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# CHILD CUSTODY JURISDICTION AND THE PARENTAL KIDNAPPING PREVENTION ACT—A DUE PROCESS DILEMMA?

Sandra Brown Sherman\*

## I. INTRODUCTION

The recently enacted Parental Kidnapping Prevention Act (PKPA)<sup>1</sup> raises again the question of whether personal jurisdiction over both parents is a constitutional prerequisite to an enforceable child custody decree. The Act, which embraces most of the Uniform Child Custody Jurisdiction Act (UCCJA) already enacted by forty-seven states,<sup>2</sup>

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1. Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3566, 3568-73 (1980) (to be codified at 28 U.S.C. § 1738A and various sections of the Social Security Act, 42 U.S.C. §§ 301-1397) [hereinafter cited as PKPA]. The Act is included with amendments to the Social Security Act. The section of the law which contains the Social Security amendments specifies the effective date as July 1, 1981. It is not clear whether this effective date applies to the entire law or only to the Social Security amendments. The law was signed December 28, 1980.

2. These statutes are based on the UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111 (1979) [hereinafter cited as UCCJA]. ALA. CODE §§ 30-3-20 to -44 (Supp. 1981); ALASKA STAT. §§ 25.30.010-.190 (1977); ARIZ. REV. STAT. ANN. §§ 8-401 to -424 (Supp. 1981-1982); ARK. STAT. ANN. §§ 34-2701 to -2726 (Supp. 1981); CAL. CIV. CODE §§ 5150-5174 (West Supp. 1982); COLO. REV. STAT. §§ 14-13-101 to -126 (1973); CONN. GEN. STAT. ANN. §§ 46b-90 to -114 (West Supp. 1981); DEL. CODE ANN. tit. 13, §§ 1901-1925 (1981); FLA. STAT. ANN. §§ 61.1302-1348 (West Supp. 1982); GA. CODE ANN. §§ 74-501 to -525 (1981); HAWAII REV. STAT. §§ 583-1 to -26 (1976); IDAHO CODE §§ 5-1001 to -1025 (1979); ILL. REV. STAT. ch. 40, §§ 2101-2126 (1979); IND. CODE §§ 31-1-11.6-1 to -6-24 (1980); IOWA CODE ANN. §§ 598A.1-.25 (West 1981); KAN. STAT. ANN. §§ 38-1301 to -1326 (1981); KY. REV. STAT. §§ 403.400-.630 (Supp. 1980); LA. REV. STAT. ANN. §§ 13:1700-.1724 (West Supp. 1982); ME. REV. STAT. ANN. tit. 19, §§ 801-825 (1981); MD. ANN. CODE art. 16, §§ 184-207 (1981 Supp.); MICH. COMP. LAWS §§ 600.651-.673 (1981); MINN. STAT. §§ 518A.02-.25 (1982); MO. ANN. STAT. §§ 452.440-.550 (Vernon Supp. 1982); MONT. CODE ANN. §§ 40-7-101 to -125 (1979); NEB. REV. STAT. §§ 43-1201 to -1225 (Supp. 1980); NEV. REV. STAT. §§ 125A.010-.250 (1979); N.H. REV. STAT. ANN. §§ 458-A:1-.25 (Supp. 1979); N.J. STAT. ANN. §§ 2A:34-28 to -52 (West Supp. 1981-1982); N.M. STAT. ANN. §§ 40-10-1 to -24 (Supp. 1981); N.Y. DOM. REL. LAW §§ 75-a to -z (McKinney Supp. 1981-1982); N.C. GEN. STAT. §§ 50A-1 to -25 (Supp. 1981); N.D. CENT. CODE §§ 14-14-01 to -26 (1981); OHIO REV. CODE ANN. §§ 3109.21-.37 (Baldwin Supp. 1980); OKLA. STAT. tit. 10, §§ 1601-1627 (Supp. 1980); OR. REV. STAT. §§ 109.700-.930 (1979); PA. STAT. ANN. tit. 11, §§ 2301-2325 (Purdon Supp. 1980-1981); R.I. GEN. LAWS §§ 15-14-1 to -26 (1981); S.C. CODE ANN. §§ 20-7-782 to -830 (Law. Co-op. Supp. 1981); S.D. CODIFIED LAWS ANN. §§ 26-5-5 to -52 (Supp. 1981); TENN. CODE ANN. §§ 36-1301 to -1325 (Supp. 1981); UTAH CODE ANN. §§ 78-45c-1 to -26 (Supp. 1981); VT. STAT. ANN. tit. 15, §§ 1031-

requires that states recognize a custody decree rendered by another state which has correctly assumed jurisdiction under the Act's provisions.<sup>3</sup> Like the UCCJA, the new federal Act, in some cases, requires the recognition of a determination made without personal jurisdiction over both parents.<sup>4</sup> It is not clear whether such recognition comports with due process in light of the 1953 Supreme Court opinion in *May v. Anderson*.<sup>5</sup> In *May*, the Court indicated that due process forbids the recognition of a custody decree entered without personal jurisdiction over the absent parent. Nevertheless, the UCCJA drafters chose not to include a personal jurisdiction requirement in the UCCJA<sup>6</sup> and this omission is perpetuated in the PKPA. It is therefore necessary to re-examine *May* and evaluate its implications regarding the constitutionality of the PKPA.

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1051 (Supp. 1981); VA. CODE §§ 20-125 to -146 (Supp. 1981); WASH. REV. CODE §§ 26.27.010-.930 (Supp. 1982); W. VA. CODE §§ 48-10-1 to -26 (Supp. 1981); WIS. STAT. §§ 822.01 -.25 (1977); WYO. STAT. §§ 20-5-101 to -125 (1977). Although not yet enacted in Massachusetts, the courts of that state also follow the Act. See *Murphy v. Murphy*, — Mass. —, 404 N.E.2d 69, 72 (1980); *Doe v. Roe*, 377 Mass. 616, —, 387 N.E.2d 143, 145 n.3 (1979).

