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# Full Faith and Credit: Extraterritorial Effect of Custody Decrees

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# FULL FAITH AND CREDIT: EXTRATERRITORIAL EFFECT OF CUSTODY DECREES

## INTRODUCTION

The Congress, in implementing the full faith and credit clause[1] of the Federal Constitution, has provided that judgments "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state, . . . from which they are taken."[2] The history[3] of the full faith and credit clause reveals that it was intended to establish a degree of mandatory comity between the states of the union, and thus avoid the complete subjection of foreign judgment creditors to the dominating local policy of the *lex fori*. The cases involving judgments fall into two main classifications; (1) those involving attempts to give extra-state effect to money judgments, (2) and those using the judgment as res judicata in defending a new or collateral action arising out of the same facts as the original suit. Included in this second classification are divorce decrees. Judicial awards of the custody of children are a by-product of such litigation.[4] The question of whether admittedly valid custody decrees are entitled to extra-state recognition under the full faith and credit clause is not entirely settled.

The scope of this comment is limited to a discussion of the applicability of full faith and credit to valid foreign custody decrees. There will be no attempt at a detailed discussion of the jurisdictional[5] and finality[6] problems

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1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and *Judicial Proceedings* of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." (Emphasis added.) U. S. CONST. art IV, §1.

2. The Acts of the legislature of any State, Territory; or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the U. S. and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same Full Faith and Credit in every court within the U. S. and its territories and possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 28 U. S. C. §1738 (1952).

3. The history of the full faith and credit clause is discussed in Corwin, *The Full Faith and Credit Clause*, 81 U. of PA. L. REV. 371 (1933).

4. Corwin, *supra* note 3, at 378, 381.

5. The Supreme Court has held that "(a) judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction," Griffin v. Griffin, 327 U. S. 220, 228 (1946); Williams v. North Carolina, 325 U. S. 226 (1945) (original court must have had proper jurisdiction of the parties or the subject matter). For an excellent review of cases involving jurisdictional problems in custody decrees see Annot., 4 A. L. R. 2d 7 (1949).

6. The judgment must be final and not subject to modification, Barber v. Barber, 323 U. S. 77 (1944); Sistare v. Sistare, 218 U. S. 1 (1910). The majority of state courts, however, have held that custody decrees are final and res judicata as to the facts

involved in custody decree cases, except where necessary to elucidate any problems which may subsequently arise.

### THE FEDERAL CASES

The Supreme Court of the United States in decisions involving this specific question has not been particularly helpful. The majority and dissenting opinions in the following cases reflect the Court's division on this issue and its failure to establish a uniform basis of recognition for custody decrees throughout the United States. In *Halvey v. Halvey*,[7] a mother established residence with her child in Florida and there instituted a suit for divorce. Service of process on the husband was made by publication; he did not appear in the action. The day before the Florida decree was granted, Mr. Halvey without the knowledge or approval of his wife took the child back to New York. Armed with the subsequent Florida decree which granted and awarded permanent custody of the child to her, Mrs. Halvey brought a habeas corpus proceeding in a New York court challenging the legality of the father's detention of the child. The New York courts[8] modified the Florida custody decree, and this was assailed by petitioner as a denial of *full faith and credit* to the Florida decree. This decision was affirmed on certiorari by the Supreme Court.

The majority opinion as expressed by Justice Douglas proceeded on the narrow ground that under Florida law[9] the decree was subject to modification at any time, and "what Florida could do modifying the decree, New York may do."[10] The Court concluded that there was no proof that the Florida decree received less credit in New York than it had in Florida.[11] The Court expressly reserved decision on "whether the power of New York to modify the custody decree was greater than Florida's power,"[12] and thereby refrained from examining the applicability of the full faith and credit clause to custody decrees as such. In a concurring opinion Justice Frankfurter expressed the view that *in the absence of changed conditions* affecting the welfare of the child, "a *valid* custodial decree by Florida could not be

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before the court at the time of judgment, Worthy v. Worthy, 246 Ala. 18 So. 2d 721 (1944); *In Re* Cameron, 66 Cal. App. 2d 884, 153 P. 2d 385 (1944); McMillin v. McMillin, 114 Colo. 247, 158 P. 2d 444 (1945); Freund v. Burns, 131 Conn. 380, 40 A. 2d 754 (1944); Bourn v. Hinsey, 134 Fla. 404 183 So. 614 (1938); For a collection of cases on point see Annot., 160 A.L.R. 400 (1946). For an excellent discussion on finality in judgments, see Note 41 COLUM. L. REV. 878 (1941).

7. New York *ex rel.* Halvey v. Halvey, 330 U. S. 610 (1947).

8. *Ex parte* Halvey, 185 Misc. 52, 55 N.Y.S. 2d 761 Sup. Ct. (1945), *aff'd mem.*, 295 N.Y. 836, 66 N.E. 2d 851 (1946).

9. FLA. STAT. §65.14 (1957). In any suit for divorce or alimony, the court shall have power at any stage of the cause to make such orders touching the care, custody and maintenance of the children of the marriage, and what, if any, security to be given for the same, as from the circumstances of the parties and the nature of the case may be fit, equitable and just, and such order touching their custody as their best spiritual as well as other interests may require.

10. New York *ex rel.* Halvey v. Halvey, 330 U. S. 610, 614 (1947).

11. *Id.* at 615.

12. *Id.* at 615, 616.

set aside simply because a New York court, on independent consideration, has its own view of that custody would be appropriate."[13] (Emphasis added.)

