

# DIVISIBLE DIVORCE AND RIGHTS TO SUPPORT, PROPERTY AND CUSTODY

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Some may praise the phenomenon as a marvelous example of the law's elasticity and adaptability to changing society; others may condemn it as gross expediency or capricious judge-made law. Whether one praises or blames, the area of marriage and divorce law is an excellent illustration of legal concepts formulated and applied because of the events and accidents of history and the practical necessities of the times.

It takes only a brief glance into legal history to confirm that most of our concepts concerning marriage and divorce stem from the early times when the Church in England and its ecclesiastical courts had complete control of marriage as a religious matter.<sup>1</sup> The Protestant Reformation led to control by temporal bodies and the notion that these were temporal matters. And hard on the heels of the Reformation came the philosophies of liberalism and enlightenment which propounded each person's right to pursue happiness. For a fleeting moment marriage was thought of as no more than a civil contract to be repudiated freely by either party if it interfered with his happiness. The pressure for governmental regulation of marriage and family relations quickly altered that idea to one more in accord with our present concepts. Marriage as only a civil contract between man and wife would have left government with no control over what was considered to be the basic unit of society, the family. During the nineteenth century courts and writers formed the now-familiar conclusions that marriage was a social institution, a status, a res in which the state had an interest. By 1888 the idea was clearly expressed:

[W]hilst marriage is often termed by text writers and in decisions of courts a civil contract . . . it is something more than a mere contract. . . . It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.<sup>2</sup>

Bishop, in his treatise on marriage and divorce, stretched the status idea of the marriage relationship to that of a res, and it was the

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<sup>1</sup> See Rheinstein, "Trends in Marriage and Divorce Law of Western Countries," 18 *Law and Contemp. Prob.* 3 (1953).

<sup>2</sup> *Maynard v. Hill*, 125 U.S. 190, 210-211 (1888).

Supreme Court in *Pennoyer v. Neff* which, in dicta, cited his work and thereby crystallized the concept.<sup>3</sup>

In the twentieth century we find the struggle to categorize the marriage relation disappearing. In its place appears a frank recognition that the exigencies of the times are the determining factors in solving marriage and divorce problems. In *Williams I* the Court did not need the artificial support of holding that the marriage status is a res, but instead expounded upon the practical necessities of a state being able to control the marital affairs of its domiciliaries:

. . . [I]t does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*. Such a suit, however, is not a mere *in personam* action. . . . Hence, the decrees in this case, like other divorce decrees, are more than *in personam* judgments. They involve the marital status of the parties. Domicile creates a relationship to the state which is adequate for numerous exercises of state power. Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal.<sup>4</sup>

Much as it frustrates our ivory-towered hearts, it must be accepted that a definitive analysis of what marriage really is has not been made and is not needed. Perhaps we must be content knowing that the law in this area has always moved toward that solution which will further governmental control and protection of marital relationships. We have no reason to doubt that conflict of laws problems will be settled by solutions which enhance a state's control over marital relations within its boundaries. We saw that when *Williams I* held that a state in which one spouse is domiciled could end the marital relation *ex parte* for the purposes of remarriage and legitimacy and that all other states must give full faith and credit to that action. But what of other purposes? The movement has been in the same direction, and the accidents of history and the pragmatic pressures of the period are equally influential there.

#### RIGHT TO SUPPORT

The only divorce recognized by the ecclesiastical courts was the divorce *a mensa et thoro*, its modern day equivalent being a legal separation. At that time a married man had complete control of his wife's

<sup>3</sup> Bishop, *Marriage and Divorce* § 156 (4th ed. 1864); *Pennoyer v. Neff*, 95 U.S. 714, 735 (1878).

<sup>4</sup> *Williams v. North Carolina*, 317 U.S. 287, 297-298 (1942).

property and income. Since the divorce *a mensa et thoro* in no way dissolved the bonds of matrimony, his exclusive control continued. To prevent the separated wife from becoming a public charge, the court had to order the husband to support her.<sup>5</sup> When a judicial divorce *a vinculo*, severing the marital relationship entirely, was authorized by the English statute of 1857, it also authorized the courts to order former husbands to support their former wives.<sup>6</sup> Of course, if the wife had any property or income, it would in this situation have been available to her for support. But what of the woman with no property or whose property the husband had dissipated? In a case soon after the passage of the statute, the judge stated that the legislature had intended that the wife should not have to seek her remedy of divorce at the expense of being left destitute.<sup>7</sup> In other words, the legislature permitted an entirely new situation, a man no longer married having to support his ex-wife, for the same basic reason that the ecclesiastical courts had ordered support: to keep the woman from becoming a pauper. Nearly all the states in this country have somewhat similar statutes.

