Best Interest of the Child in Custody Proceedings and Waiver of Jurisdictional Objection - Sommer v. Borovic

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The rise in divorce rates and the increased mobility of present-day society makes the choice of the most appropriate jurisdiction in a child custody dispute one of great importance. Problems in determining whether a given court has jurisdiction in a child custody modification proceeding are most readily apparent within the framework of an interstate conflict. No uniform guidelines exist and, consequently, the litigation is characterized by confusion and uncertainty. Further aggravating the problem is the legalized kidnapping

1. The argument for establishing uniform guidelines has been criticized and rejected by commentators and courts alike. In Sampsell v. Superior Court, 32 Cal.2d 763, 197 P.2d 739 (1948), the California Supreme Court rejected any "hard and fast rules" in allocating jurisdiction and upheld the principle of concurrent jurisdiction. Concurrent jurisdiction is defined as the jurisdiction of several different tribunals, each authorized to deal with the same subject matter at the choice of the suitor. Mackinaw Drainage Dist. v. Martin, 242 Ill. App. 139, 143 (3d Dist. 1926), aff'd, 325 Ill. 400, 156 N.E. 274 (1927). In support of the California court's position, many commentators urge that courts assume jurisdiction without regard to legalistic formulas whenever the welfare of the child so requires. See, e.g., A. Ehrenzweig, A TREATISE ON THE CONFLICT OF LAWS §§ 87-89, at 288-300 (1962); Ehrenzweig, Interstate Recognition of Custody Decrees: Law and Reason v. the Restatement, 51 Mich. L. Rev. 345 (1953); Stansbury, Custody and Maintenance Law Across State Lines, 10 LAW & CONTEMP. PROB. 819 (1944); Stumberg, The Status of Children in the Conflict of Laws, 8 U. Chi. L. Rev. 42, 53-58 (1940); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971). Practically speaking, many jurisdictions have followed this suggestion. Courts have abandoned any pretense of being guided by absolute doctrines which are either too rigid in requiring recognition and enforcement of custody decrees without regard to the child's welfare, see, e.g., Weddington v. Weddington, 243 N.C. 702, 92 S.E.2d 71 (1956) (court refused to adjudicate custody issue when child was removed from jurisdiction even after custodial parent was served with notice of proceeding), or too flexible in permitting non-recognition and non-enforcement in favor of a "fugitive" parent. See, e.g., Halverson v. Halverson, 42 Ill. App.2d 284, 291, 192 N.E.2d 258, 261-62 (1st Dist. 1963) (modification based on change of circumstances). See also A. Ehrenzweig, A TREATISE ON THE CONFLICT OF LAWS §§ 87-89, at 289-92, 297-300 (1962). In the alternative, several jurisdictions have adopted the Independent Investigation rule and claimed absolute discretion in examining the merits of child custody decrees. The Kansas Supreme Court maintains that since the court is obligated to secure the best interests of the child, former adjudication is evidentiary only and not controlling. Moyer v. Moyer, 171 Kan. 495, 233 P.2d 711 (1951). See also Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521 (1948); People ex rel. Herzog v. Morgan, 287 N.Y. 317, 39 N.E.2d 255 (1942); Comment, Jurisdiction in Kansas Child Custody Cases, 8 Washburn L.J. 48 (1968).
of children by their parents. Principles of concurrent jurisdiction and failure to grant full faith and credit to child custody decrees encourage parents to forum shop in hopes of finding a sympathetic jurisdiction.

Similar problems have arisen in predominantly intrastate controversies involving the modification of child custody decrees. Recognizing its obligation to secure the best interests of the child in any custody proceeding, the Illinois Supreme Court in *Sommer v. Borovic* held

3. See note 1 supra.

4. While the Supreme Court has not expressly rejected the notion that the full faith and credit clause applies to child custody decrees, it has failed to speak directly on that issue when the opportunity to do so has arisen. See *Ford v. Ford*, 371 U.S. 187 (1962) (failing to decide case on grounds of full faith and credit, the Supreme Court held that res judicata did not bar South Carolina court from making an independent investigation as the Virginia decree was based solely on an agreement between the parties); *Kovacs v. Brewer*, 356 U.S. 604 (1958) (full faith and credit clause did not prevent North Carolina from modifying New York custody decree based on subsequent change in circumstances); *May v. Anderson*, 345 U.S. 528 (1953) (Ohio court was not bound to give full faith and credit to a Wisconsin custody decree entered without having first obtained in personam jurisdiction over the defendant); *Halvey v. Halvey*, 330 U.S. 610 (1947) (full faith and credit clause did not prevent New York court from modifying Florida decree in accordance with the law in Florida). See also Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 Sup. Ct. Rev. 89 (1964) (decision that custody decrees are entitled to full faith and credit would be improper, amounting to judicial legislation); Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 Va. L. Rev. 379 (1959) (best interests of child served by ignoring sister state decrees); Comment, *The Full Faith and Credit Clause and Its Relation to Custody Decrees*, 11 Ala. L. Rev. 139 (1958) (application of the full faith and credit clause necessitates a test of uniform national application such as substantially changed circumstances or facts substantially affecting child's welfare); Comment, *Full Faith and Credit to Judgments: Law and Reason Versus the Restatement Second*, 54 Calif. L. Rev. 282, 287-91 (1966) (Second Restatement is the least desirable alternative as a practical solution to problems of child custody).


