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FLORIDA SPOUSES ADOPT ITALIAN CHILD IN GERMANY: MULTISTATE ADOPTION AND DOCTRINE OF "HIDDEN RENVOI"

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Since adoption statutes vary considerably in different countries, conflicts cases involving adoptions with foreign contacts have arisen all over the world. At common law the question whether a court may grant an adoption to foreign domiciliaries is almost unanimously considered one of jurisdiction. Once jurisdiction has been taken the court will apply its own law.[1] Thus, "jurisdiction and the choice of law are treated as coextensive."[2] Under civil law, however, conflicts problems in adoption matters have been discussed mostly in terms of choice of law.[3]

In Germany the substantive requisites of adoption are determined by the national law of the adopter.[4] The German statute is phrased as a unilateral conflicts rule providing that German law applies to an adoption by a German adopter, but courts and writers generally admit the multilateral interpretation of this statute to be that adoptions by foreign adotpers are determined by their national law. The rules of jurisdiction (*internationale Zuständigkeit*) may then follow the choice of law: when German substantive law has to be applied, German courts also have jurisdiction regardless of whether the adopter has his domicile or residence in Germany;[5] when the German choice-of-law points at foreign law, German courts have jurisdiction only if the foreign applicable law will recognize the German adoption, and if not they will not take the case even if the adopter is domiciled in Germany or resides in that country.[6] Thus, jurisdiction of German courts may depend either on

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1. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS, 402 (1962); De Nova, *Adoption in Comparative Private International Law*, 104 RECUEIL DES COURS 69 (1961).

2. Comment, 1968 CAMB. L. J. 32 (1968). *See also* KAHN-FREUND, THE GROWTH OF INTERNATIONALISM IN ENGLISH PRIVATE INTERNATIONAL LAW 66 (1960).

3. *Cf.* De Nova, *supra* note 1, at 94.

4. If the national law of the adopters has a federal system of different laws even as to conflicts law, the domicile of the adopters will be the "subsidiary" connecting factor. *See generally* De Nova, *Les Systèmes Juridiques Complexes en Droit International Privé*, 44 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1 (1955).

5. *Cf., e.g.*, Judgment of June 3, 1957, [1956-1957] Die Deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts 451-52, No. 139 (Landgericht Schweinfurt) [hereinafter cited as IPRspr.]; Dölle, *Uber einige Kernprobleme des Internationalen Rechts der Freiwilligen Gerichtsbarkeit*, 27 RABELS ZEITSCHRIFT 200, 208-09, 217 (1962).

6. German courts, before taking jurisdiction, state that the national law of the adopters does not claim exclusive jurisdiction. *Cf.* Judgment of July 31, 1959, 13 NEUE JURISTISCHE WOCHENSCHRIFT 248, 250 (Kammergericht) (1960) [hereinafter cited as NJW] as to Pennsylvania); Judgment of Mar. 22, 1957, [1956-1957] IPRspr. 445, No. 137 (Bayerisches Oberstes Landesgericht) (as to the United States); Judgment of Mar. 10, [1933] IPRspr. 118, 120, No. 53 (Kammergericht) (as to New York); Judgment of Sept. 30, 1927, [1928] IPRspr. 88, No. 53

the applicability of German law or on probable recognition of the German adoption in the adopter's home state. This twofold dependence of jurisdiction on choice of law is derived from the maxim of parallelism (*Gleichlauf*) of choice of law and jurisdiction. This is a basic principle of conflicts law, particularly in matters of extralitigious procedure.[7] The two different approaches may cause special difficulties when, in a multistate adoption case, one interested party is a citizen of a jurisdiction state while the state of the other party and the *lex fori* solve the conflicts problem by means of choice of the substantive law. The following German case – recently decided by the Amtsgericht Mainz[8] – is a revealing example of the technique to which German courts resort in these cases: the doctrine of renvoi.

