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Henry H. Foster

Doris Jonas Freed

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# Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act

By HENRY H. FOSTER\* and DORIS JONAS FREED\*\*

## Introduction

The maturity of a legal system may be judged in part by the way it has provided alternatives to self-help. The blood feud, *lex talionis*, composition, and the law of libel and slander, are familiar examples of such options.<sup>1</sup> Matrimonial actions may be regarded as substitutes for what has been called "Divorce Italian Style."<sup>2</sup> But our law as to child custody remains barbaric. To the possessor belong the spoils.

A few years ago the editor of the *Saturday Evening Post* wrote to the president of the American Bar Association to report a conversation he had overheard regarding a contested custody case. The editor wrote that he heard a lawyer advise his client to seize his child and flee to another state where the courts would be more favorable to his side of the case. "Can this be true," asked the editor, "is there no law to preclude kidnapping by a parent?" The answer, of course, is that under the existing law of most states and countries, child-snatching by a parent usually is condoned, often rewarded, and rarely punished.<sup>3</sup> Moreover, federal authorities and the Constitution to date have displayed a "hands off" attitude.

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\* Professor of Law, New York University.

\*\* Member of the New York and Maryland Bars.

1. See O. HOLMES, *THE COMMON LAW* 3-4 (1881).

2. It should be noted that since the film *Divorce Italian Style* Italy has enacted a divorce law. The successor of Justin the Second repealed an ordinance of Justinian decreed in 542 A.D. which forbade divorce even by mutual consent and justified his action on the ground that indissoluble marriage was an incitement to murder. M. RADIN, *HANDBOOK OF ROMAN LAW* 117 (1927).

3. See, e.g., *Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866, 154 N.Y.S.2d 903 (1956). See also *Ferguson v. State*, 251 Ala. 645, 38 So. 2d 853 (1949); *Rethorst v. Rethorst*, 214 Md. 1, 133 A.2d 101 (1957); *Casteel v. Casteel*, 45 N.J. Super. 338, 132 A.2d 529 (1957).

The law remains unchanged despite sensational cases such as those involving "Baby Lenore"<sup>4</sup> and the Mellon family.<sup>5</sup> The egregious inadequacy of the law and the success of self-help have been exposed to full public view and well may have added to public cynicism regarding our system of justice. A recent issue of *The Wall Street Journal*<sup>6</sup> reports the activities of one Eugene Austin of Foley, Missouri, who runs a heating and airconditioning business and moonlights as a child-snatcher in custody cases. Mr. Austin is reputed to have completed more than two hundred snatches, most of them for fathers, and has run into legal difficulties only once in his career.<sup>7</sup> According to the account, Mr. Austin is widely known as "Mean Gene," and his professed goal is to reform child custody laws.<sup>8</sup>

With friends like that, family law reformers should be spared enemies. And yet, surprisingly, no great impetus has come from the organized bar for the elimination of predatory practices in custody cases. This article will deal with the existing law and proposals for its reform.

### The Legal Problem

Although the full faith and credit clause<sup>9</sup> of the Constitution

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4. Baby Lenore was held for adoption by her mother soon after birth in May, 1970. The baby was placed with a family but before an adoption order was entered the natural mother apparently changed her mind and eventually brought a habeas corpus action to reclaim her child from the responsible adoption agency. The adopting family's attempt to intervene in that proceeding was disallowed and the mother's action to recover the baby was successful both in the lower court and on appeal. *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y. 2d 185, 269 N.E.2d 787, 321 N.Y.S. 2d 65 (1971). The adoptive parents subsequently moved to Florida before any order was served upon them; the natural mother brought another habeas corpus action in Florida. In the second proceeding, however, the Florida court denied full faith and credit to the New York decision and subsequently awarded custody to the adoptive parents. For a full discussion of the Baby Lenore case, see Foster, *Adoption and Child Custody: Best Interest of the Child?*, 22 BUFF. L. REV. 1, 7-14 (1972).

5. The Mellon children were apparently the victims of two parental abductions. Mrs. Karen Boyd Mellon took her two children from Pennsylvania to New York approximately a year and a half after custody had been awarded to her husband by a Pennsylvania court in April of 1974. In March 1976, after Mrs. Mellon had won custody of the children from a New York court, Mr. Mellon took the children from their bodyguard and returned them to Pennsylvania through an elaborate scheme involving private airplanes and armed agents. See *N.Y. Times*, Mar. 21, 1976, at 1, col. 7.

6. See Huey, *To Man Whose Job is Child-Snatching, End Justifies Means*, *Wall St. Journal*, Mar. 24, 1976, at 1, col. 4.

