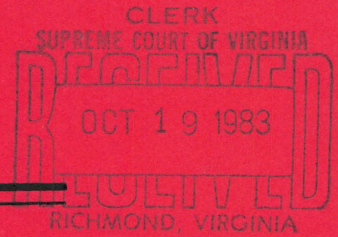


227 VA 82



IN THE
Supreme Court of Virginia
AT RICHMOND

WASHINGTON & LEE
LAW LIBRARY

RECORD NO. 822080

MAY 23 1984

SHEILA J. MIDDLETON

Appellant,

v.

BRIAN C. MIDDLETON

Appellee.

JOINT APPENDIX
VOLUME I

Donald K. Butler, Esquire
526 North Boulevard
Richmond, VA 23220

Counsel for Appellant

B. VanDenburg Hall, Esquire
Suite 400, Equity Building
4085 Chain Bridge Road
Fairfax, VA 22030

Counsel for Appellee

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Filed in the Clerk's Office the 27th day of June, 1977
Process 1 and 1 to Sheriff of no serving Officer - Returned to p.p.
Issued 27th day of June, 1977 for service
Writ Tax \$ 5.00
Fee 25.25
Sheriff Fee 1.00
Total Paid \$ 31.25
Teste: LEWIS H. VADEN, Clerk
By Jacqueline A. Hartman D. C.

BILL OF COMPLAINT

To the Honorable Judge of said court:

Your plaintiff, Brian Carter Middleton, respectfully represents unto

Your Honor the following facts:

1. That on the 17th day of February, 1962, your plaintiff was lawfully married in Cleveland, England, to Sheila Joan Thompson Middleton.
2. That your plaintiff and the said Sheila Joan Thompson Middleton are both over the age of eighteen years, and are members of the White race.
3. That your plaintiff is domiciled in and is and has been an actual bona fide resident of the State of Virginia for at least six months preceding the commencement of this suit.
4. That your plaintiff last cohabited with the said Sheila Joan Thompson Middleton in Chesterfield County, Virginia.
5. That there are two children born of this marriage, namely; Claire Nichole Middleton, aged 7, and Nichole Amie Middleton, aged 5.
6. That your plaintiff and the defendant have lived separate and apart without cohabitation and without interruption for a period of more than one year.

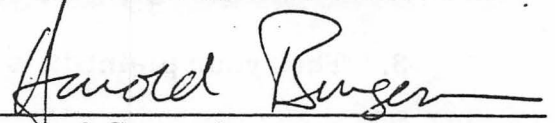
In Consideration Whereof, and forasmuch as your plaintiff is remediless save in a court of equity where such matters are properly cognizable, your

plaintiff prays that process be issued; that the defendant be required to answer the same, but not under oath, oath being hereby expressly waived; that he be granted a divorce from the bond of matrimony on the grounds of living separate and apart without cohabitation and without interruption for a period of more than one year, and that your plaintiff may have all such further and general relief as the nature of his case may require and to equity seem meet.

And your plaintiff will ever pray, etc.

BRIAN CARTER MIDDLETON

By


of Counsel

Harold W. Burgess, Jr., p.q.
Jennings, Beddow, Marley & Burgess
P. O. Box 145
Chesterfield, Virginia 23832

PROOF OF SERVICE

Virginia:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

CHANCERY NO. 3305-77

BRIAN CARTER MIDDLETON

vs.

SHEILA JOAN THOMPSON MIDDLETON
Flat 11 St. Mary's Walk
Ridley Drive
Norton
Cleveland, England

Returns shall be made hereon, showing service of Subpoena in Chancery issued.....
June 27, 1977, with copy of Bill of Complaint.....
filed June 27, 1977, attached:

Executed on the.....day of....., 19....., in the County of Chesterfield,
Virginia, by delivering a true copy of the above mentioned papers attached to each other,
to.....
.....in person.

SHERIFF, COUNTY OF CHESTERFIELD, VA.

BY....., DEPUTY SHERIFF

(Use the space below if a different form of return is necessary)

I hereby accept legal and timely service of the foregoing Subpoena in Chancery
issued June 27, 1977, with copy of Bill of Complaint filed June 27, 1977, this
27th day of July, 1977.

Sheila Joan Thompson Middleton
Sheila Joan Thompson Middleton

United Kingdom of Great Britain & Northern Ireland
County of Wiltshire, to-wit:

Sheila Joan Thompson Middleton, this day appeared before me and
acknowledged her signature to the foregoing service of Subpoena in Chancery and
Bill of Complaint as stated above, in my jurisdiction aforesaid.

Given under my hand this 27 day of July, 1977.

My ~~commission expires~~: 7p.

J. B. Pacey

SEAL

Notary Public

Stockton on Tees

Returned and filed the 4th day of August, 1977 England

Lewis H. Vaden

, CLERK.

B. S.

, DEPUTY CLERK.

NOTICE

To: Sheila Joan Thompson Middleton

YOU ARE HEREBY NOTIFIED that on the 12th day of August, 1977, at 2:00 o'clock p. m., at the office of Harold W. Burgess, Jr., Attorney at Law, Chesterfield, Virginia, I shall proceed to take the depositions of myself and others, to be read as evidence in my behalf in a certain suit in equity, now pending in the Circuit Court of Chesterfield County, Virginia, wherein I am plaintiff and you are defendant; and if the taking of said depositions be not commenced, or if commenced, be not completed on said day, then the same shall be continued from day to day at the same time and place until completed.

BRIAN CARTER MIDDLETON

By Harold Burgess
of Counsel

Harold W. Burgess, Jr., p. q.
Jennings, Beddow, Marley & Burgess
P. O. Box 145
Chesterfield, Virginia 23832

I hereby accept legal and timely service of the foregoing Notice, this 27th day of July, 1977.

Sheila Joan Thompson Middleton
Sheila Joan Thompson Middleton

United Kingdom of Great Britain & Northern Ireland
County of Cleveland, to-wit:

Sheila Joan Thompson Middleton, this day appeared before me and acknowledged her signature to this foregoing Notice to Take Depositions, in my jurisdiction aforesaid. Given under my hand this 27 day of July, 1977.

SEAL

Two Tracy
Notary Public West

Present:

Eubank Wilson Garnett, Jr. witness for
plaintiff

No appearance by or on behalf of defendant

Brian Carter Middleton, testifying in his own behalf, after being duly sworn, deposes and says as follows:

QUESTIONS BY HAROLD BURGESS

Q. Would you please state your name for the Court?

A. Brian Carter Middleton.

Q. Where do you live?

A. 6113 Daleshire Drive, Richmond, Virginia.

Q. Mr. Middleton are you the plaintiff in a divorce suit now pending in Circuit Court of Chesterfield County, Virginia wherein your wife, Sheila Joan Thompson Middleton is the defendant?

A. Yes.

Q. Were you and she lawfully married on February 17, 1962, in Cleveland, England?

A. Yes.

Q. Are you both members of the White race and over the age of eighteen?

A. Yes.

Q. Are you domiciled in and have you been an actual bona fide resident of the State of Virginia for at least six months prior to the commencement of this suit?

A. Yes.

Q. In what City or County did you and your wife, the defendant, last live together as man and wife?

A. Chesterfield County.

Q. What was the date that you and she last lived together?

A. June 17, 1974.

Q. Were any children born of your marriage?

A. Yes, two girls.

Q. What are their respective names and ages?

A. Clair Michelle, aged 8 and Nichole Amie, aged 6.

Q. Mr. Middleton, you have alleged in your bill of complaint that you and the defendant have lived separate and apart without cohabitation and without interruption for a period of more than one year, of course, that being from June 17, 1974, to the present time. Have you in fact lived separate and apart without cohabitation and without interruption for a period of more than one year.

A. Yes.

Q. In June 1974 did Mrs. Middleton sign over to you her interest in the house?

A. Yes.

Q. Since June 1974, has Mrs. Middleton returned to live with you?

A. No.

Q. At the time of your separation was it obvious to her that you were separating with the intent not to return?

A. Yes, there was every evidence.

Q. Do you believe there is a possibility or probability of reconciling with her?

A. No.

Q. I hand you this agreement and ask you if you can identify it for the Court?

A. Yes, this agreement entered into the 31st of May and my signature is on it.

Q. Was that May of 1977?

A. Yes.

Q. Did your wife sign the agreement?

A. Yes.

Q. Do you ask that this agreement be filed with the Court?

A. Yes.

Moved to introduce this as plaintiff's Exhibit A.

Q. Do you ask the Court to award you a final divorce from Mrs. Middleton on the grounds of living separate and apart without cohabitation and without interruption for a period of more than one year?

A. Yes I do.

Q. Do you waive your signature to this deposition?

A. Yes sir.

And further this deponent saith not

Eubank Wilson Garnett Jr., testifying in behalf of the plaintiff, after being duly sworn, deposes and says as follows:

QUESTIONS BY HAROLD BURGESS

Q. Would you please state your name?

A. Eubank Wilson Garnett, Jr.

Q. What is your address?

A. 15 P 2000 Riverside Drive, Richmond, Virginia.

Q. Are you acquainted with the parties to this suit?

A. Yes.

Q. How do you know them?

A. From having worked with Brian since the beginning of 1972.

Q. Were he and Mrs. Middleton living together at the time you first met them?

A. Yes.

Q. To the best of your knowledge Mr. Garnett were these parties lawfully married in Cleveland, England on February 17, 1962?

A. To the best of my knowledge.

Q. Are they members of the White race and over the age of eighteen years?

A. Yes.

Q. To the best of your knowledge is Mr. Middleton domiciled in and has he been an actual bona fide resident of the State of Virginia for at least six months prior to the commencement of this suit or since January 1, 1977?

A. Yes.

Q. Further to the best of your knowledge did they last live together as man and wife in Chesterfield County?

A. Yes.

Q. Additionally, to the best of your knowledge did they separate on or about June of 1974?

A. Yes.

Q. Mr. Garnett, as you know Mr. Middleton has alleged in his Bill of Complaint that he and his wife have lived separate and apart without cohabitation and without interruption for a period of more than one year, that being from his testimony, June of 1974 to the present time. To the best of your knowledge sir is that a true statement of fact?

A. That is true.

Q. You see Mr. Middleton often now?

A. Yes.

Q. You still work with him now?

A. Yes.

Q. Then if he and Mrs. Middleton had reconciled you would know about it?

A. Yes.

Q. Do you believe that a reconciliation between them is possible or probable?

A. No.

Q. Do you know where she is now living?

A. In England, I don't know the town in England.

Q. Do you waive your signature to this deposition?

A. Yes.

And further this deponent saith not.

RECEIVED UNDER SEAL
AND FILED
AUG 26 1977
LEWIS H. VADEN, CLERK
Qit

State of Virginia
County of Chesterfield, to-wit:

I, June B. Phillips, a Notary Public in and for the County of Chesterfield, in the State of Virginia, do certify that the foregoing depositions of Brian Carter Middleton and Eubank Wilson Garnett, Jr. were duly taken, sworn to and signatures waived by the witnesses before me at the time and place therein mentioned.

Given under my hand this 26th day of August, 1977.
My commission expires December 29, 1980.

June B. Phillips
Notary Public

THIS AGREEMENT, made and entered into this 31 day of MAY, 1977, by and between BRIAN CARTER MIDDLETON, hereinafter referred to as "Husband", and ~~SHELIA~~ JOAN THOMPSON MIDDLETON, hereinafter referred to as "Wife."

W I T N E S S E T H:

WHEREAS, the said parties to this agreement are husband and wife;
and

WHEREAS, differences have arisen between the husband and wife of such a nature as to bring about a separation, all efforts at reconciliation have failed; and

WHEREAS, in order to avoid protracted litigation with reference to the duties of the parties to each other and any infant children of this marriage, the parties have reached an agreement regarding same and are now desirable of reducing this agreement to writing;

NOW THEREFORE, for and in consideration of these premises and other good and valuable consideration and the mutual covenants and conditions herein contained, the parties hereto agree each with the other as follows:

1. Wife shall have the care, custody and control of Claire Nichole Middleton, age 7, and Nichole Amie Middleton, age 5, infant children of the parties. Husband shall have a reasonable right of visitation with said children at times and places mutually agreed to by the parties hereto.

2. Husband agrees to pay unto Wife the sum of Two Hundred Dollars (\$200.00) per month for the support and maintenance of the aforementioned children and additionally provide Wife with the use of an automobile of reasonable value and utility until the said children become emancipated or reach the age of eighteen years, whichever first occurs.

3. Wife hereby waives all rights, past, present and future to any obligation of support and alimony for herself arising out of the marriage of the parties.

4. This agreement represents the entire understanding of the parties and is entered into under and shall be governed by the laws of the State of Virginia.

5. It is understood and agreed between the parties that if they are subsequently divorced this agreement shall be presented to the Court in which such divorce is sought for the approval and confirmation of such Court with the request that its contents be made a part of the decree entered therein.

WITNESS the following signatures and seals:

Notary
Angela L. Hoffman
Brian Carter Middleton (SEAL)
Brian Carter Middleton

Shelia Joan Thompson Middleton (SEAL)
Shelia Joan Thompson Middleton

FINAL DECREE

This cause, which has been regularly docketed, matured and set for hearing as to the defendant, who has failed to plead, answer or demur, came on this day to be heard upon the bill of complaint; upon proof of proper and legal service of process upon the defendant; upon the depositions of witnesses on behalf of the plaintiff, regularly taken after proper and legal notice and filed in accordance with law, and was argued by counsel.

Upon Consideration Whereof, the Court finds from the evidence, independently of any admissions of the parties in the pleadings or otherwise, the following facts: that the parties are members of the White race and over the age of eighteen; that they were lawfully married in Cleveland, England on February 17, 1962; that there are two infant children born of this marriage, whose names are Claire Michelle Middleton, aged 7 and Nichole Amie Middleton, aged 5; that the plaintiff is domiciled in and is and has been an actual bona fide resident of the State of Virginia for a period of more than six months immediately preceding the commencement of this suit; that the plaintiff and defendant last cohabited as husband and wife in the County of Chesterfield, Virginia; that the allegation that the parties have lived separate and apart without cohabitation and without interruption for a period of more than one year as set forth in the bill of complaint has been fully proved by the evidence, and that the plaintiff is entitled to the relief prayed for.

Accordingly, it is ADJUDGED, ORDERED and DECREED that the plaintiff, Brian Carter Middleton, is now absolutely divorced from the defendant, Sheila Joan Thompson Middleton, from the bond of matrimony on the grounds that the parties have lived separate and apart without any

cohabitation and without interruption for more than one year, and that the bond of matrimony created by the marriage between these parties of February 17, 1962, is dissolved.

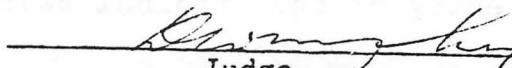
It is ADJUDGED and ORDERED that custody of Claire Michelle Middleton and Nichole Amie Middleton, infant children of the parties, is awarded to the defendant, but leave is granted to the plaintiff to see and visit the said children at reasonable times and places; and it is further ORDERED that the plaintiff pay to the defendant for the care, support and maintenance of the said children \$200.00 per month.

It appearing that the parties have entered into a written agreement dated May 31, 1977, it is ORDERED that a copy thereof be filed with the papers in this cause.

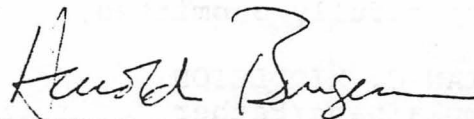
And nothing further remaining to be done herein, it is ORDERED that this cause is stricken from the docket and the papers placed among the ended causes.

Enter: 10 1 19 1 77

I ask for this:

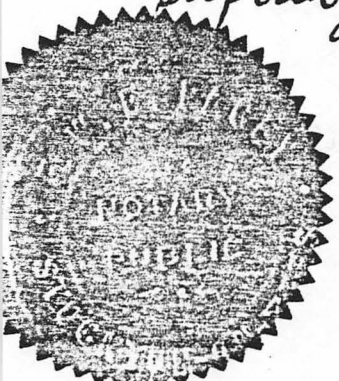

Judge
Chy O.B. 79- page 400

copy
mailed
10-19-77



P. g.

I Sheila Joan Thompson Middleton the above named Defendant in this cause hereby acknowledge to have been served with a copy of the proposed final decree herein, to which I hereby give my assent.
Signed by the said Sheila Joan Thompson Middleton at Stockton on Teco in the County of Cleveland England this 13th day of October 1977 Before Me F.W.B. Tracy, Notary Public, Stockton on Teco England
13



M O T I O N

COMES NOW your Complainant, Brian C. Middleton, by Counsel, and moves this Honorable Court for an Order reinstating the above-styled case, and for his reasons states as follows:

1. At the time of the Decree of Divorce granted to your Complainant, custody of the minor children, issues of the marriage, was awarded to the Defendant, Sheila Joan Middleton.

2. Your Complainant has filed a Petition with this Court praying for an alteration in the award of custody due to changes in circumstances affecting the welfare and best interests of the minor children.

WHEREFORE, your Complainant prays that this Honorable Court enter an Order reinstating the above-styled case so that a new determination of custody can be made based on the changed circumstances that have occurred since the entry of the original award of custody.

Respectfully Submitted,


BRIAN C. MIDDLETON
Complainant/Father
By Counsel

Re: Middleton vs. Middleton
In Chancery No. 3305-77

RECEIVED AND FILED

AUG 21 1981

LEWIS H. VADEN, CLERK


B. VanDenburg Hall
Counsel for Complainant/Father
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

PETITION FOR CHANGE OF CUSTODY

COMES NOW your Complainant, BRIAN C. MIDDLETON, and moves this Honorable Court to enter an Order granting him control and custody of the minor children, CLAIRE MICHELLE MIDDLETON and NICHOLE AMIE MIDDLETON, and for his reasons states as follows:

1. Complainant and Defendant, Sheila Joan Middleton, were married on February 17, 1963, in Cleveland, England. Two children were born of this marriage, namely, Claire Michelle Middleton, born September 4, 1969, and presently eleven years old, and Nichole Amie Middleton, born September 9, 1971, and presently ten years old.

2. A Decree of Divorce was granted your Complainant by the Circuit Court of Chesterfield County, Virginia, in 1977. Custody of the children was awarded at that time to the Defendant, Sheila Joan Middleton.

3. The Complainant, Brian C. Middleton, presently lives at 4463 Edan Mae Court, Annandale, Virginia 22003, with his children. He has lived continuously in the State of Virginia since 1967.

4. There have occurred significant changes in circumstances since the time of the Decree of Divorce which changes and circumstances affect the general welfare and best interests of the children. Such changes of circumstances include:

a. The Defendant who is custodial parent, has taken into her home an unknown number of lovers over the past five years. This has occurred within the presence of the minor children.

b. The lovers are strangers to and unknown to

the children except for one man who is known to the children as Mike Davis.

c. The Defendant intends to separate the children and split them up and put one child with an aunt and keep the other child with her. The children are very close and are opposed to being separated.

5. The Defendant has made many demeaning and denegrating comments about your Complainant to the minor children.

6. The Respondent has made attempts to frustrate and render a nullity the decretal visitation rights of your Complainant. The children want to remain with their father.

7. It is in the best interests of the children at this time that the Circuit Court of Chesterfield County, Virginia assume jurisdiction of these minor children in that your Complainant has a significant connection with this Commonwealth and there is available, in this Commonwealth, substantial evidence concerning the children's present or future care, protection, training, and personal relationships; and the children are presently physically in this Commonwealth and it is necessary to protect the children because they have been subjected to mistreatment by the Defendant as shown in Paragraph Four above.

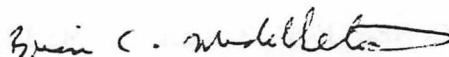
8. There is no other state that would have jurisdiction under prerequisites substantially in accordance with paragraphs 1, 2, or 3 of Section 20-126 of the Annotated Code of Virginia.

9. The Commonwealth of Virginia and in particular, Chesterfield County, is the appropriate forum to determine the custody of the children in that it is in the best interests of these children that this Court assume jurisdiction because

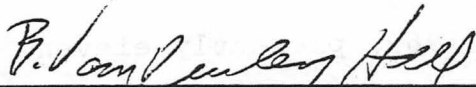
Complainant was granted a divorce by the Circuit Court of Chesterfield County, Virginia and this Court made the Decree awarding custody of the children to the Defendant.

WHEREFORE, your Complainant prays this Honorable Court for an Order granting him pendente lite and permanent sole care and custody of these minor children, Claire Michelle Middleton and Nichole Amie Middleton.

Respectfully Submitted



BRIAN C. MIDDLETON
Complainant/Father



B. Vandenburg Hall
Counsel for Complainant/Father
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

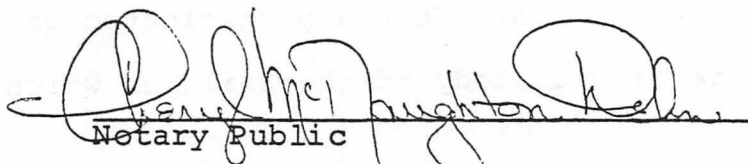
Subscribed and sworn to by Brian C. Middleton before me, Cheryl McNaughton Dehn, a Notary Public, on this 17th day of August, 1981, in the Commonwealth of Virginia, within Fairfax County, as true to the best of his knowledge, information and belief.

Given under my hand and seal this 17th day of August, 1981.

My commission expires on September 25, 1981.

RECEIVED AND FILED

AUG 21 1981


Notary Public

LEWIS H. VADEN, CLERK



RECEIVED AND FILED

AUG 21 1981

LEWIS H. VADEN, CLERK



A F F I D A V I T

COMES NOW Brian C. Middleton, after first being duly sworn deposes and says that:

1. He is the father of the minor children, Claire Michelle Middleton, born September 4, 1969, presently eleven years old and Nichole Amie Middleton, born September 9, 1971, presently ten years old; both children are American citizens.

2. The minor children presently reside with him at 4463 Edan.Mae Court, Annandale, Virginia 22003.

3. The children have lived with him since the 25th day of July, 1981.

4. The children have lived with their mother, Sheila Joan Middleton, for the five years preceeding the 25th day of July, 1981 at the following addresses:

For the last two years at Flat 6, St. Mary's Court Ridley Drive, Norton Cleveland, England, and for the three years before that at Flat 11, St. Mary's Court, Ridley Drive, Norton Cleveland, England.

5. He has participated as a party in litigation concerning custody of the children which litigation took place in

Chesterfield County, Virginia and was part of the divorce proceedings instituted by the Affiant against Sheila Joan Middleton, his former wife, which proceedings ended in the Affiant being granted a divorce due to the desertion of the former wife and the children being placed in the custody of the wife with reasonable rights of visitation for the Affiant.

6. He knows of no other custody proceedings pending in any jurisdiction except the one mentioned in 5 above.

7. The Affiant's former wife, Sheila Joan Middleton, who dwells at Flat 6, St. Mary's Court, Ridley Drive, Norton Cleveland, England has the decretal right of physical custody of the children.

FURTHER, Affiant saith naught.

Brian C. Middleton
BRIAN C. MIDDLETON
Complainant/Father

Subscribed and sworn to Brian C. Middleton before me,
Charles McLaughton Dean, a Notary Public, on this 17th
day of AUGUST, 1981 in the Commonwealth of Virginia,
within Fairfax County, as true to the best of his knowledge,
information, and belief.

GIVEN under my hand and seal this 17th day of AUGUST,
1981.

Charles McLaughton Dean
Notary Public

My Commission expires: September 25, 1984

B. Vandenburg Hall
B. Vandenburg Hall
Counsel for Complainant/Father
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

BRIAN C. MIDDLETON

Plaintiff,

v.

SHEILA J. MIDDLETON,

Defendant

Chancery Case No. 3305-77

O R D E R

WHEREAS there is now pending before this Court a petition concerning possible change of custody of Claire M. Middleton and Nicole A. Middleton, the infant children of the plaintiff and defendant, it is ADJUDGED, ORDERED and DECREED that the parties are hereby enjoined and restrained from removing either or both of the children of the parties, namely Claire M. Middleton and Nicole A. Middleton from ^{the Commonwealth of Virginia and} the United States of America until the further order of this Court.

ENTER: 9 / 2 / 81

Ernest F. Sals
Judge

I Ask For This:

Chy. O. B. 96-page 435

N. Leslie Saunders Jr. p.q.
N. Leslie Saunders, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY

BRIAN C. MIDDLETON
Complainant

vs.

SHEILA JOAN MIDDLETON
Defendant

IN CHANCERY NO. 3305-77

ORDER

THIS MATTER CAME ON TO BE HEARD upon Complainant's Motion for a reinstatement of the above-styled case, and

IT APPEARING TO THE COURT, that this case should be reinstated; and it is hereby

ADJUDGED, ORDERED and DECREED that the above-styled case is hereby reinstated for the reconsideration of custody.

AND THIS CAUSE IS CONTINUED.

ENTERED this 14th day of September, 1981.

I ASK FOR THIS:

Euseeb J. Gales
JUDGE

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Complainant/Father
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

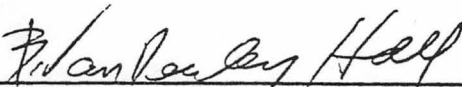
Chy. O B. 96-page 445

NOTICE

TO: Sheila J. Middleton
Flat 6, St. Mary's Court
Ridley Drive
Norton Cleveland, ENGLAND

PLEASE TAKE NOTICE that on Tuesday, September 22, 1981, Brian C. Middleton, by counsel, will move this Honorable Court for a Rule to Show Cause why the defendant, Sheila J. Middleton, should not be held in contempt of this court for violating the Order of September 2, 1981. Hearing to commence at 9:00 a.m.

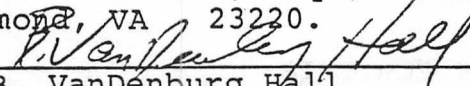
BRIAN C. MIDDLETON
By Counsel



B. Vandenburg Hall
Counsel for Defendant
Suite 400 Equity Building
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Certificate of Service

I hereby certify that on this 16th day of September, 1981, I mailed, postage-prepaid, by certified, express mail, a true copy of the foregoing documents: Notice, Petition For Rule and Rule To Show Cause upon Ms. Sheila Joan Middleton, Defendant, at Flat 6, St. Mary's Court, Ridley Drive, Norton Cleveland, England; and by regular mail to Donald K. Bulter, Esq., Counsel for Defendant, 526 North Boulevard, Richmond, VA 23220.



B. Vandenburg Hall

RECEIVED AND FILED

SEP 17 1981

LEWIS H. VADEN, CLERK
BR

PETITION FOR RULE

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LEWIS H. VADEN, CLERK

BR


COMES NOW the plaintiff, Brian C. Middleton, and having been duly sworn deposes and says as follows:

1. That the Circuit Court of Chesterfield County, Virginia entered an Order on the 2nd day of September, 1981 enjoining and restraining the Defendant Sheila J. Middleton from removing "either or both of the children of the parties, namely Claire M. Middleton and Nicole A. Middleton from the Commonwealth of Virginia, the United States of America until further order of this Court". A copy of said Order is attached hereto as Exhibit 'A'.

2. Contrary to this Order, the Defendant, Sheila J. Middleton has removed the children of the parties from the Commonwealth of Virginia and from the United States of America.

WHEREFORE, the Plaintiff, Brian C. Middleton, prays this Honorable Court to enter a Rule to Show Cause against the Defendant, Sheila J. Middleton, commanding her to appear and show cause, if any there be, why she should not be held in contempt of Court.


BRIAN C. MIDDLETON

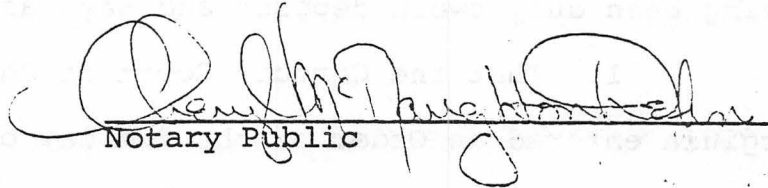

B. VanDenburg Hall
Counsel for Plaintiff
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

-2-

Subscribed and sworn to by BRIAN C. MIDDLETON before the undersigned Notary Public as true to the best of his knowledge, information and belief.

Given under my hand this 16th day of September, 1981.

My commission expires: September 25, 1984

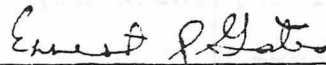

Notary Public

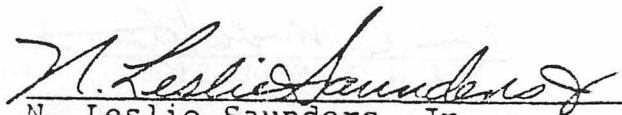
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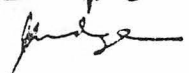
WHEREAS there is now pending before this Court a petition concerning possible change of custody of Claire M. Middleton and Nicole A. Middleton, the infant children of the plaintiff and defendant, it is ADJUDGED, ORDERED and DECREED that the parties are hereby enjoined and restrained from removing either or both of the children of the parties, namely Claire M. Middleton and Nicole A. Middleton from ~~the Commonwealth of Virginia~~ the United States of America until the further order of this Court.

ENTER: 9 / 2 / 81

I Ask For This:


Judge


N. Leslie Saunders, Jr. p.q.

certified to be a true copy:
Ernest P. Gates


SEP 18 1981

LEWIS H. VADEN, CLERK

ANSWER TO PETITION
FOR CHANGE OF CUSTODY

Comes now the defendant, Sheila Joan Middleton, and for her Answer to the Complainant's Petition for Change of Custody, states the following:

1. The allegations contained in Paragraphs 1, 2, and 3 of the Petition are admitted.

2. The allegations contained in Paragraph 4 of the Petition are denied for the reason that they are untrue. The defendant further states that the only suggestion ever made to separate the children was made by the complainant when he suggested to the defendant that he would take custody of Nicole and that she retain custody of Claire. This suggestion was rejected by the defendant as being contrary to the best interests of the children.

3. The allegations contained in Paragraph 5 are denied. The defendant avers that in fact, she has at all times since the separation of the parties endeavored to maintain in the children love and respect for their father and for his new wife, their stepmother.

4. The allegations contained in Paragraph 6 of the Petition are denied. The defendant further avers that the children have visited with the complainant in the United States on a regular basis and for five of the six weeks that they have for school vacation in the summers; that the defendant has always been willing to provide the complainant

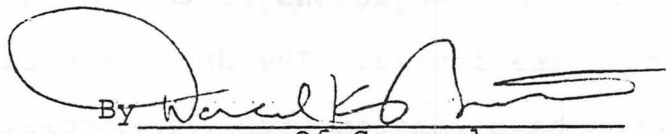
with other opportunities to visit with the children, but the complainant has refused to expend the funds necessary to finance their trips to the United States more than once yearly; that further the defendant receives from the complainant only approximately \$500.00 per month income and the total sum of \$200.00 per month child support for the two children and therefore cannot afford to pay for these visits. On the other hand, the complainant is employed as an officer with United Virginia Bank and has remarried and his new wife is also employed by said bank.

5. The allegation that the children want to remain with their father as set forth in Paragraph 6 of the Petition is denied; and the defendant further avers that the children desire to reside with their mother where they have resided since the separation of the parties.

6. The allegations contained in Paragraphs 7, 8 and 9 of the Petition are denied. A more specific response is set forth in the defendant's Plea to the Jurisdiction filed simultaneously herewith.

WHEREFORE, the defendant prays that this Court dismiss the Petition for Change in Custody and that she may be granted such other relief as the Court deem appropriate.

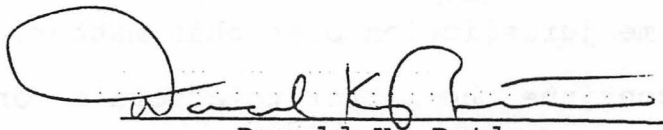
SHEILA JOAN MIDDLETON

By 
Of Counsel

Donald K. Butler, p.d.
Morano & Butler
526 North Boulevard
Richmond, VA 23220

CERTIFICATE

I hereby certify that a true copy of the foregoing Answer to Petition for Change of Custody was mailed postage prepaid this 17th day of September, 1981, to B. Vandenburg Hall, Esq., Suite 400, Equity Building 4085 Chain Bridge Road, Fairfax, VA 22030, counsel for the complainant.

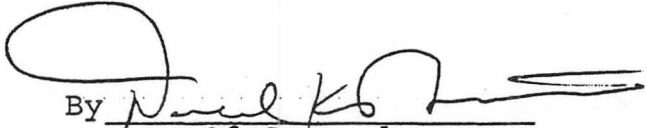

Donald K. Butler

NOTICE

TO: Brian C. Middleton
% B. Vandenburg Hall
Suite 400, Equity Building
4085 Chain Bridge Road
Fairfax, VA 22030

PLEASE TAKE NOTICE that on the 22nd day of September, 1981, at 9:00 a.m. or as soon thereafter as counsel may be heard, I will appear before one of the Judges of the Circuit Court of Chesterfield County and move the Court to decline jurisdiction over this matter. Further, should the Court assume jurisdiction over this matter, I will move the Court to continue the matter to afford me an opportunity to prepare for the defense of the allegations in your Petition for Change of Custody.

SHEILA JOAN MIDDLETON

By 
Of Counsel


Donald K. Butler, p.d.
Morano & Butler
526 North Boulevard
Richmond, VA 23220

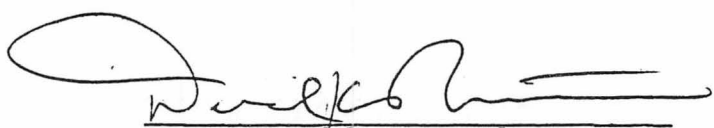
CERTIFICATE

I hereby certify that a copy of the foregoing Notice was mailed this 17th day of September, 1981, postage prepaid, to Vandenburg Hall, Esq., Suite 400, Equity Building, 4085 Chain Bridge Road, Fairfax, VA 22030, counsel for the complainant.

RECEIVED AND FILED

SEP 18 1981

LEWIS H. VADEN, CLERK 


Donald K. Butler

SEP 18 1981

LEWIS H. VADEN, CLERK



PLEA TO THE JURISDICTION

Now comes the defendant, Sheila Joan Middleton, by counsel, and moves this Court to dismiss this cause for lack of jurisdiction for the following reasons:

1. That by the final decree of divorce entered herein in 1977, this cause was stricken from the docket and placed among the ended causes thus terminating this Court's active jurisdiction over this matter.

2. That since the separation of the parties prior to the entry of said decree and subsequent to the entry of the said decree, the children have been in the custody of their mother, the defenant, continuously and uninterruptedly residing in England; that the statement set forth in Paragraph 2 of the Complainant's Affidavit is false because the children have never resided in Annandale, Virginia and have continuously resided in England since the separation of the parties.

3. That the children are not only American citizens but are British citizens as well.

4. That the children presently reside at and are physically present in England in the legal and physical custody of their mother; that on July 25, 1981, and as of the date of the filing of the Petition herein by the complainant the children were merely visiting their father at his home in Annandale, Virginia.

5. That by Order of this Court, the custody of the children was awarded to the defendant with leave to the

complainant to see and visit with the children at reasonable times and places; that the arrangement for visitation at the time of the institution of these proceedings was for the complainant to have the children visit with him at his home during their summer vacation and to be returned to the physical custody of the defendant on August 31, 1981, with their scheduled arrival time being 9:00 a.m. London Time at Heathrow Airport; that on August 25, 1981, the defendant received notice of these proceedings and subsequently learned from the complainant that the children would not be returned as prearranged, and in fact the complainant did not return the children to the physical custody of the defendant as prearranged, thereby violating the lawful orders of this Court.

6. That under the following criteria as set forth in the Uniform Child Custody Jurisdiction Act, 1950 Code of Virginia, Chapter 7, this Court should decline jurisdiction of this matter for the following reasons:

A. The concept of continuing jurisdiction of a Court granting the divorce over the determination of custody of infant children is abrogated insofar as it is inconsistent with the specific provisions of the Uniform Child Custody Jurisdiction Act.

B. The provisions of the Uniform Child Custody Jurisdiction Act and the general policies thereof extend to the international area (Code § 20-146) and further, Virginia Courts should grant comity to a foreign Court of competent jurisdiction, and specifically to England (Oehl v. Oehl 221 VA 618 (1980)). These children are presently wards of the English Court by virtue of lawful orders entered therein, copies of which shall be provided at the hearing.

C. England is the home of the children at the commencement of these proceedings and was their home state for a period of six months prior thereto (Code § 20-126 A.1.)

D. The children have no significant connection with this state (Code § 20-126 A.2(i)).

E. That substantial evidence concerning the children's present or future care, protection, training and personal relationships, and further any evidence of the defendant's alleged misconduct (of which there was none) would be available in England and not in this State (Code Section 20-126 A.2(ii)).

