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Conflict of Laws—Full Faith and Credit for Foreign Custody Judgments

P and D, a married couple with three children, were separated in 1959. P, the wife, moved to Virginia. The children remained in North Carolina with D. Two days later P took the children from North Carolina to Virginia. The following day D filed a petition in the Virginia courts for a writ of habeas corpus directing P to produce the children before the court and that the care, custody and possession of the children be awarded to D. During the pendency of this proceeding P and D reached an agreement whereby D was given custody of the children with P to have custody during certain specified periods. Upon consummation of this agreement a “consent dismissal” was had of the habeas corpus proceeding instituted by D. In 1960, P commenced an action in the South Carolina courts seeking custody of the children, then residing in South Carolina with D. The lower court awarded custody of the children to P, granting D visitation rights. D appealed on the grounds that, inter alia, the courts of South Carolina must recognize, in accordance with the full faith and credit clause of the United States Constitution, the agreed order of dismissal of the Virginia court. Held, reversed. The “consent dismissal” order of the Virginia court constituted a judgment on the merits barring subsequent action for the same cause by the same parties. Such an order was res judicata where rendered and accordingly was entitled to full faith and credit. Ford v. Ford, 124 S.E.2d 33 (N.C. 1961).

This case presents an interesting problem which has grown in importance with the increasing mobility and rising divorce rate of the American people. It is basically a question of which is the higher principle: the doctrine of res judicata as applied through the full faith and credit clause of the United States Constitution or the theory of the state as parens patriae in its relationship to children.

Article IV, section 1, of the Constitution of the United States provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.” The general theory of this clause is to prevent dissatisfied litigants from relitigating in one state issues that have
been duly litigated in another. Thus, this clause was designed to promote a major policy of the law: that there be finality and certainty and an end to litigation. *Kovacs v. Brewer*, 356 U.S. 604 (1958).

But where courts are confronted with determining the proper custody of a child, the regard for curbing litigation is subordinated to the welfare of the child. *Gaunt v. Gaunt*, 160 Okla. Crim. 195, 16 P.2d 579 (1932). This is the area of the conflict.

The court decisions on the application of the full faith and credit clause to child custody decrees have been as varied as human facts and needs due to the difficulty inherent in any attempt to apply hard and fast rules of res judicata and conflict of laws to the problems of child custody. Several general rules, admittedly uncertain, have been developed, however, that do serve as a guide in this area.

While a minority of courts apparently refuse full faith and credit to custody awards, *Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866 (1956), the weight of authority appears to be that in the absence of fraud or want of jurisdiction a decree awarding custody of a child must be given full faith and credit in other states as to the right to custody of a child at the time and under the circumstances of its rendition. *Kniepkamp v. Richards*, 192 Ga. App. 509, 16 S.E.2d 24 (1941); see generally Annot., 160 A.L.R. 400 (1946).

A court seeking to relitigate a custody judgment must, therefore, consider whether the foreign court had proper jurisdiction. The determination by the courts as to what is proper jurisdiction in this area is dominated by one of three theories. The first is that the court is acting on behalf of the child as *parens patriae*. According to this view, mere residence of the child is sufficient to give the court jurisdiction to determine the proper custody of the child. *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925). Another theory is that a custody award affects the status of the child—a permanent relationship, the jurisdiction over which is in the court of the state of the child’s domicile, and in that court only. *Beckman v. Beckman*, 358 Mo. App. 1029, 218 S.W.2d 566 (1949). A third theory maintains that jurisdiction over a child’s custody is based on in personam jurisdiction over the child’s parents. This theory emphasizes the parent-child relationship rather than the state-child relationship. *Anderson v. Anderson*, 74 W. Va.
124, 81 S.E. 706 (1914). Thus when the award sought to be enforced is not based on the jurisdictional standard recognized by the forum court, the award is generally disregarded, purportedly on the theory that full faith and credit is not mandatory.

If it is determined that the foreign court does have jurisdiction, the court must then consider whether there has been such a change in circumstances since the rendition of the foreign judgment as to render its modification desirable for the welfare of the child. Note, 25 Fordham L. Rev. 744 (1957). Custody decrees by their very nature are not made final in the sense that they cannot be modified. Therefore, such a decree has no effect in another state where there has been such a change in circumstances subsequent to the foreign decree as to render its modification desirable for the welfare of the child. Cook v. Cook, 135 F.2d 945 (D.C. Cir. 1943); Stapler v. Leamons, 101 W. Va. 235, 132 S.E. 507 (1926). While this limitation as to change in circumstances is considered essential for the protection of the child it has the disadvantage of enabling any court to reach the desired result either by finding or denying a change of circumstances. As the Connecticut court has stated, "... a finding of changed circumstances is one easily made when a court is so inclined." So it is questionable whether the recognition given to foreign custody judgments is of more than theoretical consequence. Morrill v. Morill, 83 Conn. 479, 77 Atl. 1 (1910).

The problem in the principal case which sets it apart from the great mass of litigation in this area was the consideration of whether an agreed order of dismissal under the Virginia practice put an end to the suit pending before it and operated as a bar to a subsequent suit on the same cause of action between the same parties. A majority of the court found, basing their decision on Bardach Iron & Steel Co. v. Tenenbaum, 136 Va. 163, 118 S.E. 502 (1923), that an agreed order of dismissal is equivalent to a judgment of retraxit and bars a subsequent suit on the same cause by the same parties as fully as a retraxit. West Virginia would apparently agree with the majority on this point. Pethel v. McCullough, 49 W. Va. 520, 39 S.E. 199 (1901).

Having found that an agreed order of dismissal does operate as a bar to a subsequent suit on the same cause of action between the same parties, the South Carolina court decided that there had not been a sufficient change in circumstances subsequent to the Virginia decree as to render its modification desirable by the South Carolina court. Justice Oxner, in a dissent, disagreed with
this principle when applied to a proceeding relating to the custody of children. He declared that the contract entered into by the parents in Virginia should not preclude the South Carolina courts from determining the question of custody. He maintained that the contractual rights of the parents should be subordinated to the welfare of the children.

There is much that can be said for Justice Oxner’s dissent, not only on the proposition that an agreed order of dismissal should not bar a subsequent suit on the same cause of action by the same parties but that any custody decree by a foreign court should be subject to inquiry by a court of competent jurisdiction. The primary principle in this field should be the discretion of the court as exclusively governed by the child’s welfare.

On the other hand, there are arguments that support the proposition that custody decrees should be subject to the full faith and credit clause. If parental “child snatching” and constant litigation for the possession of a child are the results of nonrecognition of foreign custody decrees, the best interests of the child are defeated.

One writer has proposed a “clean hands” approach to the problem. This theory suggests that only if the party seeking to relitigate the question of the child’s custody comes before the court in good faith without fault with respect to the child, should such relitigation be allowed. Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Rev. 345 (1953).

Whatever the best view, the welfare of the child cannot be promoted if its custody is controlled by uncertain rules as to constitutional questions and is so easily subject to change under them.

Forest Jackson Bowman

Criminal Law—Shoplifting—Lack of Requirement of Intent Does Not Invalidate Statute

D was found guilty of a misdemeanor offense under the North Carolina shoplifting statute. On appeal, D moved that the warrant be quashed on the ground that the statute does not require any felonious intent, and is therefore unconstitutional. The court allowed this motion to quash. Held, reversed. The shoplifting statute is not violative of state or federal constitutions although