THE PLIGHT OF THE INTERSTATE CHILD IN AMERICAN COURTS

LEONA MARY HUDAK

...the struggle between divorced spouses over the custody of their children has transcended the brutality and irregularity of guerrilla warfare.

1. Introduction

For every three marriages solemnized in the United States each year, one divorce is granted. In some states the statistics approach one for every two. Yet, it is not these almost overwhelming statistics which are the most pernicious aspects of the broken American marriage, but rather the tragic aftermath revolving about custody-visitation when children are involved. Therein lies an opprobrious indictment of the American juridical-legal-legislative system. For with the official rescission of the nuptial contract begin the devious, sometimes vengeful and often heart-rending machinations and maneuvers of “noncustodian v. custodian” hearing and rehearing, on the courtroom stages of 52 jurisdictions—all masquerading in the guise of doing what is in the best interest of the child. If he or she is dissatisfied, the noncustodial parent need only hire a glib, knowledgeable and conscientious attorney, with access to a good legal library, willing to find some favorable “law” in another jurisdiction.

* Assistant Professor of Law, University of Missouri-Kansas City; B.A., Case Western Reserve University; M.A., M.A.L.S., University of Wisconsin; J.D., LL.M., Cleveland State University, Cleveland-Marshall College of Law.


2 In 1972, there were 2,270,694 marriages and 753,000 divorces in the United States. In California and Florida, the statistics indicate a greater ratio than one for every two and a number of other states are very close to that ratio. From 1963 to 1972, the number of divorces had increased 82%. See THE WORLD ALMANAC 1015 (G. Delury ed. 1973).


4 See, e.g., Hixson v. Hixson, 199 Ore. 559, 263 P.2d 597 (1953) (wherein the ex-husband filed between 60 and 70 documents in regard to custody subsequent to the divorce); Munroe v. Munroe, 47 Wash. 2d 391, 287 P.2d 482 (1955) (during a three-year period following the divorce, the former spouses filed more than 20 contempt actions against each other). See also Davis, Children of Divorced Parents: Sociological and Statistical Analysis, LAW AND CONTEMP. PROB. 700, 708 (1944) (wherein it is suggested that following a divorce, the children are the only means through which to express mutual resentment).

5 Including the 50 states, the District of Columbia, and Puerto Rico. See, e.g., Allen v. Allen, 200 Ore. 278, 268 P.2d 358, 360 (1954) (a son and daughter of tender years were subjected to seven separate custodial contentions between their parents in nine years in the courts of Oklahoma, California and Oregon); Crowell v. Crowell, 184 Ore. 467, 198 P.2d 992 (1948) (a habeas corpus action where the Oregon Supreme Court had to choose between the enforcement of five decrees made at various times in Oklahoma and Texas courts).
state. His next requirement is to establish some “minimum contacts” with that state, transport the child there on its first “visitation” with him, and the battle is on, lasting in many cases for the duration of the child’s non-age, nurtured by jurists, social workers, and child psychiatrists and psychologists.

Several years ago one writer noted that there are approximately nine children in the families of every ten persons granted divorces and about one-third of a million children whose parents get divorces each year in the United States. In about 90 per cent of these cases custody of the children is awarded to the mother. Regardless of the statutory language as to the equality of parental rights, the mother, because of the “mystique of motherhood” has an advantage which is decisive, especially with children under 12, unless she is clearly shown to be unfit. Inevitably, irreconcilable disputes develop over visitation and custody irrespective of who is granted custodianship, in countless of these cases.

The unprecedented mobility of Americans during and after World War II and the increasing rate of family breakup and other social changes in the 1950’s and 1960’s have accentuated the problem. Serious complications dealing with unresolved jurisdictional conflicts arise when the litigation crosses state lines, with the competition between courts being added to competition between claimants. Ingenuously, this exigency has been described as “the law of the jungle” bringing “misery to countless children of divorce and other broken homes”;

6 Denial of visiting privileges with the noncustodial parent is virtually unknown, unless he or she is a pervert, habitual criminal, drug addict, alcoholic, or has been declared mentally incompetent. See Godbey v. Godbey, 70 Ohio App. 450, 44 N.E.2d 810 (1942). But see, Friedland v. Friedland, 174 Cal. App. 2d 874, 345 P.2d 322 (1959); Annot., 88 A.L.R.2d 148, 207-08 (1963).

7 See In re Anonymous, Doc. No. 247777 (Juvenile Ct., Cuyahoga Cty., Ohio 1968). The caseworker, in the face of an overwhelmingly positive investigation favoring the mother, apparently acting under the court’s instructions, threatened the mother with loss of custody of her three-year-old son if she did not dismiss her application to restrict the father’s visiting rights to Cuyahoga County, Cleveland, Ohio. When the mother sought relief through the court’s chief psychiatrist, he refused to acknowledge, in his professional capacity, that subjecting a child of that age to annual two-month visits 2,000 miles away from home and to further unnecessary litigation in another state was contrary to the best interests of the minor, although he seemed to avow this position privately.

8 Simon, Stepchild in the Family, 77-78 (1964).


10 See New York ex rel Halvey v. Halvey, 330 U.S. 610, 620 (1947) (Douglas, J., concurring): “[T]he effect of the decision may be to set up an unseemly litigious competition between the States and their respective courts as well as between parents. Sometime, somehow, there should be an end to litigation in such matters.”

but all of them and self-help the ultimate authority...";\(^\text{12}\) and, "where the child loses his home, not because of any urgent necessity from the standpoint of the care he receives, but to satisfy the urge to continue the marital discord at its most vulnerable point... the competition for the affection and control of the children."\(^\text{18}\)

Over a decade ago, Professor Geoffrey Hazard, Jr., reproached this deplorable condition in which he characterized the "parental right of custody as not worth the paper upon which it is written,"\(^\text{14}\) and proceeded even more graphically:

The child is filched from classroom, playground, public street, or his home, transported out of the state and perhaps across the country by the abducting parent, there to be held pending a counter-foray by the other parent. Meanwhile each parent recruits the assistance of his home court, sometimes of courts elsewhere, seeking by various proceedings to strengthen his grip on the child and to loosen that of the other parent.\(^\text{16}\)

Few courts and no legislatures have dealt with the dire problem positively. The United States Supreme Court has artfully dodged the issue, thus withholding all federal controls from interstate custody law.\(^\text{16}\)

As the Reporter for the Special Committee of the Commissioners on Uniform State Laws, which prepared the Uniform Child Custody Jurisdiction Act, has noted, any person, professional or lay, who has had experience with children will affirm, that when there has been one upheaval in a child's life because of divorce or some other ill fate, what the child needs most is "stability, security, and continuity."\(^\text{17}\) Dr. Andrew Watson, psychiatrist and professor of law, deems stability "practically the principal element in raising children, especially pre-puberty ones"; he maintains that "a child can handle almost anything better than he can handle instability."\(^\text{18}\)

\(^{12}\) Id. at 306, citing Justice Jackson, dissenting in May v. Anderson, 345 U.S. 528, 536 (1952).

\(^{13}\) Bodenheimer, supra note 11, at 305.

\(^{14}\) Hazard, supra note 1, at 395.

\(^{15}\) Id. at 392.

\(^{16}\) The United States Supreme Court has dealt with only four child custody cases: Ford v. Ford, 371 U.S. 187 (1962); Kovacs v. Brewer, 356 U.S. 604 (1958); May v. Anderson, 345 U.S. 528 (1952); New York ex rel. Halvey v. Halvey, 330 U.S. 610 (1947). In all four cases the Court evaded the issue of a state giving full faith and credit to a custody decree of a sister state. These cases will be discussed more fully later in this article. See notes 51-75 and accompanying text infra.


A growing child's need for stability of environment and constancy of affection, especially when subjected to the trauma of a disintegrated home, seems today a well-accepted fact, verifying old truths gathered from long experience of mankind. . . . Custody decisions once made "should nearly always be permanent and irrevocable."

Dr. Herbert Modlin of the Menninger Foundation emphasizes the "constancy of mothering" and the persistence of "the requirement of continuity and a sense of family, satisfying a need to belong," irrespective of the other needs of the various growth periods. Professor Homer Clark, in concurrence with Drs. Watson and Modlin, deplores the transferral of a child from one parent to another by conflicting court decrees.

In 1963 the legal profession at its annual conference heard this warning voiced: "The manner in which the courts deal with these victims of domestic catastrophe has an impact, directly or indirectly, on a substantial proportion of our people. It presents a challenge to the stability of our social institutions and is assuming threatening significance."

A decade later, in 1973, Professors Joseph Goldstein and Albert Solnit of Yale University, and Dr. Anna Freud of the Hampstead Child-Therapy Clinic, London, England, published their study Beyond the Best Interests of the Child, decrying the role American courts play in mishandling dependent children. While their findings dealt primarily with adopted and foster children, the authors made the following observations about custody in divorce and separation:

The absence of finality coupled with the concomitant increase in opportunities for appeal are in conflict with the child's need for continuity. . . . In addition certain conditions such as visitations may themselves be a source of discontinuity. . . . Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationship to both parents. . . .

Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits. What we have said is, to protect the security of an ongoing relationship—that between the child and the custodial parent. (Emphasis added.)

19 Watson, Psychiatry for Lawyers 197 (1968).
20 Fain, Readings in Law and Psychiatry 319-22 (1968) (citing the 1963 Proceedings of the Section of Family Law of the American Bar Association) [hereinafter cited as FAIN].
22 Fain, supra note 20, at 316 (1968).
Yet—in the light of these insights and realities—contemporary law and judicial practice relating to child custody and visitation are an antithesis that shocks the conscience.

II. ANTECEDENTS OF AMERICAN CHILD CUSTODY LAWS

Under the old Persian, Egyptian, Greek, Gallic, and Roman law, the father had absolute power over his children. Infanticide was legal, as was the selling of sons and daughters into slavery—on the theory that he who gave could also take away. In ancient Rome this power did not cease upon the child’s attainment of majority, but continued for the life of the pater familias.24

In feudal England, custody was automatically an incident of guardianship of lands. Only gradually did it come to be regarded as a trusteeship with responsibility toward the child.25 The Court of Wards and Liveries, established during the reign of Henry VIII, developed some measure of protection for children. A 1660 statute transferred jurisdiction over them to the chancery courts, which assumed the crown’s prerogative of parens patriae to care for infants.26

At English common law, too, the mother had no rights in regard to her children; she was entitled only to reverence and respect. The father had full authority over and custody of the children. These rights flowed from his duties of maintenance, care, education, and control. While the former were easily executed by courts, enforcement of the latter then, as today, presented insuperable difficulties and insoluble problems, which gradually led to an erosion of paternal authority, subject to centuries of stubborn challenge.

Finally, in 1837, the British Infants’ Custody Act was introduced in Parliament by Mr. Serjeant Talfourd, who described the pathos of the mother if her husband chose to abandon her:

Not only may she be prevented from bestowing upon them [her children] in their early infancy those solicitudes of love for the absence of which nothing can compensate—not only may she be prevented from tending upon them in the extremity of sickness, but she may be denied the sight of them; and if she should obtain possession of them, by whatever means, may be compelled by the writ of habeas corpus to resign them to her husband or his agents without condition—without hope. That is the law . . . and how is it enforced? By process of contempt, issued at the instance of the husband against his wife, for her refusal to obey it, under which

For an excellent review of the effect of this book on American courts thus far, see Child’s Point of View, Time, September 30, 1975, at 65.