3. PKPA, Pub. L. No. 96-611, § 8(a)(a), 94 Stat. 3566, 3569 (1980). More specifically, the Act requires recognition of a decree rendered by another state if the rendering state had jurisdiction under its own law, *id.* § 8(a)(c)(1), 94 Stat. at 3570, and under the PKPA. The PKPA provides that a state may assert jurisdiction if: 1) It is the home state of the child, *id.* § 8(a)(c)(2)(A), 94 Stat. at 3570; 2) providing no home state exists, the child and one contestant have a significant connection with the state and substantial evidence relative to the custody determination is available there, *id.* § 8(a)(c)(2)(B), 94 Stat. at 3570; 3) the child is present in the state and has been abandoned or abused, *id.* § 8(a)(c)(2)(C), 94 Stat. at 3570; or, 4) no other state can assert jurisdiction, *id.* § 8(a)(c)(2)(D), 94 Stat. at 3570. Furthermore, continuing jurisdiction remains exclusive if the child or any parent remains in the state of the previous decree. *Id.* §§ 8(a)(c)(2)(E), (a)(d), 94 Stat. at 3570-71. These PKPA provisions reflect the provisions of UCCJA §§ 3, 14, 9 U.L.A. 122-23, 153-54 (1979), with two important exceptions. The PKPA establishes with more specificity those situations to which continuing jurisdiction is applicable or should be deferred. In comparison, the corresponding UCCJA provision is more vague. It allows for the exercise of continuing jurisdiction and deference to this jurisdiction if the state would still have jurisdiction "substantially in accordance with" the UCCJA. *Id.* § 14, 9 U.L.A. at 153-54. Also, the PKPA establishes definite priorities in its jurisdictional scheme. For example, "significant connection-substantial evidence" jurisdiction, PKPA, Pub. L. No. 96-611, § 8(a)(c)(2)(B), 94 Stat. 3566, 3570 (1980), can only be invoked if there is no home state. In contrast, the UCCJA would permit the exercise of jurisdiction concurrently by the home state, UCCJA § 3(a)(1), 9 U.L.A. 122 (1979), and a state asserting the existence of a significant connection to and substantial evidence regarding the controversy. *Id.* § 3(a)(2), 9 U.L.A. at 122. To the extent that the federal law would preempt a state version of the UCCJA, this concurrent jurisdiction problem should no longer arise.

4. See the hypothetical situation discussed *infra* pp. 716-17.

5. 345 U.S. 528 (1953).

6. See Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1232-33 (1969). Bodenheimer cites the difficulty in drafting a suitable long-arm provision and the problems in constructing uniform custody legislation around a personal jurisdiction requirement as reasons for the commissioners' decision not to include a personal jurisdiction requirement in the Act.

II. THE MEANING OF *MAY V. ANDERSON*

In *May*, the parents had separated, the father remaining in Wisconsin and the mother moving to Ohio with the children. The father sought a divorce and custody of the children in Wisconsin. The mother was notified, but never participated in the proceeding.<sup>7</sup> Wisconsin granted the divorce and awarded custody to the father. The father sought Ohio enforcement of the Wisconsin decree. The Ohio court extended full faith and credit to the decree<sup>8</sup> and the Supreme Court reversed.<sup>9</sup>

At issue in *May* was the "validity of the decree as to custody"<sup>10</sup> or, stated otherwise, "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*."<sup>11</sup> Justice Burton, delivering the opinion of the Court, focused on the validity of the Wisconsin decree rather than on Ohio's power (or absence of power) to recognize it. In a previous case, *Estin v. Estin*,<sup>12</sup> the Court had upheld the validity of a Nevada *ex parte* divorce, but held that the Nevada court was powerless to affect the absent spouse's right to support.<sup>13</sup> The Court in *May* applied the *Estin* holding to the custody situation, noting that the absent spouse's right to custody was entitled to at least as much protection as the right to alimony.<sup>14</sup> The children's not being domiciled in Wisconsin was not considered to be crucial, for the Court stated that even if Wisconsin were their domicile, "that [would] not

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7. It should be noted that there was no available long-arm provision which might have brought the mother within the reach of Wisconsin's jurisdiction. In this case, Wisconsin law provided that personal jurisdiction could only have been obtained by service on the mother within the state. See 345 U.S. at 531 n.3. If a long-arm statute had been available, the mother would undoubtedly have been subject to Wisconsin jurisdiction.

8. The trial court considered itself obligated to recognize the decree under the full faith and credit clause. The Ohio Court of Appeals affirmed. 91 Ohio App. 557, —, 107 N.E.2d 358, 362 (1952). The Supreme Court of Ohio refused to hear the case on the grounds that no constitutional question was presented. 157 Ohio St. 436, —, 105 N.E.2d 648, 648 (1952).

9. 345 U.S. at 535.

10. *Id.* at 531.

11. *Id.* at 533 (emphasis in original).

12. 334 U.S. 541 (1948).

13. *Id.* at 548-49.

14. 345 U.S. at 534. The Court's reasoning that the *May* holding necessarily follows from the decision in *Estin* has been criticized on the basis that the custody determination involves consideration of the best interests of the child, a consideration not at issue in the alimony proceeding. See, e.g., E. SCOLES & P. HAY, HANDBOOK ON CONFLICT OF LAWS § 15.31 (5th ed. 1982 expected publication date); Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 378 (1959).

give Wisconsin, certainly as against Ohio, the personal jurisdiction that it *must* have in order to deprive their mother of her personal right to their immediate possession."<sup>15</sup> The Court's use of the word "must" indicates that personal jurisdiction over the absent parent is required in order to create an enforceable custody decree. This personal jurisdiction requirement is the essence of Justice Burton's opinion.

