University of Dayton Law Review

Volume 7 | Number 1 Article 14

1981

Child Custody: Substantial Justice toward Children or Procedural Purity for Parents

Wayne Everett Waite
University of Dayton

CHILD CUSTODY: SUBSTANTIAL JUSTICE TOWARD CHILDREN OR PROCEDURAL PURITY FOR PARENTS?—*Pasqualone v. Pasqualone,* 63 Ohio St.2d 96, 406 N.E.2d 1121 (1980).

INTRODUCTION

Under the current state of child custody law, children are often transported from one state to another while their parents battle for the right to enjoy permanent custody.[1] Even after custody has been awarded to one of the parties, the stability of the child's future may still be uncertain. The Uniform Laws Commission asserts that those who lose a court battle over custody are frequently unwilling to accept the judgment of the court and will abduct the child or fail to return him after a visit.[2] Even though these parents have illegally abducted their children, they often relitigate the matter in another jurisdiction in an attempt to find a judge who will grant their plea for custody.[3]

In response to this confusion, the Ohio Legislature[4] adopted the Uniform Child Custody Jurisdiction Act (UCCJA).[5] This Act was designed to remedy the practices of "self-help" and "seize-and-run" which became more beneficial to parents than the orderly processes of the law.[6]

> Underlying the entire Act is the concept that to avoid jurisdictional conflicts and confusions which have done serious harm to innumerable children, a court in one state must assume major responsibility to deter-

---

1. UNIFORM CHILD CUSTODY JURISDICTION ACT (Commissioners' Prefatory Note).

2. *See* Foster, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act,* 28 HAST. L.J. 1011 (1977) [hereinafter cited as Foster].

Although child snatching has always been illegal, new federal legislation has been passed which may curb the illegal removal of children. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611 (1981). This Act requires that state courts give full faith and credit to the custody decrees of other states. Furthermore, the bill declares it to be congressional intent that the FBI treat parents in "illegal custody" of their children as violators of the criminal code section on interstate flight to avoid prosecution. 18 U.S.C. § 1073 (1976).

3. UNIFORM CHILD CUSTODY JURISDICTION ACT (Commissioners' Prefatory Note).

4. On October 25, 1977, the Ohio Legislature adopted the Uniform Child Custody Jurisdiction Act, OHIO REV. CODE ANN. §§ 3109.21-.37 (Page 1980). For an analysis of the Act see Geron, *A Brief Analysis of the Uniform Child Custody Jurisdiction Act,* 51 OHIO BAR 347 (1978); MILLIGAN, OHIO PRAC. § 4047.02 (1981).

5. UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 1-28.

6. UNIFORM CHILD CUSTODY JURISDICTION ACT (Commissioners' Prefatory Note).

> mine who is to have custody of a particular child; that this court must reach out for help of courts in other states in order to arrive at a fully informed judgment which transcends state lines and considers all claimants, residents, and non-residents, on an equal basis and from the standpoint of the welfare of the child.[7]

In 1980, the Ohio Supreme Court had the opportunity to interpret the Act in the case of *Pasqualone v. Pasqualone*. This casenote involves three general issues which are germane to child custody disputes. First, should the final determination of custody be irresolute because a defendant parent refuses to litigate the matter in a particular jurisdiction? Second, do amendable custody decrees further the child's best interest? Third, should a court direct its attention towards insuring substantial justice for the defendant parent, or should the court's primary concern be focused on the future welfare of the child?

FACTS OF THE CASE

Bridget and David Pasqualone were married in Ohio on December 20, 1975, two months after the birth of their daughter, Jennifer. After experiencing difficulties during the first two years of marriage,[8] the parties executed a separation agreement giving Bridget custody of Jennifer.[9] The agreement stipulated that Bridget was not to remove the child from Indiana or Ohio without David's written consent.[10] Nonetheless, on Feburary 12, 1978, Bridget and Jennifer moved from Indiana to Illinois without first obtaining David's permission.[11] On July 5, 1978, Bridget filed for dissolution of marriage and custody of the child in the Circuit Court of Cook County, Illinois.[12] Eight days later, the trio met at an airport in Fort Wayne, Indiana. At that time David took Jennifer for a visit

---

7. *Id.*

8. In February 1976, Bridget and Jennifer moved to Wickliffe, Ohio to live with David's parents while David completed his education in Cincinnati. Upon completion of his schooling, David rejoined his wife and child. The family unit continued to reside together until July 1977, when David and Bridget were separated.