7. *Id.* at 19, cols. 1-3. Mr. Austin was extradited from Missouri on a charge of child torture and was convicted on one count of aggravated assault and sentenced to thirty months in jail and thirty months on probation by the Miami, Florida court. He is now free on appeal, a \$7,500 bond having been posted by a divorced men's group.

8. *Id.*

9. U.S. CONST. art. IV, § 1.

mandates interstate recognition of sister state decrees,<sup>10</sup> and has no proviso limiting its operation to "final" decrees, a condition of finality has nonetheless been judicially imposed.<sup>11</sup> Decrees and orders relating to child custody and visitation (and also child support) are invariably subject to modification owing to a change of circumstances and hence are nonfinal in that sense. Moreover, since the first forum may modify, it is permissible for a second forum to do so without violating any full faith and credit obligation.<sup>12</sup>

The unfortunate results of these principles of full faith and credit in the custody area were marked some years ago by the concurring opinion of Mr. Justice Rutledge in *New York ex rel. Halvey v. Helvey*.<sup>13</sup> He pointed out that the lack of constitutional obligation to recognize prior custody decrees makes possible a continuing round of litigation over custody, perhaps also of abduction, with consequences that "hardly can be thought conducive to the child's welfare."<sup>14</sup> He further said that the effect of such a rule "may be to set up an unseemly litigious competition between the states and their respective courts as well as between parents," and that somehow "there should be an end to litigation in such matters."<sup>15</sup>

Mr. Justice Rutledge's realistic appraisal of the results of withholding full faith and credit from custody decrees has been confirmed by subsequent experience. New York will give some *res judicata* effect to the prior determination of facts bearing on child custody,<sup>16</sup> but for all practical purposes a *de novo* determination will be made when modification is sought. The leading cases of *Bachman v. Mejias*<sup>17</sup> and *Berlin v. Berlin*<sup>18</sup> illustrate that the New York courts usually feel unrestrained by prior adjudications of custody. The Supreme Court has accommodated its decisions to the New York views<sup>19</sup> and Mr. Justice

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10. See *Barber v. Barber*, 323 U.S. 77, 86 (1944) (Jackson, J., concurring).

11. See Foster & Freed, *Modification, Recognition and Enforcement of Foreign Alimony Orders*, 11 CAL. WEST. L. REV. 280 (1975).

12. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 325 (1968) [hereinafter cited as CLARK].

13. 330 U.S. 610, 619 (1947).

14. *Id.* at 619-20.

15. *Id.*

16. See H. FOSTER & D. FREED, *LAW AND THE FAMILY—NEW YORK* § 29:35 (1966).

17. 1 N.Y.2d 575, 136 N.E.2d 866, 154 N.Y.S.2d 903 (1956).

18. 21 N.Y.2d 371, 235 N.E.2d 109, 288 N.Y.S.2d 44 (1967); cf. *Berlin v. Berlin*, 239 Md. 52, 210 A.2d 380 (1965).

19. See CLARK, *supra* note 12, at 323-26.

Frankfurter in a series of decisions ended up adopting the position that the full faith and credit clause had no application to custody cases.<sup>20</sup>

Fortunately, New York occasionally has exercised some self-restraint in interstate custody disputes. There are decisions applying estoppel or the "clean hands" doctrine against a party who has wrongfully taken children from their proper or legal custodian and then sought a New York change of custody or visitation rights.<sup>21</sup> In addition, at least one recent decision on the trial level deferred to jurisdiction of an English court because it had better access to all the data bearing on the custody issue.<sup>22</sup> This example of forum non conveniens, however, is not typical of New York cases and depended upon the unusual facts of the case.<sup>23</sup>

It should be noted that so far we have been discussing the typical child-snatching case. We are not concerned with an exercise of emergency jurisdiction to intervene and stop child abuse or to protect a "battered child." Of course, it is appropriate to intervene where the life or health of a child is seriously threatened,<sup>24</sup> and such an exercise of *parens patriae* power is undisputed. Indeed, a failure to act may be regarded as irresponsible.<sup>25</sup>

It is probably fortuitous that the two states which most often have shown disdain for prior custody decisions are Florida and New York. In Florida, there is a literal *de novo* trial of custodial rights without reference to prior decrees of sister states.<sup>26</sup> New York is not quite so parochial but usually its courts are adept at finding a change of circumstances so as to justify a new order.<sup>27</sup> Other states appear to be more apt to defer to the original forum or to impose the clean hands doctrine.<sup>28</sup>

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20. See the opinions by Mr. Justice Frankfurter in *Kovacs v. Brewer*, 356 U.S. 604, 613 (1958); *May v. Anderson*, 345 U.S. 528, 535 (1953).

