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CLOSING THE CUSTODY FLOODGATE: FLORIDA ADOPTS THE UNIFORM CHILD CUSTODY JURISDICTION ACT

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I. INTRODUCTION

It is a sober commentary on child custody litigation that the most salient feature of this area of family law is the degree of indignation it inspires in the typically understated pages of legal journals. Criticism has ranged from the succinct characterization of custody litigation techniques as "barbaric"[1] to the florid description of custody litigation as "a hideous, cancerous chancre on the body of American jurisprudence."[2] Of one fact there can be little doubt: the present status of child custody litigation, for whatever reasons, is an embarrassment and a blight on the whole area of family law.

Legal kidnapping is just one of the more effective means employed to take advantage of the jurisdictional loopholes in child custody laws. The most publicized case of legal kidnapping involved the wealthy Mellon family. Seward Grosser Mellon and Karen Boyd Mellon were divorced in 1974. A Pennsylvania court awarded custody of their two children, Constance Elizabeth, 5, and Catherine Leigh, 7, to their father. In fall, 1975, the children visited their mother in North Carolina. Mrs. Mellon, by her own account, slipped the children away from their governess and onto a chartered plane to New York. In just a few short months the children had used nine names and had stayed in 14 hotels and finally in a middle class home in Brooklyn. Meanwhile, a New York court granted custody to Mrs. Mellon. Subsequently, in March, 1976, as the children were being escorted to school by an armed guard, they were snatched by three men posing as F.B.I. agents. The three men disarmed the guard, put the children into a car, and delivered them to Mr. Mellon

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1. Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011 (1977).

2. Hudak, *The Plight of the Interstate Child in American Courts*, 9 AKRON L. REV. 257, 299 (1975).

in Pittsburgh. Mr. Mellon promptly called the New York police and the F.B.I. and informed the authorities that the children had arrived safely.[3] Other incidents have occurred in which the results were more shocking:

> In a recent Oklahoma tragedy a four-year-old and his father died in a wreck following a high speed auto chase after the father had snatched the boy from the custody of his mother and tried to leave the state. After the boy had been seized, the mother's brother had given chase and forced the car off the road. In another incident in Massachusetts, two brothers were violently snatched and removed to their father's Alabama home. The boys had been playing when two men chased them and knocked one from his bicycle to accomplish the abduction. Fortunately, the snatch went smoothly enough that the men did not have to use the tear gas or the club they were armed with. This operation was orchestrated by a person who was recommended to the father by a veteran of over 400 child snatchings.[4]

Kidnapping is not the only problem. The following is a typical scenario: State *A* awards custody of the child to mother Jane living in state *A*. The child spends his summer with father Bob in state *B*. Father Bob refuses to return the child on the ground that the child's best interests will be furthered if the child remains in state *B*. He seeks a court decree in state *B* granting him custody. The court is faced with a dilemma:

> If the court, in order to protect the best interests of the child, reopens the custody question, it encourages parents to violate existing decrees in order to gain access to a more favorable forum; in effect, the court rewards a form of child stealing. Yet if the court refused to reopen the question, it risks rendering an order disconsonant with the [alleged] best interests of the child.[5]

Proposed solutions to this dilemma have varied. It has been suggested that criminal penalties be imposed for removing a child from a lawful custodian in violation of a custody decree, that Congress amend the Judiciary Act so that full faith and credit must be given to custody decrees,[6] that courts voluntarily refrain from modifying

3. St. Petersburg Times, March 26, 1976, § A, at 20, col. 1.

4. Noelker, *The Uniform Child Custody Jurisdiction Act: The Difficulties It Presents for Poor People,* in CLEARINGHOUSE REVIEW 222 (1977).