Justice Frankfurter's acceptance of full faith and credit to custody decrees of sister states may be readily implied from his opinion in this decision.[14] Justice Rutledge, in another concurring opinion, apparently took exception to the literal mandate of full faith and credit. He declared it to be merely a form of national policy, and that on occasion, other national policies, *e.g.*, welfare of children, will take precedence over it.[15] The Supreme Court in the instant case contributed very little toward settling the basis of recognition for custody decrees. The states wishing to apply *full faith and credit* to *valid* custody decrees can use it as federal authority to support their position and still remain quite free to disregard decrees of other states at will by either finding a change of circumstances or by merely stating that as *parens patriae* its interest in the welfare of the child is controlling in any particular case. Throughout the majority and concurring opinions there appears to be a shadow of doubt cast by the Justices as to the validity of the original Florida decree. This was openly expressed by Justice Jackson who concurred in the result on the grounds that the record did not show proper jurisdiction in the Florida court.[16] In view of the divergent opinions it is the author's view that the *Halvey* case is not valid authority for any expression of federal policy in regard to the applicability of *full faith and credit* to custody decrees. The decision interpreted Florida law and concluded that a state in deciding whether to abide by a foreign custody decree, should determine what effect would be given to such a decree by the state which rendered it. The decision failed to create any original federal law. No valid federal policy in this area can be authoritatively supported by it except through implication and rationalization by state tribunals. By the use of hindsight obtained through the subsequent case of *May v. Anderson*,[17] the Court could have reached a proper result purely on jurisdictional grounds as indicated by the brief concurring opinion of Justice Jackson.[18]

In *May v. Anderson*[19] the parties were domiciled in Wisconsin until they separated and the wife moved to Ohio. The husband obtained an *ex parte* divorce in Wisconsin and was awarded custody of the children who at the time were visiting their mother in Ohio; she did not participate in any way in

13. *Id* at 617.
14. *But cf.* Justice Stone's dissent in Yarborough v. Yarborough, 290 U. S. 202 at 213, 214 (1933). "But if we are to read the decree as though it contained a clause, in terms, restricting the power of any other state, in which the minor might come to reside, to make provision for her support, then, in the absence of some law of Congress requiring it, I am not persuaded that the full faith and credit clause gives sanction to such control by one state of the internal affairs of another."
15. See note 10 *supra* at 619, 620.
16. See note 10 *supra* at 616.
17. 345 U. S. 528 (1953).
18. See note 16 *supra*.
19. 345 U. S. 528 (1953).

the proceedings. The children, on the strength of the Wisconsin decree, were returned to the father. However, upon a subsequent visit of the children to Ohio, the mother refused to surrender them. The ex-husband, relying on the Wisconsin decree, filed a petition for habeas corpus in an Ohio state court.[20] He was granted relief on the ground that the Wisconsin decree required full faith and credit. This was reversed by the Supreme Court of the United States.

The majority of the Court held that the Wisconsin decree was not entitled to full faith and credit because it was rendered without personal jurisdiction over the mother.[21] Mr. Justice Burton in expressing this view declined to decide the procedural validity of the Wisconsin decree, but instead characterized a mother's right to custody as a *personal right*, which could not be terminated by an *ex parte* divorce decree.[22] The dissenting Justices, Jackson and Reed, [23] were of the opinion that the Wisconsin decree was valid due to the court's personal jurisdiction over the father and the children.[24] This disparity of opinion results from different jurisdictional approaches towards the basic nature of the action; *i.e.*, whether it is one in personam[25] or one in rem.[26] The conclusion was then reached, at least by implication, that without exception a valid judgment is entitled to *full faith*

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20. The lower court's opinion is printed in the Brief For Appellants, p.1a. It was affirmed in 91 Ohio App. 557, 107 N. E. 2d 358 (1951),*aff'd mem.*, 157 Ohio St. 436, 105 N. E. 2d 648 (1952).

21. May v. Anderson, 345 U. S. 528, at 534 (1953). "We find it unnecessary to determine the children's legal domicile because, . . . that does not give Wisconsin . . . the personal jurisdiction it must have in order to deprive their mother of her personal right to their immediate possession."

22. *Id.* at 533, 534. "we have before us the elemental question whether a court of a state . . . may cut off her immediate right to . . . custody . . . 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 to be bound by the Wisconsin award of custody . . . . In the instant case, we recognize a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony." (Emphasis added.)

23. *Id.* at 537.

24. *Id.* at 534. Although the Court noted that there was a technical domicile with the father, the question of the children's domicile was left open in the Court's opinion. For a discussion of children's domicile, see Goodrich, *Custody of Children in Divorce Suits*, 7 CORNELL L.Q. 1, 4-5 (1921). See note 21 *supra* at 539, the dissent, in holding Wisconsin did have jurisdiction, and therefore the decree was valid, felt that the majority placed the convenience of a "leave-taking" parent above the right of Wisconsin to promote the welfare of children domiciled in Wisconsin.

25. May v. Anderson, 345 U. S. 528, 533 (1953). "It is now too well settled to be open to further dispute that the Full Faith and Credit clause and the act of Congress passed pursuant to it do not entitle a judgment *in personam* to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound. Baker v. Baker, Eccles & Co., 242 U. S. 394, 401 (1917)."