6. As stated by Judge Cardozo when writing for the majority in *Finlay v. Finlay*, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925):

The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts as tares patriae to do what is best for the interest of the child.


Since the passage of the new *Illinois Marriage and Dissolution of Marriage Act*, Ill. Rev. Stat. ch. 40, §§ 101-802 (1977), the Illinois judiciary in determining the child's best interest has been instructed to consider all relevant factors, with particular attention paid to the following:

(1) the wishes of the child's parent or parents as to his custody;
(2) the wishes of the child as to his custodian;
(3) the interaction and interrelationship of the child with his parent or parents, his
that the court which originally determines custody retains exclusive jurisdiction over the child, and that the parents or guardian of the child may not subsequently waive that restriction on jurisdiction by seeking to modify the custody degree in a court of a different county. In other words, appearance and participation in the modification proceeding of any county court other than that court which issued the original custody decree will not deprive the decretal court of its jurisdiction, since only the decretal court may entertain petitions for modification.

The Illinois judiciary has long recognized that the jurisdiction of the decretal court is continuing.\(^8\) The decretal court's continuing jurisdiction to modify a decree does not in itself preclude any other court from litigating the same matter, and does not require that a modification proceeding be brought in the decretal court if both parties agree otherwise. The courts had generally avoided using mandatory language and taking an absolutist approach.\(^9\) However, a trend evolved which gradually gave acceptance to the principle that the decretal court's jurisdiction is exclusive as well as continuing. In support of the exclusive jurisdiction principle, an Illinois Appellate Court in *Kohler v. Kohler*\(^10\) stated that "an application to enforce or modify a

siblings and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community; and

(5) the mental and physical health of all individuals involved.

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\(^7\) 69 Ill.2d 220, 370 N.E.2d 1028 (1977).


\(^9\) This practice may have been due in part to the fact that nowhere in Section 19 of the Divorce Act (relied upon by the judiciary in the past but since repealed) did the legislature state that the decretal court is the only court with jurisdiction to modify a custody decree. Section 19 reads in part as follows: "The court may, on application, from time to time, make such alterations in the . . . custody . . . of the children, as shall appear reasonable and proper." *Law of July 27, 1949, ch. 40, § 19, 1949 Ill. Laws 729* (repealed 1977).

decree for custody or support of minor children in a divorce case must be made in the court where the decree was rendered.”

Thereafter, it generally was conceded that the decretal court's jurisdiction was "continuous and at least arguably exclusive.”

Sommer v. Borovic appears to be the first Illinois Supreme Court case to speak on the issue of continuing and exclusive jurisdiction, thereby enabling the Illinois practitioner to ascertain with absolute certainty the court having custody jurisdiction. This Note will analyze the policy considerations behind the court's adoption of an absolutist approach in an area of law requiring, in the opinion of many jurists, the utmost of flexibility in decision making. It also will discuss the alternative approach suggested by the dissenting opinion. Finally, the propriety of the majority's position will be emphasized by pinpointing the inadequacies of the dissenters' argument.

Sommer v. Borovic: The Struggle for Custody

The controversy giving rise to the court's decision in Sommer emerged from a complicated fact situation which generally typifies child custody proceedings. In short, the divorce decree awarding custody to the mother was entered by the DuPage County Court and, sometime thereafter, a petition to modify the original decree was filed in Lake County by the father. The mother acquiesced to the Lake County court's jurisdiction and participated in the modification proceeding for over a year before she first questioned the Lake County court's power to resolve the dispute. In the interim, con-

11. Id. at 110, 61 N.E.2d at 689 (emphasis added).
13. Commentators have criticized judicial opinions which decide a question of custody by mere reference to generalizations designed to guide courts without an examination of the specifics of the cases. See generally Oster, Custody Proceeding: A Study of Vague and Indefinite Standards, 5 J. Fam. L. 21 (1965); Taylor, supra note 6.
14. See, e.g., In re Giblin, 304 Minn. 510, 232 N.W.2d 214 (1975); Crawley v. Bauchens, 13 Ill. App.3d 791, 300 N.E.2d 603 (5th Dist. 1973). Custody battles have been characterized as transcending "the brutality and irregularity of guerilla warfare." Hazard, supra note 4, at 392.
15. The mother to whom custody was awarded later remarried and, with the court's permission, moved with her children to New Jersey. Subsequently, she and the children's father, Dr. Sommer, agreed that their youngest daughter would live temporarily with her father in Illinois. Some months later, the mother requested return of the daughter, but the father refused. It was at this point that Dr. Sommer filed a petition for modification in Lake County.
16. The mother filed a general appearance and counter-claimed for child support payments in arrears and for an increase in future payments. After a hearing, custody was awarded to the father. Thereafter, the mother instituted an action in the New Jersey courts and eventually filed in Lake County an "emergency petition for change of child custody." Finally, she moved to vacate the Lake County custody order for want of jurisdiction. Sommer v. Borovic, 69 Ill.2d 220, 226, 370 N.E.2d 1028, 1029 (1977).
considerable child-snatching resulted in the child being taken from Illinois to New Jersey and finally back to Illinois again. Thereafter, the mother turned to the DuPage County court, the court which entered the original decree, and sought relief from an adverse custody decree entered in Lake County.