The adoptive parents, a young American couple domiciled in Florida, had come to Germany and lived there for awhile, possibly for the reason that the husband was employed in the American military service. The child was the illegitimate issue of an Italian woman, who had left her country for temporary employment in Germany where she gave birth to the child. The Florida spouses nursed and later adopted the child. A German court[9] applying German law approved the adoption contract between the foster parents and the mother acting as the child's legal guardian.[10] Under German law the adopters should have reached the age of thirty-five years, but exemption may be given from this requirement by discretion of the court and was granted in this case. All parties seem to have left Germany afterwards. Questions of validity of an adoption normally come up in succession cases. But in countries where, as in Germany, personal status is registered the public registrar may

(Kammergericht) (as to Poland). Other courts take jurisdiction when recognition will be given to the German adoption in the domicile state of the American adopters, *see, e.g.*, Judgment of Aug. 15, 1957, [1956-1957] IPRspr. 453, 454, No. 140 (Landgericht Berlin) (as to Texas). The Bayerisches Oberstes Landesgericht, Judgment of July 9, 1965, 18 Das Standesamt 275 (1965) held that a German court's approval of an adoption contract between Ohio domiciliaries was invalid because the German court did not have jurisdiction under Ohio law. The view that jurisdiction (*internationale Zuständigkeit*) of German courts depends on recognition by the adopter's national law, is shared by many writers. *Cf.* Wengler, ZUR ADOPTION DEUTSCHER KINDER DURCH AMERIKANISCHE STAATSANGEHÖRIGE, 12 NJW 127 (1959); Gündisch, *Internationale Zuständigkeit und versteckte Rückverweisung bei Adoptionen durch Ausländer in Deutschland*, 8 ZEITSCHRIFT FUR DAS GESAMTE FAMILLENRECHT 352 (1961) [hereinafter cited as FAMRZ]; Dölle, *supra* note 5, at 217. *Contra*, KEGEL, INTERNATIONALES PRIVATRECHT 343 (2d ed. 1964); Beitzke, *Die deutsche internationale Zuständigkeit in Familienrechtssachen*, 14 FAMRZ 592, 594 n.11, 604-05 (1967).

7. *See* NEUHAUS, DIE GRUNDBEGRIFFE DES INTERNATIONALEN PRIVATRECHTS 242-48 (1962). *See also* HELDRICH, DIE INTERESSEN BEI DER REGELUNG DER INTERNATIONALEN ZUSTANDIGKEIT, FESTSCHRIFT FÜR HANS G. FICKER 205, 210-12 (1967). This author speaks of *Gleichlauf* only with regard to jurisdiction of German courts in cases in which German law applies according to German conflicts rules.

8. Judgment of Oct. 21, 1966 (4 III 34/66 - 4 A R 155/66) Das Standesamt 243 (Amtsgericht Mainz) (1967). For further analysis of this case see Jayme, *Un Caso Di Adozione Italo-Americana Tratto Dalla Practica Tedesca Ed Il Problema Della "Versteckte Rückverweisung,"* 22 DIRITTO INTERNAZIONALE 84 (1968-1).

9. Judgment of April 15, 1966 (6 XS 15/66) (Amtsgericht Bad Kreuznach) (unpublished).

10. Under German law the constitutive act of the adoption is the transaction between the adopters and the child. This contract, however, is not valid unless approved by the court. Adoption matters are handled in extralitigious procedure (*freiwillige Gerichtsbarkeit*).

contest the validity of the adoption by refusing to register the change of status, especially when he has to state the new name of an adoptive child whose birth was registered in Germany. The lower court will then decide whether change of status has taken place. In this way the case came up for the second time. Another German court[11] held that the adoption did not affect the status of the child. The opinion reasoned as follows: the German choice of law rule pointed to American and Florida law under which — according to the view of the court — the *lex domicilii* or the *lex patriae* of the child should be applicable. The child was domiciled in Italy[12] and therefore by means of a renvoi,[13] the law of that nation had to be applied. Since the Florida spouses did not comply with the forty-year age prerequisite for the exemption from the normally required fifty-year limit of the Italian Civil Code,[14] the adoption was considered to be invalid and not to have changed the status and name of the child.

To understand the two contrasting decisions one has to focus on the German courts' usage of the doctrine of renvoi in American-German adoption cases.

The renvoi principle is generally recognized in German law, but in the limited form of remission to the German *lex fori*. It has been broadened, however, by the courts insofar as they normally will take into account the choice of law rule of the foreign law that is primarily considered to be applicable. In cases of American adopters, German courts will seldom find special choice of law rules of the domicile state because American courts having jurisdiction will apply their own laws without mentioning the choice of law problem. The German courts, however, have interpreted the jurisdiction rules of American states as concealing the choice of law rules.[15] The absence of local jurisdiction of an American court combined with the general rule that recognition will be given to adoption decrees of foreign courts, which

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11. Judgment of Oct. 21, 1966 (4 III 34/66 - 4 A R 155/66), Das Standesamt 243 (Amtsgericht Mainz) (1967).