26. *Id.* at 540, 541, Jackson, J., dissenting, "This decision appears to equate the jurisdictional requirements for a custody decree to those for an *in personam* money judgment. One reads the opinion in vain to discover reasons for this choice, . . . ." It is this writer's opinion that the majority's view as to the nature of the action being one in personam will prevail over the dissentor's attempt to retain the domicile concept and in rem approach to custody actions. This is certainly the current jurisdictional approach to divorce actions. See note 45 *infra*.

*and credit.*[27] Mr. Justice Minton concurred with the dissent on the ground that the Wisconsin decree was not properly challenged under Ohio law and being therefore valid on its face commanded full compliance by the Ohio courts.[28] Mr. Justice Frankfurter rendered a separate opinion[29] concurring with the result reached by the majority. It attempted to modify the import of the holding of the majority and answer the views expressed by the dissenters. He declared that the Court had not, as he understood it, decided that the Wisconsin decree was invalid per se but only that the full faith and credit clause did not require Ohio under the facts of the instant case to accept the foreign decree.[30] The lack of personal jurisdiction over one of the parties thus becomes a sufficient excuse for a sister state to ignore a prior decree and to adjudicate custody on the basis of its own interest in the welfare of the child. A "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 another time."[31] Under this view the interstate enforcibility of even jurisdictionally valid custody decrees is left to the discretion of the courts of a sister state when they have a legitimate interest in the children. The present position of Justice Frankfurter seems to be in conflict with his earlier view as expressed in *Halvey v. Halvey*.[32] The absence of any explanation or clarification of his position in the *Halvey*[33] case at best makes his future position in this matter unpredictable. His statement, that the Ohio court would not have deprived the wife of due process in recognizing the prior decree,[34] appears to conflict with the rationale of the majority opinion; an opinion in which he concurred. This conclusion is based on his premise that the Court did not decide that Wisconsin lacked jurisdiction. While not categorically stating that the Wisconsin decree was basically defective as a deprivation of property without due process, that seems to be the logic of the holding.[35] If the Court had not considered the decree invalid per se,

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27. See note 22 *supra*, the implication is that if the court did have in personam jurisdiction over the other its decree would have been valid. See also May v. Anderson, 345 U. S. 528, 537, Jackson, J., "If Wisconsin had rendered a *valid* judgment, the Constitution not only requires every state to give it full faith and credit, but, . . . commands that they shall have the same full faith and credit in every court within the United States . . . as in the courts of such state . . . from which they are taken." (Emphasis added.)

28. May v. Anderson, 345 U. S. 528, 543 (1953).

29. *Id.* at 535.

30. *Ibid.*

31. *Id.* at 536. Perhaps J. Frankfurter's view here may be rationalized with the *Halvey* case, in that he is insinuating here that the *mere* passage of time since the prior adjudication is the change of conditions necessary to allow a court to exercise its discretion as parents patria. Mere "lapse of time" is a very narrow interpretation of "change of condition"; see STUMBERG, CONFLICT OF LAWS at 328 (2d ed. 1951).

32. Halvey v. Halvey, 330 U. S. 610, 617 (1947). See also Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 359 (1953).

33. *Ibid.*

34. See note 28 *supra*, at 535.

35. See note 22 *supra*. All three dissenters thought that the opinion of the court was on jurisdictional grounds; see note 39 *infra*.

how could it have reached the decision it did without discussing the applicability of full faith and credit to what would then have been a valid judgment of a sister state? The fact that the Court apparently considered the lack of personal jurisdiction over the wife as the only element depriving the Wisconsin decree of extraterritorial effect[36] supports the conclusion that they felt it would have been unenforceable even in Wisconsin. The contrary assumption in the concurring opinion that the decree was valid appears to be misconceived.

The insistence by Justice Frankfurter that the jurisdictional question was not decided by the majority, may be rationalized as an attempt to retain the status concept of custodial relations. The status concept had been the traditional approach used in solving the jurisdictional problems in custody cases.[37] But the Court had stated that a parent has the same personal right in a child as a wife has in alimony.[38] Thus, the Court treats the parental rights to custody as property rights and consequently the Wisconsin award should be void in toto as a deprivation of property without jurisdictional due process.[39] The rationale of Justice Frankfurter's concurrence suggests that the national policy of child welfare should take precedence over the national policy of unity embodied in the full faith and credit clause.[40] This approach was used by Justice Rutledge concurring in *Halvey v Halvey*.[41] This view necessarily requires the retention of the status concept, which is essential in order for a state to effectuate its legitimate interest in the welfare of its citizens.[42] The argument that the status rule is necessary in

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36. *Ibid.*

37. See RESTATEMENT, CONFLICT OF LAWS §119, 146 (1934); *cf.* RESTATEMENT CONTINUED, CONFLICT OF LAWS §117 (Tent. Draft No. 1, 1953). See Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. OF CHI. L. REV. 42, 56 (1940). *But cf.* Goodrich, *Custody of Children in Divorce Suits*, 7 CORNELL L.Q. 1, 67 (1921). Notes, *Effect of Custody Decree in a State Other Than Where Rendered*, 81 U. OF PA. L. REV. 970 (1933); *Jurisdictional Basis of Custody Decrees*, 53 HARV. L. REV. 1024 (1940).

38. May v. Anderson, 345 U. S. 528, 534 (1953), "In the instant case, we recognize that a mother's right to custody of her children is a *personal right* entitled to at least as much protection as her right to alimony." (Emphasis added.)

