Montana Law Review

Volume 31
Issue 1 *Fall 1969*

Article 8

7-1-1969

Jurisdictional Problems of Foreign Divorce Decrees under the Full Faith and Credit Clause

Sandra Muckelston

JURISDICTIONAL PROBLEMS OF FOREIGN DIVORCE DECREES UNDER THE FULL FAITH AND CREDIT CLAUSE

Article IV, section one of the U. S. Constitution requires each state to give full faith and credit to the "public Acts, Records, and judicial Proceedings of every other State." In the area of extraterritorial recognition of foreign divorce decrees, however, courts may consider conflicting states' interests in the marital status, the welfare of a child, the property rights of the spouses, reciprocity between states, and the need for putting an end to litigation in addition to the full faith and credit requirement. These considerations have raised numerous jurisdictional issues, some of which will be examined more specifically in this article.[1]

I. MARITAL STATUS

A. *Divorce obtained ex parte*

Before 1942 a state was not required to recognize a divorce obtained in another state. In *Haddock v. Haddock*,[2] the U. S. Supreme Court ruled that even though one spouse might leave the state where the matrimonial domicile[3] was established, set up domicile in another state, and obtain a divorce in an *ex parte* proceeding, the foreign decree need not be recognized in the state of matrimonial domicile.

In the first *Williams* case (1942),[4] however, the Supreme Court overruled *Haddock*[5] and declared that a foreign decree rendered in an *ex parte* proceeding was entitled to extra-territorial recognition under the full faith and credit clause. Here two citizens of North Carolina had established residence in Nevada and obtained divorces from their respective spouses in order to marry each other. Jurisdiction of the Nevada court over the absent spouses had been obtained by constructive service. After their marriage the couple returned to North Carolina where they were later prosecuted for bigamy. In reversing the convictions and establishing interstate recognition of the *ex parte* decrees, the Supreme Court recognized that constructive service must satisfy due process requirements.[6] However, the Court did not determine whether such a decree

[1]For a general discussion of interstate recognition of foreign divorce decrees, see Sumner, *Full Faith and Credit for Divorce Decrees — Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1 (1955); GOODRICH, CONFLICT OF LAWS § 127-139 (4th ed. 1964); EHRENZWEIG, CONFLICT OF LAWS § 71-92 (1962).

[2]201 U.S. 562 (1905).

[3]The state of matrimonial domicile is the state in which the couple last resided as man and wife.

[4]Williams v. North Carolina, 317 U.S. 287 (1942).

[5]*Supra* note 2; Lorenzen, *Harrock v. Haddock Overruled*, 52 YALE L. J. 341 (1943).

[6]*Supra* note 4, at 299.

must be recognized if the plaintiff's domicile was not *bona fide*. This opportunity presented itself three years later. The *Williams* case had returned to the North Carolina court which examined the validity of the couple's domiciles while in Nevada. Upon evidence that they had set up temporary lodgings and then promptly returned to North Carolina after gaining their divorces, it was held that no *bona fide* domicile had been established.[7] The Nevada court, therefore, had no jurisdiction to render a binding divorce decree under the full faith and credit clause. Upon a second appeal, the Supreme Court upheld the convictions. It stated that in order for a foreign decree based on constructive service against a non-resident to be entitled to full faith and credit in a sister state, the divorce forum must be the *bona fide* domicile of the plaintiff.[8] The judgment of one state is conclusive on the merits in another only if the first state had jurisdiction to pass on the merits, and the basis of divorce jurisdiction is domicile.[9] Consequently the foreign decree is conclusive of everything except jurisdictional facts. Since domicile is a jurisdictional fact, the issue of domicile is open to collateral impeachment in the courts of a sister state.[10]

B. *Divorce where both spouses participate*

When the defendant participates in the divorce proceedings, either by counsel[11] or by personal appearance in court,[12] the foreign decree based on a finding of *bona fide* domicile must be given recognition and effect in another state under the full faith and credit clause.[13] Since both parties have participated in the proceeding, the opportunity was available to contest jurisdiction, and the participants are thereafter barred from collateral attack on the decree on jurisdictional grounds.[14] The sister-state court is precluded from relitigating the issues by the doctrine of *res judicata*.[15] This rule has been extended to apply where one party merely files a waiver of service and entry of appearance; the filing forecloses the jurisdictional question as *res judicata* and bars later

[7]Williams v. North Carolina, 325 U.S. 226 (1945).

[8]*Id.*

[9]*Id.* at 229.