9. Usually separation agreements are valid as long as they do not tend to induce divorce or separation. H. CLARK, LAW OF DOMESTIC RELATIONS 326 (1968). Even though the parties cannot control the courts in the granting or denial of divorce, they may attempt to control the financial incidents of litigation. Frequently, the major issue of enforceability of separation agreements focuses upon the degree to which the courts are willing to accept the arrangements made by the parties. For an excellent treatment of this topic, see Comment, *Divorce Agreements: Independent Contract or Incorporation in Decree*, 20 U. CHI. L. REV. 138 (1952).

10. Brief for Appellee at 1, Pasqualone v. Pasqualone, 63 Ohio St. 2d 96, 406 N.E.2d 1121 (1980).

11. *Id.*

12. *In re* Pasqualone, No. 78 D 15817 (Circuit Court of Cook County, Illinois, August 16, 1978) (judgment for dissolution of marriage).

to Ohio which was to last for two weeks. He later refused to surrender Jennifer.[13] On July 15, 1978, David received "actual notice"[14] of Bridget's Illinois action. Two days later, he filed for divorce and custody of Jennifer in Ohio.[15]

In October 1978, the Illinois court granted a dissolution of the marriage and issued an order granting Bridget permanent custody of Jennifer. With the Illinois judgment in hand, Bridget filed a writ of habeas corpus[16] to secure custody of Jennifer in the Juvenile Court Division of the Court of Common Pleas, Lake County, Ohio. The Ohio court denied Bridget's plea for habeas corpus on jurisdictional grounds and ordered that permanent custody of Jennifer be awarded to David Pasqualone.[17] On appeal, the Lake County Court of Appeals affirmed and the case was then brought before the Ohio Supreme Court.[18]

DECISION OF THE COURT

The Supreme Court of Ohio affirmed the lower court's denial of habeas corpus to Bridget, but reversed the decision granting permanent custody of Jennifer to David.[19] First, the court held David's failure to inform the Ohio court of Bridget's action for custody in Illinois, as re-

13. *Id.*

14. For purposes of this casenote, "actual notice" is a term which designates that a litigant has received information that informs him that a suit is pending. Moreover, it focuses upon the subjective knowledge of the defendant rather than on the procedural prerequisites used to determine when technical notice has been served. Although actual notice is usually not recognized as legally sufficient for purposes of due process, courts seldom explain why actual notice is insufficient. It is not clear why a defendant who admits actual knowledge of a suit and has been given an opportunity to be heard, but chooses not to appear, should have his interests protected at the expense of an innocent child.

15. Brief for Appellee at 2.

16. *Ex rel.* Pasqualone, No. 78 JUV 1933 (Cook County Juvenile Court, Ohio, filed November 9, 1978) (writ of habeas corpus). One of the most useful remedies through which equity exercises its power to protect children is the writ of habeas corpus. H. CLARK, LAW OF DOMESTIC RELATIONS 578 (1968). This is the mechanism through which appellant, Bridget Pasqualone, sought custody of Jennifer. Historically, habeas corpus was used to obtain the release of an individual wrongfully held for a criminal offense. *See In re* Burrus, 136 U.S. 586 (1890). Although the action used to regain custody is analogous to the older criminal writ, "child custody habeas" affords the court broader discretion. *See* New York Foundling Hosp. v. Gahi, 203 U.S. 429 (1906).

17. *Ex rel.* Pasqualone, No. 78 JUV 1933 (Lake County Juvenile Court, Ohio, filed November 9, 1978).

18. Notice of Appeal, Appellate Court Docket No. CA 7-085, Pasqualone v. Pasqualone, 63 Ohio St. 2d 96, 406 N.E.2d 1121 (1980).

