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THE STATUS OF THE MISSOURI LAW IN THE TROUBLED AREA OF CHILD CUSTODY

JOSEPH W. LEWIS* AND GERALD TOCKMAN**

The basic principle that the welfare of the child is the paramount consideration in judicial determinations of the right to custody has been so universally proclaimed by all courts of Missouri and by the other courts of the land, both federal and state, that the doctrine has indeed become a judicial truism with which no courts take issue. The layman and, indeed, the lawyer unfamiliar with child custody problems might be refreshed to know that here at least is one area of the law where a simple, noble, human precept will guide the courts in resolving the problems presented to them. It is thus somewhat disconcerting to realize that even this great principle of law is so buffeted by exceptions, exceptions to exceptions, statutory and judicial procedural restrictions, jurisdictional limitations and uncertainties and other overriding legal principles, that the great axiom so happily and so consistently enunciated appears in many instances to be all but lost in the confusion.

This article comprises primarily a review of the Missouri decisions involving civil transfers of custody of children by courts pursuant to existing statutory authority. Specifically, the article will discuss cases arising: (1) under the new Missouri Juvenile Code;¹ (2) under that portion of the Missouri divorce law relating to transfer of custody of minor children;² and (3) under the Missouri Habeas Corpus Statutes.³

Custody problems in connection with adoption proceedings which are, of course, under the jurisdiction of the juvenile court,⁴ are discussed comprehensively in another part of this symposium⁵ and will be touched upon only incidentally in this article.

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1. §§ 211.011-431, RSMo 1959. (All statutory references herein will be to RSMo 1959 unless otherwise specifically indicated.)

2. § 452.070.

3. Ch. 532.

4. Ch. 475; § 211.031.

5. See Cook, *Adoption Revisited*, 27 Mo. L. REV. 391 (1962).

I. THE JUVENILE CODE

The present Missouri Juvenile Code was enacted by the 69th General Assembly and became effective on August 29, 1957. The primary purpose of this portion of this article is to examine the problems which have been presented by the appellate cases arising to date under the law and how these problems have been resolved by the courts, and to forecast some of the not yet adjudicated problems which may be anticipated most readily. A review of the history, philosophy and social merits of the law⁶ are not within the scope of this article although some comments in these areas will inevitably be made.

A. *The Statute*

A brief summary of the most fundamental provisions of the Juvenile Code is, of course, necessary in order to understand the issues raised in the cases to be discussed and in order to appreciate some of the problems facing juvenile judges in custody proceedings under the code.

The code provides that the juvenile court shall have exclusive original jurisdiction in proceedings involving a child seventeen years of age or younger who is in need of care and treatment (1) because the persons responsible for the care and support of the child have neglected or refused to provide such care and support, (2) because the child is otherwise without proper care, custody or support, (3) because the behavior, environment or associations of the child are injurious to his welfare or the welfare of others, or (4) because the child is alleged to have violated any state law or municipal ordinance. Jurisdiction also vests in the juvenile court as respects a minor seventeen years of age or older who is alleged to have violated a state law or municipal ordinance prior to having become seventeen years of age, or for the suspension or revocation of an automobile license. The court also has exclusive jurisdiction for the adoption of any person and for the commitment of a child to the guardianship of the Department of Public Health and Welfare, as provided by law.⁷

6. For interesting commentaries on the history, philosophy and development of the Missouri Juvenile Code, see Weinstein, *The Juvenile Court Concept in Missouri: Its Historical Development—The Need for New Legislation*, 1957 WASH. U.L.Q. 17; Weinstein and Robins, *The Juvenile Court in Missouri: 1957-59—A Survey of Current Development and Future Requirements*, 1959 WASH. U.L.Q. 373. For an excellent symposium on various facets of modern juvenile court acts, see the July 1959 issue of the *National Probation and Parole Association Journal*.

7. § 211.031.

Once the juvenile court has attained jurisdiction over a child, such jurisdiction is retained until the child reaches twenty-one years of age.⁸

Nothing in the code shall deprive other courts of the right to determine legal custody of children upon writs of habeas corpus or to determine legal custody or guardianship of children when incidental to the determination of causes pending in other courts. Such questions, however, may be certified by another court to the juvenile court for hearing, determination or recommendation.⁹

Any child taken into custody for an offense is immediately turned over to the juvenile court or juvenile officer.¹⁰

The juvenile court, in its discretion, may dismiss any petition with respect to any child fourteen years of age or older who is alleged to have committed an offense which would be a felony if committed by an adult or who is alleged to have violated a state or municipal traffic law, or with respect to a minor seventeen years of age or older who is alleged to have violated any state law or municipal ordinance if such child came under the jurisdiction of the juvenile court prior to reaching seventeen years of age, and, in any such case, such child may be prosecuted under the general law.¹¹

Whenever anyone informs the juvenile court in person and in writing that a child appears to be subject to the jurisdiction of the court, the court makes a preliminary inquiry to determine the facts and to determine whether or not the interests of the public or the child require that further action be taken, and, on the basis of this inquiry, the juvenile court may make such informal adjustments as are practicable without a petition or may authorize the filing of a petition by the juvenile officer.¹²

When a petition is filed, the person who has custody of the child shall be summoned to appear before the court and, if such person is someone other than the parent or guardian of the child, then the parent or guardian must also be notified of the case. If it appears that the child's welfare requires that his custody be immediately assumed by the court, the summons shall so state and the officer serving the summons shall take the child into custody at once. Summons may be served personally or, if the juvenile court finds that it is impracticable to serve summons personally, service by registered mail to the last known address of the person is authorized.¹³

8. § 211.041.

9. § 211.051.

10. § 211.061.

11. § 211.071.

12. § 211.081.

13. §§ 211.101, .111.

When a child is taken into custody such act is not considered an arrest.¹⁴

There are provisions for the detention of the child under certain circumstances, such provisions being geared to the protection of the child.¹⁵

The juvenile court may cause a child to be examined by a physician, psychiatrist or psychologist appointed by the court, and for this purpose the services of state, county or municipal personnel or institutions may be used and a county may, at the request of the juvenile court, provide proper services in connection with diagnosis and treatment of children.¹⁶

At any hearing before the court the procedure is determined by the juvenile court and may be formal or informal, as the court deems desirable. Testimony may be recorded, if the court shall so determine. Only persons having a direct interest in the case or in the work of the court are admitted to hearings. Equity practice and procedures govern proceedings in the juvenile court.¹⁷

When a child is found by the court to have come within its jurisdiction, the court shall so decree and make a finding of fact upon which it exercises its jurisdiction. The court may, by order: (1) place the child back in his own home or in the custody of a relative or other suitable person upon such conditions as the court may require; (2) commit the child to the custody of a public or private agency or institution authorized or licensed by law to care for children, or commit the child to an institution in another state willing to receive the child if the appropriate state authorities approve such commitment, or commit the child to the custody of the juvenile officer; (3) place the child in a family home; (4) cause the child to be examined and treated by a physician and placed in a public or private hospital or other institution for treatment and care; or (5) suspend or revoke a driver's license.¹⁸

In placing or committing a child the court shall, when practicable, select a person, agency or institution which has or is governed by the same religious faith as that of the parents of the child, or, if the parents' faiths differ, as the same religious faith of the child, or, if the religious faith of the child is unascertainable, as the same faith of either of the parents.¹⁹

14. § 211.131.

15. §§ 211.141, .151.

16. § 211.161.

17. § 211.171.

18. § 211.181.

19. § 211.221.

If the court finds that the parents are able to support the child, the court has power to require such support.²⁰

Any decree of the juvenile court may be modified on the court's own motion. Also, the parent, guardian, legal custodian, spouse, relative or next friend of a child committed to the custody of an institution or agency may petition the court for modification.²¹

An appeal is allowed to the child from any final judgment, order or decree under the Juvenile Code and may be taken on the part of the child by its parent, guardian, legal custodian, spouse, relative or next friend. Also, an appeal may be allowed to any parent from any final judgment affecting the parent.²²

No adjudication by the juvenile court shall be deemed a conviction, and no child shall be charged of a crime or convicted unless the case is transferred to a court of general jurisdiction under the circumstances permitted by the code. Also, evidence in a juvenile case is not lawful or proper evidence against the child for any purpose whatsoever in any civil or criminal proceeding other than subsequent cases arising under the code.²³

No court record shall be inspected without a court order. Similarly, police records, if any, kept on children are to be kept separate and may not be inspected by anyone except on court order. Court records on children over twenty-one may be destroyed upon court order.²⁴

The code contains provisions for the furnishing and maintenance of detention facilities and personnel, the appointment and qualification of juvenile officers, and the salary of the juvenile court's staff including the juvenile officers.²⁵

It is the duty of circuit prosecuting attorneys and city and county counselors and of police officers, constables, sheriffs and other authorized persons to give information concerning a child to the juvenile court or the juvenile officer and to render all assistance and cooperation within their jurisdictional power which may further the objects of the Juvenile Code. The court is authorized to seek cooperation of all organizations having for their object the protection or aid of children.²⁶

20. § 211.241.

21. § 211.251.

22. § 211.261.

23. § 211.271.

24. § 211.321.

25. §§ 211.331-.401.

26. § 211.411.

B. *Constitutionality of Juvenile Code*

Since the effective date of the code in August, 1957, there have been two Missouri cases under the act which have dealt with constitutional questions. In *In re V.*,²⁷ the court held that those provisions of article V, section 20, of the Constitution of Missouri providing that magistrates in counties of less than seventy thousand inhabitants shall have concurrent juvenile jurisdiction with the circuit court are not self-executing and that Section 482.130 of the 1959 Revised Statutes of Missouri, does not violate the constitutional provision. Section 482.130, enacted by the Missouri Legislature in 1947, confers upon magistrate courts in counties of less than seventy thousand inhabitants the powers of the circuit judge in chambers when the circuit judge is absent from the county (and does not, therefore, give the magistrate courts in such counties concurrent juvenile jurisdiction with the circuit court). Thus, the judgment of the magistrate court in Franklin County in a habeas corpus proceeding transferring custody of a minor child to an institution under the alleged authority of the Juvenile Code was held to be void since the legislature had not conferred such powers upon magistrate courts. (Actually, the judgment rendered by the magistrate court was rendered under Missouri's prior Juvenile Court Act, but in its opinion the supreme court cites the present code, implying that the decision is equally as applicable to it.)

A more fundamental constitutional question was decided in *Minor Children of F. B. v. Caruthers*.²⁸ In that case the juvenile court, in a proceeding properly initiated under the code, transferred custody of a minor child to an agency. Pending the appeal from the juvenile court's judgment, the mother of the child filed a habeas corpus petition in the St. Louis Court of Appeals, challenging the constitutionality of the code, particularly the jurisdictional provisions of section 211.031. The petitioner contended that these provisions violated the due process clause of the fourteenth amendment of the United States Constitution, and article I, section 10, of the Constitution of Missouri, on the grounds that these provisions were so vague, indefinite and uncertain that they fixed no ascertainable standard of conduct regarding the care of children. The court of appeals (after first accepting jurisdiction of the case, in spite of the pending action in the circuit court, because a constitutional question was involved) acknowledged that the statute is broad but that it is no more extensive than the juris-

27. 306 S.W.2d 461 (Mo. 1957) (en banc).

28. 323 S.W.2d 397 (St. L. Ct. App. 1959).

diction which has been vested in equity for many years; that the juvenile court is a court of equity to which the constitution gives jurisdiction over minors; and that the language of the statute has acquired an accepted legal meaning.

In a recent article in the *Journal of the Missouri Bar*,²⁹ discussing secrecy and privacy problems in the juvenile court field, Judge Henry A. Riederer, juvenile judge for Missouri's Sixteenth Judicial Circuit (Kansas City), expressed the view that the sixth amendment to the United States Constitution, providing in part that criminal prosecutions shall be public, and similar provisions in state constitutions, are not offended by the Juvenile Code's requirement that juvenile proceedings are not public.³⁰

Judge Riederer noted that it has been universally held that juvenile proceedings under laws similar to Missouri's Juvenile Code are not criminal proceedings and are, therefore, not governed by constitutional provisions applicable to criminal proceedings.

The constitutionality of many provisions of the code will inevitably be frequently challenged. Without seeking to anticipate the bases of any such challenges, suffice it to say at the moment that at least as respects some of the more fundamental provisions of the code, decisions of Missouri courts upholding the constitutionality of former Missouri juvenile laws will be equally as applicable. For example, in *State ex rel. Corella v. Pence*,³¹ the provision of an earlier act³² to the effect that the jurisdiction of the juvenile court shall be retained over a child who has come under the jurisdiction of the court until the child reaches twenty-one was held not to violate Missouri's constitutional provisions against special laws on the theory that children over eighteen who have not theretofore come under the jurisdiction of the juvenile court could be treated as criminals and would not come under the juvenile court's jurisdiction. And again, in *State ex rel. Matacia v. Buckner*³³ an earlier juvenile law³⁴ was held not to be unconstitutional on the grounds that it denied constitutional protections applicable to trials for crimes. In that case the court pointed out that the juvenile laws did not involve procedures for punishing crimes, but that the purpose of the law

29. Riederer, *Secrecy or Privacy? Communication Problems in the Juvenile Court Field*, 17 J. Mo. B. 66 (1961).

30. *State ex rel. Matacia v. Buckner*, 300 Mo. 359, 254 S.W. 179 (1923) (en banc).

31. 262 S.W. 360 (Mo. 1924) (en banc).

32. § 2591 ff., RSMo 1919, as amended by Mo. Laws 1923, at 153.

33. *Supra* note 30.

34. § 2591, RSMo 1919, as amended by Mo. Laws 1923, at 153.

was the protection and support of neglected children and the reformation of delinquent children. In *Boyd v. Rutledge*³⁵ the court upheld the constitutionality of the then law³⁶ authorizing the juvenile court in its discretion to dismiss a delinquency petition and the prosecution of the juvenile under the general law. The court noted that the classification of some boys as being subject to criminal prosecution and others of the same age as being subject to the juvenile act was not fanciful or arbitrary.

It should be observed that, in upholding the constitutionality of earlier acts, the Missouri courts, in fortifying their specific rulings, have recognized and leaned upon the doctrine that the state, as *parens patriae*, has the power to promote the well-being of its children.³⁷

In all of the cases mentioned above, which arose under earlier acts, the provisions of the statutes under scrutiny, as well as the constitutional provisions being challenged, were sufficiently similar to the corresponding provisions of the present Juvenile Code and the present constitution that, it is submitted, they still represent the Missouri law. It is not purported that these cases represent a complete review of the constitutional cases arising under earlier Missouri juvenile court acts, but the cases cited do illustrate the fact that, although there have been but a few constitutional cases decided under the present code, many of the basic constitutional questions presented by the code have, in all likelihood, already been resolved.

C. *Application of Juvenile Code, Custody Proceedings*³⁸

In spite of the overriding recognized principle that the court will look to the best interests and welfare of the child and in spite of the broad powers and discretion vested in the juvenile court by the code, most of the cases decided under the code demonstrate judicial insistence on compliance with the code's procedural provisions and judicial recognition of the applicability of established rules of law and equity.

In *State v. Taylor*,³⁹ the Springfield Court of Appeals reversed the juvenile court's finding of neglect and transfer of custody of a child to an agency on the grounds that the petition in the juvenile court proceeding had been filed by the prosecuting attorney of Howell County and not by

35. 13 S.W.2d 1061 (Mo. 1929).

36. Mo. Laws 1927, at 129-30.

37. See *State ex rel. Matacia v. Buckner*, *supra* note 30; *State ex rel. Cave v. Tinker*, 258 Mo. 1, 166 S.W. 1028 (1914) (en banc); *Ex parte Loving*, 178 Mo. 194, 77 S.W. 508 (1903) (en banc).

38. The reader is again reminded that custody proceedings under the Adoption Law are not covered in this article.

39. 323 S.W.2d 534 (Spr. Ct. App. 1959).

the juvenile officer as provided in section 211.081 of the code. The court emphasized the necessity of exact compliance with statutes establishing procedures permitting the destruction of the parent-child relationship. Similarly, in *Shepler v. Shepler*⁴⁰ the St. Louis Court of Appeals held that a "Petition for Custody" filed in the circuit court by a child's grandparents had not been properly instituted under the Juvenile Code, which requires that petitions thereunder must be filed by the juvenile officer. The circuit court's award of custody of the child to the grandparents was reversed and remanded.

Again, in *In re C.*,⁴¹ although affirming the juvenile court's finding and award of custody of the child involved to an agency, the court stated that it was inclined to dismiss the appeal, since the appeal had not been in strict compliance with the appeal provisions of the code as set forth in section 211.261. In this case the appeal had been taken by the attorney for the child and the court indicated that section 211.261 requires that an appeal cannot be taken by the child or his attorney, but must be taken by a parent, guardian, legal custodian, spouse, relative or next friend of the child. The court stated that it was deciding the question on its merits in spite of the procedural defect in the appeal because of the importance of the case to the child, but it certainly cannot be assumed from the language of the court that it, or any other court, will hereafter ignore any procedural defect.

In *In re M. P. S.*,⁴² the mother of the child appealed from the judgment of the juvenile court which had declared the child to be neglected and had transferred custody of the child to an agency. The court of appeals thoroughly reviewed the evidence and held that the evidence in the case, which was almost entirely circumstantial, was insufficient to justify the juvenile court's finding of neglect. (The court further held that the juvenile court should have admitted the testimony of the child's doctor and, accordingly, it remanded the case to the juvenile court with instructions to admit the doctor's testimony, the court recognizing that such testimony might result in evidence which would be sufficient to sustain the court's finding of neglect.) In the course of the opinion the court pointed out that a proceeding under the Juvenile Code partakes of the character of a civil case insofar as appellate review and procedure are concerned; that a finding to justify recovery on circumstantial evidence must exclude guesswork and

40. 348 S.W.2d 607 (St. L. Ct. App. 1961).

41. 314 S.W.2d 756 (Spr. Ct. App. 1958).

42. 342 S.W.2d 277 (St. L. Ct. App. 1961).

conjecture; that a mother should not be deprived of the care and companionship of her child except for grave reasons and such as are authorized by legislative enactments; and that whoever seeks to deny a mother her child has the burden of proof.

The very recent case of *Mashak v. Poelker*, decided by the St. Louis Court of Appeals on April 17, 1962,⁴³ further illustrates the strictness with which the appellate courts are prone to interpret the Juvenile Code. In that case the plaintiff-appellant challenged the authority of the St. Louis juvenile court to engage and pay the salary of an administrative assistant, since the Juvenile Code does not specifically provide for such office or the payment of any salary to any such officer. The opinion centered around the provisions of section 211.161 and particularly the last sentence of paragraph three, which provides: "The juvenile court may appoint and fix the compensation of such professional and other personnel as it deems necessary to provide the court with proper diagnostic, clinical and treatment services for children under its jurisdiction." The court noted that this entire section dealt primarily with the court's authority to provide treatment for a child through medical, psychiatric or *other facilities* and that in authorizing the court to appoint and fix the compensation of such professional and *other personnel*, as it deems necessary, the statute means personnel of a professional character within the general purport of the section. After an elaborate recitation of the testimony in the case the court came to the conclusion that the administrative assistant did not perform services of a character contemplated by the section and that, accordingly, the job of administrative assistant had not been authorized. The court also pointed out that section 211.381 specifically sets out what employees the juvenile court shall hire and what their compensation shall be. The court noted that since no office of the importance of administrative assistant was provided for in this section, no such office was contemplated by the statute.

The court reached this decision while specifically noting that under section 211.011, the code is to be liberally construed.

Two other cases complete the list of decisions under the new code (not

43. 356 S.W.2d 713 (St. L. Ct. App. 1962). The interest which this case has generated is indicated by the fact that the Bar Association of St. Louis and the St. Louis Division of the Missouri Association of Social Welfare have both filed petitions and been given the right to intervene as *amicus curiae* in connection with the defendants-respondents motion for rehearing and motion for transfer to the Missouri Supreme Court. Aside from the somewhat technical legal issue on which the case was decided, it is of primary interest as it illustrates the serious problems of the juvenile courts in obtaining competent staffs and in the payment of competitive salaries in face of the salary limitations established by the code.

including cases arising in connection with adoption proceedings). In *State v. Tolia*,⁴⁴ the supreme court held that the trial court in a criminal proceeding had properly excluded testimony tending to show that a witness for the state had been "convicted" in a juvenile court proceeding and had been committed to a juvenile institution. The court noted that section 211.271 clearly provides that the disposition of a case in a juvenile court is not a conviction and may not be shown for any reason whatsoever, including, as in this case, for the purpose of challenging a juvenile's credibility. And in the case of *In re M.*,⁴⁵ the court of appeals held that the testimony in the trial court was sufficient to support the juvenile court's finding of neglect and its award of custody of the child to the child's aunt as against the claim of the child's natural father.⁴⁶

In the case of *In re Pope*,⁴⁷ a habeas corpus proceeding now pending in the St. Louis Court of Appeals, the pleadings suggest or present the following problems arising under the code:

(1) Is the initiation of a juvenile court proceeding by the filing of a petition in the juvenile court by the juvenile officer sufficient to meet the requirements of section 211.081, or does this section, in addition, require that prior information be given by a person in writing that a child appears to come within the jurisdiction of the court?