24 See Kent, Commentaries on American Law 204-05 (11th ed. 1867); 1 Blackstone, Commentaries on the Laws of England 451 (1884).
she must be sent to prison, there to remain until she shall yield or until
she shall die. 27

Reminiscent of today's women's liberationists, Serjeant Talfourd pleaded
eloquently:

In palliation of these miseries, I do not seek to alter the law of England
as to the father's rights—I do not ask you to place the unspotted matron
on a level with the frail mother of illegitimate children, who is by law
entitled to their custody . . . I do ask some mitigation of the mother's lot
. . . some slight control over the operation of that tyranny which one sex
has exerted over the helplessness of the other. 28

The bill was passed by Parliament in 1837. It provided for access to
children of tender age by the noncustodial mother and served as the forerunner
of our visitation rights. 29

In 1839, Parliament amended the act to provide further that the
Lord Chancellor and Master of the Rolls might, upon the petition of
the mother and at his discretion, enter an order for children under the age
of seven years to be delivered to the mother and to remain in her custody until
they attained this age, subject to any regulations he deemed convenient and
just. Such order was subject to enforcement by an action for contempt. The
only absolute bar to the mother's petition for custody was a conviction of
adultery in an action for criminal conversation brought by her husband or by
a similar sentence issued by an ecclesiastical court. 30

The Act of 1873 31 extended the period during which infants might
remain in their mother's custody to the age of 16 years. The Guardianship of
Infants Act of 1925 32 at long last established the welfare of the child as the
paramount consideration in determining its custody. The Child and Young
Persons Act of 1933 33 provided that a parent or guardian could be deprived
of a child's custody if he or she were found unfit or unable to fulfil his or
her parental responsibilities.

III. EARLY AMERICAN CHILD CUSTODY LAWS

James Kent (1763-1847), Chief Justice and Chancellor of the New
York Supreme Court and Professor of Law at Columbia University, in his
Commentaries, noted that the father's duty to maintain and educate his

27 39 Parl. Deb. (3d ser.) 1082 (1837) [1830-1837].
28 Id. at 1090.
29 Id.
30 British Infants Custody Act, 2 & 3 Vict., c. 54 (1839).
33 Child and Young Persons Act of 1933, 23 Geo. V, c. 12, § 61, 62.
children during their minority was absolute, even though they had property of their own; but the obligation to support did not extend to the mother. As a result the father was generally entitled to the custody of their persons and to the value of their labors and services. This was an absolute right until the children reached at least the age of 14—and by inference of the law—until they reached the age of 21.  

If his children were improperly detained, a father could regain their custody by suing out a writ of habeas corpus. Courts of law and equity would then investigate the circumstances and the inclinations of the infants; and, utilizing sound discretion, place a child where they deemed best, which may have meant retention of control by third persons, particularly where the morals, safety, or interests of the infants demanded it. On a father's death, the mother's right to custody was superior to that of others.

One of the earliest cases to consider the matter of child custody was *Commonwealth v. Addicks*. Involved were two girls aged seven and ten. About four years prior to the filing of the suit, the father, Joseph Lee, had become financially embarrassed and was unable to support his family. The mother, Barbara Addicks, kept a boardinghouse, using the proceeds to maintain and educate her children. A minor son had continued to live with Lee. Following her abandonment by Lee, she assumed a relationship with Addicks, whom she married after Lee obtained a divorce from her in 1813. Pennsylvania law forbade a spouse guilty of adultery from marrying the paramour during the lifetime of the former husband or wife. Lee then petitioned for a habeas corpus on grounds of Barbara's immoral conduct and on grounds that his improved circumstances enabled him again to support the children. There were no allegations of unfitness against the mother.

Chief Justice Tilghman of the Pennsylvania Supreme Court utilized, probably for the first time, what we now call the "best interests of the child" doctrine, a holding which was a century and a half ahead of its time. Although he expressed disapprobation of the mother's conduct, he observed that she had taken good care of the girls in all respects. In consideration of this and their tender age, he concluded that they stood in need of assistance which could be provided by none so well as a mother. Exercising his discretion, he continued custody with the mother, with visiting privileges accorded the father.

---

55 *Id.* at 194, 203-05.
56 5 Binn. 520 (Pa. 1813).
By contrast, in *People ex rel. Barry v. Mercein*, the New York Supreme Court retrogressed in utilizing the "paramount right of the father" doctrine. One Eliza Anna Mercein, of New York City, married John Barry of Nova Scotia, in 1835. The family moved back and forth several times. Finally, in 1838, Barry decided to remain in his native land when his father-in-law refused to advance him money to establish him in business. He took with him four children of a previous marriage and the couple's son. In 1839 he sought by habeas corpus the custody of their 19-month-old daughter. On the fifth writ he succeeded. The New York Court of Correction of Errors reversed in 1840, by a vote of 19 to 3, only to be reversed by the state supreme court on a sixth writ in 1842. Justice Bronson described the superior claims of the father as "the law of the land... in accordance with the law of God," although he admitted that such laws might not have "kept pace with progress of civilization." Rather sarcastically he added: "It may be best that the wife should be declared the head of the family, and that she should be at liberty to desert her husband at pleasure and take the children of the marriage with her..."

In 1881, in the case of *Chapsky v. Wood*, Justice Brewer of the Kansas Supreme Court first expressed in the United States what is now termed the "best interests of the child" doctrine. He held that irrespective of the issues of the case and the rights of others, the paramount consideration before the court was: "What will promote the welfare of the child?" Plaintiff father sought possession of his five-and-a-half-year-old daughter whom he had gifted to his wife's sister at birth—the mother being too ill to care for her—while he satisfied his wanderlust. In a unanimous decision the major Kansas tribunal continued custody in the maternal aunt, observing: "[A]n affection for the child is seen in Mrs. Wood that can be found nowhere else. And it is apparent, that so far as a mother's love can be equalled, its foster-mother has that love, and will continue to have it."

Another unfortunate milestone in the history of child custody litigation

---

38 8 Paige 46 (N.Y. Ct. Chancery 1839), rev'd, 3 Hill 399 (N.Y. S. Ct. 1842).
39 25 Wend. 64 (N.Y. Ct. of Errors 1840).
40 3 Hill at 421-23.
41 This is in marked contrast to the Chancellor's opinion in the Court of Errors below which stated:

[T]he mother is the most proper person to be entrusted with the custody of a child of this tender age... the law of nature had given to her an attachment for her infant offspring which no relative will be likely to possess in an equal degree. And where no sufficient reason exists for depriving her of the care and nurture of her child, it would not be a proper exercise of discretion in any court to violate the law of nature in this respect.

25 Wend. at 106.
42 3 Hill at 422.
43 26 Kan. 650 (1881).
44 *Id.* at 657.
was reached in 1905 by the Supreme Court of New York County, New York in the case of *People ex rel. Sinclair v. Sinclair*, when it arbitrarily decided that a five-year-old boy was no longer of such tender age that he needed maternal love and care. The "paramount right of the father" doctrine prevailed, as Judge Bischoff reversed the mother's custody decree, citing the *Mercein* case, and holding that the attainment of such age constituted a sufficient change of condition to warrant the action: "If the question of the child's tender years, as bearing upon the necessity of his having a mother's personal care, is not eliminated at the age of five years, it is difficult to see how it would be eliminated at the age of ten years. . . ."  

Not all states were as blind to the needs of infants as was New York. Kansas and Oregon gave both parties equal rights to custodianship of their children, by statute, before the turn of the century, with many others eventually following suit.  

IV. THE UNITED STATES SUPREME COURT AND CHILD CUSTODY  
Our highest tribunal has considered the issue of custody and the interstate child only four times in its history. *Halvey v. Halvey* came before it in 1947. The Halveys were married in 1937. Their son was born in 1938. In 1944, without her husband's consent, Mrs. Halvey and the child went to Florida to establish residence; and in 1945 she filed for divorce there. Mr. Halvey, served by publication, made no appearance. The day before the decree was granted, awarding Mrs. Halvey a divorce and permanent care, custody, and control of the child, Mr. Halvey secreted his son back to New York. Thereafter, Mrs. Halvey brought a habeas corpus in a New York Supreme Court, challenging her former spouse's detention of their child.  

Following a hearing, the New York court ordered that custody was to remain in the mother, subject to visiting rights in the father, which included having his son with him during certain vacation periods each year. Further, Mrs. Halvey was ordered to file a $5,000 bond, conditioned on her delivering up the child to the father in Florida each year. The order was subsequently affirmed by all courts, including the United States Supreme Court, on certiorari. Justice Douglas wrote the opinion, utilizing the rationale that full faith and credit did not have to be given to the Florida decree; since,
what Florida could do, viz., modify the custody decree, the courts of any other state could likewise do.\textsuperscript{53}

The Court did not consider the other questions argued: (1) whether Florida had jurisdiction over the child;\textsuperscript{54} (2) whether the Florida decree of custody, lacking personal service, bound Mr. Halvey; (3) whether New York had greater power to modify the decree; (4) whether a state which has jurisdiction over the child, in the face of a custody decree rendered by another state, may make such orders regarding custody as the welfare of the child from time to time requires. These issues were reserved for decision at a later date.\textsuperscript{55}

Justice Rutledge concurred \textit{dubitante} with Justice Douglas, on grounds that under Florida law \textit{res judicata} has no application to an award of custody. He pointed out that the result would make possible a continuous round of litigation over custody, perhaps including abduction, between alienated parents, hardly conducive to the child's welfare. He felt that the controlling consideration should be the best interest of the child. However, he was mindful of the well-settled rule that generally a state is required to give to the judgment of a sister state only as much effect as the rendering state gives it—no more. He also questioned whether Florida would be bound by the New York changes if Mrs. Halvey subsequently applied for a modification.\textsuperscript{56}

\textit{May v. Anderson}\textsuperscript{57} confronted the Supreme Court on certiorari in 1953. The issue was whether in a habeas corpus proceeding attacking the right of the mother to retain possession of her minor children, an Ohio court must give full faith and credit to a Wisconsin decree awarding custody of the children to their father in an \textit{ex parte} divorce action. In an opinion written by Justice Burton, the Court replied in the negative.

The Andersons were married and lived in Wisconsin. By mutual agreement, Mrs. Anderson took the children to her home in Lisbon, Ohio, in 1946, following a family rift. Upon notification on New Year's Day, 1947, of her intent to remain there, Anderson filed for divorce, serving defendant wife in Ohio personally. She made no appearance. He was awarded both the divorce and the custody of the children, with Mrs. Anderson receiving the right to visit them at reasonable times.

\begin{itemize}
\item \textsuperscript{53} \textit{Id.} at 614.
\item \textsuperscript{54} \textit{Id.} at 615 n. 2. Under Florida law, a valid decree of child custody depends on the child being either domiciled or present on its soil. However, the child's domicile usually follows the father's. Thus Justice Jackson reached the same result as Justice Douglas but on grounds of lack of jurisdiction by the Florida court.
\item \textsuperscript{55} \textit{Id.} at 615-16.
\item \textsuperscript{56} \textit{Id.} at 619-21.
\item \textsuperscript{57} 345 U.S. 528 (1953). \textit{See} Hazard, \textit{supra} note 1.
\end{itemize}
Armed with the Wisconsin decree and accompanied by a local police officer, Anderson then obtained the children from their mother in Lisbon, Ohio, and took them to his home where they ostensibly remained until 1951 when he allowed them to visit her. This time she refused to surrender them, whereupon the father filed a habeas corpus action to regain their possession in the Probate Court of Columbiana County, Ohio, which action was affirmed on appeal.\textsuperscript{58} The Ohio Supreme Court refused to certify the case.\textsuperscript{59}

The United States Supreme Court reversed the decision, as Justice Burton declared: "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."\textsuperscript{60} The tribunal's rationale was based on the rule that the full faith and credit clause and the act of Congress passed pursuant to it (28 U.S.C. Section 1738) do not entitle a judgment \textit{in personam} to extraterritorial effect if it was rendered without jurisdiction over the person sought to be bound.\textsuperscript{61}

Justice Frankfurter, concurring with Justice Burton, observed:

Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty toward children... the 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.\textsuperscript{62}

Justice Jackson voiced strong disapproval of the majority view, noting that such a "cardiac consideration" appeared to be grounded in a misapprehension between proceedings \textit{in rem} and \textit{in personam}, the decision ostensibly equating jurisdictional requirements for a custody decree with those for a personal money judgment. He went on to say that the assumption that personal jurisdiction over all parties overrides all other considerations and that in its absence a state is constitutionally impotent to resolve questions of custody flew in the face of the Court's own cases. Prophetically, he foresaw that the decision would author new confusions which would reduce the law of custody to a rule of seize-and-run.\textsuperscript{63}

\textsuperscript{58} 91 Ohio App. 557, 107 N.E.2d 358 (1951).
\textsuperscript{59} 157 Ohio St. 436, 105 N.E.2d 648 (1952). [EDITOR'S NOTE: Recently the Ohio Supreme Court considered in the case of Williams v. Williams, 44 Ohio St. 2d 28 (1975) the question of whether Ohio must give full faith and credit to a Mississippi decree granting permanent custody of the children to the father. The court held that: "Where a court of another state has awarded custody of a minor child pursuant to a valid \textit{in personam} order, and there is no evidence of a subsequent change in circumstances affecting the best interests of the child, the courts of this state will give full faith and credit to that order." \textit{Id.} at 32.]
\textsuperscript{60} 345 U.S. at 533.
\textsuperscript{61} \textit{Id.} See 28 U.S.C. § 1738 (1948).
\textsuperscript{62} \textit{Id.} at 536.
\textsuperscript{63} \textit{Id.} at 542.
Kovacs v. Brewer placed before the Supreme Court the issue of what restriction, if any, the Constitution of the United States imposes on a state court when it is determining the custody of the child before it; or, more specifically: Did the Federal Constitution require North Carolina to give effect to a New York child custody decree?

