Case Comments

CONFLICT OF LAWS—*Effect of Wife's Foreign Ex Parte Divorce Decree upon Independent Suit for Support of Minor Child.* (Illinois)

The petitioner in the present suit, Virginia Rice Parker, secured a divorce from the present defendant in the state of Indiana, based on constructive service on the defendant husband. The Indiana decree awarded custody of the minor child of the divorced parties to the mother. No provision for support of the child was entered. The minor child, Anna Winslow Parker, instituted the present action in the Circuit Court of DuPage County, where the defendant presently resides, to require the defendant to contribute to her support. The petition was dismissed for lack of jurisdiction. On appeal to the Appellate Court of the Second District, *held*: Reversed and remanded. The Indiana decree was not determinative of the defendant's continuing duty of support of his minor child. That duty may be enforced in a subsequent independent proceeding in Illinois. *Parker v. Parker*, 335 Ill. App. 293, 81 N.E.2d 745 (1948).

Although the decision of the Illinois court in the instant case is in accord with the majority of other jurisdictions wherein similar rights have been adjudicated, the circumstance that the present decision is squarely contrary to the only former Illinois case presenting identical problems [1] renders advisable a consideration of the several principles of the Conflict of Laws which apply to such a situation. The initial difficulty facing the court in this connection is the extra-territorial effect to be accorded the prior Indiana decree.

At the time of the divorce proceeding in Indiana the husband, defendant in this action, was residing in Illinois and was served only by publication. Therefore, the Indiana court was without power to enter an in personam judgment for support of the defendant's minor child.[2] This factor alone demands the conclusion that the Indiana decree may not logically be regarded as res judicata on the question of support.[3] However, a further problem arises as to the applicability of the "full faith and credit" clause of the Constitution.[4] In this respect a brief examination

[1] Hawkins v. Hawkins, 288 Ill. App. 623, 6 N.E.2d 509 (1st Dist. 1937).

[2] Proctor v. Proctor, 215 Ill. 275, 74 N.E. 145 (1905); RESTATEMENT, CONFLICT OF LAWS, § 116 (1934).

[3] Geary v. Geary, 102 Neb. 511, 167 N.W. 778 (1918); Davies v. Fisher, 34 Cal. App. 137, 166 P. 833 (1917); *See* Esenwein v. Commonwealth of Pennsylvania, 325 U. S. 279, 65 S.Ct. 1118 (1945) in which the court remarked, "I am not convinced that in absence of an appearance or personal service the decree (of a foreign state) need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. . . . the jurisdictional foundation for a decree in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter marital status with extra-territorial effect."

[4] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U. S. CONST. Art. IV, § 1.

of the trend of Illinois decisions in a field of closely related cases, those involving the custody of minor children, will prove of assistance.

Generally, courts profess to give recognition to decrees of sister states which are found properly to have awarded custody of a minor to one of his parents.[5] This is in accord with the view of the Restatement of Conflicts.[6] Yet it has been widely recognized that a court may modify or alter a foreign custody order to meet changed circumstances;[7] at least so long as the child is within the state.[8] It has been held in a recent United States Supreme Court decision that a foreign custody decree was binding upon the court of the forum only to the extent that it was not susceptible to modification by the court where originally entered.[9] The modern trend plainly turns toward allowing the state wherein the child is located a large measure of freedom in regulating his relations with others. It is to be noted that the courts of Illinois have always exercised considerable freedom in regulating the custody of minor children, in the face of foreign decrees.[10] If, in the closely related problem of support, comparable freedom of action is felt available to the court, then the decision in the instant case becomes a readily explainable parallel.

In past decisions involving decrees for support and alimony the Illinois courts have frequently demonstrated a tendency to modify such decrees to meet "changed conditions." [11] The Illinois court has also held that a divorced wife could maintain an action in Illinois for funds furnished out of her personal estate in support of a minor child when the foreign decree was silent as to support; a situation quite similar in substance to the present.[12] In view of the indicated tendencies of the Illinois courts, it is clear that those courts will not regard a foreign decree making no provision for support of a minor child, where indeed it was beyond the scope of the foreign court's power to effectuate such a provision, as entitled to "full faith and credit" in the sense that it would operate to bar an action

[5] Church v. Church, 50 App. D.C. 237, 270 F. 359 (1921); People v. Schaedel, 340 Ill. 560, 173 N.E. 172 (1930); People ex rel Pickle v. Pickle, 215 App. Div. 38, 213 N.Y.S. 70 (1925).

[6] RESTATEMENT, CONFLICT OF LAWS, § 147 (1934).

[7] People ex rel Crofts v. Wait, 243 Ill. App. 367 (1st Dist. 1927); People v. Schaedel, 340 Ill. 560, 173 N.E. 172 (1930); Ex Parte Peddicord, 269 Mich. 142, 256 N.W. 833 (1934).

[8] People ex rel Crofts v. Wait, *supra* note 7; People v. Hickey, 86 Ill. App. 20 (1st Dist. 1899); RESTATEMENT, CONFLICT OF LAWS, § 148 (1934).

[9] People of State of New York ex rel Halvey v. Halvey, 330 U.S. 610, 67 S.Ct. 903 (1947); *see* Heard v. Heard, . . . Mass. . . ., 82 N.E.2d 219 (1948) in which the decision of *ex rel Halvey* is discussed with approval.

[10] Cases cited, note 8 *supra*.

[11] People v. Miller, 225 Ill. App. 150 (2d Dist. 1922); Hilliard v. Anderson, 197 Ill. 549, 64 N.E. 326 (1902); Herrick v. Herrick, 319 Ill. 146, 149 N.E. 820 (1925). The two former cases were cited and approved by Justice Stone dissenting in Yarborough v. Yarborough, 290 U.S. 202, 54 S.Ct. 181 (1933).

