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# AFFECTING THE PARENT-CHILD RELATIONSHIP WITHOUT JURISDICTION OVER BOTH PARENTS\*

by

Russell J. Weintraub\*\*

THIS Article focuses on subject matter jurisdiction to affect the parent-child relationship in the absence of personal jurisdiction over all claimants to the child's custody (typically without personal jurisdiction over both parents) and on problems of sister states' extension of full faith and credit to custody decrees. Two recent developments invite this focus: first is the Houston [First District] court of civil appeals' holding in *Dillon v. Medellin*;<sup>1</sup> second, closely related but not as recent, is 28 U.S.C. § 1738A, passed as part of the Parental Kidnaping Prevention Act of 1980,<sup>2</sup> which requires sister-state custody decrees to be enforced and not to be modified.

## I. FULL FAITH AND CREDIT TO CUSTODY DECREES

### A. *Barriers to Full Faith and Credit*

Two problems are encountered when urging full faith and credit to custody decrees. First, custody decrees are modifiable. Secondly, does due process forbid full faith and credit to a custody decree if the court rendering the decree did not have personal jurisdiction over both parents?

All custody decrees are modifiable in the light of changed circumstances.<sup>3</sup> While this modifiability is necessary to protect the best interests of the child, it is an embarrassment to urging full faith and credit to sister-state custody decrees. No state need give more full faith and credit to a

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1. 627 S.W.2d 737 (Tex. Civ. App.—Houston [1st Dist.] 1981), *writ ref'd n.r.e. per curiam*, 633 S.W.2d 786 (Tex. 1982). The author consulted with counsel for the father.

2. Pub. L. No. 96-611, § 8(b), 94 Stat. 3566, 3568-71 (1980) (codified in part at 28 U.S.C. § 1738A (Supp. IV 1980)).

3. *See, e.g.*, TEX. FAM. CODE ANN. § 11.05(a) (Vernon Supp. 1982-1983) (continuing jurisdiction over all matters in connection with the child).

judgment than that judgment would receive in the state that rendered it.<sup>4</sup> Because a custody decree can be modified in the original jurisdiction, a sister state may also modify the decree.<sup>5</sup> A court that is intent on changing a sister-state decree can, therefore, ostensibly find that circumstances have changed and then proceed to modify the decree in its discretion. This practice encouraged the national scandal of snatch, run, and relitigate.<sup>6</sup> Section 1738A of the Parental Kidnaping Prevention Act of 1980,<sup>7</sup> discussed in section II(B), addresses this problem.

The Supreme Court's ambiguous holding in *May v. Anderson*<sup>8</sup> addresses the issue of whether a court may defer to the custody decree of a sister state when that state did not have personal jurisdiction over both spouses. The Court had previously held in *Williams v. North Carolina*<sup>9</sup> that a valid ex parte divorce may be acquired in the state where one of the spouses, typically the petitioner, is domiciled. The state in which the divorce is obtained need not have personal jurisdiction over the other spouse, nor be the marital domicile, nor be the scene of any of the acts that are grounds for divorce. Although a valid ex parte divorce may be obtained, some reasons necessitate personal jurisdiction over the other spouse. Without personal jurisdiction over the absent spouse, that spouse may collaterally attack the divorce court's essential jurisdictional finding of domicile of the petitioner.<sup>10</sup> To obtain a valid money judgment for such items as alimony, support, and attorney's fees, personal jurisdiction must be exercised over the obligated spouse.<sup>11</sup> The initial determination and any termination of a spouse's rights to support require personal jurisdiction over that spouse.<sup>12</sup> *May v. Anderson* raises the question of whether personal jurisdiction over a spouse is necessary in order to render a custody decree that will withstand an assault by the absent spouse asserting a due process requirement of complete de novo review.<sup>13</sup>

*May* involved a Wisconsin divorce in which Wisconsin had been the marital domicile. The petitioner's wife left Wisconsin with the children and went to Ohio. The husband then brought suit in Wisconsin for divorce and petitioned for custody of the children. Wisconsin granted the husband a divorce and also gave him custody of the children. At that time Wisconsin did not have a long-arm statute that would give it personal jurisdiction over the recently departed wife.<sup>14</sup> The Wisconsin custody decree

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4. See *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614-15 (1947).

5. *Id.* at 613-14.

6. See, e.g., *People ex rel. Bukovich v. Bukovich*, 39 Ill. 2d 76, 233 N.E.2d 382 (1968).

7. 28 U.S.C. § 1738A(a), (c) (Supp. IV 1980).