[10]Rice v. Rice, 336 U.S. 674 (1949); Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897 (1946); Mott v. Secretary of Health, Education and Welfare, 407 F.2d 59 (CANJ, 1969).

[11]Knox v. Knox, 88 C.A.2d 666, 199 P.2d 766 (1948); Alderson v. Alderson, 454 P.2d 122 (Hawaii, 1969).

[12]Sherrer v. Sherrer, 334 U.S. 343 (1947); Coe v. Coe, 334 U.S. 378 (1948); Harley v. Superior Court, 226 Cal.App.2d 432, 38 Cal. Rptr. 72 (1964).

[13]*Id.*

[14]Cook v. Cook, 342 U.S. 126 (1951); EHRENZWEIG, *supra* note 1, at 251.

[15]*Supra* note 12.

collateral attack.[16] Collateral attack is allowed, however, if the party attacking would be permitted such an attack in the courts of the rendering state.[17]

Still to be determined was whether strangers, not parties to the original foreign decree, were barred from collateral attack on the jurisdiction of the court rendering the divorce decree. In *Johnson v. Muelberger*,[18] the husband had married three times. The wife of the second marriage obtained a Florida divorce in which her husband appeared and contested on the merits, but failed to contest jurisdiction. This wife had not completed the ninety-day residence requirement. The husband married again, and after his death, a child from his first marriage contested the right of wife #3 to qualify for the widow's share. The child attacked the Florida decree obtained by wife #2 as invalid since no jurisdiction could be taken due to faulty residence. The Supreme Court ruled that under full faith and credit, foreign decrees are binding on third parties where both spouses appeared in the original proceeding unless the rendering state would allow such attack by third parties. Since the child could not challenge the decree under Florida law, she could not do so in another state.[19]

In 1948 the Montana Supreme Court held that the doctrine of comity prevented collateral attack by heirs to an estate on a divorce decree obtained by the widow before marrying the decedent, even though the full faith and credit clause would allow the attack.[20] The widow had obtained the divorce in an *ex parte* proceeding in Nevada, immediately returned to Montana, and married the decedent. Under the rule in the second *Williams* case[21] the heirs could attack the validity of her domicile in Nevada. The Court did not allow the attack. Under the principles of comity, recognition of the Nevada decree would or be contrary to public policy in Montana.[22]

[16]Reeves v. Reeves, La. 209 So.2d 554 (1968).

[17]Johnson v. Muelberger, 340 U.S. 581 (1951); Farley v. Farley, 227 Cal.App.2d 1, 38 Cal.Rptr. 357 (1964); Mumma v. Mumma, 86 Cal.App.2d 133, 194 P.2d 24 (1949) (collateral attack allowed because prior rights would be prejudiced).

[18]Johnson, *supra* note 17.

[19]*See* Comment, 24 U. CHI. L. REV. 376 (1957).

[20]In re Anderson's Estate, 121 Mont. 515, 194 P.2d 621 (1948).

[21]*Supra* note 7.

[22]Another overriding factor in barring the attack was "enforcing the sanctity of a marriage entered into in Montana." *Supra* note 20, at 525. In 1963 Montana enacted the Uniform Divorce Recognition Act, R.C.M.1947, § 21-150; however, there is no evidence that the statute has been construed by the Montana Supreme Court. California (Cal.Civ.Code § 150-150.4) and Washington (RCWA § 26.08.200-26.08.210) adopted the Act in 1949. For these states' constructions, see In re Englund's Estate, 45 Wash.2d 708, 277 P.2d 717 (1954) (stranger estopped from collaterally attacking foreign divorce decree); Dietrich v. Dietrich, 41 Cal.2d 497, 261 P.2d 269 (1953) (party relying on foreign decree estopped from collateral attack); Marsh, *The Uniform Divorce Recognition Act Sections 20 and 21 of the Divorce Act of 1949*, 24 WASH. L. REV. 259 (1949); Note, *Foreign Divorce Recognition in California*, 16 HASTE. L.J. 121 (1964).