12. The child shared the Italian domicile of the mother. The reasoning of the court is due to an oversight; the pertinent Florida statute, §63.061 (1967) (formerly §72.04 (1965)), does not require the legal domicile of the child to be within the state of Florida; residence is a sufficient connection for taking jurisdiction. *See* note 27 *infra*.

13. The court used the term *Rückverweisung* (remission); it would have been more correct to speak of *Weiterverweisung* (transmission).

14. In the meantime article 291 of the Italian Codice Civil has been changed by article 1 of the Legge of June 5, 1967, n.431 [1967] Gazz. Uff. 3319, No. 154 (June 22, 1967): the adopters must have reached the age of 35 years; exemption may be given to at least 30 year-old adopters. The 28 year-old Florida couple would not have complied even with the less severe requirements of the new statute. This statute also introduced the special adoption (*adozione speciale*) for children who have been declared by court decision to be in a state of abandonment. As to this kind of adoption, no age limits are prescribed for adopters. For recent developments of Italian adoption legislation *see* CAMPAGNA, FAMIGLIA LEGITTIMA E FAMIGLIA ADOTTIVA (1966); PALLADINO, L'ADOZIONE SPECIALE (1968); Jayme, *Zur geplanten Neuordnung des italienischen Familienrechts*, 14 FAMRZ 537, 538 (1967). Luther, *Die Sonderadoption des italienischen Rechts*, 32 RABELS ZEITSCHRIFT 488 (1968).

15. Judgment of July 9, 1965, 18 Das Standesamt 275, 276 (Bayerisches Oberstes Landesgericht) (1965) speaks of *versteckte Kollisionsnorm* (hidden choice-of-law rule).

had international jurisdiction as to the particular state,[16] becomes – in the eyes of the German judge – a foreign choice of law rule pointing at German law as the *lex fori*. Judges will determine whether the German court has jurisdiction under the law of the adopter's domicile and, if so, they will apply German law.[17] This way of using the renvoi doctrine is now a settled principle in German courts.[18] Writers have coined the expression "hidden renvoi" (*versteckte Rückverweisung*)[19] because the choice of law rules of the foreign law are considered to be hidden behind the rules of jurisdiction. Professor Ehrenzweig speaks of an "analytically improper but serviceable application of the doctrine of renvoi."[20] The usefulness of this approach may be shown by the fact that it will open German courts and German law to American adopters living in Germany when American courts do not have jurisdiction over the parties and therefore do not provide for their citizens abroad. The application of the German *lex fori* will not jeopardize the uniformity of decisions, the classic aim of all conflicts law, since probable recognition of the adoption in the adopter's state is one condition upon which the doctrine is based.[21]

In our case the German court had to look first at Florida law as the personal law of the adopters. As to jurisdiction in adopting matters, Florida Statutes, section 72.08, states:

> The circuit court shall have exclusive jurisdiction in all matters of adoption. All petitions for adoption shall be filed in the circuit court of the county in which the petitioner or petitioners reside, or in which is located any licensed child placing agency to which the child sought to be adopted has been permanently committed, or in which such child may reside.

Since neither the adoptive parents nor the child resided in Florida, the courts of this state had no jurisdiction over the parties. It may be inferred

16. *Cf.* RESTATEMENT (SECOND) CONFLICT OF LAWS §143 (Tent. Draft No. 4, 1967).

17. Judgment of July 31, 1959, 13 NJW 248, 250-51 (Kammergericht) (1960); Judgment of March 7, 1958, 11 Das Standesamt 292 (Landgericht Mannheim) (1958); Judgment of March 22, 1957, [1956-1957] IPRspr. 445, No. 137 (Bayerisches Oberstes Landesgericht); Judgment of June 3, 1957, [1956-1957] IPRspr. 461, 462, No. 139 (Landgericht Schweinfurt).

18. This principle is not limited to adoption; it has been used also as to other questions of family law, *e.g.*, divorce and custody, *See* Hanisch, *Die "versteckte" Rückverweisung im Internationalen Familienrecht*, 19 NJW 2085 (1966).