21. See Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 357-69 (1953). The leading New York case is *Lang v. Lang*, 7 N.Y.2d 1029, 166 N.E.2d 861, 200 N.Y.S.2d 71 (1960).

22. *Turner v. Ratnoff*, 78 Misc. 2d 878, 358 N.Y.S.2d 586 (Sup. Ct. 1973).

23. The New York court deferred to the High Court of Justice of England which had assumed custody jurisdiction over the child and had made her a ward of the court and had appointed the official solicitor as guardian. *Id.*

24. See *Ferreira v. Ferreira*, 9 Cal. 3d 824, 512 P.2d 304, 109 Cal. Rptr. 80 (1973).

25. *Id.*

26. See *Scarpetta v. DeMartino*, 254 So. 2d 813 (Fla. App. 1971), *cert. denied*, 409 U.S. 1011 (1972).

27. See H. FOSTER & D. FREED, *LAW AND THE FAMILY—NEW YORK* § 29:35 (1966).

28. See note 21 *supra*.

To date the suggestions as to remedies for the child-snatching problem have been (1) judicial self-restraint in entertaining modification proceedings,<sup>29</sup> (2) congressional action to amend the Judiciary Act so that the full faith and credit obligation is expressly made to adhere to custody and visitation decrees and orders,<sup>30</sup> (3) the imposition of criminal sanctions against those who wrongfully or illegally take or retain children in violation of the rights of the lawful custodian, and (4) the Uniform Child Custody Jurisdiction Act. In this article we will discuss the third and fourth suggestions at some length.

### Expansion of Kidnapping Statutes

At common law kidnapping was a misdemeanor punishable by fine, imprisonment, and pillory.<sup>31</sup> Under modern statutes it is a felony, and frequently kidnapping for ransom has been made a capital offense.<sup>32</sup> In some states abduction of a child is included within the purview of a kidnapping statute.<sup>33</sup> In most states, however, either child abduction is not expressly covered or there are separate "child-stealing" statutes which vary in form and coverage.

Child-stealing statutes require that the child be abducted by force, persuasion, or enticement, and often prescribe a given age for the child.<sup>34</sup> In the absence of any custodial decree, a parent taking or

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29. See *Levicky v. Levicky*, 49 N.J. Super. 562, 140 A.2d 534 (1958); *Brazy v. Brazy*, 5 Wis. 2d 352, 92 N.W.2d 738 (1958); *Stansbury, Custody and Maintenance Law Across State Lines*, 10 L. & CONTEMP. PROB. 819, 831 (1944).

30. See *Currie, Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, SUP. CT. REV. 89, 109-18 (1964). The policy expressed in the Uniform Act was originally advanced by Professor Leonard Ratner. See *Ratner, Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964); *Ratner, Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183 (1965).

31. R. PERKINS, CRIMINAL LAW 180 (2d ed. 1969) [hereinafter cited as PERKINS].

32. *Id.* See also Lindbergh Kidnapping Act, 18 U.S.C. §§ 1201-02 (1970 & Supp. V, 1975); 18 U.S.C. § 2113(e) (1970) (kidnapping during bank robbery).

33. PERKINS, *supra* note 31, at 181. However, N.Y. PEN. LAW § 135.30 (McKinney 1975) expressly makes it an affirmative defense to a kidnapping charge that the defendant was a relative of the person abducted and his sole purpose was to assume control of the person. Another statute makes "custodial interference" a class A misdemeanor. *Id.* § 135.45. But if the child's safety or health are endangered the abduction is made a class E felony. *Id.* § 135.50. The sentence for a class A misdemeanor may not exceed one year. *Id.* § 70.15. The sentence for a class E felony may not exceed four years. *Id.* § 70.00. To be guilty of custodial interference the one who takes or entices the child from the legal custodian must know "that he has no legal right to do so." *Id.* § 135.45.