Petitioner Aida Kovacs and George Brewer, Jr., were married in New York City in 1945. Their daughter, Jane Elizabeth, was born in 1946. In January, 1951, Brewer was granted a divorce by a New York court which awarded custody of the child to his father, pending his discharge from the Navy. After the rendering of the decree, petitioner hid with her child. Respondent grandfather found his granddaughter and recovered possession of her on a writ of habeas corpus. He took her to his home in North Carolina, where she remained during the pendency of the appeal through the United States Supreme Court.

In 1954, after marrying one Kovacs, petitioner applied to the New York court for a change of custody, which request was granted. The grandfather refused to deliver the child to the mother, who, 14 months later, in 1956, sued to recover her daughter in his home county in North Carolina. A hearing de novo resulted, with all parties present and represented. The North Carolina court determined that it did not have to give effect to the 1954 New York decree, and it denied the mother's petition. The North Carolina Supreme Court affirmed, holding that the New York decree was without extraterritorial effect, since the child had not been before it when it was rendered.

The United States Supreme Court, Justice Black presiding, vacated the judgment of the North Carolina Supreme Court and remanded the cause to the lower courts to determine definitively the issue of changed circumstances, if any, between the 1954 New York decree and the filing of petitioner's suit in North Carolina to obtain control of her child from respondent grandfather. Justice Black felt that the North Carolina Supreme Court had not clarified the issue of changed circumstances as a basis for not giving effect to the prior New York decree; but in view of the evidence below, he thought it may have intended to decide the case alternatively on that basis. He held that if North Carolina courts properly found that changed conditions showed it in the best interest of the child for custody to continue in the grandfather, then decision of the constitutional questions before the United States Supreme Court was unnecessary—a remarkable feat of evasion, ambiguity, and "buck passing" by the esteemed jurist.

Id. at 609-11.
Id. at 607-08.
Justice Frankfurter dissented on grounds that the implication of the majority opinion was that unless circumstances had changed since the rendering of the New York decree, it had to be given full faith and credit. He observed that the purpose of the full faith and credit clause was to preclude dissatisfied litigants from taking advantage of the federal character of the nation by relitigating issues in one state that had been decided in another—promoting a policy of finality. However, he deemed the determination of the proper custody of children a more important consideration than curbing litigious strife. Both the underlying purpose of the clause and the nature of custody decrees militate strongly against a constitutionally enforced requirement of respect to foreign decrees. He noted that the North Carolina Supreme Court had already unqualifiedly declared that it was not bound by the New York decree. If it was subsequently obliged to find that conditions had changed since the second New York decree, in order not to be bound by it, then the latter decree had legal significance under the full faith and credit clause.

While Justice Frankfurter agreed that the Court should be rigorous in avoiding constitutional issues where a reasonable alternative exists, he thought such an issue cannot and is not avoided when a ruling is made that includes one—even though by implication. He would have affirmed the judgment of the North Carolina Supreme Court.

*Ford v. Ford,* heard and decided by the Court late in 1962, also dealt with full faith and credit. Litigation in regard to custody began in 1959, when the husband filed a writ of habeas corpus in a Virginia court, alleging that his wife was an unfit person to keep their three children and requesting that custody be awarded to him. Mrs. Ford sought dismissal of the writ. Thereafter by mutual agreement the parties stipulated that Mr. Ford was to have custody during the school year, and Mrs. Ford during summer vacations and holidays. Notified of this, the Virginia court dismissed the case.

Nine months later, in August, 1960, when the children were with her in Greenville, South Carolina, Mrs. Ford initiated a suit for full custody in the local juvenile court. Mr. Ford made a general appearance, alleging the mother’s unfitness and the prior agreement. After a plenary hearing which included the testimony of 11 witnesses, the trial judge, although finding both parents fit, held that in “the best interest of the children...the mother [should] have custody and control.” He also refused to treat as *res judicata* the order of dismissal in the Virginia court on the issue of fitness.

---

67 Id. at 609-16.
69 371 U.S. at 188.
70 Id at 188-90.
On appeal, the court of common pleas, like the juvenile court, held the interest of the children paramount, and, in effect, it inverted the parents' Virginia agreement, giving the father custody during the school year. The South Carolina Supreme Court reversed, its rationale being that if Mrs. Ford had instituted the action in Virginia courts which she began in South Carolina, Mr. Ford could have successfully interposed the defense of *res judicata*. Thus, since the judgment entered by agreement in the Virginia court was *res judicata* in that state, it was deemed to be entitled to full faith and credit in South Carolina.\(^\text{71}\)

The United States Supreme Court granted certiorari to determine whether the South Carolina Supreme Court had rested its judgment upon a proper base. Reviewing Virginia law, Justice Black, in giving the Court's opinion, cited *Mullen v. Mullen*,\(^\text{72}\) as he noted that the welfare of the infant is the primary, paramount, and controlling consideration of a court in all controversies over the custody of minor children; and that all other matters are subordinate. Noting further that by authority of *Buchanan v. Buchanan*,\(^\text{73}\) the custody and welfare of children are not the subject of barter, he believed that Virginia courts would not consider themselves bound by a mere order of dismissal, where, as here, the trial judge never saw the agreement for custody and heard no testimony whatsoever upon which to base a judgment as to what would be best for the children.\(^\text{74}\)

Thus, Justice Black held, consistent with the Court's prior opinion in *Halvey*,\(^\text{75}\) that whatever a Virginia court could do in a case where another court had exercised its judgment before awarding custody, the South Carolina court was also free to do—without preclusion by the full faith and credit clause. The South Carolina Supreme Court had clearly been in error, and the cause was reversed and remanded to it for further proceedings not inconsistent with the Court's opinion.\(^\text{76}\)

The 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 child custody litigation in American courts.

V. THEORIES OF JURISDICTION IN INTERSTATE CUSTODY-VISITATION SUITS

In refusing to enforce or recognize custody-visitation awards of sister states, courts have relied mainly on three theories: (1) the *jurisdictional*
defect theory; (2) the changed circumstances or conditions theory; and, (3) the concurrent jurisdiction theory.

Under the first of these, the court of the second state can reexamine the original decree because the child was neither present nor domiciled in the state of that award during the pendency of the suit, and thus the decree is a nullity; or both parents were not before the court (ex parte divorce) and thus the rights of the absent parent could not be adjudicated. Under the second theory, depending on the state, the second court, as parens patriae, allegedly acting in the child's best interests, can reexamine the custody decree even when the child is but temporarily in the state. The foreign award is deemed res judicata only as of the time it was entered and it is not binding on the courts of the sister state. In the guise of this theory, courts have reached various desired and, at times, predetermined results, by grasping at any straw to find a "change of circumstances," to the extent of determining custody of abducted children brought upon their soil. To echo the words of Justice Prentice of the Connecticut Supreme Court in Morrill v. Morrill: "A finding of changed conditions is one easily made when a court is so inclined, and plausible grounds therefore can quite generally be found."

The third theory, ostensibly juridically launched in 1948 by Justice Traynor in the California Supreme Court decision of Sampsell v. Superior

77 See Restatement of Conflict of Laws, § 117 (1934); Annot., 4 A.L.R.2d 1, 14, 25, 69 (1949); Goodrich, Custody of Children in Divorce Suits, 7 CORNELL L. REV. 1 (1921); Note, Custody of Children and Conflict of Laws, 24 HARV. L. REV. 142 (1910).


79 See New York ex rel. Halvey v. Halvey, 330 U.S. 610, 614 (1947), wherein Justice Douglas found that the Federal Constitution requires that a state shall give to the judgment of a court of a sister state only the force and effect to which it is entitled in the state where it is rendered; and if the courts of the latter state can modify a minor-child custody order or decree upon a proper showing of a change of circumstances subsequent to its rendition, the courts of another state can do likewise. See also Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Rev. 345 (1953), for the rule followed by the various states.

80 In re Anonymous, Doc. No. 247777 (Juv. Ct., Cuyahoga Cty., Ohio, 1968), the juvenile court, at various hearings within a one and a half-year period of time altered the three-year-old child's visitations at various times from two periods of 31 and 25 days to one period of 57 days; to one period of 62 days; to one period of 60 days; to one period of 30 days and two one-week periods, to one 45-day period—all in contravention of the court psychiatrist's recommendation. The court ordered the child shuttled back and forth between El Paso and Cleveland—a 2,000-mile span—in spite of evidence that the child was suffering from a heart defect and in spite of the father's apparent history of abandonment and somewhat other erratic conduct. The child had apparently contracted his heart ailment on the father's military tour of duty in Turkey.

81 Cook v. Cook, 135 F.2d 945 (D.C. Cir. 1943); Helton v. Crawley, 241 Iowa 296, 41 N.W.2d 60 (1950); Gilman v. Morgan, 158 Fla. 605, 29 S.2d 372 (1947), cert. denied, 331 U.S. 796 (1947). See also Hazard, supra note 1, at 392.

82 83 Conn. 479, 77 A. 1 (1910).

83 Id. at 492, 77 A. at 6.
and given currency by Halvey, opened a Pandora’s box of legally unbounded “discretion” to judges, when it declared:

There is authority for the proposition that courts of two or more states may have concurrent jurisdiction over the custody of a child. . . . In the interest of the child, there is no reason why the state where the child is living may not have jurisdiction to act to protect the child’s welfare, and there is likewise no reason why other states would not also have jurisdiction. (emphasis added.)

Reexamined custody decrees, often prompted by expediency, wherein the child's rights and best interests were not even considered, let alone mentioned, became a wholesale commodity in many states. The parent with the best combination of money, social prominence, and political and/or fraternal ties often prevailed, and, indeed, still prevails today.

The key to such custody-visitation relitigation, of course, is possession of the child—whether obtained by means of a lawful out-of-state “visitation” decree in the original suit, or by abduction. Changed circumstances and/or unfitness of the custodial parent need not necessarily be shown. At the trial level, almost any contrived evidence may suffice.

In enunciating the theory of concurrent jurisdiction, Justice Traynor cited an earlier legal article by Professor Dale Stanbury:

A court of any state that has a substantial interest in the welfare of the child . . . has jurisdiction to determine its custody, and such determination may exist in two or more states at the same time. . . . A judicial determination of custody in one state is not binding on the courts of a second state. . . . (emphasis added.)

Beginning with Wakefield v. Ives, wherein the Supreme Court of Iowa reaffirmed the wife’s Minnesota custody decree, in express accordance with the full faith and credit clause of the United States Constitution, the law of child custody and visitation in our country has gone from one extreme of a court’s declining to reexamine 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.
VI. TRAGIC EXAMPLES OF INTERSTATE CHILD CUSTODY LITIGATION

In addition to those cases already cited, the following bear witness to the ignominious chaos now existing in this country’s custody laws, where courts have either acted in isolation or in competition with each other. Three reported cases show the courts of one state awarding custody to the mother, while courts of another decree that the child or children must go with the father: Stout v. Pate and Pate v. Stout; Moniz v. Moniz, and Sharpe v. Sharpe. Which court do parties litigant obey? If they comply with the orders of one state, then they may face punishment for contempt and even criminal charges for child stealing in another.

