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Domestic Relations—Foreign Custody Decrees

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both from the standpoint of the child itself and the interest which the state has by virtue of its social welfare laws. The only remaining question is whether the New York procedure of enforcing this duty in the situation contemplated by the Act denies due process to a prospective respondent.

Due process, of course, does not guarantee any particular type of procedure in the state system but it does require that the procedures which are employed be fair.²² The patent necessity of cross-examination to a fair hearing has been emphasized by many writers.²³ It would be impossible for a court sitting in New York to determine the credibility of a complainant or witness in California unless there is direct evidence contradicting the testimony thus obtained.

It is submitted by the writer that, although the decision upon this point is correct, the grounds set forth by the Court, that this is a civil suit and not a criminal action, are somewhat weak. The Act is directed toward the errant father and is a means of overcoming his ability to use lack of jurisdiction as a shield against this responsibility. The respondent may always submit himself to the jurisdiction of the initiating court in order to confront the complainant and her witnesses.²⁴ The respondent has a choice, albeit an expensive one, in the instant situation. It would seem that better social policy would dictate that the expense of travel should be placed upon the one who has shirked his duty than upon the one to whom the duty is owing. Due process has not been denied—it merely has been used as a bargaining tool.

Foreign Custody Decrees

In *Bachman v. Mejias*²⁵ the controversial²⁶ question of custody of children was again before the Court of Appeals. Respondent had taken her child to New York in defiance of an order of a Puerto Rico Court which had previously given custody to the child's grandparents. The prior decree had provided for readjudication after a hearing. Evidence tended to show that the child's social development was retarded as a result of his separation from his mother, brother and sister. Petitioner commenced habeas corpus proceedings in New York for the return of the child.²⁷ The Court held, reversing the Appellate Division,²⁸ that the writ was properly denied.

22. *Dohany v. Rogers*, 281 U. S. 362 (1930).

23. See, e.g., 5 WIGMORE, EVIDENCE §1367 (3d ed. 1940); Stryker, *Cross-Examination*, 2 BUFFALO L. REV. 45 (1952).

24. MCK. UNCONSOL. LAWS §2118; *Smith v. Smith*, 125 Cal. App. 2d 154, 270 P. 2d 613 (1954). The *Smith* case presents an excellent resume of the purposes and procedures of reciprocal support laws.

25. 1 N. Y. 2d 575, 136 N. E. 2d 866 (1956).

26. Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953).

27. *People ex rel. Pruyne v. Walts*, 122 N. Y. 238, 25 N. E. 266 (1890).

28. 1 A. D. 2d 319, 151 N. Y. S. 2d 48 (2d Dep't 1956).

It has been stated as a general rule that the Full Faith and Credit Clause does not apply to child custody decrees.²⁹ This is a rather broad statement of social policy although at least one state has felt itself empowered to re-open any foreign custody decree where the child in question is a resident regardless of the circumstances. The prior decree is considered to be evidentiary but not controlling.³⁰ A few states will "hold against" a spouse who defies a foreign decree whereas it has been held that the culpability of the abducting parent is of little materiality.³¹

In the maze of "rules" resulting from the necessary case by case adjudication of custody disputes, the welfare of the child seems to be the foremost factor.³² While a decree of divorce from a foreign state is given full faith and credit in New York even where custody is involved, the custody provision is subject to modification if it is deemed necessary for the child's welfare and the child is a resident of New York.³³ Of course a custody decree will not be interfered with where there has been no change in the circumstances which surrounded the original decree — the scheming parent may not take advantage of a social policy which is for the benefit of the child.³⁴

In the instant case the Court has correctly refused to punish the child for the sins of the mother (if, indeed, the departure from Puerto Rico in the face of loss of the child for an additional period can be said to have been a transgression).³⁵ The constitutionality of the decision cannot be denied in view of the decision in *People ex rel. Halvey v. Halvey*.³⁶

29. While this rule has generally been applied, the Supreme Court has never decided this question. However, in *People ex rel. Halvey v. Halvey*, 330 U. S. 610 (1947) it was held that where the foreign jurisdiction provided a means of reopening the adjudication, the state of residence of the child could do so also. In *May v. Anderson*, 345 U. S. 528 (1953), Mr. Justice Frankfurter indicated in his concurring opinion that the welfare of children takes precedence over the Full Faith and Credit Clause although the decision was based upon a jurisdictional point.

30. *Moyer v. Moyer*, 171 Kan. 495, 233 P. 2d 711 (1951).

31. *In re Bauman*, 82 Cal. App. 2d 359, 186 P. 2d 384 (1947); *Cook v. Cook*, 135 F. 2d 945 (D. C. Cir. 1943); the latter case involved a dispute between a parent and a foster home.

32. *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624 (1925); *May v. Anderson*, 345 U. S. 528 (1953).

33. *Ansorge v. Armour*, 267 N. Y. 492, 196 N. E. 546 (1935).

34. *Ansorge v. Armour*, *supra* note 33; *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624 (1925).

35. Pending a readjudication of the custody decree, the Puerto Rico court had ordered respondent to return the child to its grandparents. Prior to service of this order, respondent returned to New York.

36. 330 U. S. 610 (1947). Since the Puerto Rico court provided for a readjudication New York could modify the decree.