It is interesting that when ordering alimony or support payments, courts seldom analyze why they do so. Most of them parrot that there is a duty of support arising out of the marital relation.<sup>8</sup> Their language indicates that this is a duty which has existed from the very day the marriage was contracted. However, the correlative right to support has never had an adequate remedy at any time while the couple lived together. Other than trying to charge necessities to her husband's account, there is nothing a woman can do to force her husband to support her so long as she lives with him. The fact that they are alive and are living together is treated as irrefutable proof that he is supporting her.<sup>9</sup> The husband determines in every way what shall constitute this so-called right of support. It is not until a separation or divorce ensues that the wife may obtain any judicial enforcement of the right. Crozier put it well when she wrote: "Whatever tendency there is toward the right of support becoming a definite right to some definite thing is not in marriage but in separation and divorce."<sup>10</sup> What kind of right is this

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<sup>5</sup> *Mathewson v. Mathewson*, 79 Conn. 23, 63 Atl. 285 (1906); Madden, *Persons and Domestic Relations* §§ 97-98 (1931); Jacobs & Goebel, *Cases on Domestic Relations* 378 (3d ed. 1952).

<sup>6</sup> 20 & 21 Vict. c. 85, § 32 (1857), as discussed in Madden, *op. cit. supra* note 5.

<sup>7</sup> *Fisher v. Fisher*, 2 Swab. & T. 410 (1861), as discussed in Madden, *ibid.*

<sup>8</sup> *Garlock v. Garlock*, 279 N.Y. 337, 18 N.E.2d 521 (1939); *Whitebird v. Luckey*, 180 Okla. 1, 67 P.2d 775 (1937).

<sup>9</sup> *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953); Crozier, "Marital Support," *Selected Essays on Family Law* 831, 834 (1950); Paulsen, "Support Rights and Duties Between Husband and Wife," 9 Vand. L. Rev. 709, 719 (1956).

<sup>10</sup> Crozier, *supra* note 9, at 838.

that "arises from the marriage" but has no remedy except when the marriage fails? The answer is the same as in the time of the ecclesiastical courts. Although one occasionally finds reference to damages or a dividing of mutual resources, the major factor is clearly one of protecting the public purse. Even though the divorced wife controls her property and is generally more capable of supporting herself than such a woman 100 years ago, too often the years of marriage have prevented her from obtaining the skills necessary to earn a living or have caused her to forget those she once had. Many more divorced women would be on welfare rolls were it not for alimony payments. An article in the Milwaukee Journal headlined "Fear of Jail Is Saving Taxpayers Millions" is an ample illustration. By aiding in the collection of alimony and support arrearages, the county welfare department in the Milwaukee area in a three-year period was reimbursed for one million dollars it had given to divorced women who had not received their ex-husbands' payments.<sup>11</sup> Modern alimony is no more than each state affording financial protection to its ex-wives by imposing upon every man who enters a marital relationship in that state the possible obligation of supporting the woman when the relationship ends. There is a vague resemblance to unemployment compensation in the sense that it is the conclusion of a pre-existing relationship whereby one person obtained the means of supporting himself which gives rise to the "right." In this respect it is perfectly proper to call it a "right to support." This is not something in the nature of a "natural" right or a constitutional right, but a right which owes its existence to statutory authorization, and the history of which indicates no purpose other than to relieve the state of the necessity of supporting former wives who cannot support themselves. It is the local quality of this right which shapes its course in conflict of laws problems.

In some states the right to support is an ephemeral right while in others it has a marked quality of durability. This is why there are conflict of laws problems. Most states follow the English example and authorize the granting of alimony in the same statute which empowers courts to grant divorces. In a minority of states it is held that support may be ordered only at the time a separation or divorce decree is granted. These tend to be old rules not recently challenged.<sup>12</sup> One reason for such holdings stems from the fact that the ecclesiastical courts only made support orders at the time they rendered a separation decree, and Chancery in taking over their function followed their practice. Chancery held that it only had power to so order as incidental

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<sup>11</sup> Milwaukee Journal, Jan. 28, 1960, p. 20, col. 1.

<sup>12</sup> See cases collected in Annot., 141 A.L.R. 399 (1942).

relief along with the divorce decree. This is probably the origin of the use of the ambiguous phrase "incident of the marriage" to describe support. Some American courts, since they act as equity courts, follow this rule of Chancery and hold that they can only order alimony as an incident of the divorce decree. A second reason sometimes given is probably a corruption of the first: support is an "incident" of the marital relation and cannot be ordered at any time after the marriage relation itself no longer exists. A last reason is a matter of statutory interpretation. Since the wording of many of the statutes is that the court may order support when decreeing divorce, this is interpreted as limiting the power to do so to that time. Whichever of these reasons is utilized, the result is a substantive definition of the right of support which sharply limits its existence to a right enforceable only at the very time a decree of separation or divorce is granted.<sup>13</sup> Consequently, a valid *ex parte* divorce decree obtained by either spouse automatically ends the right to support. As one writer described it, it is a terminable interest and the condition subsequent which causes termination occurs.<sup>14</sup> Perhaps it would be more proper in these states to label this interest a mere possibility or expectancy rather than a right since it is so ephemeral in nature.<sup>15</sup>

The majority of states interpret the possibility of obtaining support as a vested personal right which should not be delimited by the absence of personal jurisdiction over one of the spouses at the time of divorce. The courts will entertain claims for support after the marital relation is ended. Many of these rulings also came in old cases. For example, in 1869 the Ohio Supreme Court, in upholding an alimony award to a woman whose ex-husband had defended against her claim by asserting his *ex parte* divorce, said: "It is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed."<sup>16</sup> So it is that the concept of "divisible divorce" is an old one and many, many cases had been disposed of under the theory before Justice Douglas coined the catchy phrase and thus erroneously received the credit or blame for originating the concept.