5. Ferreira v. Ferreira, 512 P.2d 304, 307 (Cal. 1973).

6. *See id.;* Sampsell v. Superior Court, 197 P.2d 739 (Cal. 1948); Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress,* 1964 SUP. CT. REV. 89.

custody decrees rendered in another state,[7] or that states adopt the Uniform Child Custody Jurisdiction Act (UCCJA). The last suggestion has recently emerged as the most popular of the four.[8] Professor Leona Mary Hudak, speaking in reference to the Uniform Child Custody Jurisdiction Act, viewed its passage as essential. "If the Act's adoption is not simultaneous, unanimous, and reciprocal, the presently rampant 'guerilla warfare' in child custody litigation will merely perpetuate itself."[9]

II. LEGISLATIVE HISTORY

On May 2, 1975, House Bill 2013 (HB 2013), entitled "An Act Relating to Child Custody; Creating the Uniform Child Custody Jurisdiction Act" was introduced by the House Committee on Health and Rehabilitative Services (HRS) and Representative Barry Kutun.[10] The bill, which encompassed the Uniform Child Custody Jurisdiction Act drafted by the National Conference of Commissioners on Uniform State Laws,[11] provided "a procedure for determining jurisdiction in child custody cases between states."[12] HB 2013 was read for the first time and placed on the House Calendar on the day it was introduced; it was not referred to a committee.[13]

One week later, the Florida House of Representatives passed HB 2013 by a vote of 108 to 0.[14] On the same day, May 9, 1975, Senator Jack Gordon introduced Senate Bill 1187 (SB1187), entitled "An Act Relating to Child Custody; Creating the Uniform Child Custody Jurisdiction Act."[15] On May 14, 1975, the Judiciary-Civil Committee of the Florida Senate requested an extension of time for consideration of SB 1187.[16] Having passed the house, HB 2013 was read in the senate for the first time on May 20, 1975, and re-

7. *See* Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 825 (1944).

8. The states that have adopted the Uniform Child Custody Jurisdiction Act are Alaska, California, Colorado, Delaware, Florida, Hawaii, Indiana, Iowa, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Pennsylvania, Wisconsin, and Wyoming. 9 UNIFORM LAWS ANN. 33 (Supp. 1978). Recently the Supreme Court of Washington urged that state's legislature to adopt the Uniform Child Custody Jurisdiction Act. Dunkley v. Dunkley, 46 U.S.L.W. 1142 (Wash. Mar. 9, 1978).

9. Hudak, *supra* note 2, at 297.

10. FLA. H.R. JOUR. 394 (Reg. Sess. 1975).

11. *See* 9 UNIFORM LAWS ANN. 99 (1973).

12. FLA. H.R. JOUR. 394 (Reg. Sess. 1975).

13. *Id.* at 395.

14. *Id.* at 471.

15. FLA. S. JOUR. 267 (Reg. Sess. 1975).

16. *Id.* at 304.

ferred to the Judiciary-Civil Committee.[17] Neither bill received further consideration during the 1975 legislative session.

During the 1976 session, the HRS Committee and Representative Kutun again introduced HB 2013.[18] On April 16, 1976, HB 2013 was amended, passed 110 to 0 and certified to the senate.[19] The senate received HB 2013 on April 23, 1976, and referred it to the Judiciary-Civil Committee.[20] On May 11, 1976, the committee reported the bill favorably with one amendment. HB 2013 was placed on the Senate Calendar, but it failed to receive any further consideration.[21]

Representative Kutun again introduced the Uniform Child Custody Jurisdiction bill (HB 650) for the 1977 legislative session. This time the bill was co-sponsored by Representatives Roberta Fox and George Hieber.[22] The same day an identically titled bill, Senate Bill 410 (SB 410), was introduced in the senate by Senator Kenneth Myers and referred to the Judiciary-Civil Committee.[23]

On May 6, 1977, the House Judiciary Committee reported favorably on HB 650 and referred it to the Committee on Appropriations.[24] On May 18, 1977, HB 650 was withdrawn from Appropriations and placed on the House Calendar.[25] Five days later, the Senate Judiciary-Civil Committee reported Senator Myers' companion bill,

17. *Id.* at 339.

18. FLA. H.R. JOUR. 106 (1976). The bill was introduced on April 6, 1976. *Id.* On April 9, 1976, a related bill, HB 3137, entitled "An Act Relating to Kidnapping and False Imprisonment," was introduced by Representative Thomas Lewis. HB 3137 prohibited persons "without either a court order or the permission of any custodial parent residing in the state from enticing or removing a child beyond the limits to the state." The bill was referred to the Committee on Criminal Justice and was reported out of committee favorably with amendments. FLA. H.R. JOUR. 222, 663 (1976).

19. *Id.* at 302.

20. FLA. S. JOUR. 154 (1976).

21. *Id.* at 268. Nine days later HB 3137 was reported favorably with amendments by the House Criminal Justice Committee. Though it was placed on the House Calendar, no further action was taken on it. FLA. H.R. JOUR. 663 (1976).