Eventually, a dispute arose between DuPage County and Lake County over the validity of court orders issued by both. The controversy ended when the matter, on a writ of mandamus, was brought before the Illinois Supreme Court, which clearly established that the jurisdiction of the decretal court was continuing and exclusive. The court stated that the child custody decree was an interlocutory order, not a final one. Therefore, the doctrine of prior jurisdiction and the orderly administration of justice precluded any other court in the state from later exercising jurisdiction over the same subject matter.

The court's holding was dictated by its obligation in a child custody proceeding to secure the best interests of the child. This duty

17. When the child's father refused her mother's request to return their daughter to New Jersey, the mother removed the child herself in violation of the Lake County custody decree. After the mother initiated proceedings in New Jersey and the New Jersey court denied the father's motion to dismiss, he removed the child from New Jersey and brought her back to Illinois.

18. The Lake County court declared the mother in contempt of court when she removed her daughter from Illinois and brought the child back to New Jersey. On the other hand, the DuPage County court placed the mother "under protective order" of the court, declared the contempt order void, and enjoined the sheriffs of Lake and DuPage counties from attempting to enforce the order. Moreover, it enjoined Dr. Sommer from proceeding further in the Lake County court. Consequently, he sought relief in the Illinois Supreme Court.

19. While the Illinois Supreme Court made very clear that the principle of exclusive jurisdiction is based on principles of comity, other jurisdictions have not done the same. In depriving any court other than the decretal court of jurisdiction, many courts do not distinguish between a total lack of subject matter jurisdiction and judicial restraint. The distinction is worth making since it is foreseeable that circumstances would arise making an exercise of jurisdiction advisable. This would be the case in emergency situations involving child abuse or abandonment of a child. If the doctrine of exclusive jurisdiction entirely deprived a non-decretal court of power, the court would be precluded from exercising jurisdiction in such emergency situations. And with respect to the waiver problem, parties would never be permitted to consent to the jurisdiction of another county court, since a stipulation of the parties can never confer jurisdiction where the power to act is involved. See Annot., 146 A.L.R. 1153, 1155-57 (1943).

20. The "best interest of the child" standard has been subject to considerable attack as being unconstitutionally vague. One court, in In re Adoption of J.S.R., 374 A.2d 860 (D.C. App. 1977), while recognizing that the concept lacked precise meaning, upheld its validity and commented that:

the standard "best interest of the child" requires the judge . . . to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives. . . . No more precision appears possible. In this context, no more is constitutionally required.

Id. at 863 (citations and footnotes omitted). In defining "best interests," the court's focus on the least detrimental alternative is not without support. Legal commentators have pinpointed the
arises, the court stated, because the children of divorced parents are wards of the state.\textsuperscript{21} Reiterating a well-accepted principle, the court ruled that, after submitting themselves to the jurisdiction of the decreral court, parties could not bind the court on the question of what was in the best interest of the child by either their agreements\textsuperscript{22} or their actions.\textsuperscript{23} Therefore, the mother could not waive the jurisdictional objection.\textsuperscript{24} To confer upon the court in Lake County jurisdic-

\textsuperscript{21} See also Crawley v. Bauchens, 13 Ill. App.\textsuperscript{3d} 791, 795, 300 N.E.2d 603, 606 (5th Dist. 1973).

\textsuperscript{22} As the court in Kminek v. Kminek, 27 Ill. App.\textsuperscript{3d} 78, 83, 325 N.E.2d 741, 745 (1st Dist. 1975) pointed out, child custody agreements do not provide a "straightjacket" for the court in determining the best interests of the child. Yet, when the terms of such agreements are consistent with the child's welfare, they will be given effect. The agreements have probative value and are persuasive in reaching a final decision.

\textsuperscript{23} With their actions litigants often attempt to bind the court on procedural matters, as did the parents in Sommer. The court illustrates the futility of such endeavors by citing Emrich v. McNeil, 126 F.2d 841 (D.C. Cir. 1942). In that case, the original divorce decree was entered in the United States District Court for the District of Columbia. Nevertheless, the mother filed suit against the father in the Municipal Court of the District of Columbia to collect child support payments in arrears. The court held that as long as the child and her parents remained subject to the jurisdiction of the District Court, principles of prior jurisdiction and public policy demanded that it determine all questions of custody and support.

\textsuperscript{24} In Johnson v. Johnson, 185 Tenn. 400, 206 S.W.2d 400 (1947), the divorce decree entered in the Union County court awarded custody to the father, who later filed a petition for a writ of habeas corpus in Anderson County alleging that the mother was illegally withholding the child. No jurisdictional objection was raised, the matter was litigated, and custody was awarded to the mother. On appeal, the court vacated the lower court order and warned that no definite or orderly settlement of custody could be achieved if either parent were free to invoke the jurisdiction of any county court in disregard of previous decrees entered by other courts of the state. Without some element of finality, the child becomes the hapless victim of the litigation.