34. PERKINS, *supra* note 31, at 181.

retaining his child does not violate most child-stealing statutes.<sup>35</sup> Such has been held even though the taking or retention violated an agreement<sup>36</sup> or occurred while a custodial decree was pending.<sup>37</sup> Moreover, a third person helping a parent appears to be entitled to the same defense.<sup>38</sup>

Where a wrongful taking or retention occurs after a valid custody order or decree, a few cases have held that such wrongful conduct constitutes kidnapping or child-stealing,<sup>39</sup> although prosecutors may be loath to prosecute and courts or juries slow to convict. The severity of the penalty weakens its efficacy. The draftsmen of the Model Penal Code refused to include ordinary child-snatching within its provisions regarding kidnapping and abduction;<sup>40</sup> under the Code's terms a claim to legal right of custody constitutes a complete defense, even though the taking or retention was in violation of a court order.<sup>41</sup>

The practical result is that under the criminal law of most states child-snatching is not prosecuted. Moreover, police and prosecutors usually are uncooperative, viewing a custody dispute as one example of a family fight that had best be avoided. This "hands off" attitude also has been shared by the FBI, which reputedly has ignored appeals for aid in child-snatching cases on the ground that no federal law is alleged to have been violated.<sup>42</sup>

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35. *Id.*

36. *Id.*

37. *Id.* at 182. See generally *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

38. See *State v. Dewey*, 155 Iowa 469, 136 N.W. 533 (1912).

39. *E.g.*, *Lee v. People*, 53 Colo. 507, 127 P. 1023 (1912). However, a parent taking the child before any custody decree has been held not to be guilty of kidnapping. See *People v. Spiers*, 17 Cal. App. 2d 477, 62 P.2d 414 (1936); *People v. Nelson*, 322 Mich. 262, 33 N.W.2d 786 (1948).

40. See MODEL PENAL CODE §§ 212.1, .4 (1962) (kidnapping and interference with custody respectively).

41. To be guilty of interfering with custody, the defendant must have "knowingly or recklessly" taken or enticed the child from the lawful custodian "when he has no privilege to do so." *Id.* § 212.4. It is an affirmative defense that he "believed that his action was necessary to preserve the child from danger to its welfare." *Id.* The reporter rejected Professor Foster's suggestions that teeth be put into this provision in order to deter child-snatching and encourage police cooperation.

42. In a letter to a California parent, Richard L. Thornburgh, United States Assistant Attorney General, Criminal Division, explained the FBI's position: "[W]ithout clear evidence that [the abducting parent] has absented himself from California to avoid prosecution and that by reason of his mental condition or otherwise he presents a substantial threat of physical injury to [the abducted child], Federal intervention here would be inappropriate." Letter from Richard L. Thornburgh to Mrs. Shirley Ryan, Aug. 15, 1975 (on file with the *Hastings Law Journal*).

Bills were introduced in the last session of Congress to extend federal and FBI authority to child-snatching cases.<sup>43</sup> In substance, the proposed amendment to the Lindberg Act<sup>44</sup> would have authorized imprisonment for up to one year and a \$1,000 fine, or both, where a person is convicted of interstate child-snatching in violation of a court order or decree.<sup>45</sup> The importance of this proposed legislation is not that it might be a deterrent to child-snatching as such but that it would confer clear authority for FBI investigation in such cases and would facilitate the tracing of abducted children. Such legislation also might be of assistance in international custody disputes where a child is illegally taken out of the United States or is retained abroad in violation of a court order.

California has recently passed legislation<sup>46</sup> supplementing the Uniform Child Custody Jurisdiction Act<sup>47</sup> and specifically dealing with child abduction by parents in violation of custody decrees. The legislation provides that anyone who, without a right to custody, abducts a minor child "with intent to detain or conceal such child from a parent, guardian, or other person having the lawful charge of such child" may be fined up to \$10,000 and imprisoned up to ten years.<sup>48</sup> Custody violation by the parent having custody rights is also covered. The legislation provides that a custodian who detains or conceals a child from another person with visitation or partial custody rights under a decree will also be punished by imprisonment for up to a year and a fine of up to \$1,000.<sup>49</sup> Enforcement of these provisions is ensured by a mandate that "the district attorney shall take all actions necessary" to locate those who violate custody decrees or orders to appear before the court for adjudication of custody.<sup>50</sup> This new legislation should provide some assistance for California courts attempting to protect children from the extralegal hazards of custody disputes and should reduce the possibility that desperate parents will take the law into their own hands. The need for similar legislation elsewhere, however, remains acute.

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43. See *Hearings on H.R. 4191 and H.R. 8722 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess., ser. 38 (1974).

44. 18 U.S.C. §§ 1201-02 (1970 & Supp. V, 1975).

45. See H.R. 4486, 94th Cong., 1st Sess. (1975) (introduced by Representative Bennett).

46. Cal. Stat. 1976, ch. 1399.

47. See CAL. CIV. CODE §§ 5150-58 (West Supp. 1976).

48. Cal. Stat. 1976, ch. 1399, § 10.

49. *Id.* § 10.5.

50. *Id.* § 3.