II. SUPPORT RIGHTS

A. *Divisible Divorce*

The *Estin* case,[23] involving an *ex parte* divorce, revived the divisible *res* theory of *Haddock*.[24] That is, jurisdiction over the marital status by a *bona fide* domicile of one spouse does not preclude the state of matrimonial domicile from retaining jurisdiction over the personal rights of the other spouse. The *Estin* court held that a divorce decree obtained in a state where the husband had acquired domicile is entitled to full faith and credit only to the extent that the decree terminates the marital status.[25] Recognition need not be extended to the point where the wife's rights to separate maintenance under a previous decree rendered in the state of matrimonial domicile would also be terminated.[26] Support obligations arising from the marriage, therefore, are continuing unless the foreign court acquires personal jurisdiction over the defendant.[27]

In *Estin* the Supreme Court applied New York law which allowed the support order to survive an out-of-state divorce decree.[28] However, the laws of some states provide that the local support order will terminate when there is evidence of a divorce, foreign or domestic.[29]

B. *Enforcement of support rights*

Suppose the divorce decree entitles the wife to monthly alimony, but she subsequently moves to another state. Thereafter the husband fails to make payments. The wife then attempts to recover the payments

[23]Estin v. Estin, 334 U.S. 541 (1948).

[24]*Supra* note 2.

[25]*Supra* note 23.

[26]See Krieger v. Krieger, 334 U.S. 555 (1948).

[27]*Supra* note 23, at 214; Hudson v. Hudson, 52 Cal.2d 735, 344 P.2d 295 (1959); Clyne v. Clyne, 228 Cal.App.2d 597, 39 Cal.Rptr. 677 (1964); Bryan v. Bryan, 255 Cal.App. 2d 833, 63 Cal.Rptr. 612 (1967). In Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957), the Estin rule was held applicable to instances where the wife files for support after the foreign decree has been rendered. For an excellent discussion of the Estin rule and its general applicability in the U.S., see Rymanowski v. Rymanowski, 249 A.2d 407 (R.I. 1969) and cases cited therein at 412; Spadea v. Spadea, 225 Ga. 80, 165 S.E.2d 836 (1969). Also see Ritz, *Migratory Alimonys; A Constitutional Dilemma in the Exercise of In Personam Jurisdiction*, 29 FORD L. REV. 83 (1960-61); Note, *Divorce with Full Faith and Credit*, 15 VAND. L. REV. 1185, 1199-1200 (1965).

[28]*Supra* note 23; however, when the foreign court had personal jurisdiction over both parties in the divorce proceeding, New York applies the support rule of the foreign state which in Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748, 28 A.L.R.2d 1335, terminated the New York support order. See also Worthley v. Worthley, 44 Cal.2d 465, 283 P.2d 19 (1955) (applying N.J. law); Lednum v. Lednum, 85 Colo. 364, 276 P.2d 674 (1929) (support order survived because Montana decree not entitled to full faith and credit).

[29]Jurczyk v. Jurczyk, 232 Cal.App.2d 270, 42 Cal.Rptr. 660 (1965); Jelly v. Jelly, 327 Mas. 706, 100 N.E.2d 681 (1951); Commonwealth ex rel. McCormack v. McCormack, 164 Pa.Super. 553, 67 A.2d 603 (1949); Rodda v. Rodda, 185 Or. 140, 200 P.2d 616, 202 P.2d 638 (1948), cert. den. 337 U.S. 946 (1949).

in a court of the state where she now resides. Is the court required under the full faith and credit clause to enforce the judgment as to the accrued alimony?

This question was answered by the Supreme Court in *Sistare v. Sistare*.[30] When these payments become due, a right to payment vests in the wife and has such finality as to be entitled to full faith and credit in a sister state. If, however, the accrued alimony is subject to modification according to the state law of the rendering court or the provisions of the decree, the decree is not entitled to full faith and credit. The state court in *Sistare* was required to render judgment for the accrued alimony even though the foreign decree could be modified prospectively as to future installments.[31]

In *Espeland v. Espeland*[32] a Washington alimony decree was held enforceable by the Montana court, not under the full faith and credit clause but under the principles of comity. The Court applied the *Sistare* ruling[33] which did not entitle the decree to full faith and credit because the Washington court had reserved the right to modify the accrued alimony.[34] But in the *Gibson* case[35] the Montana court refused to apply the concept of comity[36] or give full faith and credit to a New York alimony decree. Since the accrued alimony could be modified under New York law, the award did not come within the ambit of the full faith and credit requirement as stated in *Sistare*.[37]

The Revised Uniform Reciprocal Enforcement of Support Act (1968)[37a] will probably resolve the conflicting results of the *Gibson* and *Espeland* cases. Upon registration of a foreign support order,[38] it

> . . . shall be treated in the same manner as a support order issued by the court of this state. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner.[39] (emphasis added)

[30]218 U.S. 1 (1909).

[31]*Id.* For those jurisdictions upholding the Sistare rule, see Catlett v. Catlett, Okl. 412 P.2d 942 (1966); Bowling v. Bowling, 100 N.E.2d 725 (Ohio, 1951).