(2) Related to the foregoing question, does an informal report in the court's file by the social worker in the case constitute the giving of information by a person in writing within the meaning of section 211.081?

(3) Before a petition under section 211.081 can be filed by the juvenile officer, what is the extent of the preliminary inquiry which the section provides must first be made by the court?

(4) Does the juvenile court have the power upon the filing of a petition by the juvenile officer to grant *temporary* custody of a child?

(5) Is the service of a subpoena upon the father of a child (who does not have custody of the child) to appear at a hearing before the juvenile court on a petition filed by the juvenile officer sufficient notice to the father as required by paragraph two of section 211.101?

44. 326 S.W.2d 329 (Mo. 1959).

45. 329 S.W.2d 247 (St. L. Ct. App. 1959).

46. This article does not discuss the various factors which juvenile courts have considered in determining the merits of a case. Of course, the evidence in cases such as *In re M.*, *supra* note 45, and cases under earlier acts, where the courts do rule on the matter of neglect or other basis for the courts' assuming jurisdiction and in connection with the award of custody, vary considerably.

47. No. 31155 (undecided).

It is apparent from the foregoing review of the problems presented or suggested in the cited cases that the vast majority of these problems are procedural or jurisdictional, and undoubtedly there will continue to be presented to the courts a substantial number of other unresolved procedural and jurisdictional questions until the case law under this relatively new statute has become more abundant and settled. It is quite clear, however, that the small volume of case law to date reflects a very definite trend that, in spite of the code's admonition that it should be liberally construed (section 211.011), and in spite of the broad powers which the code vests in the juvenile court, and in spite of the fact that the urgency with which a juvenile court must often act does not afford the opportunity for adequate reflection on the part of the judge or for the careful detailed attendance to procedural safeguards which are characteristic of most types of judicial proceedings, the courts will interpret the code strictly at least insofar as procedural and jurisdictional provisions are concerned. It is suggested, therefore, that it may be dangerous to place undue confidence in many of the broad provisions of the code, at least as far as procedural and jurisdictional matters are concerned, and that the juvenile courts, their staffs and counsel appearing before them, as well as social agencies involved in juvenile court proceedings, should take all practicable steps to assure that the technical and procedural provisions of the code are complied with.

The cases give little guide as to how the more substantive provisions of the code will be construed and, in particular, how strictly the appellate courts will scrutinize the exercise by the juvenile courts of their broad discretionary powers. *In re M. P. S.*,⁴⁸ indicates clearly that appellate courts will carefully review the evidence in juvenile court proceedings as in other equity cases and that juvenile courts will not be given *carte blanche* authority to exercise even their broad discretionary powers in any manner which cannot be fully justified, upon appeal, by the evidence in the case. In this connection, although the court has the power to hold informal hearings and not to record testimony (unless a party in the proceedings requests such recording), absence of recorded testimony could prove troublesome if the record in the case is not otherwise sufficient for an appellate court to review the basis of a juvenile court's judgment or decree; and it would seem that the juvenile courts and other interested parties would want to assure that the record is at least sufficient for appellate review even in respect to hearings which may be informal.

48. *Supra* note 42.

As indicated above, cases decided under the new code have not yet been concerned to any substantial extent with the code's more substantive provisions. Although it is not the purpose of this article to anticipate the areas in this regard which will in due course prove troublesome, the case of *In re Slaughter*⁴⁹ is here mentioned to point out a situation with respect to which certain juvenile judges have informally manifested concern and to illustrate the type of problems with which the juvenile courts may expect to be confronted. In the *Slaughter* case the child had been adjudicated neglected by the juvenile court under the prior Juvenile Court Act⁵⁰ and placed under the supervision of the Welfare Department which, in turn, had placed the child in the custody of foster parents. Two years later the foster parents filed a petition for adoption which the natural mother defended. The adoption court, after finding that the child had been abandoned or neglected by the mother, entered its adoption decree. On appeal by the mother the Springfield Court of Appeals affirmed. The real problem suggested in this case concerns the impact of a custody award pursuant to a so-called "neglect petition" (as compared to an award of custody in connection with an adoption petition) upon a subsequent adoption proceeding initiated by the foster parents. It is not uncommon in such a situation that, at the time of the original custody award, adoption is not contemplated and that, accordingly, no consent to adopt the child is sought from the natural parents. However, the foster parents over a period of time become endeared to the child and, in due course, seek to adopt it only to find that the natural parents object, even though they may have manifested no particular interest in the child between the period from the original custody award and the filing of the adoption petition. Circumstances may well indicate that it is in the best interests of the child to grant the adoption, but the court cannot, of course, ignore the rights of the natural parents to the child. This situation represents a most difficult human as well as legal problem, and there appears nothing in either the adoption law or the Juvenile Code which affords guidance to suitable solution. The seriousness of this type of problem suggests that the employment of the new statute on termination of parental rights⁵¹ could, in proper cases, be employed at the time of the hearing on the original "neglect petition" with the view of forcing the natural parents, who have "neglected" their child, to lose their parental rights so that the door may be opened for suitable foster parents, in due

49. 290 S.W.2d 408 (Spr. Ct. App. 1956).

50. Ch. 211, RSMo 1949.

51. §§ 211.411-511 (Mo. Laws 1959, H.B. 437).

course, to adopt the child without interference by the natural parents. The courts will, no doubt, employ the Termination of Parental Rights Act with temerity, as this law provides a most "extraordinary remedy" in authorizing a court, under stated conditions, to terminate a parent's rights to his child, but, it is submitted, if employed under proper circumstances, it could well be a constructive vehicle in happily resolving many problems of the type suggested above.

In concluding this discussion the authors would like to commend the diligence with which the juvenile courts in Missouri are proceeding to seek to resolve the many problems confronting them as the administration of this new law is passing through its difficult embryonic stage. Not only have many of the juvenile courts made considerable progress in organizing competent staffs (in spite of the low salary limitations for professional and semi-professional personnel which the code imposes), but also, through the Missouri Counsel of Juvenile Judges, they are seeking in a constructive manner to exchange their views and experiences, to establish uniform practices and to resolve within the framework of the code many of the procedural and jurisdictional problems which, without such understanding and cooperation on the part of the judges, would undoubtedly become even more difficult of resolution.

II. CUSTODY PROBLEMS IN DIVORCE PROCEEDINGS

The divorce court, in the exercise of its statutory power as arbiter of child custody, operates within a socio-economic area with far-reaching consequences not only upon parties litigant but also upon the public. In the exercise of this power the primary issue confronting the court is the substantive determination of the disposition of child custody. In the solution of this central problem the court is not, and should not be, constrained within the strict limits of a narrow construction of its statutory power. Both the tenor and the underlying intent of the empowering statute clearly demonstrate that the divorce court, in determining the child custody question, must be free to make that disposition which is consonant with the best welfare of the child. It is apparent, therefore, that any attempt to list and discuss the factors utilized by courts in arriving at a determination regarding disposition of child custody would be of no avail. The courts, although voicing their opinions within recognized juridical phraseology,⁵² base their

52. Decisions in this state amply illustrate the recurrent recitation by courts of established propositions regarding child custody as supplementary to and supporting, as distinguished from determining, the disposition of custody. The reader's

decisions upon an appraisal of the factual context surrounding a custody problem and are clearly not circumscribed in this decision by established legal precedents or maxims regarding the disposition of child custody. It is not our purpose herein to recount the vague concatenations of factors prosai-

attention is directed to the following familiar statements reiterated by the courts in their opinions on the custody question.

Neither parent has a paramount right to custody but all things being equal the custody of children of tender years will usually be awarded to the mother.

Davis v. Davis, 354 S.W.2d 526 (Spr. Ct. App. 1962); S. v. G., 298 S.W.2d 67 (Spr. Ct. App. 1957); *In re Richardet*, 280 S.W.2d 466 (St. L. Ct. App. 1955); *Ex parte Ferone*, 267 S.W.2d 695 (K.C. Ct. App. 1954); Lehr v. Lehr, 264 S.W.2d 35 (Spr. Ct. App. 1954); Wilson v. Wilson, 260 S.W.2d 770 (St. L. Ct. App. 1953); *Ex parte Loftis*, 222 S.W.2d 101 (Spr. Ct. App. 1949); Rex v. Rex, 217 S.W.2d 391 (K.C. Ct. App. 1948); Irvine v. Aust, 193 S.W.2d 336 (St. L. Ct. App. 1946); Lane v. Lane, 186 S.W.2d 47 (St. L. Ct. App. 1945); Mothershead v. Mothershead, 236 Mo. App. 737, 161 S.W.2d 669 (K. C. Ct. App. 1942); Wells v. Wells, 117 S.W.2d 700 (St. L. Ct. App. 1938); Tuter v. Tuter, 120 S.W.2d 203 (Spr. Ct. App. 1938); Tomlinson v. French Institute of Notre Dame de Sion, 232 Mo. App. 597, 109 S.W.2d 73 (K.C. Ct. App. 1937); Abel v. Ingram, 223 Mo. App. 1087, 24 S.W.2d 1048 (Spr. Ct. App. 1930); Knepper v. Knepper, 139 Mo. App. 493, 122 S.W. 1117 (K.C. Ct. App. 1909).

Custody will ordinarily be awarded to parents as opposed to third parties; there must be special circumstances or extraordinary reasons to justify disposition of custody to third parties.

In re Wakefield, 365 Mo. 415, 283 S.W.2d 467 (1955) (en banc); *Ex parte Badger*, 286 Mo. 139, 226 S.W. 936 (1920) (en banc); Le Claire v. Le Claire, 352 S.W.2d 379 (St. L. Ct. App. 1961); Neustaedter v. Neustaedter, 305 S.W.2d 40 (St. L. Ct. App. 1957); I. v. B., 305 S.W.2d 713 (Spr. Ct. App. 1957); McCoy v. Briegel, 305 S.W.2d 29 (St. L. Ct. App. 1957); State v. Pogue, 282 S.W.2d 582 (Spr. Ct. App. 1955); Long v. Long, 280 S.W.2d 690 (Spr. Ct. App. 1955); *Ex parte Ferone, supra*; Swan v. Swan, 262 S.W.2d 312 (St. L. Ct. App. 1953); Stricklin v. Richters, 256 S.W.2d 53 (Spr. Ct. App. 1953); Wilson v. Wilson, *supra*; Cox v. Carapella, 246 S.W.2d 513 (St. L. Ct. App. 1952); Vance v. Vance, 203 S.W.2d 899 (St. L. Ct. App. 1947); *Ex parte De Castro*, 238 Mo. App. 1011, 190 S.W.2d 949 (St. L. Ct. App. 1945); McDevitt v. Morrison, 180 S.W.2d 608 (Spr. Ct. App. 1944); Bell v. Catholic Charities of St. Louis, 170 S.W.2d 697 (St. L. Ct. App. 1943).

In awarding custody, where neither parent is unfit insofar as custody is concerned, the best interest of the child will be served by an arrangement enabling association with both parents.

Davis v. Davis, *supra*; Lewis v. Lewis, 301 S.W.2d 861 (St. L. Ct. App. 1957); Fago v. Fago, 250 S.W.2d 837 (St. L. Ct. App. 1952); Watkins v. Watkins, 230 S.W.2d 778 (K.C. Ct. App. 1950); Lambert v. Lambert, 222 S.W.2d 544 (St. L. Ct. App. 1949); Lane v. Lane, *supra*; Olson v. Olson, 184 S.W.2d 768 (St. L. Ct. App. 1945); Martin v. Martin, 160 S.W.2d 457 (St. L. Ct. App. 1942); Baer v. Baer, 51 S.W.2d 873 (St. L. Ct. App. 1932); Conrad v. Conrad, 296 S.W. 196 (St. L. Ct. App. 1927); Hartman v. Hartman, 277 S.W. 950 (K.C. Ct. App. 1925); Kaplun v. Kaplun, 227 S.W. 894 (St. L. Ct. App. 1920); Nations v. Nations, 201 Mo. App. 639, 213 S.W. 511 (St. L. Ct. App. 1919).

In disposing of the custody question where there is more than one child of the parties involved, the court should attempt to avoid separating the children in making its custody award.

Davis v. Davis, *supra*; L. v. N., 326 S.W.2d 751 (Spr. Ct. App. 1959); Poor v. Poor, 237 Mo. App. 744, 167 S.W.2d 471 (Spr. Ct. App. 1942); Tuter v. Tuter, *supra*; Fisher v. Fisher, 207 S.W. 261 (St. L. Ct. App. 1918).

cally utilized by the courts in supplementing their determinations regarding child custody questions but to present and discuss problem areas affecting the child custody question arising in and growing out of divorce proceedings. These problems center upon and are concerned with the nature and extent of the divorce court's power with regard to the child custody question, and the exercise of this power as affected by the jurisdictional requisites upon which the exercise of this power is predicated.

A. *The Nature and Extent of the Divorce Court's Powers*

The power of the circuit court, as a divorce court, to determine custody questions is contained within Section 452.070 of the 1959 Revised Statutes of Missouri. The language of this section is quite general; it provides, in terms similar to that of its statutory predecessors,⁵³ as follows:

When a divorce shall be adjudged, the court shall make such order touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be reasonable

This statute vests in the circuit court a broad discretion with regard to the disposition of child custody and contains no inherent limitations upon the exercise of that discretion other than that the custody award shall be reasonable in regard to the circumstances of the parties and the nature of the case. Decisions in the child custody area indicate that the courts fully recognize the wide area of discretion which they possess in awarding child custody,⁵⁴ although in the majority of cases the courts do not expressly ad-

53. § 2375, RSMo 1909; § 1519, RSMo 1939; § 1355, RSMo 1929; § 1806, RSMo 1919.

54. *In re Wakefield*, *supra* note 52; *Ex parte Sangster*, 295 Mo. 49, 244 S.W. 920 (1922) (en banc); *Ex parte Badger*, *supra* note 52; *Le Claire v. Le Claire*, *supra* note 52; *Tootle v. Tootle*, 329 S.W.2d 218 (K.C. Ct. App. 1959); *McCoy v. Briegel*, *supra* note 52; *S. v. G.*, *supra* note 52; *Graves v. Wooden*, 291 S.W.2d 665 (Spr. Ct. App. 1956); *State ex rel. McKenzie v. La Driere*, 294 S.W.2d 610 (St. L. Ct. App. 1956); *Hensley v. Lake*, 274 S.W.2d 493 (Spr. Ct. App. 1955); *Pope v. Pope*, 267 S.W.2d 340 (St. L. Ct. App. 1954); *Davis v. Davis*, 254 S.W.2d 270 (St. L. Ct. App. 1953); *Wilson v. Wilson*, *supra* note 52; *Link v. Link*, 262 S.W.2d 318 (St. L. Ct. App. 1953); *Hensley v. Hensley*, 233 S.W.2d 42 (K.C. Ct. App. 1950); *Shepard v. Shepard*, 194 S.W.2d 319 (K.C. Ct. App. 1946); *Drew v. Drew*, 186 S.W.2d 858 (K.C. Ct. App. 1945); *Ex parte De Castro*, *supra* note 52; *Burgess v. Burgess*, 239 Mo. App. 390, 190 S.W.2d 282 (K.C. Ct. App. 1945); *Olson v. Olson*, *supra* note 52; *Bell v. Catholic Charities of St. Louis*, *supra* note 52; *Hess v. Hess*, 232 Mo. App. 825, 113 S.W.2d 139 (K.C. Ct. App. 1938); *Rone v. Rone*, 20 S.W.2d 545 (Spr. Ct. App. 1929); *Sanders v. Sanders*, 223 Mo. App. 834, 14 S.W.2d 458 (Spr. Ct. App. 1929); *Ruedlinger v. Ruedlinger*, 222 Mo. App. 819, 10 S.W.2d 324 (St. L. Ct. App. 1928); *Conrad v. Conrad*, *supra* note 52; *Cole v. Cole*, 256 S.W. 518

vert to the broad nature of this power. It is clear that a determination that one parent or the other shall prevail in the divorce proceedings is not controlling in the custody question⁵⁵ and that the court, in determining custody, will make its award upon a factual determination effectuating the best interest and welfare of the child. Nor is the court in making its award limited to a consideration of the merits of one parent or the other as a prospective custodian; it may, and where necessary will, award custody to third persons⁵⁶ not parties to the divorce proceedings or to an institution or welfare

(Spr. Ct. App. 1923); Sabourin v. Sabourin, 213 S.W. 490 (St. L. Ct. App. 1919); Waters v. Gray, 193 S.W. 33 (St. L. Ct. App. 1917); Freeman v. Freeman, 94 Mo. App. 504, 68 S.W. 389 (St. L. Ct. App. 1902); Brown v. Brown, 53 Mo. App. 453 (K.C. Ct. App. 1893).

See also, *In re Wakefield*, *supra* note 52; *Ex parte Sangster*, *supra* (court refused to intervene by habeas corpus to compel defendant to return child to Missouri after having removed child during pendency of divorce proceedings on ground divorce court has power to make appropriate custody orders pendente lite); *In re Morgan*, 117 Mo. 249, 21 S.W. 1122 (1893) (en banc) (dissenting opinion at 22 S.W. 913 (divorce court may award custody although petition and cross-bill for divorce dismissed where motions for new trial pending); *Ex parte Lofts*, *supra* note 52; *Shepard v. Shepard*, *supra* (supporting the proposition that the circuit court can make temporary custody awards pending final adjudication of the divorce although the statute does not expressly empower the court to make custody awards pendente lite); *Smith v. Smith*, 151 Mo. App. 649, 132 S.W. 312 (Spr. Ct. App. 1910). *Cf.* *King v. King*, 42 Mo. App. 454 (K.C. Ct. App. 1890) (holding that trial court erred in hearing and determining husband's motion for custody where wife's petition for divorce dismissed and motion for new trial overruled and her appeal was pending).

55. *Kelly v. Kelly*, 329 Mo. 992, 47 S.W.2d 762 (1932) (en banc); *Lusk v. Lusk*, 28 Mo. 91 (1859); *Davis v. Davis*, 354 S.W.2d 526 (Spr. Ct. App. 1962); *L. v. N.*, *supra* note 52; *Paxton v. Paxton*, 319 S.W.2d 280 (K.C. Ct. App. 1958); *McKenzie v. McKenzie*, 306 S.W.2d 588 (St. L. Ct. App. 1957); *Thomas v. Thomas*, 288 S.W.2d 689 (K.C. Ct. App. 1956); *Martin v. Martin*, *supra* note 52; *Baer v. Baer*, *supra* note 52; *Tossier v. Tossier*, 33 S.W.2d 995 (St. L. Ct. App. 1931); *Bedal v. Bedal*, 2 S.W.2d 180 (St. L. Ct. App. 1928); *Hartman v. Hartman*, *supra* note 52; *Freeman v. Freeman*, *supra* note 54.

The courts have recognized that from a practical standpoint a finding for one party to a divorce action means no more than that his or her conduct or character was not such as would entitle the other party to a divorce. See *Elgin v. Elgin*, 301 S.W.2d 869 (St. L. Ct. App. 1957); *Cadenhead v. Cadenhead*, 265 S.W.2d 426 (K.C. Ct. App. 1954); *Dunlap v. Dunlap*, 255 S.W.2d 441 (K.C. Ct. App. 1953); *Politte v. Politte*, 230 S.W.2d 142 (St. L. Ct. App. 1950); *Rowland v. Rowland*, 227 S.W.2d 478 (St. L. Ct. App. 1950).

Contrast the general statement found in a number of cases that custody is usually awarded to the prevailing party in the divorce action. *Wilson v. Wilson*, *supra* note 52; *Fite v. Fite*, 196 S.W.2d 65 (Spr. Ct. App. 1946); *Irvine v. Aust*, *supra* note 52; *Wells v. Wells*, *supra* note 52; *Tuter v. Tuter*, *supra* note 52; *Ellis v. Johnson*, 218 Mo. App. 272, 260 S.W. 1010 (Spr. Ct. App. 1924).

56. *Ex parte Sangster*, *supra* note 54; *Le Claire v. Le Claire*, *supra* note 52; *Hensley v. Lake*, *supra* note 54; *Wilson v. Wilson*, *supra* note 52; *Burgess v. Burgess*, *supra* note 54; *Drew v. Drew*, *supra* note 54; *Parks v. Cook*, 180 S.W.2d 64 (St. L. Ct. App. 1944); *Lewis v. Lewis*, *supra* note 52; *Abel v. Ingram*, *supra* note 52;

agency.⁵⁷ In the majority of cases involving an award of custody to third parties, such as maternal or paternal grandparents or other relatives of the parents, the propriety of awarding custody to such third persons ordinarily has been suggested to the court by one of the parties to the divorce proceeding;⁵⁸ however, under its broad statutory power the divorce court may, *sua sponte*, determine that neither of the contesting parents is entitled to custody and that it would best suit the welfare of the child to award its custody to some third party or to an institution or agency.⁵⁹ In addition, in disposing of custody, the divorce court has wide latitude in shaping its orders in order to assure the carrying out of the provisions of the decree and the effectual realization of the child's welfare.⁶⁰

Ruedlinger v. Ruedlinger, *supra* note 54; Madigan v. Madigan, 260 S.W.2d 485 (St. L. Ct. App. 1924); Cole v. Cole, *supra* note 54; Tines v. Tines, 216 S.W. 563 (St. L. Ct. App. 1919); Waters v. Gray, *supra* note 54.