In Benson v. Benson, 121 Mont. 439, 193 P.2d 827 (1948), the mother was awarded custody by a divorce decree entered by the Roosevelt County court. She later filed a writ of habeas corpus in the Sheridan County court after the father failed to return their son at the end of summer vacation. The father filed a general appearance, evidence was introduced by both parents, and the court affirmed the original custody order. On appeal, the Montana Supreme Court concluded that since no appeal was taken from the original decree, it was binding not
tion to modify the decree would thereby prevent the DuPage County court from doing the same.

**OBJECTIVES IN ALLOCATING CUSTODY JURISDICTION**

An examination of why the court took an absolutist approach in allocating jurisdiction and refused to allow waiver leads to an analysis of the policy considerations supporting the decisions. These considerations, which must be taken into account in allocating child custody jurisdiction, are numerous and often are at odds with one another. Those considerations most frequently cited include: (1) stability of environment and affection relationships; (2) fair venue; (3) maximum accessibility to evidence; (4) correct decision making; (5) prevention of custody decree violation; (6) prevention of maltreatment or abuse; and (7) certainty of determining which court has jurisdiction. Inherent in any attempt to secure one objective is the risk of sacrificing another.

The court in *Sharpe v. Sharpe* faced that very dilemma and balanced the objectives in allocating jurisdiction in favor of a “single court” theory. Although the problem presented in *Sharpe* involved an interstate conflict, the legal theory underlying the court’s deci-
sion is indicative of the Illinois judiciary’s position on the priority given objectives in allocating jurisdiction. The court was to determine which theory of child custody jurisdiction should prevail: jurisdiction based on domicile or jurisdiction based on the principle that the court first acquiring jurisdiction retains it. The court realized that the former ensures that the custody determination be made by the court most likely to decide correctly. In other words, the home state would be in the best position to determine the child’s custody.

Balanced against this objective of correct decision making was the court’s concern for continuity. Acceptance of the “single court” theory prevents forum shopping, which the court cited as being at war with the stability of the court’s decree and, therefore, the stability of the child’s environment. Moreover, it recognized the need of parties to be able to ascertain with reasonable certainty the tribunal with the authority to resolve controversies involving child custody.

The propriety of assigning priority to continuity and stability in balancing objectives in allocating jurisdiction is justified by a court’s obligation to secure the best interests of the child. Continuity-of-affection relationships and stability of environment long have been

modify the decree. However, when situations are reversed, the Illinois judiciary does not feel compelled to do the same. The decree of a sister state is res judicata as to facts then existing, but not as to subsequent facts. Therefore, Illinois courts are empowered to litigate a dispute if the modification proceeding is based on change in circumstances. People v. Schaedel, 340 Ill. 560, 173 N.E. 172 (1930). See generally Stansbury, supra note 1, at 825-28 (discussion of the problems inherent in the theory of continuing jurisdiction); Goodrich, Custody of Children in Divorce Suits, 7 CORNELL L.Q. 1 (1921) (argument in support of the continuing jurisdiction of decretal court).

30. However, the court also noted that domicile is an ambiguous and technical term involving the conflict of laws. Sharpe v. Sharpe, 77 Ill. App.2d 295, 298, 222 N.E.2d 340, 341 (4th Dist. 1966). The concept has been criticized by the courts and academicians alike as being too rigid and yet too flexible in its application, and one which has little practical concern for the child’s welfare. See note 1 supra. But see May v. Anderson, 345 U.S. 528, 539 (1953) (Jackson, J., dissenting) (necessity of retaining the concept to preserve the federal system until a more suitable replacement is discovered).


32. During the period of development, the instability of all mental processes must be offset by uninterrupted support from external sources. Smooth growth is arrested when upheavals in the external world are added to internal trauma. A child will experience regression in affection relationships, skill achievements, and social adaptation when there are changes of a parent figure. The younger the child, the less able he is to deal with any change in routine or break in relationship with his psychological parent. Therefore, disruptions of continuity have different consequences for different ages. For instance, change of the caretaking person for infants and toddlers will cause setbacks in the quality of their next attachments. With every break in the continuity-of-affection relationship, emotional attachments become increasingly distrustful, shallow, and indiscriminate. For children under the age of five, disruption of continuity affects achievements which develop in the intimate exchange with a stable parent figure (communication-
recognized as "the first and foremost requirements for the child's health and proper growth." The court in a recent Illinois case, *Kminek v. Kminek*, based its refusal to uproot the children from the custody of their father on the theory that stability of environment was an important factor in determining the best interests of the child. The court warned that care must be taken to prevent shuttling the children between contesting parents.

