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**Domestic Relations—Full Faith and Credit—Effect of Decree
Granting Custody of Children**

A husband domiciled in Wisconsin obtained a divorce decree in Wisconsin from his non-resident, absent wife, and an order awarding him the custody of the children. He filed for habeas corpus in Ohio to obtain the children after the wife violated the decree. The wife contended that Ohio should deny full faith and credit because Wisconsin had no personal jurisdiction over her. The husband reasoned that his domicile plus that of the children was a sufficient jurisdictional basis to enable Wisconsin, also the marital domicile, to bind all parties interested in their custody. At the time of the decree, although the children were admittedly domiciled in Wisconsin, they were temporarily with their mother in Ohio on the understanding that they would be returned to their father in Wisconsin if the mother remained in Ohio. *Held*: the ex parte decree fixing custody of children was not entitled to full faith and credit, in the absence of personal jurisdiction over the mother.¹

Prior to this decision, state courts had disagreed as to whether full faith and credit² should be extended to a custody decree where jurisdiction was based on domicile of the child alone;³ the weight of authority⁴ and the Restatement⁵ supporting the dissenting view in the principal case. As a result of this and prior United States Supreme Court cases,⁶ the following conclusion may be drawn: if a spouse secures divorce, alimony, and custody decrees in a state where the plaintiff and children are domiciled, the defendant being domiciled elsewhere and the children absent from the forum, the only decree entitled to

¹ *May v. Anderson*, 345 U.S. 528 (1953). See *Halvey v. Halvey*, 330 U.S. 610 (1946).

² U.S. Const. Art. IV, § 1.

³ Goodrich, *Custody of Children in Divorce Suits*, 7 Cornell L.Q. 1 (1921) ("To state the questions generally—(1) what constitutes jurisdiction, from the standpoint of Conflict of Laws, to render a decree awarding custody of a minor child; (2) what effect should such an award have in another state.").

⁴ Goodrich, *Conflict of Laws* § 136 (3d ed. 1949) ("Jurisdiction to award custody of children in a divorce action is in the courts of the domicile of the children."); § 422 ("The weight of authority holds that the decree is conclusive as to all matters up to the time of its rendition, and will be recognized and given effect in another state."); Note, 9 A.L.R.2d 454 (1950) (cases collected). See *Barnes v. Morash*, 156 Neb. 721, 57 N.W.2d 783 (1953). This note is limited to the discussion of a decree awarding custody where the child was domiciled in the state of decree and the effect such a decree should have in another state.

⁵ Restatement, *Conflict of Laws* § 117 (1934) ("A state can exercise through its courts jurisdiction to determine the custody of children or to create the status of guardian of the person only if the domicile of the person placed under custody or guardianship is within the state."); *Id.* at § 147, comment a ("An award of custody, like any other judgment or decree of a competent court, is entitled to recognition and enforcement in other states.").

⁶ *Estin v. Estin*, 334 U.S. 541 (1947); *Kreiger v. Kreiger*, 334 U.S. 555 (1947).

full faith and credit is the one terminating the marital status of husband and wife.

To justify giving full faith and credit to divorce decrees, the courts⁷ and text authorities⁸ have stated that the action is in rem, the res being the status of the parties. This is in reality a fiction, and the same fiction could be extended to the status of the children. There seem to be two strong principles in conflict which provide the real reasons for these holdings, rather than the fact that they are in rem or in personam. On the one hand, there is the principle that the defendant should get the best opportunity which the law can provide to protect his or her rights. Thus a method of service ought to be required which is likely to reach the defendant. On the other hand, there is the principle that a plaintiff should be able to get some kind of court action to settle his rights. This becomes especially important where it is difficult, if not impossible, to get service on the other party. The latter policy at present prevails only in the decree affecting the status of man and wife.

The decision in the instant case presents additional difficulties. Two basic ideas are found in the *Williams* cases⁹ where full faith and credit to divorce decrees was the issue: (1) if the forum rendering the foreign judgment has jurisdiction, that decree is valid and must be given full faith and credit; (2) jurisdiction can not be litigated in the second forum if litigated in the first forum. The *Williams* cases gave the full faith and credit clause additional force, but the principal case appears to point out a reluctance on the part of the Court to extend the clause any further at this time.¹⁰

In addition, the case seems to engender unpredictability. If the locations of the husband and wife had been reversed in this case, would the decision have been different? May an errant husband who has left the home overturn a custody decree when, due to his absence, there was no personal jurisdiction over him? If the children had been physically present in Wisconsin would the decision have been the same? Has the court created a situation where the Wisconsin courts cannot bind the mother, and the Ohio courts cannot bind the father, thus making possession nine points of the law?