As in the past, criminal sanctions have but limited application to the overall problem. For example, self-help before a court has acted may be unethical but not illegal. Before a court order has been handed down, parents may have an equal legal right to custody, as is true under New York law.<sup>51</sup> Even if the court order or decree is violated, prosecution and conviction may be extremely unlikely, and states have been known to refuse extradition of a fugitive parent. As in the case of interstate child support collection, cooperation between states in civil proceedings may be more practicable.<sup>52</sup>

### Uniform Child Custody Jurisdiction Act

In 1968 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Child Custody Jurisdiction Act which then was approved by the American Bar Association.<sup>53</sup> Professor Foster was an adviser and participated in the drafting of the statute. Unfortunately, to date the Uniform Act has been enacted in only eight states (California,<sup>54</sup> Colorado,<sup>55</sup> Hawaii,<sup>56</sup> Maryland,<sup>57</sup> Michigan,<sup>58</sup> North Dakota,<sup>59</sup> Oregon,<sup>60</sup> and Wyoming<sup>61</sup>), although it is pending before the legislatures of several states, including the current session in New York.<sup>62</sup>

The basic purposes of the Uniform Act are to discourage continued controversies over child custody in the interest of stability of home environment for the child, to deter child abductions and similar practices, and to promote interstate assistance in adjudicating custody matters.<sup>63</sup> The basic scheme is to designate one court as the proper forum for determining custody initially or for seeking modification and to

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51. See N.Y. DOMESTIC RELATIONS LAW §§ 70, 240 (McKinney 1964 & Supp. 1976).

52. Cf. *id.* §§ 30-43.

53. For a full discussion of the Uniform Act see Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969).

54. CAL. CIV. CODE §§ 5150-74 (West Supp. 1976).

55. COL. REV. STAT. ANN. §§ 14-13-101 to -126 (1974).

56. HAWAII REV. STAT. §§ 583-1 to -26 (Supp. 1975).

57. MD. ANN. CODE art. 16, §§ 184-207 (1976).

58. MICH. COMP. LAWS ANN. §§ 600.651-.675 (1976).

59. N.D. CENT. CODE §§ 14-14-01 to -26 (1971).

60. ORE. REV. STAT. §§ 109.700-.930 (Supp. 1975).

61. WYO. STAT. ANN. §§ 20-143 to -167 (Cum. Supp. 1975).

62. S. 7075. The bill, introduced by Senator Pisani, would enact the Uniform Act as article 5-A of the domestic relations law.

63. UNIFORM CHILD CUSTODY JURISDICTION ACT § 1.

channel to that court relevant data from other places. Other states are supposed to cooperate but not to compete with the proper forum on custodial matters.

The proper forum to determine custody in most instances is the so-called "home state" of the child, on the assumption that it is in the best position to gather evidence and to have a continuity of control. "Home state" is defined as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or person acting as parent, for at least six consecutive months . . . ." <sup>64</sup> Where the child is less than six months old, the home state is "the state in which the child lived from birth with any of the persons mentioned." <sup>65</sup> Periods of temporary absence from the state are counted as part of the six month period, and if a child is removed from or retained out of his home state it nonetheless retains full custody jurisdiction for a six month period thereafter. <sup>66</sup> As long as the home state has jurisdiction under the Uniform Act, other states defer to and cooperate with that jurisdiction.

This concept of continuing jurisdiction in the home state over child custody and visitation is consistent with conflict of laws theory regarding jurisdiction, <sup>67</sup> and deference to that authority by other states reflects a policy of forum non conveniens <sup>68</sup> which is compulsory for those states which enact the Uniform Act. An analogy also may be made to long-arm statutes in that the home state nexus is the basis for adjudicating custodial status even if the child has been removed or retained out of state. <sup>69</sup>

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64. *Id.* § 2(5).

65. *Id.*

66. *Id.* § 3(a)(1).

67. *See generally* Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913).

68. *But see* N.Y. CIV. PRAC. LAW § 327 (McKinney Supp. 1976). "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, *may* stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." *Id.* (emphasis added).

69. *See id.* § 302 (b), which provides: "A court in any matrimonial action or family court proceeding involving a demand for support or alimony may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the obligation to pay support or alimony accrued under the laws of this state or under an agreement executed in this state."