39. *Id.* at 537; the dissenters apparently felt that this was the view being taken by the Court, as the only escape from obedience to the Wisconsin decree. Finding the decree valid and not lacking in due process, the dissenters felt it required full faith and credit and under no condition would following it be optional to Ohio.

40. *Id.* at 536. "Interest of a state other than its duty towards children may also prevail over the interest of national unity that underlies the Full Faith and Credit clause."

41. 330 U. S. 610, 619-620 (1947); "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. And, if possible, I would avoid such a distressing result, *since I think that the controlling consideration should be the best interests of the child, not only for disposing of such cases as a matter of local policy, as it is in Florida and New York, but also for formulating Federal policies of full faith and credit as well as of jurisdiction and due process in relation to such dispositions.*" (Emphasis added.)

42. For example, in divorce, a state has the power to protect its legitimate interest in the welfare of its citizens, if but one spouse is domiciled there, because that gives it jurisdiction over the *marital status* in which its domicilian is involved, Williams v. North Carolina, 317 U. S. 287 (1942). In another case the Court upheld the validity of a Nevada decree obtained *ex parte* by a husband, resident in Nevada, insofar as it dissolved

custody cases for the welfare of the child is subject to rebuttal. As pointed out by the Court, the right to custody involves a relation which is almost wholly physical[43] and affects considerably fewer legal relations than other status relationships.[44] The attempted retention of the status premise in the face of the majority opinion results, for all purposes, in a view that custody proceedings are in rem as far as due process is concerned but in personam in relation to full faith and credit.[45] The status therefore is the res through which the state could effectuate its interest in the parties. The majority's treatment of "custody" as a property right has the effect of destroying the res which the state could control as an interested party, and in theory if not in fact, requires an in personam jurisdictional due process when adjudicating custodial rights. It is submitted that the position taken by Justice Frankfurter was an attempt to limit the holding of the Court to the particular circumstances before it and to retain the status concept of custodial relationship beween parent and child and thus, in effect, retain an in rem jurisdictional due process requirement in custody proceedings.

In the recent case of *Kovacs v. Brewer*,[46] the Supreme Court of the United States had an opportunity to settle the question of the applicability of the full faith and credit clause to valid custody decrees. The Court avoided the important question before it by remanding the case to the state court for clarification, "without expressing or impliedly indicating any views about . . . [it]."[47]

In the *Kovacs* case an action was brought in North Carolina to enforce a New York custody decree. The decree was a modification of a previous

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the *marriage status*. However, it held Nevada powerless to cut off a spouse's right to financial support under the prior decree of another state. "The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony." Thus, a state's power, in *ex parte* divorce proceedings, is limited to a determination of the *status* of the party over which it has jurisdiction; Estin v. Estin, 334 U. S. 541, 549 (1948). See also Armstrong v. Armstrong, 350 U. S. 568 (1956) (The Court here cited May v. Anderson as jurisdictional authority); Kreiger v. Kreiger, 334 U. S. 555 (1948).

43. See note 22 *supra*.

44. E. g., in divorce, the right to remarry, dower and curtesy rights, etc.; in guardianship, the capacity to handle the ward's affairs and transfer his property; and rules of descent and distribution in the case of adoption and legitimacy.

45. There is some support for this view in the field of divorce. But, even if valid in the divorce field, it cannot work in custody matters unless the status concept is retained, see note 42 *supra*. "From the standpoint of partitioning power among states, there may well be wisdom in having a gap between what due process will not forbid and what full faith and credit will not require." Powell, *And Repent At Leisure—An Inquiry Into The Unhappy lot of Those Whom Nevada Hath Joined Together And North Carolina Hath Put Asunder*, 58 HARV. L. REV. 930, 936 (1945). Harris and Cardozo, *Divorce without Domicile: Two Views on the Virgin Islands Statute*, 39 CORNELL L.Q. 293 (1953).

46. 78 Sup. Ct. 963 (1958). This decision was handed down subsequent to the completion of this comment. It was inserted in the section on Federal Cases in order to make the paper as current as possible. The author wishes to call the reader's attention to the fact that all discussion preceding and following the insertion of the Kovacs case, was completed before its issuance and does not in any way reflect or attempt to reflect its effect on any of the cases discussed in any section of the paper.

47. 78 Sup. Ct. 963, 966 (1958).

divorce decree which had awarded custody of a female child to the paternal grandfather pending the discharge of the father from the Navy. The father and grandfather appeared through counsel at the New York modification proceeding. The child was not present at the hearing. Since the original decree, issued six years earlier, she had been domiciled with the grandfather in North Carolina. The modified decree was granted fourteen months prior to an attempted enforcement by the mother.[48] The North Carolina trial court made numerous findings of fact and declared that the child's welfare to be controlling and that it was not bound by or required to give effect to the New York decree.[49] Although the issue of "changed circumstances" was raised in the pleadings,[50] the Supreme Court of North Carolina[51] avoided it and without specifying any particular reason, upheld the trial court's "conclusion of law." [52] It then went on to declare that the New York decree was jurisdictionally defective because at the time of the modification the child was a resident and domiciliary of North Carolina.[53] The Supreme Court of the United States granted certiorari[54] to consider the claim that the North Carolina courts had failed to give full faith and credit to the judicial proceedings of another state. The case was remanded "to the North Carolina courts for clarification, and if they have not already decided, so they may have an opportunity to determine the issue of changed circum-

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48. The original custody award was made on January 17, 1951, and resulted from a divorce action which found the wife guilty of adultery. The modification was obtained in November, 1954, after the mother married Mr. Kovacs who was the correspondent in the original suit. The enforcement of the decree was not sought until February, 1956.