[32]Espeland v. Espeland, 111 Mont. 365, 109 P.2d 792 (1941).

[33]*Supra* note 30.

[34]The U.S. Supreme Court suggested in Griffin v. Griffin, 327 U.S. 220 (1946) that alimony decrees subject to retroactive modifications by the rendering court could be enforced in a sister state if the enforcing court had personal jurisdiction over both spouses and the defendant could present those defenses to which he'd be entitled in the rendering state.

[35]Gibson v. Gibson, 137 Mont. 528, 353 P.2d 344 (1960).

[36]*Id.* at 533.

[37]*Supra* note 30.

[37a]Repl. Vol. 7, R.C.M.1947, tit. 93, ch. 2601.

[38]Repl. Vol. 7, R.C.M.1947, § 93-2601-77.

[39]Repl. Vol. 7, R.C.M.1947, § 93-2601-80.

Under California's interpretation of this Act, a court is required to recognize and enforce foreign support decrees, whether subject to retroactive or prospective modification or not.[40]

III. CHILD CUSTODY

The modifiable nature of foreign decrees granting child custody has prohibited the strict application of the full faith and credit clause.[41] Other considerations, however, such as the best interests of the child, the State as *parens patriae,* and changed circumstances have permitted courts to bypass the full faith and credit requirement, ignore the foreign decree as *res judicata,* and modify the decree on the basis of new facts.[42]

Although child custody decrees rendered in an *ex parte* proceeding are not entitled to full faith and credit in another state,[43] the *Halvey* decision established that a sister state could modify a custody decree in the same manner as the rendering state without a violation to the full faith and credit clause.[44] Changed circumstances is the basis of modification of a foreign decree in many jurisdictions, including Montana.[45] New York relies on its role as *parens patriae* to determine the welfare of a child in its jurisdiction, regardless of its domicile or a foreign decree awarding custody.[46]

In determining the validity of a foreign decree in this state, the Montana Supreme Court has considered three factors in examining child custody jurisdiction: (1) *in personam* jurisdiction over the child's parents, (2) the child's domicile, and (3) the physical presence of the child within the rendering state.[47] The cases concerning recognition of foreign custody decrees in Montana fall within the following three categories.

[40]Worthley, *supra* note 28 and cases cited therein; Comment, *Interstate Recognition of Alimony Decrees,* 41 CALIF. L. REV. 692 (1953); Leverett v. Superior Court, 222 Cal. App.2d 126, 34 Cal.Rptr. 784 (1963) (once foreign decree established in California, California court has continuing jurisdiction to modify decree).

[41]In re Guardianship of Rodgers, 412 P.2d 744 (Ariz. 1966); Foster v. Foster, 9 Cal.2d 719, 68 P.2d 719 (1937).

[42]*Infra* notes 45, 46.

[43]May v. Anderson, 345 U.S. 528 (1952); Hazard, *May v. Andersons; Preamble to Family Law Chaos,* 45 VA. L. REV. 379 (1959).

[44]Halvey v. Halvey, 330 U.S. 610 (1946).

[45]Albright v. Albright, 45 N.M. 302, 115 P.2d 59 (1941); Slade v. Slade, 212 Ga. 758, 95 S.E.2d. 620 (1956); Cleeland v. Cleeland, 249 N.C. 16, 105 S.E.2d 114 (1958); In re Wren, 48 Cal.2d 159, 308 P.2d 329 (1957); Bloom v. Wilde, 42 Ohio Ops. 404, 59 Ohio L.Abs. 20, 94 N.E.2d 656 (1950); Tolman v. Wassom, 16 Utah2d 258, 399 P.2d 147 (1965); *infra* note 53. One rationale given was that custody proceedings under a divorce decree must be given full faith and credit in other states only as to the right of the custody of the child at the time and under the circumstances when the decree was originally rendered. Rodgers, *supra* note 41.

[46]Hahn v. Falce, 56 Misc.2d 427, 289 N.Y.S.2d 100 (1968) (citing New York cases as well as other jurisdiction that apply this approach). Also see the Kansas rule of "independent investigation", EHRENZWEIG, *supra* note 1, at 290.

[47]Application of Eaks, 129 Mont. 353, 360, 287 P.2d 19 (1955).