A custody decree entered in one state one year is often overturned in another the next; and the child is expatriated from the security of one home and placed with a second family as in the cases of Commonwealth ex rel. Thomas v. Gillard; In re Guardianship of Rodgers; Berlin v. Berlin; and Batchelor v. Fulcher.

Probably the most notorious of these cases was that of Jean Field, whose husband deserted her when their son was four years old and their daughter only three weeks old, leaving a note in the typewriter and no money. Mrs. Field obtained a divorce in the local California court, along with custody of the children, whom she reared almost unaided, in exemplary fashion, for ten years, rarely receiving the $30 a month child support awarded her by the original decree. The father had in the interim not exercised his visiting privilege even once.

Then one summer, the paternal grandparents asked to have the children visit them in Oklahoma City, promising that they would be returned in time for the opening of school in September. In good faith, the mother complied with the request to the extent of paying the plane fare herself. The grandparents, instead of returning the children, had the father institute suit

89 209 Ga. 786, 75 S.E.2d 748 (1953).
94 100 Ariz. 269, 413 P.2d 774 (1966).
96 415 S.W.2d 828 (Ky. 1967).
97 DESPERT, CHILDREN OF DIVORCE 209-10 (1953). This author was unable to find the case in reported sources. The New York Times Index likewise shed no light upon it. A personal letter to Dr. Louise Despert, written and sent in April, 1971, yielded no reply. The account given is taken from her book.
in Oklahoma City to obtain custody. Before the hearing the mother came to
get the children and took them to California.

The Oklahoma court overturned the California award, whereupon the
father traveled to Santa Monica with an Oklahoma deputy, tried to pick up
his son at school and then had the mother arrested for child stealing. The
children were then confined to a juvenile detention home for six weeks, while
the father sought and received a temporary order in California, followed by
a permanent confirmation of his Oklahoma award.

The undisputed evidence showed that in no way was the mother either
unfit or immoral, there having been no such allegations made whatsoever. The
two children were found by the investigators to be healthy, well-adjusted,
well-behaved, and outstanding in scholarship, athletics, and leadership. They
testified that they loved their mother and preferred to live with her. The
father, on the other hand, had a record of financial irresponsibility, drunken-
ness, and conviction of forgery. The home he and his second wife lived in
was described as dirty, and the children had no clothes to wear when they
visited him although the mother had sent clothes with them.

These facts, bearing on the welfare of the children, were adduced
in both California hearings, but not in the Oklahoma one. Yet based on
the father's testimony that the mother had taught the children racial equality
and had expressed disapproval of the Korean War, the California courts
ruled in his favor "in all the circumstances of the case." The Oklahoma
judgment was grounded on the mother's taking the children out of the
state, resulting in a contempt citation.

During the pendency of the California proceedings, which lasted almost
a month and a half, the children were kept in the juvenile detention home
under court order, on the father's plea that the mother would take them out of
the country. The children at first were not permitted to see their mother at all.
Later this was changed to let her visit them one hour on Sunday and a half
hour on Thanksgiving Day. When the decision was handed down, they were
delivered "forthwith" to the father, without affording the mother ten parting
minutes with them. When they returned to Oklahoma, the father and his
attorney precluded all communication between them and their mother, to the
extent of returning her letters unopened.

The political ramifications of the case are frightening. The crass cruelty
and blindness of the courts are reminiscent of a 1984 totalitarian state. One
fact is painfully clear, the sole consideration in the entire shameful annal—
the children's best interests—did not occur to even one judge involved, in
spite of statutory and common law precedent declaring this to be the
determining factor in custody suits in both states.

VII. JUDICIAL ATTEMPTS TO ALLEVIATE THE PLIGHT
OF THE INTERSTATE CHILD

Astonishingly, only two reported cases in the United States to date have
squarely faced the issue of probable further litigation regarding custody by
the grant of an out-of-state “visitation” with the noncustodial parent and have
rendered judgments to preclude such litigation.

In York v. York, the Supreme Court of Iowa, Justice Larson presiding,
denied the mother the right of having her three children aged 11, 12, and 13
visit her in Ohio for three weeks each summer. It should be noted that her
worst “offense” was having abandoned them to the father and the paternal
grandmother for four and one-half years. Writing the opinion of the court,
Justice Larson emphatically stated:

Experience has shown that allowing the child to live part of the time in
one household, and a part of the time in another, is not only not to the
best interest and welfare of the child, but in many instances it is wholly
destructive of discipline. It also shows that the party who has the child
for a short time in some instances sows seeds of discontent, inculcates a
spirit of dissatisfaction and rebellion against authority in the child and
devotes the whole time that the child is with that person in trying to wean
the child away from the other party in whose custody it is placed by the
decree, and is not for the best interest and welfare of the child, which, as
said, should be the fundamental basis on which an order in such
matters is founded.

The Iowa court met the argument that the modification of the divorce
decree to allow for out-of-state visitation would not be a change of custody by
finding no distinction between even short periods of “visitation rights” and
“change of custody” since the children would actually be under the full
and complete control of the nonresident parent.

The other aspect to which the court addressed itself, and which was of
immediate concern, was the fact that such out-of-state visitations placed
the children beyond the jurisdiction of the court possibly subjecting the original
decree to collateral attack. The opinion manifests the court’s displeasure with

98 This term was originally introduced by Professor Ehrenzweig in his article entitled: The
Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings, 64 Mich. L.
Rev. 1 (1965).
100 Id. at 139, 67 N.W.2d at 32-3, citing Bennett v. Bennett, 200 Iowa 415, 418, 203 N.W. 26,
27 (1925).
101 Id. at 140-41, 67 N.W.2d at 33-34.
such a situation not in terms of "full faith and credit" or judicial jealousy, but rather in terms of the effect on the children, stating:

It is particularly hazardous to allow children permanently in the custody of a resident to be placed temporarily and from time to time in the custody of a nonresident. It not only often results in costly and lengthy litigation for the resident custodian, . . . but is conducive to "interstate bickering" over the custody of the children. It is obvious such conflicts would be detrimental to the best interests of the children. . . .

The court correctly and realistically appraised the extremely detrimental effect and acknowledged the resident parent's objections to the loss of custodial rights and the court's jurisdiction as rightfully asserted. It determined that if the nonresident parent truly sought the best interests of the children that the same could be better accomplished by expressing the existing visitation rights contained in the original decree and not by removing the children to another state.

Anonymous v. Anonymous, a policy decision handed down in 1962 by the Common Pleas Court of Hamilton County, Cincinnati, Ohio, having the effect of an appellate decree, also effectively forestalled interstate litigation.

The custodian-mother and eight-year-old daughter lived in Cincinnati; the father, in New York. In writing the opinion of the court, Judge Schwartz observed:

. . . this Court interviewed the daughter and found her . . . with residual effects of a broken home, and . . . bitterly opposed to leaving Cincinnati and going to visit her father in New York. She is happy in her present environment with her remarried mother, living in an understanding and warm family and in a happy home. She has achieved an emotional stability, which was lacking in the past. The child was not responsible for the home being broken nor the acrimony and misunderstanding between the father and mother and the resulting divorce. She has been subjected to sufficient sorrow, problems, wanderings, and frustrations . . . it must be clear that there is no certainty that while these boys are in the foreign jurisdiction some action there may not be taken to deprive the father and the Iowa court of further authority in regard to their custody. If the children were not returned as required in the modification order, costly and time-consuming as well as heart-rending litigation would result, engulfing these young boys in unwelcome experiences that can be and should be avoided for their best interest and welfare.

If defendant wishes to renew her normal functions of motherhood from which she has had a five year vacation, she will find some way to visit them regularly at their present, satisfactory and peaceful domicile. If she cares, she will arrange to do so. Under the record here any modification of the rights of visitation should not include the right to take the children from the jurisdiction of this state nor from the actual custody of the plaintiff father.

102 Id. at 141-42, 67 N.W.2d at 34.
103 Id. at 142, 67 N.W.2d at 34: "It is not mere whim or fictitious objections that he [the resident parent] voices, nor a remote danger to the present peace and security of the children."
104 Id. at 142-43, 67 N.W.2d at 34-35:
. . . it must be clear that there is no certainty that while these boys are in the foreign jurisdiction some action there may not be taken to deprive the father and the Iowa court of further authority in regard to their custody. If the children were not returned as required in the modification order, costly and time-consuming as well as heart-rending litigation would result, engulfing these young boys in unwelcome experiences that can be and should be avoided for their best interest and welfare.

If defendant wishes to renew her normal functions of motherhood from which she has had a five year vacation, she will find some way to visit them regularly at their present, satisfactory and peaceful domicile. If she cares, she will arrange to do so. Under the record here any modification of the rights of visitation should not include the right to take the children from the jurisdiction of this state nor from the actual custody of the plaintiff father.

105 180 N.E.2d 205 (Ohio C.P. 1962).
without adding the shock of periodically removing her from home and travelling over 600 miles away for the sole purpose of visiting a parent. In addition, this Court does not wish to add on the tragic effect of the child being involved in possible litigation in New York and being compelled to remain in that state. (emphasis added)\textsuperscript{106} 

In so doing, the court gave a great deal of credence and emphasis to the real desires of the child involved,\textsuperscript{107} the resident custodian parent’s provision for the child, and the current home arrangement, as it declared:

This Court is of the opinion that the best and most equitable arrangement would be for the father to come to Cincinnati to visit with his child. Every consideration must be given by each parent to the well-being of the child, who has been traumatized enough. If the father wishes to exercise his right of visitation, he should make the necessary arrangements to come to Cincinnati. (emphasis added)\textsuperscript{108} 

In \textit{MacWhinney v. MacWhinney},\textsuperscript{109} the custodial father sought and was granted a modification of his custody rights to prevent his eight-year-old daughter from having to go to California for an annual visit with her mother from July 1 to August 15 each year, after the mother had sued for permanent custody in California courts on a previous visit. In denying the out-of-state visitation, Judge Matson of the Minnesota Supreme Court reasoned:

No child should be made the victim of a tug of war between parents or between the courts of two conflicting jurisdictions. . . . It can only lead to bitterness between the child and one or both of its parents. For this same reason, the court was justified in depriving the mother of all right to take the child from the father’s home to California.\textsuperscript{110} 

In \textit{Friedland v. Friedland},\textsuperscript{111} Justice Foley of the California First District Court of Appeals, held that the trial court had not abused its discretion in awarding absolute custody of a three-and-a-half-year-old son to his mother and denying the father all visitation rights in the divorce action. The mother had been given complete care, control, and custody of the child by a previous

\textsuperscript{106} Id. at 205-06.
\textsuperscript{108} 180 N.E.2d at 206. The Ohio court construed former Section 3109.04 of the Ohio Revised Code, which remains essentially the same today by saying:

The basic philosophy . . . in Section [3109.04] . . . of the Revised Code of Ohio . . . is . . . that this Court's purpose is to serve the "child's welfare" and this is true as to visitations as any other phase of a child's life. The Defendant herein is granted the right of reasonable visitation within this jurisdiction, until further orders of this court, and a practical schedule will be arranged to suit both the needs of the father and daughter. (emphasis added.)