8. 345 U.S. 528 (1953).

9. 317 U.S. 287 (1942) (often called *Williams I* to distinguish it from *Williams v. North Carolina*, 325 U.S. 226 (1945)).

10. *Esenwein v. Commonwealth ex rel. Esenwein*, 325 U.S. 279 (1945).

11. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 77(1) (1971).

12. See *Estin v. Estin*, 334 U.S. 541 (1948).

13. 345 U.S. 528 (1953).

14. See, e.g., TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1982-1983) (jurisdiction over nonresident). Wisconsin now has such a statute. WIS. STAT. ANN. § 801.05(11) (West Supp. 1982-1983).

was rendered, therefore, without personal jurisdiction over the wife. Nevertheless, armed with this decree and accompanied by an Ohio police officer, the husband obtained the children from their mother. Four years later the wife retained the children in Ohio after their visitation time had expired. The husband filed a petition for habeas corpus in Ohio to regain possession of the children. The Ohio courts, not wishing to encourage child snatching, ordered the return of the children. The United States Supreme Court reversed in an opinion that has continued to puzzle commentators.

The Court in *May v. Anderson* split 4-1-2-1 and its members wrote four opinions.<sup>15</sup> The case would, therefore, raise substantial questions as to where the court stood even if each individual opinion were a model of clarity. The plurality opinion by Justice Burton, however, is completely ambiguous on the crucial issue of whether or not Ohio can defer to the Wisconsin decree if it so desires, or whether the mother, as a matter of due process, is entitled to a de novo determination of custody because the court rendering the original decree did not have personal jurisdiction over her.<sup>16</sup> To add to the confusion, Justice Frankfurter, in his concurring opinion, assumes that the plurality opinion is simply deciding that full faith and credit does not require Ohio to enforce the Wisconsin decree, but that Ohio may defer to Wisconsin if it so wishes.<sup>17</sup> Justice Jackson, in a dissent in which he is joined by Justice Reed, assumes that the plurality holds that Ohio could not constitutionally defer to the Wisconsin decree.<sup>18</sup>

#### B. Section 1738A

The Supreme Court of the United States has not clarified whether Justice Frankfurter's or Justice Jackson's interpretation of *May v. Anderson* is correct, but the consensus adopts Justice Frankfurter's view. Section 1738A,<sup>19</sup> section 3 of the Uniform Child Custody Jurisdiction Act,<sup>20</sup> and

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15. Justice Burton wrote for the plurality of four. 345 U.S. at 528-35. Justice Frankfurter concurred. *Id.* at 535-36. Justice Jackson dissented in an opinion joined by Justice Reed. *Id.* at 536-42. Justice Minton dissented separately. *Id.* at 542-43. Justice Clark took no part. *Id.* at 535.

16. Compare the following two passages in Justice Burton's opinion:

The question presented is whether, in a habeas corpus proceeding attacking the right of a 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 when that decree is obtained by the father in an *ex parte* divorce action in a Wisconsin court which had no personal jurisdiction over the mother.

*Id.* at 528-29.

We find it unnecessary to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession.

*Id.* at 534 (footnote omitted).

17. *Id.* at 535-36.

18. *Id.* at 536-37.

19. 28 U.S.C. § 1738A (Supp. IV 1980).

20. UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 116, 122-23 (1979) [hereinafter cited as UCCJA § —, 9 U.L.A. at —].

section 11.045 of the Texas Family Code<sup>21</sup> all adopt the Frankfurter approach. Each of these enactments articulates bases for subject matter jurisdiction in custody cases that do not include personal jurisdiction over all claimants and requires enforcement of sister-state decrees rendered under similar jurisdictional bases.<sup>22</sup> Section 1738A uses the power of Congress under article IV, section 1 of the Constitution to "prescribe" "the effect" of state "public acts, records, and judicial proceedings."<sup>23</sup> Under this provision Congress can extend the scope of full faith and credit provided it does not violate due process. Thus, the constitutional validity of section 1738A turns on accepting Justice Frankfurter's view of *May v. Anderson*.