A. *Child brought to Montana after foreign decree rendered*

In *Nipp v. Nipp*,[48] the father brought his son to Montana where they established residence in violation of a Nebraska custody decree forbidding each parent to interfere with the visitation rights of the other. The mother persuaded the Nebraska court to modify the decree and grant custody of the son to her. She sought return of the child through a writ of *habeas corpus*. The father challenged the jurisdiction of the Nebraska court to modify the custody award when the child was domiciled in Montana. The Court held that the modification was binding in Montana because the jurisdiction of the Nebraska court continued under its original decree in face of the father's violation. In recognizing the foreign decree under full faith and credit, the Court insisted this was the only proper procedure. Otherwise Montana would be sitting in review of the Nebraska courts.[49] The Court, however, expressly reserved the right to determine the status of persons within its jurisdiction,[50] but obviously was not going to aid the abducting parent.[51] Apparently the *in personam* jurisdiction of the Nebraska court over the parents and the domicile of the child in Nebraska when the decree was rendered was the basis of recognizing the decree.

In 1955, the site of the child's domicile was controlling. In the *Enke* case,[52] a California court issued an interlocutory decree granting the mother custody of the children, as had been agreed to by both parents. Between the time after this decree was rendered and before the final decree was entered, she moved to Montana with the children. A few years later the father won a modification of the decree in California, gaining custody. The Montana court refused to recognize the California modification under full faith and credit since the children were lawfully domiciled in Montana at the time the modification was made, even through the mother had been represented by counsel and resisted the custody change.

The Court distinguished the *Nipp* and *Enke* decisions in *Corkill v. Cloninger*,[53] which involved a situation almost identical to that in *Enke*.

> Nipp recognizes that a court of a sister state lawfully possessing jurisdiction to modify such award retains continuing jurisdiction to modify such award even though such child subsequently becomes domiciled in another state. Enke denies jurisdiction to determine

[48]346 Mont. 425, 128 P. 590 (1912).

[49]*Id.* at 436.

[50]*Id.*

[51]Apparent application of the "clean hands" rule, coined by Ehrenzweig, where one parent abducts the child, and takes it to another state disobeying the foreign decree in hopes of getting the decree modified in another stat. EHRENZWEIG, *supra* note 1 § 88.

[52]*Supra* note 47.

[53]26 St. Rep. 271 (Mont. 1969).

> custody to any court outside the state of the child's then existing domicile. With this basic holding in Enke we cannot agree and expressly overrule it.[54]

The Court went on to hold that the California decree was entitled to full faith and credit in Montana on the basis of the continuing jurisdiction theory stemming from *Nipp*.[55] A change in the child's domicile, however, could vest the state of domicile with concurrent jurisdiction to modify the decree upon evidence of a change in circumstances.[56]

B. *Child brought to Montana before decree rendered*

In cases where one parent tries to defeat jurisdiction in a foreign court by bringing the children into Montana before the decree is rendered, Montana has consistently held that the custody award of the other state will be recognized under either the full faith and credit clause or the principles of comity.[57]

C. *Child brought to Montana by agreement of the parents*

Where the parent awarded custody by a foreign court voluntarily relinquishes custody to the other parent, Montana views the relinquishment as a waiver of the custodial parent's rights under the foreign decree.[58] If the children are domiciled in Montana, the courts here have concurrent jurisdiction to modify the decree if there is evidence of changed circumstances.[59] However, when there is insufficient evidence that the custodial parent voluntarily gave the children to the other parent, the Court has enforced the foreign court's decree, refusing to take jurisdiction to determine if the custody award should be modified.[60]

IV. CONCLUSION

It is evident that no hard and fast rule can be stated concerning the enforcement of the foreign divorce decree under the full faith and credit clause. The conflicting interests of two states seems to be waning in favor of the assurance individuals need that their marital status won't change by crossing state lines. Unless the foreign decree is recognized and enforced, the challenging party is forced to return to the courts of the rendering state which proves costly and increases litigation.

[54] *Id.* at 276.
[55] *Supra* note 48.
[56] *Supra* note 53, at 277.
[57] Talbot v. Talbot, 120 Mont. 167, 181 P.2d 148 (1947); Application of Butts, 129 Mont. 440, 289 P.2d 949 (1955).
[58] State v. District Court, Gallatin County, 132 Mont. 357, 318 P.2d 571 (1957).
[59] *Id.* citing Enke, *supra* note 47.
[60] Carroll v. White, 25 St.Rep. 451, 448 P.2d 15 (Mont. 1968).

By enacting the Revised Uniform Reciprocal Enforcement of Support Act (1968) and the Uniform Divorce Recognition Act (1963)[61] Montana is moving forward. The effect of these Uniform Laws, however, has yet to be determined.

SANDRA MUCKELSTON

[61] Repl. Vol. 7, R.C.M.1947, tit. 93, ch. 2601; R.C.M.1947, § 21-150.