\textsuperscript{109} 248 Minn. 303, 79 N.W.2d 683 (1956).
\textsuperscript{110} Id. at 308, 79 N.W.2d at 687. See also Annot., 88 A.L.R.2d 148, 207 (1963); Annot., 13 A.L.R.2d 306 (1950).
court order, after which the father was arrested and convicted for nonsupport of his son. The mother believed that if her former spouse were to acquire possession of the boy for even one day he would take the child beyond the court’s jurisdiction. Because her home had been broken into several times, she had taken the child to the home of relatives in Minnesota. A friend of the father’s had called her and told her: “One way or the other he will get the child; don’t dare leave the child out of the house.” The mother feared the father would harm the child, since he had threatened eventually to obtain his son vengefully.112

As we have seen, there is scant authority that fear by the custodial parent that the parent exercising “visitation” rights beyond the jurisdiction of the court may refuse to return the child is grounds for complete denial of visiting privileges to the noncustodian. Generally, as in Anonymous113 and York,114 courts have granted visitation but limited it in some way—the rationale being that in the event of the custodial parent’s death or incapacity, the child can make a smoother adjustment to living with the other parent he has learned to know through visits, rather than one who is a total stranger. Unless he is wholly unfit or incompetent, a surviving parent has prima facie right to custody as against any other member of the family.115

In MacWhinney,116 the mother had voluntarily relinquished control of the minor to the father, who was subsequently granted custody in a Minnesota divorce action. The mother received the right to remove her daughter to California for six weeks each summer. However, when the child was on California soil, she succeeded in reversing the decree. The father, in turn, when the child was visiting him in Minnesota during the summer, sought to deprive the mother of all visitation rights. The Minnesota Supreme Court modified the original decree by restricting the mother’s visits with her child to Minnesota, on the basis of her wilful violation of the original decree by refusing to return the child and resorting to the courts of another state.

In the older case of Carter v. Carter,117 the husband obtained a divorce and custody of the six-year-old son on grounds of desertion in the state of Maryland. The mother was granted summer “visitation” privileges in New York. When she refused to return the child, the father instituted habeas corpus

---

112 Id.
113 180 N.E.2d 205 (Ohio C.P. 1962).
114 246 Iowa 132, 67 N.W.2d 28 (1954).
116 248 Minn. 303, 79 N.W.2d 683 (1956).
117 156 Md. 500, 144 A. 490 (1928).
proceedings in New York, during the pendency of which Mrs. Carter secreted the child to Canada and subsequently to Connecticut, where the father regained possession of him with the help of a detective. While the Maryland Court of Appeals cancelled the out-of-state “visitation” on grounds of unclean hands, it would not deny the mother reasonable “access” to the child, “upon such terms as may be prescribed by the chancellor.”118

In Brown v. Brown,119 the father absconded with the children to South Africa, during the pendency of the divorce action in Illinois. The mother went through a harrowing experience searching for them. She finally found them through the efforts of the State Department. The trial court originally denied the erring father visitation privileges, but these were later restored; although apparently they were limited to the jurisdiction of the court.120

Occasionally one finds cases in which either the trial121 or appellate122 court prohibits removal of the child from the state,123 county,124 or city of residence125 of the custodian, by the visiting parent, thereby also nipping forum shopping in the bud; but these are rare.

A more popular instrument used by the courts to discourage further litigation by a nonresident parent granted permission to remove the child temporarily beyond the court’s jurisdiction is to impose a bond upon him or her, conditioned upon the faithful performance of the terms of the order and the return of the child to the domicile.126 The danger here lies, as was pointed out in Page v. Page,127 that while a bond may possibly secure the payment of damages, it may not produce the child. At present day inflated prices and costs of services, a minimum of $10,000 would be necessary to meet expenses of attorneys, court costs, detectives, and transportation to recover the child. If, indeed, it can be done! Usually, however, it seems as a practical matter that such bonds are set at $500 or $1,000, a grossly inadequate sum.

118 Id. at 507, 144 A. at 493.
127 166 N.C. 90, 81 S.E. 1060 (1914). See also Harris v. Harris, 115 N.C. 587, 20 S.E. 187 (1894) (posing the same problem).
Often, too, one finds express policy statements issued by various officers of a court. Unfortunately, these are more honored in the breach than in the observance. Appropriate excerpts from one such pamphlet reads:

[T]his means, in our opinion, that a child should not be divided emotionally between his parents, nor should he be subjected to the recurring shock of leaving one home to take up residence in another from time to time....

...too often parents feel that they have a right to visit or to have the child in their possession for a vacation, when actually they have no rights of any kind—only obligations. **A visiting program is designed to be beneficial to the child not the parent.** (emphasis added)

VIII. VISITATION V. SPLIT, DIVIDED, OR ALTERNATE CUSTODY

Psychiatrist James S. Plant, in an article discussing behavior of children from broken homes, published in 1944, made the following commentary regarding the judicial practice of split custody:

Through the years we have seen many children of divorced parents and out of this experience have crystallized certain... provisional hypotheses. The ones that come from the quaint custom of awarding the child to each of the parents for alternate periods would make lively writing but you wouldn’t believe the stories. Apparently it remained to modern Solomons to be the ones to really cut the child in two.

I can’t imagine a situation in which it is fair to the child to divide him... the court would do well to make its basic rule that one or the other have custody and control.

It is imperative at this juncture to examine definitions of the terms visitation and custody; for by the adroit use of the former term, the courts have cleverly accomplished what they might not have if they used the latter. One major dictionary defines visitation as “the act of visiting.” Black and Webster do not employ it in this context at all, but define it rather as an

---

128 E. Dana Brooks, Director, Dept. of Domestic Relations, Common Pleas Court, Cuyahoga County, Cleveland, Ohio, Your Child's Rights (undated) [hereinafter cited as Brooks].
129 See In re Anonymous, Doc. No. 247777 (Juv. Ct., Cuyahoga Cty., Ohio 1968) in which the court refused to follow this policy.
130 Brooks, supra note 128, at 2.
131 Id. at 3.
133 Id. at 816.
134 RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2558 (1968).
official call by a superior upon an institution. In Ballentine it is "the right of divorced parent denied the custody of a minor child to visit such child at such times and places as the court may fix in its decree." Another source equates the right of visitation with the parent's right of access to his child.

Custody, on the other hand, "connotes the right to establish the child’s domicile and includes the elements of immediate care and direct control of the child, together with provision for its needs." Custody is also described as including "within its meaning every element of provision for the physical, moral, and mental well-being of the children and implies that the person having custody has the immediate personal care and control of the children." Black defines it as "the care and keeping of anything; the detainer of a man's person by virtue of lawful process or authority.

It has been held that "those rights inherent in a custody decree are not held by one enjoying visitation rights"; that "a decree which merely permits visitation does not authorize the visiting parent to transport the child away from its home"; and that "the right of visitation should not be extended to the point where it becomes a divided custody or the equivalent thereof."

A number of courts have attempted to distinguish the difference between visitation and divided custody, with varying results. In McDermett v. McDermett, Justice Olsen of the Minnesota Supreme Court overturned a trial court’s decree, allowing the father to have his three-year-old son for a week each month:

There should be here an end to the disturbances of this child and mother by the shifting of the child back and forth between the two homes, and an end to the repeated motions and court proceedings in reference to the child's custody. So long as the mother is able to and does properly care for the child, she should be left in undisturbed custody.

142 441 S.W.2d 658, at 660.
143 246 Iowa 132, 67 N.W.2d 28 (1954); McDermett v. McDermett, 192 Minn. 32, 255 N.W. 247 (1934); 27 C.J.S. Divorce § 312, at 483 (1957).
145 192 Minn. 32, 255 N.W. 247.
146 Id. at 36, 255 N.W. at 248-49.
In *Laithold v. Plass*, the Supreme Court of Texas upheld the trial court's decision that a two-week sojourn by the minor son with the adoptive father in California, in lieu of a prior Arizona order of random one-day visits in the adoptive mother's home, constitutes a modification of visitation rights, in spite of the fact that the father, in petitioning for the change, asked for *custody and control* of the child for a specified period of time (two and a half months). Apparently, Justice Steakley felt that two weeks out of the state was a *visitation*; but, as Justice Norvell, speaking for the three dissenting justices, so aptly stated:

... the decree entered reduced the custody period of Mrs. Plass from 52 weeks to 50 weeks.... [W]hen would visitation become custody—in a period of two, twenty-two or forty weeks?

To me, this case is what is generally referred to as a split custody case. Can it reasonably be said that a child's mind may escape the feelings and expressions of ill will and bad feeling with their consequent emotional disturbance by designating the adoptive father's two week period of possession of the child as a "visitation" rather than a "custody" right? The controlling issue in this case—the best interest of the child—should not be "named" away.

Ninety days after the *Leithold* decision, the Dallas Court of Civil Appeals, Chief Justice Dixon presiding, undaunted at having been reversed by the Texas Supreme Court in *Leithold*, nevertheless "stuck to its guns" in *Leaverton v. Leaverton*. The appeals court refused to allow the trial court's modification of its divorce decree, to order the nine-year-old daughter of the marriage to be sent from Alabama to Texas, to visit her father for two weeks one year and four weeks in subsequent years. It struck down the father's contention that this was a mere motion to clarify visitation rights and held the trial court's order to be a modification of custody of the original divorce decree. On rehearing, respondent father cited *Leithold*; but Justice Dixon reaffirmed his position, apparently attempting to distinguish the case from *Leithold* on the basis that four weeks constituted split custody, while two weeks amounted to a visitation.

Just as it is practically impossible to draw an exact line marking the change from one color to another in a rainbow, so it is practically impossible to draw an exact line marking the change from visitation to a modification of custody in cases involving children. Yet the time comes when the difference is apparent and must be recognized... he [the father][147]

---

147 413 S.W.2d 698.
148 Id. at 703-04.
149 Id. at 705.
did obtain a decree giving him charge of the child in Texas for four weeks each year. ... In the Leithold case the father was granted only a two weeks' visitation period.\footnote{151 Id. at 85-86.}

The Amarillo Court of Civil Appeals had a bit more difficulty with Leithold in McFarland v. Boyd.\footnote{152 431 S.W.2d 41 (Tex. Civ. App. 1968).} The trial court modified a New Mexico divorce decree by giving the father the right to have his 12-year-old son and 10-year-old daughter visit him in Nebraska for two weeks each summer, in lieu of his visiting them at their mother's residence in Amarillo. At first blush, reviewing both Leithold and Leaverton, Justice Northcutt construed the order as one of split custody, observing quite accurately: "If control is changed from one parent to the other as here ordered, soon no one will have control of the children";\footnote{153 Id. at 43.} he reversed the decision. However, although Chief Justice Denton and Justice Chapman wholeheartedly agreed with the dissent in Leithold, they felt compelled to follow the mandate of the Texas Supreme Court. Thus, Chief Justice Denton had no alternative but to affirm the lower court, as he admitted: "The original opinion which was presumed to be the majority opinion at the time it was written must now become a dissenting opinion."\footnote{154 Id. at 45.}

**IX. Favorable Judicial Results Under the Split Custody Rationale**

The cases\footnote{155 York v. York, 246 Iowa 132, 67 N.W.2d 28 (1954); McFarland v. Boyd, 431 S.W.2d 41 (Tex. Civ. App. 1968); Leaverton v. Leaverton, 417 S.W.2d 82 (Tex. Civ. App. 1968); Leithold v. Plass, 413 S.W.2d 698 (Tex. Civ. App. 1967).} cited clearly show that what often passes under the label of "visitation" rights is in reality split, divided, or alternate custody, in that when a child crosses a state line and passes into another state with the parent accorded such rights, not only does the custodian lose immediate possession, care, and control of the child, but the court loses jurisdiction over him; and, in most instances, as we have noted, its orders are without force. What degree of acumen or perspicacity need be possessed to determine that such circumstances whether the time element be several hours, days, weeks, or months, amount to custody? Remarkably, although courts are loath to deny out-of-state "visitation" rights to the "loser," except under "extraordinary" circumstances; when they "call a spade a spade" (\textit{i.e.,} when an out-of-state "visitation" is called \textit{split custody}), they have had comparatively little difficulty in effectuating a decree in the best interests of the child and not for the sole convenience of the

\footnote{156 See Leaverton v. Leaverton, 417 S.W.2d 82 (Tex. Civ. App. 1968).}
parent,\textsuperscript{156} it being a foregone conclusion that any parent who truly loves his child will overcome all obstacles to see him.\textsuperscript{157} Remarkably, too, upon denying split custody, these same judges are able to grant visitation rights within the jurisdiction of their courts. Had they done so originally, a great deal of misery would have been spared the children involved and the custodial parent.