22. FLA. H.R. JOUR. 85 (Reg. Sess. 1977).

23. FLA. S. JOUR. 59, 169, 293, 396 (1977). Representative Lewis' bill, numbered HB 357 in 1977, was introduced on April 5, 1977, and was referred to the House Committees on Criminal Justice and Appropriations. On April 20, 1977, HR 357 was reported favorably by the House Committee on Criminal Justice and then referred to the Appropriations Committee. FLA. H.R. JOUR. 328 (1977). Two days later it was withdrawn from Appropriations and placed on the House Calendar. *Id.* at 330.

On May 3, 1977, another similar bill, SB 1289, entitled "An Act Relating to Dissolution of Marriage," was introduced by Senator David McClain and was referred to the Judiciary-Civil Committee. SB 1289 permitted "qualified staff of court to make investigations and social studies in any action in which child custody is in issue . . . ." FLA. S. JOUR. 303 (1977). On May 5, 1977, this bill was reported favorably by the Judiciary-Civil Committee and placed on the calendar but was not considered. *Id.* at 337.

24. FLA. H.R. JOUR. 473 (Reg. Sess. 1977).

25. *Id.* at 607.

SB 410, favorably and placed it on the Senate Calendar.[26] On June 2, 1977, HB 650 was amended and passed 109 to 1; it was immediately certified to the Senate.[27]

The Senate received HB 650 the next day and placed it on the Special Order Calender.[28] A parliamentary maneuver caused the bill to be removed from the calendar and referred to the Senate Committee on Commerce.[29] However, in another maneuver on the same day, HB 650 was withdrawn from the Commerce Committee, placed back on the Special Order Calendar, and passed 27 to 8.[30] The bill was presented to the Governor on June 30, 1977, and signed into law.[31]

III. LEGISLATIVE INTENT

Florida adopted the language of the Uniform Child Custody Jurisdiction Act without substantial change.[32] The legislature recognized that the opportunities for cooperation and compliance between states would be greatly enhanced if the uniform statutory language were maintained nationwide. This recognition is consistent with the "general purposes of the act," which are set forth as follows:

> (1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.
> (2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child.
> (3) Assure that litigation concerning the custody of the child takes place ordinarily in the state with which the child and his family have the closest connection and where significant evidence

26. FLA. S. JOUR. 500 (1977).
27. FLA. H.R. JOUR. 1145-46 (Reg. Sess. 1977).
28. FLA. S. JOUR. 76 (1977).
29. *Id.*
30. *Id.*
31. Uniform Child Custody Jurisdiction Act, ch. 77-433, 1977 Fla. Laws 1756 (codified at FLA. STAT. §§ 61.1302-.1348 (1977)).
32. There are only a few deviations from the exact terms of the Uniform Act in the Florida version. In the section on purposes, subsection (b) of the Uniform Act has been omitted from the Florida law. *Compare* FLA. STAT. § 61.1304 (1977) *with* § 1(b), 9 UNIFORM LAWS ANN. 99, 104 (1973). That subsection states, "[t]his Act shall be construed to promote the general purposes stated in this section." *Id.* Another change is the omission of the words "as a custody decree rendered by a court of this state" in FLA. STAT. § 61.1332(1) (1977). *Compare with* § 15(a), 9 UNIFORM LAWS ANN. 124 (1973). In addition section 25 of the Uniform Act—severability—was omitted. Finally, Florida changed the term "divorce" to "dissolution of marriage" wherever it appeared.

> concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have closer connection with another state.
> (4) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.
> (5) Deter abductions and other unilateral removals of children undertaken to obtain custody awards.
> (6) Avoid relitigation of custody decisions of other states in this state insofar as feasible.
> (7) Facilitate the enforcement of custody decrees of other states.
> (8) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.
> (9) [Make uniform the law with respect to the subject of this act among the states enacting it.][33]

The expression of such detailed general purposes indicates the clear intention that the specific provisions that follow be interpreted in light of the clear legislative intent expressed in the Act.