The Uniform Act thus would apply in situations where New York was the home state<sup>70</sup> and a parent or custodian flees with the child to another state before or during custodial proceedings. The act would also apply to a child who was temporarily out of the state visiting someone who refused to return him to New York. If the state where the child was physically present has enacted the Uniform Act, it would defer to New York's jurisdiction and decline to entertain custody proceedings; if already commenced, such proceedings would be stayed unless New York in turn held that the second state was a more appropriate forum,<sup>71</sup> in which event the second state could determine custodial rights. The Uniform Act expressly states that although physical presence of the child is desirable for an exercise of custody jurisdiction,<sup>72</sup> it is not a prerequisite thereto except in emergency situations, such as where the child has been abandoned or abused, or otherwise neglected.<sup>73</sup>

In addition to the usual home state basis for custody jurisdiction, the act has a catch-all provision which applies where it is in the best interest of the child to assume jurisdiction. The best interest requirement would be met where the child and at least one contestant have a significant connection with the forum and where substantial evidence concerning the child's care, protection, training, and personal relationships is present in that forum. In rare instances jurisdiction of a second state could supersede that of the technical home state because of the legitimacy of the second state's concern and superior access to relevant evidence.

There are two other possible bases for custody jurisdiction in the Uniform Act, but they will have minimal application. First, the forum state may exercise jurisdiction in emergency situations where the child is physically present within the state and has been abandoned, mistreated, abused, neglected, or has been threatened with such treatment.<sup>74</sup> Second, jurisdiction may be exercised if it appears that no other state would have jurisdiction under any of the other three bases,<sup>75</sup> or if it appears that another state has declined to exercise jurisdiction on the ground that a second state is the more appropriate forum, and if it would be in the best interest of the child to assume jurisdiction, then the second state

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70. See note 64 *supra*.

71. See UNIFORM CHILD CUSTODY JURISDICTION ACT § 7.

72. *Id.* § 3(c).

73. *Id.* § 3(a)(3).

74. *Id.*

75. *Id.* §§ 3(a)(1)-(3).

may proceed even though it does not qualify as a home state.<sup>76</sup> Such exceptional circumstances should be rare.

The act's provisions concerning jurisdiction are in accord with prevailing theories of child development and the psychological best interests of children.<sup>77</sup> There is a consensus among experts on child development that stability, continuity, and security of the parent-child relationship is of utmost importance, although the damage caused by disruption may differ in degree depending upon the age of the child and the kinds of environment.<sup>78</sup> The home state requirement for custodial jurisdiction backs up the experience and insights of behavioral scientists, and since the act prevents or inhibits child-snatching it protects the stability of ongoing relationships.

There is, however, a possible legal issue regarding the jurisdictional provisions. In *May v. Anderson*,<sup>79</sup> Mr. Justice Burton in a plurality opinion compared custodial rights with personal property rights and insisted that the other party was not bound by an ex parte divorce and award of custody, at least where the absent party was the mother living in another state. The opinion, which has been roundly criticized,<sup>80</sup> intimates that custody, like alimony or support, is an incident of marital status that cannot, for full faith and credit purposes, be cut off without personal jurisdiction over the affected party. Mr. Justice Frankfurter, however, was careful to point out that although full faith and credit to the ex parte decree was not obligatory, nonetheless comity might be accorded to it.<sup>81</sup>

We are thus faced with the possibility that *May v. Anderson* may be read as constitutional doctrine making personal jurisdiction over a party claiming custody a sine qua non because custodial rights are equated with property rights and because due process requires in personam jurisdiction for their termination. The practical consequences of such a rationale are that parental rights are given priority over the best

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76. *Id.* § 3(a)(4).

77. See CLARK, *supra* note 12, at 326; A. WATSON, *PSYCHIATRY FOR LAWYERS* 197 (1968); Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1209 (1969).

78. See Modlin, *Statement*, READINGS IN LAW AND PSYCHIATRY 319-22 (R. Allen, E. Fester, & J. Rubin eds. 1968); Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 L. & CONTEMP. PROB. 807, 812-14 (1944).

79. 345 U.S. 528 (1953).

80. See, e.g., Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959).

81. 345 U.S. at 535-36 (Frankfurter, J., concurring).

interests of children and the traditional *parens patriae* powers of the states. Moreover, it may be doubted that Mr. Justice Burton's plurality opinion would be applied to the situation where it was the *father* who had left the home state and the mother obtained a divorce with a custody order, even though theoretically his parental rights were cut off without personal jurisdiction over him.