Just as there is concern about the shuttling of children from one parent to another through modification decrees, there is also concern about the stability of the child's environment. The achievement of certain skills, such as toilet training, is easier for the child to lose if it has recently been acquired. See J. Goldstein et al., supra note 20, at 17-20, 32-34. The implication of such guidelines is that custody decrees should be final and irrevocable. See J. Goldstein et al., supra note 20, at 35; A. Watson, *Psychiatry for Lawyers* 197 (1968); Goldstein & Glitter, *Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 Fam. L.Q. 75, 88 (1969). If not permanent, custody decrees should remain unchangeable for a specified period of time, such as one or two years. See *Ill. Rev. Stat. ch. 40, § 610(a) (1977) generally, no modification for a two year period)*; R. Levy, *Uniform Marriage and Divorce Legislation: A Preliminary Analysis* 237 (1969). This approach is justified in light of the abuses which have taken place in some instances. See, e.g., Hixson v. Hixson, 199 Or. 559, 263 P.2d 597 (1953) (father filed sixty to seventy separate documents in regard to custody); Allen v. Allen, 200 Or. 678, 268 P.2d 358 (1954) (children of tender years exposed to seven different custody contentions between parents in nine years in courts of three states).

This controversy focused on the modification of a custody decree after both parents signed an agreement awarding permanent custody to the father. After a court order was entered in accordance with the parents agreement, the mother claimed that she interpreted the signed agreement "making it legal" to be temporary in nature and that entry of a modification order violated her procedural due process rights since she received no notice of its presentation to the court. In rejecting both arguments, the court upheld the judgment, giving custody to the father.

The court gave priority to the stability factor when faced with the mother's countervailing arguments based on the tender years doctrine. The latter presumes that the best interests of minor children are served when placed with the mother. People v. Bukovich, 39 Ill.2d 76, 83, 233 N.E.2d 382, 386 (1968). While it recognized that Illinois is an advocate of the doctrine, the court concluded that custody could be given to the father under some circumstances, as in the instant case in which the mother voluntarily agreed to relinquish custody to the father.


7. See also *Collins v. Collins*, 120 Ill. App.2d 125, 128, 256 N.E.2d 108, 109 (2d Dist. 1970) (court cautioned that permanent custody decrees should not be subject to constant or spasmodic variation, and denied father's petition for modification which was based on the admitted adulterous conduct of mother); *Szczawinski v. Szczawinski*, 37 Ill. App.2d 350, 353, 185 N.E.2d 375, 377 (1962) (court held that the contumacy of the mother would not justify punishment of the child through alteration of the original decree); *Taylor*, supra note 6, at 521.

8. Evidence of this concern can be found in *610(a) of the Illinois Marriage and Dissolution of Marriage Act*, which provides for the following:
cern about self-help remedies employed by disappointed parents which results in the legalized kidnapping of children. While many states refuse to exempt parents from criminal responsibility under state kidnapping statutes if violation of a custody decree results, there are few if any convictions under current law, as a result of a "hands-off" policy taken by many jurisdictions. Emphasis on the

No motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health. ILL. REV. STAT. 40, § 610 (1977). As the court emphasized in King v. Vancil, 34 Ill. App. 3d 831, 341 N.E. 2d 65 (5th Dist. 1975), children and parents "are entitled to a certain degree of finality and conclusiveness when an order of custody is entered"; custody, being "the most important aspect of divorce," should not be subject to frequent modifications. Id. at 834-35, 341 N.E. 2d 66.

39. As Justice Jackson aptly points out in his dissent in May v. Anderson, 345 U.S. 528, 539 (1953), "A state of the law such as this, where possession apparently is not merely nine points of the law but all of them and self-help the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system." See also Prefatory Note to UNIFORM CHILD CUSTODY JURISDICTION ACT at iii; Foster & Freed, Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act, 28 HASTINGS L.J. 1011 (1977); Note, Domestic Relations—Criminal Sanctions Against "Child-Snatching" in North Carolina, 55 N.C. L. REV. 1275, 1285 (1977).

40. In Note, The Problem of Parental Kidnapping, 10 Wyo. L.J. 225, 225-26 (1956), a distinction is made between kidnapping and child stealing statutes. Kidnapping, as it is commonly defined, is the unlawful taking and carrying away of a person by force or fraud and against his will. 51 C.J.S. Kidnapping § 1 (1947). Child stealing generally refers to the forcible or fraudulent taking of a child from the person having the lawful custody of the child. See, e.g., N.C. GEN. STAT. § 14-320.1 (1969). It appears that child stealing statutes protect parents and guardians against the malicious deprivation of their right to the custody of their children. In contrast, kidnapping statutes are designed to protect the victim against forcible abduction.

41. See Annot., 77 A.L.R. 317, 320-23 (1932). At one time, the Illinois Criminal Code excluded parents from its sanctions unless the abduction was in violation of a court order. Law of June 27, 1923, § 166, 1923 Ill. Laws 318 (repealed 1977). However, the Illinois legislature repealed the exemption in 1961 making parents criminally responsible for all abductions. The statute no longer differentiates between parental violations of custody decrees and abductions of children in the absence of a court order.