The expansive reach of the Uniform Child Custody Jurisdiction Act, as reflected in its general purposes, indicates a legislative intention to encourage and promote appropriate judicial intervention in child custody matters. The Act:

> requir[es] the addition of parties to a custody proceeding under certain circumstances; provid[es] for the appearance of any party as well as the child who is the subject of the custody proceeding before the court under certain circumstances; provid[es] for the binding force and res judicata effect of custody decrees; provid[es] for the legal recognition of out-of-state custody decrees and for the filing and enforcement of such decrees; provid[es] for the modification of such decrees; requir[es] the Clerk of the Circuit Court to keep a registry of out-of-state custody decrees and proceedings and authoriz[es] the clerk to provide certified copies to certain courts and persons; provid[es] for the taking of testimony in another state; provid[es] for hearings and studies in another state as well as orders to appear . . . .[34]

By retaining most of the exact wording of the Uniform Act, the Florida Legislature encouraged the application of existing case law

33. FLA. STAT. § 61.1304 (1977). Bracketed wording was substituted by the editors. *See* note following FLA. STAT. § 61.1304 (1977).

34. Uniform Child Custody Jursdiction Act, ch. 77-433, 1977 Fla. Laws 1756 (codified at FLA. STAT. §§ 61.1302-.1348 (1977)).

that has developed in those jurisdictions that have had time to experience the problems that arise in interpreting and construing statutory language. The precedential nature of identical and reciprocal statutes between states indicates the desire of those participating states to resolve perpetual constitutional conflicts with respect to the individual sovereignty of states by establishing a uniform compact with consistently identical language.

IV. THE ISSUE OF INITIAL JURISDICTION

It has been noted that the child custody question can be separated into three areas: (1) what state may initially determine custody; (2) what state may later modify such an initial decree; and (3) the extent to which such a determination is binding on other states.[35] A variety of theories have been posed as answers to the questions raised in these areas. The difficulties commonly encountered in child custody litigation spring from the fact that, depending on the state, any number of these theories can be used in a multitude of situations. In the area of initial jurisdiction, the number of possible theoretical approaches ranges from one[36] to four,[37] although most commentators agree on three which are the most commonly employed: domicile, actual presence, and jurisdiction over the parents.[38]

A. Domicile

The traditional view is that proper jurisdiction to determine custody exists only in the state of the child's domicile simply because the status of the child is affected in custody proceedings.[39] This is the view adopted by the original *Restatement of Conflict of Laws*.[40] Domicile, however, is an abstract concept. A child's domiciliary state is considered to be either the domiciliary state of the father[41] or, if the parents are separated, the domiciliary state of the parent

35. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964).

36. RESTATEMENT OF CONFLICT OF LAWS §§ 74, 109 (1934).

37. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, Comment a (1971).

38. *See* Note, *Child Custody Decrees—Interstate Recognition*, 49 IOWA L. REV. 1178 (1964).

39. "Domicile" is defined as: "the relationship which the law creates between an individual and a particular locality or country. The place where a person has his true fixed permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning and from which he has no present intention of moving." BALLANTINE'S LAW DICTIONARY 396 (3d ed. 1969).

40. RESTATEMENT OF CONFLICT OF LAWS (1934); Note, *Child Custody Decrees—Interstate Recognition*, 49 IOWA L. REV. 1178 (1964).

41. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 30 (1971).

given custody or with whom the child is living.[42] It is clear that under the domicile theory a court assuming jurisdiction may do so despite the fact that the child has never actually lived in the state. This occurrence often forces a judge to determine what is in the child's best interest even though the child and most of the competent evidence necessary to make such determination are located in another state.[43]

B. *Actual Presence*

Jurisdiction based on the actual presence of the child within the state is founded on the parens patriae concept of a state's ability to exercise its power for the benefit and welfare of its citizens.[44] The underlying assumption is that the state in which the child is located has the greatest interest in attending to the child's welfare and therefore is the most qualified state to render a custody determination. Unfortunately, the same basic flaw inherent in the domicile theory—that of jurisdiction being assumed by a state in which the child has never lived—is also present under this theory. A custody decree rendered without adequate evidence by a court in a state where the child is temporarily physically present may not actually be in the best interest of the child.