In order to insulate the custody decrees of the home state from such constitutional objections, the Uniform Act ensures procedural due process for claimants to custody. Reasonable notice and an opportunity to be heard must be given to any parent whose parental rights have not been previously terminated and to any person who has physical custody of the child.<sup>82</sup> If such a person cannot be personally served within the home state adequate provisions are made for service outside the state.<sup>83</sup> In addition, if it appears to the court that it is clearly an inappropriate forum it may require that party who commenced the proceedings to pay court costs and "necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses."<sup>84</sup>

The latter provision has two major purposes. First, it will offset to some degree the economic disadvantage of a party, most often the mother, who cannot afford to contest custody in another state. Second, it should discourage self-help because the party who resorts to that practice may be subjected to all of the costs of a modification proceeding. Although this technique is innovative it is singularly appropriate for child custody disputes.

With regard to the jurisdictional provisions of the Uniform Act it is important to note that they apply to both the original proceeding and to proceedings for modification of a prior order. It is also important that a court has custody jurisdiction *only* if at least one of the previously discussed bases is present. In other words, except in emergency cases of child abandonment or abuse, dependency or neglect, there is usually only one appropriate forum, and ordinarily that is the home state. Where a person having lawful custody moves with the child to another state or country the new home eventually may become the home state, superseding the former one. This scheme raises some difficult problems.

First, for those states enacting the Uniform Act, jurisdiction to grant a divorce and to award custody may not be coterminous. Divorce

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82. UNIFORM CHILD CUSTODY JURISDICTION ACT § 4.

83. *Id.* § 5.

84. *Id.* § 7(g). See also *id.* § 19(b).

jurisdiction traditionally exists at the domicile of one party. That domicile may or may not be the home state contemplated by the Uniform Act. Moreover, the pragmatic consequence of the Supreme Court's decisions applying full faith and credit principles to divorce jurisdiction<sup>85</sup> is that personal jurisdiction over both parties is a basis for granting a divorce even in the absence of any domicile. The result is the same whether expressed in terms of jurisdiction or *res judicata* and collateral estoppel. But under the Uniform Act such personal jurisdiction over the marital partners is not in itself an appropriate basis for an award of custody. This means that custody may not be adjudicated by the divorce forum which is not a home state and that custodial and visitation rights may have to be determined in subsequent proceedings at the appropriate forum.

On this issue, however, the provisions of the Uniform Act do not make the situation appreciably worse than it was under the usual rules. *May v. Anderson* had already created the problem because it defined the right to child custody as a "divisible incident" of divorce.<sup>86</sup> Under existing law divorce and custody jurisdiction are not always coterminous even though an order as to custody and visitation often accompanies divorce. More important, it may be argued that it does not comport with public policy to permit a "quickie" divorce state to adjudicate the custody issue for unrepresented children.<sup>87</sup>

The other problem regarding the custody jurisdiction of successive home states is that of cooperation between such states. A number of sections of the Uniform Act address this problem. A major section provides that even a second home state shall not modify a prior custody decree unless the original forum no longer has or declines to exercise jurisdiction under the Uniform Act; the second state must request copies of and give due consideration "to the transcript of the record and other documents of all previous proceedings submitted to it" in accordance with the Uniform Act.<sup>88</sup> The original home state is obligated to preserve the transcript and other documents and upon appropriate request to forward them to the second state.

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85. See generally *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Foster, Recognition of Migratory Divorces: Rosenstiel v. Section 250*, 43 N.Y.U.L. REV. 429 (1968).

86. See 345 U.S. 528, 534 n.6 (1953). See also *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); Note, *Divisible Divorce*, 76 HARV. L. REV. 1233 (1963).

87. For a discussion of a child's right to counsel in divorce proceedings, see Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HAST. L.J. 917 (1976).

88. See UNIFORM CHILD CUSTODY JURISDICTION ACT § 14.

Other sections of the Uniform Act provide for the recognition and enforcement of out-of-state custody decrees, whether initial decrees or modifications, if the other state assumed jurisdiction under statutory provisions substantially in accordance with the Uniform Act.<sup>89</sup> A registry of out-of-state custody decrees is to be maintained in those states which adopt the Uniform Act, including certified copies of decrees and orders, any communications regarding the pendency of custodial proceedings, findings as to inconvenient forums, and other matters affecting an assumption of custody jurisdiction.<sup>90</sup> Before entertaining jurisdiction to modify a prior custody order, a state which has adopted the Uniform Act must consult the registry to determine whether any proceeding is pending in another state.<sup>91</sup> Finally, when a certified copy of the custody decree of another state is filed with the clerk of the supreme court or the family courts it "shall be enforced in like manner as a custody decree rendered by a court of this State."<sup>92</sup> A person violating a custody decree of another state, thereby making it necessary to enforce the decree locally, may be required to pay necessary travel and other expenses, including attorney fees, incurred by witnesses of the party entitled to custody.<sup>93</sup>

Still other provisions of the Uniform Act cover the situation where a custody proceeding is brought at an inconvenient forum or at the original forum after it no longer is a convenient forum.<sup>94</sup> For a determination of inconvenience several factors are set forth: whether or not it is in the best interests of the child to have another state assume jurisdiction; whether another state is or recently was the home state, or has a closer connection with the child and family; the availability of relevant evidence; and whether an assumption or refusal of jurisdiction would further the purposes of the Uniform Act. Before making such a determination there must be communication and an exchange of information between states. The court may decline to exercise jurisdiction or stay its proceedings as circumstances warrant.