42. Evidence of such a practice is provided by judicial treatment of parents who arrange to have their children deprogrammed after conversion to alien religious cults. Not only have the courts dismissed complaints filed against parents and their agents (the deprogrammers) for kidnapping and false imprisonment, but the judiciary has upheld parental rights to control and custody of a child who has reached the age of majority. Notwithstanding deprivation of liberty interests and First Amendment freedoms, it has resorted to the use of court orders of conservatorship, guardianship, and writs of habeas corpus to deliver converts from the "clutches of the cults." See Kelley, Deprogramming and Religious Liberty, 4 C.L. REV. 23, 27 (July/Aug. 1977); Comment, Legalized Kidnapping of Children by Their Parents, 80 DICK. L. REV. 305, 311 n.45 (1976); Note, People v. Religious Cults: Legal Guidelines for Criminal Activities, Tort Liability, and Parental Remedies, 11 SUFFOLK L. REV. 1025, 1046-57 (1977). See also MODEL PENAL CODE § 212.4 (1962). Under this provision, it is an affirmative defense to claim a legal right to custody, even if the abduction was in violation of a custody decree. It is sufficient to plead that the abducting parent "believed that his action was necessary to preserve the child from
doctrine of *parens patriae* and natural parental rights to custody compels the state court into which the abducting parent brings the child to disregard the parental misconduct and to exercise jurisdiction when the child's welfare demands it.

Legalized kidnapping and parental violations of custody decrees also are encouraged by principles of concurrent jurisdiction. In *Sommer*, the court impliedly recognized that allowing parties to waive jurisdictional objections would promote forum shopping. By simply showing a change in circumstances which affects the child's welfare,
a fugitive parent, prior to Sommér, could bring the child into another county of the state and enlist the sympathies of that county's court to modify the decree. Guided by its obligation to secure the best interests of the child under the doctrine of parens patriae, a court often will reverse the order of its decisions by first deciding the merits of the controversy and later justifying its exercise of jurisdiction.49 However, it is unlikely that this "seize and run"50 procedure ever could ensure stability in a child's environment. By increasing the number of courts with jurisdiction to modify a custody decree, modification of that decree becomes more likely. Consequently, an absolutist approach was taken by the majority in Sommér.

The court's position in Sommér is based on the same concern for stability that led the Illinois legislature to enact Section 601 of the Illinois Marriage and Dissolution of Marriage Act.51 It in effect codifies Section 3 of the Uniform Child Custody Jurisdiction Act (UCCJA) which provides for the allocation of jurisdiction in an interstate dispute.52 Under the act, jurisdiction is based generally on (1) the child's home state, (2) significant connection with and substantial evidence within the state, or (3) physical presence in cases of

ification is only allowed when needed to promote the child's welfare. Id. at 528. See also Kjel-

lesvik v. Shannon, 41 Ill. App.3d 674, 355 N.E.2d 120 (3d Dist. 1976) (custody decree may be modified where custodian subsequently remarries one who suffers from mental illness and there is an absence of evidence that such individual has recovered); Sorenson v. Sorenson, 10 Ill. App.3d 980, 295 N.E.2d 347 (4th Dist. 1973) (change of condition sufficient to warrant modification where mother moved often, was unemployed, and became intoxicated in front of children on several occasions); Kline v. Kline, 57 Ill. App.2d 244, 205 N.E.2d 775 (1st Dist. 1965) (modification proper where mother's second husband had not provided a suitable home).

In solving these problems Illinois courts have not simply applied moral judgments. Taylor, supra note 6, at 528. See Fears v. Fears, 5 Ill. App.3d 610, 283 N.E.2d 709 (5th Dist. 1972) (marijuana use is not in itself sufficient to warrant a change of custody); Jayroe v. Jayroe, 58 Ill. App.2d 79, 206 N.E.2d 266 (4th Dist. 1965) (giving birth to an illegitimate child by mother who has custody is not itself sufficient basis for modification).

The safeguards ensured by a rule structure which requires a finding of changed circumstances to prevent unwarranted modification may be lost following the court's decision in McDonald v. McDonald, 13 Ill. App.3d 87, 299 N.E.2d 787 (4th Dist. 1973). There is concern that in some circumstances the interest of the child will be subordinated and stability and continuity impaired since the court announced that:

where custody is awarded upon the stipulation of the parties and the court receives no evidence upon the best interests of the child or children, the court does not, in fact, exercise judicial discretion in awarding custody and . . . the rule that a custody order is subject to modification only if there is a substantial change of condition affecting the child's welfare does not apply.

Id. at 89, 299 N.E.2d at 789.

50. See generally Hudak, supra note 33.
52. UNIFORM CHILD CUSTODY JURISDICTION ACT § 3(a).
emergency. An examination of the Uniform Act’s provisions discloses the intent of its authors: to ensure the best interests of the child by avoiding jurisdictional competition which has in the past resulted in the shifting of children from state to state with harmful effect on their well-being.\(^5\) Section 3(b) makes clear that residence or physical presence alone is insufficient to confer jurisdiction upon a court.\(^5\) Furthermore, the jurisdiction of the child’s home state continues for a six-month period following his or her removal from that state.\(^5\) Taken together, the two provisions make it unlikely that an abducting parent will gain any advantage in removing a child from the state with custody jurisdiction.\(^6\) Consequently, current Illinois legislation eliminates the incentive in an interstate conflict to seek a sympathetic forum,\(^5\) just as the Sommer case eliminates the incentive in an intrastate dispute.