C. *Jurisdiction over the Parents*

When a family quarrel results in a separation by mutual consent, one spouse, along with the couple's children, often moves out of state and, after a time, the other sues for divorce. The out-of-state spouse makes no appearance at the hearing, and the other spouse is awarded a divorce and custody of the children. In *May v. Anderson*,[45] the United States Supreme Court held that the full faith and credit clause of the United States Constitution and the statutory provision passed pursuant to it[46] do not entitle an in personam judgment rendered without jurisdiction over one party to receive full faith and credit. Implicit in this decision is the basic foundation for the third theory of initial jurisdiction: if both parents are present in state, jurisdiction may be properly assumed.

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42. *Id.* § 32.

43. The "best interest" standard was recognized as early as 1881. Chapsky v. Wood, 26 Kan. 650 (1881). For an excellent analysis, see J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD (1973).

44. *See* Note, *Child Custody Decrees—Interstate Recognition*, 49 IOWA L. REV. 1178, 1180 (1964).

45. 345 U.S. 528 (1953). The *May* case is one of only four child custody cases heard by the Supreme Court.

46. 28 U.S.C. § 1738 (1970).

All three theories provide little deterrence to the rule of "seize and run."[47] Any theory of jurisdiction in which physical presence of the child is a primary criterion encourages a parent to remove the child to a state subscribing to such a position at the onset of custody proceedings. When this happens, the other parent has no course of action other than either to travel to the area to which the child has been taken and institute or challenge legal proceedings or to attempt to "recapture" the child. In the event that proceedings are allowed in the new location, relevant evidence may be lacking or the cost of bringing in witnesses may be prohibitive. Clearly, the "best interests" of the child are sacrificed rather than furthered. The Uniform Act attempts to solve this problem.

V. Initial Jurisdiction Under the Uniform Child Custody Jurisdiction Act

The UCCJA incorporates Professor Leonard Ratner's concept of an "established home"[48] into a concept of the "home state" as a basis for determining proper jurisdiction. Ratner's "established home" idea involves a state in which a child has lived for sufficient time to become "integrated into the community."[49] Such integration "involves becoming familiar with the physical and cultural environment, making close personal attachments, and adjusting to an educational pattern."[50] This approach is modified in the UCCJA to include "the state in which the child, immediately preceding the time involved, lived with his parents, a parent, or a person acting as parent for at least 6 consecutive months [or], in the case of a child less than 6 months old, the state in which the child lived from birth with any of the persons mentioned."[51] Mere physical presence is ruled out as an exclusive basis for jurisdiction.[52]

Since physical presence is ruled out as the sole means of establishing jurisdiction, states adopting the Act have attempted to insure that a child will not be brought into the state against either his will or the will of his custodian. To discourage removal from the state, the UCCJA extends the "home state" concept to include a six-month period preceding the initiation of a proceeding if "the child

47. *See* May v. Anderson, 345 U.S. 528, 536 (1953) (Jackson, J., dissenting).

48. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 815 (1964).

49. *Id.*

50. *Id.* at 815-16.

51. FLA. STAT. § 61.1306(5) (1977). The law as passed used the word "and." The editors substituted the word "or" in the statute. *See* note following FLA. STAT. § 61.1306 (1977).

52. *Id.* § 61.1308(2) provides: "physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination."

is absent from this state because of his removal or retention by a person claiming his custody. . . ."[53] This section applies not only in instances of intentional removal but also in cases where the child may be legitimately out of the state. For example, the child may be attending school.

The Act provides a second basis for jurisdiction in the event there is no "home state." A "strong contacts" rule allows jurisdiction if a child and at least one contestant have a "significant connection with the state" and there is available substantial evidence concerning the child's "care, protection, training, and personal relationships."[54]

These two alternative bases for jurisdiction do not preclude the state from assuming jurisdiction in order to protect the child in an emergency. Despite the absence of either "strong contacts" or "home state" affiliations, jurisdiction may be assumed in cases where the child has been abandoned or subjected to or threatened with mistreatment, abuse, or neglect.[55] Finally, if no other court can assume or has assumed jurisdiction under any of the specified rules, and it is in the best interest of the child, a court which is petitioned may do so.[56]

VI. THE ISSUE OF RECOGNITION, ENFORCEMENT, AND MODIFICATION JURISDICTION

The question of whether a state may modify a custody decree of another state is tied to the full faith and credit clause of the United States Constitution.[57] Despite the fact that the full faith and credit clause provides for recognition of the decrees of sister states, it is generally considered inapplicable to custody decrees.[58] The result has been the furtherance of the "seize and run rule"—removal of the child to another state by the non-custodial parent in order to reopen custody litigation in an effort to have the original decree set aside. Although four child custody cases have reached the United States Supreme Court, the Court has cautiously avoided deciding the question of whether the full faith and credit clause does, in fact, apply