The import of the opinion is diminished by Justice Frankfurter's concurrence. In his concurrence, Justice Frankfurter stated that he joined in the majority opinion, but went on to say that the only thing the Court had decided was that Ohio may refuse to recognize the Wisconsin decree, not that it must.<sup>16</sup> Justice Frankfurter's explanation is plainly at odds with the opinion in which he joined. The majority opinion reversed the Ohio holding that recognition be granted. If Ohio had the option to recognize or not recognize the Wisconsin decree, as Justice Frankfurter contended, reversal would not have been indicated. Furthermore, Justice Jackson in his dissent indicated that he understood the majority opinion to hold that the Constitution prohibited Ohio's recognition of the Wisconsin decree because of Wisconsin's lack of jurisdiction over the mother.<sup>17</sup> Despite Justice Frankfurter's concurrence, it remains inescapable that a majority of the Court endorsed Justice Burton's opinion holding that personal jurisdiction over the absent parent is a due process prerequisite to an enforceable custody decree.<sup>18</sup>

Since the Supreme Court has yet to overrule *May*, it seems ill-advised to draft child custody legislation that requires recognition of decrees rendered without personal jurisdiction over both parents. Yet under both the PKPA and the UCCJA, a situation could arise where recognition of such a decree would be required.<sup>19</sup> A hypothetical illustrates this problem. Suppose an initial custody determination in State

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15. 345 U.S. at 534 (emphasis added).

16. *Id.* at 535 (Frankfurter, J., concurring).

17. *Id.* at 536-37 (Jackson, J., dissenting).

18. Also noting that the *May* decision rests on due process grounds are: H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 323 (1968); E. SCOLES & P. HAY, *supra* note 14, at § 15.30; Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289, 316 (1973); Note, *May v. Anderson*, 38 MINN. L. REV. 273, 276 (1954). See also Weintraub, *Texas Long-Arm Jurisdiction in Family Law Cases*, 32 SW. L.J. 965, 972-73 (1978) (under *May*, it is unclear whether a forum can give full faith and credit to a decree rendered by another state which did not have personal jurisdiction over the contesting parent).

19. The potential conflict between the constitutional basis of the *May* holding and the UCCJA is noted in Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011, 1021 (1977); Comment, *The Due Process Dilemma of the Uniform Child Custody Jurisdiction Act*, 6 OHIO N.U.L. REV. 586, 589 (1979).

A gives custody of the children to the mother during the school year and the father during the summer. Subsequent to this decree, the mother and children move to State B; the father moves to State C.<sup>20</sup> After the children have been with the mother in State B for more than six months, the mother brings a modification proceeding in State B requesting that the father's summer visitation be limited to two weeks. State B assumes jurisdiction under the "home state" provision.<sup>21</sup> The father is notified of the proceeding but refuses to appear. No long-arm provision is invoked.<sup>22</sup> State B grants the mother's request for modification. At the beginning of the summer, the mother sends the children to visit the father for what she expects will be a two-week visit. Instead, the father indicates his refusal to return them until the summer's end. Pursuant to recognition requirements<sup>23</sup> in effect in State C, the mother seeks State C's enforcement of the modification. The father raises a due process defense, alleging that the modification is unenforceable because of State B's lack of personal jurisdiction over him. Given the implication of *May*, nonrecognition appears constitutionally compelled despite PKPA and UCCJA requirements to the contrary.

### III. THE RELEVANCE OF *MAY* TODAY

As noted earlier, the UCCJA drafters chose not to reconcile the UCCJA with the majority opinion in *May*, although they recognized the potential conflict.<sup>24</sup> Furthermore, this conflict was apparently not addressed by Congress when it passed the PKPA. The UCCJA drafters, however, were not alone in their approach to *May*. Many cases<sup>25</sup>

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20. State A would no longer have jurisdiction to modify the custody decree since PKPA, Pub. L. No. 96-611, § 8(a)(d), 94 Stat. 3566, 3570-71 (1980), permits the exercise of continuing jurisdiction only if the child or a parent remains in the state. Similarly, UCCJA § 14, 9 U.L.A. 153-54 (1979), would also be inapplicable since it permits the exercise of continuing jurisdiction only if the state would still have jurisdiction substantially in accordance with the UCCJA.

21. State B could assert "home state" jurisdiction under PKPA, Pub. L. No. 96-611, § 8(a)(c)(2)(A), 94 Stat. 3566, 3570 (1980), or UCCJA § 3(a)(1), 9 U.L.A. 122 (1979), since the children have lawfully lived in State B for at least six months immediately preceding the modification action. This definition of "home state" is expressed in PKPA § 8(a)(b)(4), 94 Stat. at 3570, and UCCJA § 2(5), 9 U.L.A. at 119.

22. Both the PKPA, Pub. L. No. 96-611, § 8(a)(e), 94 Stat. 3566, 3571 (1980), and the UCCJA § 4, 9 U.L.A. 129-30 (1979), require only that reasonable notice and opportunity to be heard be given the absent parent. Notice having been given, neither act requires further action on the part of the mother to bring the father into the State B proceeding.

23. Both PKPA, Pub. L. No. 96-611, § 8(a)(a), 94 Stat. 3566, 3571 (1980), and UCCJA § 13, 9 U.L.A. 151 (1979), require recognition of a decree rendered consistent with those respective acts, therefore, recognition would be required in this hypothetical.