Furthermore, no court has disputed the fact that the interests of

⁷ *Axtell v. Axtell*, 181 Ga. 24, 181 S.E. 295 (1935).

⁸ Goodrich, *Conflict of Laws* § 132 (3d ed. 1949) ("A decree of divorce is not a personal judgment secured by one person against another, but an act of law operating upon the marital relation between the husband and wife. It is often spoken of as an action in rem; the res being the marriage status.").

⁹ *Williams v. North Carolina*, 317 U.S. 287 (1942); *Williams v. North Carolina*, 325 U.S. 226 (1945).

¹⁰ *Pennyroyer v. Neff*, 95 U.S. 714 (1877); *Williams v. North Carolina*, 317 U.S. 287 (1942). Also see the dissent of Mr. Justice Minton in the principal case, 345 U.S. 528 (1953).

the children are the paramount consideration,¹¹ but in the present status of the relationship between states it seems that the forum rendering the custody decree could just as adequately protect those interests. Full faith and credit is extended to divorce decrees decided by states which seek only to grind out divorces, and yet there is a refusal to recognize custody decrees awarded by other state courts in which courts have placed more "confidence."¹² If there is some reason for not extending full faith and credit to the first decree, such as a change in circumstances, the person seeking to avoid the first decree should be able to prove the new circumstances, but all matters prior to the first decree should be finally adjudicated. Also, it would be better for the child if his status could be determined once and for all, instead of being the subject of a constant struggle as long as the conditions present at the time of the custody decree remain substantially the same.¹³

The instant decision is contrary to the Restatement¹⁴ and weight of authority,¹⁵ seems to be inconsistent with the two *Williams* cases,¹⁶ and other United States Supreme Court decisions,¹⁷ amounts to a step back from the trend of recent cases extending the power of the full faith and credit clause, lacks any degree of predictability, and goes farther than necessary to protect the welfare of the child, since a change in conditions even under the minority view would call for

¹¹ *May v. Anderson*, 345 U.S. 528 (1953). The concurring opinion of Mr. Justice Frankfurter is concerned mainly with this argument.

¹² *Goodrich*, *Conflict of Laws* § 136 (3d ed. 1949) ("To allow relitigation of the question involves an unfortunate lack of confidence in the competence of the judicial officers of a sister state, and an unduly narrow interpretation of the full faith and credit clause of the Constitution.")

¹³ *May v. Anderson*, 345 U.S. 528 (1953) (Mr. Justice Jackson in his dissent states: "The wife's marital ties may be dissolved without personal jurisdiction over her by a state where the husband has a genuine domicile because the concern of that state with the welfare and marital status of its domiciliary is felt to be sufficiently urgent. . . . The claim of children as well as the home-keeping parent to have their status determined with reasonable certainty and to be free from an incessant tug of war between squabbling parents, is equally urgent.")

¹⁴ *Supra* note 5.

¹⁵ *Supra* note 4.

¹⁶ *Supra* note 9.

¹⁷ See, e.g., *Yarborough v. Yarborough*, 290 U.S. 202 (1943) (Held: the Georgia decree discharging the father's obligation to support his child was entitled to full faith and credit in South Carolina. The child was bound by the Georgia decision, even though the court had no jurisdiction to render a decree adjudicating rights of the child since she was not even served with process. She was bound by the Georgia decision because the father's liability should be governed by the law of his domicile. The South Carolina court was not trying to get a personal judgment against the father but simply to enforce his duty to support out of assets in South Carolina.)

judicial action.¹⁸ However, the majority decision might be supported on the ground that the connecting factor for jurisdiction to award custody should be the actual presence of the children before the forum, rather than a fictitious domicile imposed by operation of law, because then the court would have a first hand opportunity to determine what is actually best for their welfare. But to rest the result upon the basis that the absentee wife has something akin to a property right in the children which cannot be cut off except by in personam jurisdiction, merely adds obfuscation to an already confused field.

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¹⁸ *May v. Anderson*, 345 U.S. 528 (1953) (The dissent states: "The mother in this case would not be permanently precluded from attempting to redetermine the custody of the children. If the Wisconsin courts would allow modification of the decree upon a showing of changed circumstances, such modification could be accomplished by another state which acquired jurisdiction over the parties.").