53. *Id.* § 61.1308(1)(a)(2).
54. *Id.* § 61.1308(1)(b).
55. *Id.* § 61.1308(1)(c).
56. *Id.* § 61.1308(1)(d).
57. "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." U.S. CONST. art. IV, § 1.
58. *See* Note, *Child Custody Decrees—Interstate Recognition*, 49 IOWA L. REV. 1178, 1185 (1964).

to custody decrees.

In *New York ex rel. Halvey v. Halvey,*[59] the Court held that the full faith and credit clause would not require a state to honor a custody decree of another state if the state with initial jurisdiction could have reconsidered the original decree when presented with evidence not presented at the earlier hearing.[60] *Halvey* did not decide the question of whether a custody decree may be modified by a second state based not on "new evidence" alone. Rather, the opinion recognized that the primary court had jurisdiction to modify its decree; hence the secondary court could do the same.[61] It is generally assumed that *Halvey* requires that a custody decree of one state be given only that degree of credit which it would be given in a subsequent proceeding in the same state.

Justice Rutledge, in his concurring opinion, exhibited remarkable foresight in noting that "[t]he result seems unfortunate in that, apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction, between alienated parents."[62] The passage of time has changed Justice Rutledge's prediction to fact. As Professor Bodenheimer has noted, "[t]he legal vacuum created by the *Halvey* doctrine, combined with the social transformations of recent times, have created a situation in which self-help and the 'rule of seize and run' flourish . . . ."[63]

In *Kovacs v. Brewer,*[64] the Court was confronted with an outright refusal to extend credit to a custody decree of a sister state, yet it avoided the full faith and credit issue by remanding the case for clarification as to whether the new decree was based on changed circumstances. In keeping with the *Halvey* rule, Justice Frankfurter noted in dissent that "[a] court that is called upon to determine to whom and under what circumstances custody of an infant will be granted cannot, if it is to perform its function responsibly, be bound by a prior decree of another court . . . ."[65] In *May v. Anderson*[66] the Court once again evaded the issue, holding only that the full faith and credit clause does not require credit to be given to a judgment rendered in personam without jurisdiction over the party sought to

59. 330 U.S. 610 (1947).

60. *Id.* at 614. Mrs. Halvey had taken the child to Florida and obtained a divorce. Mr. Halvey made no appearance in the action.

61. *Id.* at 615.

62. *Id.* at 619.

63. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws,* 22 VAND. L. REV. 1207, 1215 (1969).

64. 356 U.S. 604 (1958).

65. *Id.* at 612.

66. 345 U.S. 528 (1953).

be bound. In *Ford v. Ford,*[67] the Court's most recent child custody pronouncement, it was held, in keeping with the *Halvey* rule, that since the court originally taking jurisdiction was not bound by its own decision, the full faith and credit clause did not prevent the court of a sister state from modifying the initial decree.

Professor Hudak, in reviewing these decisions, has stated: "[T]he consequences of these four vapid decisions by the United States Supreme Court have been disastrous to countless children of broken homes. Increasing chaos and confusion have continued to be the products of custody litigation in American courts."[68] The confusion to which Hudak referred stems largely from the fact that each of the four decisions appears to support a different theory of modification jurisdiction, thus allowing courts to refuse to recognize foreign custody decrees with relative ease. Three theories of modification jurisdiction stand out: (1) the jurisdictional defect theory, (2) the changed circumstance or condition theory, and (3) the concurrent jurisdiction theory.