24. See Bodenheimer, *supra* note 6.

25. See, e.g., cases cited *infra* note 28.

and much of the commentary<sup>26</sup> reflect the view that no due process obstacles are presented when custody is determined without personal jurisdiction over both parents. In support of this position, *May's* detractors pose two main arguments: 1) That the decision was not one of constitutional dimension; or 2) that even if the decision did have constitutional underpinnings, the Supreme Court would not accept the *May* holding today insofar as it emphasizes the protection of parental rather than children's rights.

One theory proposes that the real holding of *May* is expressed in the Frankfurter concurrence, that there is no constitutional impediment to the recognition of a decree rendered without personal jurisdiction over a parent, but recognition is not required.<sup>27</sup> The concurrence has been followed by several state courts.<sup>28</sup> Nevertheless, this reluctance to accept the Burton opinion is based more on philosophical differences with its position than on a rational and thoughtful interpretation of the case. The fact remains that Justice Frankfurter is the only justice who espoused the reasoning expressed in his concurrence, and Justice Burton's opinion enjoyed the assent of a majority of the Court (including Frankfurter).<sup>29</sup> For these and other reasons, many state courts have chosen to follow the majority opinion.<sup>30</sup>

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26. See, e.g., Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C.D. L. REV. 229 (1979); Comment, *supra* note 19.

27. The UCCJA drafters cited the Frankfurter concurrence in support of their position that personal jurisdiction is not required. UCCJA § 13 comment, 9 U.L.A. 152 (1979).

28. See *Perry v. Ponder*, 604 S.W.2d 306, 320 (Tex. Civ. App. 1980). Also recognizing as valid a decree rendered without personal jurisdiction is *Titus v. Superior Court*, 23 Cal. App. 3d 792, 798, 100 Cal. Rptr. 477, 482 (1972) (only children's presence, not parents', required to create recognizable decree).

29. This is true despite repeated references in the cases and commentary to the Burton "plurality" opinion. See, e.g., *Perry v. Ponder*, 604 S.W.2d 306, 320 (Tex. Civ. App. 1980); Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289, 316 (1973); Comment, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1248 (1980). The court in *Perry* goes so far as to suggest that the Frankfurter concurrence represents the opinion of the Court under the rationale that it was the narrowest ground deciding the case on which five Justices assented. 604 S.W.2d at 320 (citing *Marks v. United States*, 430 U.S. 188 (1977)). This conclusion is clearly erroneous. Frankfurter's theory enjoyed only his assent, and, as mentioned earlier, he did join in the Burton opinion. The concurrence was not a special one. See *supra* text accompanying notes 15-17.

30. See *Cooper v. Cooper*, 229 Ark. 770, —, 318 S.W.2d 587, 588 (1958) (refusal to recognize custody decree rendered without personal jurisdiction over father); *Boggus v. Boggus*, 236 Ga. 126, —, 223 S.E.2d 103, 106 (1976) (refusal to recognize decree rendered without personal jurisdiction over both parents); *People ex rel. Lehman v. Lehman*, 34 Ill. 2d 286, —, 215 N.E.2d 806, 809 (1966) (court, in dicta, notes its inability to decree custody without personal jurisdiction over both parents); *Batchelor v. Fulcher*, 415 S.W.2d 828, 830 (Ky. 1967) (no recognition of custody decree rendered without personal service on mother); *Hutchins v. Moore*, 231 Miss. 772, —, 97 So. 2d 748, 753 (1957) (constructive service on grandparents insufficient to create recognizable decree); *McLam v. McLam*, 81 N.M. 37, —, 462 P.2d 622, 623-24 (1969) (no recognition of decree ren-

Others hypothesize that *May* was overruled *sub silentio* by the Supreme Court in *Stanley v. Illinois*.<sup>31</sup> At issue in *Stanley* was whether due process required that notice and opportunity to be heard must be given to the father of an illegitimate child in a parental termination proceeding.<sup>32</sup> The Court held that absent such protections, the father's constitutional rights would be violated. The Court did not discuss whether personal jurisdiction would have to be obtained over an absent father before his rights to his illegitimate child could be terminated.<sup>33</sup> This failure to impose any personal jurisdiction requirement has led some to conclude that the Court tacitly held that it is constitutionally permissible to terminate parental rights without personal jurisdiction over both parents.<sup>34</sup> The argument continues that if it is permissible to permanently terminate custody without jurisdiction, it would also be

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dered without personal jurisdiction over child and one parent); *Turner v. Ratloff*, 74 Misc. 2d 693, —, 346 N.Y.S.2d 943, 946 (1973) (recognition denied where no allegation of personal service on absent party in original proceeding); *Lennon v. Lennon*, 252 N.C. 659, —, 114 S.E.2d 571, 576 (1960) (refusal to recognize *ex parte* custody order); *Pasqualone v. Pasqualone*, 63 Ohio St. 2d 96, —, 406 N.E.2d 1121, 1127 (1980) (no recognition of decree rendered without personal jurisdiction over father); *Swope v. Swope*, 163 Ohio St. 59, —, 125 N.E. 336, 337 (1955) (refusal to decree custody in a fact situation similar to *May*); *Ex parte Elliott*, 114 Ohio App. 533, —, 183 N.E.2d 804, 805-06 (1961) (court will not recognize custody decree without personal jurisdiction over mother); *Dieringer v. Heiney*, 10 Or. App. 345, —, 497 P.2d 1201, 1203 (1972) (recognition denied where no personal jurisdiction in modification action due to inapplicability of continuing jurisdiction); *Clayton v. Newton*, 524 S.W.2d 368, 372-73 (Tex. Civ. App. 1975) (failure to notify custodial grandparents creates unenforceable decree). Requiring personal jurisdiction for the creation of binding custody decrees, but not explicitly acknowledging the *May* holding are: *Ferrari v. Ferrari*, 585 S.W.2d 546, 548 (Mo. Ct. App. 1979) (refusing to decree incidents of divorce without personal jurisdiction over wife and mother); *State v. Jones*, 349 S.W.2d 534, 537 (Mo. Ct. App. 1961) (without personal jurisdiction over wife and mother, court can adjudicate only divorce and not child custody).