In recent legislation<sup>95</sup> California has expanded the concepts of cooperation and communication between states. Under California's amendments to the Uniform Act a court declining to exercise jurisdiction upon a petition for an initial custody proceeding must notify the

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89. *See id.* §§ 13, 15.

90. *Id.* § 16.

91. *Id.* § 14.

92. *Id.* § 16.

93. *Id.*

94. *Id.* § 13.

95. Cal Stat. 1976, ch. 1399.

parent or guardian in another state as well as the prosecuting attorney of that state.<sup>96</sup> Upon a proper motion from the other state, the court can order the petitioner "to appear with the child in a custody proceeding instituted in the other state . . . ."<sup>97</sup> The court may also place the child in the custody of the court for return to the legal custodian in the other state.<sup>98</sup> Under these amendments, the institution of new custody proceedings by an abducting parent will present substantial risks for that parent and the California courts will have new flexibility in protecting the abducted child.

Tied in with the concept of convenient forum is an application of the clean hands doctrine where a petitioner "has wrongfully taken the child from another state or has engaged in similar reprehensible conduct . . . ."<sup>99</sup> Unless required to do so in the interests of the child, custody jurisdiction shall not be exercised in such cases, and the duty of the court is to recognize and enforce any prior decree of another state.<sup>100</sup>

### Conclusion

Read together the several sections of the Uniform Act provide a sophisticated and civilized legal process for the handling of custody cases. The Uniform Act is not a reciprocal act; hence a state which passes it is obligated by its terms even though another state concerned with the matter has not enacted it. But in any event interstate cooperation is required of states which have adopted the new law. Favoritism for the local contestant over the nonresident should be reduced to a minimum, and ad hoc custody determinations should be a thing of the past. No longer will possession of the child be the most important factor.

We should be realistic, however, in noting the impact of the proposed law. Other than by way of appeal, there is no escape hatch where the home state renders a deplorable decision regarding child custody. The fact that the second forum would have decided the issue differently is no justification for not enforcing the order of the first forum. The effects of an erroneous or bad decision thus are insulated from attack. Of course, this is analogous to the conflict of laws rule of

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96. *Id.* § 5.

97. *Id.*

98. *Id.*

99. *Id.* § 15.

100. *Id.* For a discussion of the effect on children of parental custody battles see DESPERT, CHILDREN OF DIVORCE 202-13 (1953).

*Fauntleroy v. Lum*,<sup>101</sup> that ordinarily an affront to local public policy or the fact that a prior decision was erroneous are not excuses for withholding full faith and credit. Similarly, the fact that the home state determined child custody on an unacceptable basis or awarded the child to the wrong party is no justification for entertaining a modification proceeding under the Uniform Act. This is part of the price to be paid for bringing order out of chaos in the child custody field. Although an occasional poor decision may be insulated from challenge, the stability, continuity, and security of ongoing relationships will be protected.

Of course, national implementation of the act may be difficult due to the substantial change it effects in custody proceedings. If judges and lawyers accept the public policy expressed in the act and do not seek to circumvent it, this unconscionable area of family law will be rehabilitated. Cases such as the recent Mellon custody controversy clearly demonstrate the need for abandoning self-help and the substitution of a rule of law for the social evil of child-snatching.

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101. 210 U.S. 230 (1908). Apart from full faith and credit or constitutional mandate the common law rule is that mistaken findings of fact or applications of law in the prior proceedings are irrelevant so long as the court had jurisdiction. R. LEFLAR, *AMERICAN CONFLICTS LAW* 169 (1968). However, Mr. Justice Frankfurter urged that strong local policy in exceptional situations may justify withholding recognition of a foreign decree. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 426 (1957) (dissenting opinion).

[*Editor's Note*: Immediately prior to publication of this article, a ninth state adopted the Uniform Child Custody Jurisdiction Act, Arizona. ARIZ. REV. STAT. § 25-331 (West Supp. 1976). See notes 54-61 & accompanying text *supra*.]