19. Although David was not granted permanent custody on appeal, the court's determination that David would supply the best interest of the child appears to favor him if another suit is brought under OHIO REV. CODE ANN. § 3109.21-.37 (Page 1980).

quired by Ohio's version of the UCCJA,[20] did not mandate that Bridget's writ for habeas corpus be granted.[21] Ohio's version of the UCCJA requires litigants to inform the court of proceedings pending in other jurisdictions.[22] This requirement opens direct lines of communication between the courts of different states to prevent jurisdictional conflict and to promote judicial assistance in custody cases.[23] Because the disclosure requirements[24] had not been met, the Ohio Supreme Court refused to grant David permanent custody of Jennifer. Second, the court ruled that presence of the wife and child in Illinois was insufficient to give Illinois personal jurisdiction over the father. Because the Illinois decision was rendered without personal jurisdiction over David Pasqualone, Ohio courts were not bound to apply the "full faith and credit" clause[25] of the United States Constitution.[26] Third, since the Illinois legislature had only adopted a small segment of the UCCJA,[27] the two states' custody laws were not substantially similar;[28] therefore, Ohio was not compelled by its own statute to acquiesce in, or to enforce, the Illinois decree awarding Bridget custody.[29] Although not germane to the *Pasqualone* litigations, it is

20. Ohio's version of the Act may be found at OHIO REV. CODE ANN. § 3109.21-.37 (Page 1980).

21. Pasqualone v. Pasqualone, 63 Ohio St. 2d 96, 406 N.E.2d 1121 (1980).

22. OHIO REV. CODE ANN. §§ 3109.24, .27 (Page 1980). These sections require that litigants inform the court of all suits pending in other jurisdictions concerning the custody of the child in question.

23. *Id.*

24. *Id.*

25. U.S. CONST. art. IV, § 1, cl. 1. For a general discussion of this topic, see Note, *Ford v. Ford: Full Faith and Credit to Custody Decrees?*, 73 YALE L.J. 134 (1963).

26. U.S. CONST. art. IV, § 1, cl. 1.

27. The Illinois version was similar to OHIO REV. CODE ANN. § 3109.22 (Page 1980).

28. The Ohio Uniform Child Custody law provides for reciprocal enforcement of foreign decrees. Nonetheless, if the forum which rendered the original decree does not have jurisdictional prerequisites substantially in accordance with Ohio law, the Ohio Courts are not bound by the decree. OHIO REV. CODE ANN. § 3109.31 (Page 1980). Because the Illinois legislature had only adopted a small segment of the UCCJA equivalent to OHIO REV. CODE ANN. § 3109.22 (Page 1980), the *Pasqualone* court found the two states' custody provisions were not "substantially similar" and, therefore, not reciprocally binding.

29. OHIO REV. CODE ANN. § 3109.24 (Page 1980) specifically requires the judge to determine whether his court is the best forum in which to litigate the matter. Because Illinois had no corresponding provision, the *Pasqualone* court interpreted this omission to be determinative of the dissimilarity of the two statutes. As a result, the court ruled that enforcement of the Illinois decree was not mandated by Ohio statutory law. On September 11, 1979, a more complete version of the UCCJA became effective in Illinois. ILL. ANN. STAT. ch. 40, §§ 2101-2126 (Smith-Hurd 1980). The 1980 Act is substantially similar to Ohio law. Hopefully, future custody disputes between Illinois and Ohio will not incur many of the barriers faced by the *Pasqualone* litigants.

important to note that Illinois has subsequently promulgated a more complete version of the UCCJA which is substantially similar to Ohio law.[30] Fourth, the court ruled that Juvenile Court of Lake County, Ohio had not erred in its determination that David would provide an environment which was in the best interest of the child, Jennifer.

Even though the court determined that David would supply an environment in Jennifer's best interest, it did not grant him permanent custody. In summary, David was denied custody because he failed, in violation of Ohio's disclosure requirements, to inform the court of the Illinois decision. Bridget was also denied custody because the judgment upon which her habeas corpus writ was issued was obtained without proper personal jurisdiction over David. Because no one was granted permanent custody, the status of the child's custody may still be unsettled.

A. Historical Development of Child Custody Jurisdiction

To better understand the current requirements for proper jurisdiction, a brief history of its development is in order. The landmark case of *Pennoyer v. Neff*[31] provides a starting point for modern civil procedure. The case involved a piece of property owned by a non-resident of the state. When a dispute arose over who had proper title, the state court ruled in favor of the resident who was personally before the court. Service of process was never received by the non-resident, nor did he appear before the court. On appeal, the Supreme Court held that as long as the person or property at issue remained outside of the state's territorial boundaries, it would not be subject to the soveriegn power of the state.[32] *Pennoyer* is also relevant to child custody law because of the distinction the Court drew between actions which are "in rem"[33] and those which are "in personam."[34] The following quote depicts the distinction as it applies to child custody litigation:

> The difference between a proceeding involving the status, custody and support of children and one involving adjudication of property rights is too apparent to require elaboration. In the former, courts are no longer concerned primarily with the proprietary claims of the contestants for the "*res*" itself. Custody is viewed not with the idea of adjudicating rights *in* the children, as if they were chattels, but rather with the idea of making

30. See ILL. ANN. STAT. ch. 40, §§ 2101-2126 (Smith-Hurd 1980).
31. 95 U.S. 714 (1877).
32. *Id.* at 724.
33. Historically, in rem jurisdiction was invoked when the ownership or status of property was involved. M. GREEN, BASIC CIVIL PROCEDURE 5 (2d ed. 1979).
34. In personam jurisdiction requires that the court not only have jurisdiction over the res, but also over the parties of the dispute. *Id.* at 4.

> the best disposition possible for the welfare of the children. To speak of a court's cutting off a mother's right to custody of her children, as if it raised problems similar to those involved in cutting off her rights to a plot of ground, is to obliterate these obvious distinctions.[35]

Because the interest in a child is "in-personam" the forum which litigates a child custody dispute must have jurisdiction over the parties who have a personal interest in the outcome of the dispute.[36] In *International Shoe Co. v. Washington*,[37] the Supreme Court pronounced that if a defendant was not within the territory of the state, due process required that he have certain "minimum contacts" with the adjudicating forum before action could be taken against him.[38] While the requirements of minimum contacts,[39] or territorial jurisdiction,[40] safeguard the interests of parents, they have been severely criticized as inappropriate in child custody disputes.[41] As long as a parent is free from a court's jurisdictional authority and can avoid minimum contacts with the geographical territory, the status of the child's custody may continue to be undetermined.[42] Not only does this result leave the child's status undetermined and, therefore, his future unsettled, it may also invite child-snatching practices by "professionals" who enter a jurisdiction, remove the child, and place it with a parent outside of the jurisdiction of the state in which the other parent resides.[43] Certainly this scenario does not have the attributes of fair play. Nonetheless,

---

35. May v. Anderson, 345 U.S. 528, 541 (1953) (Jackson, J., dissenting).
36. 345 U.S. at 533.
37. 326 U.S. 310 (1945).
38. *Id.* at 316.
39. The requirement of minimum contacts is based on the rationale that a litigant must have some relationship to a state before it is fair for that state to issue a judgment against him. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).
40. Historically, courts acquired jurisdiction over the person of the defendant by arresting him and keeping him in the dungeon pending the outcome of the case. As long as the defendant was within the territorial jurisdiction of the arresting officer, the court had power over the defendant. *See* M. GREEN, BASIC CIVIL PROCEDURE 32 (2d ed. 1979).
41. *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1232 (1969).
42. *Id.* It is generally agreed that a child's welfare demands stability and regularity. "If he is continually being transferred from one parent to the other by conflicting court decrees, he may be a great deal worse off than if left with one parent, even though as an original proposition some better provision could have been made for him." H. CLARK, LAW OF DOMESTIC RELATIONS 326 (1968). *See also* Application of Lang, 9 A.D.2d 401, 409, 193 N.Y.S.2d 763, 771 (1959) (generally, the custody of children is to be established on a long term basis).
43. *See* Foster, *supra* note 2.

traditional notions of fair play and substantial justice[44] are the touchstones used to justify the requirement that a potential defendant have minimum contacts with a jurisdiction before he is subject to its authority.[45] In effect, the rights of parents are protected by this rule, but the legal custody of children is often left unsettled.[46] By refusing to enforce a foreign judgment on the grounds that it would be unfair to the defendant, the courts create a substantial injustice to the child by depriving it of the stability and certainty necessary for healthy child-rearing.[47]

Much of this result is directly attributable to *May v. Anderson*[48] which held a custody order is not entitled to full faith and credit if it was issued without personal jurisdiction over the defendant. In *May*, both parties were residents of Wisconsin until they experienced marital difficulties. Together they agreed that the wife should move to Ohio with the children to plan her future course while the husband remained in Wisconsin. After the husband learned his wife did not intend to return, he filed in Wisconsin for divorce and custody of the children. After receiving favorable judgments in Wisconsin, he filed a petition for habeas corpus in an Ohio state court. The petition was granted on the grounds that the Wisconsin decree was entitled to full faith and credit in Ohio. On appeal, five members of the Supreme Court reversed holding that the Wisconsin decree was not entitled to full faith and credit because it was issued without personal jurisdiction over the defendant mother.[49] *May* suggests that any person who is not served with process in the state or is otherwise not technically under the personal jurisdiction of the court, cannot be bound by its custody decree.[50] In essence, *May* protects the defendant's interest in the child, but not the child's interest in its future.