19. *Cf.* NEUHAUS, *supra* note 7, at 190-94. *See also* A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW, 147-48 (1967); von Mehren, *The Renvoi and its Relation to Various Approaches to the Choice-of-Law Problem, XXth Century Comparative and Conflicts Law*, in LEGAL ESSAYS IN HONOR OF HESSEL YNTEMA 380, 381-82 n.7 (1961), uses the expression "concealed renvoi" for different renvoi situations. Some writers do not approve the doctrine of hidden renvoi in cases where the national law of the adopters provides concurring jurisdictions. *See* Wengler, *supra* note 6, at 129; Beitzke, Note, 13 NJW 248-49 (1960); but it has been pointed out that recognition will be given to the adoption decree of the German court that took jurisdiction according to one of the concurring requirements; the foreign law effects the renvoi by pointing at the *lex fori* of the court that actually deals with the case. *See* Gündisch, *supra* note 6, at 356; Hanisch, *supra* note 18, at 2090.

20. A. EHRENZWEIG, *supra* note 1, at 404.

21. *Cf.* Hanisch, *supra* note 18, at 2091.

from Florida cases, however, that recognition will be given to a foreign adoption decree when the foreign court complied with the jurisdiction requirements of Florida law. This seemingly opposite statement in *Tankersley v. Davis*[22] that the child adopted . . . another state and who never acquired domicile in this state would not inherit . . . under the laws of the state of Florida" is to be viewed in light of *Mott v. First National Bank*[23] on which *Tankersley* relied. The *Mott* case stated generally that "[t]he relation of parent and child having been competently established by adoption in Connecticut . . . that status will be recognized in Florida under the rules of comity or under the full faith and credit clause of the Federal Constitution."[24] This case applies also to international adoptions as shown by the quotation in *Tsilidis v. Pedakis.*[25] The public policy restrictions on recognition of foreign adoptions, which are found in these cases, have been superseded by legislation,[26] so there is some probability that Florida courts will recognize a foreign adoption when the foreign court had jurisdiction by Florida standards. When the German court confirmed the adoption contract, the child and the adopters resided in Germany.[27] Therefore, the first German court's application of German law was justified by the doctrine of hidden renvoi according to which German courts accept the remission of the case to the forum effected by the primarily applicable Florida rules. The second German court overlooked the jurisdictional basis of this doctrine: purporting to apply Florida law, it separated the choice of law question from the jurisdiction of the German court and decided on Italian law. Erroneous as this may be under existing German law, the decision perhaps confirms a certain trend to give more weight to the child's personal law as it is advocated by other recent decisions,[28] writers,[29] and in a more limited way also by the draft of the Hague Convention on adoption.[30]

22. 128 Fla. 507, 175 So. 501, 503 (1937).

23. 98 Fla. 444, 124 So. 36 (1929).

24. *Id.* at 37.

25. 132 So. 2d 9, 11-12 (1st D.C.A. Fla. 1961).

26. *Cf.* FLA. STAT. §731.39 (1967) (Florida Probate Code); FLA. STAT. §§63.241-.291 (1967) relating to the adoption of adults; Taintor, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222, 252 n.157 (1954).

27. The court overlooked that Florida statute, §72.08 (1965), uses the term "reside." Residence, as distinguished from the formal domicile may be described as "place of abode whether permanent or temporary," Fowler v. Fowler, 156 Fla. 316, 22 So. 2d 817, 818 (1945). For different meanings of "residence," *see* Taintor, *supra* note 26, at 233-34.

28. *Cf., e.g.*, Judgment of Nov. 17, 1967, 22 Monatsschrift für Deutsches Recht 326 (Bayerisches Oberstes Landesgericht) (1968), which applied Italian law as the natural father's and the child's personal law as to the question of which person was to act as the child's guardian for concluding the adoption contract. For recent developments in England, *see In re* B. (S.) (An Infant) [1967] 3 W.L.R. 1438, 1445. Goff, J., took into account the question of recognition of an English adoption order in the country of the child's domicile (Spain).

29. *Cf.* GRAVESON, THE CONFLICT OF LAWS 328 (5th ed. 1965); Neuhaus, *Um die Reform des deutschen Internationalen Kindschaftsrechts*, 14 FAMRZ 22, 25 (1967).

30. *Cf.* Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption, 2 Actes et Documents de la Dixième Session, 399 (1964), arts. 5, 22; Ficker, Die 10. Haager Konferenz, 30 RABELS ZEITSCHRIFT 606, 626 (1966). As to the unification of substantive rules of adoption see the draft of the "Convention européenne sur l'adoption," 1967 REVUE INTERNATIONALE DE DROIT COMPARÉ 691 (1967).