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<sup>13</sup> *Sims v. Sims*, 253 Ala. 307, 45 So. 2d 25 (1950); *Hall v. Hall*, 141 Ga. 361, 80 S.E. 992 (1914); *Shaw v. Shaw*, 92 Iowa 722, 61 N.W. 368 (1894); *Shain v. Shain*, 324 Mass. 603, 88 N.E.2d 143 (1949), *cert. denied*, 338 U.S. 954 (1949).

<sup>14</sup> *Morris*, "Divisible Divorce," 64 Harv. L. Rev. 1287 (1951).

<sup>15</sup> Query? If these courts do label it a "right," is there not a question as to the constitutionality of their permitting it to be so eliminated even within their own state borders?

<sup>16</sup> *Cox v. Cox*, 19 Ohio St. 502, 512 (1869). See also *Slapp v. Slapp*, 143 Ohio St. 105, 54 N.E.2d 153 (1944); *Wick v. Wick*, 58 Ohio App. 72 (1938); *Annot.*, 141 A.L.R. 399 (1942); *Note*, 34 Ky. L.J. 149 (1946).

The phrase was first used in *Estin v. Estin*.<sup>17</sup> There the wife had obtained a decree of separation and a support order in New York before the husband established a domicile in Nevada and obtained an *ex parte* divorce there. Nevada followed the rule that divorce ends a support order automatically while the New York court held that a divorce under these circumstances did not dissolve the support order. The Supreme Court could hardly have held otherwise than it did: Nevada had no jurisdiction to affect the personal property interest in the wife created by the New York judgment without personal jurisdiction over her. The Nevada decree being void as to the effect on the New York support order to that extent, it was not entitled to full faith and credit in New York. Since this holding did not authorize an exception to full faith and credit on the basis of overriding local policy, it would not have been necessary for the Court to state why New York's policy was justified in pursuing enforcement of the support order. However, the Court did so emphatically: "New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is plainly a matter in which her community had a legitimate interest."<sup>18</sup> As evidence of the Court's sympathy with the state's ability to protect itself from having to support indigent ex-wives, the statement was the open sesame for *Vanderbilt v. Vanderbilt*.<sup>19</sup>

The primary difference between *Estin* and *Vanderbilt* is that in the latter case, there had been no support order of any kind made prior to the divorce. The former wife had to be recognized in New York as a single woman by virtue of the valid *ex parte* divorce her husband had obtained in Nevada. When she prayed for separation and alimony in New York, the court recognized that the marriage was dissolved but ordered support payments on the theory that the dissolution of the marriage did not end the former wife's right to support from her former husband. The Supreme Court decided the case exactly as it had *Estin*, brushing off the difference between them as immaterial and assuming that the wife had a "support right" which could not be cut off without personal jurisdiction over her. The fact that the Court did not bother to analyze the nature of this claimed right is compelling evidence of its predilection to further the state's ability to protect its own domiciliary. Of course, Douglas, speaking in *Esenwein v. Esenwein*,<sup>20</sup> had given the

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<sup>17</sup> *Estin v. Estin*, 334 U.S. 541 (1948).

<sup>18</sup> *Id.* at 547.

<sup>19</sup> *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

<sup>20</sup> "But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. The problem under the full faith and credit clause is to ac-

first indication of this policy's influence upon him. No better example could be given of the law's accommodation to conflicting interests than the contrast of *Williams I* and *Vanderbilt* which are two sides of the same coin. It is because of *Williams I* that *Vanderbilt* arose and was decided as it was. *Williams I* forced recognition of *ex parte* decrees so as to further the first state's interest in its domiciliary. *Vanderbilt* protects the second state by requiring personal jurisdiction to affect support rights. The need for such a balance was expressed before *Vanderbilt* by a well-known state court justice: "Since the courts have evolved rules of law that allow the husband readily to obtain a divorce, corresponding rules of law must be invoked to protect the wife and prevent injustice."<sup>21</sup>

Because of the increasing affluence and mobility of the American public and the difficulties of disproving domicile in the state which granted the *ex parte* decree, one may expect that the problems of divisible divorce have not been laid to rest. A perhaps unexpected result of *Vanderbilt* may lessen the number of conflicts questions. This is a possible change in local law among those states which have traditionally held that the right to support ends with the marriage. In California this has already occurred. In 1953 in *Dimon v. Dimon*,<sup>22</sup> the California court held that no support order could be made at any time other than when divorce or separation was decreed and cited more than fifteen prior California cases purportedly in accord with its ruling. In 1959 in *Hudson v. Hudson*,<sup>23</sup> the court specifically overruled prior cases and held that alimony could be ordered at other times. This opinion is replete with references to *Estin* and *Vanderbilt* and even reads as though the court felt that those cases required this change in local law. Referring to a case being overruled, the court noted "that case was decided before the theory of divisible divorce was established in *Estin v. Estin*," and "after the *Vanderbilt* case," the proposition "that by terminating the marriage the *ex parte* divorce automatically terminated all rights, including the nonadjudicated right to support that grew out of that marriage . . . cannot be maintained." This opinion was written by Traynor who dissented admirably in the *Dimon* case, pointing out the policy reasons for a local law that support does survive and distin-

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 commodate as fully as possible the conflicting interests of the two States. . . . The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household." *Esenwein v. Esenwein*, 325 U.S. 279, 282 (1945) (concurring opinion).