F. The children are not physically present in this State (Code Section 20-126 A.3).

G. It appears that England would have jurisdiction under the prerequisites substantially in accordance with Paragraphs 1, 2 and 3 and it would be in the best interest of the children that the English Court assume jurisdiction (Code § 20-126 A.4)

H. The English Court is a more convenient forum for determination of a change in custody (Code § 20-130)

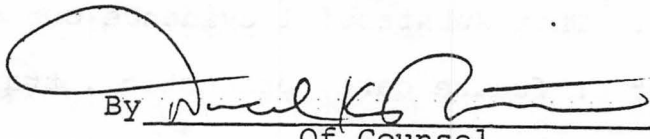
I. The Court should decline jurisdiction because of the conduct of the complainant in violating the orders of this Court by not returning the children to the defendant who had lawful custody (Code § 20-131).

7. That because of the complainants reprehensible conduct in refusing to return the children as aforesaid, the defendant has incurred considerable expense in having to travel to the United States and to have the children accompany her back to England; that further she has incurred substantial counsel fees and costs in connection with this proceeding.

WHEREFORE, the defendant prays that this Court decline to exercise jurisdiction in this matter and defer to the

appropriate English Court for any determination of a change in custody; that further she be awarded her expenses and counsel fees as provided for in Code § 20-138.

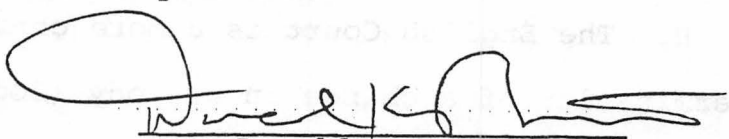
SHEILA JOAN MIDDLETON

By 
Of Counsel

Donald K. Butler, p.d.
Morano & Butler
526 North Boulevard
Richmond, VA 23220

CERTIFICATE

I hereby certify that a true copy of the foregoing Plea To The Jurisdiction was mailed postage prepaid this 17th day of September, 1981, to B. Vandenburg Hall, Esq. Suite 400, Equity Building, 4085 Chain Bridge Road, Fairfax, VA 22030, counsel for the complainant.


Donald K. Butler

SEP 24 1981

LEWIS H. YADEN, CLERK

REQUEST FOR ADMISSIONS

Pursuant to Rule 4:11 of the Rules of the Supreme Court of Virginia, plaintiff requests that the defendant admit within twenty-one (21) days after service of this request and for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the hearing, that each of the facts stated herein is true and correct. If any fact is not admitted, the plaintiff demands that the defendant deny the matter. Further, if the defendant can admit only a part of the facts stated herein, or can admit the facts subject to a qualification, plaintiff demands that defendant specify so much of such fact as is true and deny the remainder.

The matter is admitted unless, within twenty-one (21) days after service of the request, or within such shorter or longer period of time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by her attorney.

An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless defendant states that she has made reasonable inquiry and that the information known or readily obtainable by defendant is insufficient to admit or deny.

You are further advised that under Rule 4:12(c), should you fail to admit the genuineness of any document or the truth of any matter set forth herein as requested, and the plaintiff thereafter proves the genuineness of the document or the truth of the matter set forth herein, the plaintiff will apply to the Court for an Order requiring you to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

WHEREFORE, defendant will either admit or deny the following:

1. You, Sheila J. Middleton, have had sexual relations with a single male named Mike Davies on numerous occasions while my children, Claire and Nichole Middleton, were present in the home.
2. You, Sheila J. Middleton, have taken the children to the home of Mike Davies and have had sexual relations with him while the children, Clare and Nichole, were present in his home.
3. You, Sheila J. Middleton, have had sexual relations with a married male named John Clay on numerous occasions while the children, Claire and Nichole, were present in the home.
4. You, Sheila J. Middleton, have had sexual relations with a married male named Gordon Brough on numerous occasions while the children, Claire and Nichole, were present in the home.
5. You, Sheila J. Middleton, have had sexual relations with a married male named Alistar Chafer on numerous occasions while the children, Claire and Nichole, were present in the home.
6. You, Sheila J. Middleton, have appeared in the nude in the presence of men on a number of unspecified occasions in the presence of the children, Claire and Nichole.
7. You, Sheila J. Middleton, have accepted monies and goods from numerous men in exchange for sexual favors and such gifts were made known to the children, Claire and Nichole.

8. You, Sheila J. Middleton, have brought into the home unknown males for the purpose of sexual intercourse and have caused fear and mental anguish to the children, Claire and Nichole, because of the presence of these unknown males in their home.

9. You, Sheila J. Middleton, have invited a number of policemen into the home for the purpose of sexual intercourse while the children, Claire and Nichole, were present in the home.

10. The child, Claire, was to be sent to an aunt named Dinsdale living at Quebec Road, Hartburn, Cleveland and such an address has been registered at the school named Ian Ramsay as the home address of Claire.

11. The child, Nichole, has left home on a number of occasions because of being refused the right to live with her father, Brian C. Middleton, in the Commonwealth of Virginia, U.S.A.

12. Both children, Claire and Nichole, have expressed to you, Sheila J. Middleton, their desire to live with their father, Brian C. Middleton, in the Commonwealth of Virginia, U.S.A.

13. You, Sheila J. Middleton, have lied to Brian C. Middleton about the dates of the school term breaks in order to frustrate his visitation rights and to reduce the children's visitation with their father to a minimum.

14. On Saturday, August 30, 1981, the child, Claire, informed your sister, Linda Watson, by telephone that she wished to remain with her father, Brian C. Middleton, in America and that she did not want her mother to escort her back to England from America.

15. You, Sheila J. Middleton, were present in the home, Flat 6 Ridley Court, when your sister called the children by telephone on Saturday, August 30, 1981.

16. The child, Nichole, informed you, Sheila J. Middleton, in person, on September 2, 1981, at approximately

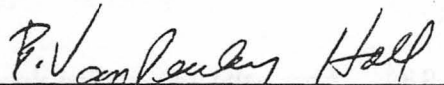
1:00 p.m. that she did not want to leave her father's home and go with you and that she wished to live with her father, Brian C. Middleton, in America.

17. The child, Claire, informed you, Sheila J. Middleton, in person, on September 2, 1981, at approximately 1:00 p.m. that she would only get into the car with you in order to talk and have a drink of coke on the condition that you promise to return her to her father, Brian C. Middleton. You made such a promise to the child numerous times.

18. Monies that the father, Brian C. Middleton, has sent to the children, Claire and Nichole, have been confiscated by you, Sheila J. Middleton, for your personal benefit.

19. Gifts of clothes that the father, Brian C. Middleton, has sent to the children, Claire and Nichole, have routinely been denied to the children and later presented as being bought by you, Sheila J. Middleton.

20. At the time of divorce in 1977, Sheila J. Middleton made a verbal agreement with the father, Brian C. Middleton, that she would allow the children to live with their father in America upon reaching the age of 10 years if the children so desired.


B. VanDenburg Hall
Counsel for Plaintiff
Suite 400 Equity Building
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703)385-8777

Respectfully submitted,

BRIAN C. MIDDLETON
By Counsel

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 1981, I caused to be hand delivered a true copy of the foregoing Request for Admissions to Donald K. Bulter, Esquire, Counsel for Defendant, 526 North Boulevard, Richmond, Virginia 23220.


B. VanDenburg Hall

reckless disregard of the truth or falsity of a statement. Quoting from *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), Judge Orth said:

"These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

[7] Appellants urge strenuously that the failure of the appellees to act in good faith to verify the boundaries of the land which they claimed and in their failure to secure expert opinion as to the validity of their claim is evidence of a reckless disregard for the truth. This contention ignores, however, our holding in *Kapiloff*, *supra*, where we said:

"Although the test for reckless disregard does not avail itself of easy application, one point is clear: mere failure to investigate, in and of itself, is not sufficient evidence under the *New York Times* privilege. . . . Since failure to investigate cannot satisfy the constitutional test of reckless disregard, we cannot perceive how mere failure to seek assistance of educational experts, without more, could satisfy that standard." *Id.* at 543, 343 A.2d at 269.

The trial court found as a fact that there was no abuse of the conditional privilege and we find no plain error in its conclusions. Rule 1086 requires that in a case tried below without a jury that we not set aside a judgment of the lower court on the evidence unless we find the trial court clearly erroneous. We are also required to give due regard to the opportunity of the trial court to judge the credibility of the witnesses. Applying these standards, we find no reversible error.

JUDGMENTS AFFIRMED. COSTS TO BE DIVIDED BETWEEN HORNING AND HARDYS.

Roger HOWARD et al.

v.

James L. GISH.

No. 1017.

Court of Special Appeals of Maryland.

June 13, 1977.

Natural father and maternal grandmother instituted proceedings seeking custody of ten-year-old daughter following death of natural mother, who had been awarded custody on divorce. The Circuit Court for Washington County, Irvine H. Rutledge, J., awarded custody to stepfather, and appeal was taken. The Court of Special Appeals, Menchine, J., held that: (1) where child had resided with natural mother and stepfather in Maryland for no less than 11 months prior to mother's death, the Maryland court had jurisdiction by virtue of the Uniform Child Custody Jurisdiction Act, notwithstanding that divorce was obtained in Georgia and natural father and maternal grandmother continued to reside in that state; (2) chancellor's factual finding was subject to review under the clearly erroneous standard and (3) remand for further proceedings was required in view of substantial unanswered questions as to stepfather's fitness.

Remanded for further proceedings.

1. Parent and Child ⇐2(5)

Where infant had resided with her natural mother and stepfather in Maryland for not less than 11 months prior to mother's death, Maryland was the infant's "home state" within meaning of Uniform Child Custody Jurisdiction Act and, hence, Maryland court had jurisdiction of custody proceeding instituted by natural father and maternal grandmother, notwithstanding

that the natural parents were divorced in Georgia, with Georgia court awarding custody to the mother, or that the natural father and maternal grandmother were Georgia residents (*Berlin v. Berlin*, 239 Md. 52, 210 A.2d 380, and other prior inconsistent cases are no longer controlling). Code 1957, art. 16, §§ 184-207.

See publication Words and Phrases for other judicial constructions and definitions.

2. Parent and Child ⇐ 2(1, 3.1, 3.3)

Right of a parent to the custody of his child will not be enforced inexorably, contrary to the best interest of the child; parental custody may be forfeited where it appears that any parent is unfit to have custody, or where some exceptional circumstances render such custody detrimental to best interest of the child. Code 1957, art. 16, § 184.

3. Infants ⇐ 16.15

Clearly erroneous standard governs review of factual findings in a child custody proceeding; however, factual findings are distinguished from the ultimate conclusion as to custody. Code 1957, art. 16, §§ 184-207; Maryland Rules, Rule 1086.

4. Parent and Child ⇐ 2(20)

Remand of child custody proceeding for further proceedings was required where chancellor dealt most summarily with custody claims of natural father and maternal grandmother and basis for award of custody to stepfather was even more terse and record produced more questions than answers respecting stepfather's fitness and natural father was regularly employed, had purchased a new home and had remarried. Code 1957, art. 16, §§ 184-207.

Robert Paul Phillips, III, Savannah, Ga., and J. Russell Robinson, Hagerstown, for appellants.

R. Noel Spence, Hagerstown, with whom were William C. Wantz and Kaylor & Spence, Hagerstown, on the brief, for appellee.

Argued before GILBERT, C. J., and MORTON and MENCHINE, JJ.

MENCHINE, Judge.

Roger Howard (natural father) and Inez C. Todd (maternal grandmother) appeal to this Court from a decree of the Circuit Court for Washington County, whereby custody of Lori Lynn Howard, age 10 years, was awarded to her stepfather, James L. Gish. The mother of the child had died on May 21, 1976, from injuries sustained when she fell from a horse.

The litigation developed under the following circumstances:

The body of Marcia Todd Gish had been taken to Darien, Georgia for burial. James L. Gish and Lori Lynn went to Georgia on Thursday. The funeral was scheduled for Saturday.

Between Thursday and Saturday, however, discussions took place among the father, grandmother and stepfather with respect to the future custody of the child. As a result, the stepfather and the child left Georgia without notice on Friday at about 10 p. m., prior to the funeral of the mother.

He explained that he had done so, "Because I had every indication and every belief that they was trying to take Lori from me then, they wasn't going to let me bring her back home. And, I had discussed it with Lori and she said to leave." He added that he had left Georgia in such precipitant fashion upon the advise of Georgia counsel.

His petition for custody was filed shortly after his return to Maryland.

The joint answer of the father and grandmother alleged, *inter alia*:

" . . . that petitioner has never been able or willing to support himself or anyone else by steady gainful employment, but has, on the contrary, subsisted largely upon the efforts of others. He is not of proper character to maintain the stability in home life that is requisite in the rearing of a young child; he is no relation to said child and has no standing to demand custody of said child. . . . that they are next and nearest of kin to the minor child, Lori Lynn Howard; that they deep-

ly love said child; that they are jointly and severally physically, financially, and morally capable of rearing and caring for said child; that they jointly and severally desire and are entitled to custody of said child and that the best interests of said child require that custody of said child be awarded to them or to one of them."

The joint brief of the father and maternal grandmother makes the following contentions on appeal:

- I. The Circuit Court for Washington County erred by not dismissing the petition for want of jurisdiction over the subject matter of the litigation in that the legal status of Lori Lynn Howard was dependent upon her domicile and under established . . . [law] domicile is Georgia and not Maryland.
- II. The Court erred in not adhering to the 'continuing jurisdictional rule' under which the court of the state which originally awarded custody retains jurisdiction to redetermine the best interests of the child upon the death of the spouse to whom it had originally awarded custody.
- III. The Court erred in awarding custody of the child to appellee because the evidence did not support a finding of unfitness as to appellants."

I and II

We believe that passage in Maryland of the Uniform Child Custody Jurisdiction Act by Chapter 265 of the Laws of Maryland, 1975, and now codified as Article 16, §§ 184-207, inclusive, (1976 Cumulative Supplement) requires us to discuss contentions I and II together.

The Undisputed Jurisdictional Facts

Lori Lynn Howard was born to the marriage of Roger Howard and Marcie Todd Howard (now deceased) on May 30, 1966, in the State of Georgia. Both parents were natives of that State and were married there in 1962.

After their marriage the Howards lived within voice range of the maternal grandmother's home in Darien, Georgia, from the time of their marriage until their separation in June 1970. The maternal grandmother cared for Lori Lynn during the day because both parents were employed during that period of her life.

The Howards were divorced in Georgia on June 5, 1970, with custody of Lori Lynn awarded by the Georgia court to the mother, Marcia Todd Howard. Mother and daughter lived with the maternal grandmother from June 1970 until three months after Marcia's marriage to James L. Gish on September 15, 1972.

Shortly thereafter the Gishes and Lori Lynn moved to Woodbridge, Virginia, where they resided until June 1975, when they moved to Hagerstown, Maryland. They moved from Hagerstown into rural Washington County, Maryland, in November 1975 and continued to reside there until the tragic death of the mother. The stepfather and Lori Lynn remained there as residents after the mother's death and were in residence there at the time of trial in the lower court.

The Law as to Jurisdiction

By Chapter 265 of the Laws of Maryland, 1975, now codified as Article 16, §§ 184-207, inclusive, Maryland adopted the Uniform Child Custody Jurisdiction Act (the Act).

This case appears to be the first appellate examination of the jurisdictional aspects of the Act. We shall accordingly set forth in full herein the three sections of that Act that relate: (a) to the purposes intended to be served by the legislation (§ 184); (b) to the definitions of words and phrases used in the legislation (§ 185); and (c) to the jurisdictional requisites in child custody cases (§ 186). We believe that those three sections make plain that the State of Maryland has jurisdiction and that the cases indicating Maryland's adherence to the "continuing jurisdictional rule" are, to the extent of

any inconsistency with the statute, no longer controlling authorities.¹

"§ 184. *Purpose and construction of subtitle.*

(a) The general purposes of this subtitle are to:

(1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this State decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) Deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) Avoid relitigation of custody decisions of other states in this State insofar as feasible;

(7) Facilitate the enforcement of custody decrees of other states;

(8) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this State and those of other states concerned with the same child; and

(9) Make uniform the law of those states which enact it.

(b) This subtitle shall be construed to promote the general purposes stated in this section.

"§ 185. *Definitions.*

In this subtitle the following words have the meanings indicated:

(1) '*Contestant*' means a person, including a parent, who claims a right to custody or visitation rights with respect to a child.

(2) '*Custody determination*' means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person.

(3) '*Custody proceeding*' includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings.

(4) '*Decree*' or '*custody decree*' means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree.

(5) '*Home state*' means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period.

(6) '*Initial decree*' means the first custody decree concerning a particular child.

(7) '*Modification decree*' means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court.

(8) '*Physical custody*' means actual possession and control of a child.

(9) '*Person acting as parent*' means a person, other than a parent, who has physical custody of a child and who has

1. See *Berlin v. Berlin*, 239 Md. 52, 57, et seq., 210 A.2d 350, 382 et seq. (1965).

either been awarded custody by a court or claims a right to custody.

(10) 'State' means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia. (1975, ch. 265, § 2.) "§ 186. When court has jurisdiction.

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and

one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody."

[1] Briefly stated, the appellants maintain: (1) that the domicile of the father (Georgia) devolved upon the child by operation of law upon the mother's death and (2) that the decree of the Georgia court awarding custody to the mother was continuing in nature.

From these premises they argue (a) that Georgia, as the domiciliary State of the child, has exclusive jurisdiction with respect to custody and (b) that Georgia should be recognized as having exclusive jurisdiction under the "continuing jurisdiction rule" that Maryland has followed.

As to contention (a), appellants cite *Ross v. Pick*, 199 Md. 341, 86 A.2d 463 (1952) and *Schwartz v. Schwartz*, 26 Md.App. 427, 338 A.2d 386 (1975), cert. denied, 276 Md. 749 (1975), U.S. cert. denied, 423 U.S. 1088, 96 S.Ct. 880, 47 L.Ed.2d 98 (1976).

As to contention (b), appellants cite *Berlin v. Berlin*, 239 Md. 52, 210 A.2d 380 (1965) and *Seidlitz v. Seidlitz*, 23 Md.App. 327, 327 A.2d 779 (1974).

Assuming, without deciding, that in the absence of statute either or both contentions might have validity, we are persuaded that the Circuit Court for Washington County clearly had jurisdiction over custody of the child by reason of the uniform act.

It is quite clear that Maryland was the "Home State" as defined in § 185, *supra*; and that the proceedings below sought a "modification decree" as therein defined.

In view of the undisputed fact that Maryland was the home state of the child at the time of the commencement of the proceedings below and had been such for not less than eleven months prior to the death of the mother, we think the jurisdictional dispute must be resolved against the appellants by reason of § 186 of the Act, *supra*. The Circuit Court for Washington County had jurisdiction.

III

The Award of Custody

In a written opinion, to which was appended the decree awarding custody of the child to James L. Gish, her stepfather, the chancellor dealt almost summarily with the claims to custody made by the father and by the maternal grandmother, being content to say only the following:

"It appears that Mr. Howard, although under an order to pay \$50.00 per month for Lori Ann's [sic] support, has failed to do so, and even failed to communicate. He seems to have his hands full living in a mobile home with a new wife and three stepchildren. The real contest in this case is between the grandmother and the step-father.

"Mrs. Todd is a loving grandmother who owns her own home. She rents out part and has a job as a waitress at a sea-food restaurant. In marital and other difficulties Mrs. Gish and Lori Ann [sic] stayed with Mrs. Todd, but not in the past several years."

The chancellor's brusque rejection of the father, by implication finding him unfit to have the custody of his child, seems based upon the father's failure to support the child. The father had explained the failure was due to a lack of knowledge of the place of residence of the Gishes. We assume this explanation was rejected by the chancellor.

The chancellor's comment that the father "seems to have his hands full living in a mobile home" did not discuss the uncontradicted testimony of the father (a) that he is regularly employed by the Brunswick Pulp and Paper Company; (b) that his gross earnings in 1975 were \$14,454.13; and (c) that he had bought a new four bedroom brick and stucco ranch home into which he² planned to move upon his return to Georgia following the trial below.

The chancellor's expressed basis for the award of custody to the stepfather was even more terse, being limited to the following:

2. The child's father having remarried, the household would include his wife and her three children, aged 11, 14 and 15 years.

"The Court considers the best interests of the child; here the Court finds that her best interests will be served by awarding her custody to her stepfather, the plaintiff, who has shown his concern for her in a number of ways."

[2] We are mindful that the right of a parent to the custody of his child will "not be enforced inexorably, contrary to the best interest of the child," *Ross v. Hoffman*, Md., 372 A.2d 582 [Filed April 25, 1977] but "may be forfeited where it appears that any parent is unfit to have custody of a child, or where some exceptional circumstances render such custody detrimental to the best interest of the child." *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952).

[3] We are mindful also that our review of factual findings of the chancellor are governed by the "clearly erroneous" standard fixed by Maryland Rule 1086 and that "an appellate court cannot set aside factual findings unless they are clearly erroneous." *Davis v. Davis*, Md., 372 A.2d 231, 233 (1977). The Court in *Davis*, *supra*, however, distinguished "factual findings" of the chancellor from the latter's ultimate conclusion as to custody, saying at 233-34:

"... there is some confusion in our cases with respect to the standard of review applicable to the chancellor's ultimate conclusion as to which party should be awarded custody. Notwithstanding some language in our opinions that this conclusion cannot be set aside unless clearly erroneous, see, e.g., *Spencer v. Spencer*, 258 Md. 281, 284, 265 A.2d 755, 756 (1970) (per curiam); *Goldschmiedt v. Goldschmiedt*, 258 Md. 22, 26, 265 A.2d 264, 266 (1970), we believe that because such a conclusion technically is not a matter of fact, the clearly erroneous standard has no applicability. However, we also repudiate the suggestion contained in some of our predecessors' opinions, see e.g., *Melton v. Connolly*, 219 Md. 184, 188,

148 A.2d 387, 389 (1959); *Butler v. Perry*, 210 Md. 332, 339-40, 123 A.2d 453, 456 (1956); *Burns v. Bines*, 189 Md. 157, 164, 55 A.2d 487, 490 (1947); cf. *Ex Parte Frantum*, 214 Md. 100, 105, 133 A.2d 408, 411, cert. denied, 355 U.S. 882, 78 S.Ct. 149, 2 L.Ed.2d 112 (1957) (adoption case), and relied upon by the Court of Special Appeals in *Sullivan v. Auslaender*, 12 Md. App. 1, 3-5, 276 A.2d 698, 700-01 (1971), and its progeny, see, e.g., *Sartoph v. Sartoph*, 31 Md.App. 58, 64 & n. 1, 354 A.2d 467, 471 (1976); *Vernon v. Vernon*, 30 Md.App. 564, 566, 354 A.2d 222, 224 (1976), that appellate courts must exercise their 'own sound judgment' in determining whether the conclusion of the chancellor was the best one. Quite to the contrary, it is within the sound discretion of the chancellor to award custody according to the exigencies of each case, *Miller v. Miller*, 191 Md. 396, 407, 62 A.2d 293, 298 (1948), and as our decisions indicate, a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion."

The Record Below

[4] The chancellor's opinion had declared that he found "that her best interests will be served by awarding her custody to her stepfather, the plaintiff, who has shown his concern for her in a number of ways."

We find appellate evaluation of that conclusion impossible because the record below produces more questions than answers respecting the fitness of Gish to have custody of this ten year old child. The testimony of Gish alone developed the following facts:

James L. Gish, a native of Hagerstown, Maryland, was married to the deceased mother, Marcia Todd Gish, on September 15, 1972, in Darien, Georgia. He had previously been married three times. The first marriage lasted six months with no children born of the marriage. The second marriage lasted between two and three years with

two children, a boy and a girl, born as a result of that marriage. A third marriage lasted three months. No children were born of the third marriage. All three marriages ended in divorces obtained by the wives. Gish explained "it was just a mutual agreement on both parties that we wanted it terminated."

The children of Mr. Gish by his second marriage were four and five years old at the time of the hearing below. Asked whether he had always paid child support on a regular basis, Gish responded "I've always paid child support, but not a regular basis, no. It was easier for me to pay it in lump sums than it was weekly."³ Contradicting that testimony was a subsequent acknowledgment that he had been confined upon charges of non-support "when Marcie and I was ready to go off on our honeymoon."

More disturbing is his acknowledgment that he had not seen his own children for three years, although he explained that "its not because I don't want to." He acknowledged that there had been unsuccessful court proceedings in an effort to see his children that culminated in "a stipulation by the court that I cannot see those kids." He said there was a "court order that prevents [me] from seeing [my] natural children." No explanation appears in the record for the entry of such a stipulation or for the passage of such an order.

Other testimony by a deputy sheriff of Macintosh County, Georgia, where Gish at one time had conducted a service station, was to the effect that the latter's reputation in the community for honesty and integrity wasn't good.

No investigation of any kind was made with respect to the circumstances noted herein. We think some doubt necessarily arises from their recitation as to Gish's fitness to receive custody of the child as against the claims of her natural father and her maternal grandmother. That doubt cries out for resolution.

3. The record fails to reflect any light upon the question whether the mother having custody of those two children would find it easier to re-

ceive her monies in such a feast or famine manner.

In such circumstances, we believe it appropriate to make no judgment at this time upon the ultimate issue but will remand the case without affirmance or reversal for a plenary hearing in which the chancellor in making his determination as to where the best interest of the child lies, should require such investigative report and recommendations and cause the production of such testimony and other evidence as may be necessary for a fair hearing. *Jester v. Jester*, 246 Md. 162, 228 A.2d 829 (1967).

It may be that the chancellor may desire to utilize the authority conferred by § 201 of the Act to request the appropriate court in Georgia "to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this State; and to forward to the court of this State certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties, or, if necessary, ordered paid by the State." Additionally, the chancellor should issue a request for court records and documents from Georgia under the authority of § 204 of the Act; should consider the requisites for modification of an out-of-state decree as required by § 196, and after the plenary hearing, give consideration to the question whether the Maryland court is an inconvenient forum within the meaning of § 189, or justifies declining jurisdiction in Maryland under § 190 of the Act.

REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEE.

Bernard J. COSTER

v.

DEPARTMENT OF PERSONNEL, State
of Maryland, et al.

No. 1100.

Court of Special Appeals of Maryland.

June 14, 1977.

Employee, hired under classified service of Department of Personnel, filed grievance upon termination of his employment as airport operations manager. While grievance procedure was in third step of five-step procedure, employee filed bill of complaint for injunction restraining appellees from terminating his employment pending determination of merits of case. The Circuit Court, No. 2 of Baltimore City, Robert L. Sullivan, Jr., J., entered order dissolving temporary injunction, and employee appealed. The Court of Special Appeals, Moylan, J., held that: (1) where employee, if successful in grievance procedure, would be entitled to reinstatement and full back pay for entire period of separation, which relief would have afforded him as full and complete relief as injunction, employee's allegation of irreparable injury in support of injunction had no foundation and under circumstances this was not case for equity to assume jurisdiction and (2) where allegations of bill of complaint for injunction were accordingly insufficient, there was no requirement that answer be filed before temporary injunction could be dissolved.

Affirmed.

1. Injunction — 14

Court of equity reserves its injunctive process for protection of property or otherwise against actual or threatened injuries of substantial character which cannot be adequately remedied in court of law; that is to say, jurisdiction or power to grant injunctive relief should be exercised only when intervention is essential to effectually



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DEFENDANT'S MEMORANDUM IN SUPPORT
OF PLEA TO THE JURISDICTION

Preliminary Statement

This cause is before the Court on a petition of the plaintiff, Brian Carter Middleton (father), to move the Court to change the custody of the infant children of the parties, Claire M. Middleton, age 12, and Nichole Amie Middleton, age 10, from the defendant, Sheila Joan Middleton (mother), to the father. The mother has filed an answer to this petition denying its material allegations and has also filed a Plea to the Jurisdiction asking that the father's petition be dismissed on the grounds that this Court lacks jurisdiction or that it should decline jurisdiction. The Court heard some evidence on the merits of the case at the hearing on September 22, 1981, and then the Court asked that before further evidence is presented that counsel prepare legal memoranda on the jurisdictional issue raised by the defendant.

Factual Statement

The facts relevant to the jurisdictional issues are not in dispute. In the final decree of divorce entered herein in August, 1977, the father was awarded a decree of divorce on the grounds of a one year separation and custody of the infant children was awarded to the mother. This custody

award was in accordance with a written agreement between the parties dated May 31, 1977.

The children, who have dual Anglo-American citizenship, have resided exclusively and continuously in England with the mother since the separation of the parties in 1974. Since the summer of 1978, the children have spent their summer vacations with the father in the United States by an arrangement made by the parties and in accordance with the agreement and final decree providing for "reasonable rights of visitation."

It was during such a period of visitation in the summer of 1981 that this petition for a change of custody was filed. The mother received notice of these proceedings in the mail on August 25, 1981, and a subsequent phone call to the husband and the failure of the children to arrive at Heathrow Airport at the appointed time confirmed to the mother that the father would not voluntarily return the children to her lawful custody as agreed. Subsequently on September 2, 1981, the mother came to the United States, retrieved the children, and returned with them to their home in England where they are presently enrolled in school.

In his petition for a change in custody, the father alleges that "significant" changes in circumstances have occurred since the Court's award of custody to the mother which affects the general welfare and best interests of the children. Those allegations include promiscuity exposed to the children, the mother's intention to separate the children over the opposition of the children, and attempts on the part of the mother to demean the father in the eyes of the children and to frustrate his visitation rights. These allegations are denied by the mother in her Answer.

The evidence presented by the father to the Court at the hearing on September 21, 1981, reveals that he has remarried and currently resides with his new wife in a condominium in Fairfax County, Virginia where both of them are employed at United Virginia Bank in responsible and lucrative positions. While the children visit with them in their home in the summer, they engage in a variety of activities in the neighborhood, and several people at the hearing testified that they function well and comfortably socialize with the many children as well as adults in the neighborhood. They have taken a vacation with the father and his wife at Nags Head, North Carolina, this past summer and they have been provided with clothing and other amenities. The father seeks a change in custody and intends to have the children live with him and his new wife and to enroll them in the Fairfax County public schools and to have them engage in various other social and athletic activities.

At this stage of the proceedings, the mother has presented no evidence. However, cross examination of the husband and his witnesses reveals that the mother is employed as a teacher's aide at a school in her home town which is also the home town of the father. The mother and the children reside in a three bedroom apartment which was selected by the father for them and which he describes as nice. They attend separate schools there because of the difference in the grade levels and are functioning well. Claire is first in her class and Nichole ranks high, somewhere around third. They also engage in a wide variety of activities including skating, swimming team, gymnastics, drama and church activities. There is no evidence or allegation that there is any physical neglect or mistreatment of the children on the part of the

mother, but rather that the children appear to be well, healthy, and happy.

Subsequent to the return of the children to England, the mother instituted custody proceedings there for the purpose of demonstrating that the English Courts are willing to take jurisdiction over this matter. Certified copies of the English Court documents making the children wards of that Court are attached hereto, and the defendant respectively moves to introduce them as exhibits in this cause.

Legal Argument

The jurisdictional issues before this Court turn on the Uniform Child Custody Jurisdiction Act ("The Act") which, when adopted by Virginia in 1981, made this State among the 45 which thus far have adopted it. The application of the act to a foreign country such as England turns on Code §20-146 which provides that the general policies of The Act extend to the international area. Whether those policies would extend to England would turn on a question of comity, and as matter of a stare decisis, Virginia has recognized its domestic relations laws and procedures as consonant with those in our State. Oehl v. Oehl 221 Va. 618 (1980).

In the Plea to the Jurisdiction and at the hearing on September 22, 1981, counsel for the mother cited authority for the proposition that this court is without jurisdiction to determine the issue of custody by virtue of the guidelines set forth in The Act. Counsel at that time cited and presented to Court a copy of the opinion in Howard v. Gish, 36 Md. App. 419, 373 A. 2d 1280 (1977). Counsel has subsequently found in his research that the opinion in that case is in some respects faulty. This was first recognized by a reading of an article entitled "Interstate Custody: Initial and

Continuing Jurisdiction," Family Law Quarterly, Volume XIV, No. IV, Winter 1981. This authoritative article gives a thorough and clear analysis of the concepts of initial and continuing jurisdiction in custody matters and is authored by Brigitte M. Bodenheimer who was the Reporter for the National Conference of Commissioners on Uniform State Laws which led to the adoption of the Uniform Child Custody Jurisdiction Act in the 45 states. Professor Bodenheimer also served as the United States Delegate to the Hague Conference on Private International Law which framed a Convention on the Civil Aspects of International Child Abduction. A copy of this article is attached hereto for the Court and counsel for the plaintiff and made a part of this memorandum.

This analysis and further research has led counsel for the defendant to conclude that the proper basis for objecting to this Court's jurisdiction is to ask that the Court decline jurisdiction pursuant to VA Code § 20-130 rather than to assert that this Court lacks jurisdiction over this subject matter.

Another clear and complete analysis of the application of The Act where the issue of continuing jurisdiction arises when modification of a custody decree is being sought can be found in William L. v. Michele P., 46 N.Y.S. 2d 477 (1979) where the facts closely parallel those in this case. A copy of that opinion is also attached to and made a part of this memorandum.

In that case, the mother had been awarded custody pursuant to an agreement between the parties and while she was still residing in New York. Subsequently, and with permission of the New York Court, the mother left that state

with the children and her new husband to take up residence in another state. Thereafter she was again divorced, moved to a third state, remarried for a third time, moved to a fourth state and divorced again. The father of the children had been seeing them during the summers of 1976 and 1977, and in the summer of 1978 they were with him for an even longer period in order to avoid exposing the children to the turmoil of the throes of the mother's third divorce. It was during that summer period of visitation that the father filed a petition in the New York Court for a change of custody alleging a material change in circumstances, to-wit, that the mother was unstable as evidenced by her multiple marriages and changes of residence and that the children's wellbeing was being threatened by the conduct of the mother's third husband and the divorce upheaval. The mother, who then resided in Mississippi, objected to the jurisdiction of the New York Court.

In its analysis, the New York Family Court opined that it did have jurisdiction over the dispute by virtue of the criteria set forth in The Act (Va Code § 20-126 A.2.) William L. at page 480. However, the opinion went on to analyze the application of the concept of forum non conveniens (VA Code § 20-130) to the facts before it. William L. at page 481. The Court concluded that it would decline jurisdiction and defer to the Court in Mississippi because:

- (1) That Mississippi was the home state of the children.
- (2) That Mississippi had a closer connection with the children and their family or with the children and one or more contestants, New York having "... had only scant contact with the children since they left the State shortly after the divorce was granted in 1974-a sum total of three summer

visitation periods before the petition was filed." William L.
at page 482;

(3) That substantial evidence was more readily available in Mississippi because of the nature of the husband's allegations. Under the law in New York (as in Virginia), the father would be required to allege and prove that the mother was unfit in order to support a change in custody. Obviously, the sources of such evidence would most likely be located in Mississippi and not in New York.

(4) That there would be a hardship on the mother who had limited financial resources to defend proceedings in New York whereas the father was in somewhat superior economic circumstances and would be more able to bear the expense of defending the case in Mississippi.

(5) That the acts avowed purpose to prevent the evil of retention of the children by one parent after a period of visitation, which in turn invokes subsequent resort to reciprocal tactics by the other parent, would best be served by deferring to the Court in Mississippi. (Note here that on page 484 of the opinion, Note 2, Professor Bodenheimer is cited as the principal draftsman of the Uniform Child Custody Jurisdiction Act and as an authority on the purposes of The Act).

(6) That the security and stability of the free interstate movement of the children would not be promoted if the New York Court exercised jurisdiction, and that the risk of abuse of interstate visitation rights would be drastically reduced if the other state decided the matter, no matter who prevailed.

Each and every one of the foregoing reasons exist in the case at bar, and counsel will only point out that this case has an additional factor that militates for declining

jurisdiction in favor of the English Court. That fact is that the children are physically present in England whereas the children in the New York case were present in New York rather than in Mississippi.

Considering the fact that under Virginia law and The Act, the children's best interests are paramount, counsel would also point out the prospects of the future if this Court were to exercise jurisdiction. If this Court determines that the father should be awarded custody, there is very little, if any, prospect that the mother will be allowed to have the children visit with her in England because the father would constantly be fearful that the mother would try to reciprocate his actions by refusing to return them to the United States. If the English Court makes such a determination, there would be no difficulty in enforcing its decree and enforcing a return of the children to the United States after the conclusion of the period of visitation with the mother. On the other hand, should this Court take jurisdiction and determine that there should not be a change in custody, the mother would always be fearful of allowing the children to return to the United States for visitation with their father. It is obvious from the father's own evidence that the children enjoy these periods of visitation and the mother, contrary to what the father alleges, does not want them to lose contact with him.