49. Kovacs v. Brewer, 78 Sup. Ct. 963 (1958).

50. *Id.* at 966.

51. Kovacs v. Brewer, 245 N. C. 630, 97 S. E. 2d 96 (1957).

52. *Id.* at 634, 635, 97 S. E. 2d 100. The opinion by the North Carolina Supreme Court is very loosely written. The decision reads as an absolute rejection of the applicability of the full faith and credit clause to custody decree without any supporting explanation.

53. *Id.* at 635, 97 S.E. 2d 100 (where the North Carolina court contends that a custody proceeding is in rem). *Contra*, James v. James, 64 So. 2d 534 (Fla. 1953); May v. May, 233 A. D. 519, 253 N.Y.S. 606 (1st Dept. 1931). The law is well settled that no judicial proceeding is entitled to full faith and credit unless it is procedurally valid; see note 5 *supra*. If the Supreme Court of the United States felt that the New York decree was procedurally defective as stated by the North Carolina court there would have been no point in remanding the case; the decree being basically defective would have fallen of its own weight and the North Carolina decision would have been affirmed. The majority opinion of the Supreme Court silently passed over the contention of the North Carolina court that the New York decree was procedurally defective. This silence appears to support the view that the position of the state court on that matter was without merit. It is worthy of note that Justice Frankfurter in his dissenting opinion does not refer to custody proceedings as being in rem. He merely contends that the location of the child at the time a decree is rendered is an important fact to be considered in determining what weight should be given to the "in absentia" decree; Kovacs v. Brewer, 78 Sup. Ct. 963, 970 (1958). The author has already indicated his views on the proper nature of custody proceedings in the text and in notes 25—27 *supra*. The reader is reminded that a detailed discussion of the jurisdictional problems involved in custody is not within the purview of this comment. For cases involving the problem of jurisdiction in awarding custody of a child domiciled in another state see Annot., 4 A.L.R. 2d 7 (1949).

54. 355 U.S. 810 (1957).

stances."[55] It was then declared that if those courts "properly" find "changed conditions" affecting the child's welfare, it would be unnecessary to decide the constitutional question now before the court.[56]

Justice Black speaking for the majority and relying on the *Halvey*[57] case declared that since New York under its own law would not be bound by the decree if a subsequent change of circumstances had occurred, neither would the courts of North Carolina.[58] However, as already discussed, New York has rejected the applicability of full faith and credit to custody decrees.[59] Thus, if a custody decree is subject to the unlimited discretion of the New York courts,[60] it could not be expected to receive any better treatment in the courts of North Carolina. The Court must have been cognizant of this situation, but by insisting that the North Carolina court determine the issue of "changed conditions" it disregarded the New York law as actually applied and attempted to give effect to the law as it should be. This is in effect a condemnation of the New York view; a view supported by Justice Frankfurter's dissent.[61] Only by disregarding the actual position taken by the New York courts in custody matters could the Court have reached the aforementioned result.

The obvious implication of the majority opinion is that North Carolina must give full faith and credit to the New York decree unless they find that circumstances have changed since the New York modification.[62] Apparently the court has decided that the full faith and credit clause applies to custody decrees to the same extent as to any other judicial proceedings. The decision certainly appears to be the strongest authority to date in support of this viewpoint. The unfortunate result obtained by retaining and not defining the "changed circumstances" concept has already been discussed.[63]

In a vigorous dissent, Justice Frankfurter finally makes his position on the subject clear. He categorically states that the welfare of the child "is the

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55. Kovacs v. Brewer, 78 Sup. Ct. 963, 965 (1958).

56. *Ibid.*

57. 330 U.S. at 615 (1947), "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 is rendered."

58. See note 55 *supra* at 966.

59. See the section of the text dedicated to the New York cases. Justice Frankfurter in his dissent recognizes this to be the New York law. See note 55 *supra* at 969, "New York itself, the state for whose decree full faith and credit is here demanded, has rejected the applicability of that requirement to custody decrees."

60. Hicks v. Bridge, 2 A.D.2d 335, 155 N.Y.S.2d 746 (1st Dep't 1956).

61. *Ibid.* "In short, both the underlying purpose of the full faith and credit clause and the nature of the decree militate strongly against a constitutionally enforced requirement of respect to foreign custody decrees."

62. See note 55 *supra* at 968, 969, Frankfurter, J., dissenting, "The evident implication of the Court's opinion today is that, unless 'circumstances have changed' since the latter decree it must be given full faith and credit . . . for if the Supreme Court of North Carolina is obliged to find that 'circumstances have changed' since the second New York decree in order not to be bound by it, it must be that the decree has legal significance under the Full Faith and Credit Clause."

63. See text material *infra* p. 114.

polar star by which the courts must be guided in awarding custody,"[64] and that the full faith and credit clause does not apply to custody decrees.[65] The results which would follow if such were the law have been previously analyzed.[66]

The decision thus appears to establish a definite minority view that the constitutional requirement of full faith and credit towards valid foreign judgments does not apply to custody decrees.[67] A majority view supporting existence of the requirement may be implied from the Court's insistence that the state court decide the issue of changed conditions.[68]

The weakness of the federal decisions, specifically the *May* case, is evidenced by the conflicting applications accorded to it by the various jurisdictions. This contrast is exemplified in the decisions of the courts of New York and Florida, resulting in completely divergent applications of the authoritative value of the case in custody adjudications.