THE ALTERNATIVE APPROACH

While focusing on the best interests of the child, the court in Sommer implicitly recognized the importance of stability and prevention of child snatching as objectives to be secured in allocating jurisdiction. Hence, the majority refused to allow waiver. However, three justices dissented\(^5\) and took an opposite stand. The dissent pointed out that not only did the Lake County court have both personal jurisdiction over the parties and subject matter jurisdiction over the dis-

53. Section 1 sets forth the general purpose of the Act: (1) to avoid jurisdictional competition; (2) to promote cooperation among states to insure correct decision making; (3) to eliminate principles of concurrent jurisdiction; (4) to insure stability of home environment and secure family relationships; (5) to deter abductions; (6) to avoid re-litigation; (7) to facilitate enforcement of decrees of other states; and (8) to expand exchange of information and other forms of mutual assistance. Id. \(§\) 1.

54. Id. \(§\) 3(b). But see A. Ehrenzweig, A TREATISE ON THE CONFLICT OF LAWS \(§§\) 87-89, at 288-300 (1962); Stansbury, supra note 1; Stumberg, supra note 1. All argue for the elimination of legalistic formulas and the acceptance of a fluid jurisdictional concept based on parens patriae.

55. UNIFORM CHILD CUSTODY JURISDICTION ACT \(§\) 3(a)(1).

56. See Bodenheimer, supra note 26, at 1241-42. See also Commissioner’s Note, UNIFORM CHILD CUSTODY JURISDICTION ACT \(§\) 3.

57. In addition, the UCCJA incorporates the “clean hands doctrine.” Id. \(§\) 8. Section 8(b) dictates that an exercise of jurisdiction will be declined if an abducting parent petitions the court to modify a custody decree after improperly removing the child from the care and control of the person entitled to custody. However, the opposite result is achieved if required in the interest of the child. The well-being of the child will not be sacrificed only to effectively punish the abducting parent. See Reddig v. Reddig, 12 Ill. App.3d 1009, 299 N.E.2d 353 (3d Dist. 1973); Commissioner’s Note, UNIFORM CHILD CUSTODY JURISDICTION ACT \(§\) 8.

pute, but that the defendant failed to make a timely objection based on the continuing jurisdiction of the DuPage County court, and therefore consented to the Lake County court's jurisdiction. 59

In support of its position, the dissent relied upon State ex rel. Beineke v. Littell. 60 In this decision, the Indiana Supreme Court held that the county court issuing the original custody decree had lost its subject matter jurisdiction over the dispute when the mother consented to the jurisdiction of another Indiana county court which issued an order appointing a guardian for her child. 61 Such waiver of jurisdictional objections is an "outgrowth of judicial abhorrence . . . of a person's taking inconsistent positions and gaining advantages." 62 A party is foreclosed from objecting to the court's jurisdiction over his

59. Generally speaking, a party's consent to the court's jurisdiction is sufficient to confer personal jurisdiction. See A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 27(2); F. JAMES, CIVIL PROCEDURE § 12.6, at 626-27 (1965).

60. 247 Ind. 686, 220 N.E.2d 521 (1966). The dissent's reliance on this case may be improper. The Indiana Supreme Court unequivocally stated that the Morgan County court had the "same jurisdiction of the subject matter of guardianships and custody of children as that of the Marion Superior Court." Id. at 690, 220 N.E.2d at 523 (emphasis added). Nowhere does the court use the word "exclusive" to characterize the jurisdiction of the decretal court. Instead, it simply states that "the court granting the divorce and fixing custody of the children has continuing jurisdiction thereof." Id. at 690, 220 N.E.2d at 523 (emphasis added).

Whether Indiana case law recognizes the decretal court's jurisdiction as being continuing and exclusive is unclear. Julian v. Julian, 60 Ind. App. 520, 111 N.E. 196 (2d Dist. 1916), suggests that the jurisdiction of the decretal court may be exclusive in the sense that a defendant in a modification proceeding in Indiana does not have the right not to be sued in any court other than the county court of his residence. See also State v. Greene Circuit Court, 245 Ind. 1, 195 N.E.2d 776 (1964), where motion was granted to certify the cause back to decretal court after an agreement between litigants to change venue to a different county court. The court based its decision on the notion that divorce court must be deemed to have "full and continuing" jurisdiction to make necessary modifications. Id. at 3, 195 N.E.2d at 777, quoting Stone v. Stone, 158 Ind. 628, 632, 64 N.E. 86, 87 (1902) (emphasis added by Greene Circuit Court).

In either case, the distinction appears to be a matter of degree. Understandably, decision making in a child custody dispute is governed by vague and indefinite concepts and standards to ensure a maximum amount of flexibility. While the majority in Sommer grounds its decision on an attempt to secure the best interests of the child, the court in Beineke felt waiver of jurisdictional objections posed no threat to a child's welfare. What is necessary, in the discretion of one court, to promote the best interests of the child may not be necessary in the discretion of another.