Conclusion

Counsel has provided copies of Professor Bodenheimer's article and the New York case because they provide not only support for the defendant's position, but a correct analysis of the Uniform Child Custody Jurisdiction Act. That analysis is based on the remedial purpose of The Act which is to

avoid jurisdictional conflicts over a very serious matter that affects the lives of innocent children. Although not every case can be resolved by the standards set forth in The Act, cases such as this one clearly can be decided by those standards, the purpose of The Act can be served, and the welfare and best interests of the children can be promoted. Accordingly, the defendant respectfully prays that this Court decline jurisdiction and defer to the jurisdiction of the English Court for a determination of the plaintiff's motion for a change in custody.


SHEILA J. MIDDLETON

By 
Of Counsel

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CERTIFICATE

I hereby certify that a true copy of the foregoing Defendant's Memorandum in Support of Plea to the Jurisdiction was mailed, postage prepaid, this 2nd day of October, 1981, to B. VanDenburg Hall, Esq., Suite 400 Equity Building, 4085 Chain Bridge Road, Fairfax, VA 22030, counsel for the plaintiff.


Donald K. Butler

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Deborah J. Smith

Brigitte M. Bodenheimer

SEPTEMBER 27, 1912-JANUARY 7, 1981

*Life is like a breath;
Our days are but a passing shadow.
O teach us how to number them
That we may attain a heart of wisdom.*

Brigitte, our teacher, had such a heart. Her love and respect for people were the cornerstones of her life and work. For this wisdom, she is renowned both here and abroad. As a scholar, Brigitte was blessed with a brilliant mind, a distinguished heir to her distinguished parents—Ernst and Marie Levy. Her insights were swift and sure; her research was impeccable; her writing was always creative and constructive. Never strident, she was an activist, a reformer and a feminist in the best sense of the terms. Her power lay in the force of her ideas, her quiet tenacity, and her sophisticated knowledge of people and institutions. Small wonder that such distinguished colleagues as Professor Olive Stone of England and Professor Wolfram Müller-Freienfels of Germany considered her work to represent the finest in American family law scholarship.

Her writings and reputation reflect much more than her mastery of the law; they are a lasting tribute to her human qualities. Brigitte truly believed in the dignity of the individual and in our capacity to do good. No Pollyanna, she also recognized and accepted human failings and the ways in which we are capable of harming ourselves and others. Yet she was an idealist and optimist, ever ready to find the good.

Brigitte wove together in rare fashion her personal and professional lives. Her father was a distinguished legal scholar, as is Edgar. Her years with him; their children, Peter, Tom and Rosemarie; and the Levy and Blau families were marked with deep personal satisfaction and accomplishment for each family member. Peter's work in physics, Tom's in medicine, and Rosemarie's in English made her

proud. But here, too, it was their personal qualities and the joys that they and her grandchildren shared with her that brought her the greatest happiness. To Edgar, she remarked last week that it is the quality, not the length, of life that matters. All who have known them would agree that their marriage, their family, and their professional lives have been of the finest.

Brigitte turned even her sorrows to good use. In a comment she made to me last summer, she may have revealed something about herself and the many transitions and challenges that marked her years in Germany and this country. She said of another, "Now I know what he is so good and so kind. One must suffer to learn compassion."

Her example has inspired many. A student wrote, "Her courage made me more courageous, her warmth made me more human, her kindness was appreciated and her smile made me glow." Her legacy remains—in her children and grandchildren, her students and friends, and in her work on retirement plans; juvenile and conciliation courts; and adoption, marital property and custody law. She reached her crowning professional achievements during her years here in Davis. Concerned for children whose parents took the law in their own hands, she tackled the problem of child snatching. Her work as Reporter for the National Conference of Commissioners on Uniform State Laws led to a model law now enacted in forty-five states. Rarely has a Uniform Act received such rapid acceptance. As Professor Friedrich Juenger noted yesterday, "Of all the people concerned with conflict of laws, Brigitte is the only one in recent years who actually did something to make things better." With imagination and daring she built a system that decides which court should hear custody matters, provides for cooperation between the courts of different states and countries, and prevents a parent who uproots a child from taking advantage of their new location. Now, decisions once entered are honored elsewhere and parents must resolve their disputes in a way that is best for the child.

This remarkable work prompted Brigitte's choice as U.S. delegate to the Hague Conference on Private International Law, which this fall framed a Convention on the Civil Aspects of International Child Abduction. Her views and her role were central to the proceedings and its final product bears the mark of her expertise. In December, the State Department's Study Committee unanimously recommended that the Department seek this country's ratification of the Conven-

Never one to rest when there was work to be done, Brigitte sought the enactment of a complementary federal bill. How pleased she was to learn last week that Senator Wallop's Parental Kidnapping Prevention Bill was signed into law by the President on December 29th.

Her life was rich, rewarding and full—so full that we used to laugh as we who spent so many hours in offices just across the hall had to make appointments to insure that we would see one another. But she was never too busy to help someone, whether the problem was large or small, legal or personal. She brought true meaning to the words *pro bono publico*—for the public good—and the number of people whom she aided both through her writing and through personal involvement is legion. We who knew this remarkable woman will forever treasure our memories of her gentle humor, her warmth and dignity. Last weekend, I wrote to Brigitte in the hospital, wanting to express my gratitude for the profound meaning that these years together have had for me. Although I wrote for myself, I know that my words carried the feelings of many: I love you, Mother, Friend, Mentor Sister, Colleague.

Our achievements make our lives immortal
Though our span of years on earth be ended.
Love and faith and righteous, steadfast striving
Leave their imprints in the hearts of loved ones.
Brick and stone and steel that gird our structures,
All must crumble, in their time be shattered.
Naught remains of all our pride and vaunting
Save our blessed deeds that are eternal.
When the memories of our dear departed
Spur us on to nobler aspiration,
In our hearts they live enshrined forever,
Though removed from earthly habitation.
When hypocrisy and hate we banish,
When our efforts loose the bonds of evil,
When we feed the hungry, clothe the naked,
Strive for peace, for righteousness and justice—
Yea, 'tis then that we become immortal,
Deathless, timeless, living on in others.

Carol Bruch

Davis, California
January 9, 1981

Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA

BRIGITTE M. BODENHEIMER*

With the recent adoption of the Uniform Child Custody Jurisdiction Act in many new states, raising total enactments to 44,¹ it is necessary once again to bring to mind what the Act was intended to accomplish and how it goes about doing so.²

It will be recalled that for a long time child snatching prior to or after a custody decree was quasi-accepted behavior, somewhere in a no man's land of the law. Legal rules played into the hands of persons engaged in such practices. Child custody could be awarded or modified in any state where the child was physically present, whether or not another state's custody decree had been violated or proceedings were pending or ready to be commenced in the child's home state. Existing custody determinations could be reopened elsewhere and relitigated on the merits, and the child's "best interests" were often assessed differently by a judge in the new state. This state of the law not only encouraged kidnapping and the retention of children after out-of-state visits; it also led to jurisdictional

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1. As of the summer of 1980, jurisdictions without the Uniform Act were: Massachusetts, Mississippi, New Mexico, South Carolina, Texas, West Virginia, the District of Columbia, Puerto Rico, and the territories of the United States. But note that Texas has adopted some important provisions of the Act.

2. See generally Bodenheimer, *Progress under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978 (1977); Foster and Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011 (1977).

competition between several states, keeping the lives of many children in constant turmoil.³

The Act is a remedial law that is designed to eliminate the objectionable features of the prior law. Since it breaks new legal ground, the Act spells out its objectives at some length and exhorts the courts to interpret each of its provisions in light of its remedial purposes.⁴

The UCCJA plugs three major loopholes of the prior law: in the first place, it eliminates jurisdiction based on the physical presence of the child;⁵ second, it prohibits modifications of custody decrees of other states, with very limited exceptions;⁶ and third, it requires summary enforcement of out-of-state custody decrees.⁷

The Act replaces multiple and concurrent interstate jurisdiction with strictly limited jurisdiction. Initial jurisdiction and modification jurisdiction are treated differently. Initial jurisdiction is primarily in the home state of the child; the state where the child lived for six months prior to the proceedings.⁸ Home state jurisdiction is extended for an additional six months if the child has been removed from the state.⁹ Jurisdiction can also be in a state which has a "significant connection" with the child and family; but this jurisdictional test is qualified by the rule against "physical presence" jurisdiction. In other words, presence of the child for a visit or with a snatching parent negates "significant connection" jurisdiction.¹⁰

Jurisdiction to modify an existing custody decree is reserved for the state that rendered the decree. According to Section 14 of the Act, other states "shall not modify" that decree. In other words, they must respect the continuing jurisdiction of the prior state, which is exclusive. Continuing jurisdiction ends only if all the parties and the child have taken up residence in other states, or if the

3. See Prefatory Note to UCCJA, 9 UNIFORM LAWS ANN. 111 (1979); Fleck, *Child Snatching by Parents: What Legal Remedies for "Flee and Plea"?*, 55 CHI.-KENT L. REV. 303 (1979).

4. UCCJA § 1 and Commissioners' Note.

5. UCCJA § 3 (b).

6. UCCJA § 14.

7. UCCJA §§ 13, 15.

8. For a definition of "home state," see UCCJA § 2(5).

9. UCCJA § 3(a)(1).

10. UCCJA §§ 3(a)(2) and 3(b).

state of the decree has declined to exercise its modification jurisdiction.¹¹

These major rules are supplemented and reinforced by provisions relating to informational requirements, emergency jurisdiction, the application of the clean hands doctrine and the inconvenient forum rule, the imposition of costs, and a variety of rules to bring about communication and assistance between the courts of different states. The Act is not reciprocal, that is, recognition and enforcement is due to the custody decree of a non-UCCJA state if that decree "was made under factual circumstances meeting the jurisdictional standards of the Act."¹²

This article will concentrate its attention on the differing rules governing initial jurisdiction and modification jurisdiction, the Act's mechanisms to prevent jurisdictional conflict, and the manner in which these rules and mechanisms have thus far been applied by the courts.

Initial Jurisdiction

A. Pre-Decree Child Snatching

Frequently, children are surreptitiously removed to another state prior to any custody litigation or pending custody proceedings; or they fail to be returned at the end of an agreed upon out-of-state visit prior to litigation. The Uniform Act generally withholds jurisdiction from the state of refuge and confers jurisdiction on the state of the child's former home.

1. LACK OF JURISDICTION OF STATE OF REFUGE

Most of the case law under the Act denies the snatching parent access to a court in the state where the child is surreptitiously taken or detained prior to any custody decree.

In *Marriage of Ben-Yehoshua*,¹³ for example, a mother brought three children to California, ostensibly to visit her mother, but two weeks later filed an action for separation and custody which was subsequently converted to dissolution proceedings. The court held

11. UCCJA § 14 and Commissioners' Note.

12. UCCJA § 13.

13. 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (1979).

that California had no jurisdiction under the UCCJA since the children were merely physically present in the state. The presence of the mother and grandmother in the state did not help to meet the "significant connection" test of jurisdiction since that test requires "maximum rather than minimum contact with the state" and "is intended to limit jurisdiction rather than to proliferate it."¹⁴ Neither did the father's general appearance confer subject matter jurisdiction denied by the Uniform Act.¹⁵

Under similar circumstances, *Bacon v. Bacon*¹⁶ barred a father from access to a court in Michigan. The father had removed his son from California, the state of the matrimonial domicile, while custody proceedings were pending there. Not only was the trial court precluded from exercising jurisdiction because of the pendency of a prior proceeding in another state, the court held, but Michigan completely lacked jurisdiction under the Uniform Act. The boy was merely physically present in the state. The fact that he had been attending school in Michigan for a few months and was living with his father and an aunt did not amount to the "maximum contact" required to satisfy the "significant connection" basis for jurisdiction. Michigan could only have claimed jurisdiction "by exaggerating its minimum contacts," the court said; it added that it will "refuse to distort the intent and plain meaning of the Uniform Child Custody Jurisdiction Act to allow this state's assertion of jurisdiction."¹⁷

The Illinois decision of *Custody of Holman*¹⁸ likewise denied jurisdiction to determine custody in the case of a mother who had surreptitiously brought a child from their home in Texas prior to custody

14. *Id.* at 83, 84 n.3, 85.

15. "The exclusive method of determining subject matter jurisdiction in custody cases . . . is the Uniform Child Custody Jurisdiction Act. The provisions of the Act supersede any contrary decisional and statutory laws. . . . Accordingly, authorities . . . predating the . . . Act are inapposite . . . there is no provision in the Act for jurisdiction to be established by reason of the presence of the parties or by stipulation or consent." *Id.* at 83. Regarding this point of the decision, it should be noted that certain prior criteria for subject matter jurisdiction, such as "personal jurisdiction over the parties engaged in the custody controversy," listed by *Restatement (Second) of Conflict of Laws* § 79(c), have been eliminated by the Uniform Act. *Sherrer v. Sherrer*, 334 U.S. 343 (1948) is not applicable to child custody jurisdiction, directly or by analogy. See Bodenheimer, *Divorce and Child Custody Jurisdiction Don't Always Mix*, THE ADVOCATE, Idaho State Bar, Sept. 1979, p. 2; Bodenheimer, *supra* note 2, at 998-1000; Foster and Freed, *supra* note 2, at 1022-1023. See also *Marriage of Hopson*, 168 Cal. Rptr. 345, 350 Cal. App. (1980).

16. 6 FAM. L. REP. 2709 (Mich. App. 1980).

17. *Id.* at 2710.

18. 77 Ill. App. 3d 732, 396 N.E.2d 331 (1979).

litigation. Although mother and child had been in Illinois for a few months and there were apparently some relatives in the state, "significant connection jurisdiction" was absent in view of the rule against physical presence jurisdiction.

In contrast to these decisions, which carry out the letter and spirit of the Act, *Weinstein v. Weinstein*, another Illinois case, accepted jurisdiction in a pre-decree child-snatching case.¹⁹ The family had moved from Illinois to Montana in 1975. In 1978, the couple agreed that the father would take the children to Illinois for a two-week visit with his parents and then return to Montana to file for divorce. The mother accompanied them to the airport where the father purchased round-trip tickets. One day before the scheduled return to Montana, the father advised the mother that he was remaining in Illinois with the children and would file for divorce there. A few days later the father commenced dissolution and custody proceedings in Illinois. The mother petitioned for the same relief in Montana two days later. The court considered it significant that the Illinois action was filed first.²⁰ However, since there was no legitimate basis for jurisdiction in Illinois, Montana was under no obligation to decline the exercise of its admitted home state jurisdiction.²¹ The court's attempt to justify "significant connection" jurisdiction on the ground of the parties former residence in Illinois, the presence of the grandparents, and the father's intent to remain in Illinois, fall far short of overcoming the rule against "physical presence" jurisdiction. The court also refused to apply the clean hands provision of the Act.

If other courts of the state should follow the *Weinstein* ruling, Illinois might find itself in the position of a haven state for pre litigation child abductors who happen to have relatives in the state and may perhaps count on special consideration as residents of

19. 6 FAM. L. REP. 3075 (Ill. App. 1980). For a similar result, see *Thornlow v. Thornlow*, 576 S.W.2d 697 (Tex. App. 1979) (*cert. denied*, 1980), but this case preceded the adoption of Texas of Section 3 of the UCCJA excluding subject matter jurisdiction based on physical presence of the child.

20. This fact would have relevance only if Illinois had "jurisdiction substantially in conformity with [the] Act." UCCJA § 6(a). See *Vanneck v. Vanneck*, 49 N.Y.2d 602, 427 N.Y.S.2d 735 (1980), discussed in text accompanying notes 43-46.

21. The court criticized the trial courts of both states for failure to communicate with each other pursuant to Section 6 of the Uniform Act. On the question whether Montana would have been obligated to initiate contact with a state that lacked jurisdiction under the Act, see text accompanying notes 47-51, *infra*.

former residents.²² However, other states are likely to withhold recognition from custody decrees rendered under such circumstances because of failure to meet the Act's jurisdictional prerequisites.²³

2. EXTENDED HOME STATE JURISDICTION

In order to deter pre-litigation kidnapping, the UCCJA not only rejects jurisdiction of the state of refuge, but continues home state jurisdiction for six months after the child's removal or retention. That state alone has jurisdiction.²⁴ If the child was visiting out-of-state during the parents' informal separation, the six-month period runs from the failure or refusal to return the child at the appointed time. If the child had no home state, there will often be "significant connection" jurisdiction in the state from which the child was taken.²⁵ That jurisdiction can continue longer than six months after the child's departure.

The best way for the deprived parent to proceed is promptly to institute custody proceedings in the home state after the child's departure or retention. Notice must, of course, be given to the absent parent; but it is not necessary to wait until the whereabouts of that parent and child are known. Efforts to impart notice reasonably calculated to give actual notice suffice.²⁶ The court may order that the notice "include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party."²⁷ This provision is designed to aid the court in obtaining evidence from both sides. If the absent parent does return for a hearing, he or she has the opportunity to explain why the child had been removed²⁸ and to offer other evidence that may convince the court that an award of custody to the

22. Although courts are becoming increasingly conscious of the necessity in custody cases to "counteract this local advantage" (Fry v. Ball, 190 Colo. 28, 544 P.2d 402 (1975)); "to avoid provincialism" (Trujillo v. Trujillo, 378 So. 2d 812 (Fla. App. 1979)); and to resist offering "a home court advantage" (Neal v. Superior Court, 84 Cal. App. 3d 847, 148 Cal. Rptr. 841 (1978)), the unfortunate tendency to favor the local petitioner is still apparent in some decisions. But see *People ex rel. Loeser v. Loeser*, 51 Ill. 2d 567, 283 N.E.2d 884 (1972), note 31 *infra*.

23. See UCCJA § 13; *Van Heren v. Van Heren*, 6 FAM. L. REP. 2076 (N.J. Super. 1979).

24. UCCJA § 3(a)(1).

25. The family may not have lived a full six months in the state.

26. UCCJA §§ 4 and 5 and Commissioners' Notes.

27. UCCJA § 11(b).

28. Some child snatchings are meritorious. A parent may have fled with the children to protect them from violence or other intolerable conditions in the home.

child snatcher is in the best interests of the child.²⁹ If that parent does not appear, his or her chances of gaining custody are slim, unless there is strong evidence that the other parent is unfit. The decree rendered by the court is enforceable in all states which have adopted the Act.

In *Kraft v. District Court*,³⁰ for example, the father had filed for divorce and custody in Nebraska after the mother had left the state with their child. The mother was notified, but failed to participate in the proceedings. The judgment giving custody to the father was held entitled to recognition and enforcement in Colorado.³¹

The Uniform Act provides that a custody decree rendered by a court in a state with subject matter jurisdiction binds all parties who have been duly notified and given an opportunity to be heard. The Act does not require personal jurisdiction over an absent party.³²

3. DELAYED PROCEEDINGS AT HOME: USE OF CLEAN HANDS OR INCONVENIENT FORUM RULE IN STATE OF REFUGE

If the parent who is left behind fails to commence proceedings at home within six months, the state of refuge technically speaking has become the new home state of the child. However, the snatching parent who petitions for an initial custody decree there will often find the doors of the court closed because he or she came to court with "unclean hands,"³³ or because the exercise of jurisdiction would contravene a major purpose of the Act, which is deterrence of "unilateral

29. The removal of the children from the state is one factor among others considered by the courts.

30. 197 Colo. 10, 593 P.2d 321 (1979).

31. To the same effect, see the pre-UCCJA case of *People ex rel. Loeser v. Loeser*, 51 Ill. 2d 567, 283 N.E.2d 884 (1972) (habeas corpus without evidentiary hearing issued to enforce the father's custody under Indiana decree where the mother had removed the child to her parents in Illinois prior to Indiana proceedings).

32. UCCJA § 12. A custody judgment entered *ex parte* without notice is not entitled to recognition by other states under the Act. See *Olson v. Priest*, 193 Colo. 222, 564 P.2d 122 (1977). On the question of personal jurisdiction, see *Bodenheimer and Neeley-Kvarme, Jurisdiction over Child Custody and Adoption after Shaffer and Kulko*, 12 U. CAL. D. L. REV. 229 (1979). Accord, *Developments in the Law—the Constitution and the Family*, 93 HARV. L. REV. 1156, 1246-48 (1980). See also *Goldfarb v. Goldfarb*, 6 FAM. L. REP. 2637 (Ga. 1980) (minimum nexus with child sufficient). *Contra*, *Pasqualone v. Pasqualone*, 6 FAM. L. REP. 2744 (Ohio 1980) but the court intimated that the result would have been different if the entire UCCJA had been adopted by Illinois at the time of the Illinois custody judgment in question. (Only Section 3 of the UCCJA was part of Illinois law at the time.)

33. Under UCCJA § 8(a).

removals of children undertaken to obtain custody awards."³⁴

However, if the new home state should for any reason decide to exercise its jurisdiction nonetheless,³⁵ and the former home state also assumes jurisdiction on the basis of its "significant connection," the potential exists for jurisdictional conflict between two states in initial custody proceedings.³⁶

B. Pendency of Simultaneous Initial Proceedings and the Duty to Communicate

It is possible, as has just been shown, that two states have overlapping jurisdiction at the initial jurisdiction stage. One state may be the child's home state and the other has significant contacts with the child and family. Even at this stage (as distinguished from post-decree proceedings when modification jurisdiction is generally exclusive),³⁷ concurrent jurisdiction should be rare. If "significant connection" jurisdiction will be as restrictively interpreted as the Act demands, especially when a pre-decree abductor seeks custody in the state of refuge,³⁸ jurisdictional conflict would seldom arise. Yet, there are some legitimate instances of overlapping initial jurisdiction. For example, if a family had just moved to a new state and had lived there for exactly six months, there may still be strong ties and important evidence in the state of prior residence to justify significant connection jurisdiction.³⁹

It is a major concern of the Act to ward off the possibility of conflicting custody decrees in two states. To this end, the UCCJA uses a combination of three devices. First, it places an obligation on the parties to inform the court of the pendency of any custody proceeding in another jurisdiction. Second, it requires the courts involved to communicate and consult with each other so that the proceedings will go

34. Under UCCJA § 7(c)(5) in combination with § 1(a)(5). See Cole, *Child Stealing: When to Tell a Judge Not to Exercise Jurisdiction*, 1 FAM. ADVOCATE 34 (Fall 1978).

35. See, e.g., *In re Severn*, 6 FAM. L. REP. 2461 (Colo. App. 1980) (Colorado assumed jurisdiction after father and children had lived there for eight months during the parents' separation. However, it was not clear to the court whether this length of time exceeded the period agreed to by the parties.)

36. *In re Severn*, *id.*, the mother subsequently filed an action in Florida, the former home state of the children.

37. Under Section 14 of the UCCJA the state of the decree has continuing jurisdiction. See part II of this article.

38. See text accompanying notes 13-18, *supra*.

39. However, if there is an element of bad faith involved in returning the children to the former home state, that state may well decline jurisdiction. See, e.g., the facts in *Mort v. Mort*, 365 So. 2d 194 (Fla. App. 1978).

forward in only one, the more appropriate forum; third, if the question is not resolved, it applies the priority-of-filing rule.

1. INFORMATIONAL REQUIREMENT

Section 9 of the Act requires each party to give information under oath on, among other things, any past or pending proceeding concerning the custody of the child involved in the present proceedings. This is an exceedingly important provision since the Act cannot properly operate without this information.⁴⁰ At least one court has held that compliance with this section is jurisdictional, that is, non-compliance voids the entire proceedings.⁴¹

2. THE JUDICIAL DUTY TO COMMUNICATE

In *Vanneck v. Vanneck*⁴² the New York Court of Appeals gave an illuminating interpretation of Section 6 of the UCCJA,⁴³ stressing the importance of interstate judicial communication in an initial custody case with overlapping jurisdiction.

Prior to any litigation, the wife in *Vanneck* took the children from New York to the family's second home in Connecticut and commenced divorce and custody proceedings there. Two weeks later, the husband filed an action in New York seeking the same relief. The trial court in New York issued an injunction restraining the wife from prosecuting the Connecticut action. The court of appeals held the injunction to be inappropriate under the UCCJA. "Given the pendency of the Connecticut action," the court said, the trial court should have been concerned not with the question "whether New York had jurisdiction to determine the custody dispute. . . . Rather, at that stage of the proceeding, the focus of inquiry should have been whether Connecticut was 'exercising jurisdiction substantially in conformity' with [the Uniform Act]."⁴⁴

40. See Frumkes and Elser, *The Uniform Child Custody Jurisdiction Act: The Florida Experience*, 53 FLA. B.J. 684, 686 (1979).

41. *Pasqualone v. Pasqualone*, 6 FAM. L. REP. 2744 (Ohio 1980). See also *Paltrow v. Paltrow*, 37 Md. App. 191, 376 A.2d 1134 (1977); *Moser v. Davis*, 364 So. 2d 521 (Fla. App. 1978).

42. 49 N.Y.2d 602, 427 N.Y.S.2d 735 (1980).

43. Section 6 provides that a court shall not exercise its jurisdiction under the Act "if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this act . . .," and requires that the action be stayed pending communication with the other court concerning the more appropriate forum.

44. 427 N.Y.S.2d at 739.

Since Connecticut's claim to jurisdiction was at least "colorable," considering the children's prior ties with that state,⁴⁵ the court insisted that "a New York court must heed the statutory command to defer adjudicating the dispute and communicate with the foreign court." New York's "unilateral decision to exercise jurisdiction and prevent Connecticut's exercise of jurisdiction is contrary to the avowed purposes of the legislation adopted by both states. Rather than promote cooperation between courts, it fosters the very jurisdictional competition sought to be avoided."⁴⁶

One question remains. Suppose the children in a case similar to *Vanneck* had no previous connection with State X, and the mother had simply run off with them to her parents' home in that state to petition for custody before the father could file his suit in New York. Obviously, State X would have no jurisdiction.⁴⁷ Should that state nevertheless proceed to hear the case, the question is, in the words of the *Vanneck* court, "whether the pendency of proceedings in a forum totally lacking a jurisdictional predicate would mandate that a New York court suspend its action for purposes of communicating with the other court."⁴⁸ *Vanneck* had no need to answer that question and did not do so. But it did point to the UCCJA's strong policy against simultaneous proceedings which might warrant some action.

Considering this policy of the Act together with Section 6 in its entirety,⁴⁹ it seems that the pendency of any simultaneous proceeding may require some communication between the courts. Where one of the courts has no legitimate claim to jurisdiction, the other court would simply point this out and add that any decree emanating from unauthorized proceedings would not be entitled to recognition under the UCCJA.⁵⁰ The Act's mandate to communicate and lend interstate judicial assistance⁵¹ could well encompass an educational effort on the part of a court with greater familiarity with the UCCJA to

45. The court emphasized, however, that significant connection jurisdiction (which Connecticut seemed to claim) requires "maximum rather than minimum contacts with the State" and that "the legislative design to 'limit jurisdiction rather than to proliferate it' must be heeded. *Id.*

46. *Id.*

47. The children's presence with the snatching mother would not suffice. See text accompanying notes 13-18, *supra*.

48. 427 N.Y.S.2d at 739.

49. The duty to communicate is imposed on the courts of both states, regardless of the chronology of filing. See UCCJA § 6(c), last sentence, and Commissioners' Note.

50. See UCCJA § 13.

51. See, e.g., UCCJA § 1(2) and (8).

furnish information to a court in a more recent UCCJA state.

Direct communications between courts by letter or telephone have already resulted in the resolution of jurisdictional questions in a number of reported cases.⁵²

3. THE PRIORITY-OF-FILING RULE

If agreement on jurisdiction is not reached,⁵³ an ultimate conflict between two opposing custody decrees is averted by the priority-of-filing rule of the Act. The second court must yield jurisdiction to the court in which a custody action was pending first.⁵⁴ An action is "pending" under this rule when it is commenced, that is, when it is filed, not when process is served.⁵⁵

Continuing Jurisdiction

A. Background

Under state law preceding the Uniform Act, courts have the power to modify their own custody decrees.⁵⁶ They retain continuing jurisdiction to change their custody or visitation provisions, if circumstances have changed, or, under some laws, if the existing custody arrangement presents a danger to the child.⁵⁷ This jurisdiction continues when the child is absent from the state.⁵⁸

Prior to the Uniform Act, the courts of other states often assumed concurrent jurisdiction to modify a custody decree, if the child happened to be in their territory, without regard to the preexisting and continuing jurisdiction of the state of the original decree. As has been pointed out at the beginning of this article, concurrent jurisdiction in several states to modify an existing custody judgment was a major cause of parental resort to kidnapping to gain a more favorable judg-

52. E.g., *William v. Michele P.*, 99 Misc. 346, 416 N.Y.S.2d 477, 483 (1979); *Paltrow v. Paltrow*, 37 Md. App. 191, 376 A.2d 1134 (1977). Communications between courts take place at the initial jurisdiction stage (under §§ 6 and 7) as well as after a decree (under § 7).

53. Some trial courts were not yet familiar with the communication requirement. Cf. *Webb v. Webb*, 6 FAM. L. REP. 2448 (Ga. 1980).

54. E.g., *Lopez v. District Court*, 6 FAM. L. REP. 2308 (Colo. 1980).

55. *Id.* See also CAL. CODE CIV. PROC. § 1049.

56. See H. CLARK, THE LAW OF DOMESTIC RELATIONS 322-23 (1968).

57. States following Section 409 of the Uniform Marriage and Divorce Act restrict modifications of custody to cases in which the child is endangered in the existing environment and "the harm likely to be caused by a change" is outweighed by the advantage of a modification for the child. See, e.g., *Ehr v. Ehr*, 77 Ill. App. 3d 540, 396 N.E.2d 87 (1979). Some other states restrict modifications as a matter of judicial policy. See Bodenheimer, *Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495 (1975); Bodenheimer, *supra* note 2, at 1012-1014.

58. See CLARK, *supra* note 56.

ment in a new forum. The exercise of concurrent jurisdiction frequently resulted in collisions between the courts of different states which made contradictory custody awards.

Some courts in a new state would express their readiness to recognize the custody decree of the state of continuing jurisdiction as a matter of comity, if not of full faith and credit, but in the same breath they would often take the position that circumstances had changed since the entry of the other state's decree, so that their transfer of custody to the other parent was warranted.⁵⁹

B. *The UCCJA Rule of Exclusive Continuing Jurisdiction*

The UCCJA was designed "to bring some semblance of order into the existing chaos."⁶⁰ In order to do so, the Act had to go further than simply codifying the principle of recognition of out-of-state custody decrees. It had to strengthen the continuing jurisdiction of the state of the initial decree; it had to insulate that jurisdiction from out-of-state interference; in other words, it had to bestow legal effect upon that continuing jurisdiction which operates beyond the state borders.

Accordingly, Section 14 of the UCCJA provides that once "a court of another state has made a custody decree, a court of this state shall not modify that decree." In other words, the continuing jurisdiction of the prior court is exclusive. Other states do not have jurisdiction to modify the decree. They must respect and defer to the prior state's continuing jurisdiction. Section 14 is the key provision which carries out the Act's two objectives of (1) preventing the harm done to children by shifting them from state to state to relitigate custody, and (2) preventing jurisdictional conflict between the states after a custody decree has been rendered.

Some early case law under the UCCJA failed to take cognizance of this major change in the law;⁶¹ but growing numbers of decisions recognize the exclusive jurisdiction of the prior state, enforce and refuse to modify that state's custody decree, and advise petitioners for modification of custody in their courts to seek the desired relief in the

59. See, e.g., Hult, *Temporary Custody under the Uniform Child Custody Jurisdiction Act: Influence Without Modification*, 48 U. COLO. L. REV. 603, 605 (1977).

60. Prefatory Note to UCCJA, 9 UNIFORM LAWS ANN. 114 (1979).

61. Section 14 of the UCCJA was overlooked, for example, in *Wheeler v. District Court*, 186 Colo. 218, 526 P.2d 658 (1974) and *Howard v. Gish*, 36 Md. App. 419, 373 A.2d 1280 (1977).

state of continuing jurisdiction.⁶² Most of these cases involve unsuccessful attempts to gain custody in a new state after kidnapping a child, or retaining a child after a visit, in violation of an out-of-state custody decree.

Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside.⁶³ Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.⁶⁴

Misinterpretations of these essential aspects of the Act have created serious problems which will be discussed in a subsequent part of this article.

C. *Initial Jurisdiction and Modification Jurisdiction Distinguished*

Due to the exclusive nature of continuing jurisdiction, the rules governing modification jurisdiction are markedly different from the rules applicable to initial jurisdiction.⁶⁵

As has been shown, initial jurisdiction is determined primarily by Section 3 of the Act. In the event of a possible overlap of "home state"

62. E.g., *Fry v. Ball*, 190 Colo. 28, 544 P.2d 402 (1975); *Trujillo v. Trujillo*, 378 So. 2d 812 (Fla. App. 1979); *Martin v. Martin*, 45 N.Y.2d 739, 408 N.Y.S.2d 479 (1978); *In re Sagan*, 261 Pa. Super. Ct. 384, 396 A.2d 450 (1978); *In re Lemond*, 6 FAM. L. REP. 2045 (Ind. App. 1979); *Neal v. Superior Court*, 84 Cal. App. 3d 847, 148 Cal. Rptr. 841 (1978); *Pierce v. Pierce*, 6 FAM. L. REP. 2399 (Iowa 1980). California and Washington have added a provision to their Uniform Act to the effect that a petitioner for modification who is turned down pursuant to Section 14 shall be advised by the court "that any petition for modification of custody must be directed to the appropriate court of the other state which has continuing jurisdiction." See CAL. CIV. CODE § 5157(4); 9 UNIFORM LAWS ANN. 13 (1980 Supp.).

63. "The Act does make a state a child's 'home state' if he or she has stayed there for six months. However, that provision has to be read in conjunction with § 14 of the Act, which does not permit modifications by another state as long as the first state's exclusive jurisdiction continues." H. Fain, A.B.A. *Family Law Section Institute*, 5 FAM. L. REP. 2186 (1979). See also UCCJA § 14 and Commissioners' Note; CRAMTON, CURRIE & KAY, *CONFLICT OF LAWS* 845 (2d ed. 1975); *Fry v. Ball*, 190 Colo. 28, 544 P.2d 402, (1975); *Palm v. Superior Court*, 97 Cal. App. 3d 456, 158 Cal. Rptr. 786, 792-3 (1979).

64. See Commissioners' Note to Section 14.

65. "... the decision to exercise concurrent jurisdiction over pending custody proceedings is distinct in a policy sense from the decision to modify an already entered custody decree. The two decisionmaking processes are guided by different rules under the Uniform Child Custody Jurisdiction Act." *Green v. Green*, 87 Mich. App. 706, 276 N.W.2d 472, 476 n.3 (1978).

and "significant contact" jurisdiction, the mechanisms of Sections 6 and 7 take over to prevent or resolve a conflict of jurisdiction between two states. In addition, the discretionary clean hands rule of Section 8(a) is available for cases of pre-decree child snatching.

Modification jurisdiction, on the other hand, is governed primarily by Section 14, reinforced, where necessary, by the stronger clean hands rule of Section 8(b). As the Commissioners' Note to Section 6 states, "once a custody decree has been rendered in one state, jurisdiction is determined by Sections 8 and 14." This means that only one state—the state of continuing jurisdiction—has power to modify the custody decree. Only that state decides whether to decline to exercise of its jurisdiction in any particular case. The rule is clear and simple. There can be no concurrent jurisdiction and no jurisdictional conflict between two states.

D. Three Myths Surrounding Continuing Jurisdiction

Unfortunately, several myths have grown around the continuing jurisdiction rule which, if they persist, could seriously undermine the effectiveness of the Uniform Act. Some courts have overlooked, disregarded, or misread the key provision of Section 14 or have misinterpreted its meaning. They have blurred the essential distinction between initial and continuing jurisdiction.

1. THE MYTH OF CONCURRENT MODIFICATION JURISDICTION

Some decisions proceed on the erroneous assumption that both the state of the original decree and the state where the child subsequently resides for six months have jurisdiction to modify the original decree. They say that there is "significant connection" jurisdiction in the state of the original decree and concurrent "home state" jurisdiction in the new state.⁶⁶

This "concurrent jurisdiction" theory is incompatible with the clear language of the Act. Section 14 is unambiguous: if the state of the original decree has jurisdiction, a court of another state "shall not

modify that decree." In other words, the state of the prior decree alone has jurisdiction to modify its decree. This jurisdiction is exclusive. No other state has authority to hear a petition for modification.

The practical consequences of this myth are by no means negligible. For example, in *Palm v. Superior Court*,⁶⁷ North Dakota was the state of the divorce and initial custody decree. The father remained in North Dakota where the child spent considerable time on visits after the custodial mother and child had moved to California where they lived for several years. A trial court in California assumed jurisdiction to redetermine custody and visitation and ordered the father to dismiss modification proceedings he had instituted in North Dakota. While the California proceedings were pending, North Dakota awarded custody to the father, whereas California was in the process of reaffirming the mother's custody.