A. Jurisdictional Defect

The jurisdictional defect theory is supported by the decision in *May v. Anderson.*[69] Under this approach, a jurisdictional defect, such as the failure to obtain in personam jurisdiction over a spouse at the original hearing, or the fact that the child was neither domiciled nor present in the state, will render the original decree a nullity in the eyes of the court where modification of the decree is sought.[70] As early as 1944, Professor Stansbury found that many of the cases in which a foreign decree went unrecognized had been justified by resort to this position.[71]

B. Changed Circumstances

The holding in *Halvey* supports the changed circumstances theory of modification jurisdiction. The theory is given further credence by Justice Frankfurter's statement in dissent in *Kovacs v. Brewer* that

> [b]ecause the child's welfare is the controlling guide in a custody determination, a custody decree is of an essentially transitory na-

67. 371 U.S. 187 (1962).
68. Hudak, *supra* note 2, at 270.
69. 345 U.S. 528 (1953).
70. *See* Kovacs v. Brewer, 356 U.S. 604, 613-14 (1958) (Frankfurter, J., dissenting).
71. Stansbury, *Custody and Maintenance Law Across State Lines,* 10 LAW & CONTEMP. PROB. 819, 823-24 (1944).

> ture. The passage of even a relatively short period of time may work great changes, although difficult of ascertainment, in the needs of a developing child. Subtle, almost imperceptible, changes in the fitness and adaptability of custodians to provide for such needs may develop with corresponding rapidity.[72]

At the root of this theory is the "best interest of the child" concept—the idea that at any given moment a custodian may become "unfit." If this custodial unfitness occurs, a court, acting in the child's "best interest," will vacate the original decree so as to allow a more "fit" custodian to assume control. Whether such determinations are truly in the best interest of the child is open to question. The role of stability in the emotional growth of children has yet to be fully explored, but, as has been judicially noted, " 'poor parental models are easier to adapt to than ever shifting ones.' "[73]

C. *Concurrent Jurisdiction*

The theory of concurrent jurisdiction has been attributed to the opinion by Justice Traynor of California in *Sampsell v. Superior Court.*[74] Focusing on the "best interest of the child," Justice Traynor and the court held that "[t]here is authority for the proposition that courts of two or more states may have concurrent jurisdiction over the custody of a child."[75]

Legal rationales aside, perhaps the most accurate summation of the purposes and effects of the modification jurisdiction theories is that though most courts would presently affirm the principle recognizing foreign custody decrees, such prior decrees are actually rarely recognized. A court may seize upon any number of legal grounds if it determines that its disposition is preferable to that of another court.

VII. RECOGNITION, ENFORCEMENT, AND MODIFICATION UNDER THE UCCJA

The recognition and enforcement sections of the Uniform Child Custody Jurisdiction Act, together with the modification rule, have been termed "perhaps the most crucial and most directly beneficial provision[s] of the Act."[76] The benefit stems from the fact that

72. 356 U.S. 604, 612 (1958).

73. McCutchan v. McCutchan, 483 P.2d 93, 95 (Or. Ct. App. 1971) (quoting Smith v. Green, 480 P.2d 437, 439 n.1 (Or. Ct. App. 1971)).

74. 197 P.2d 739 (Cal. 1948).

75. *Id.* at 749.

76. Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L.Q. 304, 311-12 (1969).

under these rules it will be difficult, if not impossible, for courts to modify a prior custody decree arbitrarily. Nor will it be profitable to either remove a child from this state or bring a child into this state unlawfully to obtain custody in opposition to a prior order.

Section 61.1328, Florida Statutes, provides that a custody decree of another state must be recognized and enforced if it was rendered under statutory provisions substantially in accordance with, or under factual circumstances meeting the jurisdictional standards of the UCCJA.[77] In accord is section 61.1332(1), which provides that a foreign custody decree, when filed in the office of any circuit court of the state, becomes automatically enforceable and, in effect, converted into a local decree, enforceable by contempt proceedings or any other permissible method.[78]

Section 61.133(1) details the conditions under which a decree may be modified. If the original decree was made under jurisdictional standards in accordance with the Act, and the original court maintains jurisdiction, the decree may not be modified despite the possible existence of concurrent jurisdiction.[79]

VIII. CONCLUSION

Professor Hudak has noted that

> the law of child custody and visitation in our country has gone from one extreme of a court's declining to re-examine the foreign decree to the other extreme of a court's refusing to recognize it and opening the floodgate to unchecked litigation and relitigation—at the expense of countless innocent children who become pawns of insensate, vindictive parents and a generally self-serving court system.[80]

The passage of the Uniform Child Custody Jurisdiction Act in the State of Florida may, at last, close the floodgate.

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77. FLA. STAT. § 61.1328 (1977).
78. *Id.* § 61.1332(1).
79. *Id.* § 61.133(1).
80. Hudak, *supra* note 2, at 272.