<sup>21</sup> Justice Traynor dissenting in *Dimon v. Dimon*, 40 Cal. 2d 516, 539, 254 P.2d 528, 541 (1953).

<sup>22</sup> *Dimon v. Dimon*, *supra* note 21.

<sup>23</sup> *Hudson v. Hudson*, 52 Cal. 2d 735, 344 P.2d 295 (1959).

guishing all the cases cited by the majority. At that time he could not enlist enough of the court to follow his views. But six years later he had their unanimous support. The deciding factor was doubtless the existence of *Vanderbilt* and the widespread influence of the United States Supreme Court. Perhaps other Traynors in other states will bring about similar changes in the local law through a similar "misuse" of the Supreme Court decision. If so, the paucity of states still holding that the right to support disappears may eliminate the support issue as a conflicts problem.

Until it is so eliminated, there is one question which may be presented to the Supreme Court, a question that will raise the ghost of *Haddock v. Haddock*.<sup>24</sup> *Haddock* was the controlling case on migratory divorce before the *Williams* cases, and its rule was that only an *ex parte* divorce decree in the state of the matrimonial domicile was entitled to full faith and credit. Matrimonial domicile, of course, meant a state where the couple lived as husband and wife. It was the negation of this requirement by *Williams I* that allowed a spouse to obtain a valid *ex parte* divorce wherever he chose to establish domicile. In the *Estin* case, New York was the matrimonial domicile. In *Vanderbilt* the matrimonial domicile had been California, but the wife had moved to New York before a Nevada divorce was granted to her husband. In *Armstrong v. Armstrong*<sup>25</sup> the couple resided in Florida but the wife had established domicile in Ohio before the divorce decree was obtained in Florida by her husband. In the *Armstrong* case the Court upheld the power of Ohio courts to order alimony payments by the husband in an action instituted after finality of the Florida order dissolving the marriage, because it held that the Florida court had not passed on the alimony question. The four concurring justices, who felt that the Florida court had adjudicated the alimony question, gave reasons later used by the majority in *Vanderbilt*. In neither *Vanderbilt* nor *Armstrong* had the husband and wife resided together in the state which ordered the ex-husband to support his ex-wife. However, both women came to the state as a married woman wrapped in her marital status. She could have obtained a divorce there herself because the marital status was there with her. Being a domiciliary of the state while married, she had a "right to support" from her husband within the state. He had a correlative duty of support enforceable if he ever entered the state. Furthermore, this right and duty of support would be defined according to the local law where the wife was domiciled—a right which survived divorce in either New York or Ohio. This is why the *ex parte*

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<sup>24</sup> *Haddock v. Haddock*, 201 U.S. 562 (1906).

<sup>25</sup> *Armstrong v. Armstrong*, 350 U.S. 568 (1956).



divorce elsewhere could not prevent later enforcement of support in the wife's domiciliary state. A far different situation would exist if the husband obtained the *ex parte* divorce in a state such as Nevada and thereafter the ex-wife moved to New York or Ohio. This would pose the spectacle, not of forum shopping for an easy divorce state but, of the wife forum shopping for a state where the "right to support" survives divorce. On similar facts the New York court avoided constitutional issues by holding that the wife did not qualify as a "New York wife" under the particular wording of the New York statute.<sup>26</sup> It is submitted that to have enforced an order of support against the ex-husband would have been to violate substantive due process. No state could force a man to support a woman to whom he had never been married. Due process requires some logical connection between the person from whom property is taken and the person to whom it is given. The man who enters a sovereign state government's territory for the first time as a single man or as a man married to *Y* can hardly be forced to support *X* to whom he has never been married while either of them was in that state. There would never have been any connection whatsoever between that state and a marital status of those people. In his dissent in *Vanderbilt*, Frankfurter raised this problem as one of his objections to the decision,<sup>27</sup> and Harlan also dissented, saying: "In such a case New York could not pretend to be assuring the wife the mere survival of a pre-existing right, because the wife could have had no pre-divorce rights in New York at all. . . . [A]t the time of the divorce New York would have had no interest in the situation of any kind."<sup>28</sup> Even Traynor, while arguing for divisible divorce, said that the wife would not be allowed "by migrating to another state, to revive a right that had expired."<sup>29</sup>

If due process prevents some states from enforcing a support order against the ex-husband, what states will be permitted to do so? It is not the state in which the ex-wife is domiciled when she seeks the order. Therein lies the ghost of *Haddock v. Haddock*. Rather, it is the state where the wife was domiciled at the time of the divorce and, perhaps, the state of matrimonial domicile at the time the parties first lived apart. No other state would have a sufficient nexus with this marriage to justify the supposition that the husband had a duty of support within it. Therefore, the due process decision should obviate any consideration of the full faith and credit problem.

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<sup>26</sup> *Loeb v. Loeb*, 4 N.Y.2d 542, 152 N.E.2d 36 (1958), noted in 20 Ohio St. L.J. 140 (1959).

<sup>27</sup> *Vanderbilt v. Vanderbilt*, *supra* note 19, at 425.

<sup>28</sup> *Id.* at 433-434.