### THE NEW YORK CASES

In New York, prior to *May v. Anderson*,[69] the settled rule of law appeared to be that in the absence of change of circumstances a valid foreign custody decree was entitled to full faith and credit.[70] But in *Bachman v. Mejias*,[71] the New York Court of Appeals refused to abide by the valid custody decree of a Puerto Rican court and stated that "the full faith and credit clause does not apply to custody decrees. The responsibility for the welfare of infants endows the court with the power to determine custody [of minor children present or domiciled in the state] irrespective of the residence and domicile of the parents and prior custody orders in a foreign jurisdiction."[72]

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64. Frankfurter, J., quoting a phrase used by the Supreme Court of North Carolina, in Kovacs v. Brewer, 245 N.C. 630, 635, 97 S.E.2d 96, 100-101 (1957).

65. Kovacs v. Brewer, 78 Sup.Ct. 963, 968 (1958). See also note 62 *supra*.

66. See text material *infra* p. 114.

67. See notes 64, 65 *supra*.

68. See note 62 *supra*.

69. 345 U.S. 528 (1953).

70. People ex *rel.* Herzog v. Morgan, 287 N.Y. 317, 39 N.E.2d 255 (1942); Ansorge v. Annour, 267 N.Y. 492, 499, 196 N.E. 546, 548 (1935) (the court held that "the custody may be changed when circumstances or treatment since the decree render it necessary for the child's best interests, but until such facts appear our courts cannot change the . . . decree simply because they do not agree with the decision."); *People ex rel.* Scanlon v. Ciaravelli, 2 A.D.2d 702, 152 N.Y.S.2d 494 (2d Dep't 1956); Sutera v. Sutera, 1 A.D.2d 356, 150 N.Y.S.2d 448 (2d Dep't 1956); Finston v. Bernstein, 275 App. Div. 928, 90 N.Y.S.2d 201 (1st Dep't 1949); Young v. Roe, 265 App. Div. 858, 37 N.Y.S.2d 714 (2d Dep't 1942); Bradstreet v. Bradstreet, 256 App. Div. 1032, 10 N.Y.S.2d 699 (4th Dep't 1939); People *ex rel.* Tull v. Tull, 245 App. Div. 508, 283 N.Y. Supp. 183 (1st Dep't 1935), *aff'd* 270 N.Y. 619, 1 N.E.2d 359 (1936). *Contra*, People *ex rel.* Allen v. Allen, 105 N.Y. 628, 11 N.E. 143 (1887) (Full Faith and Credit is merely a fact or circumstance bearing upon the discretion to be exercised by the court, without dictating or controlling it); Matter of Bull (Hellman), 266 App. Div. 290, 42 N.Y.S.2d 53 (1st Dep't 1943); People *ex rel.* Turk v. Turk, 86 N.Y.S.2d 139 (Sup. Ct. 1949).

71. 1 N.Y.2d 575, 136 N.E.2d 866 (1956).

72. *Id* at 580, 581, 136 N.E.2d at 868, 869.

The court did find that there was a change of circumstances warranting a modification of the prior decree.[73] Supported by this, it is arguable that the court was merely expressing a dictum; that it intended its domestic public policy should govern when in conflict with principles of comity in reference to "foreign decrees"[74] and not when in conflict with the policy of full faith and credit in relation to decrees of sister states. This hopeful rationalization was disintegrated in a subsequent case. In *Hicks v. Bridge*, [75] citing the *Bachman*[76] case as authority, the court held that a state in which the children reside is not required to give full faith and credit to a custody decree of a sister state, "when it conflicts with the dominant domestic duty of the courts to guard the welfare of its wards."[77] The court admitted the absolute validity of the decree of California but maintained that, "the courts of the state, *where the children are found*, have a jurisdiction that is paramount, albeit limited in basis, to the health and welfare of the children."[78] (Emphasis added.) It is worthy of note that the court found no intervening change of circumstances, but felt that the recognition of the prior decree "may have an adverse impact upon the . . . children."[79] It is obvious that any marital strife "may" have an adverse effect on the children. New York claims that this concern with the future welfare of infants within its state creates a duty in the state to act. The chancellor is in effect given complete discretion in matters involving custody based upon the doctrine of parens patriae. The *Bachman*[80] case, which established this position, relied on *May v. Anderson*[81] as authority for its conclusion. In declaring that the infant's welfare takes precedence over the constitutional requirements of full faith and credit, the court relied solely on the concurring opinion of Justice Frankfurter.[82] Therefore, in New York the *May*[83] case has been applied as authority to deny full faith and credit to valid custody decrees when, in the discretion of the court it conflicts with the court's interest in the welfare of the infant. The foreign decree is not controlling but merely a fact or circumstance to be considered by the court in exercising its discretion.

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73. *Id.* at 581, 582, 136 N.E.2d at 869. But see Fuld, J., dissenting, *Id* at 583, 584, 136 N.E.2d at 870, stating full faith and credit should apply for the sake of judicial uniformity, "and *no change of circumstances has been shown* to justify the change in custody now being directed." (Emphasis added.)

74. The decree in the instant case was from Puerto Rico, and not from a sister state of the United States.

75. 2 A.D.2d 335, 155 N.Y.S.2d 746 (1st Dep't 1956).

76. 1 N.Y.2d 575, 136 N.E.2d 866 (1956).