While it did not deal with an interstate child situation, \textit{Martin v. Martin}\textsuperscript{158} is the leading and most often cited case on the issue of split custody. One paragraph in particular of Justice Alexander's (later Chief Justice of the Texas Supreme Court) opinion, frequently quoted by courts of other states, is as applicable today as it was in 1939:

> In our opinion, the original decree awarding the child part time to each of the parents was unwise. Certainly, no child could grow up normally when it is hawked about from one parent to the other with the embarrassing scene of changing homes at least twice a year. Such decrees are usually prompted by a laudable desire to avoid the injured feelings of the parents, but the \textit{net result is a permanent injury to the child} without any substantial benefit to the parents. In addition to the lack of stability in his surroundings, the child is constantly reminded that he is the center of a parental quarrel. It is readily apparent that such practices are calculated to arouse serious emotional conflicts in the mind of the child and are not conducive to good citizenship. Moreover, the parents are continuously pitted against each other in the unenviable contest of determining the child’s love for the other parent. Each parent is afraid to exercise any sort of discipline for fear of losing out in the contest. As a result, the child is reared without parental control. Such decrees by which the child is awarded part time to each of the parents have been condemned by numerous decisions. (emphasis added)\textsuperscript{159}

The rule of \textit{Martin} has been followed by the various courts of Kansas,\textsuperscript{160} Oregon,\textsuperscript{161} Idaho,\textsuperscript{162} Minnesota,\textsuperscript{163} Washington,\textsuperscript{164} Kentucky,\textsuperscript{165} Maryland,\textsuperscript{166}

\textsuperscript{157} 246 Iowa 132, 67 N.W.2d 28 (1954).
\textsuperscript{158} 132 S.W.2d 426 (Tex. Civ. App. 1939).
\textsuperscript{159} Id. at 428.
\textsuperscript{160} White v. White, 160 Kan. 32, 159 P.2d 461 (1945).
\textsuperscript{162} Richardson v. Richardson, 72 Idaho 19, 236 P.2d 718 (1951).
\textsuperscript{163} Larson v. Larson, 176 Minn. 490, 223 N.W. 789 (1929).
\textsuperscript{164} Mason v. Mason, 163 Wash. 539, 1 P.2d 885 (1931).
\textsuperscript{165} Towles v. Towles, 176 Ky. 225, 195 S.W. 437 (1917); McLemore v. McLemore, 346 S.W.2d 722 (Ky. Ct. App. 1961).
\textsuperscript{166} McCann v. McCann, 167 Md. 167, 173 A.7 (C.A. 1937).
THE PLIGHT OF THE INTERSTATE CHILD

New Jersey,"\textsuperscript{107} Louisiana,\textsuperscript{108} Iowa,\textsuperscript{109} Arkansas,\textsuperscript{110} Tennessee,\textsuperscript{111} Florida,\textsuperscript{112} Michigan,\textsuperscript{113} and Mississippi.\textsuperscript{114}

Justice Smith, of the Supreme Court of Mississippi, recently made the following conclusions regarding interstate split custody decrees in \textit{Brocato v. Walker:}\textsuperscript{115}

\begin{quote}
[\textit{I}t is not in the best interest of a young child that it be shifted alternately from parent to parent.]\textsuperscript{116}

The controlling consideration in all cases involving the custody of children is the welfare of the child. Rights of the respective parents must be subordinated to the best interests of the child.

\ldots

If the unhappy circumstances of the case compel a choice between the child's welfare and the father's convenience in visiting it, as regrettable as it may be, the former must prevail. The child's welfare is inextricably bound up with that of its mother.

In the meantime, appellee shall have reasonable rights of visitation and may visit the child at such times and under such times and under such circumstances as will not be disruptive of the tranquility of appellant's home.\textsuperscript{117}

Many courts have spoken out against the pernicious effects of divided custody upon children. Perhaps the minds of judges hark back to the biblical tale of the two women each claiming to be the mother of the surviving child and Solomon's threat to cleave the infant in two with his sword.\textsuperscript{118}

Among rationales and conclusions worthy of note of various courts which have done so are the following:

It has been generally held that divided custody of a child of tender years between its parents should not be permitted except under special

\begin{footnotes}
1\textsuperscript{107} Campbell v. Campbell, 96 N.J. Eq. 398, 130 A. 361 (1924).
1\textsuperscript{109} 246 Iowa 132, 67 N.W.2d 28.
1\textsuperscript{110} Sindle v. Sindle, 277 Ark. 209, 315 S.W.2d 893 (1958); Aaron v. Aaron, 228 Ark. 27, 305 S.W.2d 550 (1937).
1\textsuperscript{111} Dunavant v. Dunavant, 31 Tenn. App. 634, 219 S.W.2d 910, 915 (1949); Rowles v. Reynolds, 29 Tenn. App. 274, 196 S.W.2d 76 (1946).
1\textsuperscript{112} Phillips v. Phillips, 153 Fla. 133, 13 So. 2d 922 (1943).
1\textsuperscript{114} Brocato v. Walker, 220 So. 2d 340 (Miss. 1969).
1\textsuperscript{115} Id.
1\textsuperscript{116} Id. at 343.
1\textsuperscript{117} Id. at 344.
1\textsuperscript{118} 1 \textit{Kings} 3:16-3:18.
\end{footnotes}
conditions in which there is no reasonable alternative and it is made essential if not absolutely necessary.\textsuperscript{179}

... so long as there is a divided custody there will probably be bickerings and disputes and a natural tendency on the part of the child to play one parent against the other, as well as for the claimants to seek by indulgences to curry favor with the child, if not to prejudice it against the other.\textsuperscript{180}

Thus the child becomes a perpetual traveller. The constant change in environment, discipline, and control undoubtedly would prove to be harmful to the child. It is imperative that a child of tender years such as here involved be given uniform discipline and training. There is no substitute for mother love in caring for and rearing a child, and hence courts are loth to deprive a mother of its custody and control. It is the birthright of every child to be reared by its mother, unless she be unworthy, which, of course, is neither asserted nor shown here.\textsuperscript{181}

\textbf{In King v. King,}\textsuperscript{182} the divorce decree incorporated an agreement between the parties that the father would have custody of the minor son during the school year, and the mother, during vacations. When the mother thereafter remarried and went to California to live, the Georgia Supreme Court, Justice Bell presiding, upheld the trial court's interpretation of the divorce agreement and decree. To wit, that the father was not required to deliver the child or to provide for its transportation to the home of the mother, except to some place in Georgia.\textsuperscript{183}

\textsuperscript{181} Mason v. Mason, 163 Wash. 539, 1 P.2d 885 (1931); \textit{cf.} Allen v. Allen, 200 Ore. 678, 682, 268 P.2d 358, 360-61 (1954), in which the court stated the following:

\begin{quote}
One of the objectionable features of divided custody and control comes to the fore when the parents reside in different states, giving rise in some instances, as here, to litigation involving questions as to the situs of the child's legal domicile. This court has repeatedly expressed itself as being opposed to the principle of divided custody.\ldots \textit{No court conscious of the evils flowing from divided custody... would have ventured to give the other parent out-of-state custody and control if it had surmised that such temporary custody would be tortured into a claim of domicile in that foreign jurisdiction, when, in fact, the children were temporarily residing out of Oregon for only 30 days in each year, pursuant to a grant of a permissive visitation with their mother.}
\end{quote}

\textit{See also} Richardson v. Richardson, 72 Idaho 19, 236 P.2d 718 (1951); Heltsey v. Heltsey, 242 S.W.2d 973 (Ky. Ct. App. 1951); McCann v. McCann, 165 Md. 167, 173 A. 7 (Ct. App. 1937); Kaehler v. Kaehler, 219 Minn. 536, 18 N.W.2d 312 (1945); Larson v. Larson, 176 Minn. 490, 223 N.W. 789 (1929); Logan v. Logan, 176 S.W.2d 601 (Ct. App. Tenn 1943); Immel v. Immel, 311 S.W.2d 732 (Tex. Civ. App. 1950).
\textsuperscript{182} 202 Ga. 838, 44 S.E.2d 791 (1947).
\textsuperscript{183} Id. at 795.
THE FLIGHT OF THE INTERSTATE CHILD

In *In re DeFord*, the trial court entered a decree in a divorce action, awarding custody to the father during the school year, as in *King*, subject to the right of the mother to have her son with her in Texas or wherever else she might reside, during the summer. The father had the responsibility and the expenses of fetching and returning the five-year-old boy. The Supreme Court of North Carolina, Justice Barnhill presiding, struck down the split custody decree on the rationale that when the child went to Texas, the power of the courts of North Carolina to exercise control over him would be ousted. The courts of Texas would acquire jurisdiction, and the decree awarding his custody to the father would be rendered wholly ineffectual:

A court will not adjudicate where it cannot enforce the adjudication, or turn its suitors over to another tribunal to obtain justice, or vest the losing litigant with power to defeat the jurisdiction of the court and thus nullify the relief granted the successful suitor, or enter a decree by the very terms of which it will be divested of jurisdiction and left powerless to compel obedience. . . .

Hence in a proceeding of this nature, in the absence of unusual circumstances, a court should not enter an order which permits the infant to be removed from the state by one to whom unqualified custody has not been awarded.

Finally, as we have noted in *York*, the courts of about one-third of the states have held that "as a general rule, it is against the policy of the law to permit the removal of the child from the jurisdiction unless its welfare would be better subserved thereby." While the cases supporting this rule generally refer to giving permanent custody of a child to a resident over a nonresident claimant or placing a restriction on the removal of the child from the jurisdiction by the custodian without the permission of the court, so as not to defeat the visitation rights of the noncustodial parent, there is no reason why the rule cannot be applied with equal force to prevent out-of-state split custody awards, to protect the custodian and child from the further harassment of interstate litigation at the hands of the nonresident parent.

The most eloquent testimonials against the evils of split custody are the following two excerpts of interviews this writer was able to unearth, with a pair of famous children of yesteryear—Brenda Frazier, debutante; and Pia Lindstrom, daughter of Ingrid Bergman. Miss Frazier expressed her wretchedness in these words:

---

184 226 N.C. 189, 37 S.E.2d 516 (1946).
185 *Id.* at 517-18.
186 246 Iowa 132, 67 N.W.2d 28 (1954).
187 27B C.J.S. *Divorce* § 313, at 484 & n. 16 (1957); 24 AM. JUR. 2d *Divorce & Separation* § 799, at 703 n.3 (1966).
How could my mother possibly succeed?... [h]er marriage to my father failed after two years and was ended by divorce after three more years. After that I had two homes, in theory; in fact, I had none. My mother and father fought over my custody, but I never felt that either of them really wanted me except as a symbol of victory. I felt rejected on all sides, unloved, alone in a frightened world. To add to my young confusion, I learned in my father's home that his family would not even speak to my mother; and in my mother's home I was told that my father was a cad. . . .

When I was 9, I had to go into court to testify, in most carefully rehearsed words, that I wanted to live with my mother. . . . At times when I felt affectionate toward him [father], I felt guilty toward my mother. I had two parents, in two different homes, yet psychologically I was an orphan.¹⁸⁸

Miss Lindstrom's pathos was no less intense:

Early one sour morning in 1952, a year and a half after the California divorce, in which my custody was awarded to Papa, Papa and I drove to a crowded and clamoring court in Los Angeles. Mamma wanted me to visit her in Europe with someone other than Papa, and this was to be decided in court. Petrified, I was led to the witness stand. I was pelted with barrages of questions which were like sharp stones. . . . Trembling and terrified, I stumbled over the answers that were pounded into me for days before. . . .