Section 1738A mandates that if a state has exercised custody jurisdiction on one of the bases set forth in the section, every other state must enforce and, with one exception, not modify that custody decree.<sup>24</sup> The section delineates four bases for custody jurisdiction, which superficially seem to be the same as the bases for jurisdiction in section 3 of the Uniform Child Custody Jurisdiction Act and section 11.045 of the Texas Family Code. The four bases are: (1) the forum is the "home state" of the child (the child has lived there with a person acting as parent for six months immediately preceding the exercise of jurisdiction);<sup>25</sup> (2) the child and at least one contestant have a significant connection with the forum and substantial evidence concerning the child's welfare is located there;<sup>26</sup> (3) the child is physically present in the forum, and an emergency has arisen requiring protection of the child's welfare;<sup>27</sup> and (4) no other state has one of the other three bases for jurisdiction, or if a state does have jurisdiction, it has deferred to the forum as a more appropriate site for custody determination.<sup>28</sup> One important difference between the jurisdictional bases in section 1738A and both the Uniform Act<sup>29</sup> and the Family Code<sup>30</sup> is that in section 1738A the significant connection basis can be exercised only if no other state qualifies as the child's home state.<sup>31</sup> This provision is probably an improvement over the Uniform Act and the Family Code because "significant connection" is not defined and has been used by forums outside the home state for extremely questionable custody modifications.<sup>32</sup>

The one exception in which section 1738A permits modification of a

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21. TEX. FAM. CODE ANN. § 11.045 (Vernon Supp. 1982-1983).

22. 28 U.S.C. § 1738A(a), (c) (Supp. IV 1980); UCCJA §§ 3, 14, 9 U.L.A. at 122-23, 153-54; TEX. FAM. CODE ANN. §§ 11.045, .053 (Vernon Supp. 1982-1983).

23. *See Yarborough v. Yarborough*, 290 U.S. 202, 215 n.2 (1933): "The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone."

24. 28 U.S.C. § 1738(a) (Supp. IV 1980).

25. *Id.* § 1738A(c)(2)(A).

26. *Id.* § 1738A(c)(2)(B).

27. *Id.* § 1738A(c)(2)(C).

28. *Id.* § 1738A(c)(2)(D).

29. UCCJA § 3, 9 U.L.A. at 122-23.

30. TEX. FAM. CODE ANN. § 11.045 (Vernon Supp. 1982-1983).

31. 28 U.S.C. § 1738A(c)(2)(B) (Supp. IV 1980).

32. *See infra* note 37.

sister-state custody decree after the sister state has exercised jurisdiction consistently with the Act is if the original court no longer has jurisdiction or has declined to exercise it.<sup>33</sup> Under section 1738A(d), however, a court that originally had jurisdiction consistent with the section retains that jurisdiction so long as its state law permits and so long as its state remains the residence of the child or of any contestant.<sup>34</sup> These provisions can give rise to anomalous results under certain fact situations. For example, assume a court at the marital domicile exercises jurisdiction consistently with section 1738A and grants custody to the mother. The mother and child then move out of the state and reside elsewhere. The father remains at the marital domicile. After five years have elapsed, the father brings a suit at the marital domicile to modify the custody decree. The original court exercises its continuing jurisdiction to modify its own decree and awards custody to the father. Under section 1738A the state where the mother and child have been living for five years would have to enforce and not modify that decree.

Two mitigating factors make this scenario unlikely. First of all, judges are not ogres, and a court in the marital domicile would be unlikely to exercise jurisdiction to modify under such circumstances. Moreover, in most states a statutory provision would prevent or discourage such an extreme exercise of the continuing jurisdiction to modify. In Texas section 11.052 of the Family Code prevents a court from exercising its continuing jurisdiction when the mother and child have resided elsewhere for more than six months.<sup>35</sup> Section 3 of the Uniform Child Custody Jurisdiction Act, unlike Family Code section 11.045, controls jurisdiction to modify as well as original jurisdiction.<sup>36</sup> Under the Uniform Act, therefore, one of the four bases for custody jurisdiction would have to persist in order for modification jurisdiction to be available.<sup>37</sup> Secondly, the exercise of jurisdiction to modify under the extreme circumstances of the hypothetical would probably violate due process,<sup>38</sup> as would section 1738A if applied to

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33. 28 U.S.C. § 1738A(f)(2) (Supp. IV 1980).

34. *Id.* § 1738A(c)(1), (d).

35. TEX. FAM. CODE ANN. § 11.052(a)(1) (Vernon Supp. 1982-1983).

36. UCCJA § 3(a), 9 U.L.A. at 122.

37. *Id.* § 3(a)(2), 9 U.L.A. at 122, does permit modification if "the child and at least one contestant, have a significant connection" with the forum and "substantial evidence concerning the child's" welfare is available. "Significant connection" is not defined, and thus this provision can be used to justify modification in questionable circumstances. *Cf. In re Marriage of Weinstein*, 87 Ill. App. 3d 101, 408 N.E.2d 952 (1980) (significant connection with forum justifies custody determination contrary to that reached at marital domicile); *Hadley v. Hadley*, 394 So. 2d 769 (La. App.) (forum acquires significant connection with child before it becomes child's home state), *cert. denied*, 399 So. 2d 622 (La. 1981).