A major portion of the *Pasqualone* briefs focused upon the current vitality of *May* as it relates to the issue of personal jurisdiction. David

44. "Fair play and substantial justice" is an eloquent phrase; nonetheless, its utility as a yardstick to measure jurisdiction is questionable. The basic question is "how minimum may the contacts be without becoming constitutionally offensive?" M. GREEN, BASIC CIVIL PROCEDURE 38 (2d ed. 1979).

45. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

46. *See* Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379, 391 (1958).

47. *See generally* Bodenheimer, *supra* note 41; H. CLARK, LAW OF DOMESTIC RELATIONS 326 (1968). *See also* Wheeler v. District Court, 186 Colo. 218, 526 P.2d 658 (1974) (purpose of Uniform Child Custody Jurisdiction Act is to eliminate jurisdictional "fishing" and thus prevent emotional harm and injustice to the children involved).

48. 345 U.S. 528 (1953).

49. *Id.*

50. *Id. See also* Shaffer v. Heitner, 433 U.S. 186 (1977); International Shoe v. Washington, 326 U.S. 310 (1945).

relied on the *May* decision because of factual similarities between his own situation and the mother to whom the following quotation refers:

> [W]e have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam* . . . "It is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment *in personam* to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."[51]

David utilized this rationale to argue that since the Illinois court did not have jurisdiction over his person, the Ohio courts were not bound to enforce the Illinois decision.[52]

Another interpretation of the *May* decision was advanced by the Uniform Laws Commission[53] as amicus curiae.[54] The Commission ad-

---

51. May v. Anderson, 345 U.S. 528, 533 (1953) (quoting Baker v. Baker, Eccles & Co., 242 U.S. 394, 401 (1917)).

52. 345 U.S. at 533; *see also* 242 U.S. at 401.

53. The Uniform Laws Commission is comprised as follows:

> The National Conference of Commissioners on Uniform State Laws is composed of Commissioners from each of the states, the District of Columbia and Puerto Rico. In thirty-three of these jurisdictions the Commissioners are appointed by the chief executive acting under express legislative authority. In the other jurisdictions the appointments are made by general executive authority. There are usually three representatives from each jurisdiction. The term of appointment varies, but three years is the usual period. The Commissioners are chosen from the legal profession, being lawyers and judges of standing and experience, and teachers of law in some of the leading schools. They are united in a permanent organization, under a constitution and by-laws, and meet in Annual Conference in the same vicinity as the American Bar Association, usually for five or six days immediately preceding the meeting of that Association. The record of the activities of the National Conference, the reports of its committees, and its approved acts are printed in the Annual Proceedings.
>
> The object of the National Conference as stated in its constitution, is "to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." The National Conference works through standing and special committees. In recent years all proposals of subjects for legislation are referred to a standing Committee on Scope and Program. After due investigation, and sometimes a hearing of parties interested, this committee reports whether the subject is one upon which it is desirable and feasible to draft a uniform law. If the National Conference decides to take up the subject, it refers the same to a special committee with instructions to report a draft of an act. With respect to some of the more important acts, it has been customary to employ an expert draftsman. Tentative drafts of acts are submitted from year to year and are discussed section by section. Each uniform act is thus the result of one or more tentative drafts subjected to the criticism, correction, and emendation of the Commissioners, who represent the experience and judgment of a select body of lawyers chosen from

vanced its position that *May* was moot.[55] Its brief suggests that the UCCJA has usurped the domain of the *May* rationale and is the conclusive authority for custody litigation.

> The UCCJA is in accord with the common interpretation of the inconclusive decision in *May* . . . Under this interpretation a state is permitted to recognize a custody decree of another state regardless of lack of personal jurisdiction, so long as the due process requirements of notice and opportunity to be heard have been met.[56]

By allowing a state to recognize a custody decree of another state even though it was granted without personal jurisdiction, the UCCJA attempts to discourage continuing controversies over child custody. Similarly, it emphasizes the importance of stable home environments, secure family relationships, and the finality of judgments.[57]

B. *Policy Consideration Surrounding Amendability of Custody Decrees*

The full faith and credit clause[58] of the United States Constitution requires interstate recognition of sister state judicial decrees[59] but contains no clause limiting its operation to "final"[60] decrees. Nonetheless, the requirement of finality has been judicially imposed.[61] Courts have reasoned that decrees relating to child custody are subject to modification upon a showing of changed circumstances[62] and are, in this sense, non-final.[63] Since the original forum may modify a previous custody

---

every part of the United States. When finally approved by the National Conference, the uniform acts are recommended for general adoption throughout the jurisdiction of the United States and are submitted to the American Bar Association for its approval.