In an exceedingly lengthy and involved opinion, the majority of the appellate court declared that both North Dakota and California had jurisdiction.⁶⁸ However, realizing that it was faced with "a classic example of the interstate conflict which the Act was intended to obviate,"⁶⁹ the majority sought ways and means to prevent diametrically opposed decrees. Turning to Section 6 of the Act for a way out of the dilemma, the court concluded that since the dispute had not been resolved by agreement between the courts,⁷⁰ California was obligated to defer to North Dakota where proceedings had been instituted earlier. More or less as an afterthought, in an apparent attempt to bolster its conclusion, the majority of the court ultimately acknowledged that under Section 14 North Dakota had continuing jurisdiction which California should and would respect. The dissent took the position that both states had jurisdiction, and that California, being the home state, rightfully exercised jurisdiction under the circumstances.

In another California case, *Allison v. Superior Court*,⁷¹ the court, without any reference to Section 14 (under which California would have had exclusive jurisdiction), assumed that the children's new

66. E.g., *Schlumpf v. Superior Court*, 79 Cal. App. 3d 892, 145 Cal. Rptr. 190 (1978); *Allison v. Superior Court*, 99 Cal. App. 3d 993, 160 Cal. Rptr. 309 (1979); *Carson v. Carson*, 29 Or. App. 861, 565 P.2d 763 (1977); *Winkelman v. Moses*, 279 N.W.2d 897 (S.D. 1979); *Leighton v. Leighton*, 596 P.2d 8 (Alaska 1979); *Paltrow v. Paltrow*, 37 Md. App. 191, 376 A.2d 1134 (1977). Cf. *Matteson v. Matteson*, 379 So. 2d 677 (Fla. App. 1980); *Webb v. Webb*, 6 FAM. L. REP. 2448 (Ga. 1980).

67. 97 Cal. App. 3d 456, 158 Cal. Rptr. 786 (1979).

68. *Id.* at 790.

69. *Id.* at 788.

70. *Id.* at 792. According to the dissenting opinion, there was one telephone communication between the courts, during which the North Dakota court took the position that it had continuing jurisdiction and would proceed with the case. *Id.* at 794.

71. 99 Cal. App. 3d 993, 160 Cal. Rptr. 309 (1979).

home state of Texas had concurrent jurisdiction. As a consequence, the court had great difficulty in reaching the conclusion, again with the aid of Section 6, that a Texas judgment cutting off the visitation rights of the California parent was not binding on California.

These cases demonstrate the risks and complexities inherent in the "concurrent jurisdiction" myth.

Under Section 14, of course, the answer would have been simple and without the potential for jurisdictional conflict. In *Palm*, North Dakota had exclusive continuing jurisdiction, and in *Allison*, California alone had authority to determine custody and visitation.

Whether either of these states would or should decline to exercise its jurisdiction was up to each state alone to decide.⁷²

As has been stated before, Section 6 regarding simultaneous proceedings is not applicable when one state has continuing jurisdiction. There is no need to go through a conflict-resolving mechanism when there is, or should be, no conflict since jurisdiction of the state of the prior decree is exclusive.⁷³

67 The unnecessary application of Section 6 in continuing-jurisdiction cases has the one advantage of ameliorating some of the detrimental effects of the double-jurisdiction myth. It avoids a clash of jurisdiction. But it encourages a race to the courthouse which Section 14 is intended to prevent.

This partial corrective is unavailable when a new home state alone erroneously assumes jurisdiction. Suppose, for example, that State where the family lived during the marriage, awarded custody of a child to the father, with liberal visitation rights of the mother. Subsequently, the mother moved to State B. By agreement, the child was to spend one school year in State B and then return to the father. As soon as six months of the school year had elapsed, the mother applied for a change of custody in State B. The father challenged that state's jurisdiction. State B, believing in the concurrent jurisdiction myth, proceeded to hear the case and changed custody to the mother. State A, of course, would not recognize the judgment of State B since that

72. In *Palm*, *supra* note 67, if the roles of North Dakota and California had been reversed, California presumably would have declined jurisdiction. The *Palm* majority ultimately concluded that "if the North Dakota trial court makes the wrong decision on whether to stay its proceedings, the appellate court of North Dakota should rectify the mistake. This is not the California trial or reviewing court function." 158 Cal. Rptr. at 793.

73. See Commissioners' Note to UCCJA § 6, last paragraph.

state had no jurisdiction under the Uniform Act.⁷⁴ But the father cannot enforce his custody rights in State B. In this posture of the case, the consequences are not difficult to predict. The father has no recourse but to take the law into his own hands. Kidnappings and counter-kidnappings are the likely result.

This hypothetical case is not atypical. Flexible and long-term visitation rights or similar joint custody arrangements are becoming increasingly common.⁷⁵ The concurrent jurisdiction theory can have disastrous consequences in such cases.

Nor are these consequences necessarily limited to instances when the child stays legally and with permission in another state for six or more months. It is not unthinkable that a state subscribing to the erroneous theory may assume what it believes to be "home state" jurisdiction when a child is kidnapped or retained in violation of a custody decree. The clean hands rule of Section 8(b) should prevent this result in most cases.⁷⁶ But the Act's principal barrier against out-of-state modifications is provided by the exclusive jurisdiction rule of Section 14.

It should be clear from this discussion that the notion of concurrent jurisdiction would turn the wheel back to pre-UCCJA times when "seize and run," forum shopping, and conflicting custody decrees were the order of the day.

2. THE MYTH OF A SIX-MONTH LIMIT ON CONTINUING JURISDICTION

A more extreme view holds that as soon as the child acquires a new home state upon six-month residence, the state of the prior decree loses jurisdiction altogether.⁷⁷

74. State B had no modification jurisdiction under Section 14. The recognition mandate of Section 13 applies solely to custody decrees rendered by a court with jurisdiction under the Act. This essential feature of the UCCJA was overlooked in *Steiner v. Steiner*, 89 Cal. App. 3d 363, 152 Cal. Rptr. 612 (1979) which recognized a Colorado decree modifying a California custody judgment although California's jurisdiction clearly continued.

75. For joint custody cases with interstate aspects, see, e.g., *In re Lemond*, 6 FAM. L. REP. 2045 (Ind. App. 1979); *Bienvenu v. Bienvenu*, 380 So. 2d 1164 (Fla. App. 1980); and *Steiner v. Steiner*, *supra* note 74.

76. See, e.g., *Nehra v. Uhlir*, 43 N.Y.2d 242, 401 N.Y.S.2d 168 (1977). However, the clean hands doctrine is not 100 percent mandatory. See Commissioners' Note to UCCJA § 8(b), and Matter of Marriage of Settle, 276 Or. 759, 556 P.2d 962, 967-69 (1976). But see Marriage of Hopson, 168 Cal. Rptr. 345, 354-55 (Cal. App. 1980).

77. For example, according to *Hegler v. Hegler*, 383 So. 2d 1134, 1136 (Fla. App. 1980), "the fact that the original decree was entered in Florida does not prevent loss of jurisdiction if the children have resided elsewhere for six months." See also *Bienvenu v. Bienvenu*, 380 So. 2d

This misconception, like the concurrent jurisdiction myth, ignores or misinterprets Section 14 of the Act. Moreover, Section 7(c) declares that a court may *decline to exercise* its jurisdiction "if another state is . . . the child's home state." It follows that a state which is not the home state *has* jurisdiction in many situations. A new home state does not automatically acquire jurisdiction. Court action declining continuing jurisdiction is required to vest jurisdiction in a new home state.

Under this second myth, the noxious effects of the concurrent jurisdiction idea are compounded. The state of the custody judgment could lack even concurrent jurisdiction. Jurisdiction would shift whenever the child spent six months in another state, regardless of the circumstances of the move. A kidnapping parent would simply wait six months, perhaps hiding the child during that period, and could then relitigate custody in the new forum. The clean hands rule might not keep the petitioner out of court because, after the imagined loss of jurisdiction of the prior state, there might be no other state that could qualify for jurisdiction.

If such "horribles" have not yet occurred, this is due to the wisdom of the courts, which has thus far kept them from carrying this misconception to its ultimate logical conclusion.

3. THE MYTH OF OBTAINING MODIFICATION JURISDICTION THROUGH LOCAL ESTABLISHMENT OF A CUSTODY JUDGMENT

There seems to be a third myth in the making.⁷⁹ It appears to suggest that a person could simply register an out-of-state custody judgment in another state, establishing it as a local decree, whereupon the new court gains powers of modification. For example, upon moving to a new state with the child, a parent would file the decree with the clerk of the local court and simultaneously petition for elimination of visitation or joint custody rights of the parent who remained in the state of the decree. Or, upon the filing of a decree for purposes of enforcement, the other party would counterclaim to modify the decree.

1164, 1165 n.2 (Fla. App. 1980) indicating that the trial court may have chosen alternating custody rotating every 5- $\frac{1}{2}$ months between Florida and Louisiana to avoid losing jurisdiction through the establishment of another home state. (Alternating custody was disapproved on appeal.) There is similar language in the decisions of other states.

78. This is a conjecture based primarily on conversations with attorneys.

This again is a serious misconception of the provisions and purposes of the UCCJA. Section 15 of the Act permits the filing of a certified copy of another state's custody decree and confers upon that decree intrastate status for one single purpose. That purpose is the speedy enforcement of the out-of-state decree by means of any summary proceedings available in the state of filing. It is clear from the wording of Section 15 that the decree takes on a domestic character exclusively for purposes of enforcement. The Commissioners' Note explains that "the authority to enforce an out-of-state decree does not include the power to modify it. If modification is desired, the petition must be directed to the court which has jurisdiction to modify under Section 14."⁷⁹

In *Brown v. District Court*,⁸⁰ the Supreme Court of Colorado rejected an attempt to circumvent the Act in the described manner. After moving to Colorado from Missouri, a custodial mother filed the foreign custody judgment in Colorado and at the same time sought a termination of the father's visitation rights. Reversing the trial court's order suspending visitation pending a hearing on the merits, the court held that Missouri had continuing jurisdiction pursuant to Section 14 of the Uniform Act and that Colorado had no authority to modify the Missouri judgment.

This result is not affected by the choice of the procedural remedy to enforce an out-of-state decree. A parent seeking enforcement of primary custody rights or of visitation rights under another state's decree may use contempt proceedings or a petition to enforce a foreign judgment, or may bring habeas corpus proceedings.⁸¹ If habeas corpus is employed as a means of summary enforcement under Section 15, the writ does not in such proceedings reopen the custody issue.⁸²

79. Commissioners' Note to UCCJA § 15.

80. 192 Colo. 93, 557 P.2d 384 (1976).

81. In Florida, for example, the proper procedure is by petition to enforce a foreign judgment, but habeas corpus has not been completely ruled out. See Frumkes and Elser, *supra* note 40, at 687. In Oregon contempt proceedings are preferred, but other available methods of enforcement, including habeas corpus, are acceptable. See Butler v. Morgan, 34 Or. App. 393, 578 P.2d 814 (1978).

82. See Barcus v. Barcus, 278 N.W.2d 646, 651 (Iowa 1979) (The effect of the Uniform Act is "to narrow the scope of the habeas corpus inquiry"); Woodhouse v. District Court, 196 Colo. 558, 587 P.2d 1199, 1201 (1978).

E. *Declining the Exercise of Continuing Jurisdiction*

After the custodial parent and child have moved away, the child often returns for visits in the state of continuing jurisdiction. Noncustodial parents at times attempt to misuse this continuing jurisdiction to gain custody for themselves in modification proceedings. In order to avoid any inordinate advantage the resident petitioner might enjoy in the local court, a growing number of courts decline the exercise of their continuing jurisdiction under such circumstances.⁸³ They relinquish their jurisdiction to the new home state of the child under the inconvenient forum provision of Section 7. The noncustodial parent, if he or she believes there to be serious grounds for a change of custody, would then have to seek the desired relief in the state where the child resides.⁸⁴ If a noncustodial parent abducts a child to the state of continuing jurisdiction, naturally even stronger grounds exist for declining jurisdiction.⁸⁵

Some courts have gone so far as to hold that the exercise of continuing jurisdiction is an abuse of discretion once a child has acquired a new home state through residence elsewhere for six or more months.⁸⁶

However, caution is in order before permitting a frequently followed practice to be converted into a hard and fast rule of law which might be mechanically applied. The inconvenient forum rule involves the exercise of sound discretion which must assess the special circumstances of each case. Often the relinquishment of jurisdiction is appropriate or even necessary, but this is not always the case.⁸⁷

In some cases the possible abuse of a visitation period is not involved. In fact, visitation may have been frustrated after the child moved from the state, and the custodial parent is seeking to eliminate or restrict visiting rights in a court of the new home state. In such a situation, the noncustodial parent may well counter with a petition to reaffirm visitation rights or for a change of custody in the state of con-

83. See note 22, *supra*; Bodenheimer, *supra* note 2, at 995-997.

84. E.g., *Moore v. Moore*, 24 Or. App. 673, 546 P.2d 1104 (1976); *Schlumpf v. Superior Court*, 79 Cal. App. 3d 892, 145 Cal. Rptr. 190 (1978); *Williams v. Michelle P.*, 99 Misc. 346, 416 N.Y.S.2d 477 (1979); *Matteson v. Matteson*, 379 So. 2d 677 (Fla. App. 1980). Cf. *Detko/Robert v. Stikelether*, 370 So. 2d 383 (Fla. App. 1979).

85. See *Winkelman v. Moses*, 279 N.W.2d 897 (S.D. 1979).

86. E.g., *Clark v. Superior Court*, 73 Cal. App. 3d 298, 140 Cal. Rptr. 709 (1977); *Bosse v. Superior Court*, 89 Cal. App. 3d 440, 152 Cal. Rptr. 665 (1979).

87. See, e.g., *Hofer v. Agner*, 373 So. 2d 48 (Fla. App. 1979); *Breneman v. Breneman*, 6 P.S. 1, Dec. 2071 (Mich. App. 1979).

tinuing jurisdiction to ward off the loss of all contact with the child. This has occurred in a number of reported cases.⁸⁸ Declining jurisdiction under such circumstances and requiring the noncustodial parent to seek relief in the new home state would be decidedly unfair, especially if that state had already shown an inclination toward terminating visiting rights.⁸⁹

In such a situation, the exercise of continuing jurisdiction would not contravene, but rather serve the purposes of the Uniform Act.⁹⁰ The court could pursue two alternative courses of action. It could assume jurisdiction, but would in most cases deny a change of custody;⁹¹ it would reaffirm visitation rights, with or without a contempt decree; and it would send a copy of the judgment to the other court with a communication pointing out that the Uniform Act requires the enforcement of visitation rights and does not permit their termination contrary to the decree of the court of continuing jurisdiction.⁹² The alternative would be to decline jurisdiction with the proviso that the visitation rights are to be preserved. Under this alternative, jurisdiction would be partially relinquished to permit the question of modification of custody to be settled in the state where the child now lives and where most of the evidence concerning the ongoing care of the child exists. Under both alternatives, the parent who wishes to terminate visitation rights would be required to litigate that issue in the state of continuing jurisdiction where the noncustodial parent lives and where the evidence concerning that parent's home and fitness is found.

88. See *Allison v. Superior Court*, 99 Cal. App. 3d 892, 160 Cal. Rptr. 309 (1979); *Leighton v. Leighton*, 596 P.2d 8 (Alaska 1979); *Bosse v. Superior Court*, 89 Cal. App. 3d 440, 152 Cal. Rptr. 665 (1979); *Webb v. Webb*, 6 FAM. L. REP. 2448 (Ga. 1980).

89. In *Bosse v. Superior Court*, 89 Cal. App. 3d 440, 152 Cal. Rptr. 665 (1979), for example, the custodial mother had left California without notice or forwarding address and had refused innumerable requests concerning the father's visitation rights. After living with the child in Montana for more than two years, the mother commenced proceedings in that state. Since she had custody, the purpose of these proceedings must have been the restriction or termination of the father's visitation rights under the California decree. The court's decision to decline jurisdiction in favor of Montana probably left the father without a remedy. The visitation rights under the California decree were enforceable in Montana under its Uniform Act. See UCCJA § 15 and Commissioners' Note. But once Montana modified the California decree, prior rights are no longer recognized. See UCCJA § 13.

90. UCCJA § 7(c) provides that jurisdiction should be declined if its exercise would contravene any of the purposes of the Act. In the situation under discussion, the fact of declining jurisdiction would contravene the Act's objectives. Frustration of visitation is a well-known cause of child abductions which the Act seeks to deter.

91. Cf. *Hofer v. Agner*, 373 So. 2d 48 (Fla. App. 1979).

92. See UCCJA § 15 and Commissioners' Notes; *Brown v. District Court*, 192 Colo. 93, 557 P.2d 384 (1976).

In view of an apparent increase in attempts to cut off visitation rights in other states, it would seem wise to retain jurisdiction over the issue of visitation, whenever a court declines jurisdiction to modify primary custody rights in favor of a new home state.

F. Termination of Continuing Jurisdiction

As has been pointed out before, exclusive jurisdiction of the state of the custody decree ends when the child and all parties involved have taken up residence in other states.⁹³ Thereafter, jurisdiction to modify is determined, like initial jurisdiction, under the criteria of section 3 of the Act. However, the legal situation differs from initial jurisdiction cases in a number of respects. In the first place, the child already has a custodial parent. Therefore jurisdiction should generally be reserved for the state where the child resides with the custodial parent, whether or not the six-month period for home state jurisdiction has elapsed. The child's visit with the other parent in the state to which that parent has moved constitutes mere physical presence.⁹⁴ Second, the new court "shall give due consideration to the transcript of the record and other documents of all previous proceedings" and shall request such documents from the prior court.⁹⁵ Third, the prior decision is entitled to considerable weight and respect. Modifications require proof of a material change of circumstances and in some states proof of actual danger to the child in the present environment.

To be sure, the termination of continuing jurisdiction of one state is not under the Uniform Act a signal for a race to a new forum which might be inclined to favor the petitioner. If custody is changed by a state where the child is visiting after each parent has moved to a dif-

93. *Marriage of Hopson*, 168 Cal. Rptr. 345, 358 (Cal. App. 1980); UCCJA § 14 and Commissioners' Note. However, in a case involving an agonizing set of facts, the Supreme Court of Oregon held that Indiana's continuing jurisdiction had come to an end when the children had no contact with the custodial father (who remained in Indiana) for twenty months. This was at least in part due to the mother's concealment of the children, but there was also evidence of the father's possible unfitness to have the children's care. *Matter of Marriage of Settle*, 276 Or. 759, 556 P.2d 962 (1976). Since this case was decided, the Uniform Act's mechanisms for interstate communication and cooperation have become operative. A combination of a temporary custody order with the transmittal of information to the other court might bring about the relinquishment of continuing jurisdiction and avoid conflicting decrees. See Hult, *Temporary Custody under the Uniform Child Custody Jurisdiction Act: Influence Without Modification*, 48 COLO. L. REV. 603 (1977).

94. See text accompanying notes 13-18, *supra*.

95. UCCJA §§ 14(b) and 22.

ferent state, the Act is not properly applied.⁹⁶ The opinion has been expressed that continuing jurisdiction endures until the child reaches majority.⁹⁷ Such a rule would certainly have a stabilizing effect, preventing renewed custody warfare and possible conflicts of jurisdiction. The Act as presently written does not go that far. It requires some remaining ties with the state of the prior decree.⁹⁸ However, the prior court would often be justified in assuming jurisdiction as long as the child has not acquired a new home state or for six months after the departure of all persons concerned. Significant contacts with the child and family would in many cases remain for that period of time.

Emergency Jurisdiction

Even though another state properly has initial or continuing jurisdiction under the Act, a court may issue protective orders to safeguard a child who is present in the state in cases of abandonment or emergency situations of mistreatment or abuse.⁹⁹ Attempts have been made to gain access to a court lacking jurisdiction by claiming the existence of an emergency. Generally, courts have been circumspect and have resisted schemes to circumvent the Act in this manner.¹⁰⁰

There are, of course, legitimate occasions for the exercise of emergency jurisdiction. However, this special power to take protective measures does not encompass jurisdiction to make permanent custody determinations or to modify the custody decree of a court with continuing jurisdiction. Emergency jurisdiction confers authority to make temporary orders, including temporary custody for a

96. In an unfortunate case reported by the *Los Angeles Times*, the custodial mother had moved from Florida, the state of the decree, to Tennessee, while the father returned to his former home in Nebraska. When the child visited in Nebraska, the father obtained custody there. After the mother picked up the child, she was prosecuted on felony charges of child stealing. Nebraska had just enacted the Uniform Act at the time. Its assumption of jurisdiction to modify custody on the occasion of the child's physical presence for a visit was not justified. See White, *Parents Seeking Their Children Run Afoul of State Statutes*, L.A. Times, May 18, 1980, at 1, part I-A.

97. O'Flarity, *Detko/Roberts v. Hofer*, 5 FLA. B. FAM. L. NEWSLETTER No. 2 (1979).

98. Jurisdiction is not affected by changes of residence during the proceedings. Jurisdiction under the Act is determined as of the date of commencing initial or modification proceedings. See UCCJA § 3.

99. UCCJA § 3(a)(3).

100. See, e.g., *In re Marriage of Schwander*, 79 Cal. App. 3d 1013, 145 Cal. Rptr. 325 (1978); *Young v. District Court*, 194 Colo. 140, 570 P.2d 249 (1977); *Trujillo v. Trujillo*, 378 So. 2d 812 (Fla. App. 1979); *Martin v. Martin*, 45 N.Y.2d 739, 408 N.Y.S.2d 479 (1978); *Brock v. District Court*, 7 FAM. L. REP. 2035 (Colo. 1980). See also *State in Interest of King*, 310 So. 2d 614 (La. 1975).

limited period of time, pending proceedings in the state with regular jurisdiction under the Act.¹⁰¹

Conclusion

The question has been raised whether the UCCJA is receiving the "interpretation it demands."¹⁰² This article shows that there is a distinct forward movement, a sincere attempt on the part of many courts to implement the Act so as to stop the "guerrilla warfare in child custody litigation"¹⁰³ that has plagued us in the past. But there exists more conflict or potential conflict between courts of different states than the Act envisioned. It is true that all-out collisions between courts are often resolved with the aid of the Act's prescriptions for interstate judicial communication and cooperation. But overlapping jurisdiction in many, if not most, instances should be prevented rather than resolved.

There are two main problem areas. In the first place, pre-litigation child snatchers—perhaps the fastest growing breed—still find it possible at times to get access to a court in a state where grandparents or other relatives live and where the petitioner may have resided in the past. The assumption of jurisdiction under these circumstances violates the basic rule against "physical presence" jurisdiction. The issue of custody is to be settled at home, that is, in the state where the parents lived with the children as a family.

Secondly, once a custody decree has been rendered in one state, it happens that another state assumes jurisdiction to modify the decree. This occurs very rarely today when a child is kidnapped or retained after a short-term visit. Practically all the courts operating under the Uniform Act turn such petitioners down and direct them to seek the desired change of custody in the original court. However, there have been some misunderstandings surrounding the "home state" concept. It has been erroneously assumed, for example, that after a child lives in a state for six months on an extended visit or a

101. For particulars, see *In re Marriage of Schwander and Young v. District Court*, *supra* note 100; *Fry v. Ball*, 190 Colo. 28, 544 P.2d 402 (1975); Fain, *The Interstate Child Custody Problem Revisited*, 16 FAM. L. NEWSLETTER 1, 11 (1975); Bodenhelmer, *supra* note 2, at 990-995; Hult, *supra* note 93.

102. Skoloff, *Will Uniform Child Custody Act Receive Interpretation It Demands?*, NAT'L L.J., Sept. 10, 1979.

103. *Id.*

joint custody arrangement, that state acquires concurrent jurisdiction. This is not the law. The original court has continuing jurisdiction and that jurisdiction is exclusive. In appropriate cases, this court will decline the exercise of its jurisdiction and may relinquish jurisdiction to the new home state, especially if the child has lived there for several years. Unless declined, jurisdiction remains in one single court. This is the Act's major device to prevent conflicts of modification jurisdiction.

In an area of the law where emotions run as high as they do in custody controversies, it is realized that enormous pressures are brought to bear on courts to give a hearing to the person who is in the state with the child. It is symptomatic of this state of affairs that one court declared that it will "refuse to distort the intent and plain meaning of the Uniform Child Custody Jurisdiction Act to allow this state's assertion of jurisdiction."¹⁰⁴ Once the Act is consistently applied and the public knows what to expect, these pressures should be considerably reduced. There is some hope that parental conflict over custody will in the future frequently be resolved by peaceful and non-judicial means. But when the courts must make the decision, it is up to them to hold the line against the tragedies that result from shifting children from state to state in search of a bigger or better "share" of the child.

104. *Bacon v. Bacon*, 6 FAM. L. REP. 2710 (Mich. App. 1980).

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may designate that the respective District Attorneys perform certain duties in relation to the investigation and prosecution of matters within the Special Prosecutor's jurisdiction. Many cases have been transferred from the Special Prosecutor to a District Attorney's Office for full prosecutorial purposes. This, however, is done on a case by case basis and the final decision is within the sole province of the Special Prosecutor. The grant of authority to investigate or prosecute a particular case may take different forms pursuant to the cooperation arrangements between the various offices involved. In order to proceed, after his jurisdiction has been questioned, a District Attorney must evidence that the said authority was granted in some manner.

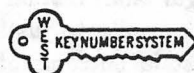
[6] Here, such authority was delegated by the Special Prosecutor's Office to the Queens County District Attorney's Office. Conversations between upper echelon assistants in both offices indicate that the Special Prosecutor did not intend to prosecute and that the District Attorney was to proceed. The District Attorney's contention that no authority was requested because none was necessary, and that none, therefore, could be granted is not the determinative factor. What is determinative is the fact that, as understood by the Special Prosecutor's Office, its discretion was exercised to permit the prosecution of this matter by the District Attorney rather than by its own office. Authority to proceed vested in the District Attorney via such a one-sided discretionary action whether he acknowledged it or not.

The problems in coordinating the prosecution of this matter are apparently based on philosophical differences which have arisen between the prosecutorial offices involved. Proper vehicles for the resolution of those differences and their attendant difficulties exist; but this Court is not the proper forum for that resolution. The integrity and effectiveness of the criminal justice administration in this city require the wholehearted communication and cooperation of its chief law enforcement officials. Failure by any prosecutorial agency (be it a local Dis-

trict Attorney or the Special Prosecutor's office itself) to faithfully and responsibly adhere to the provisions of the Executive Orders in this area may cause it to be subject to an Article 78 proceeding for acting without or in excess of its jurisdiction or even, as an extreme measure, to removal proceedings by the Governor for contravening the intents and purposes of an executive mandate.

This Court finds, therefore, that the Queens County District Attorney's Office is the proper prosecutor in this matter and there is no jurisdictional or legal impediment to the conviction of the defendant. The motion to dismiss is denied.

Discussions concerning the disposition of defendant's other motions for various relief are omitted for the purpose of publication.



99 Misc.2d 346

In the Matter of WILLIAM
L., Petitioner,

v.

MICHELE P., Respondent.

Family Court, Schenectady County.

April 20, 1979.

In a father's action seeking custody of his two daughters, who were present in New York but had previously lived with their mother in Mississippi, the Family Court, Schenectady County, Howard A. Levine, J., held that the court had jurisdiction to entertain the proceeding but would decline to exercise it in view of surrounding circumstances.

Proceeding stayed on conditions.

1. Parent and Child § 2(5)

Statute authorizing court to exercise jurisdiction over child custody dispute when

it is in best interest of child was not to be applied independently, and was insufficient as jurisdictional basis absent proof of both significant connection between the state and either child or one parent and presence within state of substantial evidence concerning child's present or future care, protection, training and personal relationships. Domestic Relations Law §§ 75-d, subd. 1(a-d).

2. Parent and Child ⇐2(18)

New York court may exercise jurisdiction over child custody dispute, even when another state's forum may also satisfy requirements to determine custody, if there are sufficient legal and factual contacts with child and his family to justify legitimate state interest in outcome of dispute, and if sufficient evidence is available upon which court may make fair and well-founded determination of custody based upon best interests of child. Domestic Relations Law §§ 75-d, subd. 1(b, d), 75-h.

3. Divorce ⇐289

Family court located in New York had jurisdiction to determine child custody dispute between father who resided in New York and mother who was resident of Mississippi where marriage had originally been dissolved by New York decree, custody award had been made in New York, father lived in New York, child was present there, and evidence was available there concerning suitability of father and children's condition and preferences. Domestic Relations Law §§ 75-d, subd. 1(b), 75-i, subds. 1, 2.

4. Courts ⇐28

Although family court located in New York had jurisdiction to determine custody of divorced couple's children, it would decline to exercise such jurisdiction where Mississippi, not New York, was children's home state and had closer connection with children and where evidence of mother's fitness, which would be primary issue involved in custody dispute, was primarily located in Mississippi. Domestic Relations Law §§ 75-d, subd. 1(b), 75-i, subds. 1, 2.

Lawrence M. Gordon, Schenectady, for petitioner.

Paul K. Mulligan, Schenectady, for respondent.

Gary O'Connor, Scotia, law guardian.

DECISION

HOWARD A. LEVINE, Judge.

By petition and order to show cause, dated August 25, 1978, the father seeks custody of his two daughters, aged nine and seven. The mother was personally served with the pleadings in Oxford, Mississippi. Thereafter, she appeared in this proceeding, and, pursuant to her request and under the provisions of section 262, Family Court Act, counsel was assigned. She has now moved to dismiss this petition on the grounds that under the Uniform Child Custody Jurisdiction Act, Domestic Relations Law Article 5-A, sections 75-a *et seq.*, (hereinafter referred to as the U.C.C.J.A.) the Family Court of Schenectady County either lacks jurisdiction or should decline to exercise jurisdiction to determine the custody of the children.

Because of some of the factual inquiries required under various jurisdictional provisions of the U.C.C.J.A., by stipulation of the parties a social investigation of both parents was made by appropriate public welfare agencies in Schenectady and Oxford, Mississippi, and a psychological evaluation of the children was performed here by a clinical psychologist. The reports of the investigations and evaluation were made available to the attorneys for the parties, the law guardian and the Court.

Based upon the foregoing reports and the uncontested allegations of the pleadings, it appears the parties were married in 1966 and lived together with the children in Schenectady until they physically separated in 1973. They entered into a formal separation agreement in January, 1974, under which the mother was given custody. The agreement was incorporated but not merged in the divorce decree dissolving the marriage granted in Supreme Court, Schenectady County in March, 1974. The sepa-

ration agreement contained a provision under which the mother agreed not to remove the children from Schenectady without the consent of the father. The mother soon remarried a man who was then in the military service and in August, 1974, she sought and received permission to leave Schenectady with the children to accompany her husband to Texas where he was stationed. That marriage was dissolved in 1975 or 1976 and she then moved to the State of Florida. While there she met and married one James P. In January, 1977, she, James P. and the children moved to Mississippi, where he was attending college. The father resumed contact with the children in Florida in January, 1976, and had them with him for mutually agreed upon periods of visitation in Schenectady during the summers of 1976 and 1977. Serious marital difficulties arose between the mother and her husband in the Spring of 1978, leading to the initiation of a divorce action by her in May, 1978. Apparently in an effort to avoid exposure of the children to the domestic turmoil and particularly to alleged harassing conduct of James P. toward the mother, the parties agreed that the children would start their visitation earlier than usual, after the school year ended in Oxford in May. The father retained the children and then commenced this proceeding to change legal custody.

Jurisdiction

Under traditional principles applied in custody litigation in New York prior to the enactment of the U.C.C.J.A. in 1977, this court clearly would have jurisdiction, either because of the physical presence of the children here, or because a New York court had rendered the original determination in the divorce decree in 1974, and retains continuing modification jurisdiction under section 240 of the Domestic Relations Law. See *Nehra v. Uhlar*, 43 N.Y.2d 242, 401 N.Y.S.2d 168, 372 N.E.2d 4; *Matter of Lang*, 9 A.D.2d 401, 193 N.Y.S.2d 763; *Anonymous v. Anonymous*, 62 Misc.2d 758, 309 N.Y.S.2d 966. Under the U.C.C.J.A., (DRL sec. 75-d(2)) however, physical presence of the child is not alone sufficient to confer jurisdiction.

Section 75-d(1) subparagraphs (a) through (d) set forth four specific alternative factual requisites for the exercise of jurisdiction:

1. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree only when:

(a) This state (i) is the home state of the child at the time of commencement of the custody proceeding, or (ii) had been the child's home state within six months before commencement of such proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(b) it is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is within the jurisdiction of the court substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(c) the child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child; or

(d) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraph (a), (b), or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

The pleadings and the agency reports establish that the children continuously resided in Mississippi from January, 1977 until May, 1978, when they were sent to Schenectady and thereafter retained by the father. The Mississippi welfare agency reported that the mother divorced James P. in August, 1978, and that even before that he

refrained from contact with her after she threatened to have him arrested, and indeed, at the time of the investigation his whereabouts were unknown. Local sources of information indicated to the investigator that apart from their exposure to the earlier marital conflict, the children functioned at least adequately while in the care of the mother and that the mother is presently employed and has adequate housing for the children if they were returned to her custody. The psychologist's report assessed the children as being normal intellectually and as suffering no severe emotional problems.

[1] Therefore, on the basis of the available factual information, the exercise of jurisdiction is not authorized under subparagraph 1(a) of section 75-d, since Mississippi, and not New York, is the home state; nor under subparagraph 1(c) since the children were not abandoned and there is not evidence that they need the immediate emergency protection of this court; nor under subparagraph 1(d), since it appears that Mississippi would have jurisdiction as the home state and has not declined to exercise such jurisdiction. Subparagraph 1(b) however, authorizes this court to exercise jurisdiction when "it is in the best interest of the child that a court of this state assume jurisdiction" because the child and at least one contestant have a "significant connection" here and there is "substantial evidence" here concerning the child's present or future care. Given the general purposes of the U.C.C.J.A., expressed in DRL section 75-b(1), as well as described in such recent interstate custody cases as *Inn v. Inn*, 93 Misc.2d 1110, 404 N.Y.S.2d 511; and *Matter of Anonymous*, 92 Misc.2d 280, 401 N.Y.S.2d 438, namely, to avoid successive and conflicting assumptions of custody jurisdiction by courts, based merely on physical presence of the child and purportedly required by his best interests, the phrase "best interest" in subparagraph 1(b) of section 75-d should not be applied independently and is insufficient as a jurisdictional basis absent proof of both the "significant connection" and "substantial evidence" requirements. This interpretation conforms to the Commissioner's Note to the corresponding sec-

tion of the Uniform Act wherein, in referring to this subparagraph, it is stated that "its purpose is to limit jurisdiction rather than to proliferate it." (9 Uniform Laws Annotated (1973), at p. 108).

Subparagraph 1(b) is the least precise of the alternative jurisdictional bases contained in section 75-d. As pointed out in the Commissioner's Note to the Uniform Act (9 U.L.A. at p. 108), "the paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description." Since subparagraph 1(d) permits the court to accept jurisdiction in the best interests of the child when no other state has jurisdiction under the jurisdictional prerequisites of the act, subparagraph 1(b) presupposes that another state's court may also meet the act's jurisdictional requirements to hear the case. Moreover, the "significant connection" and "substantial evidence" language is to be contrasted with that of the act's *forum non conveniens* provision (DRL sec. 75-h) which authorizes a court having jurisdiction to decline to exercise it based on various factors, including whether another state has a "closer connection" with the child and the contestants, and whether substantial evidence is "more readily available" concerning the child's present or future care.

[2, 3] From the foregoing, it may be inferred that subparagraph 1(b) of section 75-d permits the courts of this state to exercise jurisdiction over a custody dispute, even when another state's forum may also satisfy the requirements to determine custody, if there are sufficient legal and factual contacts with the child and his family to justify a legitimate state interest in the outcome of the dispute, and if sufficient evidence is available upon which a court could make a fair and well-founded determination of custody based upon the best interests of the child. Applying these criteria, I find that here the facts support the jurisdictional prerequisites of subparagraph 1(b). The "significant connection" of this state to the dispute consists of (1) the fact

that the original decree dissolving the marriage of the parties and awarding custody was made in New York; (2) the residence of one of the parents in New York; and (3) the presence of the children in New York. The "substantial evidence" requirement is also met in that evidence is available here concerning the suitability of one of the contestants, i. e., the father, and concerning the children's condition and preferences. The most decisive factor is that New York rendered the original custodial decree. The courts of other states where the Act has been in effect for some time construe it to retain the principle of continuing jurisdiction unless contact with the child has virtually ceased, and even when another state has become the home state. See, *Moore v. Moore*, 24 Or.App. 673, 546 P.2d 1104 (1976); *Smith v. Superior Court*, 68 Cal.App.3d 457, 137 Cal.Rptr. 348 (1977); and *Schlumpf v. Superior Court*, 79 Cal.App.3d 892, 145 Cal. Rptr. 190 (1978).¹

FORUM NON CONVENIENS

[4] DRL section 75-h provides that a court which has jurisdiction to determine custody under the act may nevertheless " . . . decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum." The Commissioners' Note to the corresponding section of the Uniform Act (9 U.L.A. at p. 114) states that it was intended to encourage judicial restraint in exercising jurisdiction "whenever another state appears to be in a better position to determine custody of a child." To implement that purpose section 75-h(3) directs that the court take into account five specific factors "among others", namely whether "(a) another state is or recently was the child's home state; (b) another state has a closer connection with the child and his family or with the child and one or more of the contestants; (c) substantial evidence con-

cerning the child's present or future care . . . is more readily available in another state; (d) the parties have agreed on another forum which is no less appropriate; and (e) the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section seventy-five-b of this article". The same Commissioners' Note further indicates that it was intended as an adaptation of common law *forum non conveniens* principles to the particular problems of child custody litigation and was not intended to exclude considerations customarily applied by courts in deciding whether to decline to exercise jurisdiction, such as convenience of the parties and hardship to the defendant.