57. *Ex parte* Sangster, *supra* note 54; McCoy v. Briegel, *supra* note 52; Shepard v. Shepard, *supra* note 54; Bell v. Catholic Charities of St. Louis, *supra* note 52; Tomlinson v. French Institute of Notre Dame de Sion, *supra* note 52.

58. See, e.g., Hensley v. Lake, *supra* note 54; Parks v. Cook, *supra* note 56; Waters v. Gray, *supra* note 54.

59. McCoy v. Briegel, *supra* note 52; Wilson v. Wilson, *supra* note 52; Shepard v. Shepard, *supra* note 54; *Ex parte* De Castro, *supra* note 52; Lewis v. Lewis, *supra* note 52; Tomlinson v. French Institute of Notre Dame de Sion, *supra* note 52; *Ex parte* Badger, *supra* note 52.

60. Custody awards may, and do, contain such additional incidental matters as the court deems necessary to insure the effective operation of its decree. See, e.g., Pope v. Pope, *supra* note 54 (decree modified to prevent father from creating religious conflict in child's mind and fostering religious barriers between child and mother); Link v. Link, *supra* note 54 (father required to pay all arrearages due under support provisions of decree as a condition to the maintenance of his motion to modify custody); Wilson v. Wilson, *supra* note 52 (express provision that child not be removed from state); Hensley v. Hensley, *supra* note 54 (general statement regarding court's power to insure carrying out of its orders regarding custody); Drew v. Drew, *supra* note 54 (requiring nonresident grandparents to whom custody was awarded to execute a formal "submission to jurisdiction" with regard to future modifications of the decree); Olson v. Olson, *supra* note 52 (preventing removal); Fernbaugh v. Clark, 236 Mo. App. 1200, 163 S.W.2d 999 (K.C. Ct. App. 1942) (express prohibition against removal of child from Missouri); Martin v. Martin, 233 Mo. App. 667, 125 S.W.2d 943 (K.C. Ct. App. 1939) (custody divided equally between father and mother with express provision that child be kept at home of paternal grandparents); Tomlinson v. French Institute of Notre Dame de Sion, *supra* note 52 (providing that parents should comply with rules and regulations of institution to which custody of child awarded); Baer v. Baer, *supra* note 52 (preventing removal); Rone v. Rone, *supra* note 54 (modification by court, of its own motion, to prevent removal of child from Missouri); Conrad v. Conrad, 296 S.W. 196 (St. L. Ct. App. 1927) (preventing removal of child from city of St. Louis or St. Louis County); Nunnink v. Nunnink, 257 S.W. 832 (K.C. Ct. App. 1924) (decree modified expressly providing that father shall not visit child where said visits shown to have disruptive effect); Sabourin v. Sabourin, *supra* note 54 (custody awarded to father and paternal grandparent jointly with express provision that child be kept at grandparent's home); Phipps v. Phipps, 168 Mo. App. 697, 154 S.W. 825 (K.C. Ct. App. 1913) (modification of award to insure father's compliance with mother's visitation rights); Freeman v. Freeman, *supra* note 54 (preventing removal).

The recent case of *McCoy v. Briegel*⁶¹ expressly recognizes the plenary power of the divorce court with regard to the disposition of custody. In that case, the trial court determined, in a default divorce proceeding, that the litigant wife was not a proper party for the award of custody and that, in fact, she would be unable to take care of the children properly should their custody be awarded to her. This determination was made by the court of its own motion, and it subsequently awarded custody of the children to a social welfare agency with instructions that that agency procure foster home care for the children. The St. Louis Court of Appeals specifically held that such an award was clearly within the trial court's jurisdiction under the broad grant of discretion with regard to child custody contained in Section 452.070 of the 1959 Revised Statutes of Missouri. The court specifically adverted to the fact, which is impliedly recognized in all custody proceedings, that the divorce court in awarding custody is clearly not limited to a consideration of the equities of the parents as parties litigant in a suit between them.⁶²

In consonance with the existence of a broad power in the trial court over the custody question in divorce proceedings it is generally stated that a full and complete appraisal of the factual context surrounding the custody question, including detailed examination of the prospective custodians, is requisite to the disposition of custody.⁶³ Procedural treatment⁶⁴ and the

61. 305 S.W.2d 29 (St. L. Ct. App. 1957).

62. The litigant wife contended in the trial court and on appeal that the divorce court, as a basis for its custody award, had determined on its own that the children were neglected and homeless at the time of institution of the divorce action. She contended that such an order, based on a finding as aforesaid, could only properly be made in a proceeding under the Juvenile Code under the provisions therein for dealing with neglected and delinquent children. The court of appeals held such contention untenable, stating that the fact that the Juvenile Code provides proceedings for the disposition of such children does not divest the divorce court of jurisdiction to determine the question of the welfare of such children. *Id.* at 35. See note 11 *supra* and text supported thereby.

63. *S. v. G.*, *supra* note 52; *Dansker v. Dansker*, 279 S.W.2d 205 (St. L. Ct. App. 1955); *In re Richardet*, *supra* note 52; *Link v. Link*, *supra* note 54; *Crooks v. Crooks*, 197 S.W.2d 678, 197 S.W.2d 689 (St. L. Ct. App. 1946); *Shepard v. Shepard*, *supra* note 54; *Fernbaugh v. Clark*, *supra* note 60; *Tomlinson v. French Institute of Notre Dame de Sion*, *supra* note 52; *Nations v. Nations*, *supra* note 52 (custody question cannot be determined by referral to a referee); *In re Krauthoff*, 191 Mo. App. 149, 177 S.W. 1112 (K.C. Ct. App. 1915).

64. The custody award is treated as a separable incident distinct and apart from the divorce decree; a party aggrieved by the custody award may appeal this aspect of the divorce proceedings alone. *Beckmann v. Beckmann*, 358 Mo. 983, 218 S.W.2d 566 (1949); *Schwer v. Schwer*, 50 S.W.2d 684, 50 S.W.2d 686 (St. L. Ct. App. 1932); *Laweing v. Laweing*, 21 S.W.2d 2 (Spr. Ct. App. 1929); *Sanders v. Sanders*, *supra* note 54; *Phipps v. Phipps*, *supra* note 60.

broad scope of appellate review in regard to custody questions attest to and supplement this requirement. The scope of appellate review of custody awards is similar to that appertaining in other equity proceedings; that is, the court will review the evidence de novo and make that determination with regard to custody which it deems appropriate under the facts and circumstances. Although the appellate court will, of course, defer to the findings of the trial court, especially where the testimony is conflicting, it is clear that it will, with painstaking accuracy, review all the evidence and make that determination with regard to custody which it deems best in the light of the child's welfare and interest.⁶⁵

The jurisdiction of the divorce court with respect to custody and the other separable incidents of the marital relationship, such as alimony, support, and maintenance, is a "continuing" one. The court rendering an adjudication of the custody question in a divorce proceeding thus retains a limited jurisdiction with regard to custody to modify its order in that regard until the majority of the child or the death of one of the parties to the divorce proceeding.⁶⁶ The divorce court thus has jurisdiction to hear and determine subsequent motions to modify the provisions of the original

65. *Wilson v. Wilson*, 354 S.W.2d 532 (Spr. Ct. App. 1962); *Davis v. Davis*, 354 S.W.2d 526 (Spr. Ct. App. 1962); *Ezell v. Ezell*, 348 S.W.2d 592 (St. L. Ct. App. 1961); *Le Claire v. Le Claire*, *supra* note 52; *Tootle v. Tootle*, *supra* note 54; *Doll v. Doll*, 327 S.W.2d 501 (St. L. Ct. App. 1959); *White v. White*, 312 S.W.2d 167 (K.C. Ct. App. 1958); *Ragan v. Ragan*, 315 S.W.2d 142 (Spr. Ct. App. 1958); *Birritieri v. Swanston*, 311 S.W.2d 364 (St. L. Ct. App. 1958); *I. v. B.*, *supra* note 52; *Edwards v. Edwards*, 302 S.W.2d 37 (K.C. Ct. App. 1957); *Graves v. Wooden*, *supra* note 54; *Hachtel v. Hachtel*, 291 S.W.2d 201 (Spr. Ct. App. 1956); *Long v. Long*, 280 S.W.2d 690 (Spr. Ct. App. 1955); *Hensley v. Lake*, *supra* note 54; *Ackermann v. Ackermann*, 280 S.W.2d 425 (St. L. Ct. App. 1955); *Pope v. Pope*, *supra* note 54; *Cherry v. Cherry*, 272 S.W.2d 700 (Spr. Ct. App. 1954); *Davis v. Davis*, 254 S.W.2d 270 (St. L. Ct. App. 1953); *Frame v. Black*, 259 S.W.2d 104 (Spr. Ct. App. 1953); *Fago v. Fago*, *supra* note 52; *Mayo v. Mayo*, 244 S.W.2d 415 (K.C. Ct. App. 1951); *Fordyce v. Fordyce*, 242 S.W.2d 307 (St. L. Ct. App. 1951); *Garvey v. Garvey*, 233 S.W.2d 48 (K.C. Ct. App. 1950); *Greenbury v. Greenbury*, 223 S.W.2d 153 (St. L. Ct. App. 1949); *Parks v. Cook*, *supra* note 56; *Tuter v. Tuter*, *supra* note 52; *Baer v. Baer*, *supra* note 52; *Lampe v. Lampe*, 28 S.W.2d 414 (St. L. Ct. App. 1930); *Rone v. Rone*, *supra* note 54; *Rhodes v. Rhodes*, 7 S.W.2d 427 (St. L. Ct. App. 1928); *Haagen v. Haagen*, 11 S.W.2d 757 (St. L. Ct. App. 1928); *Conrad v. Conrad*, *supra* note 60; *Hill v. Hill*, 277 S.W. 961 (K.C. Ct. App. 1925); *Nunnink v. Nunnink*, *supra* note 60; *Kaplun v. Kaplun*, 227 S.W. 894 (St. L. Ct. App. 1920); *Milster v. Milster*, 200 Mo. App. 603, 209 S.W. 620 (K.C. Ct. App. 1919).

66. *In re Wakefield*, *supra* note 52; *Hayes v. Hayes*, 363 Mo. 545, 252 S.W.2d 323 (1952); *Kelly v. Kelly*, *supra* note 55; *Laumeier v. Laumeier*, 308 Mo. 201, 271 S.W. 481 (1925); *Ex parte Sangster*, *supra* note 54; *Davis v. Davis*, 354 S.W.2d 526 (Spr. Ct. App. 1962); *S. v. G.*, *supra* note 52; *McCoy v. Briegel*, *supra* note 52; *Graves v. Wooden*, *supra* note 54; *Tripp v. Brawley*, 261 S.W.2d 508 (Spr. Ct. App. 1953); *Middleton v. Tozer*, 259 S.W.2d 80 (St. L. Ct. App. 1953); *Garvey v. Garvey*, 233 S.W.2d 48 (K.C. Ct. App. 1950); *Watkins v. Watkins*, *supra* note

custody award handed down at the time of rendition of the divorce decree. This limited jurisdiction of the divorce court may be invoked only by one of the parties to the original divorce proceeding.⁶⁷ The motion to modify is regarded as independent of and separate from the divorce proceeding;⁶⁸ it is treated as a petition in an original action and, to be sufficient, must

52; Schumm v. Schumm, 233 S.W.2d 122 (St. L. Ct. App. 1949); Schumacher v. Schumacher, 223 S.W.2d 841 (St. L. Ct. App. 1949); State *ex rel.* Walker v. Crouse, 240 Mo. App. 389, 205 S.W.2d 749 (K.C. Ct. App. 1947); Cervantes v. Cervantes, 239 Mo. App. 932, 203 S.W.2d 143 (Spr. Ct. App. 1947); Crooks v. Crooks, *supra* note 63; Bell v. Catholic Charities of St. Louis, *supra* note 52; Martin v. Martin, 160 S.W.2d 457 (St. L. Ct. App. 1942); Morgens v. Morgens, 164 S.W.2d 626 (St. L. Ct. App. 1942); Lewis v. Lewis, 167 S.W.2d 417 (Spr. Ct. App. 1942); Zamzow v. Zamzow, 159 S.W.2d 346 (St. L. Ct. App. 1942); Krueger v. Krueger, 107 S.W.2d 967 (Spr. Ct. App. 1937); Salkey v. Salkey, 80 S.W.2d 735 (St. L. Ct. App. 1935); Sanders v. Sanders, *supra* note 54; Thornton v. Thornton, 221 Mo. App. 189, 2 S.W.2d 821 (K.C. Ct. App. 1927); Conrad v. Conrad, 296 S.W. 196 (St. L. Ct. App. 1927); Hartman v. Hartman, *supra* note 52; Tatum v. Davis, 144 Mo. App. 125 (K.C. Ct. App. 1925); *In re* Krauthoff, *supra* note 63; Wald v. Wald, 168 Mo. App. 377 (St. L. Ct. App. 1912); Phipps v. Phipps, *supra* note 60; Shannon v. Shannon, 97 Mo. App. 119 (K.C. Ct. App. 1902); Meyers v. Meyers, 91 Mo. App. 151 (St. L. Ct. App. 1901).

See also Robinson v. Robinson, 268 Mo. 703, 186 S.W. 1032 (1916) (this continuing jurisdiction with regard to custody is sufficient to enable the court to hear and determine five years after rendition of decree a motion by nonresident mother to modify original award and provide support payments for nonresident child where original decree contained nothing with regard to support). Cf. Edwards v. Engledorf, 180 S.W.2d 603 (Spr. Ct. App. 1944) (erroneously holding that divorce court had continuing exclusive jurisdiction over the custody question although one of parents had died).

67. Jack v. Jack, 295 Mo. 128, 243 S.W. 314 (1922) (en banc) (third parties cannot file motion for change of custody or join in such a motion through intervention); Neustaedter v. Neustaedter, *supra* note 52 (only original parties to divorce suit are proper parties to motion to modify and no other person can properly litigate modification); Wilson v. Wilson, *supra* note 52; Schumacher v. Schumacher, *supra* note 66 (grandparents could not intervene in divorce action or file or join in motion to modify); Hupp v. Hupp, 238 Mo. App. 964, 194 S.W.2d 215 (Spr. Ct. App. 1946); Drew v. Drew, *supra* note 54 (father could not object to modification on ground parental grandparents who were originally granted custody were not made parties to the motion to modify, since they have no standing as such); Sabourin v. Sabourin, *supra* note 54. Cf. Tripp v. Brawley, *supra* note 66 (statement in a habeas corpus proceeding in which court refused to adjudicate custody question that third parties, grandparents of child, can file in the divorce court a motion to modify on the ground that mother, to whom the court awarded custody, is unfit).

68. Procedurally, the motion to modify is in the nature of an independent proceeding to determine the substantive rights of the parties on the basis of evidence relating to facts after rendition of the original decree. A motion for new trial in the modification proceeding is, therefore, necessary to enable the appellate court to review that proceeding de novo. Hayes v. Hayes, *supra* note 66; Arnold v. Arnold, 222 S.W. 996 (Mo. 1920) (en banc); Olson v. Olson, *supra* note 52; Tossier v. Tossier, *supra* note 55; Rudd v. Rudd, 223 Mo. App. 472, 13 S.W.2d 1082 (K.C. Ct. App. 1929); Cole v. Cole, *supra* note 54; Vordrick v. Vordrick, 226 S.W. 59 (St. L. Ct. App. 1920); Steele v. Steele, 85 Mo. App. 224 (St. L. Ct. App. 1900); Deidesheimer v. Deidesheimer, 74 Mo. App. 234 (St. L. Ct. App. 1898).

The motion is a "civil suit" within the meaning of that term as used in the

state a cause of action within the court's continuing jurisdiction.⁶⁹ It is, therefore, necessary that the motion to modify show upon its face facts indicating a material change of circumstances and conditions since the rendition of the original custody award.⁷⁰ In order to secure a requested change in the custody provision the movant must prove facts showing a material change of circumstances and conditions after rendition of the custody award⁷¹ and must demonstrate that this change is such as to warrant the requested modification in the light of the best interest and welfare

statutory provisions authorizing change of venue. *Hayes v. Hayes*, *supra* note 66, *overruling* *Cole v. Cole*, 89 Mo. App. 228 (St. L. Ct. App. 1901), *Robinson v. Robinson*, *supra* note 66, and *State ex rel. Reece v. Moore*, 158 S.W.2d 747 (Spr. Ct. App. 1942), which cases held the change of venue provisions inapplicable to modification proceedings on the theory that such proceedings were merely a continuation of the original action and supplementary thereto and thus not within the terms of the change of venue statutes.

In such a proceeding proper notice to the adverse party is requisite. *Hayes v. Hayes*, *supra* note 66; *Laumeier v. Laumeier*, *supra* note 66; *Jack v. Jack*, *supra* note 67; *Crooks v. Crooks*, *supra* note 63; *Burgess v. Burgess*, *supra* note 54; *Fernbaugh v. Clark*, *supra* note 60; *Krueger v. Krueger*, *supra* note 66; *Kaestner v. Kaestner*, 228 Mo. App. 1043, 58 S.W.2d 494 (St. L. Ct. App. 1933); *State ex rel. Tatum v. Ramey*, 134 Mo. App. 722, 115 S.W. 458 (K.C. Ct. App. 1909).

69. *Hayes v. Hayes*, 153 S.W.2d 1 (Mo. 1941); *North v. North*, 339 Mo. 1226, 100 S.W.2d 582 (1936); *Hensley v. Lake*, *supra* note 54; *Cherry v. Cherry*, *supra* note 65; *Samland v. Samland*, 277 S.W.2d 880 (K.C. Ct. App. 1955); *Luethans v. Luethans*, 243 S.W.2d 801 (St. L. Ct. App. 1951); *Wilton v. Wilton*, 235 S.W.2d 418 (K.C. Ct. App. 1950); *Shepard v. Shepard*, *supra* note 54; *Olson v. Olson*, *supra* note 52; *Tossier v. Tossier*, *supra* note 55; *Sanders v. Sanders*, *supra* note 54; *Nunnink v. Nunnink*, *supra* note 60; *Steele v. Steele*, *supra* note 68.

70. *Wilson v. Wilson*, *supra* note 52; *Fordyce v. Fordyce*, *supra* note 65; *Crooks v. Crooks*, *supra* note 63; *Mahan v. Mahan*, 239 Mo. App. 317, 192 S.W.2d 626 (K.C. Ct. App. 1946); *Armstrong v. Armstrong*, 185 S.W.2d 845 (Spr. Ct. App. 1945); *Mothershead v. Mothershead*, *supra* note 52; *State ex rel. Scott v. Harris*, 136 S.W.2d 78 (K.C. Ct. App. 1940); *Foster v. Foster*, 146 S.W.2d 849 (K.C. Ct. App. 1940); *Martin v. Martin*, 233 Mo. App. 667, 125 S.W.2d 943 (K.C. Ct. App. 1939); *Hess v. Hess*, *supra* note 54; *Salkey v. Salkey*, *supra* note 66; *Abel v. Ingram*, *supra* note 52; *Newlon v. Newlon*, 6 S.W.2d 669 (K.C. Ct. App. 1928); *Bedal v. Bedal*, *supra* note 55; *Ruedlinger v. Ruedlinger*, *supra* note 54; *Eaton v. Eaton*, 237 S.W. 896 (K.C. Ct. App. 1922).

71. *Wilson v. Wilson*, *supra* note 52; *Garvey v. Garvey*, 233 S.W.2d 48 (K.C. Ct. App. 1950) (attempt to remove child from one parent's influence as changed condition); *Wilton v. Wilton*, *supra* note 69; *Olson v. Olson*, *supra* note 52; *Martin v. Martin*, 160 S.W.2d 457 (St. L. Ct. App. 1942); *Krueger v. Krueger*, *supra* note 66 (concealment of child from other parent as a ground for modification); *Baer v. Baer*, *supra* note 52; *Lampe v. Lampe*, *supra* note 65; *Weniger v. Weniger*, 32 S.W.2d 773 (St. L. Ct. App. 1930) (showing of interference with operation of original decree established change of conditions as ground for modification); *Rone v. Rone*, *supra* note 54 (custodian's conduct in denying other parent's visitation rights is a ground for modification of custody as a changed condition); *Hull v. Hull*, 280 S.W. 1059 (Spr. Ct. App. 1926); *Rhodes v. Rhodes*, *supra* note 65; *Haagen v. Haagen*, *supra* note 65; *Hartman v. Hartman*, *supra* note 52; *Kaplun v. Kaplun*, *supra* note 65 (showing mother's actions prejudicing child against father); *Sabourin v. Sabourin*, *supra* note 54.

of the child affected thereby.⁷² The court may modify the original custody award in that manner which it deems consonant with the best interest and welfare of the child; it is clearly not limited to that modification requested by the moving party.⁷³ It may, and will, make such modification, *sua sponte*, as it deems advisable;⁷⁴ and this is the rule although the other party to the custody award does not object to the change requested by the moving party. The cases demonstrate that here, as well as in the original divorce proceedings, the divorce court exercises a wide discretion with respect to the disposition of the custody question. The exercise of this discretion by the divorce court is subject to the *de novo* review of the appellate court as in the original proceedings.