Other courts have held that although *May* could prevent recognition of the decree of another state, it is permissible to adjudicate custody without personal jurisdiction over both parents and to give that determination effect within the rendering jurisdiction. See *Goldfarb v. Goldfarb*, 246 Ga. 24, —, 268 S.E.2d 648, 651 (1980) (without personal jurisdiction over the father, custody decree valid within state despite possible nonrecognition outside state); *Hilt v. Kirkpatrick*, 538 S.W.2d 849, 851-52 (Tex. Civ. App. 1976) (custody decreed despite lack of personal jurisdiction, although possibility of nonrecognition noted). This approach is also suggested in *Currie, Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 768-69 (1961). Nevertheless, if *May* stands for the proposition that due process forbids the enforcement by another state of a decree rendered without personal jurisdiction over both parents, as it apparently does, then it would follow that due process also forbids enforcement of such a decree by the rendering state.

31. 405 U.S. 645 (1972). This theory is advocated in *Perry v. Ponder*, 604 S.W.2d 306, 321 (Tex. Civ. App. 1980); *Bodenheimer & Neeley-Kvarme*, *supra* note 26, at 251; *Comment*, *supra* note 19, at 589 n.27.

32. 405 U.S. at 647. Both the PKPA, Pub. L. No. 96-611, § 8(a)(e), 94 Stat. 3566, 3570 (1980), and the UCCJA § 4, 9 U.L.A. 129 (1979), require that notice and opportunity to be heard be given to contestants.

33. The father did not raise a personal jurisdiction issue. See *In re Stanley*, 45 Ill. 2d 132, 256 N.E.2d 814 (1970).

34. See *Bodenheimer & Neeley-Kvarme*, *supra* note 26.



permissible to make nonfinal custody determinations short of termination without jurisdiction. One commentator has gone so far as to suggest that since *Stanley* was decided subsequent to the drafting of the UCCJA it represents the Court's implicit approval of the UCCJA and the notification procedures outlined in it.<sup>35</sup> Presumably, this rationale could now be used to defend the PKPA.

Nevertheless, the Court's failure in *Stanley* to discuss personal jurisdiction may not necessarily contradict *May*. The father in *Stanley* was apparently within the jurisdiction of the Illinois courts, and the issue was never raised in the case.<sup>36</sup> Furthermore, even if the Court had explicitly held that personal jurisdiction was not required in *Stanley*, Justice Burton's opinion in *May* could remain intact. The state has a greater *parens patriae* interest in the termination proceeding than it has in the parent versus parent custody action.<sup>37</sup> The state is a party to the action, and problems would be presented in requiring the state to litigate in another state if personal jurisdiction could not be had over the absent parent—problems which do not arise to the same degree in private custody litigation.

In termination proceedings, frequently some sort of emergency situation is presented which requires expediency in determining the children's status. The parent (or other person) who previously had charge of the children often is either unable, unfit, or unwilling to continue to care for them. If personal jurisdiction were required over the absent parent, the children's status could be in limbo for extended or perhaps indefinite periods of time while the state sought personal jurisdiction, necessitating their placement in temporary foster homes and preventing their adoption. As previously noted, state officials would be required to bring the termination proceeding in another state if the absent parent were beyond the reach of jurisdiction. In the case of absent fathers of

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35. Comment, *supra* note 19, at 589 n.27. The UCCJA was proposed by the commissioners in 1968. *Stanley* was decided in 1972. Only one state (North Dakota in 1969) adopted the Act prior to *Stanley*. Since the drafters did not have the presumed benefit of *Stanley* to guide them in their decision not to follow the *May* majority, it becomes even clearer that the position they took with regard to *May* in 1968 was especially tenuous and one not particularly compatible with thoughtful drafting.

36. See *supra* note 33.

37. This greater interest was recognized by the court in *In re Appeal in Maricopa County, Juvenile Action No. JS-734*, 25 Ariz. App. 333, 543 P.2d 454 (1975). In this Arizona termination action, the mother of the child raised the defense of lack of personal jurisdiction over her. The court held that *May* was not on point because of the increased *parens patriae* interest of the state as a party to the termination action, and that the action could be decided without personal jurisdiction over the mother. *Id.* at —, 543 P.2d at 459-60.

illegitimate children, long-arm jurisdiction may be less available since there would be no previous marital domicile on which to base a finding of minimum contacts.<sup>38</sup> It is, therefore, a mistake to assume that the Constitution would accord the same degree of protection to parents in termination proceedings that it would to parents in private custody litigation.

Also, the Supreme Court's failure to reaffirm *May* in a subsequent decision does not necessarily reflect the present Court's position on the issue of the personal jurisdiction requirement in custody litigation.<sup>39</sup> Although several cases presenting facts similar to *May* have been denied certiorari,<sup>40</sup> these denials have no precedential significance. Indeed, if a majority so definitely disagreed with the Burton opinion, it seems that the Court would have overruled it long ago.

Furthermore, persuasive arguments exist supporting the idea that the Supreme Court regards *May* as good law today. With the decision in *Shaffer v. Heitner*,<sup>41</sup> the Court initiated a trend in jurisdiction cases which emphasizes fairness to the defendant even at the expense of the interest of the plaintiff or the state. In *Shaffer*, the Court held that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"<sup>42</sup> i.e., that

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38. Jurisdiction might, however, be available if the illegitimate father's relationship with the mother in the state was sufficient to create minimum contacts with the state.