UNIFORM CHILD CUSTODY JURISDICTION ACT (U.L.A.), Publisher's Explanation.

54. Brief for Amicus Curiae, Pasqualone v. Pasqualone, 63 Ohio St. 2d 96, 406 N.E.2d 1121 (1980).

55. *Id.* at 20.

56. UNIFORM CHILD CUSTODY JURISDICTION ACT § 13, Commissioners' Note.

57. See note 42 *supra*.

58. U.S. CONST. art. IV, § 1, cl. 1.

59. *See* Barber v. Barber, 323 U.S. 77, 86 (1944) (Jackson, J., concurring).

60. *See* Fostor & Freed, *Modification, Recognition and Enforcement of Foreign Alimony Orders*, 11 CAL. W.L. REV. 280, 281 (1975).

61. *See generally Id.*; H. CLARK, LAW OF DOMESTIC RELATIONS 325 (1968).

62. The rationale used to justify modification of a custody decree because of changed circumstances is based on the concept that the court should insure that the child's best interests are met. If circumstances change, the interest of the child may no longer be served by the original situation. For a case which follows this reasoning, *see* Halvey v. Halvey, 330 U.S. 610, 612 (1947).

63. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 325 (1968).

decree, it is equally permissible for another forum to do so without violating any issues of full faith and credit.[64]

In *Halvey v. Halvey*,[65] the Supreme Court held that if the court of the state which rendered the judgment had no jurisdiction over the person or the subject matter, the jurisdictional infirmity is not saved by the full faith and credit clause.[66] The Halveys were married in 1937 and lived together in New York until 1944 when marital troubles developed. Mrs. Halvey left home with the child and went to Florida to establish residence there. In 1945, she filed for divorce in Florida. Mr. Halvey never received personal service of process nor did he appear in the action. The day before the Florida decree was granted, however, Mr. Halvey took the child back to New York without the knowlege or approval of his wife. After obtaining the custody decree from Florida, Mrs. Halvey brought a habeas corpus proceeding in New York. Instead of simply enforcing the Florida decree, the New York court modified it on the basis that the Florida court did not see Mr. Halvey nor did they hear any evidence presented on his behalf concerning his fitness or his claim to "enjoy the society and association" of his son.[67] So far as the full faith and credit clause "was concerned," whatever the Florida court could do in modifying the decree, the New York court was also permitted to do.[68]

In his dissenting opinion, Mr. Justice Rutledge recognized the possible ramifications of the frequent relitigation that was implicitly authorized by the *Halvey* decision. In his opinion, the practice of continuous relitigation "hardly can be thought conducive to the child's welfare."[69] The *Halvey* doctrine, along with the assumption that children need custody decrees which may be freely reopened, encourages relitigation by individuals who have lost the first round of a custody fight.[70]

Although there may be parental support for such a practice, the welfare of a child is not improved by frequent changes in custody.[71] In order to assure stability of custody arrangements and continuity of a family concept, children may require the constitutional protection of

64. U.S. CONST. art. IV, § 1, cl. 1. See note 42 *supra*.
65. 330 U.S. 610, 614 (1947).
66. *Id.* at 614.
67. *Id.* at 613-14.
68. *Id.*
69. *Id.* at 619.
70. *See* Bodenheimer, *supra* note 41, at 1211.
71. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 325, 326 (1968). *See also* note 42 *supra*, which deals with the effects of frequent shifts in custody.

the full faith and credit clause[72] even more than adults.[73] Even though constitutional protection may have been warranted in light of an infant's inability to safeguard his own rights,[74] it was not offered by the *Halvey* decision.[75]

C. *Construction of UCCJA to Further Child's Interest*

Much of the *Pasqualone* case centers on the proper judicial interpretation of the UCCJA. The general purposes of this Act are:

> (1) To avoid jurisdictional competition and conflict with courts of other states in matters of child custody . . . ;
> (2) To 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) To 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 courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
> (4) To discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
> (5) To deter abductions and other unilateral removals of children undertaken to obtain custody awards;
> (6) To avoid re-litigation of custody decisions of other states in this state insofar as feasible;
> (7) To facilitate the enforcement of custody decrees of other states;
> (8) To promote and expand the exchange of information and other

---

72. U.S. CONST. art. IV, § 1, cl. 1.

73. Bodenheimer, *supra* note 41, at 1212.

74. Because of an infant's mental incapacity to make legal decisions to safeguard his rights, he is often represented by independent counsel. In response to this need, courts often appoint a guardian *ad litem* to prosecute or defend a pending suit on behalf of the child.