Discretionary dismissal in any civil action or proceeding on the grounds of inconvenient forum is expressly sanctioned under Rule 327 of the CPLR, and the courts of this state applied common law principles of *forum non conveniens* even before the rule was incorporated in the CPLR. As stated in *Silver v. Great American Insurance Company*, 29 N.Y.2d 356, at 360, 328 N.Y.S.2d 398 at 402, 278 N.E.2d 619, at 621, the basic inquiry is whether "on balancing the interests and conveniences of the parties and the court, the action could better be adjudicated in another forum." In leading *forum non conveniens* cases the factors that have been considered include the extent of hardship to the defendant in defending the action in New York and the availability elsewhere of a forum in which the plaintiff may obtain effective redress (*Varkonyi v. Varig*, 22 N.Y.2d 333, 292 N.Y.S.2d 670, 239 N.E.2d 542); the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses, and all other practical problems that may make trial of a case easy, expeditious and inexpensive (*Hernandez v. Cali, Inc.*, 32 A.D.2d 192, 301 N.Y.S.2d 397). These criteria are not dissimilar to the questions of home state, comparative connection to the

1. It should be noted that since there was a previous custody decree by a New York court, the provisions of paragraphs 1 and 2 of section

75-i which may bar jurisdiction because of the wrongful conduct of the petitioner, do not apply to the instant case, by their express terms.

dispute and relative availability of evidence expressly to be considered under section 75-h(3). New York courts have applied the doctrine of inconvenient forum in custody cases prior to the effective date of the U.C.C.J.A. See *Anonymous v. Anonymous*, 62 Misc.2d 758, 309 N.Y.S.2d 966; and *Gross v. Kellerman*, 62 A.D.2d 1149, 404 N.Y.S.2d 178.

Upon considering all of the foregoing factors, common law as well as statutory, I have concluded that this court should decline to exercise its jurisdiction to resolve this custody dispute. First, as previously noted, Mississippi and not New York is the home state. Likewise, Mississippi appears to have a "closer connection with the child and his family or with the child and one or more contestants" (DRL 75-h(3)(b); emphasis supplied). The repetition of "child" is apparently intentional and requires a separate analysis of which state has a closer connection with the infant subjects of the proceeding, apart from its connection with the other participants. This is consistent with the emphasis in the entire statute on encouraging a selection of the forum in the optimum position to determine the best interests of the child. While New York and Mississippi each have roughly equal connections with one parent, New York really has had only scant contact with the children since they left the State shortly after the divorce was granted in 1974—a sum total of three summer visitation periods before the petition was filed. Indeed, but for the fact that the original divorce decree awarding custody to the mother was rendered in New York, the contacts between the children and this State clearly would have been weaker support for this court's acceptance of jurisdiction under section 75-d. Mississippi, on the other hand, has been the state of continuous residence of the children since January, 1977. It, and not New York, has the primary *parens patriae* interest, and the more substantial nexus.

To determine in which state the evidence concerning the children's present or future care is more readily available requires a review of the factual issues raised by the pleadings in the light of applicable legal

principles in change-of-custody cases. The substance of the father's allegations is that the children have suffered from the instability of their mother and of their life with her, based upon repeated changes of residences, two unsuccessful marriages and particularly the disruptive atmosphere and risk to their safety arising out of the break up of the mother's marriage to James P. He also alleges that he now offers a more stable family unit and superior physical surroundings. The mother denies that the children were ever in any danger and affirmatively alleges that they have functioned well at home and in school and were well cared for, and that she has a suitable residence for them to live with her. She does not expressly deny her former husband's claim of his own fitness. From the foregoing, it is clear that the crucial contested issues of fact raised by the pleadings are concerned with the quality of care exercised by the mother, her stability and the stability of the children's home life with her and the effect, if any, of these factors on the children. Under New York decisional law, a previous order granting custody to one parent may not be changed absent proof of a change in circumstances demonstrating that the custodial parent is either unfit or less fit than at the time of the original decree. See *Obey v. Degling*, 37 N.Y.2d 763, 375 N.Y.S.2d 91, 337 N.E.2d 601; *Ebert v. Ebert*, 38 N.Y.2d 700, 382 N.Y.S.2d 472, 346 N.E.2d 240; *Dintruff v. McGreevy*, 34 N.Y.2d 887, 359 N.Y.S.2d 281, 316 N.E.2d 716; and *Feldman v. Feldman*, 45 A.D.2d 320, 358 N.Y.S.2d 507. Research discloses that under Mississippi law, before a custody order may be changed, proof also is required of a change in circumstances either actually or probably, adversely affecting the child's welfare. See *O'Neal v. Warden*, 345 So.2d 610 (Miss.Sup.Ct.1977); *Pike v. Pike*, 317 So.2d 897 (Miss.Sup.Ct. 1975); and *Brocato v. Walker*, 220 So.2d 340 (Miss.Sup.Ct.1969). Therefore, whether this proceeding is litigated in New York or in Mississippi, the critical inquiry will be concerned with the care, conduct and parental ability of the mother, and whether any defi-

ciencies have had an actually or potentially harmful effect on the welfare of the children. The sources of evidence with respect to these issues are most likely to be located in Mississippi, and not in New York.

The hardship on the mother if compelled to defend this proceeding here, and the availability of an appropriate alternative forum for the father, have also been considered. Either party will suffer some degree of inconvenience and expense if forced to litigate the issue of custody in the state of the other party's residence. The welfare agency reports submitted to the court lead to the inference, however, that the father is in at least somewhat superior economic circumstances than the mother. It is true that the father has stipulated that in the event that jurisdiction over this proceeding is retained in this court, he will pay for the traveling expenses of the mother to permit her to attend and participate in the trial here. That stipulation, however, could not be construed to extend to the expense entailed in securing the attendance of Mississippi witnesses on the threshold issue of the mother's fitness and the quality of the children's lives in Mississippi, and it is precisely those witnesses whose direct oral and demeanor evidence would be of most benefit to the court in making an appropriate decision on custody. Therefore, it appears that the hardship and prejudice to the mother in defending this proceeding in New York would be greater than there would be to the father in prosecuting the proceeding in the appropriate court in Mississippi. In attempting to assess the availability of an alternative forum where the father could obtain substantially equivalent relief, I have heeded the policies enunciated under the act concerning the promotion of interstate cooperation and exchange of information between courts (sec. 75-b(1)(b) and (h)), by addressing an inquiry to the Honorable William H. Anderson, Chancery Judge of Lafayette County, Mississippi, which encompasses Oxford, concerning procedures in custody matters in that court and the condition of its trial calendar. His written reply will be annexed to the original copy of this decision and to the copies transmitted to

counsel. It indicates that the Chancery Court would have jurisdiction over this proceeding if it were initiated in Mississippi; that there are procedures available in the Chancery Court to obtain the testimony of out-of-state witnesses by deposition, and to enter and introduce such depositions in evidence; that this proceeding could be heard at a May, 1979, trial term commencing on the fourth Monday in May; and that because a trial preference is accorded child custody cases in the court, in the event that the case is not ready for trial at the May term, it could be heard at a subsequent vacation term. Therefore, a Mississippi forum is readily accessible and available to the father for the trial of this matter under comparable procedural and similar substantive rules. Thus, these additional criteria applied generally when *forum non conveniens* is in issue also support the conclusion that Mississippi is the more appropriate forum.

Finally, section 75-h requires the court to consider on the question of inconvenient forum whether the exercise of jurisdiction by this court would contravene any of the purposes of the act. Among the purposes outlined in section 75-b(1) are included the objectives to "avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;" and to "discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child." The Commissioners' Prefatory Note to the Uniform Act points out that one of the evils addressed by the statute is the deleterious effect on children of being subjected to repeated disruptions in custodial care when courts of several different states assume the authority to modify previous custody determinations on the basis of the presence of the child within the jurisdiction, as the result of "child snatching" or retention by one parent after a period of visitation, which in turn invokes subsequent resort to reciprocal tactics by

the other parent. The particular problem of custodial insecurity in the interstate visitation context existing in the absence of the Uniform Act was noted in an article² by the principal draftsman of the Uniform Act: "A child who visits a non-custodial parent in a state not governed by the Act cannot be certain of returning home, for a court of the visited state may transfer custody. This very real possibility places 'a premium on the abuse of the right of visitation and make[s] it difficult for parties to agree on the free movement of the child from one parent to the other.' The Uniform Act eliminates the incentive for such practices."³

The security and stability of the free interstate movement of the children in this case between their parents for purposes of visitation will not be promoted if this court exercises jurisdiction, particularly if the father is successful in gaining his objective of a change in custody. In such an event, since there is nothing whatsoever in the record thus far to contraindicate it, in all likelihood visitation rights would be granted the mother. Mississippi, according to the advice of Chancery Judge Anderson, has not enacted the U.C.C.J.A. Therefore, if visitation at the mother's home was ordered and took place, under the customary jurisdictional principles previously discussed, there would be nothing to prevent a Mississippi court from entertaining an application to reopen the issue of custody. And each successive scheduled visit would be preceded by the anxiety of both custodial parent and children that it will be the occasion for retention of the children and a resort to the Mississippi courts to once again change custody. Moreover, given the apparent financial circumstances of the mother, there are no conditions which this court could impose to prevent that threat, such as requiring that visitation take place in New York or that she post security, which would not have the concomitant effect of terminating

or at the least drastically curtailing contact between mother and daughters.

It needs no elaborate explanation to demonstrate that the risks of abuse of interstate visitation rights are drastically reduced if this custody application is decided by the Mississippi courts, whichever party ultimately succeeds. If custody is retained in the mother, she will have reasonable assurance of this court's adherence to its decision not to exercise custody jurisdiction during a visitation in New York. On the other hand, if custody is awarded to the father by the Mississippi court, on a subsequent visitation in that State, he can place additional reliance on the Mississippi courts' enunciated policy against modification of their previous custody decrees except upon a strong showing of a change in circumstances adversely affecting the children's welfare.

For all the foregoing reasons, I have concluded that this court should decline to exercise jurisdiction over this proceeding on the ground that it is an inconvenient forum under section 75-h, and should stay further proceedings on various conditions which will be set forth below. This determination conforms to the prevailing case law in other states which have enacted the Uniform Act, where courts have declined to exercise their continuing jurisdiction over their own prior custody decrees when the custodial parent has moved to another state with the children and the children are present in the original state for visitation only. See *Kern v. Kern*, 87 Cal.App.3d 402, 150 Cal.Rptr. 860, 5 Family Law Reporter 2170 (dec. Dec. 18, 1978); *Moore v. Moore*, 24 Or.App. 673, 546 P.2d 1104, *supra*; *Clark v. Superior Court*, 73 Cal.App.3d 298, 140 Cal.Rptr. 709 (1977); *Schlumpf v. Superior Court*, 79 Cal.App.3d 892, 145 Cal.Rptr. 190, *supra*; and *Turley v. Griffin*, 508 S.W.2d 764 (Ky.1974).

RETROACTIVITY

Although not raised by the parties, some reference to the issue of retroactivity may

2. Bodenheimer, "Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications", 65 California Law Review 978 (1977).

3. *Id.* at pp. 985-986.

be required because of the recent decision in *Pitrowski v. Pitrowski*, 97 Misc.2d 755, 412 N.Y.S.2d 316 (Supreme Court, Nassau County). There the court held that the U.C.C.J.A. could not be applied to an already pending custody proceeding in order to validate jurisdiction nonexistent before the act's effective date, on a theory of relation back. *Pitrowski* is readily distinguishable even though the instant proceeding was commenced some six days before the effective date of the U.C.C.J.A. As previously discussed, the jurisdictional issue would be resolved the same whether before or after the enactment of the U.C.C.J.A. The determinative issue of *forum non conveniens* under section 75-h, however, deals with a discretionary procedural device to limit, not expand, the exercise of jurisdiction by the court, in deference to a more appropriate out-of-state tribunal. The general rule is that a new procedural statute will be applied in already pending actions to any procedural steps taking place subsequent to the act's effective date, in the absence of clear contrary legislative intent (See McKinney's Cons.Laws of N.Y., Book 1, Statutes, Section 55). Even in instances of substantive statutory changes in child welfare-related matters, the law "as it exists today" has been applied to cases pending before the new enactment. (*Matter of Ray A.M.*, 37 N.Y.2d 619, 622, 376 N.Y.S.2d 431, 433, 339 N.E.2d 135, 137). Moreover, well before the effective date of the U.C.C.J.A. it has been repeatedly held that the policies of the act reflect the recent common law of New York. See, *Nehra v. Uhlar*, 43 N.Y.2d *supra*, at pp. 249-251, 401 N.Y.S.2d at pp. 171-173, 372 N.E.2d at pp. 7-8; *Martin v. Martin*, 45 N.Y.2d 739, 742, 408 N.Y.S.2d 479, 481, 380 N.E.2d 305, 307; *Gross v. Kellerman*, *supra*, 62 A.D.2d at p. 1151, 404 N.Y.S.2d at p. 180; *Matter of Anonymous*, *supra*, 92 Misc.2d at p. 283, 401 N.Y.S.2d at p. 439 and *Inn v. Inn*, *supra*, 93 Misc.2d at p. 1115, 404 N.Y.S.2d at p. 514. And, as previously discussed, *forum non conveniens* has been a part of New York procedural law long before the enactment of the U.C.C.J.A., and its principles have been applied by New York courts to decline

jurisdiction in interstate custody matters either expressly or under the doctrine of comity (*Matter of Lang*, *supra*). In short, no impermissible retroactive effect is being given to the U.C.C.J.A. by dismissal here on the basis of inconvenient forum, either because such dismissal merely involves the application of a procedural statute to an already pending case, or because the U.C.C.J.A. substantially reflects the law existing before its effective date.

For the foregoing reasons, the instant proceeding is stayed on the following conditions:

1. That the mother stipulate her consent and submission to the jurisdiction of the Chancery Court of Lafayette County, Mississippi in any proceeding brought by the father for the same or similar relief.
2. That the mother further stipulate that in any such proceeding, the report of caseworker K. M. Gill, of the Child Welfare Division of the Schenectady County Department of Social Services and the reports of Dr. Thomas DiCiurcio, previously submitted to this court, may be admitted into evidence, subject to the right of either party to take the testimony of the authors of the reports in Schenectady by oral depositions, which depositions shall also be admissible in evidence.

This court will retain jurisdiction to direct and supervise the return of the children to the custody of their mother which will take place not later than June 23, 1979, the approximate date of the end of the school year, and may take place earlier upon application of either party or at the request of the Chancery Court of Lafayette County, Mississippi, if their presence is deemed necessary in connection with any pending custody proceeding in that court. Upon satisfactory showing of compliance with the foregoing conditions, and the return of the children to their mother, this proceeding will be dismissed.



GREAT BRITAIN AND NORTHERN IRELAND)
LONDON, ENGLAND) ss.
EMBASSY OF THE UNITED STATES OF AMERICA)

I, **JOYCE A. DE SHAZO** Vice Consul of the United States of
America residing at London, England, duly commissioned and qualified,
do hereby certify that

KEITH FRANCIS CROFT BAKER

whose signature and official seal are respectively subscribed and
affixed to the annexed certificate, was on the date of signing
thereof a Notary Public at London, England, duly authorized to
perform notarial acts, duly appointed and qualified, to whose
official acts faith and credit are due; that I have compared the
signature of said

KEITH FRANCIS CROFT BAKER

on the annexed certificate with a specimen of his signature filed
in this Embassy; that I believe his signature to be genuine; that
I have compared the impression of the seal affixed thereto with a
specimen thereof filed in this Embassy, and that I believe the
impression of the seal upon the said original annexed certificate
to be genuine.

IN WITNESS WHEREOF I have hereunto
set my hand and affixed the seal of
the Consular Service of the United
States of America at London, England,
this ~~seventeenth~~ day of September
in the year of Our Lord one thousand
nine hundred and *Eighty-One*

Joyce A. De Shazo
JOYCE A. DE SHAZO

Vice Consul of the United States of
America at London, England.

~~Service Receipt No.~~

~~Tariff Item No.~~

~~Fee: \$2.50 -~~

~~No prescribed fee.~~

LND/119
Feb, 77

JOHN VENN & SONS.

Public Notaries
and
Translators

IMPERIAL HOUSE,
15/19, KINGSWAY,
LONDON, WC2B 6UU.

KEITH F. C. BAKER
Consultants
ALAN WALMSLEY
BRIDGET M. ELLISON

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, KEITH FRANCIS CROFT BAKER, of the City of London,
Notary Public by Royal Authority, duly admitted and sworn,
undersigned, DO HEREBY CERTIFY and ATTEST THAT the
photostatic copies hereunto annexed under my Official
Seal are true, faithful and exact copies of their

originals which have been duly produced to me, I the said Notary, having caused such
photostatic copies to be carefully read over, examined and compared with the said produced
originals, when the same were found to correspond and agree exactly therewith; AND THAT
faith and credit may and ought to be given to the said copies in Courts of Judicature
and elsewhere.

IN FAITH AND TESTIMONY WHEREOF

I have hereunto set my hand and affixed my said Official
Seal to serve and avail where needful.

DATED IN LONDON, this sixteenth day of September One
thousand nine hundred and eighty-one.



File Number Slip

Principal Registry of the Family Division
Somerset House, Strand, London WC2R 1LP

FILE NO. *WG 621* OF 19 *81*

In the matter of *Middleton (2 minors)*
and in the matter of the Law Reform (Miscellaneous Provisions) Act 1949
and in the matter of the Guardianship of Minors Acts 1971 and 1973 (*where appropriate*)

Between *S J Middleton* ~~Applicant~~ Plaintiff
and *B.C Middleton* ~~Respondent~~ Defendant

~~This application~~ originating summons

was lodged on the *4* day of *Sept* 19 *81*

and has been given the number shown above which must be endorsed
on all documents filed in the Registry.

Dated the *4* day of *Sept* 19 *81*

R.L.BAYNE-POWELL

Registrar

Address all communications for the Court to the Principal Registry of the Family Division (CD) Somerset House, Strand, London WC2R 1LP quoting the file number shown on this form. The Registry is open from 10 a.m. till 4.30 p.m. on Mondays to Fridays.

D. 265

to the Plaintiff and his/her solicitor

A copy of the appended notice should be served on the defendant (or, where the defendant is a minor, on the person on whom the originating summons is served) with the originating summons, the original being produced at the time of service. A copy may also be served on any other person who should be made aware that the minor is a ward of court.

Wherever the age and situation of the minor are such that he or she may be in need of advice and assistance a copy of this notice should also be served on him or her, whether or not he or she is the defendant.



No. W4 621 of 19 81

Principal Registry of the Family Division
Somerset House Strand London WC2R 1LP

TAKE NOTICE that Nicole AMIE MIDDLETON (minor)

became a Ward of Court on 4th September 1981 pursuant to the provisions of Section 9 (2) of the Law Reform (Miscellaneous Provisions) Act 1949.

Without the leave of the Court a Ward of Court may not marry or go outside England and Wales nor should there be any material change in the arrangements for his or her welfare, care and control or education without such leave.

Where necessary, a guardian (probably the Official Solicitor) will be appointed to present the Ward's views to the Court and give any necessary assistance. If the Ward is in doubt about what to do, he or she may approach the Official Solicitor, 48/49 Chancery Lane, London WC2A 1JR (Telephone number 01-405 7641 Extension 3088), who will give advice pending the formal appointment of a guardian.

L. Baye - Powell

Registrar

To the Plaintiff and his/her solicitor

A copy of the appended notice should be served on the defendant (or, where the defendant is a minor, on the person on whom the originating summons is served) with the originating summons, the original being produced at the time of service. A copy may also be served on any other person who should be made aware that the minor is a ward of court.

Wherever the age and situation of the minor are such that he or she may be in need of advice and assistance a copy of this notice should also be served on him or her, whether or not he or she is the defendant.



No. W4621 of 1981

Principal Registry of the Family Division
Somerset House Strand London WC2R 1LP

TAKE NOTICE that *Claire Michelle MIDDLETON (Minor)*

became a Ward of Court on *4 September 1981* pursuant to the provisions of Section 9 (2) of the Law Reform (Miscellaneous Provisions) Act 1949.

Without the leave of the Court a Ward of Court may not marry or go outside England and Wales nor should there be any material change in the arrangements for his or her welfare, care and control or education without such leave.

Where necessary, a guardian (probably the Official Solicitor) will be appointed to present the Ward's views to the Court and give any necessary assistance. If the Ward is in doubt about what to do, he or she may approach the Official Solicitor, 48/49 Chancery Lane, London WC2A 1JR (Telephone number 01-405 7641 Extension 3088), who will give advice pending the formal appointment of a guardian.

J L Bayne - Powell

Registrar

Originating Summons (Wardship/Guardianship)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. of

Matter **WG 621/81**

(1) Complete
and/or delete as
appropriate.

Principal/~~District Registry~~(*)

NOT FOR SERVICE OUT
OF JURISDICTION

IN THE MATTER of

CLAIRE MICHELLE MIDDLETON and NICOLE AMIE MIDDLETON

Minor^s

And in the matter of the Law Reform (Miscellaneous Provisions)
Act 1949

(2) And in the matter of the Guardianship of Minors Acts
1971 and 1973

Between

SHEILA JOAN MIDDLETON

Plaintiff

and

BRIAN CARTER MIDDLETON

Defendant

To BRIAN CARTER MIDDLETON

of 4463 Edan Mae Court, Annandale Virginia 22003

IMPORTANT NOTICE: It is a contempt of Court, which may
be punished by imprisonment, to take any child named in this
summons out of England and Wales even to Scotland, Northern
Ireland, the Republic of Ireland, the Channel Islands or the
Isle of Man, without the leave of the Court

(3) Delete as
appropriate.

Let the Defendant, within 14 days after service of this Summons on
him, counting the day of service, return the accompanying
Acknowledgment of Service to (3) [the Principal Registry of the
Family Division]~~[the~~ ~~District Registry of~~

~~the High Court]~~

By this Summons, which is issued on the application of the Plaintiff,
Sheila Joan Middleton

of Flat 6, Ridley Court, Norton, Cleveland, England

the Plaintiff claim(s) against the Defendant

that her daughters Claire Michelle Middleton and Nicole Amie Middleton be made Wards of Court and that she be granted care and control of the said minors.

(4) On a wardship application state the present whereabouts of the minor(s) or that the Plaintiff is unaware of the whereabouts of the minor(s).

(4) The present whereabouts of the minor s are
Flat 6, Ridley Court, Norton, Cleveland, England

(5) On a wardship application state, if possible, the date of birth of each minor.

A certified copy of the birth certificate (or entry in the Adopted Children Register) must be lodged in the registry on issuing the Summons or before or at the first hearing, or directions must be obtained at the first hearing as to the manner of proof of birth.

(5) The minor Claire Michelle Middleton was born on 4th September 1969

The Minor Nichole Amie Middleton was born on the 9th September 1971
If the Defendant does not acknowledge service, such judgment may be given or order made against or in relation to him as the Court may think just and expedient.

Dated the 4th day of September 19 71

NOTE.—*This Summons may not be served later than 12 calendar months beginning with the above date unless renewed by order of the Court.*

This Summons was taken out by

Robinson & Co., 29 Great Queen Street, London WC2B 5BB

Agents for: Messrs J. R. Waite and Alsop, 11 Duke Street
Darlington, Co. Durham, DL3 7RY.

Solicitor sfor the said Plaintiff whose address is as stated above.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

(6) Delete the whole of this notice if the application is made solely under the Guardianship of Minors Acts 1971 and 1973.

(6) TO THE DEFENDANT(S) (other than the minor)

TAKE NOTICE that, pursuant to Order 90, rule 3 (5) and (6) of the Rules of the Supreme Court—

- (1) you must forthwith after being served with this Summons lodge in the above-mentioned Registry a notice stating your address and the whereabouts of the minor (or if it be the case, that you are unaware of the minor's whereabouts) and, unless the Court otherwise directs, you must serve a copy of such notice on the plaintiff; and
- (2) if you subsequently change your address or become aware of any change in the minor's whereabouts you must, unless the Court otherwise directs, lodge in the above-mentioned Registry notice of your new address or of the new whereabouts of the minor, as the case may be, and serve a copy of such notice on the plaintiff.

(7) If the matter is proceeding in a District Registry, substitute the address of that Registry.

Any notice required to be lodged in the above-mentioned Registry should be sent or delivered to ⁽⁷⁾ the Principal Clerk (CD), Principal Registry of the Family Division, Somerset House, Strand, London WC2R 1LP.

No. of Matter
In the High Court of Justice
FAMILY DIVISION
PRINCIPAL/DISTRICT REGISTRY

IN THE MATTER OF

CLAIRE MICHELLE MIDDLETON and
NICOLE AMIE MIDDLETON

Minors

Originating Summons

Robinson & Co.,
29 Great Queen Street,
London WC2B 5BB

Agents for J.R.Waite & Alsop,
11 Duke St. Solicitors for the Plaintiff
Darlington, Co.Durham
Ref: S/3/Middleton.

Oyez Publishing Limited, Norwich House, 11/13 Norwich Street,
London EC4A 1AB, a subsidiary of The Solicitors' Law Stationery Society,
Limited.

F424 4/80

Divorce 80

★ ★ ★ ★

Directions for Acknowledgment of Service

The accompanying form of **ACKNOWLEDGMENT OF SERVICE** should be detached and completed by a Solicitor acting on behalf of the Defendant or by the Defendant if acting in person. After completion it must be delivered or sent by post to the *[Principal Registry of the Family Division, Somerset House, Strand, London WC2R 1LP.] ~~The District Registrar, District Registry of the High Court~~

**Delete and
complete as
appropriate*

See over for Notes for Guidance



Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the appropriate Court Office.
2. For the purpose of calculating the period of 14 days for acknowledging service, an Originating Summons served on the Defendant personally is treated as having been served on the day it was delivered to him and an Originating Summons served by post or by insertion through the Defendant's letter box is treated as having been served on the seventh day after the date of posting or insertion.
3. Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words "sued as (*the name stated on the Originating Summons*)".
4. Where the Defendant is a **MINOR** or a **MENTAL** Patient, the form must be completed by a Solicitor acting for a guardian *ad litem*.
5. A Defendant acting in person may obtain help in completing the form either at the Principal Registry or at any District Registry of the High Court or at any Citizens' Advice Bureau.
6. A Defendant may be entitled to Legal Aid. Information about the Legal Aid Scheme may be obtained from any Citizens' Advice Bureau and from most firms of Solicitors.
7. These notes deal only with the more usual cases. In case of difficulty a Defendant in person should refer to paragraphs 5 and 6 above.

delete and/or
as appropriate
The adjacent
heading should
be completed by
the Plaintiff

IN THE HIGH COURT OF JUSTICE
Family Division

No WC 621 of 19 81
~~19~~ . . . ~~No.~~

Principal/District Registry

Between

SHEILA JOAN MIDDLETON

Plaintiff

AND

BRIAN CARTER MIDDLETON

Defendant

If you intend to instruct a Solicitor to act for you, give him this form IMMEDIATELY

IMPORTANT

Read the accompanying directions and notes for guidance carefully before completing this form. If any information required is omitted or given wrongly, THIS FORM MAY HAVE TO BE RETURNED.

See Notes 1
and 3

1 State the full name of the Defendant by whom or on whose behalf the service of the Originating Summons is being acknowledged.

2 State whether the Defendant intends to contest the proceedings (tick appropriate box)

☐ yes ☐ no

Service of the Originating Summons is acknowledged accordingly

(Signed)

* [Solicitor] [Agent for
[Defendant in person]

Address for service

*Where words
appear between
square brackets,
delete if
inapplicable

Notes as to Address for Service

Solicitor. Where the Defendant is represented by a Solicitor, state the Solicitor's place of business in England or Wales. If the Solicitor is the Agent of another Solicitor, state the name and the place of business of the Solicitor for whom he is acting.

Defendant in person. Where the Defendant is acting in person, he must give his residence OR, if he does not reside in England or Wales, he must give an address in England or Wales where communications for him should be sent.

SHEILA JOAN MIDDLETON Plaintiff

BRIAN CARTER MIDDLETON Defendant

Acknowledgment of Service

Name

Address

[Solicitor for] Defendants

Ref:

P R A E C I P E

TO: Clerk
Circuit Court of Chesterfield County
Courthouse
Chesterfield, Virginia 23832

The Clerk will please enter in the file of the above-styled case the attached original copy of an Affidavit of service, with verification of signature by the Vice Consul of the United States Embassy at London, to the effect that service of the Complainant's Motion to reinstate the case and his Petition for Change of Custody and related papers were personally served upon the Defendant on September 12, 1981, at 9:50 a.m. at Flat 6, St. Mary's Court, Ridley Drive, Norton Cleveland, England.

BRIAN C. MIDDLETON
By Counsel

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for the Complainant
Suite 400, 4085 Chain Bridge Rd.
Fairfax, Virginia 22030
(703) 385-8777


Certificate of Service

I certify that on the 7th day of October, 1981, I mailed, postage prepaid, a true copy of the foregoing Praecipe and the Affidavit of service and verification described above to Donald K. Butler, Counsel for the Defendant, at 526 North Boulevard, Richmond, Virginia 23220.

RECEIVED AND FILED

B. VanDenburg Hall
B. VanDenburg Hall

OCT 9 1981

LEWIS H. VADEN, CLERK



GREAT BRITAIN AND NORTHERN IRELAND)
LONDON, ENGLAND)
EMBASSY OF THE UNITED STATES OF AMERICA)

SS.

I, Frederick J. Vogel, Vice Consul
of the United States of America at London, England, duly commissioned and
qualified, do hereby certify that JOHN FLINTOFF

whose true signature and official seal are, respectively, subscribed and affixed
to the foregoing/annexed certificate was, on the date of the signing thereof
a Notary Public practicing in Newcastle-upon-Tyne, England,
to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal
of the Consular Service of the United States of America at London, England,
this September 22, 1981.



Frederick J. Vogel
Vice Consul of
the United States of America
London, England

A F F I D A V I T

THIS DAY Duncan LAWS personally appeared before the undersigned Notary Public in and for the aforesaid jurisdiction, and having been duly sworn according to law, deposes and states as follows: that (s)he is not a party to, or otherwise interested in, the subject matter in controversy in the within cause; that (s)he is over the age of 18 years; that on the 12 th day of September, 1981, at 9.50 a.m. (s)he personally served the attached Notice, Motion, proposed Order, Petition for Change of Custody, and Affidavit, upon the Defendant herein, Sheila Joan Middleton, in person, at Flat 6, St. Mary's Court, Midley Drive, Norton Cleveland, England; and that the Defendant herein is not a resident of the Commonwealth of Virginia.

W. H. H.

AFFIANT

Subscribed and sworn to before me in my jurisdiction,
this 14 day of September, 1981.

My commission expires:



last. the boy

Notary Public

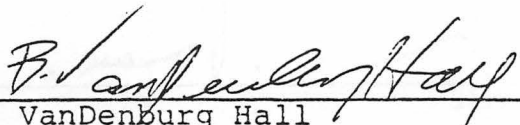
Notary Public
Newcastle upon Tyne
England

N O T I C E

TO: SHEILA JOAN MIDDLETON
Flat 6
St. Mary's Court
Ridley Drive
Norton Cleveland, England

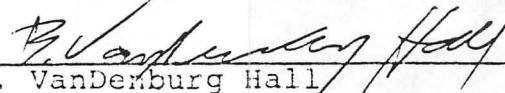
PLEASE TAKE NOTICE that on the 22nd day of September, 1981, at 9:00 o'clock a.m. or as soon thereafter as counsel may be heard, the Complainant, Brian C. Middleton, by Counsel, will present the attached Motion to the Circuit Court of Chesterfield County, Virginia at the Courthouse thereof for entry of an Order consistent with the attached Motion to reinstate and he will also, by counsel, at 9:00 a.m. on September 22, 1981 in said Court move for the entry of an Order consistent with the attached Petition for Change of Custody.

BRIAN C. MIDDLETON
Complainant/Father
By Counsel


B. VanDenburg Hall
Counsel for Complainant/Father
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Certificate of Service

I hereby certify that on this 20th day of August, 1981, I mailed, postage-prepaid, by certified, international mail, a true copy of the foregoing documents: Notice, Motion, Order, Petition for Change of Custody, and Affidavit to Sheila Joan Middleton, residing at Flat 6, St. Mary's Ct, Ridley Drive, Norton Cleveland, England.


B. VanDenburg Hall

M O T I O N

COMES NOW your Complainant, Brian C. Middleton, by Counsel, and moves this Honorable Court for an Order reinstating the above-styled case, and for his reasons states as follows:

1. At the time of the Decree of Divorce granted to your Complainant, custody of the minor children, issues of the marriage, was awarded to the Defendant, Sheila Joan Middleton.

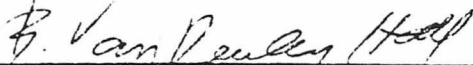
2. Your Complainant has filed a Petition with this Court praying for an alteration in the award of custody due to changes in circumstances affecting the welfare and best interests of the minor children.

WHEREFORE, your Complainant prays that this Honorable Court enter an Order reinstating the above-styled case so that a new determination of custody can be made based on the changed circumstances that have occurred since the entry of the original award of custody.

Respectfully Submitted,

BRIAN C. MIDDLETON
Complainant/Father
By Counsel

Re: Middleton vs. Middleton
In Chancery No. 3305-77


B. VanDenburg Hall
Counsel for Complainant/Father
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

O R D E R

THIS MATTER CAME ON TO BE HEARD upon Complainant's Motion for a reinstatement of the above-styled case, and

IT APPEARING TO THE COURT, that this case should be reinstated; and it is hereby

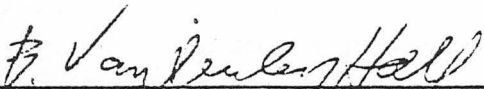
ADJUDGED, ORDERED and DECREED that the above-styled case is hereby reinstated for the reconsideration of custody.

AND THIS CAUSE IS CONTINUED.

ENTERED this _____ day of _____, 1981.

I ASK FOR THIS:

JUDGE



B. VanDenburg Hall
Counsel for Complainant/Father
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

PETITION FOR CHANGE OF CUSTODY

COMES NOW your Complainant, BRIAN C. MIDDLETON, and moves this Honorable Court to enter an Order granting him control and custody of the minor children, CLAIRE MICHELLE MIDDLETON and NICHOLE AMIE MIDDLETON, and for his reasons states as follows:

1. Complainant and Defendant, Sheila Joan Middleton, were married on February 17, 1963, in Cleveland, England. Two children were born of this marriage, namely, Claire Michelle Middleton, born September 4, 1969, and presently eleven years old, and Nichole Amie Middleton, born September 9, 1971, and presently ten years old.

2. A Decree of Divorce was granted your Complainant by the Circuit Court of Chesterfield County, Virginia, in 1977. Custody of the children was awarded at that time to the Defendant, Sheila Joan Middleton.

3. The Complainant, Brian C. Middleton, presently lives at 4463 Edan Mae Court, Annandale, Virginia 22003, with his children. He has lived continuously in the State of Virginia since 1967.

4. There have occurred significant changes in circumstances since the time of the Decree of Divorce which changes and circumstances affect the general welfare and best interests of the children. Such changes of circumstances include:

a. The Defendant who is custodial parent, has taken into her home an unknown number of lovers over the past five years. This has occurred within the presence of the minor children.

b. The lovers are strangers to and unknown to

the children except for one man who is known to the children as Mike Davis.

c. The Defendant intends to separate the children and split them up and put one child with an aunt and keep the other child with her. The children are very close and are opposed to being separated.

5. The Defendant has made many demeaning and denegrating comments about your Complainant to the minor children.

6. The Respondent has made attempts to frustrate and render a nullity the decretal visitation rights of your Complainant. The children want to remain with their father.