<sup>29</sup> *Dimon v. Dimon*, *supra* note 21.

However, a court wishing to avoid the due process issue could dispose of this problem by a choice of law approach. Since the enforceable right to support, even in states where it survives divorce, originates at the time of legal separation or divorce, the court could refer to the state which had the most substantial contact with the wife at that time. For example, if the divorce were obtained in Nevada while the wife resided in Pennsylvania and she is now before the Ohio court seeking a support order, the Ohio court would give full faith and credit to the Nevada decree insofar as it dissolved the marriage but not insofar as it may have affected personal rights elsewhere. The court would then look to the law of Pennsylvania to determine whether or not the wife had a right to support. Since support does not survive divorce in Pennsylvania, she would not.<sup>30</sup> On either due process or choice of law approaches, we have reached the point where the state's interest in protecting its domiciliary from the welfare rolls is not enough to warrant enforced support payments from an ex-husband.

#### RIGHTS IN PROPERTY

The granting of a divorce decree in itself has no effect on the title to most property owned individually or in common by a married couple since such ownership is independent of the marriage relationship. Even in community property states, the statutes usually provide that the court must specifically order the division of property upon divorce.<sup>31</sup> At the other extreme are possibilities of obtaining property because of the marriage relationship. The possibility of inheriting a spouse's property or of obtaining pension payments upon his death are so universally considered to be mere expectancies that they are of little concern to us.<sup>32</sup> These are not in the nature of recognized property interests and unquestionably disappear with the end of the marriage.

Only interests equivalent to common-law dower or curtesy which could be affected by operation of law when a divorce is decreed might create divisible divorce problems. Although there is now wide variety among the states in the nature of these interests,<sup>33</sup> they tend to be similar in that they come into existence by operation of law when a marriage is created and are often labeled "incidents" of the marriage. To this

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<sup>30</sup> Query whether it would enforce a right to support if it found she had such a right elsewhere? Restatement, Conflict of Laws § 458 (1934) says that no state will directly enforce a duty of support created by the law of another state because it is a matter of peculiarly local policy.

<sup>31</sup> 2 Vernier, American Family Laws § 101 (1932) [hereinafter cited as Vernier].

<sup>32</sup> Ostrander v. Preece, 129 Ohio St. 625, 196 N.E. 670 (1935), *appeal dismissed*, 296 U.S. 543 (1935).

<sup>33</sup> 2 Powell, The Law of Real Property § 217 (1962 cum. supp.).

extent they resemble the right to support. However, there should be little litigation of conflict of laws questions in this area. Unlike support, it is clear that the interest of the absent spouse does not depend upon domicile but upon the location of the land. Only the law of the state where the divorce is granted and the law of the state where the land is situated could be involved. Since there is a long-established and universal rule that the determination of interests in land is controlled by the law of the state where the land is located, it is that law which will determine what effect an *ex parte* divorce granted there or elsewhere will have on the interests.<sup>34</sup> There will be no forum shopping for a state which might recognize the interest. Moreover, the law has already been well-developed that no court has the power to affect interests in land by operation of law unless the land is subject to its jurisdiction.<sup>35</sup> In the face of these cases, one would hardly expect a Nevada court to attempt to affect *ex parte* interests in land located in another state.

An additional factor which should tend to lessen the problems of divisible divorce in this area is that these interests in the land of the other spouse are ordinarily considered to be inchoate until his death.<sup>36</sup> They are more similar to the so-called "right to inherit" than to the right of support. The fact that they may be mere possibilities rather than rights would not enable the divorcing state to affect them extraterritorially, but it does prevent due process objections from successfully controlling the effect which the state of location gives to the *ex parte* divorce. The change in Ohio law is a good example. In 1927 an Ohio court held that the state rendering an *ex parte* decree could not project its jurisdiction into Ohio so as to bar the Ohio dower interest of the divorced spouse.<sup>37</sup> However, in 1932 the legislature provided that all dower interest should terminate upon the granting of an absolute divorce within or without the state.<sup>38</sup> The implementation of either of these views violates neither full faith and credit nor due process.<sup>39</sup> The trend is apparently toward holding that interests like dower and curtesy as a matter of local law are no more than mere possibilities which expire with the termination of the marriage.<sup>40</sup> In

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<sup>34</sup> Barrett v. Failing, 111 U.S. 523 (1884); Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. 779 (1896); Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079 (1908); Restatement, Conflict of Laws §§ 223, 237, 248 (1934); 28 C.J.S. *Dower* § 53 (1941).

<sup>35</sup> Pennoyer v. Neff, *supra* note 3; Fall v. Estlin, 215 U.S. 1 (1909); Clouse v. Clouse, 185 Tenn. 666, 207 S.W.2d 576 (1948).

<sup>36</sup> Goodman v. Gertsle, 158 Ohio St. 353, 109 N.E.2d 489 (1952); 2 Vernier § 96; 16 C.J.S. *Constitutional Law* § 227 (1956).

<sup>37</sup> Snyder v. Buckeye State Bldg. & Loan Co., 26 Ohio App. 166, 160 N.E. 37 (1927).

<sup>38</sup> Ohio Rev. Code § 2103.02 (1953).

<sup>39</sup> Goodman v. Gertsle, *supra* note 36.