77. See note 75 *supra* at 339, 155 N.Y.S.2d at 751.

78. *Id.* at 340, 155 N.Y.S.2d at 752.

79. *Ibid.*

80. Bachman v. Mejias, 1 N.Y.2d 575, 136 N.E.2d 866 (1956).

81. 345 U.S. 528 (1953).

82. See note 80 *supra* at 580, 136 N.E.2d at 869, 870.

83. See note 81 *supra*.

### THE FLORIDA CASES

There can be no doubt that in Florida, although the welfare of the child is the paramount consideration,[84] the courts in the absence of a showing of a change in conditions affecting the welfare of the infant, will accord full faith and credit to a valid foreign custody decree.[85] "Uncertainties of Florida law"[86] in custody matters arise mostly in determining the jurisdictional validity of the foreign decree. When following the general rule that in the absence of a custody award the legal domicile of the child is the domicile of his father, the court held that it had jurisdiction to make a custody award as an incident to a divorce suit, even though the mother and child were not within the state.[87] In *Randolph v. Randolph*,[88] the supreme court construed the state's joint natural -guardian statute[89] as modifying the common law in that "the father has no right of custody superior to that of the mother,[90]" and the court has no authority to adjudicate custody when the child *and* parent are without its jurisdiction.[91] It has been held that where both parties are before the court, a custody decree may be rendered although the child is not physically present within the state; the child is considered constructively present.[92] The intricate legal problems involved in jurisdictional determinations are not within the purview of this comment, except to the extent that *May v. Anderson*[93] has affected this field of Florida law. It has been referred to at present by only two Florida decisions.[94] In *Gessler v. Gessler*,[95] the husband and children were living in Florida. The wife surreptitiously took the children back to her home in Pennsylvania

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84. Bennett v. Bennett, 73 So.2d 274 (Fla. 1954). Little v. Franklin, 40 So.2d 768 (Fla. 1949); Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734 (1941). FLA. STAT. § 65.14 (1957), *supra* note 9.

85. Bennett v. Bennett, 73 So.2d 274 (Fla. 1954) [involved modification of Florida decree, but court held that change in conditions must be substantial and must affect the welfare of the child); Weldgen v. Weldgen, 62 So.2d 420, 422, (Fla. 1952), "since there has been no change of conditions the New York decree operates as an 'estoppel by judgment' and should be accorded full faith and credit by the courts of Florida." Lambertson v. Williams, 61 So.2d 478 (Fla. 1952) (full faith and credit should be given valid foreign decrees, in the absence of changed conditions, and the court cited Halvey v. Halvey, 330 U.S. 610 (1947), as authority].

86. Frankfurter, J., in Halvey v. Halvey, 330 U.S. 610, 618 (1947).

87. Minick v. Minck, 111 Fla. 469, 149 So. 483 (1933).

88. 146 Fla. 491, 1 So.2d 480 (1941).

89. FLA. STAT. § 744.13(1) (1957) "The mother and father jointly are natural guardians of their own children and of their adopted children during infancy . . ."

90. See note 88 *supra*, at 492, So.2d at 481, overruling Hopkins v. Hopkins, 84 Fla. 500, 94 So. 157 (1922), which had held that the statute applied only to "joint rights of parents as natural guardians" and did not apply in a case in which each parent claimed exclusive right to the custody and care of their minor children.

91. See also Dorman v. Friendly, 146 Fla. 732, 1 So.2d 734 (1941), cited by the United States Supreme Court in the *Halvey* case, *supra* note 81, as authority for the conclusion that jurisdiction in Florida courts to award custody is obtained when the child is actually physically present in the state or is domiciled in the state.

92. James v. James, 64 So.2d 534 (Fla. 1953).

93. 345 U.S. 528 (1953).

94. Dahlke v. Dahlke, 97 So.2d 16 (Fla. 1957); Gessler v. Gessler, 78 So.2d 722 (Fla. 1955).

95. 78 So.2d 722 (Fla. 1955).

where she was legally domiciled. The husband petitioned for custody in Florida and process was served upon the wife by publication. She appeared specifically to contest the jurisdiction of the court. The bill was dismissed on the ground that the court did not acquire jurisdiction over the mother by service of process by publication.[96] The Supreme Court of Florida cited the *May*[97] case in declaring that the court had to acquire in personam jurisdiction over the defendant to render a valid custody award.[98] In *Dahlke v. Dahlke*,[99] a mother petitioned for modification of a custody decree awarding the children to the father.[100] The father was domiciled in Ohio and made no appearance. The Supreme Court of Florida held that the proceedings were in personam and not quasi-in-rem and that the lower court was without jurisdiction to issue a decree binding on the defendant. "Furthermore, the full faith and credit clause of the Constitution of the United States would not make a decree favorable to the appellant-petitioner binding on the appellees or the courts of Ohio in event of proceedings brought to enforce it there."[101] In these decisions the court seems to follow the majority opinion of the *May*[102] case. If the court had been inclined towards the concurring opinion of Justice Frankfurter, then a custody decree could still have been rendered in the *Dahlke*[103] case which would have been binding on the appellees in Florida, even though the court believed that Ohio would have the power to deny the decree full faith and credit. In Florida, *May v. Anderson*[104] has been applied, according to the literal interpretation of the majority opinion, as authority for the rule that a *valid* custody decree cannot be rendered without an in personam jurisdiction over the party whose rights in the child are to be affected. The Supreme Court of Florida has wisely chosen to ignore the opinion of Justice Frankfurter insofar as it may be considered as a denial of the applicability of the full faith and credit clause to valid custody decrees. It is the view of this writer that the Florida approach to the *May*[105] case is correct and that the New York court has permitted itself to be deterred by an over-zealous sense of duty towards the welfare of minors. It seems inconceivable that the highly regarded courts of New York are justifying their denial of the constitutional requirement of the full faith and credit clause on the ground that it conflicts with its local policy towards infants. The state's interest in the welfare of children is concededly one of the highest degree; however, the federal constitution is the supreme law of the land, and when it conflicts with local policy or the