61. State ex rel. Beineke v. Littell, 247 Ind. 686, 691-92, 220 N.E.2d 521, 524 (1966). Originally, a Marion County, Indiana court granted a couple a divorce and awarded custody of their minor son to the mother. The mother subsequently consented to the appointment of a guardian for the child by a court in Morgan County. She thereafter petitioned for dissolution of the guardianship and, being unsuccessful, later attacked the exercise of jurisdiction by the Morgan County court in an original action filed with the Indiana Supreme Court seeking a writ of prohibition.

person if that party invoked the jurisdiction of the court or filed a general appearance and litigated the matter on its merits.

As the dissent in Sommer suggests, allowing waiver even in custody modification proceedings is not without its advantages. A venue convenient to both parents is likely to ensure a full adversary proceeding. If a defendant consents to the jurisdiction of a court other than the decretal court, that court is presumably convenient for the defendant. Since a full adversary proceeding increases the availability of relevant evidence, the probability of correct decision making is increased as well. Also enhanced is the respect for, and consequently the effectiveness of a decision made by a court whose authority is recognized by both parties.

THE MAJORITY'S POSITION: AN APPROPRIATE RESULT

It is evident that the court in Sommer was faced with the desirability of both approaches and the inability to secure the advantages of

63. See Stewart v. Stewart, 231 Ill. App. 159 (1st Dist. 1923) (court denied complainant’s motion to vacate an order granting defendant-cross-complainant a divorce for defendant’s alleged failure to meet residency requirements); Sterl v. Sterl, 2 Ill. App. 223 (1st Dist. 1902) (complainant estopped from challenging the court’s jurisdiction to hear and determine all equities when court permitted defendant to file a cross-bill in the divorce action).

64. See South Park Comm’rs v. Phillips, 27 Ill. App. 380 (1st Dist. 1888) (defendant’s answer to an intervening petition to enforce an equitable lien precluded defendant from raising issue of lack of jurisdiction). Consent expressed by the filing of a general appearance may extend beyond the original complaint to claims by the same plaintiff stated in amendments. Moreover, a special appearance filed for the limited purpose of contesting jurisdiction may be of the same consequence as a general appearance. For example, error in ruling against the defendant on objection is usually waived by defendant’s participation in further proceedings. See Freesen v. Scott County Drainage & Levee Dist., 238 Ill. 536, 119 N.E. 625 (1918) (where defendant appeared generally and went to trial on merits, the benefit gained by entry of his previous special appearance was waived); Mueller v. Mueller, 36 Ill. App.2d 305, 183 N.E.2d 887 (1st Dist. 1962) (defendant converted his special appearance into a general appearance by raising defense of statute of limitations).

65. See Ratner, supra note 2, at 819. Legal commentators have noted that a satisfactory solution to the problem of allocating child custody jurisdiction can never be found as long as the controversies are litigated within the framework of an adversary system. The latter is designed to preserve the rights and duties of litigants rather than to investigate the best interests of the child. Instead, it has been suggested that custody determinations be made in “extralitigious proceedings” instituted by the state as parens patriae in disregard of the resistance or cooperation of feuding parents. Ehrenzweig, Interstate Recognition of Custody Decrees: Law and Reason v. The Restatement, 51 MICH. L. REV. 345, 372 (1953).

each. Having balanced competing objectives, the court has taken a course that will effectively further the child’s welfare. Since the court gave priority to the objectives of certainty of tribunal, stability, and prevention of parental violations of custody decrees, it will fail to gain maximum accessibility to relevant evidence. However, while the latter can be seen as a tremendous obstacle to correct decision making within the framework of an interstate conflict, it should not be as great a concern within any one state. The distance between tribunal and evidence is likely to be reduced and the spirit of cooperation in procuring the evidence increased. Furthermore, the possibility of transferring a case from one court to another when the need arises becomes a more realistic alternative within the jurisdiction of a single state.

The court’s decision will not necessarily provide a convenient forum for the litigants. Yet the court has little concern for the interests of the feuding parents when the child’s welfare is at stake. Moreover, there is little risk that the adversariness of the proceedings will suffer. Where the care and control of minor children is at stake, parents will not easily be dissuaded from pursuing their natural parental rights to custody. Finally, while the rule allowing waiver is found in many adversarial proceedings, custody proceedings are not truly adversarial. It is the child’s best interests that are at issue and the case is not viewed as being one in which a plaintiff is pitted against a defendant. Accordingly, the parties’ actions, such as waiver, are irrelevant. It is for this reason that the majority refused to allow waiver and therefore differed with the dissenters.

CONCLUSION

Ignoring the great degree of mobility in society today,68 the Illinois Supreme Court in Sommer took an absolutist approach and refused to allow litigants in a child custody dispute to waive jurisdictional objections and consent to the jurisdiction of another county court. The best interest of the child necessarily takes priority over the convenience of the feuding parents. Depriving any county court other than the decretal court of concurrent jurisdiction to modify a custody decree will reduce the likelihood of modification and thereby increase stability of environment and affection relationships. Moreover, the incentive to

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forum shop is eliminated and, hence, the temptation to “seize and run” with the already victimized child in a custody dispute is minimized. The court’s concern for child welfare as it is affected by procedural formalities could lead to no other result.

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