<sup>40</sup> Maynard v. Hill, *supra* note 2; Carpenter v. Carpenter, 93 F. Supp. 225 (S.D. Fla.

view of this trend and the already formulated rules which fit neatly into the divisible divorce concept as enunciated in *Estin* and *Vanderbilt*, one should expect little future litigation concerning the effect of *ex parte* divorces upon dower and curtesy interests.

#### RIGHT TO CUSTODY

Custody over children presents an entirely different problem. . . . [I]nsofar as the spouses' interests are concerned, the divorce may terminate their relations with each other as husband and wife, but it cannot terminate their relation to their children. They are still parents.<sup>41</sup>

These words delineate an essential difference between the divisible divorce problems of support or property and the problem of child custody. It has never been asserted that the latter is in any way affected by the granting of a divorce decree itself. It is true that courts often speak of their power to make custody orders as an incident of the divorce decree, but they could also make such orders in a wide variety of other proceedings which could be instituted for the sole purpose of determining custody.<sup>42</sup> Parental rights including custody are not incidents of the marriage relation. They exist regardless of marriage. Since divorce could never affect custody *ipso facto*, it would be a misnomer to speak of "divisible divorce" in this regard. It is only because the Supreme Court used *Estin* as authority in deciding *May v. Anderson*<sup>43</sup> that the custody problem may be logically discussed in an article otherwise dealing with divisible divorce.

In *May v. Anderson*, the wife and children left Wisconsin and went to Ohio. Shortly thereafter the husband-father obtained an *ex parte* divorce in Wisconsin where he was domiciled. The court also gave him custody of the children. In a later *habeas corpus* proceeding in Ohio, which tested only the legality of the custody order, the Supreme Court held that Ohio was not required by the Constitution to give full faith and credit to the Wisconsin custody order. The Court placed the mother's right to custody of her children in the same category as that of her right as a wife to support and, without more ado, said it could not be cut off without personal jurisdiction over her. This reliance upon *Estin* not only allowed the Court to eke out a decision with no analysis of the over-all problems confronting it, but also interjected needless confusion into one of the most complicated and insoluble conflict of

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1950); *Pawley v. Pawley*, 46 So. 2d 464 (Fla. 1950), *cert. denied*, 340 U.S. 866 (1950); *Graham v. Onderdonk*, 33 N.J. 356, 164 A.2d 749 (1960); 28 C.J.S. *Dower* § 53 (1941).

<sup>41</sup> *Vanderbilt v. Vanderbilt*, *supra* note 19, at 421 n.1.

<sup>42</sup> *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925).

<sup>43</sup> *May v. Anderson*, 345 U.S. 528 (1953).

laws situations existing. The confusion lies in treating the custody problem like the support problem.

A woman's right to support is created by a state as an instrument to aid that state in providing for her well-being. The state's interest and the woman's welfare are identical. *Estin* and *Vanderbilt* protect her right of support for the purpose of enhancing her state's protection of her welfare. This is not true in regard to a possible right to custody of a child. There the state's paramount interest is in the welfare of the child. As *parens patriae* the state functions as the ultimate guardian and protector of the child.<sup>44</sup> Whenever a custody question is litigated, the state's interest in accomplishing what is best for the welfare of the child must be in direct conflict with the asserted rights of at least one of the parents. The interest of the state and the right of the parent are antagonistic. Because furtherance of one of these interests does not further the other, the custody problem is unlike the support problem. The conflict of laws situation concerning custody is infinitely more complicated. Not only must the competition of the various states which claim an interest in the child be resolved, but the competition between those states and the parent must also be resolved. This is not to say that the result in *May v. Anderson* is wrong, but that reasoning which equates the right of support with a right to custody is inadequate and misleading.

Prior to *May v. Anderson*, the struggles of the state courts were confined to the requisites for jurisdiction over the subject matter of custody. One view promoted by Beale and Goodrich and adopted by the Restatement was that only the state of the domicile of the child had jurisdiction to make custody orders.<sup>45</sup> The theory was that custody was a status or res which was located only in the state of domicile. Since a child's domicile is determined by operation of law and was often said to remain with the father no matter where the child was living,

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<sup>44</sup> The old common-law rule was that the father had the unequivocal right to the control and custody of his child. In more recent times a mother's rights to control and custody have been recognized. But it has been the unquestioned view in England by statute (*In re B's Settlement*, [1940] 1 Ch. 54; Guardianship of Infants Act, 1925, 15 & 16 Geo. 5, c. 45, § 1) and in America by court decisions that the child's welfare is a consideration paramount to any rights of the parents. *Finlay v. Finlay*, *supra* note 42; 2 Nelson, *Divorce and Annulment* § 15.02 (2d ed. 1961 rev. vol.); 4 Vernier § 232; Weinman, "The Trial Judge Awards Custody," 10 *Law and Contemp. Prob.* 721 (1944).