96. *Id.* at 724.
97. See note 93 *supra*.
98. See note 95 *supra* at 724.
99. 97 So.2d 16 (Fla. 1957).
100. The children were originally awarded to the grandparents, but they have surrendered the children to the father.
101. See note 99 *supra* at 17.
102. See note 93 *supra*.
103. See note 99 *supra*.
104. See note 93 *supra*.
105. *Ibid.*

common law, the latter must yield. In *Sherrer v. Sherrer*,[106] the Supreme Court, in discussing the effect of the full faith and credit clause on the recognition of foreign decrees held that the clause controls, and ruled: "If in its application local policy must at times be required to give way, such is part of the price of our Federal system."[107] The New York position may also result in encouraging parents to ignore court custody orders, abduct the children, flee the restraining judgment in other jurisdictions and seek a relitigation in New York in hope of a more favorable result. It should be noted that the Florida courts though pledged to give full faith and credit to a valid foreign custody decree, may in fact avoid obedience by merely finding a change of conditions since adjudication of the prior decree.[108] However, in the light of the federal command to give full faith and credit to foreign judgments, a position conceding complete discretionary power to the chancellor to ignore valid prior adjudications of custody matters based upon the court's independent investigation is in complete disagreement with the views of this writer.

## CONCLUSION

The purpose of this article was to determine the applicability of the full faith and credit clause to valid foreign custody awards. This writer believes it applies to custody awards to the same extent as it does to any other foreign judgment. The requirement of the legal technicality of the decree being a final judgment when the happiness and future of infants are in issue is absurd.[109] The jurisdictional problems involved in the entire field of divorce and custody proceedings are highly complex. The inherent conflicts between the various meanings given to terms such as domicile, physical presence, in personam, in rem, quasi-in-rem, status, res judicata, finality, actual and constructive service of process, etc., in jurisdictional approaches

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106. 334 U.S. 343 (1948) (the court also held that by virtue of the full faith and credit clause a person is estopped to assail the validity of a decree after having filed a general denial and having appeared and participated in the proceedings). See also the companion case, Coe v. Coe, 334 U.S. 343 (1948).

107. *Id.* at 355.

108. See note 85 *supra*.

109. People of New York *ex rel.* Halvey v. Halvey, 330 U. S. 610 (1947); Frankfurter, J., at 616, "In substance, the framers deemed it against the national welfare for a controversy that was truly litigated in one state to be relitigated in another. The scope of the full faith and credit clause is bound by underlying policy and not by procedural considerations unrelated to it. Thus, in judgments affecting domestic relations technical questions of "finality" as to alimony and custody seem to me irrelevant . . . ." Barber v. Barber, 323 U.S. 77 (1944); Jackson, J., at 87, "I concur in the result, but I think that the judgment . . . was entitled to full 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 or, for that matter, about any judgments. Both require that full faith and credit be given to 'judicial proceedings' without limitations as to finality." Sayward v. Sayward, 43 So.2d 865, 868 (Fla. 1949) (a custody decree is final as to conditions then existing); Frazier v. Frazier, 109 Fla. 164, 147 So. 464 (1933).

to the cases in this sphere are staggering.[110] In passing, it is submitted that the theory of in personam jurisdiction of the parties involved, regardless of the exact and immediate presence of the child will overcome the historical concept of domicile-status; that the theory of valid prior adjudications as res judicata will supplant the domicile concept, and that the attempt to apply the unwritten finality requirement of judgments to custody decrees will disappear. It is confessed that much criticism has been levied at the treatment this field of law has received from both the federal and state courts, and few constructive suggestions have been made. Any well-thought suggestion for a solution in this field is subject to an equally logical rebuttal.[111] It seems that no court or individual can offer an answer acceptable to a majority of the state tribunals. The only answer remains in strict adherence to the constitutional requirement of full faith and credit to valid judgments coupled with supplementary federal legislation[112] describing the requirements necessary to give validity and extraterritorial effect to a judgment, or in the voluntary adoption by all of the states, of a uniform domestic relations act accompanied with the necessary conflict rules complying with the constitutional requirements of full faith and credit.

Ronald E. Kay

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110. The following statement by Mr. Justice Jackson, 16 U.S.L. Week 3123 (October 21, 1947), summarizes the situation; "Lawyers don't know what in the world to advise their clients. Clients don't know how to dispose of their property; or whether they are divorced or not divorced. People—simple people—have to live by these rules."

111. For a decision which was regarded in many quarters as logically indefensible, but caused so many practical difficulties that it was subsequently overruled, see Haddock v. Haddock, 201 U.S. 562 (1906).

112. Yarborough v. Yarborough, 290 U.S. 202 (1933); Stone, J., dissenting at 215 note 2, "the mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by congress. Much of the confusion and procedural deficiencies which the constitutional provision alone has not avoided may be remedied by legislation; Cook, *Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J., 421 (1919)." See also Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1 (1955).