7. It is in the best interests of the children at this time that the Circuit Court of Chesterfield County, Virginia assume jurisdiction of these minor children in that your Complainant has a significant connection with this Commonwealth and there is available, in this Commonwealth, substantial evidence concerning the children's present or future care, protection, training, and personal relationships; and the children are presently physically in this Commonwealth and it is necessary to protect the children because they have been subjected to mistreatment by the Defendant as shown in Paragraph Four above.

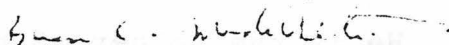
8. There is no other state that would have jurisdiction under prerequisites substantially in accordance with paragraphs 1, 2, or 3 of Section 20-126 of the Annotated Code of Virginia.

9. The Commonwealth of Virginia and in particular, Chesterfield County, is the appropriate forum to determine the custody of the children in that it is in the best interests of these children that this Court assume jurisdiction because Complainant was granted a divorce by the Circuit Court of

Chesterfield County, Virginia and this Court made the Decree awarding custody of the children to the Defendant.

WHEREFORE, your Complainant prays this Honorable Court for an Order granting him pendente lite and permanent sole care and custody of these minor children, Claire Michelle Middleton and Nichole Amie Middleton.

Respectfully Submitted



BRIAN C. MIDDLETON
Complainant/Father



B. VanDenburg Hall
Counsel for Complainant/Father
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777


STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

Subscribed and sworn to by Brian C. Middleton before me, Cheryl McNaughton Dehn, a Notary Public, on this 17th day of August, 1981, in the Commonwealth of Virginia, within Fairfax County, as true to the best of his knowledge, information and belief.

Given under my hand and seal this 17th day of August, 1981.

My commission expires on September 25, 1981


Notary Public

A F F I D A V I T

COMES NOW Brian C. Middleton, after first being duly sworn deposes and says that:

1. He is the father of the minor children, Claire Michelle Middleton, born September 4, 1969, presently eleven years old and Nichole Amie Middleton, born September 9, 1971, presently ten years old; both children are American citizens.

2. The minor children presently reside with him at 4463 Edan Mae Court, Annandale, Virginia 22003.

3. The children have lived with him since the 25th day of July, 1981.

4. The children have lived with their mother, Sheila Joan Middleton, for the five years preceeding the 25th day of July, 1981 at the following addresses:

For the last two years at Flat 6, St. Mary's Court Ridley Drive, Norton Cleveland, England, and for the three years before that at Flat 11, St. Mary's Court, Ridley Drive, Norton Cleveland, England.

5. He has participated as a party in litigation concerning custody of the children which litigation took place in

Chesterfield County, Virginia and was part of the divorce proceedings instituted by the Affiant against Sheila Joan Middleton, his former wife, which proceedings ended in the Affiant being granted a divorce due to the desertion of the former wife and the children being placed in the custody of the wife with reasonable rights of visitation for the Affiant.

6. He knows of no other custody proceedings pending in any jurisdiction except the one mentioned in 5 above.

7. The Affiant's former wife, Sheila Joan Middleton, who dwells at Flat 6, St. Mary's Court, Ridley Drive, Norton Cleveland, England has the decretal right of physical custody of the children.

FURTHER, Affiant saith naught.

Brian C. Middleton
BRIAN C. MIDDLETON
Complainant/Father

Subscribed and sworn to Brian C. Middleton before me, CERYL McJAGHTON DEAN, a Notary Public, on this 17th day of AUGUST, 1981 in the Commonwealth of Virginia, within Fairfax County, as true to the best of his knowledge, information, and belief.

GIVEN under my hand and seal this 17th day of AUGUST, 1981.

Ceryl McJaghton Dean
Notary Public

My Commission expires: September 25, 1984

B. Vandenburg Hall
B. Vandenburg Hall
Counsel for Complainant/Father
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

OPPOSITION TO DEFENDANT'S PLEA TO THE JURISDICTION

COMES NOW the Complainant, Brian C. Middleton, by counsel, and opposes the Defendant's Plea to the Jurisdiction and prays this Court to take and exercise jurisdiction to hear this cause. For his reasons therefor, the Complainant states as follows.

1. Complainant incorporates by reference the Complainant's Brief, a copy of which is attached hereto, as if it were fully set forth herein, and relies on statements and arguments set forth in the Brief as his reasons why the aforesaid Plea to the Jurisdiction should be denied by the Court.

WHEREFORE the Complainant, Brian C. Middleton opposes the Defendant's Plea to the Jurisdiction and prays this Court to take and exercise jurisdiction to determine all matters in this cause.

BRIAN C. MIDDLETON, Complainant
By Counsel

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Complainant
4085 Chain Bridge Road, Suite 400
Fairfax, Virginia
(703) 385-8777

RECEIVED AND FILED

OCT 14 1981

LEWIS H. VADEN, CLERK



Certificate of Service

I hereby certify that on this 13th day of October, 1981, I mailed, postage-prepaid, a true copy of the foregoing Opposition to Defendant's Plea to the Jurisdiction together with a copy of the Complainant's Brief and the attachments thereto to Donald K. Butler, Esquire, Counsel for the Defendant, Sheila J. Middleton, at 526 North Boulevard, Richmond, VA. 23220.

B. VanDenburg Hall
B. VanDenburg Hall

COMPLAINANT'S BRIEF

OCT 14 1981

LEWIS H. VADEN, CLERK


The Complainant, Brian C. Middleton, submits this brief in support of his opposition to Defendant's Plea to the Jurisdiction, and pursuant to the Court's directive on September 22, 1981 (Tr. 19).

I. Posture of the Case

1. This action was initiated in 1977 for divorce. Complainant was granted a decree of divorce, and custody of the two minor children was given the mother with visitation at "reasonable times and places" awarded to the father. The case was reinstated upon the motion of father/Complainant by an Order entered on September 14, 1981, to consider the father's Petition for Change of Custody. On September 2, 1981, on Complainant's motion, the Court entered an injunctive order restraining and enjoining both parties from removing either or both of their children from the Commonwealth of Virginia or the United States of America until further order of this Court. Defendant filed an Answer to the Petition for Change of Custody and a Plea to the Jurisdiction, arguing that this Court lacks jurisdiction of the subject matter and further that the Court should decline to exercise jurisdiction under the Uniform Child Custody Jurisdiction Act of the Virginia Code (§§20-125 through 20-146). On September 22, 1981 part of the Complainant's case was heard before Judge Gates. The presiding Judge invited the parties to submit briefs on the question of jurisdiction; Tr. 19.

II. Statement of Background Facts

2. Brian C. Middleton and Sheila Joan Middleton were married in England in 1962. They immigrated into the United States in 1967 with permanent resident status. Two children were born to them in Virginia: Claire Michelle on September 4, 1969, and Nicole Amie on September 9, 1971. Brian C. Middleton was employed as an Engineer by Allied Chemical Corp., Fibers Division, in Southside, Chesterfield County, Virginia. In 1974, Sheila J. Middleton returned to England taking the children with her, and in 1977 the Complainant obtained a divorce on grounds of separation. Custody provisions of the decree are in general terms, permitting reasonable visitation with the father. Brian C. Middleton has sent more support money than the decree requires. He has called the children by telephone each month, and visited them in England during his vacation time each year until the children were old enough for unaccompanied air travel. In 1978, the children spent their entire six week summer school break with the father in Virginia. In 1979, the children spent three weeks with their father in Virginia in the spring plus four weeks with him here in the summer. In 1980 and 1981 the mother cut back their visitation with their father to four weeks each summer and would not allow them to come to Virginia any other time of the year despite the father's requests.

3. In 1979, Brian C. Middleton married Angela Middleton who loves Claire and Nicole, and they love and respect her. Angela Middleton is an officer of the United Virginia Bank, Manager of Loan Administration. She is teaching the children her hobbies -- needlework, knitting, dressmaking, etc. -- which the children enjoy.

4. In 1972, Brian C. Middleton was graduated at the University of Richmond with a Masters Degree in Business

Administration. He was hired by the United Virginia Bank, received quick promotions, and was responsible for major re-organizations. He became Vice President and Manager of the Northern Region Operations in April 1979 and moved to Fairfax County, where he owns a spacious and gracious home. He supervises 156 bank employees and has a \$3.4 million budget. Brian C. Middleton is known to be vocal about opportunity and the quality of life in Virginia and the United States.

5. Claire and Nicole Middleton have become an established part of the father's neighborhood. They have formed continuing friendships here with many children their own ages and have almost no close friends in England. Both girls see their future in America and desire to attend school and college here. Both girls have asked both parents to allow them to remain in Virginia and attend school here, which is basically what the mother had agreed to allow when the children were over 10 years of age.

6. Sheila J. Middleton does not have a college education, and works as a nursery school teacher's aide. She has a wealthy aunt and uncle who are capable of helping financially and apparently financed her recent trip to Virginia. She has no hobbies and spends her leisure time in public bars. She has one-night boyfriends stay overnight in the three bedroom apartment, with the daughters in the apartment. She has exposed herself nude to men there, in the presence of the daughters. The father is greatly concerned by the type of role model Sheila Middleton sets for the daughters, and by the daughters report that their mother provided them with boyfriends on a recent vacation in Portugal who were 20 and 23 years old.

7. This year when the daughters came for summer visitation they begged to remain for school this year,¹ and the father initiated this custody motion to obtain Court sanction of an arrangement which the children desire. Sheila Middleton admits that she received a copy of the custody motion in the mail on August 25, 1981, that she then boarded an airplane and came to Virginia on or about August 31, 1981. On September 2, 1981 she and her uncle induced the children to enter an automobile, departed with them, taking a devious route for England. Her agent and accomplice in that affair called the father's house several times with assurances that the daughters were with the mother but that the children were confused and upset. He said that Sheila wanted to talk with Brian because it appeared that the children would be unhappy being taken away from their father. The agent also on September 2, and 3, said that she was in Florida with the children and that the children were upset about leaving and she wanted a telephone number where she could reach Brian on September 3, 1981 at 3:30 P.M. She wanted to talk to him because the children were upset. Her agent was told at about 10:00 A.M. on the day after the injunction was issued, and just after he had said that these girls were in the U.S., that the Defendant/mother was enjoined from removing those children from Virginia and the United States. She thereafter took them to England anyway.

8. Several times in the past, Nicole has run away from home because the mother would not agree to allow her to live with her father, and the Complainant is greatly concerned that there will be a repetition, placing the child in dangerous

¹ Unless the transfer from English schools to Virginia schools is made before the sixth grade, there will be a loss of credits which will delay graduation. In quality, the English schools of northeast England where the mother resides are far below Virginia standards, and the gap will widen as time goes by.

situations. In addition, the children do not wish to be separated, and they report that the mother intends to send Claire to live with her aunt during this school year, and thus to separate them.

9. The children do love and respect their father. While they love their mother they do not respect her and she has to resort to physical force and threats to get them to obey her. Even with this she has little control over them.

III. Argument

The Complainant will address the Defendant's arguments in the following order.

10. First, the Defendant claims that a Court in England has entered wardship orders making these children wards of the English Court, and argues that Virginia should defer to the jurisdiction of the English Court. The Defendant relies upon §20-129 of the Code of Virginia -- a section of the Uniform Child Custody Jurisdiction Act (UCCJA) which became effective on January 1, 1980.

11. Second, the Defendant claims that this Court should refuse to hear the father's petition because of his reprehensible conduct, to-wit, his refusal to return the children to the custodial parent after their visitation period ended. The Defendant relies upon §20-131 of the Code.

12. Third, the Defendant in her Plea to the Jurisdiction asserts that Virginia has repealed the continuing jurisdiction doctrine by adopting the UCCJA and this Court lacks jurisdiction of the subject matter. She further asserts that this Court, in any event, should decline to exercise jurisdiction because England is a more convenient forum; the principal evidence is available in that country, and the mother and children are there. However, she now asserts in her Memorandum

in Support that she withdraws her challenge to the Court's continuing jurisdiction and relies upon the forum non conveniens doctrine alone, as set forth in §20-130 of the Code.

A. The Alleged Wardship Suit in England

13. As noted above, §20-129 of the Code provides that a Virginia Court will defer to another state's jurisdiction and decline to hear a custody petition where there is pending in another jurisdiction a suit to resolve the custody questions raised before the Virginia Court, provided the parties have significant connections to the foreign jurisdiction, and the petition in the foreign jurisdiction was pending before the Virginia Court took jurisdiction.

14. On three separate occasions, the Defendant has made affirmative representations to this Court that "English orders" have been entered making these children wards of the English Court: in her Plea to the Jurisdiction, in the hearing before this Court on September 22, 1981, and in the Defendant's Memorandum in Support of Defendant's Plea to the Jurisdiction. Defendant promised in her Plea to produce copies of the "English orders" on September 22, 1981, but none was provided at that time. Counsel for Plaintiff received copies of the alleged "English orders" along with the Memorandum in Support. Examination of these alleged "English orders" by Complainant's counsel reveals that they are not orders at all. It appears affirmatively from these documents that no "English orders" regarding wardship of the children have been entered. The Complainant will demonstrate below that until such time as an English Court issues a wardship order, custody, or wardship, of a child has not been undertaken by the English Court.

15. Defendant has attached great significance to her representations as to the English Court having made the children

wards of that Court, as a ground for urging this Court to decline jurisdiction. A serious question arises, therefore, whether the Defendant and her counsel are attempting to mislead the Court by misrepresenting facts. Her representations should, therefore, be examined carefully.

16. Defendant made the following representations to this Court as to the existence of a wardship order by an English Court.

a. In the Plea to the Jurisdiction, the Defendant states:

"These children are presently wards of the English Court by virtue of lawful orders entered therein, copies of which shall be provided at the hearing [on September 22, 1981]..."
(Paragraph 6B of the Plea).

* * *

This Court should "decline to exercise jurisdiction in this matter and defer to the appropriate English Court for any determination of a change of custody..."
(Wherefore clause of the Defendant's Plea).

b. At the hearing on September 22, 1981, counsel for Defendant did not provide the Court and opposing counsel copies of the alleged English orders as promised. He did, however, wave a handful of papers and represent to this Court that the English Court had already entered orders in Defendant's favor making the children wards of that court.

c. On page 4 of her Memorandum in Support of her Plea to the Jurisdiction, Defendant states:

"Subsequent to the return of the children to England, the mother instituted custody proceedings there for the purpose of demonstrating that the English Courts are willing to take jurisdiction over this matter..."

What is the nature of the papers which Defendant has initiated in England? There are three groups of papers, as follows:

- (1) A copy of a form captioned "Originating Summons (Wardship/Guardianship)" and typed thereon is the style of a case entitled "Sheila Joan Middleton v. Brian Carter Middleton."
- (2) Forms for acknowledgement of service by the person who is served.
- (3) A packet of forms provided to a plaintiff in an English lawsuit, the first indicating that the originating summons was lodged with the Principal Registry of the Family Division, Somerset House, and another instructing the Plaintiff to make sure to attach to the summons notice to the defendant that each of the children has become a ward of the Court pursuant to Section 9(2) of the Law Reform (Miscellaneous Provisions) Act 1949.

17. Upon examination, none of these papers could be construed as an order of a court. The return of service of the summons has not been completed, and the Defendant well knows that service has never been made upon Brian Middleton.²

18. A question arises: what significance is attached in England to these papers which the Defendant has misrepresented to be wardship orders? The following authorities will be useful in making that determination, and copies of the full text from which these excerpts are taken are attached to Complainant's Brief. Bromely on Family Law (5th Ed.), at page 397 states as to English law:

"Until 1949, a child automatically became a ward of court in a number of cases, for example on a petition to appoint a guardian or on payment into court under the Trustee Act of a fund belonging to him or, in fact, upon any

² Several observations are appropriate with regard to the forms which Defendant has provided copies of. First, the form for summons which Sheila Middleton has used is clearly marked: "NOT FOR SERVICE OUT OF JURISDICTION." It would appear that the summons on that form cannot be served upon Brian Middleton in the United States. Moreover, the summons is dated September 4, 1971 and following thereupon in bold print is the admonition to the Plaintiff that it must be served within twelve months of that date or it is void. Thus, the summons appears to be on the wrong form, void on its face, and unserved. No papers whatsoever relating to any proceeding in any court in England have ever been served upon Brian Carter Middleton.

application made to the court on his behalf. But now Section 9 of the Law Reform (Miscellaneous Provisions) Act 1949, has enacted that a child shall be made a ward of court only by virtue of an order to that effect made by the court. Immediately an application for an order is made, the child becomes a ward of court; but he ceases to be one unless an appointment to hear the summons is obtained within 21 days or if the court refuses to make the order." (Footnotes omitted). [Emphasis supplied]. [Copy attached].

19. Rayden's Law and Practice in Divorce and Family Matters in All Courts (13th Ed.), Vol. I at page 1107, dealing with the same subject, states:

"Since 1949, however, no infant can be constituted a ward of court save by an application to the Court to that effect, and the infant becomes a ward on the making of the application. (g) Once made, a valid order of wardship subsists until the ward attains majority (h) or until the Court, either upon an application in that behalf or of its own motion, orders that any minor who is for the time being a ward of court shall cease to be such (i) The Court's order and jurisdiction continues even though the ward becomes of unsound mind (j)." [Copy attached].

20. From these authorities, it is apparent that entry of an order has been necessary since 1949, to make children wards of an English Court. It is equally apparent from Sheila Middleton's papers that none of them is an order, and no valid order making these children a ward of an English Court has been entered.

21. The Defendant intended this Court to rely heavily upon her representations that the children are now wards of an English Court, and to decline jurisdiction to modify the 1977 custody order on that basis. The Complainant respectfully submits that the Defendant and her counsel have made material misrepresentations intended to mislead this Court, and to obtain judgment based on a misrepresentation of fact. Such conduct exceeds what may be allowed as zealous advocacy.

22. Finally, it should be pointed out that the Defendant has conceded (on page 4 of her Memorandum in Support) that she first took action to commence a custody suit in England after she had notice of the hearing date in the Virginia custody cause. Clearly, there is no pending custody petition in any jurisdiction outside Virginia, which could invoke the provisions of §20-130 of the Code, and Defendant's Plea to the Jurisdiction in this regard lacks any reasonable factual basis for asserting it.

B. Conduct of the Parties

23. Sheila Middleton asserts in Paragraphs 6(I) and 7 of her Plea to the Jurisdiction that Complainant violated Virginia's custody order by not returning the children to the Defendant when the visitation period in America expired, and she cites §20-131 of the Code, under which this Court may decline jurisdiction by reason of a petitioner's reprehensible conduct. There is no reasonable basis for this argument.

24. The 1977 custody order does not set forth any specific dates for the children's visitation with the father. It provides generally for visitation "at reasonable times and places."³ Before the English schools opened, this Court on September 2, 1981, entered an order enjoining both parents from removing the children from Virginia or the United States without prior order of the Court. The father was, therefore, in compliance with the order of the Court; and there was nothing reprehensible in his conduct. Manifestly, the Defendant has

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The October 19, 1977 Court Order awards the Complainant visitation "at reasonable times and places." The 1977 order does not spell out that the father is to have the children in his home during the 6 weeks summer school break of the English schools. However, since 1978, the children have come to Plaintiff's home in Virginia, that is, as soon as the children were old enough to travel by air without a companion,

the father began bringing them here and has done so in 1978, 1979, 1980 and 1981. Such customary usage evidences what "reasonable times and places" are, and may not be changed unilaterally by the mother.

made no showing which would cause the Court to decline to exercise its jurisdiction under §20-131 of the Code.

25. The Defendant's conduct, by contrast, is reprehensible. She has attempted to mislead the Court by stating that the children have been made wards of an English Court. In addition, she violated the Court's injunction on September 2, 1981, by removing the children from Virginia and the United States. Moreover, the Defendant had notice of the injunction, prior to her removal of the children from the United States. Instead of asking for a prompt court hearing, Sheila Middleton induced the children to enter an automobile with her on September 2, 1981 with promises that they could remain with the father, but she wanted to discuss it with them. She then sped away and stopped only after they were far removed from the father's home. Sheila then had an agent call Brian Middleton's house; he stated the children were with the mother in Florida and were "all right". Angela Middleton informed the agent that there is a Court order prohibiting either parent from removing the children from Virginia or from the United States; he hung up. Defendant is clearly in contempt of this Honorable Court and comes before it with "unclean hands." In similar circumstances, the Court have held that custody should be altered and transferred to the father. See Brittain v. Brittain, 4 F.L.R. 2046 (N.C. Ct. App., 10/19/77); Entwistle v. Entwistle, 4 F.L.R. 2254 (N.Y. App. Div. 2d Dept., 2/27/78).

26. Since the children's removal to England, they have told their father on the telephone that they did not wish to leave Virginia; that they were taken from Virginia over

their protests; that they were frightened by the experience; and that they wish to return to Virginia and have told their mother so. It is expected that they will testify to that effect.

27. It is apparent that the Defendant, in removing these children from Virginia, was motivated by a desire to deprive this Court of the benefit of their testimony. The children are intelligent and mature and are fully capable of testimony on matters crucial to this case. By separate petition which Complainant will file simultaneously or in the very near future, he will request the Court to order the mother to appear personally with the children at trial in Virginia, pursuant to §20-134 of the Code of Virginia, and for such other relief as the Court deems proper.

28. One further aspect of the mother's conduct warrants comment here. On page 8 of the Memorandum in Support, the Defendant states:

" . . . On the other hand, should this Court take jurisdiction and determine that there should not be a change in custody, the mother would always be fearful of allowing the children to return to the United States for visitation with the father."

The Complainant understands by this incredible statement that the mother will not let the children come to their father's home in Virginia in the future. Complainant maintains that she promises disobedience of the Court's 1977 custody decree, which granted the father visitation at "reasonable times and places." "Reasonable times and places" has, by longstanding practice of the last four years since 1978 come to mean visitation for approximately six weeks in the father's home in Virginia, and the Defendant cannot change that practice unilaterally, without leave of this Court, without violating the 1977 decree.

29. In view of the trans-Atlantic travel and the

requirements of Complainant's work, two or three day visits are not feasible. As a practical matter, the Defendant has announced her intention of terminating all visitation of the daughters with their father. This fact -- the mother's statement of an intention to deny the father all visitation with the children on a regular basis -- is a change of circumstances which in itself requires reopening of the custody case and inquiry into what custody and visitation arrangements will be in the children's best interests.

C. Statutes and Precedents Re this Court's Jurisdiction

30. The Defendant challenges this Court's jurisdiction of the subject matter and, in addition, urges this Court if it find that it has jurisdiction to decline to exercise it. In support of the first argument, Defendant asserts (Paragraph 6A, Plea to the Jurisdiction; Tr. 12 et seq., 9/22/81) that the doctrine that the Court has continuing jurisdiction was rescinded by the adoption of the Uniform Child Custody Jurisdiction Act (UCCJA), citing a Maryland case, Howard v. Gish, 373 A.2d 1280 (1977). However, at page 4 of her Memorandum in Support, Defendant states the opinion in the Howard case was "faulty."

31. Complainant responds as follows. In the Howard case, the divorce was decreed in Georgia and the mother moved with her new husband and the child to Maryland. Suit was brought in Maryland by the stepfather for custody of the child and the natural father contended that only Georgia would hear the case because Georgia had continuing jurisdiction. The Maryland Court refused to decide the point of Georgia's continuing jurisdiction because the case was not lodged there (373 A.2d at 1284). It held that Maryland was not precluded

under the UCCJA from exercising jurisdiction because Maryland was the home state of the child at the time the custody petition was filed. Howard v. Gish is, therefore, inapposite and does not stand for the proposition that Virginia cannot exercise jurisdiction either under the continuing jurisdiction rule or under provisions of the UCCJA. Sheila Middleton's reliance upon Howard v. Gish is misplaced for the Maryland Court refused to hold that Georgia could not exercise jurisdiction.

32. The UCCJA became effective in Virginia on January 1, 1980, and no revision of §20-108 has been passed by the General Assembly. §20-108 specifically provides for the continuing jurisdiction of Virginia Court where the original custody decree was issued in this State in connection with a divorce. It states:

"The Court may, from time to time after decreeing as provided in the preceding section (§20-107), on petition of either of the parents, or on its own motion, . . . revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parent and the benefit of the children may require."

33. The reason for §20-108, as stated in Andrews v. Geyer, 200 Va. 107, 104 S.E.2d 747 (1958), has lost none of its initial validity. In Andrews, the Court explained that it is rare when a court can be positive, at the time, that its award of custody will prove to be for the best interest of the child, which is the paramount question. The uncertainty involved is the reason for this section, which empowers the court to alter or change the custody of children, viewed in the light of subsequent events. In the Cumulative Supplement, two 1979 cases demonstrate the continuing viability of this provision. See Notes to §20-108 of the Code citing Featherstone v. Brooks, 220 Va. 442, 258 S.E.2d 513 (1979), and Cutshaw v. Cutshaw, 220 Va. 638, 261 S.E.2d 52 (1979).

34. Section 14 of the UCCJA continues the law as stated above. Under §14 of the UCCJA the State which issued the original custody decree has continuing jurisdiction to modify it, and only that State has authority to modify it, although this aspect of the Uniform Act has frequently been overlooked through misunderstanding of the provisions of §14; see the article "Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA" by Brigitte M. Bodenheimer, which the Defendant attached to her Memorandum in Support.

35. Only when all parties, the parents and the children, have left the jurisdiction of the State issuing the initial custody decree, or when the children reach majority, does the original-decree State lose power to modify the decree. Id. Thus, the UCCJA gives to the "significant connection" provisions of the Code (§20-126(a)(2) and §20-130(C)(2)) such great significance that they override the "home state" provisions of §20-126(A)(1) and §20-130(C)(1). See Joseph E.H. v. Jane E.H., 7 F.L.R. 2119 (Pa. Super. Ct., 12/5/80); and Montola v. Montola, 7 F.L.R. 2491 (Hartford, Conn. Super. Ct., 5/7/81).

36. In sum, the adoption of the UCCJA did not revoke or rescind the continuing jurisdiction rule in Virginia, and so long as the father and children maintain a significant connection with Virginia, only Virginia can modify the order. Virginia may, however, decline to exercise its jurisdiction in favor of a more convenient forum. Defendant urges that Virginia should decline jurisdiction in this case.

37. In support of its request that the Court decline to exercise jurisdiction, the Defendant relies upon a case in the Family Court of Schenectady County, New York -- William L.

v. Michele P., 99 Misc.2d 346, 416 N.Y.S.2d 477 (1979), in which that court reasoned that the New York father (Plaintiff) could be sure of enforcement in New York of any modification of its original decree by a Mississippi court (where the wife then resided) but -- because Mississippi had not adopted the UCCJA -- the reverse would not be true. The father could not be sure that a New York revision of the original decree would be enforced in Mississippi. The Court reasoned that the father would be better off if he could obtain a revision of the decree in Mississippi; and it stated that evidence would be more readily available in Mississippi to the less-well-off mother. The Court was also impressed that the wife had clean hands. She had resorted to the Court rather than self-help, which the UCCJA is intended to discourage. The Court declined the jurisdiction in favor of Mississippi, conditioned on the wife's personal appearance in the Mississippi Court where the father might in future bring suit, and that she raise no objection to admission into evidence of case worker reports from New York. Complainant believes the Family Court's assumption that another court would not enforce any order it entered was an extraordinary assumption on which to refuse to act, and that the William L. case represents an unusual example of the exercise of the originating State's discretion to decline jurisdiction. A discussion of the factors to be weighed in making this determination, as provided in UCCJA provisions of §20-130 of the Code is appropriate at this point.

38. The three factors of significance here are:

(1) Whether another state is the children's home state;

(2) Whether another state has a closer connection with the children and his family or with the child and one or more of the contestants;

(3) Whether substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state (forum non conveniens).

39. Home State. England was the "home state" of the mother and the children at the time of the original decree in 1977 and continues to be their place of residence. Although the State of the original decree may defer to home state jurisdiction, -- always a more convenient forum for the custodial parent, -- the Court should refuse to do so here, because the mother who claims the advantage of being custodial parent under Virginia's 1977 decree is at the same time flouting the visitation provisions of the same order, stating she will no longer allow him visitation "at reasonable times and places." The mother also has violated the Virginia Court's September 2, 1981 injunction prohibiting her from removing the children from Virginia or from the United States without order of this Court, unlike the William L. case upon which she relies. An element of estoppel works to prevent her from claiming the benefits of the 1977 order while flouting the Court's orders which do not suit her. See Ryan v. Ryan, 7 F.L.R. 2295 (N.J. Super.Ct. App. Div. 1/19/81); Parks v. Parks, 7 F.L.R. 2274 (Pa. Super.Ct., 2/13/81); E.H. v. E.H., 7 F.L.R. 2119 (Pa. 12/5/80).

40. Significant Connection. The forum which originally determined custody may decline to exercise continuing jurisdiction in favor of the home state but usually does not do so, if a significant connection with the child has been maintained; Lustig v. Lustig, 7 F.L.R. 2195 (Mich.Ct.App. 8/28/80 released 12/9/80). The daughters six-weeks visits each summer during the past four years have sufficed for them to maintain close ties to the father

and stepmother, and with the children of the neighborhood and school of the county. These connection have been stated above in paragraphs 5 and 7 of this Brief.

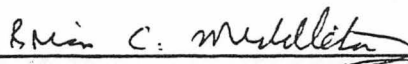
41. Convenience of the Forum. Neither Virginia nor England provides a wholly convenient forum for the parties. Evidence as to the quality of life in both parties' homes must be adduced and compared, to make a decision as to what will serve the children's best interest. Complainant proposes to call between 10 and 12 adult witnesses and 6 to 12 children in Virginia to establish the quality of life in the father's home in Virginia, the close connections the children have maintained here, the father's character, and the quality of the Fairfax County Schools. He proposes to call a number of English witnesses to testify as to the quality of the schools in or near Cleveland, England, the dissatisfaction of the children with the quality of life in the mother's home, and the mother's promiscuity. Unlike the William L. case upon which Defendant relies, there is no reason to believe the father would be better off with an award by the English Court than with an award in this Virginia Court. Rather it appears that the English Court would enforce a Virginia decree; see Re H., 1 All England Reports 881 (1966); 3 All E.R. 906 (1965). (Copy attached)

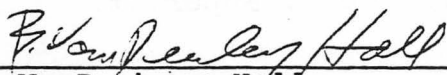
42. Virginia counsel for Complainant proffers that, as an accomodation to Sheila Middleton, he will personally attend deposition sessions in England during the week of November 9-14, 1981, when he will be present in that country. Notices of Depositions are being filed immediately after this Brief. As previously stated, Complainant intends to seek an Order of this Court under §20-134 of the Code that the mother appear personally with the children, Complainant considers the testimony of all three essential to making a full record. The Complainant will

attempt to reach a stipulation which will allow English witnesses for both parties to be deposed in England, if the Court has no objection to the use of depositions; otherwise the Complainant will bring some English witnesses to Virginia to testify.

IV. Conclusions

43. The Complainant concludes from all the above that Sheila Middleton, the Defendant, has attempted to deceive the Court as to the existence of a custody suit in the Court of England, when no custody action is in progress there. The Defendant is guilty of reprehensible conduct. She has disobeyed an injunction of this Court by removing the children from Virginia and from the United States. Defendant has boldly stated she will not abide by the existing custody decree in the future, inasmuch as visitation "at reasonable times and places" must be interpreted as visitation with the father in his home in Virginia. The Defendant has not shown, under §20-130 of the Code, that the children do not have significant connections with Virginia or that England is significantly more convenient as a forum than Virginia. This Court should hear and decide the questions which have been raised as to the custody arrangements that will be in the best interests of the children, in the light of changed circumstances. The Court should also enter an Order compelling the mother to appear with the children.


BRIAN C. MIDDLETON, COMPLAINANT


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Certificate of Service

I hereby certify that on this 13th day of October, 1981, I mailed, postage-prepaid, a true copy of the foregoing Brief in Support of Opposition to Defendant's Plea to the Jurisdiction to Donald K. Butler, Esquire, Counsel for the Defendant, Sheila J. Middleton, at 526 North Boulevard, Richmond, Virginia 23220.

B. VanDenburg Hall
B. VanDenburg Hall

TABLE OF AUTHORITIES ATTACHED TO COMPLAINANT'S BRIEF

Attached for convenience are copies of English treatises and English cases, and of American cases published in Family Law Reporter, which are referenced in the Complainant's Brief.

Citation

English cases:

Re H (Infants), 1 All England Report 886 (1966); 3 All E.R. 906 (1976).

English Treatises:

"Family Law" by P. M. Bromley (5th Ed.) London

Rayden's Law and Practice in Divorce and Family
Matters in All Court (13th Ed.) Volume 1 (1979)
London.

Family Law Reporter:

Brittain v. Brittain, 4 F.L.R. 2046, N.C. Ct.App., (19/19/77).

Entwistle v. Entwistle, 4 F.L.R. 2254, N.Y. App.Div., 2d Dept.,
(2/27/78).

Joseph E. H. v. Jane I. H., 7 F.L.R. 2119, Pa. Super.Ct., (12/5/80).

Lustig v. Lustig, 7 F.L.R. 3295, Mich. Ct.App. (8/28/80 released
12/9/80).

Montola v. Montola, 7 F.L.R. 2491, Hartford, Conn. Super.Ct.
(5/7/81).

Parks v. Parks, 7 F.L.R. 2274, Pa. Super.Ct. (2/13/81).

Ryan v. Ryan, 7 F.L.R. 2295, N.J. Super.Ct., App.Div. (1/19/81).

constitution which seemed to him best fitted to the facts of the case with which A he was dealing.

Once it is accepted, as I consider it must be, that the constitution of the company is not one of which the petitioner is entitled to complain, then in the absence of any proof of what LORD SHAW in the well known case of *Loch v. John Blackwood, Ltd.* (13), referred to as "a lack of probity in the conduct of the company's affairs", the petition must, in my judgment, fail. B

I would, therefore, dismiss it on both grounds.

- *Petition dismissed.*

Solicitors: *Uziel & Co.* (for the petitioner); *Crawley & de Roya* (for the respondents).

[Reported by JACQUELINE METCALFE, Barrister-at-Law.] C

Re H. (infants).

[COURT OF APPEAL (Willmer, Harman and Russell, L.J.J.); January 20, 21, D 24, 25, 1966.]

Ward of Court—Jurisdiction—Alien children—Children of American parents—Dissolution of marriage in Mexico—Custody of children given to mother with liberal access by father—Consent order for children to remain in and under control of the State of New York—Wife's removal of children to England—Consent of court and father not sought—Order by New York State court to return children there—Children made wards of court in England by mother—Whether children should be returned to State of New York in custody of father—Whether judge bound to make full inquiry into merits. E

The parents of two boys were American citizens; the father was a natural-born American citizen, the mother, though of Scottish origin, had been resident for twenty years in the United States. They were divorced on the ground of incompatibility in 1953 by a decree in Mexico, which embodied provisions relating to the two boys contained in a prior separation agreement, giving custody to the mother with liberal access to the father. The provisions were amended by a consent order made in the Supreme Court of the State of New York in December, 1964, which perpetuated a provision in the original separation agreement that the boys should reside at all times in the State of New York, and should at all times be under the control and jurisdiction of the State of New York. In March, 1965, the mother removed the boys to England, without any significant event having occurred meanwhile justifying the course, without having obtained the approval of the New York court, and without having consulted the father; she purchased a house in England with the intention of remaining permanently and of cutting off all contacts with the father. She ignored an order made in June, 1965, by the Supreme Court of New York State to return the boys there, and issued an originating summons in July, 1965, under which the boys became wards of court. On a motion on notice given by the father, the trial judge, without conducting a full inquiry into the merits of the dispute, made an order that the mother deliver the boys forthwith into the care of the father to whom liberty was given to take them back to New York. F G H

Held: although the court had jurisdiction to make full inquiry, if it wished, into the merits of all the matters in dispute between the parents before deciding whether to send the boys back to the United States, yet the court was not bound to do so, and, being satisfied that the boys would come to no harm if their father took them back there, the trial judge had rightly I

[13] [1964] All E.R. Rep. 200 at p. 202. [1964] A.C. 783 at p. 782.

- A decided to authorise their return to the United States (see p. 889, letters H and I, p. 890, letter H, p. 892, letter H, and p. 893, letter C, post).
McKee v. McKee ([1951] 1 All E.R. 942) explained and distinguished.
 Decision of Cross, J. ([1965] 3 All E.R. 906) affirmed.
- [As to custody disputes affected by conflict of laws, see 7 HALSBURY'S LAWS (3rd Edn.) 126, 127, para. 227; as to the infants' welfare being paramount, see 21 *ibid.*, 193, para. 428; and for cases on that subject, see 28 DIGEST (Repl.) 614, 615, 1205-1218.]
- B

Cases referred to:

- B.'s Settlement, Re, B. v. B.*, [1951] 1 All E.R. 949, n.; [1940] Ch. 34; 109 L.J.Ch. 20; 28 Digest (Repl.) 657, 1518.
- C *Kernot (an infant), Re*, [1964] 3 All E.R. 339; [1965] Ch. 217; [1964] 3 W.L.R. 1210; 3rd Digest Supp.
- McKee v. McKee*, [1951] 1 All E.R. 942; [1951] A.C. 352; 28 Digest (Repl.) 614, 1218.