<sup>45</sup> *Beckman v. Beckman*, 358 Mo. 1029, 218 S.W.2d 566 (1949). See Annot., 4 A.L.R.2d 7, 13 (1949); Restatement, *Conflict of Laws* § 117 (1934); 2 Beale, *Conflict of Laws* § 144.3 (1935); Goodrich, *Conflict of Laws* § 136 (3rd ed. 1949); Stansbury, "Custody and Maintenance Law Across State Lines," 10 *Law and Contemp. Prob.* 819, 820 (1944). The writer commends all readers to Stansbury's article. Although written before *May v. Anderson*, *supra* note 43, it is still timely.

many courts did not follow this view. They either adopted the more modern view that residence sufficed for jurisdiction or interpreted the child's domicile as the place where he resided regardless of the whereabouts of the father.<sup>46</sup> This view is more in accord with the tendency to further a state's ability to protect and control domestic relations within its boundaries and is practically necessary to accomplish the state's function of guardian of children within its borders. Cardozo stated it thus:

The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicil of its parents. It has its origin in the protection that is due to the incompetent or helpless. . . . For this, the residence of the child suffices, though domicil may be elsewhere.<sup>47</sup>

Only a few cases seemed concerned with the necessity for personal jurisdiction over the parents. In most of these instances where the court held that it was without jurisdiction, the child was either not domiciled or not present within the state.<sup>48</sup> These were sensible decisions solely from the point of view of jurisdiction over the subject matter. If the child were not within the state and one parent was absent with him, it would be difficult to justify the state's present or future concern with the child.

Once jurisdiction attached, it was generally held to continue so long as the child was an unemancipated minor, and the court's orders were modifiable upon changed circumstances.<sup>49</sup> If the child went into another state, jurisdiction over the subject matter of custody arose there from the new domicile or residence of the child.<sup>50</sup> Full faith and credit problems seldom arose because either the original jurisdiction was thought to be lost<sup>51</sup> or, if continuing, the modifiable order was just as modifiable in the second state.<sup>52</sup>

The lack of litigation and writing concerned with necessity for

<sup>46</sup> *Wicks v. Cox*, 146 Tex. 489, 208 S.W.2d 876 (1948). See cases collected in Annot., 4 A.L.R.2d 7 (1949) and 9 A.L.R.2d 434, 438 (1950); *Stansbury*, *supra* note 45, at 823.

<sup>47</sup> *Finlay v. Finlay*, *supra* note 42.

<sup>48</sup> *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345 (1896); *Weber v. Redding*, 200 Ind. 448, 163 N.E. 269 (1928), cited by the Court in *May v. Anderson*, *supra* note 43; *Steele v. Steele*, 152 Miss. 365, 118 So. 721 (1928); *Payton v. Payton*, 29 N.M. 618, 225 Pac. 576 (1924); 2 *Nelson*, *op. cit. supra* note 44, § 15.32.

<sup>49</sup> *Halvey v. Halvey*, 330 U.S. 610 (1947); *Mylius v. Cargill*, 19 N.M. 278, 142 Pac. 918 (1914); *Wicks v. Cox*, *supra* note 46; 2 *Nelson*, *op. cit. supra* note 44, § 15.35; *Stansbury*, *supra* note 45, at 827.

<sup>50</sup> *State ex rel. Larson v. Larson*, 198 Minn. 489, 252 N.W. 329 (1934); *Wicks v. Cox*, *supra* note 46.

<sup>51</sup> *State ex rel. Larson v. Larson*, *supra* note 50.

<sup>52</sup> *Halvey v. Halvey*, *supra* note 49; *Ford v. Ford*, 371 U.S. 187 (1962).

personal jurisdiction over both parents is almost certainly attributable to a feeling that the relationship between a state once found to be legitimately concerned with a child within its borders and that child was a sufficient basis for the state to act upon things affecting the child. If this is, indeed, the reason that personal jurisdiction was largely ignored, it is extremely unfortunate that this factor was not discussed in *May v. Anderson*. There can be no doubt that this case brought the personal rights of the parents to the fore, but it apparently ignored the state's interest which for so many years and in so many cases was the main question for the courts. Exactly what is the significance of *May v. Anderson*?

One of the few things that can be said with certainty about *May v. Anderson* is that it held that full faith and credit does not require the state where the mother and children are residing to accept a custody order made without personal jurisdiction of the mother in another state when the children were not present. In his concurring opinion, Frankfurter emphasized that this was the only thing decided and, therefore, the decree could have been given effect without offending due process.<sup>53</sup> The Court found that the mother was not domiciled in Wisconsin but it found it unnecessary to determine the childrens' 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."<sup>54</sup> It is the Court's phrase "certainly as against Ohio" which makes the decision ambiguous. Except for that phrase, its other language equating the mother's personal right to custody with her right to alimony would lead one to interpret the decision as holding that the Wisconsin order was invalid as a personal judgment without personal jurisdiction. That phrase gives credence to Frankfurter's explanation. His concurrence outlines the necessity of allowing the state having an interest in the children to discharge its responsibility without being foreclosed by a prior decree of another state. In subsequent federal cases the courts refer to this concurring opinion for an explanation of what the case held.<sup>55</sup> So long as an interpretation of this type is adhered to, *May v. Anderson* may be a helpful steppingstone to a thorough and much needed clarification of jurisdiction and full faith and credit recognition of custody orders by the Supreme Court.

The case would have been in accord with the many state decisions

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<sup>53</sup> *May v. Anderson*, *supra* note 43, at 535.

<sup>54</sup> *Id.* at 534.

