to that test, as when both the child and a departing parent have moved to a different state and the stay-at-home parent elects to bring the action in the second state. Thus while jurisdiction may *exist* in two states, it will not be *exercised* in both. Sections 6 and 7 guard against simultaneous jurisdiction.

[88]Recognition is mandatory if the prior decree was made under statutory provisions similar to the act, or if the factual basis of the decree would have vested jurisdiction in the prior state if the act had been law in that state.

[89]*Id.* § 14. N.D. CENT. C. ANN § 14-14-14.

[90]*See* text accompanying notes 27-42 *supra.*

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Similarly section 15 provides for a workable enforcement mechanism for foreign decrees by allowing any out of state custody decree to be filed with the clerk of the court, such decree then becoming as binding as if it had been rendered in the subsequent state.[91]

The principal value of the proposed act is in the recognition that a single court should have exclusive authority to decide or modify custody arrangements with the machinery available to transfer information or cases should this become necessary. Similarly the act provides that a court may refuse to exercise its jurisdiction if it finds itself to be an inconvenient forum[92] or if the parent seeking the jurisdiction of the court has been guilty of some wrongdoing in bringing the child to the forum.[93]

B. OTHER RECOMMENDATIONS

In a somewhat different approach, Professor Ehrenzweig has suggested that the whole concept of the adversary process in custody cases be reexamined, and that extralitigious or non-adversary procedures be substituted.[94] Analogizing to practices now followed in adoption and mental commitment proceedings, Professor Ehrenzweig envisions family courts in each state, staffed by professionals from all disciplines and vested with power to transfer cases by a Uniform Act, which would be responsible for all intrafamilial legal problems.[95] The court of original jurisdiction, usually the divorce court, unless it is a migratory forum, would be responsible for all matters relating to the child's interest, with a guardian *ad litem* provided to protect the interests of the child.[96] This "guardianship court" would have exclusive jurisdiction to make any changes needed to protect the child's welfare with other states having concurrent and temporary juris-

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[91] UNIFORM CHILD CUSTODY JURISDICTION ACT; § 15; N. D. CENT. C. ANN §14-14-15. As a comment to the section makes clear, however, the power to enforce a decree does not include the power to modify a decree, which must be done in accordance with the provisions of § 14. The section also provides that if enforcement should become necessary due to a violation of a foreign decree, that all costs, including travel expenses and attorney's fees, are to be borne by the wrongdoer.

[92] UNIFORM CHILD CUSTODY JURISDICTION ACT, § 7. N. D. CENT. CODE ANN. § 14-14-07.

[93] *Id.* § 8. N.D. CENT. CODE ANN. § 14-14-08. This is the codification of the "clean hands" check within the Act. The denial of jurisdiction in the event of illegal removal or retention is mandatory unless such action would be detrimental to the child's interest. In addition if the petitioner for an initial decree has removed the child wrongfully from another state the court may decline to assume jurisdiction even though technically no legal right has been violated.

[94] Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralitigous Proceedings*, 64 MICH. L. REV. 1 (1966).

[95] *Id.* at 5.

[96] *Id.* at 6, 7.

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diction in the event of emergencies.[97] In addition, the guardianship court would prepare a "dossier" of all actions taken in relation to a particular child, which records could be made available to a new guardianship court should the child's domicile change.[98]

However not all writers are convinced that a solution to the problem lies in the restriction of the ability of subsequent forums to modify custody decrees. Professor B. Currie, for one, believed that Congress should add a "simple proviso to § 1738 of the Judicial Code to the effect that no judgment shall preclude the courts of a state having a 'legitimate interest' in the matter from making whatever custodial decree is required, in their judgment and discretion, for the welfare of the child."[99] This approach, labelled "anarchic jurisdiction" by Professor Ehrenzweig[100] is obviously antithetical to the goals of finality and stability sought by the Uniform Act. In fact, in a reference to an article by Professor Ratner which initially proposed a Uniform Act,[101] Professor Currie stated:

> although the article is apparently written against the background of some experience . . . the proposal is clearly regressive in comparison with the permissive solution reached in *Sampsell v. Superior Court.*[102] The denial of jurisdiction to the state in which the child is physically present rejects the considerable element of wisdom in Justice Frankfurter's view . . .[103]

Professor Ratner responded to Professor Currie's objection by reasserting that the goal of increased stability would not be advanced by a rule which granted to a number of forums the ability to reopen a previously judicially determined custody issue.[104] In reference to Professor Currie's proposed Congressional legislation, Professor Ratner stated:

> This proposed codification, whether of the *Sampsell* or the Frankfurter variety, has the defects of both rules: it encourages unilateral removal of the child and repeated litigation; it permits a parent who departs with the child to choose a forum unfairly inconvenient to the stay-at-home parent and far from the relevant evidence; it is thus destructive of the emotional and environment [*sic*] stability im-

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[97] *Id.* at 10.
[98] *Id.* at 11.
[99] Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, THE SUPREME COURT REVIEW 89 at 115 (1964).
[100] Ehrenzweig, *supra* note 94, at 10.
[101] *See* Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964).
[102] *See supra* notes 19-24 and accompanying text.
[103] Currie, *supra* note 99 at 117. Professor Currie is referring to the dissenting opinion of Justice Frankfurter in *Kovacs.*
[104] Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183 (1965).

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portant to the child's welfare, and wasteful of public and private resources.[105]

C. THE WISCONSIN APPROACH

One state at least has developed a unique judicially-initiated method of dealing with interstate child custody problems. In Wisconsin, the courts have combined wide discretion to hear interstate custody cases with a strong judicial policy towards cooperating and deferring to the courts of sister states. A typical example of this approach is the case of *Zillmer v. Zillmer,*[106] in which the validity of an uncontested Kansas decree giving custody to the mother was tested in the Wisconsin courts after the paternal grandparents, with whom the children had been living temporarily refused to give them up. The grandparents introduced evidence of the mother's mental instability in the Wisconsin courts which had not been heard in the Kansas proceeding, but the trial court still held that the Kansas decree was res judicata and granted custody to the mother. The Supreme Court of Wisconsin, on the first hearing, asserted that both Kansas and Wisconsin had jurisdiction but that the Kansas decree should be deferred to on the principle of comity.[107] On rehearing,[108] however, the evidence of the mother's mental imbalance caused the court to modify its decision so as to retain temporary custody with the grandparents for 60 days pending their application to the district court of Kansas for modification of the Kansas decree. If the application were not made, or if it was made and denied, or if undue delay occurred then the prior decree giving custody to the mother was to be reinstated. If, however, the Kansas courts modified the decree, then that modification was to be recognized.[109]

The *Zillmer* case is illustrative of the desire of the Wisconsin courts to foster cooperation rather than competition. Their willingness to assume jurisdiction to modify or determine custody arrangements is thus partially offset by the recognition that a sister state may nevertheless be in a far better position to ultimately determine the issue. The wide jurisdictional scope would raise serious obstacles to the stability of the child's environment were it not tempered by the strong judicial policy towards deference to the legitimate decrees of sister states. As Justice Thomas E. Fairchild of the Wisconsin Supreme Court stated:

> As you may have surmised, I favor the doctrine that there are several proper foundations for jurisdiction over custody of children and that

[105] *Id.* at 194.
[106] Zillmer v. Zillmer, 8 Wis. 2d 657, 100 N.W.2d 564 (1960).
[107] 100 N.W.2d at 567.
[108] Zillmer v. Zillmer, 8 Wis. 2d 657, 101 N.W.2d 703 (1960).
[109] 101 N.W.2d at 704 (1960).