Appeal.

- The appeal arose out of wardship proceedings instituted by the mother of two children by her former marriage with the father, Mr. H. The father was an American citizen, resident in the State of New York; his marriage with the mother had been celebrated in America, they had had their matrimonial home there, and the children were American children. By a motion in the wardship proceedings the father sought relief as follows: (i) "that the plaintiff [the mother] do forthwith deliver into the care of the defendant", the father, the two children of the marriage between the father and the mother, who were boys aged eight and seven respectively; (ii) "that he [the father] be at liberty forthwith to convey the infants to the State of New York"; and (iii) "that upon the infants leaving the jurisdiction of this Honourable Court pursuant to the liberty aforesaid the wardship herein be discharged". On Nov. 26, 1965, as reported at [1965] 3 All E.R. 906, Cross, J., made an order for the children to be returned to New York State, whether in the custody of the father or of the mother to be debated further in camera. The mother appealed to the Court of Appeal.
- F

The cases noted below* were cited during the argument in addition to those referred to in the judgment.

Harold Lightman, Q.C., and *N. C. H. Browne-Wilkinson* for the mother.
Charles Sparrow for the father.

- G WILLMER, L.J.: This appeal concerns two American boys who are at present resident in this country and have been made wards of court. It is an appeal from a judgment of Cross, J. (1) given on Nov. 26, 1965, on a motion brought by the father in wardship proceedings instituted by the mother. The effect of the judge's order was that the two boys, although remaining wards of court, were to be at liberty to leave the jurisdiction and return to the State of New York in the care of their father. Let me say straight away that, for reasons which I will endeavour to give as briefly as possible, I am quite satisfied that the judge made the proper order in the circumstances of this case, and that the appeal should be dismissed. The judge gave a very careful and detailed judgment, in the course of which he set out all the material facts. That, I think, makes it unnecessary, and indeed undesirable, for me to attract further possible publicity to the case by setting out those facts again in any detail in my judgment. I propose to refer only to certain salient facts.
- H
- I

(i) The parents of these two boys are American citizens, domiciled and at all material times resident in New York State. The father is a natural-born American

* *Nugent v. Vetzera*, [1861-73] All E.R. Rep. 318; (1866), L.R. 2 Eq. 704; *Harben v. Harben*, [1957] 1 All E.R. 379; *Re P. (G. E.) (an infant)*, [1964] 3 All E.R. 977; [1965] Ch. 568.

(1) [1965] 3 All E.R. 906.

citizen. The mother is of Scottish origin but has been resident in the United States of America for twenty years, and in the course of those twenty years has been married to three husbands, all of whom have been American citizens. (ii) The boys' parents were divorced by a decree of the court in the State of Mexico dated Jan. 26, 1963, on the ground of incompatibility. (iii) That divorce decree embodied certain somewhat elaborate provisions relating to these two boys, which had been contained in a prior separation agreement between the parents. The effect of those provisions was to give the custody of the two boys to the mother, with very liberal access to the father. (iv) These provisions were amended in some respects (though still leaving custody with the mother, and preserving liberal access to the father) by a consent order made by DILLON, J., in the Supreme Court of New York State on Dec. 11, 1964. This order perpetuated a provision contained in the original separation agreement to the effect that the boys should reside at all times in the State of New York, and should at all times be under the control and jurisdiction of the State of New York. (v) On Mar. 3, 1965, the mother, without obtaining the approval of the New York court, and without consulting the father, brought these two boys to this country, where they have since resided. (vi) There is no evidence of any significant event occurring between Dec. 11, 1964 (the date of the consent order), and Mar. 3, 1965, the date when the mother left with the boys, to justify this breach of the consent order. (vii) On June 15, 1965, after the departure of the mother, an order was made by NOLAN, J., in the Supreme Court of New York State in proceedings instituted by the father (in which the mother was represented by her attorney), the effect of which was to require the mother to return the boys to New York State within twenty days. (viii) The mother failed (and has continued to fail) to comply with that order, and she has thus been in contempt of the order for at any rate the last six months. (ix) The mother admits that, unknown to her present husband and unknown to her own attorney in New York, when she left New York on Mar. 3, 1965, she intended if possible to remain permanently in this country, because she thought that the only hope for the boys having a stable future was "to get away from New York for good so as to cut off all disturbing contacts with their father". I quote those words from the wife's own affidavit. (x) In June, 1965, the mother purchased with the aid of a mortgage a house at Staverton near Daventry in this country, where the boys have been residing for the last seven months or so.

The mother issued her originating summons on July 15, 1965, as the result of which the boys became wards of court. The present proceedings arise on a notice of motion given by the father on Oct. 5, 1965, whereby he asked: (a) that the plaintiff (i.e., the mother) do forthwith deliver into the care of the defendant (i.e., the father) the above-named infants; (b) that the defendant be at liberty forthwith to take them back to New York; (c) that on leaving the jurisdiction pursuant to such liberty the wardship of the boys should be discharged. The judge found in favour of the father in respect of the first two requests, but did not see fit to make the third order for which he asked.

On the bare facts which I have stated, in the absence of authority, and treating the matter as one of ordinary common sense, it seems to me that anyone would be forgiven for thinking that this was the plainest and most obvious of cases; that the proper order was to send these two American boys back to their own State of New York, where they belong (and where the Supreme Court is already seized of their case, and has been seized of it since December, 1964) and more especially so having regard to the fact that they have been kept here in flagrant contempt of the New York court's order. In that connexion I should like to say that I heartily agree with the remark made by the judge where he said (2):

"The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of

(2) [1965] 3 All E.R. at p. 912.

- A - all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing."

That, I think, would be the ordinary common-sense approach of anyone in the absence of authority.

- B However, it has been argued before us that the judge was precluded by authority from making the order which he did, permitting the boys to be removed from the jurisdiction, unless and until he had himself conducted a full inquiry into the whole of the merits of the dispute between the father and the mother, and had formed his own conclusion that in the best interests of the boys it was right to commit them to the care of the parent who sought to remove them from this jurisdiction. When we asked what was to happen if, having conducted that full inquiry, the judge did come to the conclusion that these boys should go back to the State of New York, what was said was that the matter would, no doubt, then be debated in the New York court, but that that court would presumably follow the view expressed by the court here, and would make an order of its own to the like effect. Putting what amounts to virtually the same argument in another way, it was contended by counsel for the mother that what this court cannot do is to abdicate its responsibility for its own wards.

- D As I think was pointed out by the judge, if the view of the law presented by counsel is correct, it would undoubtedly confer a great and undesirable advantage on the parent whom I may call the "kidnapping" parent, i.e., the one who has wrongly brought the infants in question to this country. For, with all respect to counsel's submissions in his concluding address, I entertain no doubt but that such a full inquiry as he envisaged might well last for many months, especially having regard to the need for evidence from abroad. There would thus be grave risk that, by the time the judge who eventually had to deal with the case came to give his decision, he would find it very hard to make any order which would have the effect of taking the children away again from a home in which they would, by that time, have taken root. I wholly agree with the view, more than once expressed by the judge, that, if these boys are to be sent back to the United States at all, then it is in their interests, and in the interests of their welfare, that they should be sent back as soon as possible, indeed, the sooner the better.

- F In the present case there was in fact a considerable body of evidence, both oral and documentary. A number of witnesses attended for cross-examination on their affidavits, and a number of documents as well as affidavits were included in the bundle. Even so, however, it is, I think, plain that such inquiry as was conducted by the learned judge did fall short of what would be required if, as counsel for the mother contends, the judge was not entitled to make an order at all until fully satisfied as to the merits of all the points in dispute between the parents. Indeed, counsel for the mother rather made it a matter of complaint that on a number of occasions he was, if not actually stopped, at any rate actively discouraged, from pursuing his cross-examination of the father with regard to some of the disputed matters.

- H The judge took the view (and I think that it was the right view) that, in a case such as the present, it was not necessary to go into all the disputed questions between the parents, but that he ought to send these boys back to their own country to be dealt with by the court of their own country, provided that he was satisfied (as he was satisfied, having seen the father himself, and having had the benefit of the view expressed on behalf of the Official Solicitor) that they would come to no harm if the father took them back to the United States; and that this was so, even though it might subsequently turn out, after all the merits of the case had been thoroughly thrashed out in the court in New York, that it would perhaps be better after all for the boys to reside in England and see little or nothing of their father.

I I do not think that the authorities cited by counsel for the mother warrant the somewhat sweeping proposition which he put forward. Even if the cases which

have been cited to us did justify the proposition, however, I think that it is only proper to point out that none of them is binding on this court, although clearly the decision of the Privy Council in *McKee v. McKee* (3), is one which must be treated with the utmost respect. A

I turn directly to that case. I need not refer to the relevant facts because they have been very fully set out in Cross, J.'s judgment (4); but I think that before I read from the report I ought to make this clear. As I read it, the question which was debated in the Privy Council in that case was whether a trial judge, who had in fact thought fit himself to conduct a full investigation of all the disputed facts, and to reach his own conclusion thereon, could be said to have been wrong to do so, on the basis that he was bound, without inquiry, to send the infant concerned back to his own country. B

That being the question which had to be decided, I think that the gist of the Privy Council's decision is to be found in the passage which has been read more than once during the hearing of this appeal (5). Lord SIMONDS, in giving the decision of the board, said this: C

"It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. It is, however, the negation of the proposition, from which every judgment in the present case has proceeded, viz., that the infant's welfare is the paramount consideration, to say that where the learned trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case. It may be that, if the matter comes before the court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an order as the Supreme Court made in this case could be justified. If that is so, it would be not because the court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant." D E F G

That passage, I think, prompts various remarks in relation to its relevance to the present case. First, I do not doubt that the judge would have had jurisdiction, had he seen fit, to make a full inquiry into all the disputed issues of fact before he arrived at his decision. Cross, J., did not see fit to do so, so that the question now at issue is the exact reverse of that which was considered by the Privy Council in the case of *McKee* (3). Secondly, it would not, I think, be right to describe Cross, J., as "blindly following" the order of the foreign court. What he did was to apply his mind to the question whether, in all the circumstances, it was proper to give directions in aid of the order of the foreign court; and the relevant question in reaching his conclusion on that, and the question which he himself asked and answered, was whether the boys would come to any harm if they were sent back to be dealt with by the foreign court. Thirdly, in contradistinction to the case of *McKee* (3) where there was a very considerable delay, I think that it can be said that this matter has come before this court within a relatively H I

(3) [1951] 1 All E.R. 942; [1951] A.C. 352. (4) [1965] 3 All E.R. at pp. 913, 914.

(5) [1951] 1 All E.R. at pp. 947, 948; [1951] A.C. at pp. 362, 363.

- A short time of the order of the New York court, and that there is no new circumstance to be considered since that order was made. As a matter of chronology the boys were made wards of court within about four months of their arrival in this country, and the present motion was instituted some six months after their arrival in this country. Lastly, I would emphasise what LORD SIMONDS said in the last sentence of the passage which I have quoted. It was clearly his view that the course which CROSS, J., took in this case would not amount to an abdication of his jurisdiction, but rather to an exercise (or at least a purported exercise) of his jurisdiction in relation to these two boys.

Before leaving the case of *McKee* (6), I should, of course, refer to a dictum on which reliance was placed on behalf of the mother. LORD SIMONDS there said (7):

- "There is, in fact, no *via media* between the abdication of jurisdiction, which he [i.e., the judge] rejected, and the consideration of the case on its merits, in which the respect payable to a foreign order must always be in the foreground."

That remark was much relied on by counsel for the mother, in presenting his case, but it is fair to observe that it was in no way necessary for the decision in that case; and, with the utmost respect to the law lord who made the remark, it does seem to me to be somewhat inconsistent with what he had already said in the passage that I have quoted from (8).

- The other two authorities principally relied on were the decision of MORTON, J., in *Re B.'s Settlement, B. v. B.* (9), and the recent decision of BUCKLEY, J., in *Re Kernot (an infant)* (10). I do not think that it is necessary to refer to either of those two cases in any detail, for the reason that I do not think that either of them establishes the sweeping proposition for which counsel for the mother has contended. As to the first of those two cases (MORTON, J.'s decision (9)), there is some obscurity in the report whether the decision was arrived at after a full investigation, such as counsel for the mother contends is desirable and necessary in a case of this sort, or whether it was arrived at after only a partial investigation such as has actually taken place in this case. Counsel for the mother said in the course of his argument that, as he understood it, in that case the judge arrived at his decision after a full investigation. If that were so, then it would seem to me that that case certainly does not throw any light on the decision of this case. If MORTON, J., however, was holding only a partial inquiry, then, if counsel's submission is right, he was taking a course which was wholly unnecessary, since all that he had to do (if the argument is right) was to say at the outset that, as a matter of law, he could not make the order sought by the father in that case except after having conducted a full inquiry. Similarly, if counsel for the mother is right, in the second of the cases (10) referred to all that BUCKLEY, J., had to do was to take the same short cut and refuse to entertain the case at all except on the basis of conducting a full inquiry; and, unless the mother was prepared to accept such full inquiry, that again would have been an end of the case. In fact, as he himself pointed out in the course of his judgment, BUCKLEY, J., reached his conclusion after only a partial investigation; the evidence which he had before him was contained in conflicting affidavits, there was no cross-examination, and the mother was not even present at the trial before him. Moreover, in spite of the submission to the contrary of counsel for the mother, I think that it is plain that the judge in that case was clearly greatly impressed by the question of forum conveniens. He had particular regard to the fact that, if in that case he did send the child back to Italy, the evidence showed that the Italian court would apply English law. In all the circumstances I agree with the view expressed by CROSS, J., that neither the case of *Re B.'s Settlement* (9) nor that of *Re Kernot* (10) in any

(6) [1951] 1 All E.R. 942; [1951] A.C. 352.

(7) [1951] 1 All E.R. at p. 949; [1951] A.C. at pp. 365, 366.

(8) [1951] 1 All E.R. at pp. 947, 948; [1951] A.C. at pp. 363, 364.

(9) [1951] 1 All E.R. 949, n.; [1940] Ch. 54.

way governs, or indeed assists us in, the solution of the question in the present case. That being so, I do not think that counsel for the mother has made good the very wide proposition which he puts forward as to the jurisdiction of the court.

[His LORDSHIP considered the mother's alternative submissions that the judge in any event exercised his discretion wrongly, in particular failing to conduct a proper investigation into the serious allegation that the father was not a fit and proper person to have the custody of the boys, that there had never been any decision on the merits in the case but only a consent order, and that the judge had overlooked the fundamental maxim that the welfare of the children was the paramount consideration, held that there was no substance in them and said that the appeal should be dismissed.]

HARMAN, L.J.: This appeal raises the question of the proper course for the English court to take in what may be called a "kidnapping" case. One starts inevitably with the view that the mother, who had done the kidnapping, should not be allowed to reap the advantage of her wrongdoing. One has only, as RUSSELL, L.J., did, to reverse the position to see what our feelings would be if the American court in reverse circumstances took the course which is urged on this court.

It is said that there is authority which binds us. I never heard of binding authority in an infant case before. It is contended here, however, that a decision in the Privy Council has laid down that, whatever the circumstances in which children arrive in this country and are made wards, no course is open to the court here but to go into the whole of the circumstances and decide (paying nodding respect to the foreign court's decision, but in fact ignoring it) what the English court would do. In my judgment there is no such authority. In the Privy Council case (*McKee v. McKee* (11)) the father had taken the children over a boundary from California into Ontario. The children, having arrived there, were made the subject of habeas corpus proceedings. The order in the habeas corpus proceedings was that a judge should try the issue whether the children should go back to California, or should remain in Ontario. That was the issue which the trial judge tried. He went into the whole of the circumstances, and he came to the conclusion that it was in the best interests of the children that they should remain with their father in Ontario.

The Supreme Court of Canada reversed that decision on the ground that, as a matter of discretion, the court had no right to act in that way. The Privy Council reversed the decision of the Supreme Court on the ground that the judge, having taken the whole of the circumstances into consideration, as he was bound to do in that case under the terms of the order before him, was perfectly entitled to act on it, and that is all that the case of *McKee* (11) in the Privy Council decided.

Similarly in *Re B's Settlement, B. v. B.* (12), the case before MORRIS, J., he had made up his mind, after considering the whole of the circumstances, what was the right course to adopt, and he chose to override the decision given two years before of the Belgian court. It is not a question of jurisdiction. The court here has jurisdiction to do those things. If the judge chooses to take that course, he cannot be upset on the ground either of jurisdiction or on the ground of some authority. If he chose, however, to take the course which the judge here took in the interests of the children, as he thought, of sending them back to the United States with no more inquiry into the matter than to ensure, so far as he could, that there was no danger to their moral or physical health in taking that course, I am of opinion that he was amply justified, and that that was the right way in which to approach the issue.

These children had been the subject of an order (it is true made by consent) made in the courts of their own country in December, 1964. It was only three months later that the mother flouted that order; deceived her own advisers and

(11) [1951] 1 All E.R. 942; [1951] A.C. 352.

(12) [1951] 1 All E.R. 949, n.; [1940] Ch. 54.

- A deceived the court, and brought the children here with the object of taking them right out of their father's life and depriving him altogether of their society. The interval is so short that it seems to me that the court inevitably was bound to view the matter through those spectacles; i.e., that the order having been made so shortly before, and there being no difference in the circumstances in the three months which had elapsed, there was no justification for the course which the mother had taken, and that she was not entitled to seek to bolster her own wrong by seeking the assistance of this court in perpetuating that position, and seeking to change the situation to the father's disadvantage.
- B I do not want to elaborate on the matter. It is quite obvious to me that the judge's judgment admirably dealt with the whole situation; that he took the right matters into consideration, and that his judgment is wholly unassailable.
- C I would dismiss the appeal.

RUSSELL, L.J.: I agree. Bearing in mind, as he did, that in this jurisdiction the welfare of the infants is the paramount, but not the only, consideration, the judge was well entitled to conclude that the best course was for them to go back to their home land at the earliest moment before the stage could be reached of a full hearing and a conclusion on the evidence. The fact that the native State administers the same jurisdiction over infants as does the court here is a factor for consideration; indeed, it is a factor in favour of exercising the jurisdiction by directing the return of these boys; it is not an abdication of the jurisdiction so to exercise it.

- Another factor is the suggestion that the father is a paranoiac, and that as a result contact with the father will be harmful to the children; indeed, it was stressed by counsel for the mother that, if that suggestion were destroyed by a report of an agreed psychiatrist, there could be no answer to the return of the boys to the United States. In fact there was really no evidence of paranoia at all, or that harm might result. It is said that there is a risk that on fullest investigation, both may be established; but in looking for overall benefit, some risks may have to be taken. I cannot help feeling that in this case the risk is negligible, and that, in so far as it existed at all, it was well outweighed by other factors. In the end, however, I assert that an English court is not without power in a suitable case promptly to return to their home foreign wards who have been kidnapped into England, without having to wait for the full course of a full hearing and full evidence, during which time there is the very real danger of their sinking roots in the soil of England, a process which may well hereafter prove to be harmful. I see no ground whatever for saying that Cross, J., (13) in this case wrongly exercised that power. I would dismiss the appeal.
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Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Stops & Burton*, Daventry (for the mother); *Kenneth Brown, Baker, Baker* (for the father).

- H [Reported by F. A. AMES, Esq., Barrister-at-Law.]

I

Re. H. (infants).

[CHANCERY DIVISION (Cross, J.), November 23, 24, 25, 26, 1965.]

Ward of Court—Jurisdiction—Forum conveniens—American children of former marriage of Scottish mother to an American—Marriage dissolved in America—Custody proceedings brought by father in New York—Mother's re-marriage—Children brought to England by mother without father's consent—Exclusive custody given to father by American court—Whether English court should order children to be returned to State of New York without going into the merits of claims to custody.

On Dec. 15, 1957, the mother, who was born in Scotland, married the father who was an American citizen domiciled and resident in the United States. There were two children of the marriage, boys aged eight and seven respectively. On Jan. 16, 1963, the mother and father entered into a separation agreement. On Jan. 26, 1963, the marriage was dissolved by a decree of a Mexican court for incompatibility of temperament. The decree provided, inter alia, that the children should remain in the custody of their mother with visitation rights to the father in accordance with the provisions of the separation agreement. On Dec. 12, 1963, the mother married her present husband, Mr. I. In the autumn of 1964, the father started custody proceedings against the mother in the Supreme Court of the State of New York, and by a consent order made on Dec. 11, 1964, the terms of the separation agreement were made an order of the court with certain variations: access by Mr. I. was to consist of a long holiday in the summer and a number of week-ends throughout the rest of the year. Towards the end of 1964, Mr. I. found himself in grave financial difficulties and was threatened with eviction from the flat in which he was living with the mother and her children. The mother's brother, who lived in England, suggested that she and the children should come to England for a holiday while Mr. I. settled with his creditors and found a cheaper flat. Neither the mother nor Mr. I. asked the father for his consent to the suggestion. The children spent the week-end of Feb. 26 to Feb. 28, 1965, with their father and were returned by him to the mother on Feb. 28. On Mar. 3, the mother and the children sailed on the Queen Mary for England. When the mother left America, she hoped in fact never to return but to induce her husband later to leave America himself and settle in England with her and the children. On June 15, 1965, the court in New York directed that the children should be returned to that State: this order having been disobeyed by the mother the New York court granted exclusive custody to the father on Sept. 7, 1965. In June, 1965, Mr. I. went to England to see the mother; she told him of her wish that he should leave America for good and that both of them with the children should make their home in England. He was willing to settle at her request in England, but if the court decided that the children should go back to America then he was willing to remain there. On July 15, 1965, the mother issued a summons against the father of the children by which the children were made wards of court. On motion by the father in the wardship proceedings for an order that the mother should deliver the children into his care and that he should be at liberty to take them to New York, and that on the children leaving the jurisdiction of the court the wardship should be discharged.

Held: (i) the court was satisfied that the children would come to no harm by being sent back to America with their father and staying with him pending the American court's determination of the merits of claims to their custody (see p. 912, letter B, post).

(ii) accordingly, as the children were American children and the American court was the proper court to decide the issue of custody, and as it was the duty of courts in all countries to see that a parent doing wrong by removing

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children out of their country did not gain advantage by his or her wrongdoing, the court, without going into the merits on the question where and with whom the children should live, would order that the children should go back to America (see p. 912, letters G and I, p. 913, letter B, and p. 916, letter A, post).

McKee v. McKee ([1951] 1 All E.R. 942) considered.

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Re Kernot (an infant) ([1964] 3 All E.R. 339) distinguished.

[As to custody disputes affected by conflict of laws, see 7 HALSBURY'S LAWS (3rd Edn.) 126, 127, para. 227; as to the infants' welfare being paramount, see 21 *ibid.*, 193, para. 428; and for cases on that subject, see 28 Digest (Repl.) 614, 615, 1205-1218.]

Cases referred to:

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B.'s Settlement, Re, B. v. B., [1951] 1 All E.R. 949, n; [1940] Ch. 54; 109 L.J.Ch. 20; 28 Digest (Repl.) 657, 1518.

Harben v. Harben, [1957] 1 All E.R. 379; [1957] 1 W.L.R. 261; Digest (Cont. Vol. A) 765, 4437a.

Kernot (an infant), Re, [1964] 3 All E.R. 339; [1965] Ch. 217; [1964] 3 W.L.R. 1210; 3rd Digest Supp.

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McKee v. McKee, [1951] 1 All E.R. 942; [1951] A.C. 352; 28 Digest (Repl.) 614, 1218.

Nugent v. Feizera, [1861-73] All E.R. Rep. 318; (1866) L.R. 2 Eq. 704; 35 L.J.Ch. 777; 15 L.T. 33; 30 J.P. 820; 28 Digest (Repl.) 656, 1517.

P. (G. E.) (an infant), Re, [1964] 3 All E.R. 977; [1965] Ch. 568; [1965] 2 W.L.R. 1; 3rd Digest Supp.

E

Motion.

This was a motion in wardship proceedings instituted by Mrs. I. in relation to children of her former marriage with Mr. H. By the motion, brought by Mr. H., he sought the following relief: (i) "that the plaintiff do forthwith deliver into the care of the defendant" the two children of the marriage between Mr. H. and Mrs. I., who were boys aged eight and seven respectively; (ii) "that he [Mr. H.] be at liberty forthwith to convey the infants to the State of New York", and (iii) "that upon the infants leaving the jurisdiction of this Honourable Court pursuant to the liberty aforesaid the wardship herein be discharged". Mr. H. was an American citizen, resident in the State of New York; his marriage with Mrs. I. had been celebrated in America, where also they had had their matrimonial home, and the children were American children. The facts are fully set out in the judgment.

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The motion was heard in camera, but judgment was delivered in open court.

Charles Sparrow for the applicant, the father.

Harold Lightman, Q.C., and *N. C. Browne-Wilkinson* for the mother.

W. J. C. Tonge for the Official Solicitor as guardian ad litem of the infants.

H

Cur. adv. vult.

Nov. 26. CROSS, J. read the following judgment: On July 15, 1965, a lady whom I will call Mrs. I. issued a summons against her former husband, Mr. H., asking that the two children of their marriage, who are boys aged eight and seven respectively, should be made wards of this court and that directions should be given with regard to custody, care and control and access. By an order made on July 29, the children were added as defendants and appearances were entered for them by the Official Solicitor as their guardian ad litem. Mrs. I. was born in Scotland, but in 1945 she married an American Service man and went to live with him in the United States. There were no children of that marriage, which was subsequently dissolved. On Dec. 15, 1957, Mrs. I. married Mr. H., who was and is an American citizen domiciled and resident in the United States. He is an attorney and member of the Bar practising in the State of New York. He had himself been married before, but had no children. The oldest of the two children to whom this application relates was born on Feb. 5, 1957—some

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ten months before his parents' marriage - and the younger on May 31, 1958. It has not been suggested on either side that the fact that the older child was illegitimate when born has any bearing on the issues involved. On Jan. 16, 1963, Mr. H. and Mrs. I. entered into a separation agreement, to some of the clauses of which I must refer. Clause 3 is as follows:

"Except as hereinafter provided, the custody and control of the children and the control of their education in the public schools shall be in the wife. However, the wife agrees that the children shall reside at all times in the State of New York and that the children shall at all times be under the control and jurisdiction of the State of New York."

By cl. 4 and cl. 5 Mr. H. agreed to make certain payments to her which should cease on her remarriage, and certain payments for the maintenance of the children during minority. Under cl. 9 the husband was given extensive rights of access to his children, which I need not read in detail. Clause 9 (c), which I find difficult to understand, is in the following terms:

"The wife agrees that the children shall be maintained in the City of New York at the wife's apartment above noted and shall not be removed therefrom within the radius of fifty miles from the City of Peekskill, without the prior written consent of the husband."

Peekskill is a city in the County of Westchester, which is part of New York State immediately adjoining the City of New York. Westchester has about 500,000 inhabitants. Peekskill has about 20,000; and is about forty miles from the City of New York.

On Jan. 26, 1963, the marriage between Mr. H. and Mrs. I. was dissolved by a decree of a Mexican court for incompatibility of temperament. The decree provided, amongst other things, that the children should remain in the custody of their mother, with visitation rights to the father in accordance with the provisions of the separation agreement, and contained the following clause:

"Fourth: The separation agreement entered into between the spouses on Jan. 16, 1963, in the City and State of New York, United States of America, is hereby approved in all its terms and provisions, is incorporated in this decree by reference, but shall survive the decree."

On Dec. 12, 1963, Mrs. I. was married to her present husband, Mr. L., who is also an attorney practising in New York. He was married before. There are five children of that marriage whose ages range from sixteen to four. Their mother has custody of them, but Mr. L. has access to them. In the autumn of 1964 Mr. H. started custody proceedings against Mrs. I. in the Supreme Court of the State of New York held for the County of Westchester, alleging that he was experiencing difficulty in getting access to the children. In order to be in a position to defend these proceedings, Mrs. I. had the children examined by three psychiatrists to whose reports I shall be referring shortly. In fact, however, the proceedings were not contested, but by a consent order made by DILLON, J. on Dec. 11, 1964, the terms of the separation agreement were made an order of the court with certain variations, including variations in relation to access. I need not read them in full. The principal change was that instead of having the children to stay with him each week end from 6 p.m. on Friday to 6 p.m. on Sunday, he should have such access only on certain week-ends. Nevertheless, his access, consisting as it did of a long holiday in the summer and a number of week-ends throughout the rest of the year, remained, by our standards, extensive. It was further provided that,

"for clarity, the phrase in para. ninth (c): 'that the children shall be maintained in the City of New York at the wife's apartment above noted and shall not be removed therefrom within the radius of fifty miles from the City of Peekskill, without the prior written consent of the husband', means

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the residence of the children and is not a prohibition against any vacation trips on which the defendant may desire to take the children with her."

I can say without impertinence, because NOLAN, J., subsequently said so himself, that this provision does nothing to clarify the position in the earlier document.

Towards the end of 1964 Mr. I. found himself in grave financial difficulties and was threatened with eviction from the flat in which he was living with Mrs. I. and her children. In this crisis Mrs. I.'s brother, who lives in England, suggested that she and the children should come to England for a holiday while Mr. I. settled with his creditors and found a cheaper flat. The brother offered himself to pay for the three passages. Mr. I., reasonably enough, thought this an excellent suggestion; but he and Mrs. I. did not see fit to ask Mr. H. for his consent to it. The children spent the week-end of Feb. 26 to 28, 1965 with their father and were returned by him to Mrs. I. on Feb. 28. In fact, Mr. I. had already on Feb. 26 booked passages on the "Queen Mary" for Mar. 3, and on that day Mrs. I. and the children sailed for England. When Mr. H. called for the children on the following week-end, he found that the I.'s flat was empty and the furniture in store. Mrs. I. told me that when she left America, though she gave her husband to understand that she was only going for a short holiday, she hoped in fact never to return but to induce her husband later to leave America himself and settle in England with her and the children. If Mr. I. had had any suspicion of what was in Mrs. I.'s mind, presumably he would not have allowed her to leave New York. Even as it was, as she was going without Mr. H.'s consent, he must, as a lawyer, have anticipated that there might be trouble from that quarter. He took the view, however, that the words "vacation trips" in the order of Dec. 11, 1964, might reasonably be held to cover a trip abroad without Mr. H.'s consent and the leave of the court, and that in any event, as Mr. H. was in arrears with his maintenance payments, the court would not be likely to hold Mrs. I. to be in contempt. In March Mr. H. applied to the New York court to punish Mrs. I. for contempt. This application was opposed by Mrs. I.'s lawyers on the above grounds. No evidence from Mrs. I. herself was before the court, and Mrs. I. told the court that she had only gone for a holiday.

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By a judgment given on June 15 NOLAN, J., held (a) that the fact that Mr. H. was in arrears with some payments (subsequently made) did not afford a defence to Mrs. I.; but (b) that the expression "vacation trips" was too indefinite to justify a finding that Mrs. I. was in contempt on the evidence as to her intentions which was then available. He continued:

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"The evidence does establish, however, that defendant's actions have deprived the children, during the period of their absence, of the personal care, companionship and guidance of their father, which were considered essential for their welfare by the parties and the court when the order providing for temporary custody by the father, and visitation rights, was made, and which are, in my opinion, essential now, in the interest of the welfare of the children. At their age these children should have the benefit of association with and guidance by their father, as well as the benefit of maternal care and affection. Although on an application of this kind the court is not concerned with the settlement of disputes between parents, it is concerned with the welfare of these children, and in the interest of that welfare will direct that the children be returned to this State, within a distance of fifty miles from the City of Peekskill, within twenty days after the entry of an order hereon. If the children are so returned they may remain in their mother's custody, subject to the provisions of the order heretofore entered, pursuant to stipulation, provided that they shall not be removed from the State of New York, or to any place other than their mother's residence in the City of New York, which is more than fifty miles distance from Peekskill, without the father's consent. If they shall not be so returned, an order may be entered

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"The evidence does establish, however, that defendant's actions have deprived the children, during the period of their absence, of the personal care, companionship and guidance of their father, which were considered essential for their welfare by the parties and the court when the order providing for temporary custody by the father, and visitation rights, was made, and which are, in my opinion, essential now, in the interest of the welfare of the children. At their age these children should have the benefit of association with and guidance by their father, as well as the benefit of maternal care and affection. Although on an application of this kind the court is not concerned with the settlement of disputes between parents, it is concerned with the welfare of these children, and in the interest of that welfare will direct that the children be returned to this State, within a distance of fifty miles from the City of Peekskill, within twenty days after the entry of an order hereon. If the children are so returned they may remain in their mother's custody, subject to the provisions of the order heretofore entered, pursuant to stipulation, provided that they shall not be removed from the State of New York, or to any place other than their mother's residence in the City of New York, which is more than fifty miles distance from Peekskill, without the father's consent. If they shall not be so returned, an order may be entered

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"The evidence does establish, however, that defendant's actions have deprived the children, during the period of their absence, of the personal care, companionship and guidance of their father, which were considered essential for their welfare by the parties and the court when the order providing for temporary custody by the father, and visitation rights, was made, and which are, in my opinion, essential now, in the interest of the welfare of the children. At their age these children should have the benefit of association with and guidance by their father, as well as the benefit of maternal care and affection. Although on an application of this kind the court is not concerned with the settlement of disputes between parents, it is concerned with the welfare of these children, and in the interest of that welfare will direct that the children be returned to this State, within a distance of fifty miles from the City of Peekskill, within twenty days after the entry of an order hereon. If the children are so returned they may remain in their mother's custody, subject to the provisions of the order heretofore entered, pursuant to stipulation, provided that they shall not be removed from the State of New York, or to any place other than their mother's residence in the City of New York, which is more than fifty miles distance from Peekskill, without the father's consent. If they shall not be so returned, an order may be entered

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providing for exclusive custody in the father, without prejudice to such application as the mother may be advised to make with respect to visitation rights."

As Mrs. I. did not obey this order of NOLAN, J., but remained with the children in this country, Mr. H. applied to the New York court on Aug. 10, 1965, for exclusive custody, which was granted to him by an order made by GAGLIARDI, J. on Sept. 7, 1965. After NOLAN, J., had given his judgment on June 15, Mr. I. came over to England to see Mrs. I. She then told him that her wish was that he should leave America for good and that both of them with the children should make their home in this country. He was prepared to entertain this idea, though obviously it would take him some time to wind up his affairs in America and obtain suitable employment over here. He told me that, so far as he could see at present, he would probably be in a position himself to come over to England to live in about three or four months time. He said, however, very candidly that if the court decided that the children should go back to America, he was for his part ready and willing to remain in the United States. In June Mrs. I. purchased a house at Daventry, where she is now living with the children, who go to school there. She tells me, and I am quite prepared to accept it, that they are happy over here and are doing well at school. She also told me, very frankly, that if this court ordered the return of the children to New York, she would at once give up her residence in England and return to the United States.

It was no doubt as a measure of precaution, in view of the order of NOLAN, J., that Mrs. I. made the children wards by the issue of the summons on July 15. She swore an affidavit in support of an application for leave to serve Mr. H. out of the jurisdiction, in which, as well as setting out some of the matters which I have already detailed, she made certain allegations to which I must now refer. She said that Mr. H. was a man of violent temper, who might indeed be said to be paranoiac, that he had assaulted her on many occasions and that women and children can live with him only at the risk of their health. She further said rather inconsistently on the face of it that Mr. H. had on several occasions caused distress to her and the children by not exercising the very extensive rights of week-end access given him by the separation agreement. She further said that she had often been told by the children, after they visited their father, that he had different women staying in the house and sleeping in his bedroom, and that until 1964 he had employed a man of notoriously bad character as a handyman and allowed the children to come into contact with him. She further said that she had in the summer of 1964 experienced difficulty in visiting the children (as she was allowed to do under the terms of the order) during Mr. H.'s period of access to them.

One cannot fail to observe that all these matters of complaint--if and so far as justified--were all well known to Mrs. I. when she agreed to the order of Dec. 11, 1964. Finally she said that, as Mr. H. is a member of the American Bar and a member of a firm of attorneys in Peekskill and two of his brothers are respected and influential lawyers in Peekskill, she felt at a disadvantage in the courts of the State of New York. I take it that she meant by this that she felt justified in transferring the children to the jurisdiction of this court without reference to her husband and the New York courts. Counsel for Mrs. I., as one would suppose, did not seek to avail himself of this argument. Indeed in view of the evidence given by Mr. I. on this point, it is plain that any suggestion that the relevant New York courts would not have given a fair hearing to any application by her to remove the children permanently to England is fantastic. Mrs. I. may well have thought that if she could bring the children to England and keep them here for a number of months, the English courts would be more likely to allow them to remain here than the American courts would have been likely to have allowed her to bring them over in the first place--but that is quite a different matter.