It is interesting to observe that, when the courts follow a logical extension of the theoretical basis upon which the motion to modify is grounded, the result, in many instances, is a restriction upon the operation of the court's practical function in hearing and determining such motions. Substantively the motion is considered to be in the nature of an independent proceeding wherein the rights of the parties regarding a change in the custody provisions are determined upon the basis of evidence restricted to facts arising after rendition of the original divorce decree and custody award.⁷⁵ It follows, therefore, that evidence regarding facts and circumstances prior to the initial adjudication of the custody question in the divorce proceeding is not admissible in hearing the motion to modify, on the

72. *S. v. G.*, *supra* note 52 (conduct of parent seeking to instill fear, disrespect, or hatred in child for other parent is sufficient basis for modification); *Luethans v. Luethans*, *supra* note 69; *Green v. Perr*, 238 S.W.2d 924 (St. L. Ct. App. 1951); *Watkins v. Watkins*, *supra* note 52; *Williams v. Williams*, 211 S.W.2d 740 (K.C. Ct. App. 1948); *Crooks v. Crooks*, *supra* note 63; *Olson v. Olson*, *supra* note 52; *Drew v. Drew*, *supra* note 54; *Parks v. Cook*, *supra* note 56; *Lewis v. Lewis*, 167 S.W.2d 417 (Spr. Ct. App. 1942); *Wilson v. Wilson*, *supra* note 52 (demonstration of any disrespect or disregard for the terms of the custody decree by the parent awarded custody is significant, not only as a changed condition, but also as a factor in passing upon the welfare of the child); *Mothershead v. Mothershead*, *supra* note 52 (motion showing that father, who was awarded custody originally, had abandoned child to paternal grandparents warranted modification of award); *Martin v. Martin*, 160 S.W.2d 457 (St. L. Ct. App. 1942); *Hill v. Hill*, *supra* note 65; *Nunnink v. Nunnink*, *supra* note 60; *Barnhart v. Barnhart*, 253 S.W. 56 (K.C. Ct. App. 1923); *Sabourin v. Sabourin*, *supra* note 54; *Waters v. Gray*, *supra* note 54; *In re Krauthoff*, *supra* note 63; *Phipps v. Phipps*, *supra* note 60; *West v. West*, 94 Mo. App. 683 (St. L. Ct. App. 1902).

73. *Hayes v. Hayes*, *supra* note 66; *S. v. G.*, *supra* note 52; *Wilson v. Wilson*, *supra* note 52; *Shepard v. Shepard*, *supra* note 54; *Baer v. Baer*, *supra* note 52; *Eaton v. Eaton*, *supra* note 70; *Phipps v. Phipps*, *supra* note 60.

74. *Hayes v. Hayes*, *supra* note 66; *Shepard v. Shepard*, *supra* note 54; *Lewis v. Lewis*, *supra* note 72; *Rone v. Rone*, *supra* note 54.

75. See notes 69 and 70 *supra* and text supported thereby.

ground that the divorce decree is *res judicata* as to those matters.⁷⁶ The resultant exclusion of matters which transpired prior to entry of the divorce decree on the basis of strict application of the *res judicata* doctrine directly impedes the broad scope of inquiry necessary to a proper adjudication of the custody question. Disposition of custody is predicated upon factual examination and consideration of the moral character, conduct and circumstances of those vying for the custody award. Limitation of the basis for examination to matters occurring after rendition of the divorce decree eliminates the availability of matters necessary to a knowledgeable and meaningful determination of the custody problem. The impropriety of such a restriction upon the scope of inquiry in modification proceedings is forcefully demonstrated upon consideration of the practicalities of divorce proceedings. In the majority of divorce cases the complaint contains numerous general allegations regarding the conduct and character of both parties and the decree rendered is ordinarily a general one containing no specific findings of fact with regard to these matters. Moreover, in a great number of divorce proceedings the complaint does not contain any matters going to the moral character and conduct of the parties where such can be avoided and the decree is, therefore, often silent in this regard. Application of the *res judicata* doctrine, in restricting evidence on a motion to modify to matters occurring after rendition of the divorce decree on the ground that factors material to the disposition of custody arising before the decree were considered and determined in the divorce proceeding, is therefore often premised upon an unreal assumption.

Decisions involving motions to modify impliedly recognize the inapplicability of strict operation of the doctrine of *res judicata* in this area. These cases hold in effect that, although the subject of inquiry in a modification proceeding is whether the substantive rights of the parties require

76. *In re Wakefield*, *supra* note 52; *Jack v. Jack*, *supra* note 67; *S. v. G.*, *supra* note 52; *Samland v. Samland*, *supra* note 69; *Ackermann v. Ackermann*, *supra* note 65; *Lehr v. Lehr*, *supra* note 52; *Cherry v. Cherry*, *supra* note 65; *Frame v. Black*, *supra* note 65; *Montgomery v. Montgomery*, 257 S.W.2d 189 (St. L. Ct. App. 1953); *Fago v. Fago*, *supra* note 52; *Fordyce v. Fordyce*, *supra* note 65; *Brake v. Brake*, 244 S.W.2d 786 (Spr. Ct. App. 1951); *Schumm v. Schumm*, *supra* note 66; *Lambert v. Lambert*, *supra* note 52; *Hawkins v. Thompson*, 210 S.W.2d 747 (Spr. Ct. App. 1948); *Crooks v. Crooks*, *supra* note 63; *Shepard v. Shepard*, *supra* note 54; *Mahan v. Mahan*, *supra* note 70; *Armstrong v. Armstrong*, *supra* note 70; *Drew v. Drew*, *supra* note 54; *Foster v. Foster*, *supra* note 70; *Martin v. Martin*, 125 S.W.2d 943 (K.C. Ct. App. 1939); *Krueger v. Krueger*, *supra* note 66; *Salkey v. Salkey*, *supra* note 66; *Baer v. Baer*, *supra* note 52; *Abel v. Ingram*, *supra* note 52; *Rone v. Rone*, *supra* note 54; *Sanders v. Sanders*, *supra* note 54; *Haagen v. Haagen*, *supra* note 65; *Newlon v. Newlon*, *supra* note 70.

modification of custody because of new facts since rendition of the original decree, the scope of that inquiry must be sufficient to assure protection of the child and its welfare. Where it is apparent from a consideration of the tenor of the original decree that the rendering court did not actually *adjudicate* the custody question but merely incorporated the agreement of the parties with regard to custody, evidence relating to the conduct and character of the parties before the decree will be allowed where material to the custody question.⁷⁷ The basis of this exception to the operation of *res judicata* is that although a divorce decree, like other judgments, is conclusive not only as to matters actually adjudicated but also as to matters which might properly have been litigated but were not, the position of the child as a ward of the court and the continuing duty of the court to protect its welfare requires a determination based upon all material facts whether before or after entry of the divorce decree.⁷⁸ Similarly, where it is demonstrated that facts material to the disposition of custody, existing at the time of the divorce decree, were concealed from or unknown to the rendering court, inquiry into these matters is permissible.⁷⁹ Although courts vary in regard to the extent to which inquiry into pre-decree matters is permissible, the majority hold that pre-decree matters are admissible where they relate to the moral character, propriety and circumstances of the prospective custodian.⁸⁰

In the recent case of *S. v. G.*⁸¹ the Springfield Court of Appeals acknowledges this uncertainty regarding the nature of the inquiry in

77. *Wilson v. Wilson*, *supra* note 52; *Crooks v. Crooks*, *supra* note 63; *Newlon v. Newlon*, *supra* note 70; *Eaton v. Eaton*, *supra* note 70; *In re Krauthoff*, *supra* note 63.

78. *In re Wakefield*, *supra* note 52; *Crooks v. Crooks*, *supra* note 63; *In re Krauthoff*, *supra* note 63.

79. *In re Wakefield*, *supra* note 52; *S. v. G.*, *supra* note 52; *Sanders v. Sanders*, *supra* note 54; *Ellis v. Johnson*, *supra* note 55.

80. *Hurley v. Hurley*, 284 S.W.2d 72 (Spr. Ct. App. 1955) (evidence regarding father's pre-divorce conduct admissible where directly bearing upon his moral character); *Dansker v. Dansker*, *supra* note 63; *Link v. Link*, *supra* note 54 (on motion to modify, morals of both parents are proper subject of inquiry); *Garvey v. Garvey*, *supra* note 65; *Watkins v. Watkins*, *supra* note 52 (evidence of movant-mother's pre-decree relationship with another man held admissible, especially in view of fact she had subsequently married this man and her remarriage was basis for her motion to modify original award to father); *Rex v. Rex*, 217 S.W.2d 391 (K.C. Ct. App. 1948); *Drew v. Drew*, *supra* note 54 (evidence of character and fitness of movant admissible although such evidence goes behind the divorce decree); *Davis v. Davis*, 192 S.W.2d 41 (K.C. Ct. App. 1945) (evidence of movant-mother's pre-decree adultery admissible because it goes to issue of her fitness for custody award; evidence relating to father's "sexual appetite" and excessive sexual demands upon mother prior to divorce held inadmissible because not material to the custody issue).

81. 298 S.W.2d 67 (Spr. Ct. App. 1957).

regard to past affairs when determining a motion to modify. In this case it is pointed out that a court, when confronted with the custody question on a motion to modify, must determine, first, whether there has been a material change of circumstances and conditions since rendition of the original custody award and, secondly, whether these changes call for any modification of the custody award in order to promote the child's best interests. In determining the existence of a material change in facts and circumstances, it is necessary that the court considering the motion to modify be informed as to the facts and circumstances existing at the time the original decree was rendered. The court noted that in the majority of divorce cases the complaint contains numerous allegations and the divorce decree predicated upon such complaint is usually a general one containing no specific findings of fact. The court observed that, in the absence of such specific findings of fact, a court considering the motion to modify would be precluded from ascertaining the facts and circumstances existing at the time of the original decree unless it could hear evidence regarding conduct and circumstances prior to the divorce. Once it has been determined that there has been a material change of facts and circumstances since rendition of the original decree the court may then consider the second and controlling issue—whether such change demonstrates that a modification of the original custody award is necessary to effectuate the best interests and welfare of the child. The court states, in considering the scope of inquiry necessary, that:

[E]ach case must stand upon its own factual situation; . . . the inquiry in respect to circumstances prior to the decree should extend so far, and only so far, as is necessary to inform the court of the actual situation and circumstances which existed at the time the decree was rendered, also as to those traits of character (and in some instances, physical and mental conditions) which might be of permanent nature or which are so recent in occurrence or demonstration as to leave the possibility of their continued existence, which traits of character are of such nature that there is a reasonable possibility that they may affect the welfare of the child.⁸²

It is submitted that, from a practical standpoint, the rule laid down by the Springfield Court of Appeals with regard to the proper scope of inquiry in considering a motion to modify is the correct one. If a court is properly to perform its function in ascertaining and promoting the best interests and welfare of children subject to its jurisdiction, it must be able to acquaint it-

82. *Id.* at 76.

self with the facts and circumstances existing prior to the original decree as well as thereafter, in order to ascertain whether there has been a material change in facts and circumstances since rendition of the original decree and to determine whether a change in the custody award should be made and the nature of the modification necessary.

B. *The Exercise of a Divorce Court's Power as Affected by Jurisdictional Problems*

Treatment of the motion to modify as an original action independent of the divorce proceeding in which the custody award was rendered is not adhered to in all phases of the custody problem. Substantively the motion is considered to be a continuation of the original (divorce) proceeding insofar as the jurisdictional basis of the court to hear and dispose of such motions is in issue.⁸³ If the court rendering the divorce decree had jurisdiction *in limine* to adjudicate the custody question, its jurisdiction over questions affecting custody, arising subsequent to rendition of the original decree, is held to continue during the minority of the child unless terminated earlier by the death of one of the parties to the divorce proceeding.⁸⁴ The courts regard this "retained" jurisdiction as the base upon which to hear and determine subsequent motions to modify the original custody award, notwithstanding the fact that at the time of the motion either the party adversely situated to such motion or the child affected by such motion, or both, are without the *physical* jurisdiction of the court.⁸⁵ Where a court

83. *Hayes v. Hayes*, *supra* note 66; *State ex rel. Burtrum v. Smith*, 357 Mo. 134, 206 S.W.2d 558 (1947) (en banc); *Kelly v. Kelly*, *supra* note 55; *Robinson v. Robinson*, *supra* note 66; *Williamson v. Williamson*, 331 S.W.2d 140 (St. L. Ct. App. 1960); *Wilson v. Wilson*, *supra* note 52; *Crooks v. Crooks*, *supra* note 63; *Lewis v. Lewis*, *supra* note 72; *Krueger v. Krueger*, *supra* note 66; *Sanders v. Sanders*, *supra* note 54; *Ruedlinger v. Ruedlinger*, *supra* note 54; *Thornton v. Thornton*, *supra* note 66; *Hill v. Hill*, *supra* note 65; *Nunnink v. Nunnink*, *supra* note 60; *Barnhart v. Barnhart*, *supra* note 72; *Eaton v. Eaton*, *supra* note 70; *Phipps v. Phipps*, *supra* note 60.

84. *Hayes v. Hayes*, *supra* note 66; *Robinson v. Robinson*, *supra* note 66; *S. v. G.*, *supra* note 52; *Graves v. Wooden*, *supra* note 54; *Middleton v. Tozer*, *supra* note 66; *Garvey v. Garvey*, *supra* note 71; *Schumacher v. Schumacher*, *supra* note 66; *Crooks v. Crooks*, *supra* note 63; *Rone v. Rone*, *supra* note 54; *Conrad v. Conrad*, *supra* note 52; *Shannon v. Shannon*, 97 Mo. App. 119, 71 S.W. 104 (K.C. Ct. App. 1902); *Cole v. Cole*, *supra* note 68.

85. *State ex rel. Shoemaker v. Hall*, 257 S.W. 1047 (Mo. 1924) (en banc); *Robinson v. Robinson*, *supra* note 66 (movant-mother and child residing and domiciled in Oregon); *Williamson v. Williamson*, *supra* note 83 (adverse party to motion and child domiciled in Georgia); *Hachtel v. Hachtel*, *supra* note 65; *Middleton v. Tozer*, *supra* note 66 (dictum); *Wilson v. Wilson*, *supra* note 52; *Shepard v. Shepard*, *supra* note 54; *Drew v. Drew*, *supra* note 54 (movant-mother's motion to modify granted where children residing in Rhode Island); *Fernbaugh v. Clark*, *supra* note 60 (father forcibly seized children in Louisiana where they were

proceeds with and determines a motion to modify in such a situation, the party purportedly aggrieved thereby cannot raise objection to the court's jurisdiction to adjudicate the modification but may only object on the non-jurisdictional ground that he did not receive proper notice of the pendency of the motion.⁸⁶ Cases in this area turn upon the sufficiency of the notice to the opposite party. For example, notice to the opposing party's attorney of record (in the divorce proceeding) is sufficient where it is demonstrated that there is in existence, at the time of the motion, an attorney-client relationship between the opposing party and his attorney of record.⁸⁷ The cases indicate generally that that notice which is consonant with concepts of due process will be sufficient and that where such is demonstrated the court may properly modify the original custody award although thereby affecting one not within the physical jurisdiction of the court.⁸⁸ Where the notice given does not comport with theoretical concepts of due process, any modification of the original custody award will be negated, although the opposing party in fact had actual notice of the pendency of the modification proceeding.⁸⁹

The viability of the "retained" jurisdiction theory with regard to the rendering court's ability to hear and determine subsequent motions to modify the custody provisions of a divorce decree although the persons affected thereby are outside the court's physical jurisdiction is demonstrated in a plethora of cases involving the disposition of custody. In original divorce proceedings as well as in modification proceedings the courts have awarded custody to non-residents⁹⁰ or have allowed the party awarded

domiciled and brought them to Missouri); *Riesenmey v. Riesenmey*, 155 S.W.2d 505 (K.C. Ct. App. 1941) (dictum); *Krueger v. Krueger*, *supra* note 66; *Sanders v. Sanders*, *supra* note 54; *Nunnink v. Nunnink*, *supra* note 60; *Eaton v. Eaton*, *supra* note 70 (children residing in California at time of motion); *In re Krauthoff*, *supra* note 63.

86. *Jack v. Jack*, *supra* note 67; *Williamson v. Williamson*, *supra* note 83; *Crooks v. Crooks*, *supra* note 63; *Burgess v. Burgess*, *supra* note 54; *Fernbaugh v. Clark*, *supra* note 60; *Krueger v. Krueger*, *supra* note 66; *State ex rel. Tatum v. Ramey*, *supra* note 68.

87. *Burgess v. Burgess*, *supra* note 54 (where movant served notice on opposing party's attorney of record in divorce proceeding movant had burden of proof to establish that attorney-client relationship was in existence at time of motion); *Fernbaugh v. Clark*, *supra* note 60.

88. *Kelly v. Kelly*, *supra* note 55; *Williamson v. Williamson*, *supra* note 83; *Crooks v. Crooks*, *supra* note 63; *Burgess v. Burgess*, *supra* note 54; *Fernbaugh v. Clark*, *supra* note 60; *Tossier v. Tossier*, *supra* note 55 (dictum).

89. *Williamson v. Williamson*, *supra* note 83; *Fernbaugh v. Clark*, *supra* note 60.

90. *Graves v. Wooden*, *supra* note 54 (modification proceeding); *Lane v. Lane*, *supra* note 52 (modification proceeding); *Drew v. Drew*, *supra* note 54 (divorce proceeding); *Fernbaugh v. Clark*, *supra* note 60; *In re Krauthoff*, *supra*

custody to remove the child from Missouri,⁹¹ stating generally that removal of the child from the state is not a taking of the child beyond the jurisdiction of the court in the sense that the rendering court would thereby lose jurisdiction to change its order in the future should circumstances so require.⁹² Both the grant of custody to non-residents and the allowance of removal upon the "retained" jurisdiction theory are predicated upon two basic assumptions by the rendering court: (1) that the parents, as parties to the original (divorce) proceeding, are personally bound by the rendering court's orders and decrees;⁹³ and, (2) that the orders and decrees of the rendering court will be controlling upon and recognized in the courts of other states.⁹⁴

Although stating that it is against the policy of the law to allow removal of the child from the state,⁹⁵ the majority of cases consider this policy as

note 63 (modification proceeding); *Brown v. Brown*, *supra* note 54 (divorce proceeding).

91. *Mitchell v. Mitchell*, 350 S.W.2d 116 (K.C. Ct. App. 1961); *Williamson v. Williamson*, *supra* note 83; *Frame v. Black*, *supra* note 65; *Fago v. Fago*, *supra* note 52 (modification proceeding); *Conrad v. Conrad*, *supra* note 60 (modification proceeding); *Hartman v. Hartman*, *supra* note 52; *Tatum v. Davis*, *supra* note 66; *Freeman v. Freeman*, *supra* note 54.

In this connection it should be noted that our courts hold that where the decree is silent as to removal of the child from the state and does not specifically prohibit such removal, the party to whom custody has been awarded may lawfully remove the child without securing the consent of the granting court prior thereto. *Middleton v. Tozer*, *supra* note 66 (civil contempt proceeding); *Shreckengast v. Shreckengast*, 219 S.W.2d 244 (K.C. Ct. App. 1949); *Rone v. Rone*, *supra* note 54; *Tatum v. Davis*, *supra* note 66; *In re Krauthoff*, *supra* note 63 (dictum).

92. *S. v. G.*, *supra* note 52 (dictum); *Dansker v. Dansker*, *supra* note 63 (juvenile court proceeding); *Middleton v. Tozer*, *supra* note 66; *Lane v. Lane*, *supra* note 52; *Riesenmey v. Riesenmey*, *supra* note 85; *Sanders v. Sanders*, *supra* note 54; *Conrad v. Conrad*, *supra* note 60; *Tatum v. Davis*, *supra* note 66; *In re Krauthoff*, *supra* note 63.