To a child, this was much more shattering than the worst Frankenstein nightmares. . . . What a cruel barbarism to inflict on a torn and bewildered child. How could I at thirteen know what I wanted?¹⁸⁹

X. ADDITIONAL FAILINGS OF OUT-OF-STATE VISITATION OR SPLIT CUSTODY AWARDS

As Justice Matson of the Minnesota Supreme Court observed in Kaehler v. Kaehler,¹⁹⁰ stability is an essential factor in a child's emotional life and development. Inevitably, the child finds such personal attachments, stability, and security in a happy home environment with its permanent custodian. Temporary uprootings whether for several days, several weeks, or several months, hundreds of miles away from the custodial home, leave an indelible trauma upon the child's mind, especially one under the age of 10 or 12, in that he or she loses contact and continuity with that security;¹⁹¹

¹⁹⁰ Larson v. Larson, 176 Minn. 490, 223 Minn. 490, 223 N.W. 789 (1928).
and, very often, not only does not see the custodial parent for the entire period
but is denied the opportunity to telephone or correspond with that parent.\textsuperscript{192}

This argument was advanced by the mother, on error, in\textit{Reynolds v. Reynolds,}\textsuperscript{193} wherein the father was granted visitation rights from June 15 to
August 15 of each year, with his son, aged seven, and his daughter, aged five.
Chief Justice Brady of the Washington Supreme Court held that the absence
of a provision in the decree allowing visitation with the mother during that
period did not mean that the decree was to be construed as depriving her of
such privilege, consistent with her custody; and that if the father prevented
such rights, the mother could resort to contempt proceedings. While this might
be feasible where both parents are within reasonable proximity of each other
geographically and in the same state, the rationale is specious when state
boundaries are crossed, and the child is out of the court’s jurisdiction. As a
practical matter, the mother would first have to reenter the original court and
have her visitation rights specifically defined and entered in the record, it being
a well-accepted rule that contempt will not lie for unjournalized orders.\textsuperscript{194}

The strongest factor militating against out-of-state visitation or split
custody awards is one which to date has not been litigated in any reported
case, to the knowledge of the author. That is a constitutional one. Each of the
50 jurisdictions of the United States has both statutory\textsuperscript{195} and case law\textsuperscript{196} to
the effect that in its capacity as \textit{parens patriae}, it is the duty of the court, acting
on behalf of the state, to do what is in the best interests of the child. Likewise,
all jurisdictions have a provision akin to the “equal protection” clause of the
Federal Constitution.\textsuperscript{197} By sending a child beyond its jurisdiction under
the present gallimaufry in custody law, a court denies both the child and its
permanent custodian the equal protection of the laws of their home state. In
fact, it deprives them of rights enjoyed by children and custodians not
subject to out-of-state visitations or split custody—a form of invidious
discrimination. That the attendant consequences of multiple litigation
constitute a deprivation of happiness to both child and custodian is too
obvious to suffer elucidation. Various of the rationales and conclusions
referred above have unequivocally attested to this.

\textsuperscript{192} \textit{In re Anonymous}, Doc. No. 247777 (Juv. Ct., Cuyahoga Cty., Ohio 1968). During the
two-month interim that the child under six was with his father, the summer of 1969, 2,000
miles away from the mother, the father refused to allow the child to talk with his mother
unless she, a full-time student, paid for the phone calls.

\textsuperscript{193} 45 Wash. 2d 394, 275 P.2d 421 (1954).


\textsuperscript{195} \textit{See Ohio Rev. Code Ann.}, § 3109.04 (Pages, 1971).

\textsuperscript{196} Cunningham v. Cunningham, 166 Ohio St. 203, 141 N.E.2d 172 (1957).

\textsuperscript{197} U.S. Const. amend. XIV, § 1.
A. Solutions to the Problem

1. The Texas Rule

While various panaceas to interstate child custody relitigation have been proposed, thus far only one jurisdiction has approached a workable solution. Texas alone has established the rule that modification of a custody decree is governed by the law of venue. The action—considered new and independent of the divorce decree—must be brought in the county where the custodian and child reside. Whether or not a Texas court has authority to confer a custody-visitation award as part of the divorce decree where both parents are within the court's jurisdiction, but the child is neither domiciled nor present on its soil during the pendency of the suit, is unclear from the case law.

2. The Uniform Child Custody Jurisdiction Act

Fully cognizant of the evils flowing from interstate custody litigation and disheartened by the grim reality that neither the United States Congress nor Supreme Court were demonstrating any propensity toward alleviating the plight of the child thus enmeshed, the Commissioners on Uniform State Laws adopted in July, 1968, the Uniform Child Custody Jurisdiction Act, which was approved by the American Bar Association the following month.

The spark that allegedly ignited the flame was a letter written by one William Clemmons to the Committee on State Legislation, Council of State Governments, on June 30, 1957, and forwarded to the National Conference of Commissioners. The complainant said that he was unable through proper legal procedures to see his son, who by the terms of the divorce decree was to spend two months with him each summer. His wife had threatened that if he attempted to enforce his so-called "visitation" rights in the state in which she resided, she would depart the state and continue the practice until he stopped annoying them.

The National Conference of Commissioners subsequently conducted a

---


199 Cf., DeLaughter v. DeLaughter, 370 S.W.2d 207 (Tex. Civ. App. 1963), wherein it was said that alternate prerequisites for a court to have jurisdiction to enter a custody decree are domicile or presence of the child on Texas soil, with Leaverton v. Leaverton, 417 S.W.2d 82 (Tex. Civ. App. 1968), wherein a custody-visitation decree was entered by a Texas court although the child was in Alabama at all times during the pendency of the suit.

200 Legislative Remedy, supra note 17, at 1208. National Conference of Commissioners on Uniform State Laws, UNIFORM CHILD CUSTODY JURISDICTION ACT (1968). A copy of the Act may be had for 50 cents by writing to the National Conference of Commissioners on Uniform State Laws, American Bar Association, 1155 E. 60th St., Chicago, Ill. 60637.

201 Legislative Remedy, supra note 17, at 1217-18 & n.1.
survey which bore out the fact that the rule of "seize and run" is indeed rampant in the United States where interstate children are concerned. The Family Law Section of the American Bar Association also studied the problem, under the chairmanship of Mr. Harry Fain. They were ably aided by Professor Leonard Ratner, who studied applicable law and drafted a proposed uniform act. Professor Albert Ehrenzweig added his expertise on both the subjects of interstate child custody litigation and conflict of laws, stressing the need for jurisdiction centered in one court. Various other distinguished scholars participated in the effort.

The Act is an attempt to bring some semblance of order into the now existent chaos. The avowed purposes of Section 1 are to:

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 a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that the courts of this state decline the exercise of jurisdiction when the child and his family have a 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 re-litigation 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; and

9. make uniform the law of those states which enact it.

202 Professor of Law, University of Southern California.
204 Legislative Remedy, supra note 17, at 1217-18.
205 Uniform Child Custody Jurisdiction Act § 1, at 17 (1968).
Section 2 consists of definitions of terminology peculiar to child "custody proceedings," which latter term is broadly defined to include divorce and separation, child neglect, dependency, habeas corpus, guardianship, and related actions.

The nub of the Act is to be found in Section 3, which enunciates the two alternative criteria for jurisdiction by a court to enter a custody decree initially or by modification: (1) the court of a child’s "home state" has jurisdiction; or (2) if there is no "home state" or if the child and his family have significant ties with another state, a court of the latter has jurisdiction. Any resultant concurrent jurisdiction under these tests is allegedly resolved by Sections 6 and 7—intended to be read together—which provide that courts are expected to ferret out information about any other custody proceedings concerning the same child. They then shall, by mutual agreement, yield to the "appropriate forum"; this latter phrase apparently means that if courts of more than one state have jurisdiction over the child, the priority in time principle shall prevail, unless it is preempted by the inconvenient forum principle. The nebulousness of the term ostensibly is to be left for resolution by "consultation and cooperation" among the courts, in accordance with some guidelines for determining the inconvenient forum issue and correct proceedings after its determination.206

"Home state" is a variation of the "established home" concept—but broader in scope—introduced by Professor Ratner.207 It is defined as

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, and 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. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period.208

In cases of abandonment or other emergencies such as abuse, provision is made for state in its capacity as parens patriae to assume jurisdiction over a child physically present within its borders, to provide it with immediate protection. Neglect alone, however, will not give rise to such jurisdiction.209

Finally, if no other court can or has under the previous subsections assumed jurisdiction, then a court so petitioned may—if it is in the best interest of the child.210 Physical presence of the child and one parent in the

206 Id. at §§ 3, 6, 7 at 9, 12-15.
207 Ratner, supra note 203, at 815-16.
208 UNIFORM CHILD CUSTODY JURISDICTION ACT § 2(5), at 8 (1968).
209 Id. § 3(a)(3), at 9-11.
210 Id. § 3(a)(4).
state is not enough to confer jurisdiction on the court, except in the last two instances.\textsuperscript{211} Physical presence of the child is also not a prerequisite.\textsuperscript{212}

The Act next provides reasonable notice and opportunity to be heard to contestants, parents whose rights have not been previously terminated, and any person who has physical custody of the child. In the case of nonresidents, notice may be either by personal service or by certified mail, with return receipt. Publication \textit{in lieu} of other means is precluded. If a person submits to the jurisdiction of the court, notice is not required.\textsuperscript{213}

The Act also embodies the "clean hands" doctrine. One who has abducted a child from another state or has indulged in other reprehensible conduct allegedly may not enlist the aid of a court in modifying the extant custody decree of another state. Unfortunately, under the Act, the declining of jurisdiction by the court is \textit{permissive} and not mandatory, the loophole to assumption of jurisdiction being the words "just and proper under the circumstances." The court has wide discretion in interpreting the meaning of this phrase. This section also imposes a penalty upon an errant petitioner. The court dismissing his complaint can dun him for its court costs, travel expenses, and attorney fees incurred by other parties and their witnesses. These are payable to and through its clerk.\textsuperscript{214}

The initial pleading in a custody proceeding under the Act must be made under oath. It must state the child's address and the names of his guardians for the past five years. The affiant must also list previous similar proceedings in which he has participated in any capacity in the instant or any other state or country; whether or not such other proceedings are pending in another state; and whether or not other individuals have an interest in the child who have not been joined as parties defendant.\textsuperscript{215}

If, pursuant to the previous section, the court ascertains that a person not joined in the suit has or claims to have physical custody of the child, it must order his joinder as a party defendant and notify him thereof. If such person is a nonresident, service is made upon him as previously noted. The purpose of this section is to prevent relitigation of custody by claimants other than parents.\textsuperscript{216}

The court may order any party to the proceeding who is within the state to appear personally before it. It may order the custodian to appear with the

\textsuperscript{211} Id. § 3(b), referring to its subsections (3) and (4).
\textsuperscript{212} Id. at § 3(c).
\textsuperscript{213} Id. at § 4, 5, at 11-12.
\textsuperscript{214} Id. at § 8, at 15-17.
\textsuperscript{215} Id. § 9, at 17.
\textsuperscript{216} Id. § 10, at 17-18.
child. It may order a nonresident to appear personally with or without
the child, with a *caveat* that failure to obey the mandate may result in a
decision adverse to the defaulter. It may also order the expenses of the
nonresident and the child paid by another party, through the court registry, if
circumstances make it just and proper.\(^\text{217}\)

Any custody decree rendered in accordance with the terms of the Act by
a court of competent jurisdiction binds all parties who have been served,
notified, or who have made an appearance in the proceeding and have been
given an opportunity to be heard. The decree is conclusive on all issues of law
and fact determined. Since a custody decree is normally subject to modification
in the interest of the child upon a showing of material change of circumstances,
it does not have absolute finality. As long as it has not been altered, however, it
is binding as a final judgment.\(^\text{218}\)

The key to the entire Act is Section 13. It makes mandatory the
recognition and enforcement by a sister state of an initial or modified custody
decree of a foreign court which had assumed jurisdiction under the provisions
of the Act or has issued it under standards similar thereto, if the state has not
adopted the Act. In effect, it declares that full faith and credit must be given a
valid out-of-state decree, if due process requirements of notice and opportunity
to be heard have been met. Personal jurisdiction over the defendant is not
necessary.\(^\text{219}\) Conceivably, if the prior modified decree is a punitive or
disciplinary one, courts in other states might be reluctant to recognize and
enforce it. This problem allegedly could be alleviated by enforcement of
the visitation provisions of the original decree; or, if conditions change
materially, by a petition for their modification.