<sup>55</sup> *In re Adoption of a Minor*, 214 F.2d 844 (D.C. Cir. 1954); *Hopson v. Hopson*, 221 F.2d 839 (D.C. Cir. 1955); *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

holding that a custody order is void without presence of the children or personal jurisdiction of the parents if it had held that domicile alone was not a sufficient jurisdictional basis to satisfy due process. But to interpret the case as requiring personal jurisdiction of both parents in order to make a valid custody order whether the children were present or not, would be to unjustifiably protect the parental rights at the expense of the state. It would unduly straightjacket a state in which children were residing to prevent that state from controlling their well-being unless the state were lucky enough to be able to obtain personal jurisdiction over both parents. Such a decision would be contrary to both the generally accepted concept that the state is the guardian of children within its borders and the recently apparent policy of the Supreme Court to further the state's ability to control its own domestic relations. It is hoped that, in addition to its narrow holding, *May v. Anderson* will serve only as a much needed reminder that rights of parents are also involved in custody problems in conflict of laws.

The competition between states as to which should have jurisdiction over custody matters was well on its way to a sensible solution in state court decisions. Technical domicile was not exclusive. Since a child may never be within the state of his technical domicile, it is absurd to propose that that state has any concern with him. The state courts have been rapidly moving to residence as the test. *May v. Anderson* has not dealt a death blow to domicile, but it certainly has demonstrated that it is not only the state of domicile which may act.

Assuming that residence is a sufficient basis for jurisdiction over the subject matter, the state courts have also been moving toward an acceptable solution of the conflicts problem when a child moves to another state. Even if jurisdiction continues in the first state, the new state now has the child and must be able to deal with him. As a matter of policy the second state's interest is so great that it should not be required to give full faith and credit to the original order and thus foreclose itself from acting. This is obviously what Frankfurter thought *May v. Anderson* held. It is frankly an exception to the requirements of full faith and credit and should be used cautiously only when really necessary in the second state.<sup>56</sup>

The competition between the parent and the state which exists in custody cases but not in the support cases must be resolved on a basis fitting to it. The state's interest in the care and well-being of the child and the need of a minor for the state's protection constitute a relationship of sufficient substance to recognize that the state deals with

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<sup>56</sup> For a discussion of the workability of such a view, see Stansbury, *supra* note 45, at 830.



this relationship and not merely in personam on the parent when it makes custody orders. If the need for controlling marital status was enough to permit *ex parte* determinations, the practical need in regard to the status of helpless children is infinitely more so. This does not mean that the parent and his rights are to be ignored. They are valuable and precious rights. Due process requires that he be given every opportunity reasonable under the circumstances to assert his rights. The problem is akin to that in *Mullane v. Central Hanover Bank & Trust Co.*<sup>57</sup> In that case it was necessary for the state of New York to supervise and control accounting of common trust funds in the state, the beneficiaries of which were often nonresidents. The result of the court procedure for periodic settlements was that the nonresident beneficiaries were deprived of property rights and of the opportunity to make personal claims against the trustees. The Supreme Court stated that a classification as an in rem proceeding was not necessary, but that it was sufficient to observe that "the interest of each state in providing means to close trusts . . . is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or non-resident, provided its procedure accords full opportunity to appear and be heard."<sup>58</sup> It added that the fundamental requisite of due process is the opportunity to be heard. It then dismissed mere publication of notice as inadequate, partly because the caretaker of the beneficiaries' interests could not be relied upon to pass the notice on to the beneficiaries since in the proceedings he became the beneficiaries' adversary. (The parent who has control of the child within the jurisdiction is in much the same relationship to the absent parent.) The Court held that due process would be satisfied by actual notice mailed to the beneficiaries whose addresses are known. The *Mullane* case is similar to the situation of a child resident within a state which must supervise and control that child. Like the trust beneficiaries, it is unlikely that the address of a parent who had any concern for the child would be unknown. The interests of the state in discharging its responsibility toward the child and the interests of the absent parent can only be accommodated through a reasonable compromise such as this which allows the state to act upon the child's status, but affords a reasonable chance for the absent parent to assert his rights by assuring as certainly as can reasonably be done that he is given notice of the proceeding.

A century ago this was the over-all solution which Judge Cooley must have had in mind when he discussed jurisdiction over divorce,

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<sup>57</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>58</sup> *Id.* at 313.

custody, and alimony. He said that service by publication would be sufficient for terminating marriage and perhaps "to pass upon the question of the custody and control of the children of the marriage, if they were then within its jurisdiction. But a decree on this subject would only be absolutely binding on the parties while the children remained within the jurisdiction." He continued by saying that personal jurisdiction would be necessary for an alimony decree so that if the decree were *ex parte*, the remedy would be confined to dissolution of the marriage "and to an order for the custody of the children, if within the state."<sup>59</sup> All the theoretical tools necessary for such a solution are at hand; the need is to convince the Court that the practical necessities of our times require it. If there is any connection at all between divisible divorce litigation and that of conflict of laws in child custody matters, it is that not only the considerations expressed in *Estin* and *Vanderbilt* as to personal rights, but also those expressed in *Williams I* as to the state's interest must be given due weight in order to reach a decision which combines both expediency and fairness.

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<sup>59</sup> Cooley, *Constitutional Limitations* 405 (1868).