UCCJA § 3(a)(3), 9 U.L.A. at 122, permits modification if the child is physically present in the forum and an emergency arises concerning the child's welfare. This provision can also be abused. *See Webb v. Webb*, 245 Ga. 650, 266 S.E.2d 463 (1980) (emergency provision used to permit modification of forum's prior decree after mother and child have resided in another state for over a year), *cert. dismissed for want of jurisdiction*, 451 U.S. 493 (1981), and *infra* part II, discussing *Dillon v. Medellin*, 627 S.W.2d 737 (Tex. Civ. App.—Houston [1st Dist.] 1981), *writ refused n.r.e. per curiam*, 633 S.W.2d 786 (Tex. 1982).

38. *Cf. Corliss v. Smith*, 560 S.W.2d 166 (Tex. Civ. App.—Tyler 1977, no writ) (due

mandate enforcement.

The strangest aspect of section 1738A is that it appears to be a blatant exercise of legislative overkill. At one time sister-state custody decrees were widely flouted,<sup>39</sup> but under the salutary influence of widespread criticism<sup>40</sup> and of the Uniform Child Custody Jurisdiction Act, the states have increasingly recognized sister-state decrees.<sup>41</sup> At least on the appellate level, finding a custody decision that encourages the tactics of snatch, run, and relitigate is difficult.<sup>42</sup> In 1983, three years after the date of its enactment, section 1738A creates more problems than it solves.

## II. *DILLON V. MEDELLIN*: PERSONAL VERSUS SUBJECT MATTER JURISDICTION

### A. *Relationship Between Personal and Subject Matter Jurisdiction in Custody Cases*

The civil appeals decision in *Dillon v. Medellin*<sup>43</sup> raises two issues: first, the distinction between personal and subject matter jurisdiction under the Texas Family Code in suits affecting the parent-child relationship; and secondly, the power of a Texas court to protect a child in an emergency when the managing conservator and the child have had their principal residence outside of Texas for over six months.

In *Dillon* a divorce was granted in Texas, the marital domicile, and the mother was designated managing conservator of the couple's only child. The mother moved to Louisiana with the child and remarried. After the mother and child had been living in Louisiana for two and one-half years, the father filed a petition in Texas to modify the custody decree in which he alleged that the child was being abused in Louisiana. The motion was filed while the child was still in Texas at the end of an annual visit with the father. The mother made a special appearance and asserted that under section 11.052 of the Family Code<sup>44</sup> the Texas court that rendered the original custody decree could not exercise its continuing jurisdiction to modify, because the mother and child had been living outside of Texas for more than six months. The father then amended his petition to request an original custody decree under section 11.045 of the Family Code.<sup>45</sup> The father alleged two grounds for jurisdiction: first, the significant connection

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process does not permit exercise of jurisdiction over mother to modify custody decree when mother had resided outside of state with the children for over three years).

39. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 5.3C (2d ed. 1980).

40. See, e.g., Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969).

41. See Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977).

42. But see *supra* note 37 (citing cases from Georgia, Illinois, and Louisiana).

43. 627 S.W.2d 737 (Tex. Civ. App.—Houston [1st Dist.] 1981), writ *ref'd n.r.e. per curiam*, 633 S.W.2d 786 (Tex. 1982).

44. TEX. FAM. CODE ANN. § 11.052(a)(1) (Vernon Supp. 1982-1983).

45. 627 S.W.2d at 739.

ground, because the child's visits constituted a significant connection between the child and Texas, and there was substantial evidence in the state concerning the child's welfare;<sup>46</sup> and secondly, the physical presence of the child coupled with an emergency affecting the child's welfare.<sup>47</sup> The trial court granted the father's petition under these provisions of section 11.045 and also under Family Code section 14.10(c),<sup>48</sup> which permits a temporary order in habeas corpus proceedings to protect the child. The Houston [First District] court of appeals reversed and ordered the father's petition dismissed for want of jurisdiction.<sup>49</sup> The court of appeals held that the exercise of jurisdiction over the mother violated due process despite the fact that the facts satisfied two provisions of the custody long-arm statute, Family Code section 11.051:<sup>50</sup> The child had been conceived in Texas,<sup>51</sup> and the mother had resided with the child in Texas.<sup>52</sup> The court of appeals also indicated that Louisiana was a more convenient forum to litigate issues concerning the child's welfare.<sup>53</sup> The Texas Supreme Court declined a full review on the ground that no reversible error was committed. The court took the unusual step, however, of issuing a per curiam opinion indicating it agreed with the court of appeals that Louisiana was a more appropriate forum, but expressly declining to rule whether the exercise of personal jurisdiction over the mother would violate due process.<sup>54</sup>