In the *Pasqualone* case, *ad litem* counsel for the child deferred her time allocation in the oral argument to the Uniform Laws Commission as amicus curiae. However, the court did not take the responsibility of insuring that amicus was heard. As a result, the positions of neither *ad litem* counsel nor *amicus curiae* were heard on appeal. Interview with Charles Geron, Attorney for Amicus Curiae on behalf of the Ohio State Board of Uniform Laws and the National Conference of Commissions on Uniform State Laws, Pasqualone v. Pasqualone, 63 Ohio St. 2d 96, 406 N.E.2d 1121 (1980), in Xenia, Ohio (October 1980). (Mr. Geron's assistance and insight have been very helpful and are greatly appreciated by the author).

75. Halvey v. Halvey, 330 U.S. 610 (1947).

forms of mutual assistance between the courts of this state and those of other states concerned with the same child;
(9) To make uniform the law of those states which enact it.[76]

In the past, competition and conflict have resulted in the shifting of children from state to state with harmful effects on their well-being.[77] A court of one state may award custody to the father while another jurisdiction may order that custody be granted to the mother.[78] In situations such as this, the litigants have no way to know whom they should obey. Even more serious, a custody decree made in one state one year is often overturned in another jurisdiction the next year and the child is then handed over to another family.[79] Because the law has been so unsettled, physical presence of the child has given a litigant a large advantage.[80] It is not surprising, then, that custody claimants have tended to take the law into their own hands; they have resorted to self help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child.[81]

The Ohio version of the UCCJA provides for reciporcal enforcement of foreign decrees to help remedy this confusion.[82] Nonetheless, if the forum which rendered the original decree does not have jurisdictional prerequisites substantially in accordance with Ohio law, the Ohio courts are not bound by the decree.[83] Because the Illinois legislature had only adopted a small segment of the UCCJA,[84] the *Pasqualone* court found that the two states' custody provisions were not "substantially similar" and, therefore, not reciprocally binding. Ohio law specifically requires the judge to determine whether his court is the best forum in which to litigate the matter.[85] Because Illinois had no corresponding provision, the *Pasqualone* court interpreted this omission to be determinative of the dissimilarity of the two statutes. As a

76. UNIFORM CHILD CUSTODY JURISDICTION ACT § 1.
77. See notes 1-3 *supra*.
78. *See* Stout v. Pate, 209 Ga. 786, 75 S.E.2d 748 (1953) and Stout v. Pate, 120 Cal. App. 2d 699, 261 P.2d 788 (1953), *cert. denied in both cases*, 347 U.S. 968 (1954); Moniz v. Moniz, 142 Cal. App. 2d 527, 298 P.2d 710 (1956); and Sharpe v. Sharpe, 77 Ill. App. 2d 295, 222 N.E.2d 340 (1966).
79. *See* Thomas v. Gillard, 203 Pa. Super. 95, 198 A.2d 377 (1964); *In re* Guardianship of Rodgers, 100 Ariz. 269, 413 P.2d 774 (1966); Berlin v. Berlin, 239 Md. 52, 210 A.2d 380 (1965); Berlin v. Berlin, 21 N.Y.2d 371, 235 N.E.2d 109 (1967), *cert. denied*, 393 U.S. 840 (1968); and Batchelor v. Fulcher, 415 S.W.2d 828 (Ky. 1967).
80. UNIFORM CHILD CUSTODY JURISDICTION ACT (Commissioners' Note).
81. *Id.*
82. 14 MILLIGAN, OHIO PRAC. § 4047.02 (1981).
83. OHIO REV. CODE ANN. § 3109.31 (Page 1980).
84. The former Illinois Statute was equivalent to OHIO REV. CODE ANN. § 3109.22 (Page 1980).
85. *See* OHIO REV. CODE ANN. § 3109.24 (Page 1980).

result, the court ruled that enforcement of the Illinois decree was not mandated by Ohio "statutory law."[86] Although this construction was permissible by the terms of the Act, it does not appear that it was compulsory. In any event, on September 11, 1979, a more complete version of the UCCJA became effective in Illinois which renders that question moot.[87] The current Illinois Act is substantially similar to Ohio law.