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> they may exist at the same time in different states. While recognizing the competence of several courts to deal with the question, I think that a court should be willing to weigh the circumstances of a particular case, determine as objectively as possible whether some court ought to be the one to make the decision, and be ready to defer to that court upon the assumption that it will act honestly and with its best wisdom.[110]

V. CONCLUSION

As has been seen, the present state of the law with respect to the dilemma of the interstate child is at best frequently at odds with the oft stated "best interests of the child." Since the paramount interest of all concerned should be a maximization of the stability of the child's environment and a corresponding reduction in changes of custody, the thrust of the law should be in the direction of retarding multiple child custody actions. But as it now stands, the ease with which custody actions may be relitigated in various forums encourages a defeated parent in the hope of a better result in a new lawsuit. Jurisdiction attaches easily, on the theory that a decree modifiable in the rendering state is equally modifiable in the forum state,[111] and the limitation that a "change in circumstance" must be shown is "liable to be more theoretical than of great practical importance."[112] Similarly the clean hands doctrine, which purportedly refuses jurisdiction to a parent who comes to the forum in violation of a foreign decree,[113] will not be applied when to do so would be adverse to the child's interests,[114] nor is it applicable if the petition is made during a period of legal visitation.[115]

The resultant confusion and adverse effects on children ensuing from these jurisdictional conflicts have been the subject of a number of proposed solutions by writers in the field, all of whom, with the possible exception of Professor B. Currie, are in favor of preventing courts with only minimal contact with the issue from modifying or determining custody questions. This trend seems to be a positive approach to the problem. Unfortunately this "trend," has not captured the imagination of either the courts or the legislatures. To date only one state, North Dakota, has adopted the Uniform Child

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[110] Address by Justice Fairchild of the Wisconsin Supreme Court, *Conference of Chief Justices*, August 1961.
[111] N.Y. *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947), *see supra* notes 27-42 and accompanying text.
[112] Morrill v. Morrill, 83 Conn. 479, 77 A. 1 (1910).
[113] Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P.2d 853 (1958), *supra* notes 68-70 and accompanying text.
[114] Smith v. Smith, 135 Cal. App. 2d 100, 286 P.2d 1009 (1955). *Cf. In re* Walker, 228 App. 2d 217, 39 Cal. Rptr. 243 (1964).
[115] Titus v. Superior Court, 23 Cal. App. 2d 792, 100 Cal. Rptr. 477 (1972), *see supra* notes 71-76 and accompanying text.

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Custody Jurisdiction Act, and only the courts of Wisconsin and possibly Montana[116] have evidenced any real willingness to defer to the prior decrees of out of state courts. In a highly mobile society, a return to the "domicile rule," which was never more than an artificial solution to the problem, would certainly be ill-advised. Yet between that anachronism and Professor Currie's "anarchic jurisdiction"[117] there is a wide range of possibilities. The best that may be hoped for, although it may be a utopian vision at this time, is Professor Ehrenzweig's suggestion of a nationwide non-adversary system of family courts to handle all intrafamilial problems, bound to each other by a Uniform Act. Short of that there is the Uniform Child Custody Jurisdiction Act, which would lessen conflicts in jurisdiction even though retaining the traditional adversary process.

The only alternative to judicial cooperation is continued judicial competition, illustrated by the result in the *Pate* case which began this article. After winding their way twice to the Georgia Supreme Court, once to the California Supreme Court and from both state courts to the U.S. Supreme Court, the parties found themselves, six years after the dissolution of the marriage, without a judicial remedy. If the mother retained the children in California, then she would be the lawful custodian. Conversely, the father's sole remedy would be to wait for an unguarded moment and "snatch" them back to Georgia, where he is legally entitled to custody. The only foreseeable end to the fear of judicially-sanctioned kidnapping would be the day the children reached majority and rendered the issue moot. It is felt that the interests of all the parties, but especially the children, would be better served by a less anarchic result.

Brian C. Lysaght

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[116] Corkill v. Cloninger, 153 Mont. 142, 454 P.2d 911 (1969).
[117] Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extra-litigious Proceedings*, 64 MICH. L. REV. 1 at 10 (1966).

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