This result may well be right, but it is not for the reason given by the court of appeals that there was lack of personal jurisdiction over the mother. Personal jurisdiction over the mother is unnecessary for the exercise of subject matter jurisdiction under Family Code section 11.045, unless Justice Jackson was correct in his *May v. Anderson* dissent,<sup>55</sup> and the consensus is that he was not.<sup>56</sup> A court can, however, decline to exercise jurisdiction that it does have, and arguably *Dillon* raises a due process objection to a Texas court's exercise of jurisdiction to modify the original decree. Although the mother could not have been subjected to personal jurisdiction, the exercise of subject matter jurisdiction would have required her, as a practical matter, to litigate the charges of abuse in a very inconvenient forum.

### *B. Protecting a Child When Continuing Jurisdiction Cannot Be Used*

What can a Texas court do in a case like *Dillon* when there is an allegation of serious danger to a child present in Texas, but the child and the managing conservator have resided outside Texas for more than six

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46. TEX. FAM. CODE ANN. § 11.045(a)(2)(A) (Vernon Supp. 1982-1983).

47. *Id.* § 11.045(a)(2)(B).

48. *Id.* § 14.10(c).

49. 627 S.W.2d at 737.

50. TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1982-1983).

51. *See id.* § 11.051(1).

52. *See id.* § 11.051(3).

53. 627 S.W.2d at 741.

54. 633 S.W.2d 786, 787 (Tex. 1982).

55. *See supra* note 18 and accompanying text.

56. *See supra* notes 19-22 and accompanying text.

months? The Texas court can grant a temporary order to protect the child under Family Code section 14.10(c)<sup>57</sup> if the proceeding is for habeas corpus and under Family Code section 11.11 if it is not.<sup>58</sup> The Texas court should then transfer the case to the state where the child and managing conservator have been residing to determine the merits of the abuse charges. The Texas Supreme Court recognized this power in *Marshall v. Wilson*.<sup>59</sup> In *Marshall* a Texas divorce was granted and the mother was made managing conservator. After the mother and child had lived outside of Texas for six years, the father took the child from Tennessee and brought her to Texas. The mother filed a petition for habeas corpus in Texas. The Supreme Court of Texas held that the mother was entitled to prevail under Family Code section 14.10(d)<sup>60</sup> "by mere proof that she has an order making her the managing conservator."<sup>61</sup> The court, however, expressly noted that "[t]he record is devoid of evidence of 'a serious immediate question concerning the welfare of the child.'"<sup>62</sup>

### III. CONCLUSION

*Dillon* illustrates the subtle relationship between personal and subject matter jurisdiction in custody cases. Despite the doubts originally raised by *May v. Anderson*, a court almost certainly has power to exercise subject matter jurisdiction to affect the parent-child relationship without personal jurisdiction over both parents. Equally certain is that another state does not violate due process when it enforces that decree against the absent parent. The exercise of this subject matter jurisdiction in a forum inconvenient for the nonresident parent, however, may violate due process. This violation is most likely to occur when subject matter jurisdiction is exercised to modify a prior decree that gave custody to the parent over whom the modifying court does not have personal jurisdiction.

Cases like *Dillon* reveal the awesome complexities of jurisdictional problems and warn against making broad assertions concerning clear distinctions between personal and subject matter jurisdiction. Personal and subject matter jurisdiction are different, but they are also closely related. The exact nature of this relationship is one that will not cease to engross the family law practitioner.

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57. TEX. FAM. CODE ANN. § 14.10(c) (Vernon Supp. 1982-1983).

58. *Id.* § 11.11.

59. 616 S.W.2d 932 (Tex. 1981).

60. TEX. FAM. CODE ANN. § 14.10(d) (Vernon Supp. 1982-1983).

61. 616 S.W.2d at 934.

62. *Id.* (quoting TEX. FAM. CODE ANN. § 14.10(c) (Vernon Supp. 1982-1983)).