39. It has been suggested that the Court's failure to cite *May* in *Ford v. Ford*, 371 U.S. 187 (1962), indicates an unwillingness on the part of a majority to give continued support to the case. *Batchelor v. Fulcher*, 415 S.W.2d 828, 833 (Ky. 1967) (dissenting opinion). At issue in *Ford* was whether full faith and credit was required to be given to a foreign custody decree, 371 U.S. at 189-90, not, as in *May*, whether full faith and credit was prohibited because of due process defects in the original decree.

40. See, e.g., *Anonymous v. Anonymous*, 3 N.Y.2d 750, 143 N.E.2d 524, 163 N.Y.S.2d 980 (decree enforced despite absence of father in earlier action), *cert. denied*, 355 U.S. 854 (1957); *Eule v. Eule*, 9 Wis. 2d 115, 100 N.W.2d 554 (refusal to recognize decree rendered without personal jurisdiction over mother), *cert. denied*, 362 U.S. 988 (1960). In 1980 the Supreme Court granted certiorari in the case of *Webb v. Webb*, 245 Ga. 650, 266 S.E.2d 463, *cert. granted*, 449 U.S. 819 (1980), which involved the applicability of the full faith and credit clause to decrees rendered under the UCCJA. Examination of that case could have led the Court to reconsider *May*. However, the Court later declined jurisdiction to review the case. 451 U.S. 493 (1981).

41. 433 U.S. 186 (1977). The Court in *Shaffer* rejected the notion that mere presence of property in the forum state is always sufficient to invoke personal jurisdiction over the defendant. *Id.* at 208-09, 213. The *Shaffer* holding has since been affirmed in a number of cases. See *Rush v. Savchuck*, 444 U.S. 320, 328-33 (1980) (state may not exercise jurisdiction over an absent defendant by attachment of a contractual obligation of an insurer licensed to do business in the state); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 299 (1980) (sale of an automobile which passes through the forum state is insufficient contact to confer jurisdiction on that state); *Kulko v. Superior Court*, 436 U.S. 84, 94-101 (1978) (father's contacts with forum state did not satisfy requirements of *Shaffer*).

42. 433 U.S. at 212.

the defendant must have certain "minimum contacts" with the forum such that maintenance of the suit would not offend "traditional notions of fair play and substantial justice."<sup>43</sup> *Shaffer* requires that the finding of minimum contacts be based upon a sufficient nexus between the defendant, the forum, and the subject matter of the litigation.<sup>44</sup> Therefore, if the *Shaffer* holding does apply to custody adjudication, the situation presented in the earlier hypothetical involving application of the PKPA and UCCJA to an absent parent would not seem to provide sufficient basis for a finding that the requisite minimum contacts existed.<sup>45</sup> In that example, the father's only contact with the rendering state is the presence of his children there.<sup>46</sup> In the absence of other contacts, there is no defendant-forum nexus, and under *Shaffer* the exercise of jurisdiction would violate due process.

Nevertheless, there is some support for the proposition that minimum contacts are not a due process prerequisite to a valid custody decree. In footnote thirty of the *Shaffer* opinion, the Court states: "We do not suggest that the jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudication of status, are inconsistent with the standards of fairness."<sup>47</sup> Most obviously, this status exception would apply to the granting of the *ex parte* divorce; its application in custody jurisdiction is less clear. It has been argued that the exception applies with equal force in custody adjudication,<sup>48</sup> and that the "particularized jurisdiction rules" set forth in the UCCJA (and now the PKPA) satisfy the "fairness" standards set forth in *Shaffer* despite the absence of a minimum contacts requirement.<sup>49</sup>

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

44. 433 U.S. at 204.

45. The hypothetical is set forth *supra* pp. 716-17.

46. At least one commentator has argued that the domicile of the child in the forum gives rise to the necessary defendant-forum nexus. Comment, *supra* note 19, at 593 (custody status of the child domiciled in the state seems to create the sufficient nexus among the forum, the litigation, and the defendant). Cf. Vernon, *State Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 IOWA L. REV. 997, 1007 (1978) (proposing that the marital domicile would be sufficient to establish the defendant-forum nexus for the exercise of divorce jurisdiction). But see Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. The Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act*, 75 NW. U.L. REV. 363, 414 (1980) (minimum contacts should be viewed as values which facilitate the adjudication process rather than physical contacts between the forum, the claimant and the claim).

47. 433 U.S. at 208 n.30.

48. See Bodenheimer & Neeley-Kvarme, *supra* note 26, at 240; Comment, *supra* note 29, at 1246.

49. See generally Bodenheimer & Neeley-Kvarme, *supra* note 26, at 240-41; Comment, *supra* note 19, at 591.

Unfortunately, the Supreme Court has done nothing to further define the limits of the footnote thirty status exception.

Certain factors, however, indicate that child custody disputes, at least disputes between parents, are not embraced by the exception. It does not necessarily follow that if the *ex parte* divorce is permissible, so also is the *ex parte* custody determination. Marriage is essentially a consensual relationship; the parent-child relationship is not. If state law permits the *ex parte* divorce, and one partner is absolutely unwilling to continue to participate in the marital relationship, the need for personal jurisdiction over the absent spouse is much less socially compelling. Given what is considered by one party to be an irremediable breakdown in the marriage, there is less reason to consider the situation of the absent partner. In contrast, in custody adjudication the issue is which of the two parents can exercise custodial rights in the best interests of the child. This requires an examination of the circumstances of both parents and necessitates the existence of state power to hale the absent parent before the court. It has also been suggested that dissolutions of marriages involve matters of greater social urgency than do provisional custody arrangements, so that the personal jurisdiction requirement can be dispensed with in the former but not the latter.<sup>50</sup>

Finally, implicit in *May* is that custody adjudication is not purely a status proceeding; it involves an adjudication of the personal rights of the parents to the child rather than merely the status of the child.<sup>51</sup> Once again, the focus of the question returns to the meaning and applicability of the *May* holding in present-day custody litigation.