On the same theory it is generally held that the fact that the party awarded custody has removed, or intends to remove, the child from the state is not a sufficient basis for the modification of a custody award silent in this regard; modification on such a ground will only be allowed where it is demonstrated that the purpose and effect of such removal is to deprive the other parent of his rights of visitation or association with the child. *Green v. Perr*, *supra* note 72; *Garvey v. Garvey*, *supra* note 66; *Shepard v. Shepard*, *supra* note 54; *Olson v. Olson*, *supra* note 52; *Rone v. Rone*, *supra* note 54; *Tatum v. Davis*, *supra* note 66.

93. *Middleton v. Tozer*, *supra* note 66; *Drew v. Drew*, *supra* note 54; *Lane v. Lane*, *supra* note 52; *Krueger v. Krueger*, *supra* note 66; *Sanders v. Sanders*, *supra* note 54; *Conrad v. Conrad*, *supra* note 60; *Hartman v. Hartman*, *supra* note 52; *Tatum v. Davis*, *supra* note 66; *In re Krauthoff*, *supra* note 63.

94. *In re Krauthoff*, *supra* note 63; *Drew v. Drew*, *supra* note 54; *Conrad v. Conrad*, *supra* note 60; *Tatum v. Davis*, *supra* note 66; *Hartman v. Hartman*, *supra* note 52; *Sanders v. Sanders*, *supra* note 54.

95. *State ex rel. Shoemaker v. Hall*, *supra* note 85; *Graves v. Wooden*, *supra* note 54; *Hachtel v. Hachtel*, *supra* note 65; *Dansker v. Dansker*, *supra* note 63; *Frame v. Black*, *supra* note 65; *Middleton v. Tozer*, *supra* note 66; *Fago v. Fago*,

one grounded upon the rendering court's position with relation to the child whose custody has been adjudicated by it, rather than as a policy grounded upon the recognition of defects in the retained jurisdiction theory. These decisions stress the fact that the rendering court upon obtaining jurisdiction over a child and its future welfare (through the initial adjudication of the custody question) assumes a position with regard to that child analogous to guardianship, requiring close supervision, and that, therefore, any impediment to or interference with this close supervision (such as would result upon removal of the child from the state) must be supported by a strong showing that the supervening consideration of the child's welfare requires removal.⁹⁶

Other decisions in this area, proceeding upon a realistic appraisal of the practicalities of removal of the child from the state, recognize the distinction between a theoretical jurisdiction to adjudicate future custody problems and judicial *power to determine* such problems.⁹⁷ Generally, however, the courts, in awarding custody to non-residents and in allowing the removal of the child from the state, do not appear to consider that the basic premises underlying the "retained" jurisdiction theory have any inherent weakness.

The apparent faith of our courts in the extra-territorial effectiveness of custody decrees and orders, manifested in decisions awarding custody to non-residents and allowing removal of the child outside the state, is premised upon the assumption that courts of sister states will recognize and enforce such decrees and orders. Decisions in Missouri and recent decisions of the Supreme Court of the United States with regard to the applicability of the

supra note 52; Brake v. Brake, *supra* note 76; Green v. Perr, *supra* note 72; Hartman v. Hartman, *supra* note 52; Garvey v. Garvey, *supra* note 66; Watkins v. Watkins, *supra* note 52; Lane v. Lane, *supra* note 52; Wells v. Wells, *supra* note 52; Rone v. Rone, *supra* note 54; Conrad v. Conrad, *supra* note 60; Wald v. Wald, *supra* note 66.

96. Hachtel v. Hachtel, *supra* note 65; Middleton v. Tozer, *supra* note 66; Dansker v. Dansker, *supra* note 63; Green v. Perr, *supra* note 72; Watkins v. Watkins, *supra* note 52; Wald v. Wald, *supra* note 66.

97. I. v. B., *supra* note 52; Ackermann v. Ackermann, *supra* note 65; Baer v. Baer, *supra* note 52; Sanders v. Sanders, *supra* note 54; Jennings v. Jennings, 85 Mo. App. 290 (St. L. Ct. App. 1900) (absence of child from state will deprive court of power to make future orders); Edwards v. Edwards, 84 Mo. App. 552, 554 (St. L. Ct. App. 1900) (the court should hesitate from allowing removal of the child outside the state for the obvious reason that it would thereafter have no power *proprio vigore* to enforce any orders it might deem necessary). And see, Mitchell v. Mitchell, *supra* note 91 (decree modified, granting temporary custody to nonresident father, conditioned upon his posting of a bond conditioned upon compliance with custody provisions of decree as long as he remains nonresident).

full faith and credit clause to custody awards seriously challenge the validity of this underlying assumption, demonstrating that it is misplaced, if not completely unrealistic.

C. *Missouri Cases on Extra-Territorial Recognition*

The tenuous character of the statements by the courts of Missouri with regard to the extra-territorial validity of custody decrees and orders is poignantly demonstrated by decisions involving the jurisdictional base necessary to adjudication of the custody question. These cases disclose a marked distinction between the situation in which Missouri is the rendering court and that in which Missouri is in the position of the enforcing court confronted with a subsisting order or decree of another state.

Decisions in Missouri wherein the issue is the power of a Missouri court, as the rendering court, to adjudicate the custody question in a divorce proceeding, turn upon one of two theories in considering whether the jurisdictional factors necessary to that adjudication have been established. Cases in this area, relying upon the theory that the custody question is one involving a determination of personal rights between the parties to the divorce proceeding, hold that in personam jurisdiction of the parents gives the court the power to determine the custody question, the domicile or physical location of the child being immaterial.⁹⁸ Other decisions, viewing the custody question as a proceeding quasi-in rem involving the determination of status of the child, hold that domicile of the child in Mis-

98. In *Sanders v. Sanders*, *supra* note 54, the plaintiff instituted a divorce proceeding through constructive service upon defendant, living and domiciled in another state; the children were residing with defendant and domiciled in that state. Plaintiff, after obtaining ex parte divorce decree and custody award, went to that state and forcibly seized the children, bringing them to Missouri. Defendant subsequently filed motion to modify the custody award in the Missouri court. The Springfield Court of Appeals held that although the original custody award was invalid because of lack of jurisdiction, the divorce court obtained jurisdiction to determine custody in the modification proceeding because it had personal jurisdiction of the parents, defendant parent having personally submitted to the jurisdiction of the rendering court (by filing the motion to modify). See also *Laumeier v. Laumeier*, *supra* note 66; *Poole v. Poole*, 287 S.W.2d 372 (St. L. Ct. App. 1956) (dictum).

In *State ex rel. Shoemaker v. Hall*, *supra* note 85, the wife had been granted a Missouri divorce. Three years thereafter the husband filed a motion in the rendering court to re-open the proceedings in order to determine whether a child born subsequent to the divorce was his; the husband prayed alternatively in the motion that he be awarded custody should the court determine that he was the father of the child or, should the court determine that he was not, that the court enjoin his former wife and her present husband from asserting any claim against him for child support. At the time of this motion the former wife, her present husband and the child were living and domiciled in New York; service

souri provides the necessary jurisdictional base for the adjudication of custody, notwithstanding the absence of in personam jurisdiction over both parents.⁹⁹ A third jurisdictional theory upon which the ability to determine custody questions is predicated is that the state, as *parens patriae*, has sufficient interest in the welfare of any child found within its territorial jurisdiction to support its disposition of that child's custody, whether or not

upon the former wife was obtained by publication. Upon the wife's application for writ of prohibition to prevent the judge from hearing the ex-husband's motion, the supreme court held that the court had jurisdiction to proceed on the ground that it had in personam jurisdiction over both parents (the former wife had entered her appearance by consenting to and participating in the taking of depositions on the merits of the motion). The court noted that the fact that the child was not, and had never been, within the state of Missouri was immaterial.

See also *Ex parte Sangster*, *supra* note 54 (dictum); *Jack v. Jack*, *supra* note 67 (dictum that custody decree fixes the respective rights of the parents); *In re Morgan*, *supra* note 54 (dictum); *State ex rel. Miller v. Jones*, 349 S.W.2d 534 (St. L. Ct. App. 1961) (dictum); *Weiler v. Weiler*, 331 S.W.2d 165 (St. L. Ct. App. 1960) (entry of appearance by defendant wife, domiciled with children in Illinois, in Missouri divorce proceeding gives court necessary in personam jurisdiction to dispose of custody); *In re Rice*, 316 S.W.2d 329 (K.C. Ct. App. 1958) (statement of theory); *Middleton v. Tozer*, *supra* note 66 (dictum); *Daugherty v. Nelson*, 241 Mo. App. 121, 234 S.W.2d 353 (K.C. Ct. App. 1950) (custody proceedings are in personam for the purpose of fixing the reciprocal rights of the parents with regard to the child); *Schumacher v. Schumacher*, *supra* note 66 (determination of the right of custody between claims of parents); *Drew v. Drew*, *supra* note 54 (where both parents are personally present before the rendering court the physical location of the child is immaterial); *Fernbaugh v. Clark*, *supra* note 60; *Kaestner v. Kaestner*, *supra* note 68 (dictum).

99. *Beckmann v. Beckmann*, 358 Mo. 1029, 218 S.W.2d 566 (1949) (en banc); *Bernstein v. Bernstein*, 351 S.W.2d 46 (K.C. Ct. App. 1961) (ex parte divorce decree and custody award; constructive service upon defendant parent, child within state); *Moss v. Fitch*, 212 Mo. 484 (1908) (dictum); *State ex rel. Miller v. Jones*, *supra* note 98 (dictum); *In re Rice*, *supra* note 98; *McCoy v. Briegel*, *supra* note 52 (service by publication upon defendant; ex parte custody award of child present in state); *State ex rel. Stoffey v. La Driere*, 273 S.W.2d 776 (St. L. Ct. App. 1954). (Defendant wife was outside Missouri with children when plaintiff husband obtained ex parte divorce and custody award upon constructive service. Court found that defendant mother, although without the state, had not changed her Missouri domicile and that therefore the children in her custody also remained domiciled in Missouri. Court states that rendering court has power to award custody to a parent resident in Missouri although the other parent is absent from the state with the children, provided that absent parent has not changed domicile and therefore that child's domicile continues in Missouri. The continuing domicile of the child in Missouri gives the court power to determine its status.); *Dansker v. Dansker*, *supra* note 63 (dictum—juvenile court proceeding); *Daugherty v. Nelson*, *supra* note 98 (statement of theory); *Crooks v. Crooks*, *supra* note 63, at 682 (in granting divorce the court has the power, if the children are within its jurisdiction, to make an order concerning their custody); *Martin v. Martin*, *supra* note 76; *Elvins v. Elvins*, 176 Mo. App. 645, 159 S.W. 746 (St. L. Ct. App. 1913) (dictum); *Kaestner v. Kaestner*, *supra* note 68 (ex parte divorce decree and custody award upon constructive service on defendant parent; child physically present in Missouri).

such child is domiciled in the state.¹⁰⁰ Although there are no Missouri decisions specifically positing jurisdiction to render a custody award on this last-mentioned basis, cases indicate that this physical presence theory has not been rejected as a possible nexus upon which to ground the court's ability to determine the disposition of child custody.¹⁰¹

Our courts apparently do not consider the theory of personal jurisdiction over the parents and the theory of domicile of the child as mutually exclusive bases for the rendition of custody decrees.¹⁰² On the contrary, it is clear that either in personam jurisdiction over the parties to the divorce proceeding or jurisdiction of the child's domicile is sufficient to enable Missouri courts to adjudicate the custody question.¹⁰³ This conclusion is supported by the most recent pronouncement of the Supreme Court of Missouri on that issue. In *Beckmann v. Beckmann*,¹⁰⁴ plaintiff wife instituted divorce proceedings against defendant husband who was, at that time, residing in California with the children of the parties. A divorce and custody of the children were granted to plaintiff after constructive service by publication was obtained upon defendant. The supreme court, in rejecting defendant's contention that the rendering court had no jurisdiction to adjudicate the custody question, noted that defendant had not been personally served nor had he appeared or participated in the divorce proceedings. The court stated, however, that it had been established in the divorce proceedings that defendant, although physically absent from the state, had not changed his Missouri domicile¹⁰⁵ and that, therefore, the Missouri domicile

100. See, e.g., *McMillin v. McMillin*, 114 Colo. 247, 158 P.2d 444 (1945); *Sheehy v. Sheehy*, 88 N.H. 223, 186 Atl. 1 (1936); *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925); *Wicks v. Cox*, 146 Tex. 489, 208 S.W.2d 876 (1948); *Goldsmith v. Salkey*, 131 Tex. 139, 112 S.W.2d 165 (1938). See also Annot., 4 A.L.R.2d 7 (1949).

101. *Beckmann v. Beckmann*, *supra* note 99 (dictum); *State ex rel. Miller v. Jones*, *supra* note 98 (implied); *In re Rice*, *supra* note 98 (our courts apparently determine custody questions on the basis of domicile, although not disclaiming jurisdiction based upon the child's presence within the state); *Daugherty v. Nelson*, *supra* note 98, at 360; *Sanders v. Sanders*, 223 Mo. App. 834, 14 S.W.2d 458 (Spr. Ct. App. 1929).

102. *State ex rel. Miller v. Jones*, *supra* note 98; *Weiler v. Weiler*, *supra* note 98; *In re Rice*, *supra* note 98; *State ex rel. Stoffey v. La Driere*, *supra* note 99; *Daugherty v. Nelson*, *supra* note 98.

103. See notes 98 and 99 *supra* and text supported thereby.

104. 358 Mo. 1029, 218 S.W.2d 566 (1949) (en banc).

105. In the divorce proceeding defendant husband filed a special appearance, objecting to the court's jurisdiction to proceed with the case. The basis of defendant's objection was that "defendant is temporarily in the State of California and is detained there on account of ill health." (Emphasis added.) *Id.* at 1032, 218 S.W.2d at 568. The supreme court construed this statement as a judicial admission supporting the conclusion that defendant was still domiciled in Missouri. *Id.* at 1033, 218 S.W.2d at 569.

of the children, who were in defendant's actual custody, continued.¹⁰⁶ In holding that the rendering court had jurisdiction to determine the disposition of custody, notwithstanding the absence of defendant husband and the children from the state, the court stated:

[T]he status as to . . . [the children's] custody was a thing or res within the jurisdiction of the court even though the children were physically without the state. Since such status was within the court's jurisdiction, the court was authorized to deal with it, and the judgment awarding custody was a proper exercise of judicial power and therefore valid. And inasmuch as the status was within the jurisdiction of the court the fact defendant was served by publication did not deprive the court of jurisdiction.¹⁰⁷

The language of the opinion in the *Beckmann* case, considered in its entirety, clearly demonstrates that the court did not decide that domicile of the child is the only basis upon which to predicate the power to adjudicate the custody question.¹⁰⁸ The decision has been so construed by other courts in this state, holding that *Beckmann* does not rule out in personam jurisdiction of the parents as a basis for rendering a valid custody award, notwithstanding the child may be domiciled in another state.¹⁰⁹ These decisions demonstrate the existence of multiple jurisdictional bases which these courts consider sufficient for the disposition of custody.

Apparently the only situation in which the courts will not proceed to adjudicate the custody question is that obtaining where there has been constructive service upon the absent defendant parent *and* the child is not

106. The child's domicile is ordinarily that of the father. Where the parents separate and establish separate domiciles, the child takes that of the parent with whom he in fact resides. *Weiler v. Weiler*, *supra* note 98; *State ex rel. Stoffey v. La Driere*, *supra* note 99; *Daugherty v. Nelson*, *supra* note 98.

The *Beckmann* case discusses § 1526, RSMo 1939, the statutory precursor of present § 452.150, RSMo 1959, providing that custody of the child when parents separate, and pending adjudication, shall remain with the parent having actual custody.

107. 358 Mo. at 1033, 218 S.W.2d at 569.

108. The *Restatement* and several leading text writers have adopted the view that the state of the child's domicile is the only one which has jurisdiction to award custody. *RESTATEMENT, CONFLICT OF LAWS* §§ 117, 145-48 (1934); 2 *BEALE, CONFLICT OF LAWS* § 144.3, at 717 (1935); *GOODRICH, CONFLICT OF LAWS* § 132, at 358 (1927); *Annot.*, 4 A.L.R.2d 7, 14 (1949), 9 A.L.R.2d 434, 439 (1950).

109. *State ex rel. Miller v. Jones*, *supra* note 99; *Weiler v. Weiler*, *supra* note 98; *In re Rice*, *supra* note 98. In *Daugherty v. Nelson*, *supra* note 98, at 131, 234 S.W.2d at 359, the court stated: "While the . . . decision in the *Beckmann* case . . . is based on the domicile theory, it cannot be stated with certainty that our Supreme Court has made an exclusive choice between the theories which have developed to determine the basis for jurisdiction in such cases."

within the state.¹¹⁰ Even this limitation upon the jurisdiction of Missouri courts to adjudicate the custody question is qualified, however, in that should the defendant parent subsequently enter his appearance or participate in the proceedings on the merits in any manner the in personam jurisdiction resultant from such conduct will be held to remedy the initial lack of jurisdiction although the child remains outside the state.¹¹¹ The recent case of *Weiler v. Weiler*¹¹² involved a divorce suit instituted by the husband, a resident of Missouri, against his wife, living and domiciled in Illinois. Constructive service of the petition praying for custody of the children, *inter alia*, was obtained upon the defendant in Illinois. The children were at that time in the actual custody of defendant, and the court specifically noted that the children were at all times continually domiciled in Illinois. Defendant, although not physically present in Missouri, filed an answer alleging as a defense that she had obtained a divorce and custody in Illinois. The St. Louis Court of Appeals held that defendant's personal appearance in the action by filing a defensive pleading remedied any jurisdictional defect that existed initially in regard to determination of the custody question. In basing the power to determine custody upon in personam jurisdiction over the parents, the court stated,

It appears logical that the court having jurisdiction over both parents should have jurisdiction to determine and to award the custody of their children. A multiplicity of suits would otherwise result, and the best interest of the children would not thereby be served. . . .¹¹³

There are no cases in Missouri, involving the issue of the power of our courts to render a custody decree, holding or even intimating that there is only one jurisdictional basis upon which authority to adjudicate the disposition of custody may properly be predicated. On the contrary, as heretofore indicated, it is clear that our courts will proceed to render

110. *Beckmann v. Beckmann*, *supra* note 99; *State ex rel. Shoemaker v. Hall*, *supra* note 85; *State ex rel. Miller v. Jones*, *supra* note 98; *Weiler v. Weiler*, *supra* note 98; *In re Rice*, *supra* note 98; *State ex rel. Stoffey v. La Driere*, *supra* note 99; *Daugherty v. Nelson*, *supra* note 98; *Drew v. Drew*, 186 S.W.2d 458 (K.C. Ct. App. 1945); *Sanders v. Sanders*, *supra* note 101.

111. *Laumeier v. Laumeier*, *supra* note 66; *State ex rel. Shoemaker v. Hall*, *supra* note 85; *State ex rel. Miller v. Jones*, *supra* note 98; *Weiler v. Weiler*, *supra* note 98; *Poole v. Poole*, *supra* note 98; *Daugherty v. Nelson*, *supra* note 98; *Drew v. Drew*, *supra* note 110; *Sanders v. Sanders*, *supra* note 101.

112. 331 S.W.2d 165 (St. L. Ct. App. 1960).

113. *Id.* at 168-69.

custody awards upon any one of three jurisdictional theories,¹¹⁴ stating generally that none of these are mutually exclusive.

However, where Missouri is in the position of the forum state, confronted with the issue of enforcement of the custody award of another rendering state, recognition of the existence of more than one jurisdictional basis upon which adjudication of custody may properly be grounded is not readily extended. Although there is a paucity of decisional law on this point in Missouri, the general rule stated in those cases that have considered the problem is that Missouri will enforce the custody awards of sister states, where the rendering court had jurisdiction of both the parties to the divorce action *and* of the subject matter.¹¹⁵ It is clear that in stating this rule regarding the extra-territorial validity of custody awards in Missouri, our courts do not use "and" in the disjunctive. Furthermore, in referring to jurisdiction over the subject matter the clear import is that the rendering court must have domiciliary jurisdiction over the children whose custody is awarded and further that such jurisdiction does not obtain upon mere physical presence of the child within the foreign rendering state.¹¹⁶

Recognition of the validity of a foreign state's custody decree or order in Missouri may well be denied although the rendering court proceeded upon a jurisdictional base which our courts have considered sufficient to vest in them the authority to dispose of the custody question initially. *In re Rice*¹¹⁷ vividly demonstrates that where the custody decree of a sister state is based upon something less than in personam jurisdiction of the parties to the divorce action and domiciliary jurisdiction over the child, enforcement of a custody decree rendered in the divorce proceeding will be denied. In this case the husband and wife resided in Virginia with their children. Shortly after his wife left Virginia with their children, plaintiff husband instituted divorce proceedings in Virginia seeking, *inter alia*, custody of the children. Defendant wife filed an answer and cross-bill for divorce in the Virginia proceeding. After a trial on the merits in Virginia, both parties being personally present, that court awarded custody to plaintiff husband. Armed with his custody award the husband instituted habeas corpus

114. See notes 98, 99 and 101 *supra* and text supported thereby.

115. See State *ex rel.* Miller v. Jones, *supra* note 98; *In re Rice*, *supra* note 98; Daugherty v. Nelson, *supra* note 98 (implied); *Ex parte* Lofts, 222 S.W.2d 101 (Spr. Ct. App. 1949); Shreckengast v. Shreckengast, *supra* note 91; *In re* Leete, 205 Mo. App. 225, 223 S.W. 962 (St. L. Ct. App. 1920).