In *Wheeler v. District Court*,[88] the Supreme Court of Colorado held that the policy of the UCCJA was to eliminate jurisdictional fishing and thus prevent emotional harm to the children involved.[89] The case involved the question whether a Colorado court lacked jurisdiction under the UCCJA to hear the matter, but the significance of the case is the method it provides for reaching a solution to the question of proper jurisdiction. Not only must the trial court inquire into the results that may be technically and legally sufficient under the UCCJA, it must determine the result allowable under the Act that is in the child's best interest.[90]

The type of approach followed by the *Wheeler* court recognizes that the court has a responsibility to protect the child's welfare as well as the defendant's rights. In the *Pasqualone* case, however, the court primarily focused on the parents while the real issue was the child. In effect, the *Pasqualone* court reached one proper interpretation of the Act but did not demonstrate how that interpretation would best benefit the child.

D. Substantial Justice Towards Defendant or Child?

In *Shaffer v. Heitner*[91] the United States Supreme Court directed its attention toward considerations of fairness and substantial justice by focusing on whether the defendant had sufficient contacts with a jurisdiction to fairly and justly make a determination against him on a particular issue.[92]

In custody matters, perhaps the time has come when the Court should be more concerned with fairness and substantial justice for the child rather than the defendant parent. The value of reaching a final determination of custody may be superior to the value of protecting a

86. *Id.*
87. *See* ILL. ANN. STAT. ch. 40 §§ 2101-26 (Smith-Hurd 1980).
88. 186 Colo. 218, 526 P.2d 658 (1974).
89. *Id.* at 220, 526 P.2d at 660.
90. *See generally* Wheeler v. District Court, 186 Colo. 218, 526 P.2d 658 (1974); *see also* UNIFORM CHILD CUSTODY JURISDICTION ACT § 13 (Commissioners' Note) (the Act emphasizes the child's welfare as well as requirements for personal jurisdiction).
91. 433 U.S. 186 (1977).
92. *Id. See also* Worldwide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980).

party who chooses not to litigate after receiving actual notice[93] of the proceedings coupled with an opportunity to be heard. Unlike other litigation, the nature of child custody disputes is unique because of the human being at the center of the suit. The extent to which the child's future well-being is dependent upon the court's determination requires that the spirit of legislation designed to protect children be implemented by the judicial system.[94] When all parties have been afforded fair notice, it is possible that the values of territorial jurisdiction should become subservient to the value of achieving a final determination of custody. While affording justice to parents, the courts must insure that substantial injustice is not done to the child.

CONCLUSION

The *Pasqualone* court applied correct case law as well as statutory law. Although its interpretation of the law is valid, it is ironic that the court did not strive to implement the spirit of the UCCJA which is designed to protect children. The *Pasqualone* case, although technically sound, will not discourage continuing controversies. Nor does the case deter abductions and subsequent modifications of custody awards.[95] Finally, the *Pasqualone* decision does not emphasize the value of curtailing the relitigation of custody decisions. The judicial result reached in this case depicts the very situation which the UCCJA was designed to remedy. Because of jurisdictional problems[96] in Bridget's Illinois decision, it was not dispositive of custody. Similarily, because of statutory noncompliance[97] in David's Ohio suit for custody, it was also not dispositive of custody. As a result, after several appearances before the courts of two states, no one had permanent custody of the child. Her status is still irresolute. Perhaps this result is unavoidable, but further interpretations and applications of the UCCJA should attempt to implement its purpose of avoiding the psychological trauma of relitigation. Since the purpose of a custody suit is to reach a final determination benefitting the child, courts should construe the UCCJA to arrive at final determinations which minimize uncertainty and provide for continuity, stability, and strong family relationships. This goal can become reality if the courts focus upon the purpose of the UCCJA rather than on procedural distinctions which prolong uncertainty.

Wayne Everett Waite

93. *See* note 14 *supra*.
94. *See* notes 41 and 74 *supra*.
95. *See* note 2 *supra*.
96. *See* notes 28 and 29 *supra*.
97. *See* note 22 and accompanying text *supra*.