The Supreme Court has established that child support litigation is not embraced by the status exception. In *Kulko v. Superior Court*,<sup>52</sup> the Court specifically applied the minimum contacts criteria to an action for child support against an absent parent and found the defendant's contacts with the forum state did not justify the assertion of in personam jurisdiction. Although the parties agreed that the minimum contacts standard was applicable in the case,<sup>53</sup> implicit in the Court's

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50. See Currie, *supra* note 30, at 769-70; Note, *Supreme Court—1952 Term*, 67 HARV. L. REV. 91, 124 (1953). But see Perry v. Ponder, 604 S.W.2d 306, 315 (Tex. Civ. App. 1980) (custody of children is a status or relationship in which the state has an interest no less than in a marriage); Hazard, *supra* note 14, at 387 (contending that there is no reason to differentiate so sharply between the two situations regarding a possible personal jurisdiction requirement).

51. This is noted in Comment, *supra* note 19, at 587-88.

52. 436 U.S. 84 (1978).

53. *Id.* at 92.

decision is that personal jurisdiction is required in the support action.<sup>54</sup> *Kulko* further establishes that mere presence of the child within the forum state does not create a sufficient forum-defendant nexus to justify the assertion of jurisdiction over the parent.<sup>55</sup>

It has been asserted that *Kulko* is not on point in the custody situation because the custody decree does not impose the obligation to pay money.<sup>56</sup> Apparently, the assumption is that a decree which can take away the defendant's property entitles a defendant to greater due process protection than a decree which can take away his or her children. There is some strength to this argument insofar as the "thing" at issue in the child support action (money) does not have rights in and of itself as do children. Nevertheless, support, like custody, also affects the children's rights and interests and is determined in accordance with these rights and interests. Therefore, the distinction is not compelling.

It should be noted, however, that *Kulko* did not address the issue of custody jurisdiction.<sup>57</sup> This prevents any absolute conclusions as to the applicability of *Kulko* to custody litigation.<sup>58</sup> Even if *Kulko* is on point, the particular fact situation there presented may have justified a finding that minimum contacts supported the exercise of custody jurisdiction.<sup>59</sup> But, in view of *May*, *Kulko* could at least indirectly stand for the proposition that, in custody litigation, assertion of the necessary personal jurisdiction over the absent parent must be based upon a finding of sufficient contacts of that parent with the forum.<sup>60</sup> Insofar as

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54. The Court held that the father did not have the minimum contacts required for the state to compel an appearance in a child support suit or face a default judgment and reversed the California Supreme Court's denial of the father's motion to quash service for lack of personal jurisdiction. *Id.* at 101. A similar conclusion was reached by the Colorado Supreme Court in *Offerman v. Alexander*, 185 Colo. 383, —, 524 P.2d 1082, 1082 (1974).

55. "[T]he presence of the children . . . in California . . . does not mean that California has personal jurisdiction over the defendant." 436 U.S. at 98. But see *supra* note 46 for discussion of support in the commentary for a contrary conclusion at least with regard to custody jurisdiction.

56. See *Perry v. Ponder*, 604 S.W.2d 306, 312-14 (Tex. Civ. App. 1980). Several cases have held that personal jurisdiction is required to adjudicate child support but not custody. *Blech v. Blech*, 6 Ariz. App. 131, —, 430 P.2d 710, 712 (1967); *Johnson v. Johnson*, 191 So. 2d 840, 842-43 (Miss. 1966); *Noble v. Noble*, 160 N.E.2d 426, 427 (C.P. Highland County, Ohio 1959).

57. The defendant did not contest the court's jurisdiction to determine custody. 436 U.S. at 88. See also the California Supreme Court's disposition of the case at 19 Cal. 3d 514, —, 564 P.2d 353, 355, 138 Cal. Rptr. 586, 588 (1977).

58. This is also noted in *Bodenheimer & Neeley-Kvarme*, *supra* note 26, at 232.

59. The absent father had consented to have his daughter live with her mother in California despite a separation agreement which provided that the children would spend the school years with him. This may have created the requisite minimum contacts and defendant-forum-cause of action nexus so that California could have exercised custody jurisdiction. See *Weintraub*, *supra* note 18, at 981.

60. See *Comment*, *supra* note 19, at 595.

neither the UCCJA nor the PKPA provide for this, their absolute validity is drawn into question.

One final argument which has been raised to limit the application of *May* opines that the holding applies only in the narrow fact situation which the case presented.<sup>61</sup> More specifically, this theory proposes that the case is on point only in those situations where custody is determined by a state in which the children are not physically present.<sup>62</sup> Yet the *May* opinion did not address the issue of whether the children's domicile was in Wisconsin, since that issue was considered superfluous in light of the requirement that Wisconsin have personal jurisdiction over the mother in order to affect her custody rights.<sup>63</sup> The opinion does not suggest such a narrow interpretation.<sup>64</sup>

The various rationales which have been proposed to limit the applicability of *May* today rest upon one basic premise held by most of its detractors: The majority opinion is so anomalous in its requiring this high due process standard for the protection of parents, that the Court would never reach the *May* conclusion again.<sup>65</sup> Various perceived errors in the reasoning of the *May* court have been noted, and different conclusions have been suggested.

It has been proposed that parents require fewer due process protections in custody adjudication since the court's decision is not final and, therefore, due process does not compel the standard of protection enunciated in *May*.<sup>66</sup> Yet *Kulko* required that personal jurisdiction

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61. See *Cannon v. Cannon*, 260 S.C. 204, —, 195 S.E.2d 176, 177-78 (1973) *Perry v. Ponder*, 604 S.W.2d 306, 320 (Tex. Civ. App. 1980) (both distinguishing *May* on the basis of the presence of children in the rendering jurisdiction).