116. Daugherty v. Nelson, *supra* note 98; *Ex parte* Lofts, *supra* note 115; *In re* Leete, *supra* note 115.

117. 316 S.W.2d 329 (K.C. Ct. App. 1958).

proceedings in Missouri (where the wife had been residing with the children since her departure from Virginia) contending that the Virginia decree was res judicata with regard to the rights of father and mother to custody and entitled to full faith and credit. In the habeas corpus proceeding, the court held that the Virginia decree should not be enforced, on the ground that the decree affirmatively showed on its face¹¹⁸ that the Virginia court lacked jurisdiction to adjudicate the custody question. The court here noted that the evidence in the Virginia proceedings and the decree rendered therein recited that defendant wife was a resident of Missouri and that the children were at no time after commencement of the divorce proceedings physically present in Virginia. In the enforcement action the court noted the three jurisdictional theories upon which courts have premised their ability to adjudicate the custody question, stating that under the in personam theory Virginia would have had authority to determine the disposition of custody. Notwithstanding the existence of many decisions in Missouri wherein custody had been awarded on such basis,¹¹⁹ the court held that Virginia's decree, insofar as it awarded custody, was not binding and proceeded to determine the disposition of custody for itself.

The decision in the *Rice* case with regard to the extra-territorial validity of custody provisions in a divorce decree demonstrates that the forum state does not consider itself bound by the determination of the rendering state in that regard. In discussing applicability of the full faith and credit clause, the court indicates that it is not required thereunder to enforce "blindly" the custody provisions of an otherwise valid divorce decree.¹²⁰ Although paying deference to the full faith and credit clause, the essence of the decision is that this court does not consider that clause applicable to the

118. Questions regarding the propriety of collateral attack in the forum state against the judgment of the rendering state are without the scope of this article. It should be noted, however, that our courts generally hold that where the judgment is attacked for infirmities apparent on the record, such attack, although collateral, is proper. *Howey v. Howey*, 240 S.W. 450 (Mo. 1922) (en banc). Similarly, the judgment of another state may be collaterally attacked on the ground of lack of jurisdiction even though it appears in the judgment record that the court had jurisdiction and extrinsic evidence is necessary to establish its invalidity. *Daugherty v. Nelson*, *supra* note 98; *Ex parte Lofts*, *supra* note 115. See also *Leichty v. Kansas City Bridge Co.*, 354 Mo. 629, 190 S.W.2d 201 (1945) (en banc). The latter rule is predicated upon the policy that foreign judgments may always be collaterally attacked for fraud in the procurement; where there is no contention of fraud in the procurement of the judgment, jurisdictional findings of the rendering court are subject only to direct attack by appeal or writ of error. *State ex rel. Stoffey v. La Driere*, *supra* note 99. Cf. *Daugherty v. Nelson*, *supra* note 98.

119. See note 98 *supra* and text supported thereby.

120. 316 S.W.2d 329, at 332.

disposition of custody. The court does not look to the law of the rendering state to determine whether under the law of that state the jurisdictional facts requisite to valid adjudication were, in fact, extant;¹²¹ the decision is premised upon a determination of what facts are necessary to establish authority to dispose of the custody question in Missouri. It is submitted that the underlying philosophy of the *Rice* decision is that when a child is found within the physical jurisdiction of Missouri, our courts have a sufficient interest in the welfare of such child to hear and determine for themselves questions involving custody, notwithstanding the existence of a subsisting custody order rendered in another state.

D. *The Federal Cases on Extra-Territorial Recognition*

The dissolution, if not complete negation, of the extra-territorial validity of custody provisions contained in valid divorce decrees, is reflected in the trend of decisions in this area handed down by the Supreme Court of the United States. Dismemberment of the marital relationship through meticulous juridical vivisection has produced the concepts of "divisible divorce" and "separable incidents."¹²² The court of one state may thus terminate the marital relationship of the parties although being powerless to adjudicate

121. Operation of the full faith and credit clause in Missouri is fully discussed in *Howey v. Howey*, *supra* note 118. This case and the numerous cases cited and discussed therein amply demonstrate that where a foreign judgment is attacked in the forum state on the basis of jurisdictional defect, the forum state looks to the law of the rendering state to determine whether, under that law, the facts required for authority to adjudicate were present.

122. Proceeding from the decision in *Atherton v. Atherton*, 181 U.S. 155 (1901), holding that an *ex parte* divorce granted by the state of matrimonial domicile must be given full faith and credit in other jurisdictions, the Court has followed a torturous path in considering the various aspects of the marital relationship and the ability of courts to hear and determine the same. In *Haddock v. Haddock*, 201 U.S. 562 (1906), the Court held that full faith and credit cannot be used to compel a forum state to recognize as valid a divorce granted *ex parte* by a domiciliary state other than that of the matrimonial domicile. *Thompson v. Thompson*, 226 U.S. 551 (1913), applying the same jurisdictional rules to dissolution of marriage and to the adjudication of alimony, held that under full faith and credit the forum state must recognize a determination denying alimony rendered *ex parte* by the state of matrimonial domicile. In *Williams v. North Carolina, (I)*, 317 U.S. 287 (1942), overruling the *Haddock* case, application of the full faith and credit clause was extended, requiring the enforcement in the forum state of an *ex parte* divorce granted by any state where one spouse was domiciled; this principle was qualified in *Williams v. North Carolina (II)*, 325 U.S. 226 (1945), holding that full faith and credit is required only if the state granting the divorce *ex parte* was, in fact, a domiciliary state and that the finding on this issue could not be foreclosed by the rendering state but could be re-adjudicated later by the forum state. In *Sherrer v. Sherrer*, 334 U.S. 343 (1948), and *Coe v. Coe*, 334 U.S. 378 (1948), holding that where both parties had merely appeared in the original proceeding in the rendering state the forum state could not relitigate the existence of jurisdic-

the "separable incidents" of that relationship, such as alimony and support.¹²³ Decisions in this area proceed upon the theory that alimony and

tional facts, the restriction of *Williams II* upon application of full faith and credit was weakened. *Johnson v. Muelberger*, 340 U.S. 581 (1951), applying the rule of the *Sherrer* and *Coe* cases to a collateral attack in the forum state by a third party who had not appeared in the original proceeding and had an independent interest, further weakened the impediment upon the operation of full faith and credit posited by *Williams II*. Cf. *Rice v. Rice*, 336 U.S. 674 (1949). From the rejection of the *Haddock* holding in *Williams I* it would seem to follow that the rule in *Thompson*, which was premised upon *Haddock*, should no longer obtain and therefore that the state which was, in fact, the domicile of one spouse could effectually adjudicate the alimony question ex parte as well as sever the marital relationship. That such treatment would not be accorded, however, was intimated in *Estin v. Estin*, 334 U.S. 541 (1948). In the *Estin* case defendant wife had obtained a separation and support order in New York. Subsequently, plaintiff husband established domicile in Nevada where he obtained a divorce ex parte from his wife; the divorce decree contained an adjudication upon the alimony question holding that dissolution of the marital relationship ended any extant support order. The Court held that although the divorce was valid, full faith and credit did not require New York to recognize Nevada's purported termination of the support right. The *Estin* decision can be construed not as holding that Nevada could not adjudicate the support order ex parte, but that the determinative factor precluding the Nevada court in this respect was the existence of the prior New York order to which Nevada must give full faith and credit. In *Armstrong v. Armstrong*, 350 U.S. 568 (1956), the issue of the power of a court to adjudicate support or alimony ex parte was squarely presented by the rendering state's decree, based upon constructive service on defendant wife, providing "no award of alimony to wife, the defendant." The majority skirted the constitutional issue, holding that the divorce court's decree did not purport to adjudicate the alimony question and that therefore the forum state, in awarding alimony to the wife, did not fail to give the rendering court's decree full faith and credit. The concurring opinion stated that the divorce court's decree was an alimony judgment in direct conflict with the rendering court's decree. The concurring opinion held that the constitutional question of whether the forum state was justified in denying full faith and credit to the divorce court's decree was presented, and in answer thereto held that the forum court was justified on the ground that the rendering court could not adjudicate the alimony question ex parte. The issue touched upon in *Estin* and circumvented in *Armstrong* was determined in *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), overruling *Thompson* and holding, in essence, that any domiciliary state can grant divorce ex parte but no state, even if domiciliary, can adjudicate the alimony question when it grants divorce ex parte. In this case husband and wife had separated, the wife moving to New York. The husband obtained an ex parte divorce in Nevada, the effect of the decree being to end the husband's duty of support. Subsequently the wife brought an action in New York praying for separation and alimony; that court, not having personal jurisdiction over the husband, ordered the sequestration of his property in New York to satisfy his support obligations, if any, to the wife. The husband appeared specially in New York contending that under the full faith and credit clause New York must recognize the Nevada decree as having ended both the marriage and the duty to support. The New York court, although recognizing the Nevada decree as an effective termination of the marital relationship, entered an order directing the husband to make certain support payments to the wife under a special New York statute (providing that in actions for divorce, annulment, or separation where such relief is refused because of a prior ex parte divorce New York may

support are personal rights of the absent party;¹²⁴ that although a court can sever the marital relationship *ex parte* it cannot adjudicate a personal claim or obligation unless it has personal jurisdiction of the defendant under the constitutional rule set forth in *Pennoyer v. Neff*.¹²⁵ Extension of the "personal right" theory to the "separable incident" of custody occurs in *May v. Anderson*.¹²⁶ In this decision, apparently the first case in which the Supreme Court of the United States has passed upon the full faith and credit aspects of a decree fixing the custody of minor children in connection with the divorce of their parents, the Court holds that an enforcing court confronted with the *ex parte* custody decree of a sister state is not required to recognize the validity of that decree under the full faith and credit clause. In arriving at this determination the Court stated,

We find it unnecessary to determine the children's legal domicile because even if it be with their father, that does not give Wisconsin [the rendering state], certainly as against Ohio [the enforcing state], the personal jurisdiction that it *must have* in order to deprive their mother of her *personal right* to their immediate possession.¹²⁷ (Emphasis added.)

The impact of *May v. Anderson* upon the child custody area is one of far-reaching consequence not apparent upon a consideration of the decision alone. The serious threat to the extra-territorial validity of custody awards occasioned by this decision can only be comprehended by analysis of the facts of the case and the language of the Court's opinion. In the *May* case, plaintiff-husband and defendant-wife were married and domiciled in Wis-

render in the same action a judgment for maintenance of the wife). The husband contended in the Supreme Court that the New York statute, as applied, is unconstitutional because *contra* the full faith and credit clause. The Supreme Court held that New York's action was proper and that the Nevada decree, to the extent it purported to affect the wife's right to support, was void and not entitled to enforcement under full faith and credit. The Court stated that the only difference between *Estin* and *Vanderbilt* is that in the latter situation the wife's personal right to support was not reduced to judgment prior to the husband's *ex parte* divorce, whereas in the former it had been. The court held that this difference was immaterial; that the underlying principle, applicable in both cases, is that the divorce court can not extinguish the support right of the wife unless it has personal jurisdiction over the defendant wife.

123. Note 122 *supra*. See, e.g., *Beckmann v. Beckmann*, *supra* note 99; *Schwer v. Schwer*, 50 S.W.2d 684, 686 (St. L. Ct. App. 1932); *Laweing v. Laweing*, 21 S.W.2d 2 (Spr. Ct. App. 1929); *Sanders v. Sanders*, *supra* note 101.

124. *Estin v. Estin*, *supra* note 122; *Kreiger v. Kreiger*, 334 U.S. 555 (1948); *Barrett v. Failing*, 111 U.S. 523 (1884); *Barber v. Barber* 62 U.S. (21 How.) 186 (1859).

125. 95 U.S. 714 (1878).

126. 345 U.S. 528 (1953).

127. *Id.* at 534.

sons in; marital difficulties ensued, and the parties agreed that defendant should take the children with her to Ohio for a short period. Defendant decided not to return and within a few days thereafter plaintiff filed suit in Wisconsin for divorce and custody, serving defendant pursuant to a Wisconsin statute providing for constructive service, on the basis of the children's domicile in Wisconsin. Defendant did not appear or participate in the Wisconsin proceedings wherein plaintiff was granted a divorce and custody of the children. Plaintiff then obtained actual custody of the children by demand upon defendant and returned with them to Wisconsin, where they remained with him for a period of four years. Plaintiff subsequently brought the children to Ohio to visit their mother and when he demanded their return defendant refused to surrender them. Plaintiff filed petition in Ohio for habeas corpus (under Ohio procedure this writ only tests the immediate right to possession); the trial and appellate courts transferred custody to the father, holding that under the full faith and credit clause the Wisconsin decree was binding. The Supreme Court reversed, holding that the full faith and credit clause did not compel Ohio to enforce the Wisconsin custody decree rendered without personal jurisdiction over the defendant-mother. Mr. Justice Burton, writing for the majority, stated the question as follows:

Separated as our issue is from that of the future interests of the children, we 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*. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody.¹²⁸ (Emphasis added.)

The majority opinion notes that the full faith and credit clause does not entitle a judgment in personam to extra-territorial effect where it is shown that the judgment was rendered without jurisdiction over the person sought to be bound thereby. Relying upon its previous decisions in *Estin v. Estin*¹²⁹ and *Kreiger v. Kreiger*,¹³⁰ holding the domiciliary state of one spouse powerless to cut off the other spouse's right to financial support in an ex parte divorce proceeding severing the marital relationship, the court holds that a parent's right to the custody of children is a personal right entitled to at least as much protection as the support right. The Court's decision rests

128. *Id.* at 533.

129. *Supra* note 122.

130. *Supra* note 124.

squarely upon a determination that the Wisconsin decree, because rendered without personal jurisdiction of defendant, was not entitled to full faith and credit; it does not consider the issue of whether the decree, rendered upon the basis of technical domicile of the child in Wisconsin, violated due process and was, therefore, invalid even in the rendering state.

Justices Jackson and Reed dissented, stating in their opinion that the Wisconsin custody award was valid in that it was rendered in the state of the children's domicile and that a valid judgment is entitled to full faith and credit. The dissent holds that the only escape from the command of obedience contained within the full faith and credit clause is a finding that the initial decree was void because violative of due process and, therefore, entitled to no standing even in the rendering state. Mr. Justice Minton dissented on procedural grounds and Mr. Justice Clark did not participate in the decision. The split among the Justices in deciding this case gives a predominant importance to Mr. Justice Frankfurter's concurring opinion.¹³¹ Mr. Justice Frankfurter construes the majority's opinion as holding only that the full faith and credit clause does not require the forum state, in disposing of the custody of children in the forum state, to accept the disposition made by another state under the circumstances and that the majority's opinion does not hold that the forum state would be precluded from recognizing, as a matter of local law, the disposition made by the rendering state. He states further that the majority's opinion indicates that were the forum state to enforce the rendering state's custody decree there would be no offense against due process requirements. Indicating that the question of extra-territorial validity of custody decrees presents a special problem not comparable to situations involving the adjudication of property rights, personal claims or marital status, he states:

[the foregoing questions] . . . generally give rise to interests different from those relevant to the discharge of a State's *continuing responsibility to children within her borders*. . . . Legal theories and their phrasing in other cases readily lead to fallacious reasons if uncritically transferred to determination of a State's duty toward children. There are, of course, adjudications other than those pertaining to children, as for instance, decrees of alimony, which may not be definitive even in the decreeing State, let alone binding under the Full Faith and Credit Clause. Interests of a State other than its duty towards children may also prevail over the interest of national unity that underlies the Full Faith and Credit Clause. *But*

131. *Supra* note 126, at 535-36.

*the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time.*¹³² (Emphasis added.)

Mr. Justice Frankfurter's dissent in the later case of *Kovacs v. Brewer*¹³³ indicates that it is his position that the full faith and credit clause does not apply to custody decrees.¹³⁴

The full import of the decision in *May v. Anderson*, because of the grounds upon which the majority's opinion is based and the position of Mr. Justice Frankfurter as the decisive voter, can only be determined by considering it in connection with the Court's previous decision in *New York*

132. *Supra* note 126, at 536.

133. 356 U.S. 604, 609 (1958).

134. In *Kovacs* the majority opinion circumvented the full faith and credit issue presented where the enforcing court made a custody disposition contrary to that adjudicated by the rendering court in determining a motion to modify. Although the custody question was litigated initially in the rendering court upon the motion to modify (all parties being personally present there except the child who was without the state) the Supreme Court held that relitigation of the custody question culminating in a determination opposite that reached in the rendering court did not present a constitutional issue due to the probable existence of "changed circumstances" upon which the second state's decision *may* have been based. Mr. Justice Frankfurter's dissent is premised upon his construction of the majority opinion as holding that unless an enforcing court finds "changed circumstances" since rendition of the custody decree it must give full faith and credit to the rendering court's determination, whereas he would hold that the Full Faith and Credit Clause does not apply to custody decrees. Mr. Justice Frankfurter's thesis is that both the underlying purpose of full faith and credit and the nature of custody decrees militate strongly against a constitutionally enforced requirement of respect to foreign custody decrees. He states that it is the purpose of the full faith and credit doctrine to preclude dissatisfied litigants from taking advantage of the federal character of this country by relitigating in one state issues duly decided in another state; that the effect of its operation is to give certainty and finality and an end to harassing litigation. The disposition of child custody, however, presents a different and overriding consideration:

[W]hen courts are confronted with the responsibility of determining the proper custody of children, a more important consideration asserts itself to which regard for curbing litigious strife is subordinated—namely, the welfare of the child. . . . When the care and protection of the minors within their borders falls to States they must be free to do "what is best for the interest of the child . . ." (Emphasis added.)

356 U.S. at 611-12.

Mr. Justice Frankfurter points out that the child's welfare is the controlling guide and that since the passage of time will necessarily work changes in the child's needs a court in whose jurisdiction the child is found should be free to pass upon the custody question without being bound by a prior decree of another court, irrespective of whether a "change in circumstances" is objectively provable. Mr. Justice Frankfurter does not suggest that the second state should pay no attention to the prior decree of the rendering state or to the status quo established thereby; he states that the foregoing are among the relevant and even important circumstances that the second state should consider when exercising its judgment on what the welfare of the child before it requires, citing, *People ex rel. Allen v. Allen*, 11 N.E. 143 (N.Y. 1887).

ex rel. Halvey v. Halvey.¹³⁵ In the *Halvey* case, the husband, wife and children lived and resided in New York. The wife subsequently took the children with her to Florida and there obtained an *ex parte* divorce and custody award. The defendant-father, having abducted the children from Florida, returned with them to the State of New York where the plaintiff-mother instituted habeas corpus proceedings. The New York court refused to transfer custody of the children to the mother and the Supreme Court held that under the full faith and credit clause New York was not required to do so. The Court circumvented the constitutional issue, holding that the full faith and credit clause requires an enforcing state to give to a foreign decree only that force which it has in the rendering state; that the Florida decision, being subject to modification not only on the basis of changed circumstances since rendition of the divorce decree but also on the basis of facts concealed from the rendering court in the original hearing, was, therefore, *res judicata* only as to facts before the court at the time of the judgment. The Court held that what Florida could do in modifying the custody decree, New York could do, and, therefore, that New York's action in this regard would not present a question of violation of the full faith and credit clause.

The *Halvey* case, although indicating that the full faith and credit clause requires an enforcing state to recognize the validity of foreign custody decrees rendered upon a proper jurisdictional base, opened the door to evasion of full faith and credit in regard to custody decrees. Under that case, the extra-territorial recognition which custody orders receive or can command is more theoretical than practical in that an enforcing court, upon a finding of "changed conditions" can, in effect, adjudicate the custody question anew.¹³⁶ Professor Hazard¹³⁷ points out that under the auspices of

135. 330 U.S. 610 (1947).