A sister state may not modify a custody decree unless the former state no
longer has jurisdiction, or if it has declined to assume jurisdiction to modify
the decree and the second state court has jurisdiction within the purview of the
Act. In other words, continuing jurisdiction of a court in regard to custody will
remain in effect only as long as the requisite jurisdictional standards of the Act
are met. The latter court must give due consideration to the documents and
records of the former one, in order that it may be as fully informed as possible
before entering a decision. What constitutes "due consideration" is a matter
of discretion and local law.\(^\text{220}\)

A certified copy of a custody decree of a sister state may be filed with the
clerk of the appropriate court of any other state, where it shall have the same

\(^{217}\) *Id.* § 11, at 18.
\(^{218}\) *Id.* § 12, at 19.
\(^{219}\) *Id.* § 13, at 19-20.
\(^{220}\) *Id.* § 14, at 20-22. *See also* § 22, at 26.
effect and be enforced in the same manner. Violation of the decree may subject the wrongdoer to all necessary expenses incurred in its enforcement by the wronged party. It should be noted, however, that enforcement and modification are not synonymous. A petition for modification must be addressed to the same court where the decree is being filed. Likewise enforcement is not mandatory; it may be stayed if there is danger of abuse or mistreatment of the child.  

The clerk of each state court thus involved is authorized to maintain a registry in which he shall file certified copies of custody decrees of sister states, communications concerning findings of inconvenient forum of sister states, and other documents concerning custody proceedings from sister states which may affect the action in regard to the child the second court will take. The purpose of this section of the Act is to compile a complete case history of the child's custody in a single place. The same clerk may forward certified copies of his court's decree to other courts or to interested parties.  

Section 18 allows any party to a custody suit to utilize depositions, written interrogatories, and other discovery devices to adduce testimony of witnesses, parties, or children involved, in another state, applying the procedural rules of the state where the materials are to be used. In addition, the section authorizes the court *sua sponte* to gather any out-of-state evidence which it deems necessary and proper to convey a true picture of the child's circumstances, prescribing the manner and the terms under which it shall be taken.  

In a unique provision the Act enables a court of one state to request the appropriate court of another state to hold a hearing to gather evidence or to hold an investigation with respect to the child's custody and forward certified copies of the results to it, with costs taxed against the parties to the litigation or against the originating state. The court may also request the appropriate court of another state to order its resident party to appear in custody proceedings in the former one with the child, making monetary provisions for such appearance at its discretion. This brings into play the possibility of an organized network of contempt power; however, the section is permissive in nature. It is questionable whether constitutionally the courts of one state can respond by punishing a person for violating the orders of the courts of another state, contempt proceeding being general quasi-criminal in nature.

The provisions of Section 19 are reciprocated in Section 20, which

---

221 Id. § 15, at 22-23.  
222 Id. § 16, at 23.  
223 Id. § 17, at 23.  
224 Id. § 18, at 23-24.  
225 Id. § 19, at 24-25.
empowers local courts to aid out-of-state courts in a like manner. The clerk of courts is further authorized to preserve pleadings, orders and decrees, and other pertinent documents until the child reaches the age of 18 or 21; and upon the request of the court of another state, he shall forward certified copies of any or all such papers to it.

The general policies of the Act are intended to extend beyond national borders—to be effective internationally—provided that the custody decrees of foreign countries were rendered by appropriate authorities, with jurisdiction under the laws of the nation involved; and provided further that reasonable notice and opportunity to be heard was given to all persons affected by the decree sought to be recognized and enforced under the Act.

Finally, an optional section of the Act provides that when an issue of existence or exercise of jurisdiction by a court is raised, it shall be given calendar priority and handled expeditiously, in order to keep at a minimum the duration of the period of uncertainty and turmoil in a child's life.

The various provisions of the Act are severable. A declaration of invalidity of any single part or parts of it does not affect the others, which can be given effect individually.

While there is much of value in the Uniform Child Custody Jurisdiction Act, many of its provisions are unnecessarily "Pollyannaish," cumbersome, impracticable, and naive when considered in the contemporary light of the American court scene. Basically, it lacks teeth. It has overlooked what is needed most where children of broken homes are concerned—explicit standards and guidelines for all judges to follow in reaching custody-visitation decisions.

The Act presumes that all domestic relations and juvenile court judges and other professional court personnel are cut from the same cloth as Solomon and are endowed with the personal characteristics of Christ and the patience of Job. Unfortunately, reality has not always borne this out, or American child custody law would not be the abomination it is today.

If the Act were to become law in all our jurisdictions, who would bear the prohibitive expenses of joining together in one forum all interested parties, documents, depositions, reports of investigations, records, etc.,

226 Id. at § 20, 25.
227 Id. § 21, at 25-26.
228 Id. § 23, at 26-27.
229 Id. § 24, at 27.
230 Id. § 25, at 27.
presuming again that there would be the complete cooperation of not only all parties involved, but all courts involved, in not only perhaps several of the United States, but also other countries of the world, as proposed in the Act?\textsuperscript{232} The public cannot bear the tax burden of present-day overworked courts.

The "priority in time"\textsuperscript{233} and "inconvenient forum"\textsuperscript{234} rules provide loopholes for further highly subjective juridical decisions which may encourage competitive initial "seize and sue" tactics by contesting parents and which may only spell the same misery to the children concerned that they have been experiencing. Modification of custody decrees does not appear significantly and appreciably reduced—a \textit{sine qua non} of any such effective law.

A most important failing is the lack of reciprocity on the part of the states in the Act as a whole. Without this characteristic, the Act is meaningless.\textsuperscript{235}

Presuming that the Act could be efficaciously promulgated, how long would it take to secure its adoption by the 52 American jurisdictions involved? It has been in existence seven years at the writing of this article; yet within the experience of this writer, the hundred or so individuals in the various legal communities she has discussed the Act with have had no knowledge of it whatsoever, nor have they professed any interest in it. Only five states had adopted it as of December, 1974.\textsuperscript{236} If the Act's adoption is not simultaneous, unanimous, and reciprocal, the presently rampant "guerrilla warfare" in child custody litigation will merely perpetuate itself.

3. \textit{A Proposed Solution}

In the opinion of this writer, the solution to interstate custody relitigation lies in an unequivocal decision by the United States Supreme Court that will be applicable with equal force in the civil courts of all United States' jurisdictions through the fourteenth amendment, to the effect that in any action whatsoever concerning custody and/or visitation of a minor child—be it an original divorce action or an application to modify—venue lie in the county of the domiciliary custodian of said child (\textit{i.e.}, an embodiment of the Texas rule on a national scale). When a marriage disintegrates, inevitably the children remain with one parent. Only the state court where that parent is domiciled or resides would be empowered to enter a custody-visitatio decree.\textsuperscript{237} Since

\textsuperscript{232} \textit{Uniform Child Custody Jurisdiction Act} §§ 11, 18, 19, \textit{et passim}.

\textsuperscript{233} Id. § 6, at 12-13.

\textsuperscript{234} Id. § 7, at 13-15.

\textsuperscript{235} Id. \textit{Prefatory Note}, at 6.


\textsuperscript{237} Professor Ratner termed this the "established home" concept in his article. Ratner, \textit{supra} note 203, at 815-16.
procedural rules of most, if not all, states provide for venue in civil actions in
the county of defendant's residence, the court would not be playing havoc with
nor encroaching upon the states' prerogative of establishing procedural rules.
Rather, such a ruling would be in the nature of a substantive right—by carved
out exception, if necessary—in real furtherance of the universally accepted
American doctrine, the "best interests of the child."

Jurisdiction over the child would change as the permanent custodian
found it necessary to move for cogent and compelling reasons. The
custodian would register his custody decree with the appropriate new state
court and request that the child be declared its ward; or, in the alternative,
the registration could effect this automatically, to spare the custodian added
unnecessary legal expense. Any petitions for modification of the decree would
be addressed to this court, and it would subject all parties involved to a
thorough investigation. Failure on the part of an indispensable party to
cooperate would result in a ruling adverse to him or her.

Such a decision, with its concomitant guidelines, could be forthcoming
by the next session of the United States Supreme Court. Certainly there is no
paucity of cases on the issue which could be brought before it.

Other salutary guidelines the High Court might consider, on a case by
case basis, to stem the evils of split custody, are the following: Visitations for
children under 12 would be limited to the county of the custodian's residence,
with liberal privileges accorded the noncustodian—as long as they do not
interfere with the well-being of the minors and do not disrupt the tranquility of
their home. Out-of-state or out-of-town visits for children over 12 would
be subject to the individual child's wishes, to be determined by separate
conferences with (1) a qualified nonpartisan referee appointed by the court
and approved by both parties; (2) a child psychiatrist, psychologist, or family
doctor; and, (3) a teacher or minister who is acquainted with the child and
has its respect and confidence. Their individual reports would be available to
both parties as well as to the court. In the event of the death of the child's
custodian, jurisdiction to enter a modified custody decree would still be in the
court where the child is domiciled; and, subsequently, its wardship would be
transferred, if necessary, to the domiciliary court of the new custodian.

At the same time that legal efforts are being made to effect such action on
the part of the United States Supreme Court, family law sections of major bar
associations—including the American Bar Association—should simultaneously
lobby for immediate federal codification of these provisions by the Congress of
the United States. The argument that Congress has never legislated in the
area of family law does not mean that it cannot. Without a doubt, it is constitutionally empowered to do so, to protect the general welfare of a large and ever-growing segment of its population.

XI. CONCLUSION

The status of custody-visitation litigation in the United States is a hideous, cancerous chancre on the body of American jurisprudence. Each time a child crosses a state line, his custody not only can be relitigated, it frequently is—several times—under our federal system. What is perpetrated by our courts upon the innocent "interstate child" (one whose parents reside in different states) is often not in the "best interests" of the minor—the pole star courts are to be guided by—but an effective expedient to accommodate the convenience of the noncustodial parent—generally, the father. A prerequisite to such relitigation is possession of the child, whether legal or illegal. Usually this is obtained in a divorce decree by the grant of a "visitation" to the noncustodial parent. Domestic relations and juvenile court judges have wittingly indulged in games of semantics in sending infants beyond the borders of their home state by denoting such pilgrimages, which often involve round trips of five and six thousand miles and last several months, visitations, instead of split custody—the latter being considered anathema in the common law except under circumstances of the most compelling necessity. Their publicly unutterable, yet potently pervasive rationale is grounded in a specious and silent "public policy" argument. More explicitly, American courts have suited the every whim, caprice, convenience and desire of the "loser," while sacrificing the well-being of children, as an inducement to him to pay child support regularly and thus keep his issue off the welfare rolls. This was confirmed some years ago by a concerned child psychiatrist, Dr. James Plant:

Through the years we have seen many children of divorced parents. . . . The ones . . . from situations where the court granted certain rights of visitation in disregard of every consideration other than that the parent made certain monetary contributions to the child's upbringing almost match. . . . [the incredible stories of split custody awards and their effect upon children].

Our experience has been that undue importance has been given to the factor of support and the rights it entails. . . . Could we turn our faces towards decisions that boldly consider the rights of the children . . .

238 Id. at 798-99, 827 n. 153.
239 Ratner, supra note 203, at 798-99, 827 n. 153.
241 Id. at 817.
In the words of Justice Jackson of the United States Supreme Court, dissenting in *May v. Anderson*: “A state of law such as this . . . has little to commend it in legal logic or as a principle of order in a federal system.” 242

The Uniform Child Custody Jurisdiction Act, approved by the American Bar Association in 1968 but as yet adopted by only five states, has fallen short of its desired goal—the cessation of a multiplicity of suits in regard to one child’s custody. Its provisions are cumbersome and unpracticable. Its loopholes could perpetuate some of the very evils it is seeking to alleviate.

Immediate corrective steps can be taken to remedy the vicious warfare waged by vindictive parents over custody of their children in the courts of two or more states and fostered by the personnel of these self-serving courts by both the United States Supreme Court and the American Congress, by declaring all custody-visitation actions subject to the law of venue in the local court of the domiciliary or resident custodian. The crisis of stemming relitigation of a child’s custody can only be met by positive action, making Justice Jackson’s pronouncement in *May v. Anderson*—“children as well as the home keeping parent [have the right] to have their status determined with reasonable certainty, and to be free from an incessant tug of war between squabbling parents” 243—a reality, at long last!

242 345 U.S. at 539.
243 Id. at 542.