[12] Johnson v. Johnson, 239 Ill. App. 417 (1st Dist. 1926).

for support in Illinois. It may be remarked that the overwhelming weight of recent decisions supports the position thus taken in Illinois.[13]

The second major problem facing the court in the present suit was to vindicate its own jurisdiction to award support. According to the view of a number of authorities a court which proposes to deal with the custody of a child must be the court of the jurisdiction wherein the child has his domicile.[14] Influenced by this somewhat unrealistic rule some courts have proceeded upon the theory that the child must be domiciled at the forum as a basis of jurisdiction for awarding support.[15] However, a more modern position, both in the custody cases and in those regarding support, recognizes that either residence,[16] or physical presence,[17] within the state is sufficient to confer jurisdiction. As to the question of custody the position of Illinois has been defined in a recent case before the Illinois Supreme Court wherein it was stated, "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the child. The residence within the State suffices . . ." [18] A like attitude might be anticipated and is, in fact, found in the present case toward the basis of the court's jurisdiction to award the child support. The position of the court is amply supported elsewhere.

A final issue in the jurisdictional basis of the present suit relates to the desirability of permitting independent suits for support rather than demanding a recourse to the court which determined the original divorce proceeding. As to actions for alimony,[19] and custody,[20] Illinois has already recognized the possibility of independent suits. There would seem to

[13] Geary v. Geary, 102 Neb. 511, 167 N.W. 778, 20 A.L.R. 809 (1918); Stansbury, *Custody and Maintenance Decrees Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 832 (1944).

[14] RESTATEMENT, CONFLICT OF LAWS, § 117 (1934); BEALE, CONFLICT OF LAWS, 717 (1935); GOODRICH, CONFLICT OF LAWS, 358 (2d ed. 1938).

[15] Schneider v. Schneider, 141 F.2d 542 (1944); Pieretti v. Pieretti, 13 N. J. Misc. 98, 176 Atl. 589 (1935).

[16] Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. OF CHI. L. REV. 42, 62 (1940); Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1, 28 (1944); *Jurisdictional Bases of Custody Decrees*, 53 HARV. L. REV. 1024 (1940); STUMBERG, CONFLICT OF LAWS, 299 (1937). *See* the discussion of the problem by Cardozo in *Finlay* v. *Finlay*, 240 N.Y. 429, 431, 148 N.E. 624, 626 (1925).

[17] Ex Parte Inman, 32 Cal. App.2d 130, 89 P.2d 421 (1939); State ex rel Clark v. Clark, 148 Fla. 452, 4 So.2d 517 (1941); Rogers v. Commonwealth, 176 Va. 355, 11 S.E.2d 584 (1940); May v. May, 233 App. Div. 519, 253 N.Y.S. 606 (1931); Stansbury, *Custody and Maintenance Decrees Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 832 (1944).

[18] People v. Wingate, 376 Ill. 244, 33 N.E.2d 467 (1941).

[19] Bush v. Bush, 316 Ill. App. 295, 44 N.E.2d 767 (3rd Dist. 1942); McAdams v. McAdams, 267 Ill. App. 124 (1st Dist. 1932). A statute in Illinois authorizes independent suits for separate maintenance and temporary alimony: ILL. REV. STAT., c. 68, § 22 (1947).

[20] People ex rel Hargrove v. Slive, 250 Ill. App. 601 (3rd Dist. 1928); *see* note 10 *supra*.

be no valid reason why the same principle should not be extended to cases involving support of minor children. As the court in the instant case emphasized, a recourse to the court of original jurisdiction would be fruitless. To allow the continuing jurisdiction of the Indiana court to prevent an independent action of this nature would be, in practical effect, to deprive the minor child of any possible relief.

The decision of the Illinois case in *Parker v. Parker* is thus found to be entirely consistent with modern principles of the Conflict of Laws, as applied both in Illinois and in other jurisdictions. The social desirability of the result reached may scarcely be questioned. It would be, as one authority in the field has remarked, highly unreasonable "to suppose that a father can escape the duty of supporting his child simply by keeping away from the child's domicile, or that to enforce that duty the mother should be compelled to follow the father about and establish a domicile for herself and the child in a state where the father can be found." [21] In short the decision formed represents an enlightened and practical solution to a problem of increasing importance in our present day society—the need for protection and support of minor children whose divorced parents have crossed the boundaries between the states.

WESLEY G. HALL.

DEEDS—*An Unsealed Instrument Held to Convey Title to Land.* (Illinois)

Defendant purchased certain land and, when subsequently threatened with a lawsuit, deeded it to his wife, but retained active control of it and continued to pay the taxes. Shortly before her death the wife executed a document purporting to be a deed re-conveying the land to defendant.[1] Plaintiffs, children of the wife by a former marriage, filed a complaint for accounting and partition of the land in question, asserting that the deed was void in that: (1) It contained no words of grant; (2) it

[21] Stansbury, *Custody and Maintenance Decrees Across State Lines*, 10 LAW & CONTEMP. PROB. 832 (1944).

[1] In view of the importance of the document itself in this decision, its relevant portions are here set out:

> "Apr. 20—1944 Rockford Ill. *Quick Claime* Deed *Asinment* to B. F. Zimmerlee
> My interest *it* said piece of property consisting of 8 lots in *Winebago* County Ill. . . . the plat of which Subdivision is recorded . . . in the Recorder's *ofice* of Winnebago County Ill. and the above *maned* being my (husband said property is his) to hold and sell and use the *the prosedes* as long as he shall live
> this is my last wish
>
> Myrtle Zimmerlee
> witness—Mrs. Bessie F. Malone
> Notary Public Lenna Smith
> Rockford, Ill. (Seal)"