136. In *Kovacs v. Brewer* the divorce court had awarded custody to the maternal grandfather who subsequently removed the child to his home in another state. A number of years thereafter the rendering state modified its custody decree, at the motion of the child's mother, awarding custody to the mother. In the modification proceedings both the grandfather and the child's father presented affidavits challenging the mother's motion. The mother instituted an action to secure custody of the child under a special statutory procedure available to either parent of a child when those parents have been divorced outside the jurisdiction of North Carolina (where the child resided with the grandfather). After a full hearing the North Carolina trial court held that the child's welfare demanded she remain under the grandfather's custody, the court holding that it was not bound by, or required to give effect to, the modification decree of the rendering state. On appeal to the supreme court of the rendering state the action of the lower court was approved; that court stated that the modification order of the rendering state was not binding because the rendering court had no jurisdiction to modify after

Halvey a parent could be advised to absent himself from the state in which custody proceedings had been commenced by the other parent, resort to

the child had become a resident and domiciliary of North Carolina. In the proceedings before the Supreme Court of the United States the wife contended: (1) that the rendering court had jurisdiction to modify its decree awarding her custody; (2) that the jurisdictional question was *res judicata* in the enforcing court because the grandfather and father had appeared in the rendering court and litigated the custody question; and, (3) that the enforcing court had failed to give the custody decree, as modified, full faith and credit. The Court successfully avoided any determination upon these questions, holding that the basis of the North Carolina Supreme Court's decision was unclear in that it did not indicate whether it was premised upon the ground that the modification was not binding upon the enforcing court because the rendering court had no jurisdiction to modify custody after the child became a domiciliary of North Carolina, or on the ground that the enforcing court was not bound by the modification because circumstances had changed in the interim between rendition of the modification and institution of the enforcement proceedings and that the enforcing court was therefore free to determine a different arrangement with regard to custody to suit these changed conditions. The United States Supreme Court, noting that new evidence had been offered in the enforcement proceedings, particularly with reference to the period that had elapsed between modification and the date of the enforcement proceedings, remanded the case to the North Carolina court for "clarification" of the ground upon which the decision was premised, stating:

though it is not clear from the opinion of the North Carolina Supreme Court, it may be, particularly in view of this background [introduction of new evidence], that it intended to decide the case, at least alternatively, on that basis ["changed conditions"].

Kovacs v. Brewer, *supra* note 133, at 608. The court, in remanding the case for clarification, stated further:

[I]f they have not already decided, so they may have an opportunity to determine the issue of changed circumstances . . . if those courts properly find that changed conditions make it to the child's best interest for the grandfather to have custody, decision of the constitutional questions now before us would be unnecessary. *Those questions we explicitly reserve without expressly or impliedly indicating any views about them.* (Emphasis added.)

The majority opinion, in stressing the fact that "some new evidence concerning environment of the child" was introduced indicates its full adherence to the doctrine announced in the *Halvey* case—that the forum state has at least as much leeway to disregard the custody award, to qualify it, or to depart from it, as does the state of rendition. The facts of this case, and the language of the majority opinion, indicate that not only did *Halvey* open the door to avoidance of extra-territorial recognition but also that the United States Supreme Court intends to keep that door wide open. In *Kovacs* only a short time had elapsed between rendition of the modification order and institution of the enforcing action; moreover, most, if not all, of the evidence presented in the enforcing court had been presented in the modification proceedings by the counter-affidavits filed there by the father and grandfather in opposition to the mother's motion. The decision of the North Carolina Supreme Court, unqualifiedly holding that it was not bound by the modification order because the rendering court had no jurisdiction to proceed, clearly presented the full faith and credit question; the opinion of the Supreme Court, allowing the North Carolina decision to stand only if that court bases its decision upon a change in conditions, clearly demonstrates that the courts of a second state when confronted with the subsisting custody award of a sister state

self-help, and get the child before a more friendly court, hoping that that court would either find "changed conditions" or that the facts were not fully presented at the prior proceeding. With the object of securing custody awards anew, custody battles took the form of parallel but inconsistent ex parte proceedings in which the opposite sides of the same question were presented. But under the *Halvey* decision if the rendering court had a jurisdictional basis for the disposition of custody, the absent parent ran the risk that a subsequent jurisdiction would recognize the original award on one of several grounds: (a) the unclean hands of the abducting parent in defying the rendering court's decree; (b) the fact that the rendering court proceeded on a jurisdictional basis acknowledged by the enforcing court to be superior; or, (c) the fact that the rendering court's decision was subject to modification only upon a demonstration of "changed conditions" and no such change appeared. Professor Hazard further points out that the decision in *May v. Anderson* eliminates the risk imposed in relying on the *Halvey* case. Under the majority's opinion in the *May* case a parent can be advised to absent himself from any custody proceeding in which his chances of predominating are slight. Under Mr. Justice Frankfurter's theory the parent can appear in the rendering state, litigate the custody question to decision and if he loses may then take the child to another state and relitigate the custody question.¹³⁸ Professor Hazard notes that under the present state of the law *May v. Anderson* can be used as a double weapon. Thus, if the parent contesting a custody decision was not personally served in the rendering state

may refuse extra-territorial recognition thereto by merely labeling the factors leading to this determination as "changed conditions."

That a finding of "changed conditions" is easily made when a court is so inclined and extra-territorial enforcement of custody awards thereby readily averted cannot be questioned. See *Daugherty v. Nelson*, *supra* note 98; *Ex parte Lofts*, *supra* note 115; *In re Leete*, *supra* note 115; *Morrill v. Morrill*, 83 Conn. 479, 77 Atl. 1 (1910). See also, STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 328-29 (2d ed. 1951); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953).

137. Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959).

138. Mr. Justice Frankfurter's position, in both his concurring opinion in *May v. Anderson* and his dissent in *Kovacs v. Brewer*, is that the minimum connection that must exist between court and child before the award of custody should carry any authority is that the court be in a position to inform itself adequately regarding the needs and desires of the child; that the very least that should be expected in order that investigation of the circumstances surrounding the child be responsible and informative is that the child be physically present within the jurisdiction and therefore available as a source for arriving at judgment. In positing "physical presence" of the child as the only basis upon which to adjudicate the custody question, however, Frankfurter does not indicate that a demonstration that this nexus existed in the rendering court will require a court in another

he may, relying upon the majority opinion, claim that he is not bound thereby even though the child was before the rendering court. On the other hand, if the parent contesting a custody decision was present before the rendering court he may, relying on Mr. Justice Frankfurter's concurring opinion, claim that the enforcing court should make an individual inquiry regarding the child's custody. In summarizing the effect of *May v. Anderson*

state to enforce the foreign court's disposition of custody. On the contrary, it is his basic premise that *any state* wherein the child is physically present should be free to adjudicate the custody question when it is presented to it, notwithstanding the existence of a subsisting custody determination of another state.

Under this theory, adhered to in many states, *e.g.*, *Hopson v. Hopson*, 221 F.2d 839 (D.C. Cir. 1955); *In re Adoption of a Minor*, 214 F.2d 844 (D.C. Cir. 1954); *Bachman v. Mejias*, 154 N.Y.S.2d 903, 136 N.E.2d 866 (Ct. App. 1956); *People ex rel. Herzog v. Morgan*, 287 N.Y. 317, 39 N.E.2d 255 (1942); *Hicks v. Bridges*, 2 App. Div. 2d 335, 155 N.Y.S.2d 746 (1956), parties to the custody question may litigate the merits of that question fully without precluding the courts of another state from hearing and determining the disposition of custody upon the merits anew, provided the child is within the jurisdiction of the second state. Although the Missouri decision of *In re Rice*, notes 113-16 *supra* and text supported thereby, states different reasons for its conclusion in this respect, it cannot be doubted that the basic premise underlying this decision is that the court in whose jurisdiction the child is present should be free to determine questions affecting its welfare, notwithstanding the existence of the prior determination of another jurisdiction on this issue.

Unquestionably the criticism leveled against the Supreme Court's decisions in the *Halvey* and *Kovacs* cases is justified when one considers the ease with which courts have avoided giving recognition to the prior decrees of sister states by finding "changed circumstances" since rendition of the prior decree. It is submitted, however, that there is quite a difference between a theory permitting the courts of other states to adjudicate the custody question oppositely to the determination of another state upon a demonstration of a change of circumstances requiring such decision since the original rendition, and a theory that each state must be completely unhampered in taking protective action with regard to children within its territory, notwithstanding the absence of any changed circumstances since rendition of a prior custody award. The latter theory is premised upon the principle that the state, as *parens patriae*, may protect any child within its territory irrespective of the domicile or residence of that child. The doctrine of *parens patriae* is ordinarily invoked only where the child has been neglected or abandoned; it is a police measure invoked to protect the child in the assertion of the public interest. *Daugherty v. Nelson*, *supra* note 98; *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925). Where the *parens patriae* doctrine is properly invoked, the public, through some appropriate agency, becomes a party to the proceedings; and the procedure does not work a change in the parent-child relationship. *Daugherty v. Nelson*, *supra* note 98. Professor Hazard points out, *supra* note 137, that in divorce custody proceedings the public interest is asserted by the litigant parents whose interests may or may not be the same as the child's; and that in fact whether those interests are the same or not is the issue. Professor Hazard notes that utilization of the *parens patriae* doctrine as a basis for intervention in controversies between parents is improper. The limits of the doctrine are suggested by its origin (protection); it should not be used as a pretense for the adjudication of the status of parents domiciled elsewhere nor for the definition of parental rights dependent upon status. See *Finlay v. Finlay*, *supra*. See also Foster, *For Better or Worse? Decisions Since Haddock v. Haddock*, 47 A.B.A.J. 963, 966 (1961).

upon the child custody area Professor Hazard aptly states: "In sum, under the majority's rule, parents may ignore the courts; under the rule of concurrence, they may defy them."¹³⁹

It would thus appear that the Supreme Court of the United States has given sanction to the propensity of Missouri courts to ignore the custody awards of sister states.

III. ADJUDICATION OF THE CHILD CUSTODY QUESTION IN HABEAS CORPUS PROCEEDINGS

The writ of habeas corpus is traditionally a writ of right wherein generally the issue involved is whether one is being deprived of his liberty or unlawfully restrained.¹⁴⁰ In modern jurisprudential theory the availability of habeas corpus has been extended to the determination and disposition of child custody within the interstices of the divorce statutes and juvenile court procedures.¹⁴¹ Utilization of the writ of habeas corpus in the child custody sphere is not usually directed at freeing the child from illegal restraint or imprisonment, as is ordinarily the case where the writ is issued, but at securing an adjudication by the issuing court upon the question of what will promote the best interest of the child in relation to the disposition of its custody.

Judicial construction of the habeas corpus provisions of Chapter 532 of the 1959 Revised Statutes of Missouri, has extended to the courts wherein that remedy is available a jurisdiction over the custody question that is co-ordinate to, and co-extensive with, that possessed by the divorce court under Chapter 452¹⁴² of the 1959 Revised Statutes of Missouri. Al-

139. Hazard, *supra* note 137, at 394.

140. *Middleton v. Tozer*, 259 S.W.2d 80 (St. L. Ct. App. 1953); *Ex parte De Castro*, 238 Mo. App. 1011, 190 S.W.2d 949 (St. L. Ct. App. 1945); *Tomlinson v. French Institute of Notre Dame de Sion*, 232 Mo. App. 597, 109 S.W.2d 73 (K.C. Ct. App. 1937).

141. *In re Wakefield*, 365 Mo. 415, 283 S.W.2d 467 (1955) (en banc); *Ex parte Sangster*, 295 Mo. 49, 244 S.W. 920 (1922) (en banc); *Ex parte Badger*, 286 Mo. 139, 226 S.W. 936 (1920) (en banc); *In re Scarritt*, 76 Mo. 565 (1882); *Tripp v. Brawley*, 261 S.W.2d 508 (Spr. Ct. App. 1953); *State ex rel. White v. Swink*, 241 Mo. App. 1048, 256 S.W.2d 825 (St. L. Ct. App. 1953); *Ex parte De Castro*, *supra* note 140; *Hamilton v. Henderson*, 232 Mo. App. 1234, 117 S.W.2d 379 (K.C. Ct. App. 1938); *Tomlinson v. French Institute of Notre Dame de Sion*, *supra* note 140; *In re Krauthoff*, 191 Mo. App. 149, 177 S.W. 1112 (K.C. Ct. App. 1915); *Dix v. Martin*, 171 Mo. App. 266, 157 S.W. 133 (K.C. Ct. App. 1913); *In re Steele*, 107 Mo. App. 567, 81 S.W. 1182 (K.C. Ct. App. 1904); *In re Kohl*, 82 Mo. App. 442 (K.C. Ct. App. 1900); *In re Blackburn*, 41 Mo. App. 622 (K.C. Ct. App. 1890). See also *May v. Anderson*, 345 U.S. 528, at 532 n.4 (1953).

142. *In re Wakefield*, *supra* note 141; *Daugherty v. Nelson*, 241 Mo. App. 121, 234 S.W.2d 353 (K.C. Ct. App. 1950).

though the specific statutory section¹⁴³ of chapter 532 dealing with the award of child custody would appear to restrict the availability of that remedy to proceedings instituted between the parents of the child, decisions clearly indicate that the statutory language will not be so limited.¹⁴⁴ Thus one standing in the position of parent or guardian or one otherwise entitled to custody by virtue of court order or judgment may, upon application, secure issuance of the writ.¹⁴⁵

As will hereafter be shown, under proper circumstances a court in a habeas corpus proceeding, upon securing jurisdiction over the child and those having actual custody of the child, may hear evidence upon and adjudicate the custody question.¹⁴⁶ In such instances the court's power is of an equitable nature (although habeas corpus is basically and essentially a legal remedy) and it may, in the exercise of its discretion, award custody according to the best welfare of the child.¹⁴⁷ The scope of inquiry regarding the fitness and competence of those seeking the award of custody is a broad one, reflecting the equitable character of the court's power in regard to the disposition of custody.¹⁴⁸

The power of a court with regard to the determination of child custody

143. § 532.370:

Duty of court in awarding custody of children. In all cases where it shall appear from the evidence in any proceedings in *habeas corpus*, instituted between husband and wife for the custody of their children under the age of fourteen years, that by reason of insanity, drunkenness, cruelty, or other cause, the party against whom the complaint is brought is unfit to have the care and government of the child or children in controversy, it shall be lawful for the court hearing said cause to award the custody of the same to the complainant or other guardian, as shall be deemed best in the premises, and to make such other orders touching the custody and control of such child or children as the court may deem proper; and the order or decree of court touching said custody shall be valid and remain in force during any period within the minority of said child or children, which shall be fixed by said court; and any person at any time violating said order or decree may be dealt with summarily for contempt. (Emphasis added.)

144. State *ex rel.* White v. Swink, *supra* note 141.

145. *Ibid.*

146. *In re* Wakefield, *supra* note 141; Daugherty v. Nelson, *supra* note 142; *Ex parte* De Castro, *supra* note 140.

147. *Ex parte* Badger, *supra* note 141; *In re* Morgan, 117 Mo. 249 (1893) (en banc); Daugherty v. Nelson, *supra* note 142; Seat v. Seat, 227 S.W.2d 758 (K.C. Ct. App. 1950); *Ex parte* De Castro, *supra* note 140.

148. *In re* Richardet, 280 S.W.2d 466 (St. L. Ct. App. 1955); *In re* Cole, 274 S.W.2d 601 (St. L. Ct. App. 1955); *Ex parte* Ferone, 267 S.W.2d 695 (K.C. Ct. App. 1954); *Ex parte* Kaufmann, 262 S.W.2d 56 (K.C. Ct. App. 1953); Cox v. Carapella, 246 S.W.2d 513 (St. L. Ct. App. 1952).

in habeas corpus proceedings may properly be invoked in four situations:¹⁴⁹ (1) where there is no subsisting formal award of custody; (2) where one formally awarded custody is enforcing that award; (3) where for some reason a subsisting custody award is illegal or invalid upon the face of the record; and (4) where the parent who was awarded custody in prior divorce proceedings has died and the surviving parent is seeking custody of the child. The nature and extent of the court's power in habeas corpus over the disposition of child custody is not the same in each of these situations but will vary in accordance with the manner in which its authority is invoked.

A. Situations Where There Has Been No Prior Custody Award

In habeas corpus proceedings wherein the natural parent is seeking custody of his children as against respondent parent or third parties respondent, there having been no prior formal custody award to either, the court will hear evidence upon and determine the custody issue, the question of either party's legal right to custody being measured solely in terms of the child's welfare. In this instance the respondent may, by way of return to the writ, raise the issue of the petitioner's fitness to secure custody of the child, and the court will proceed to a determination of custody based upon a full inquiry into the fitness and suitability of the parties contestant.¹⁵⁰ The petitioner's fitness, when challenged in this manner, is measured by the same standards appertaining in determining whether a parent has forfeited the right to continued custody of the child under those provisions of the Juvenile Court Act which relate to the court's power to remove custody of a child from its parents.¹⁵¹ The broad extent of the scope of inquiry in this regard is demonstrated in *In re Richardet*,¹⁵² wherein the court stated:

In a habeas corpus proceeding between a natural parent seeking to obtain custody . . . and persons who hold the child

149. *In re Wakefield*, *supra* note 141.

150. *In re Wakefield*, *supra* note 141; *In re Richardet*, *supra* note 148; *State ex rel. White v. Swink*, *supra* note 141; *Ex parte Kaufman*, *supra* note 148; *Cox v. Carapella*, *supra* note 148; *Williams v. Williams*, 205 S.W.2d 949 (K.C. Ct. App. 1947); *Ex parte De Castro*, *supra* note 140; *McDevitt v. Morrison*, 180 S.W.2d 608 (Spr. Ct. App. 1944).

151. *Ex parte Badger*, *supra* note 141; *In re Richardet*, *supra* note 148; *Ex parte Ferone*, *supra* note 148; *Ex parte Kaufman*, *supra* note 148; *State ex rel. White v. Swink*, *supra* note 141; *Cox v. Carapella*, *supra* note 148; *Ex parte De Castro*, *supra* note 140. See also *Badger v. Badger*, 204 Mo. App. 252, 224 S.W. 41 (K.C. Ct. App. 1920) (equity court has jurisdiction without aid of statute to deprive parent of custody if it finds, as a matter of fact, that the parent is an unfit person).

152. 280 S.W.2d 466 (St. L. Ct. App. 1955).

without the sanction of any judicial decree, the fitness, competence and suitability of the parent to take charge of the child, when challenged, depends upon whether petitioner is guilty of *wilful abandonment* and *wilful neglect* to provide the child with proper care and maintenance; whether the child, if placed in the custody of the natural parent, would become homeless, or dependent upon the public for support or reduced to a state of habitual vagrancy or mendacity, or ill-treated or that his life, health, or morals would be endangered by continued cruel treatment, neglect, immorality, gross misconduct or depravity upon the part of the petitioner.¹⁵³ (Emphasis added.)

B. *Situations Where One Having Legal Custody Seeks To Enforce His Rights Where Such Rights Are Challenged*

Subject to the above indicated propensity of Missouri courts, in habeas corpus proceedings, to disregard the existence of a foreign custody award or foreign divorce proceeding when the child affected thereby is physically present in Missouri, it has generally been held that the writ of habeas corpus cannot be used to interfere with the inherent right and jurisdiction of the divorce court to determine and award custody.¹⁵⁴ Where a divorce court, having proper jurisdiction, has exercised that jurisdiction by making a custody award of record, that court retains jurisdiction over the custody question, precluding adjudication thereon by another court under authority of the habeas corpus statute.¹⁵⁵ The prior exercise by the divorce court of its power to dispose of custody proscribes the court in habeas corpus, a court of co-ordinate jurisdiction, from making an independent determination of the disposition of custody.¹⁵⁶ Thus the existence of a prior custody award narrows the permissible scope of in-

153. *Id.* at 471.

154. *In re Wakefield*, *supra* note 141; *State ex rel. Burtrum v. Smith*, 357 Mo. 134, 206 S.W.2d 558 (1947); *Ex parte Sangster*, *supra* note 141; *In re Morgan*, *supra* note 147; *Bell v. Catholic Charities of St. Louis*, 170 S.W.2d 697 (St. L. Ct. App. 1943); *Hamilton v. Henderson*, *supra* note 141; *In re Krauthoff*, *supra* note 141.

155. *In re Wakefield*, *supra* note 141; *State ex rel. Burtrum v. Smith*, *supra* note 154; *Kelly v. Kelly*, 329 Mo. 992, 47 S.W.2d 762 (1932) (en banc); *State ex rel. Dew v. Trimble*, 306 Mo. 657, 269 S.W. 617 (1925); *Robinson v. Robinson*, 268 Mo. 703, 186 S.W. 1032 (1916); *Shreckengast v. Shreckengast*, 219 S.W.2d 244 (K.C. Ct. App. 1949); *Fernbaugh v. Clark*, 236 Mo. App. 1200, 163 S.W.2d 999 (K.C. Ct. App. 1942); *Conrad v. Conrad*, 296 S.W. 196 (St. L. Ct. App. 1927); *Cole v. Cole*, 89 Mo. App. 228 (St. L. Ct. App. 1901).