62. In *May*, Wisconsin determined custody while the children were in Ohio with their mother. See *supra* pp. 715.

63. 345 U.S. at 534. If the children were domiciled in Wisconsin, that would result in their constructive presence in Wisconsin, even if they were actually present in Ohio. It is doubtful whether the Supreme Court would have made a distinction between constructive presence and actual presence for purposes of custody jurisdiction. Therefore, when the Court indicates that the children's domicile is irrelevant in the case, presumably the issue of their actual physical location would have also been irrelevant.

64. See E. SCOLES & P. HAY, *supra* note 14, at § 15.30; Note, *supra* note 29, at 312. Regarding the scope of *May*, an interesting question arises as to whether it applies to nonparents who are interested parties in the custody action. See *In re Fore*, 168 Ohio St. 363, —, 155 N.E.2d 194, 200 (1958) (denying recognition to a Louisiana decree rendered without jurisdiction over a nonparent party and the child).

65. See Comment, *supra* note 29, at 1248 (noting that many find it "inconceivable" that the present Court would reaffirm *May*); Comment, *supra* note 19, at 593 (describing the *May* opinion as "flawed").

66. See generally Comment, *Extending "Minimum Contacts" to Alimony: Mizner v. Mizner*, 20 HASTINGS L.J. 361, 372 (1968) (discussing due process requirement or alimony judgments where "defendant conceivably faces a lifetime of litigation").

based on minimum contacts be obtained over an absent parent in a support action—also a nonfinal judgment. It seems unlikely then that the Supreme Court would reject *May* on this basis. Also, to the extent the PKPA essentially limits custody jurisdiction to a single state,<sup>67</sup> modification will be less easily had, and the decree will become more final as a practical matter. Therefore, the argument might be made that the absent parent requires even more due process protection than he or she did at the time of *May*. The holding in *Kulko* also leads to rejection of the argument that *May* is wrong insofar as it places the interest of the parent above the *parens patriae* interest of the state.<sup>68</sup> In the support action, like the custody action, the state is interested in the child's welfare, yet minimum contacts are required before that state can exercise jurisdiction over an absent parent and before a valid support order can be entered.

The Supreme Court's perceived increased concern for children's rights has also been noted as a reason the present Court would reject *May*.<sup>69</sup> The cases cited in support of this argument deal with the rights of illegitimate children,<sup>70</sup> foster parents' rights to AFDC,<sup>71</sup> and multi-family zoning prohibitions.<sup>72</sup> They do not discuss children's rights *per se*. In response to this argument, the holdings in *Kulko* and *Ingraham v. Wright*<sup>73</sup> can be cited as examples where other interests prevailed over the rights of children. It is not clear that this Court is decidedly more pro-child than was the *May* court.<sup>74</sup>

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67. The UCCJA provided that in the event continuing jurisdiction was not applicable, jurisdiction could be exercised by the child's home state *or* by a state that had a significant connection to the child and one contestant; thus, concurrent jurisdiction remained a possibility in the UCCJA scheme. See UCCJA § 3(a)(1),(2), 9 U.L.A. 122 (1979). The PKPA provides that "significant connection" jurisdiction can only be invoked if there is no "home state" jurisdiction. See PKPA, Pub. L. No. 96-611 § 8(a)(c)(2)(A), (B), 94 Stat. 3566, 3570 (1980). Therefore, the problems of concurrent jurisdiction, which have plagued custody litigation in the past, should be eliminated.

68. The argument that the interest of the state in which the child was domiciled outweighs the possessory interest of the parent is proposed in Note, *supra* note 29, at 310.

69. See Bodenheimer & Neeley-Kvarme, *supra* note 26, at 251.

70. *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimate children's right to inherit from father in event of intestacy); *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972) (illegitimate children's right to father's workmen's compensation); *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimate children's right to bring wrongful death action upon death of mother).

71. *Youakim v. Miller*, 425 U.S. 231 (1976) (foster parents' right to AFDC despite relation to children).

72. *Moore v. City of East Cleveland*, 431 U.S. 499 (1977) (right of extended family to inhabit same dwelling).

73. 430 U.S. 651 (1977). In *Ingraham*, the Court upheld the constitutionality of corporal punishment of children by public school officials. *Id.* at 664.

74. In fact, the Supreme Court has on various occasions exhibited its concern for the constitutional rights of parents. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting that the integrity of the family unit is protected by due process, equal protection, and the ninth amendment);

## IV. CONCLUSION

The ultimate, and not inappropriate, rationale behind the sentiment against *May*, is that parental rights should not be allowed to take precedence over the rights of children in custody actions.<sup>75</sup> The *May* holding is seen as compromising the rights of the children since it gives parents another "weapon" with which to avoid the enforcement of an adverse decree. Nevertheless, any parent can prevent a successful *May* jurisdictional defense to recognition by first obtaining personal jurisdiction over the other parent. In the modification action, the continuing jurisdiction provisions of the PKPA (assuming personal jurisdiction was obtained in the original proceeding) will often be applicable. Long-arm jurisdiction may be available. If it is not, the parent can always litigate in the state where the other parent is either present or domiciled. In most instances, that state will be in a good position to consider the best interests of the child vis-à-vis the resident parent. Thus, the personal jurisdiction requirement which *May* imposes generally will not compromise the children's interests; it will at the same time provide much greater protection to the parent against whom the custody proceeding is initiated.

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Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (establishing parents' right to use contraceptives in the privacy of their homes); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that the liberty to marry and have children is one of the most basic civil rights of man).

75. See H. CLARK, *supra* note 18, at 324, 326. Hazard, *supra* note 14, at 387-88.