156. *State ex rel. Burtrum v. Smith*, *supra* note 154; *Ex parte Sangster*, *supra* note 141; *Ex parte Lofts*, 222 S.W.2d 101 (Spr. Ct. App. 1949); *In re Krauthoff*, *supra* note 141.

quiry in habeas corpus proceedings to a determination of whether that award legally justifies the party holding custody¹⁵⁷ or seeking custody¹⁵⁸ thereunder to possession of the child. As indicated above, the divorce court, having awarded custody of the child, retains jurisdiction over the issue of the fitness or suitability of the parties contestant, and, therefore, this issue cannot be raised or determined in the habeas corpus proceeding.¹⁵⁹

The jurisdiction of the divorce court with respect to the issue of custody attaches at the time of the filing of the divorce petition. Thus the mere pendency of a divorce action prohibits the determination of the disposition of custody in habeas corpus proceedings even prior to the divorce court's determination of this issue, and, if this issue is raised in a separate habeas corpus proceeding, the matter will be remitted to the divorce court wherein proceedings are pending.¹⁶⁰

An apparent exception to this general rule is indicated in the early case of *In re Delano*.¹⁶¹ In that case, the St. Louis Court of Appeals, al-

157. State *ex rel.* Burtrum v. Smith, *supra* note 154 (respondent wife awarded custody in divorce proceedings); Daugherty v. Nelson, *supra* note 142 (respondent aunt awarded custody in divorce proceedings); Shreckengaust v. Shreckengaust, *supra* note 155 (respondent husband awarded custody in Nevada divorce proceedings); Bell v. Catholic Charities of St. Louis, *supra* note 154 (habeas corpus proceeding instituted by mother of child against respondent institution awarded custody of child in divorce proceedings); Fernbaugh v. Clark, *supra* note 155 (respondent father awarded custody on motion to modify); Tomlinson v. French Institute of Notre Dame de Sion, *supra* note 140 (respondent institution holding custody under divorce court's order).

158. *In re Wakefield*, *supra* note 141 (petitioner husband awarded custody in divorce proceeding); *Ex parte* Lofts, *supra* note 156 (petitioner wife awarded custody by interlocutory decree in California divorce proceeding).

159. *In re Wakefield*, *supra* note 141; Hayes v. Hayes, 363 Mo. 545, 252 S.W.2d 323 (1952); State *ex rel.* Burtrum v. Smith, *supra* note 154; Tripp v. Brawley, 261 S.W.2d 508 (Spr. Ct. App. 1953); *Ex parte* Lofts, *supra* note 156; State *ex rel.* Gray v. Hennings, 194 Mo. App. 545, 185 S.W. 1153 (St. L. Ct. App. 1916); Libbe v. Libbe, 157 Mo. App. 610, 138 S.W. 685 (K.C. Ct. App. 1911); *In re Kohl*, *supra* note 141; *In re Delano*, 37 Mo. App. 185 (St. L. Ct. App. 1889). Cf. Ferguson v. Garrison, 262 S.W.2d 163 (Spr. Ct. App. 1953), wherein petitioner mother, who had been awarded custody in divorce suit, brought habeas corpus to obtain custody from the child's uncle. Respondent uncle in his return alleged the unfitness and previous and present inability of petitioner to care for the child. The court heard evidence on this issue and determined that the child's welfare required that she be remanded to the uncle's custody. The Missouri Supreme Court, in *In re Wakefield*, overruled the holding in the Ferguson case, stating that insofar as the court there adjudicated and awarded custody in the face of, and contrary to, the divorce court award, that decision is in error.

160. Hayes v. Hayes, *supra* note 159; State *ex rel.* Burtrum v. Smith, *supra* note 154; *Ex parte* Sangster, *supra* note 141; *In re Morgan*, *supra* note 147; *In re Scarritt*, *supra* note 141; Tripp v. Brawley, *supra* note 159; *In re Krauthoff*, *supra* note 141; *Ex parte* Ingenbohs, 173 Mo. App. 261, 158 S.W. 878 (Spr. Ct. App. 1913); *In re Blackburn*, 41 Mo. App. 622 (K.C. Ct. App. 1890).

161. 37 Mo. App. 185 (St. L. Ct. App. 1889).

though following the general rule and refusing to determine the custody question, posed a hypothetical situation wherein habeas corpus might properly be utilized to determine custody notwithstanding the pendency of a divorce action. The court there indicated that where an emergency exists and a change in custody is necessary to protect the child's health or morals a court may intervene by habeas corpus notwithstanding the fact that the custody question is pending adjudication in a divorce suit.¹⁶² Thus, the availability of the habeas corpus procedure in this type of situation has apparently not been entirely foreclosed in Missouri.¹⁶³

Habeas corpus may, however, be availed of to secure the adjudication of the custody question notwithstanding the existence of a subsisting custody award by a divorce court or a juvenile court, where it can be shown that the court awarding custody did not have a proper jurisdictional base upon which to predicate its decision.¹⁶⁴ Upon such a showing, the scope of inquiry in the habeas corpus proceeding is the same as that obtaining where there has been no formal custody award.¹⁶⁵

Similarly, although the court awarding custody may have the necessary jurisdictional basis upon which to premise a custody award, the legality of the award may still be challenged in habeas corpus on non-jurisdictional grounds.¹⁶⁶ Any such challenge, however, must be based upon a defect apparent on the record.¹⁶⁷ If such defect is found and the award is held to be illegal, the court will not decide the custody question on its

162. *Id.* at 187.

163. *Libbe v. Libbe*, *supra* note 159; *In re Kohl*, *supra* note 159.

See *State ex rel. Burtrum v. Smith*, *supra* note 154, at 143, 206 S.W.2d at 563, where the court, after discussing the exception to the general rule posited in *In re Delano* stated: "[The husband's] petition for habeas corpus below made no contention whatever that any emergency existed, or that the health or morals of the minor child . . . were endangered." See also 39 C.J. *Habeas Corpus* § 41a, citing *In re Delano* as an exception to the operation of the general rule.

That this problem may be obviated appears probable in view of the provisions of the Juvenile Code authorizing the immediate assumption of a child's custody by the juvenile court where it appears that the child's welfare requires such action. See note 15 *supra* and text supported thereby.

164. *In re Wakefield*, *supra* note 141; *In re Rice*, 316 S.W.2d 329 (K.C. Ct. App. 1958); *Daugherty v. Nelson*, *supra* note 142.

165. *Ibid.*

166. *In re Wakefield*, *supra* note 141; *Fernbaugh v. Clark*, *supra* note 155; *Tomlinson v. French Institute of Notre Dame de Sion*, *supra* note 140; *State ex rel. Dew v. Trimble*, *supra* note 155 (legality of award of custody to respondent father by juvenile court could be collaterally attacked in habeas corpus proceeding by petitioner-mother alleging that juvenile court had not determined that child was "neglected" and "abandoned" within the terms of the juvenile court statute).

167. *Ibid.*

merits, with the result that the only consequence of the court's action is, in effect, to void the disposition of custody as awarded by the rendering court. In *Fernbaugh v. Clark*¹⁶⁸ petitioner-mother instituted habeas corpus proceedings against respondent-father who had custody of the children under a modification order entered by the divorce court. In the proceedings petitioner attacked the legality of the order, demonstrating that it had been entered without precedent legal notice to her of pendency of the motion to modify. Custody of the children was remanded to the mother, the court holding that rendition of the modification without legal notice to the mother, who had been awarded custody in the original proceedings, violated due process and therefore did not justify respondent's retention of custody thereunder. *Tomlinson v. French Institute of Notre Dame de Sion*,¹⁶⁹ involved a habeas corpus proceeding instituted by the mother of a child against the respondent institution to which custody of the child had been awarded in a prior divorce action. The court, in considering the legality of the custody award, noted that the record of the rendering court showed on its face that neither parent had been found an unfit custodian and moreover that the tenor of the decision demonstrated that the divorce court considered both parents fit. The court held that the divorce court's decree, awarding custody of a two year old child to an institution in the face of findings indicating neither parent unfit for the award of custody, was violative of due process and in excess of the divorce court's authority. In stating the general rule that a court may not interfere with the exercise of the divorce court's continuing jurisdiction over the disposition of custody, the court stressed the proposition that before a court can *lawfully* take the custody of children from parents and place custody in a third party or institution there must be evidence and findings of fact that said parents are unfit. Although the writ of habeas corpus cannot usurp the functions of a writ of error or appeal and disturb any finding of fact made by the divorce court, the court notes that the writ does partake of the nature of a writ of error, "in so far as it brings into review the *legality of the authority* by which the circuit court acts in making the award."¹⁷⁰ (Emphasis added.) The court further observed:

168. 236 Mo. App. 1200, 163 S.W.2d 999 (K.C. Ct. App. 1942).

169. 232 Mo. App. 597, 109 S.W.2d 73 (K.C. Ct. App. 1937).

170. *Id.* at 603, 109 S.W.2d at 77.

Our conclusion reached in this case is based upon the fact that in the exercise of jurisdiction it is not sufficient that the act be in the name of the law, but that *the act must be done by virtue of the authority of law and the result reached must be by due process of law.*¹⁷¹ (Emphasis added.)

C. *Surviving Spouse's Rights in Habeas Corpus*

Of course, where one of the parties to the original divorce action dies, the divorce proceeding terminates and the continuing jurisdiction of the rendering court over the custody question abates.¹⁷² Thus, if the parent awarded custody in the divorce action has died, the right of the surviving parent to custody of the child cannot be asserted in the rendering court through a modification of the divorce decree.¹⁷³ Abatement of the divorce action permits another court, under authority of the habeas corpus provisions, to exercise its co-ordinate jurisdiction at the instance of the surviving parent over the custody question and to adjudicate the disposition of custody on the merits as between the surviving parent and third parties after full inquiry regarding the suitability and fitness of the parties-contestant.¹⁷⁴

CONCLUSIONS

In considering the interrelation of the powers of courts to adjudicate the disposition of custody under the divorce and habeas corpus statutes, it is apparent from the foregoing that interested third parties have no remedy through these procedures to initiate a change of custody of a child although a change might clearly be justified. For example, it is well established in Missouri that third parties may not intervene in divorce proceedings in order to secure an award of custody or to obtain modification of an existing custody award.¹⁷⁵ In addition, although the habeas corpus remedy may be instituted to challenge the legality or validity of a custody award, third

171. *Id.* at 604, 109 S.W.2d at 78.

172. *In re Wakefield*, *supra* note 141; *Schumacher v. Schumacher*, 223 S.W.2d 841 (St. L. Ct. App. 1949); *State ex rel. Walker v. Crouse*, 240 Mo. App. 389, 205 S.W.2d 749 (K.C. Ct. App. 1947).

173. *Schumacher v. Schumacher*, *supra* note 172. *Cf. Edwards v. Engledorf*, 180 S.W.2d 603 (Spr. Ct. App. 1944) (holding that where mother, who was awarded custody in divorce proceedings, had died, father's remedy to secure custody from grandparents was by application to divorce court and not by habeas corpus).

174. *In re Scarritt*, *supra* note 141; *State ex rel. Walker v. Crouse*, *supra* note 172; *Ex parte Ingenbohs*, *supra* note 160; *In re Steele*, *supra* note 141; *In re Blackburn*, *supra* note 141.

175. See note 116 *supra* and text supported thereby.

parties not standing in the position of parent or guardian to the child are precluded from instituting habeas corpus proceedings.¹⁷⁶ Thus, assuming there has been a custody award to one parent and that parent subsequently becomes unfit and unsuitable for the retention of custody, and assuming that the other parent is either absent from the state or takes no interest in the child, the question arises as to whether third persons are foreclosed from any avenue for challenge to, or modification of, the custody award. That third parties are not so foreclosed in Missouri, however, is demonstrated by decisions holding that although the assumption of power to dispose of the custody question by the divorce court will preclude courts of co-ordinate jurisdiction from considering that question, the divorce court's power to dispose of custody is not exclusive. The decision of the Supreme Court of Missouri in *State ex rel. Dew v. Trimble*¹⁷⁷ holds that the procedures available under the Juvenile Court Act could have been invoked in proper circumstances notwithstanding the exercise of the divorce court's power over the custody question and that the continuing jurisdiction of the divorce court over the custody problem did not preclude the juvenile court from proceeding in a case properly falling within its statutory jurisdiction. In this case, the mother of the child had been granted a divorce and custody. Subsequently, the father filed a petition in the juvenile court charging that these children were "neglected" within the meaning of the juvenile statute. A trial in the juvenile court resulted in a determination that the children were neglected within the meaning of the statute, and the court ordered that the children be made its wards, committing their custody to the father. The wife filed a habeas corpus proceeding against the father and the judge of the juvenile court, contending that the divorce decree gave her custody and that the divorce court alone had jurisdiction over this question, proscribing any interference by another court. The Kansas City Court of Appeals held that the juvenile court was not proscribed from taking jurisdiction over the custody question upon the petition filed by the father although he had been the losing party in the divorce proceeding. That court premised its decision upon the ground that the jurisdiction of the juvenile court is paramount to and not concurrent with the incidental jurisdiction which a divorce court may have over custody in the premises.

176. *State ex rel. White v. Swink*, *supra* note 141 (one having no legal right to custody cannot institute habeas corpus proceedings seeking to obtain custody). See also note 145 *supra* and text supported thereby.

177. 269 S.W. 617 (1925).

The Missouri Supreme Court specifically affirmed the decision of the Kansas City Court of Appeals upon this point (although reversing on other grounds),¹⁷⁸ indicating that the jurisdiction of the juvenile court is paramount to the "continuing" jurisdiction of the court rendering a divorce decree. In so holding, the supreme court stated:

The holding of the Court of Appeals is, in effect, that by the Juvenile Court Act the State has elected to exert its power, *parens patriae*, with respect to children which fall within the statutory definitions of "neglected" and "delinquents"; that it has invested the juvenile court with exclusive jurisdiction to determine and provide the care and custody of such children; and that, when the juvenile court has in a given case assumed jurisdiction with regard to any such child, its jurisdiction supersedes that of any and all other courts touching the same subject-matter. This ruling does not conflict with . . . any other decision of this court. We have never had occasion to pass upon the question. We observe, however, that the conclusion of the Court of Appeals is in accord with that reached by eminent courts of other jurisdictions, as its citations show.¹⁷⁹

Although the supreme court's decision in the *Dew* case might appear questionable as precedent for the proposition that the juvenile court may dispose of the custody question notwithstanding the exercise of the power to determine that question, or the assumption of that power, by a court under the divorce statutes, later decisions in Missouri indicate adherence to the doctrine that the juvenile court's jurisdiction is a supervening one.¹⁸⁰ There are no decisions in Missouri other than the *Dew* case (either under

178. In the *Dew* case the mother instituted habeas corpus proceedings against respondent father contending that the juvenile court, in assuming jurisdiction over, and awarding the custody of, the child, had not determined that the child came within the statutory terms of the juvenile court statute. The Kansas City Court of Appeals held: (1) that the jurisdiction of the juvenile court is paramount to and not concurrent with that of the divorce court in the child custody area; and, (2) that the judgment of the juvenile court was valid as against collateral attack in the habeas corpus proceedings. The supreme court affirmed the court of appeals on the first point but held that since the record of the juvenile court contained no finding that the child was "neglected" within the meaning of the juvenile court statute its custody award was void and subject to collateral attack by writ of habeas corpus. The court stated that so much of the court of appeals decision as holds contra (on the collateral attack point) is therefore quashed.

179. State *ex rel.* Dew v. Trimble, 306 Mo. 657, 671-72, 269 S.W. 617, 621 (1925) (en banc).

180. *In re Wakefield*, *supra* note 141; Hayes v. Hayes, *supra* note 159; State *ex rel.* Burtrum v. Smith, *supra* note 154; Hupp v. Hupp, 238 Mo. App. 964, 194 S.W.2d 215 (Spr. Ct. App. 1946).

the present Juvenile Code or prior Juvenile Court Acts) turning upon the assertion of the juvenile court's power in supersedence to the "continuing" jurisdiction of the divorce court; however, the language of decisions in the child custody area¹⁸¹ wherein this issue has been discussed make it clear that when the question is presented it will be determined that the jurisdiction of the juvenile court is paramount to and supersedes the jurisdiction of the divorce court over the custody question and that where its jurisdiction is properly invoked, the juvenile court may make its determination regarding the disposition of custody in the same manner as if no other decree or award regarding custody existed.

Aside from the fact that the Missouri cases, and, in particular, the *Dew* case, clearly indicate that the jurisdiction of the juvenile court acting pursuant to authority of the Juvenile Code is paramount to and supersedes the jurisdiction of the divorce court or a court in which habeas corpus proceedings have been brought which may have awarded custody of a child, it is clear that such a result is the only one which can be reached. Such a result should not be considered, and is not, a deprivation of the co-ordinate jurisdiction of the divorce court or the court in which habeas corpus has been filed as to custody matters properly before such courts. On the contrary, the Juvenile Code establishes unique and separate jurisdictional conditions for the assertion of power by a juvenile court in child custody matters which have no direct relation to the jurisdictional conditions which give rise to the powers of a divorce court or a court entertaining the writ of habeas corpus. Certainly, the purpose and intent of the Juvenile Code is to establish paramount jurisdiction in cases properly presented to that court. In this connection, it is significant to observe that the facilities for investigation and for care and treatment of children afforded by the Juvenile Code to the juvenile court which are not afforded to any other courts indicate that the juvenile courts are intended to be,

181. *In re Wakefield*, *supra* note 141 (noting that under certain circumstances parties may have recourse to proceedings under the juvenile court statute); *Hayes v. Hayes*, *supra* note 159 ("this jurisdiction . . . [of the divorce court] is exclusive except as it may be affected or superseded by the jurisdiction of a juvenile court under certain circumstances"); *State ex rel. Burtrum v. Smith*, *supra* note 154, at 141, 206 S.W.2d at 562 ("Our decisions hold that when such an issue [custody] is involved in a divorce case in a given court, that court has and retains exclusive jurisdiction [save in juvenile court cases], although a different court otherwise could adjudicate the same issue by habeas corpus. . . ."); *Hupp v. Hupp*, *supra* note 180 (the grandparents' relief is by proceeding under the juvenile statute and not by motion to modify in the divorce proceeding).

and are in fact, more qualified to assume paramount jurisdiction over all matters, including custody matters, properly presented to them. Indeed, recognizing the qualifications of the juvenile court in the premises, Section 211.051 of the 1959 Revised Statutes of Missouri, while not depriving other courts of the power to determine legal custody of children in proper cases, affords them the privilege of certifying custody matters to the juvenile court for hearing, determination or recommendation. That section provides:

Nothing contained in . . . [the Juvenile Code] deprives other courts of the right to determine legal custody of children . . . *Such questions, however, may be certified by another court to the juvenile court for hearing, determination or recommendation.* (Emphasis added.)

In limiting the above discussion to custody awards under the Juvenile Code, the divorce law, and the habeas corpus statute, the authors have not lost sight of the provisions of Chapter 475 of the Revised Statutes of Missouri, which provide for the appointment by the probate court of guardians of the person or estate, or both, of minor children, nor is such limitation intended in any way to minimize the legal or social importance or significance of guardianships of the person of a minor. The peculiar competency of the guardianship law, however, is in the area of the protection of a child's property and contract rights, as compared to his person, and most of the provisions of the guardianship law, as well as most of the cases decided thereunder, relate to the guardian's position as custodian of a minor's estate, which is not included in the subject matter of this article.

It should be pointed out, however, that, in recognition of the status and stature of a guardian, the Juvenile Code explicitly requires that the guardian of a child, if any, must be notified whenever a petition with respect to the child has been filed with the juvenile court,¹⁸² that the guardian shall be notified whenever a child is taken into custody,¹⁸³ and, generally that the guardian be afforded all the rights of a parent of the child. Although the affirmative legal responsibilities of a guardian to the care of the person of his ward are not entirely clear, the Juvenile Code affords a guardian full opportunity to assert such responsibilities as may be occasioned by any proceeding in the juvenile court.

Conflicts, of course, can arise (and have arisen) as to the jurisdiction of a probate court which has appointed a guardian of a child, as compared

182. § 211.101.

183. § 211.131.

to the jurisdiction of a juvenile court or a divorce court where a child's custody is at issue. From the few cases which have been decided on this question, however, it would appear that the jurisdiction of the juvenile court or the divorce court, if properly asserted, is paramount to the jurisdiction of the probate court. In the recent case of *State v. Carroll*¹⁸⁴ the maternal grandparents of a child whose parents were both deceased filed a petition for transfer of custody in the juvenile court preliminary to the filing of a petition for adoption. The paternal grandmother of the child, who was the duly appointed guardian of the person of the child, filed a writ of prohibition against the juvenile court seeking to prevent that court from hearing the case on the grounds that the transfer of custody petition was a collateral attack on the judgment of the probate court which had appointed the guardian and that, accordingly, the juvenile court lacked jurisdiction. The court held that the juvenile court had jurisdiction and that this issue had been resolved by the Missouri Supreme Court in *In re Duren*,¹⁸⁵ wherein the Missouri Supreme Court held that an adoption proceeding brought before the juvenile court under circumstances not unsimilar to those in the *Carroll* case was not an attack on the status of the guardian. The court in *Duren* stated that the effect of the adoption proceeding on the guardian is only incidental and consequential and that, although the adoption proceeding might call for termination of the guardianship and a final settlement of the estate, it would not make the guardian's appointment void ab initio.

184. 343 S.W.2d 622 (St. L. Ct. App. 1961).

185. 355 Mo. 1222, 200 S.W.2d 343 (1947) (en banc).