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A On Oct. 5, 1965, Mr. H. launched the motion in the wardship proceedings which is now before me, asking:

"(i) That the plaintiff do forthwith deliver into the care of the defendant the above-named infants. (ii) That the defendant be at liberty forthwith to convey the said infants to the State of New York. (iii) That upon the said infants leaving the jurisdiction of this Honourable Court pursuant to the liberty aforesaid the wardship herein be discharged."

B He supported this motion by an affidavit in which after setting out some of the undisputed history which had been omitted from Mrs. I.'s affidavit, he denied that he was of violent disposition or mentally unbalanced, and further denied the other allegations detrimental to him made by Mrs. I.

C Mrs. I. took a very long time in putting in any evidence in answer to this motion. So long indeed that eventually I had to fix a date after which no further evidence could be admitted. Fortunately Mrs. I. and Mr. I. put in affidavits in answer before that date. I have already stated the substance of Mr. I.'s evidence. Mrs. I.'s affidavit repeats many of the allegations contained in her earlier affidavit. The most important new matter consists of the reports of psychiatrists which she obtained when Mr. H. started proceedings in September, 1964, after the trouble over access which had arisen in the summer. It appears from those reports that there is or was a marked difference between the two children. The younger was a difficult child, restless, hard to control, complaining that everyone liked his brother better than himself, while the elder gave no trouble. One of the three reports suggests, what seems probable enough, that the maladjustment of the younger child may be in part due to the relations between mother and father. The psychiatrist in question a Dr. Alexander also expressed the view that it might be better for the children to see nothing of the father. It is, however, to be observed that this report appears to have been given largely on the basis of information supplied by the mother, and is in the nature of a proof of the evidence to be given by the doctor in the contemplated proceedings. Further, it appears

E that the elder child told Dr. Alexander that he liked both his fathers, "his Daddy and his step Daddy", i.e., Mr. H. and Mr. I. - neither one more than the other. In her affidavit Mrs. I. said that she had been told by a Miss R., a mutual friend of hers and Mr. H., that during his periods of access Mr. H. used to beat the younger child frequently. Miss R. swore an affidavit denying this, and maintained her denial in cross-examination.

G It is to be observed that, though Mrs. I. know very well that one of the chief points which would be debated on this motion was whether or not it would be safe for the children to return to the United States with their father, she did not think fit to adduce any evidence by Dr. Alexander showing how he had come to form this view of the father which apparently he had formed, and whether from his personal observation he was of the opinion that the children would be in danger if they were taken to the United States by him. Mr. H. and Mrs. I. were cross-examined. The accounts which they gave of their matrimonial history and respective characters are very conflicting. He says that she is sexually promiscuous and a drunkard. She says that he is mentally unbalanced and treated her with violence; and each denies the allegations of the other. It is, however, to be observed that neither suggests that the other is not fond of the children or that the children are not fond of him and her, though the mother says that she thinks that it would be in the children's best interests to be separated entirely from the father.

I The issue on this motion is, of course, whether this court ought to go into the merits of the case and decide after hearing all the relevant evidence whether in all the circumstances prevailing at the date of judgment it is in the best interests of the infants that they should stay in this country with their mother, or whether the court should send the children back to New York at once with a view to the questions of where and with whom they should live being decided as soon as

- A not come on for many months. By then Mr. L. will have uprooted himself from America and settled in England, the children will have taken root here, and there may well be evidence of English child psychiatrists to this effect, that it would be bad for them to go back to America. All this may make it very hard indeed for an English judge perhaps a year hence to order the return of the children to America. Therefore, since the American court is the proper court to decide this case, and the father would suffer a grave injustice if the English court assumed the task of deciding it, I would have thought, speaking always apart from authority, that the court should send the children back to America at once with a view to a decision in the American courts, unless that course was fraught with danger for them. As I have said, though I have formed no view whatever as to the respective merits of the parents, I am satisfied that there will be no such danger even if the children have to travel and stay with their father.

- Counsel for Mrs. L. who has argued this case most ably on her behalf, submits that I am precluded by authority from taking the course which, I think, the justice of the case requires. He says that if once a child is made a ward, even by some one who has brought the child here wrongfully and in defiance of the laws of the country where his home is, this court is, subject to certain limited exceptions, bound to hear the case out to the end and form an independent judgment on where and with whom and in what conditions the child shall live, and cannot send the child back to its home so that the local courts shall deal with it. He admitted indeed that there might be some exceptions to this rule, where, for instance, it was a case of *res ipsa loquens*, as in the first motion in *Re Kermel (an infant)* (1) to which I shall be referring; but he submitted that the facts of this case did not constitute an exception.

- The first case on which he relied was the decision of Mouron, J., *Re B's Settlement, B. v. B.* (2). There the salient facts were as follows. The father, a Belgian national, married the mother, a British national who took Belgian nationality on her marriage to him and went to live in Belgium. They separated and by the common law of Belgium the father was the guardian. In August, 1937, the mother, who had returned to England but had gone over to Belgium to see the child, brought the child to England without the father's consent. The father started divorce proceedings in Belgium and in October, 1937, the Belgian court gave him custody during proceedings and ordered the mother to return the child. The mother was not represented and not in fact served with the order until December, 1938. In January, 1939, the father started wardship proceedings here asking for the return of the child. The hearing before Mouron, J., was in July, 1939. The Belgian divorce proceedings were not yet heard, and the mother said that she was going to contest the issue of custody. It was argued that the English judge should blindly follow the Belgian order. Mouron, J., rejected that submission; and if I may respectfully say so, I entirely agree with him. Although an English court ought always to regard any order of a foreign court as an important factor in the case, the weight to be given to it in any given case must depend on the circumstances, e.g., was there a full hearing at which both sides were represented, how recent was the hearing, and so on. In the case of *Re B's Settlement* (2) the order was made without hearing the mother, and indeed apparently without the merit being gone into, and the child had been in England for two years since it had been made. I cannot regard that decision as throwing any light whatever on this case.

The next case relied on was *McKee v. McKee* (3). There the salient facts were as follows. The parents were divorced in California in 1942 on the petition of the father. Custody was given to the father with access to the mother. In June, 1945, the mother applied to vary the custody order, and after a contested hearing the Californian court gave custody to the mother with access to the father.

(1) [1964] 3 All E.R. 339; [1964] Ch. 217.

(2) [1951] 1 All E.R. 949, n.; [1950] Ch. 51.

(3) [1951] 1 All E.R. 942; [1951] A.C. 352.

The child was in fact with the father in Michigan. He brought successive appeals in California from the order of June, 1945, the last of which was dismissed in December, 1946. On the hearing of its dismissal the father at once moved with the child over the border from Michigan into Ontario where he said that he meant to live permanently. The mother applied to the Ontario court and there was a long hearing on the merits. The judge of first instance decided in favour of the father, and that decision was upheld by the Court of Appeal by a majority, but it was reversed by the Supreme Court of Canada by a majority. Finally, the Privy Council restored the decision of the judge of first instance. Lord SIMONDS referred (4) to the ground of the decision of the majority of the Supreme Court of Canada given by CARRWRIGHT, J.:

"It is at this point that CARRWRIGHT, J., appears to their lordships to adopt a line of reasoning which cannot be supported. For, after re-affirming 'the well established general rule that in all questions relating to the custody of an infant the paramount consideration is the welfare of the infant', he observed that no case had been referred to which established the proposition that, where the facts were such as he found them to exist in the case, the salient features of which have been stated, a parent by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the court, whose jurisdiction he himself invoked, becomes 'entitled as of right to have the whole question re-tried in our courts and to have them reach a new and independent judgment as to what is best for the infant'. It is, in effect, because he held that the father had no such right that the learned judge allowed the appeal of the mother, and that the Supreme Court made the order already referred to."

The Privy Council then go on to dispose of that reasoning in this way (4):

"With great respect to the learned judge, this was not the question which had to be determined. It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. It is however, the negation of the proposition, from which every judgment in the present case has proceeded, viz., that the infant's welfare is the paramount consideration, to say that where the learned trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled."

The essence of the matter, therefore, is this, that CARRWRIGHT, J., was saying that in what I may call for short a "kidnapping case" the judge in the court to the jurisdiction of which the child has been improperly removed has no right to go into the merits of the case. The Privy Council rejected that view of this matter and said that it was a question for the discretion of the judge whether or not to go into the merits of the case. In that case, as far as appears, no objection had in fact been raised to the trial judge going into the merits. He had formed a view, as he was entitled to do. That case again does not seem to me to throw light on this case.

Finally I must refer to the case of *Re Kermot* (5), the facts of which undoubtedly bear up to a point some resemblance to those in the present case. The salient facts were that the wife was an Italian and the husband was a domiciled Englishman. The marriage was in Italy in May, 1961. The child was born in March, 1962. The marriage was unhappy from the first. The parties had no settled home,

(4) [1951] 1 All E.R. at p. 947; [1951] A.C. at p. 363.

(5) [1964] 3 All E.R. 339; [1965] Ch. 217.

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(7) [1961] 1 All E.R. 100; [1961] 1 W.L.R. 100.
(8) [1951] 1 All E.R. 947; [1951] A.C. 363.
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- A but lived in Italy either with the wife's mother or in hotels. In May, 1962, the child was brought by the father to England without the mother's consent, and made a ward of court. The child at that stage was only about eight weeks old and was still being breast fed by the mother. In those circumstances on May 29, 1962, PLOWMAN, J., in the exercise of his discretion, ordered the summary return of the infant with his mother to Italy. The course then taken by the English judge is the course which Mr. H. is asking me to take in this case. The father followed the mother and child to Italy. There was some sort of reconciliation, but in October, 1963, a separation order was made by the Italian court giving custody to the father with access to the mother. As BUCKLEY, J., points out, the obvious intention of that order was that the father should remain in Italy having custody of the child and that the wife should have access to the child in Italy. In October, shortly after that order was made, I think only a week or so afterwards, the father again brought the child to England without the mother's consent. In January, 1964, the mother made the child a ward and asked the court to be given care and control of the child and for leave to take the child out of the jurisdiction back to Italy. BUCKLEY, J., refused that motion and said that the English court ought to go into the merits of the case and not order the summary return of the child, although the father had brought the child to England in defiance of the separation order which had been made by the Italian court under which the wife was to have access in Italy.

- Counsel for Mrs. I. naturally relied on that case very strongly; but, if one reads it carefully, there are several factors which distinguish it from this one. The first is that the father was a British national domiciled here, and the evidence was that the Italian court would have applied English law to the case. Therefore, as BUCKLEY, J., pointed out (6), it might well be said that England was the "forum conveniens". That manifestly is not the case here. Secondly the father had been given custody by the Italian court, and to order the child back to Italy in the control of the mother would on the face of it be contrary to the order of the Italian court. So far as appears, the possibility of the child going back to Italy with the father to live there with him so that the mother could have access in Italy as contemplated by the separation agreement was not canvassed. Thirdly, and I think most important of all, the court did not see the mother. There was no cross-examination on either side. There was simply a mass of affidavit evidence and grave allegations in the father's affidavit against the fitness of the mother to have the care and control of the child. On consideration I do not think that there is anything in that case to prevent me dealing with this case in the way which justice seems to demand.

- The view submitted on behalf of Mr. H. is not without support in the books. First of all, there are the observations of PAGE-WOOD, V.-C., in *Nugent v. Felzani* (7), which I consider to have still very great weight, notwithstanding what was said about the case in *Re B's Settlement* (8) and in *McKee v. McKee* (9). The maxim "do as you would be done by" applies to a judge exercising a wardship jurisdiction just as much as to anyone else. Then there is the decision of SACHS, J., in the case of *Harben v. Harben* (10); and there is the general approach to the question of jurisdiction favoured by LORD DENNING, M.R., in his judgment in *Re P. (G. E.) (An Infant)* (11).

- In infancy cases the welfare of the infant is, of course, the chief consideration; but it is far from being the only consideration. When, in what I may call for short a "kidnapping" case, the judge has to decide whether to send the child back whence he came or to allow the case to be fought out to the end over here, he has to weigh various considerations which may to some extent conflict with

(6) [1964] 3 All E.R. at p. 343; [1965] Ch. at p. 222.

(7) 1861-73 All E.R. Rep. 318; (1865), L.R. 2 Eq. 794.

(8) [1951] 1 All E.R. 949, n.c.; [1949] Ch. 54.

(9) [1951] 1 All E.R. 942; [1951] A.C. 352.

(10) [1957] 1 All E.R. 379.

(11) [1964] 3 All E.R. 977; [1965] Ch. 568.

one another. On one side there is the public policy aspect, the question of comity and the question of "forum conveniens". Again, on the same side there is the question of the injustice which may be done to the wronged parent if the court delays matters and allows the kidnapped child to take root in this country. On the other side, the court has to be satisfied, before it sends the child back, that the child will come to no harm.

For the reasons which I have stated in this case I am satisfied that this is a case in which the children should go back, and I shall order that they do go back. Whether they go back with the father or the mother is a matter which can be debated further in camera.

Order accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the applicant father); *Sharpe, Pritchard & Co.*, agents for *Shops & Barton*, Daventry (for the mother); *Official Solicitor*.

[*Reported by JACQUELINE METCALFE, Barrister-at-Law.*]

PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVORCE).

Conflict of Laws Foreign decree Declaration of validity Venue.
Marriage Validity Declaration Suit for declaration Venue.

A prayer for a declaration of validity of a marriage or foreign decree is not a matrimonial cause as defined by s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, and any suit in which there is such a prayer cannot therefore be heard by a Special Commissioner, whose jurisdiction is derived from the Matrimonial Causes (Special Commission) (No. 2) Order, 1946.

In any such suit, on the granting of the registrar's certificate, it should be directed that the hearing takes place in London, where the suit will be listed for hearing by a judge of the Probate, Divorce and Admiralty Division.

COMPTON MILLER,
Senior Registrar.

Dec. 3, 1965.

English Treatises

FAMILY LAW

By

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it was published. The Court of Appeal refused to make the order. The judgments indicate that the court will rarely, if ever, permit the interests of the child to prevail over the wider interests of the freedom of publication. Although the case is clearly not an authority for such a wide proposition, it is submitted that, once one moves outside the circle of the ward's family and acquaintances, the fact that the person likely to be injured by another's conduct is a minor is no justification for using wardship proceedings to obtain an injunction that could not be obtained were he over 18. The publication of the fact that a 15 year old girl has had an abortion or the unwarranted expulsion of a child from school in breach of contract with a parent may be highly damaging, but if the law of tort or contract affords no remedy by way of injunction, it should not be possible to obtain one in the Family Division.

A problem arises if the purpose of making the child a ward of court is to obtain an order relating to some matter, the power to determine which has been vested by statute in some other body. This could occur, for example, if the child were in the care of a local authority. The latter's discretion cannot usually be fettered by warding the child, and consequently the court will not entertain the proceedings unless the body has acted with impropriety or in disregard of its statutory duties, for otherwise the court and the body, both acting in good faith, might reach opposing decisions.¹

Jurisdiction to make a Child a Ward of Court.—Since the jurisdiction is based upon the necessity of protecting the child, any minor actually in England may be warded even though he is neither domiciled here nor a British subject. Thus in *Re D.*² a German Jewish refugee who had been brought to this country in 1939 was made a ward of court even though he was not a British subject and had no property within the jurisdiction. But it is clearly only in the most exceptional circumstances that this should be done if the child is here only temporarily, for example for educational purposes or on holiday.³ Conversely, the court has jurisdiction if the child is a British subject even though he is not resident in England at all, because he continues to be entitled to the protection of the Crown as *parens patriae* wherever he may happen to be.⁴ In *Re P. (G. E.)*⁵ the Court of Appeal went further and held that there is jurisdiction to make an order in respect

¹See *post*, pp. 420-422. Similarly the discretion vested in an immigration officer to refuse a child admission into the country cannot be called in question by warding the child: *Re A.*, 1908, 2 All E.R. 115, C.A.; 1908 Ch. 643.

²[1943] 2 All E.R. 411; [1943] Ch. 305. See also *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, H.L.

³*Per* LORD CAMPBELL, L.C., in *Stuart v. Bute* (1861), 9 H.L. Cas. 449, 464-465, H.L.; *per* PEARSON, L.J., in *Re P. (G. E.)*, [1904] 3 All E.R. 977, 983-984, C.A.; [1905] Ch. 505, 588.

⁴*Hope v. Hope* (1854), 4 De G. M. & G. 328. See also *Re Willoughby* (1885), 30 Ch. D. 324, C.A. In *Re P. (G. E.)*, (*supra*), RUSSELL, L.J., was prepared to extend the jurisdiction to the case of a stateless person travelling abroad on a British travel document or a *totum* an alien holding a British passport (at pp. 988 and 505, respectively).

⁵[1904] 3 All E.R. 977, C.A.; [1905] Ch. 508. See *Webb* in 14 L.C.L.Q. 603.

of an alien who is ordinarily resident here even though he is not in the country when the application is made. In that case the stateless parents of a child who was almost seven years old when the proceedings were commenced had left Egypt following the Suez crisis and had come to England. They later separated and agreed that the boy should live with his mother but spend every weekend with his father. One Saturday the father, having obtained a British travel document, flew to Israel with the son. On the mother's application to have the boy made a ward of court it was held that the court had jurisdiction as the son's ordinary residence was in England with his mother, and the father, having agreed to this, could not change it without the mother's consent or acquiescence. This conclusion was fortified by the fact that the father still held the travel document, which entitled him to return to England, and had entered Israel on only a temporary visa and also that justice demands that a parent left in this country should have a remedy here when the other has spirited the child out of the jurisdiction by force, deception or fraud.

But it does not follow that the court is bound to continue the wardship even though it has jurisdiction. It will always be slow to do so if the child is not in the country, particularly if proceedings are also being taken elsewhere and the other court is the *forum conveniens*.¹ Nor will it make an order if there are no means of enforcing it and no probability that it will be obeyed or if it would be contrary to the law of the state where the child is.²

"Kidnapping" Cases.—Speedy international transport has recently given rise to a number of "kidnapping" cases in which a parent, who has failed to obtain custody in another country, has brought the child to England in the hope of being successful here. Naturally the court will do its utmost to discourage this practice. Consequently it may order the child to be sent back to the country where the original order was made without considering the merits of the case at all, provided that it is satisfied that this can be done without fear of immediate harm. As Cross, J., pointed out in *Re H.*,³ this procedure is consonant with the general principles of comity and is called for if the foreign court is the *forum conveniens*: if the case were delayed for an enquiry as to the merits, the child would begin to acquire roots in this country which it might not be in his interest to sever, with resulting injustice to the wronged parent. In that case a New York court had given the custody of two boys to their mother with liberal access to the father. It had further ordered that the children should not be removed from the jurisdiction without the father's written consent. In breach of this order and in contempt of the New York

¹*Re S. (M.)*, [1971] 1 All E.R. 450, 402 (proceedings pending in Scotland where the child was domiciled and resident).

²*Hope v. Hope*, (*supra*), at pp. 347-348; *Dawson v. Jay* (1854), 3 Do G. M. & G. 794, 772.

³[1905] 3 All E.R. 600; affirmed, [1906] 1 All E.R. 886, C.A. A similar conclusion was reached in *Re G.*, [1909] 2 All E.R. 1135, where the child was ordered to be returned to Scotland.

court the mother brought her sons to England where she intended to settle permanently. The children were then made wards of court. The Court of Appeal affirmed the decision of Cross, J., that this was a case where the court should do no more than order the children to be sent back to New York where the question of their future custody could be considered on its merits. A number of considerations led them to this conclusion: this was a serious example of "kidnapping"; the father and both children were American citizens so that an American court was the *forum conveniens*; an enquiry on the merits of the parents' claims (which might have resulted in the court's giving custody to the father in the U.S.A.) would have led to great delay during which time the children would have settled down in England; and there was no evidence that sending them back with their father would cause them any harm.

As was said in *Re E. (D.)*,¹ where there is a foreign order the proper course is to send the child back unless there are compelling reasons to the contrary. There were such compelling reasons in that case. The parents of a baby girl were divorced in New Mexico. Custody was originally given to the mother, but this was later varied in favour of the father with whom the girl lived until, nearly four years later, he was killed in a motor accident. The father, who was convinced that his wife was wholly unfit to have custody, had previously indicated that in the event of his death he wished his sister, Mrs. Z who lived in England, to have custody. Immediately after the father's death, the child's paternal grandfather took her from the hospital where she was being treated and handed her over to Mrs. Z with an assurance that there was no legal objection to her being taken to England. In the meantime the mother had obtained an injunction from the New Mexico court prohibiting the child from being removed from the U.S.A. and giving her temporary custody, but Mrs. Z and the girl had left the country before the injunction could be served. The mother later came to England and Mrs. Z made the child a ward of court. It was held that she should stay in this country with Mrs. Z. The latter had acted more or less innocently, she had believed the mother was unfit to have custody, she had become a second mother to her niece, who had no other home, and the critical consideration - the court felt that it would be disastrous for the child to remove her and send her back to the U.S.A.

But this principle has been modified in recent cases. The older the child is and the longer the order has been in force, the weaker becomes the presumption that the child should be sent back.² In *Re A.*³ the Court of Appeal held that the principle does not apply at all if the child was originally brought to this country not by stealth but with the agreement of both parties and *a fortiori* if, as in that case, one parent is normally resident here, the other has the means of coming to this

¹ 1967, 1 All E.R. 320, 338; 1967 Ch. 287, 301 (Cross, J.); 1967, 2 All E.R. 881; 1967 Ch. 701, C.A. *Re T.*, 1972, 110 Sol. Jo. 78 (children hostile to father in Malta).

² *Re I.* 1969, 3 All E.R. 608 (principle not applied when boy in question was aged 16 and the order was 12 years old).

³ 1970, 3 All E.R. 184, C.A., 1970 Ch. 605.

country, the parties are probably domiciled here and matrimonial proceedings are about to be launched here.¹

Procedure to make a Child a Ward of Court. - Until 1949 a child automatically became a ward of court in a number of cases, for example on a petition to appoint a guardian or on payment into court under the Trustee Act of a fund belonging to him or, in fact, upon any application made to the court on his behalf.² But now section 9 of the Law Reform (Miscellaneous Provisions) Act 1949, has enacted that a child shall be made a ward of court only by virtue of an order to that effect made by the court. Immediately an application for an order is made, the child becomes a ward of court; but he ceases to be one unless an appointment to hear the summons is obtained within 21 days or if the court refuses to make the order.³

A divorce court may also direct proceedings to be taken to have the children of the marriage made wards of court in any proceedings for divorce, nullity or judicial separation, either before, by or after the final decree.⁴ This power is rarely exercised but is useful if the court feels that the continuous supervision that this will produce is necessary for the child's welfare.

The child can always be ordered to be separately represented and the Official Solicitor then usually acts as guardian *ad litem*. If the dispute is between a "teenage" child and its parents, separate representation is always ordered; but if it is between the parents themselves or others claiming custody, this will be done only if the case presents particular difficulty or for some other reason it is desirable for the court to have the benefit of an independent opinion.⁵

The court may at any time order that a child shall cease to be a ward of court.⁶ If this is not done, the court's jurisdiction ceases immediately the ward reaches the age of 18, but it does not cease on the ward's marriage.⁷

Exercise of the Inherent Jurisdiction in other Proceedings. The rule that a child can be made a ward of court only if the procedure laid down by the Law Reform (Miscellaneous Provisions) Act 1949 is followed has led to some doubt whether the court can now exercise its inherent jurisdiction at all if the child is not warded. In *Re E*,⁸

¹If the court embarks on an investigation and considers the merits, it must apply the same principles in kidnapping cases as in all others. The parent's conduct is merely one of the matters to be taken into account: *Re L*, 1974, 1 All E.R. 913, C.A.

²See Simpson, *Infants*, 4th Ed., 105.

³Law Reform (Miscellaneous Provisions) Act 1949, s. 9 (2); R.S.C. O. 91, r. 2. The applicant must state his relationship to the child, and if the application appears to be an abuse of process, the summons may be dismissed forthwith: *Practice Direction*, 1907, 1 All E.R. 828 (made following *Re Duddell* (1907), 111 Sol. Jo. 113, where a night-club owner made a girl a ward of court as a piece of advertisement).

⁴Matrimonial Causes Act 1973, s. 12 (1).

⁵See Cross, *loc. cit.*, pp. 207-208. For the desirability of obtaining an independent medical opinion, see *post*, pp. 401-402.

⁶Law Reform (Miscellaneous Provisions) Act 1949, s. 9 (3).

⁷*U. Re Elies* (1958), *Times*, July 30.

⁸1955, 3 All E.R. 174, 1956, Ch. 24.

ROXBURGH, J., concluded that this procedure must now be followed whenever it is desired to invoke the inherent jurisdiction, but this has since been doubted by STAMP, J., in *Re N.*¹ and by SIMON, P., in *L. v. L.*² Difficulty arises in the first place because it is not clear whether the court had such a power before 1949; the dicta conflict but on balance suggest that any summons invoking the inherent jurisdiction automatically made the child a ward of court.³ If this is so, the Act of 1949 could have had one of two results. On the one hand, as was held in *Re E.*, it prescribes the only way in which the inherent jurisdiction can now be invoked. On the other hand, it may permit an order to be made with respect to the child without its becoming a ward of court if the procedure laid down is not followed. If, as in *L. v. L.*, an injunction is required immediately for the protection of the child, the court should be able to grant it forthwith without warding the child. If this view is correct, the Act does not cut down the court's powers but limits the consequences of their exercise. It is submitted that this is the interpretation to be preferred and that *Re N.* and *L. v. L.* should be followed rather than *Re E.*

Supervision by the Court.—Apart from the fact that discretion will have to be exercised by the court and not by the guardian, the principles to be applied when the ward is under the supervision of a testamentary guardian or guardian appointed by the court are equally applicable when he is a ward of court. Thus the court must make all necessary orders relating to care and control, access, education, medical treatment, and so forth. Five points call for special comment.

Care and Supervision. Section 7 of the Family Law Reform Act 1969 has given two new powers to the court, both of which can be exercised only if there are exceptional circumstances making this desirable. If it is impracticable or undesirable to leave the ward in the care of either parent or a third person, he may be committed to the care of a local authority. Alternatively, he may be placed under the supervision of a welfare officer or a local authority. It will be seen that this brings the powers of the Family Division in wardship proceedings into line with its powers under the Guardianship of Minors Act and the Matrimonial Causes Act.⁴

Medical Evidence.—If psychiatric evidence is desired, a psychiatrist should not be appointed without the court's approval. If both sides agree on the necessity for an examination and on the name of the psychiatrist, the court will normally follow their wishes. In the event of a disagreement, the Official Solicitor should be asked to act as

¹ 1967 1 All E.R. 101, 108-109, 1967 Ch. 512, 520-531.

² 1969 1 All E.R. 852, 854, 1969 P. 25, 27. See also *Re P.*, 1973 3 All E.R. 494, 497, 1973 Fam. 168, 202.

³ See *Stuart v. Bate* (1801) 9 H.L. 440, 446; H.L., *Brown v. Collins* (1883), 25 Ch.D. 50, 61; Simpson, *Infants*, 4th ed., 168. In *Re McGrath*, 1892 2 Ch. 406, 511, North, J., held that the court could act even though the children were not warded, but the Court of Appeal limited its power to the appointment and removal of guardians (1893, 1 Ch. 113, 117).

⁴ See *ibid.* pp. 322 and 325-329.

guardian *ad litem* (if he has not been appointed already) and he can then decide (subject to the court's direction) whether an examination is necessary. This procedure has the advantage that the psychiatrist will not be the witness of either of the parties in dispute¹ and that the Official Solicitor can obtain a second opinion if necessary.²

Maintenance.—Formerly the court could not order maintenance to be paid for a ward of court unless there was some fund out of which sums could be paid for his benefit. Now, however, the court can order either parent of a *legitimate* child who is a ward of court to make periodical payments to the other or to a third person who has care and control of the child.³

Marriage of Ward of Court.—The court's consent must be obtained to the marriage of its ward⁴ and the consent will be withheld if the court is of the opinion that the proposed match would be unsuitable. It is a contempt for a ward to marry (or even to attempt to marry)⁵ without this consent, for which not only the parties but also anyone else who has brought about the marriage or has taken any active part in its celebration⁶ may be punished.

Removal of a Ward of Court from the Jurisdiction.—The danger that, if a ward left the jurisdiction, the court might lose complete control of him because it had no means of securing his return, led to the formulation of the rule that a ward of court would never be permitted to leave England. Thus, in 1801, Lord Eldon, L.C., stated that the court would never make an order for taking a ward out of the jurisdiction and he refused the guardian permission to take his ward to his own house in Scotland.⁷ But by the middle of the last century the courts were coming round to the view that a ward might be taken out, at least temporarily, if sufficient reason were shown, for example for the sake of his health or to rejoin his family, provided that his return could be ensured if the court demanded it.⁸ This wider rule was gradually extended and by the end of the century it was accepted that an application should be granted whenever it was shown to be for the ward's benefit.⁹ It must now be extremely common for wards to be taken abroad for holidays and the court may give general leave for temporary visits abroad if the other party does not object.¹⁰ Only in the most exceptional circumstances would the court refuse to permit a ward to be taken out of the jurisdiction permanently if its welfare

¹See *ante*, p. 314.

²See the views of Cross, J., in *Re S.*, 1907, 1 All E.R. 202, 209, approved and followed in *Re R. (P.M.)*, 1908, 1 All E.R. 601, 603, and *R. (M.) v. R. (R.)*, 1908, 3 All E.R. 170, 174, C.A.

³See *post*, p. 502.

⁴*Re H's Settlement*, [1900] 2 Ch. 200; Marriage Act 1949, s. 3 (6).

⁵*Walter v. Yoke* (1815), 10 Ves. 451, 454. (In this case the marriage was void but nevertheless was held to be a contempt.)

⁶E.g., the parties' parents or the officiating clergyman. *Walter v. Yoke*, (*supra*).

⁷*Mountstuart v. Mountstuart* (1801), 6 Ves. 303.

⁸See *Campbell v. M'Clachy* (1837), 2 My. & Cr. 31, and *Darson v. Jay* (1854), 3 De G. M. & G. 704.

⁹See *Re Callaghan* (1883), 28 Ch D. 180, 186, C.A.

¹⁰See *Practice Note: Wardship: Visit Abroad*, 1973, 2 All E.R. 312.

so demanded. The person most likely to oppose the application is one of the parents if the proposal is that the child should emigrate with the other; in such circumstances the court must take into account the same facts as it would if this situation arose after a divorce.¹

C. CUSTODIANSHIP

As we have seen, a guardian, whether appointed by a deceased parent or by the court, stands *in loco parentis* to his ward only after the death of the ward's parent. Unless a child is made a ward of court, there is no other way by which custody of him can be given to a third person unless one of the parents (or one of the spouses in respect of whose marriage the child is a child of the family) invokes the jurisdiction of the court by taking proceedings under the Matrimonial Causes Act or the Matrimonial Proceedings (Magistrates' Courts) Act.² One solution is for the person wishing to secure custody to apply to adopt the child, but this may not be for the latter's welfare if the applicant is a relative (because family relationships may become distorted) or if the parent is still anxious to keep in touch with the child, however unlikely it is that he will ever be in a position to exercise care and control. This gap in the law is a source of particular hardship to foster parents whose position is always precarious and who may have had the care and control of a child for years with no hope of being able to adopt it or obtain legal custody. Consequently the Houghton Committee recommended that in appropriate cases the court should have power to vest custody in someone other than the parent.³ This recommendation has been implemented by the Children Act of 1975 in provisions (not yet in force) which will enable the court to make a custodianship order.

Who may apply for an Order. The Children Act specifies three categories of persons qualified to apply for an order. They are:⁴

- (a) a relative or step-parent of the child⁵
 - (i) who applies with the consent of a person having legal custody of the child, and
 - (ii) with whom the child has had his home for the three months preceding the making of the application;
- (b) any person—
 - (i) who applies with the consent of a person having legal custody of the child, and

¹See also *Re Banno*, 1951 W.N. 130, *Re O.*, 1962 2 All E.R. 10, C.A. The court would usually debar the child if it was going abroad permanently.

²At present there is also a power to order custody to a third person if one of the parents takes proceedings under the Guardianship of Minors Act. This will be abolished when the provisions in the Children Act relating to custodianship are brought into force. See *ibid.* p. 321.

³Cmd. 5107, c. 6.

⁴S. 33(4). For the meaning of "had his home", see *ibid.* pp. 300-307.

⁵Relative has the same meaning as in the Adoption Act 1975, s. 10(1). See *ibid.* p. 321, n. 4. As there is nothing to rebut the presumption that "parent" does not include the father of an illegitimate child, the father's wife is presumably not a step-parent. The mother's husband presumably is.

- (ii) with whom the child has had his home for a period or periods before the making of the application which amount to at least twelve months and include the three months preceding the making of the application;
- (c) any person with whom the child has had his home for a period or periods before the making of the application which amount to at least three years and include the three months preceding the making of the application.

The reason that the child must have had his home with the applicant for the previous three months is to enable the local authority to ensure that he is likely to settle down there. The consent of the person with legal custody is required in the first two cases because of the fear that the whole system of fostering might be jeopardised if foster parents could automatically destroy the parents' rights by applying for an order: this can be done only if there is a long term fostering which has lasted for at least three years.¹ There is no such danger if no one has legal custody of the child, if the applicant has legal custody himself, or if the person with custody cannot be found, and consequently in these cases the requirement relating to consent does not apply.²

An application may be made by one or more persons.³ Although a joint application will usually be made by a husband and wife, it is not necessary for joint applicants to be married to each other. Hence, for example, two sisters could apply for an order together. The child must be in England or Wales when the application is made, but neither the applicant's domicile nor his residence is relevant.⁴

Two classes of person may not apply even though they come within the categories set out above. Neither the mother nor the father of the child may do so:⁵ if they do not already have custody, they must obtain it in one of the ways already open to them. Nor may a step-parent apply for an order if the child was named as a child of the family in previous proceedings for divorce or nullity in an order under section 41 of the Matrimonial Causes Act 1973 unless the parent other than the one married to the applicant has died or cannot be found.⁶ In this case jurisdiction to make orders relating to custody must remain in the divorce court already seized of the matter.

Two special cases must be mentioned. A court hearing an application for custody by a parent under the Guardianship of Minors Acts may make a custodianship order in favour of a third person if it is of the

¹The reference to a person in paras. (a) and (b) implies that, if two persons have legal custody (e.g., both parents), it will be sufficient if only one consents. The wishes of both parents must be taken into account before an order is made. The Secretary of State may by order substitute a different period for the period of three years. Children Act 1975, s. 33(7).

²Children Act 1975, s. 33(6). The reference to *the* person with custody implies there is only one.

³s. 33(1).

⁴s. 33(1). See also s. 36. The applicant will normally have to be resident within this country as he has to give notice to the local authority in whose area the child resides and the child must have his home with him: see *ibid.*

⁵s. 33(1). This includes the father of an illegitimate child.

⁶s. 33(5), s. 36(1). For s. 36, see *ibid.*, pp. 420-421. This does not apply if the court declared that there were circumstances making it desirable that the decree should be granted without delay notwithstanding that the requirements of the section had not been complied with and it has since been determined that the child was not a child of the family.

opinion that an order may be made in an adoption order and that it would not be better and that it would be the latter case of each parent compensated with, but an order in proceedings for adoption even if the minimum period of home with the

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RAYDEN'S
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2. The concept of wardship.—The notion and concept of wardship are but facets of the relationship in which the Court, as delegate and trustee of the Royal prerogative powers, stands to the monarch's subjects. It is a corollary of the principle that all subjects owe allegiance to the Crown, that the Crown protects its subjects, and in respect of those who are minors exercises a particular authority and observes a special obligation as *parens patriae* (a). In one sense, therefore, all British subjects who are minors (b) are wards of court because they are subject to the parental jurisdiction entrusted to the British Courts (c). But the expression "ward of court" has gradually acquired a more specialised significance. By the end of the last century, a ward of court was "an infant properly under the care of the guardian appointed by the Court . . . or infants brought under the authority of the Court by an application to it on their behalf although no guardian is appointed. The Court becomes, in effect, the guardian of such an infant" (d). Prior to 1949, an infant automatically became a ward of court where an action or other proceeding relating to his person or property was commenced in the Chancery Division (e). That resulted in many infants becoming wards of court although there was no need for the exercise of the Court's special jurisdiction and control, whereas it was impossible to cause an infant to become a ward of court simply by making an application to the Court in that behalf. Parties seeking to make an infant a ward of court were obliged to resort to the device of settling a sum of money upon the infant and then commencing an action to administer the trusts of the settlement (f). Since 1949, however, no infant can be constituted a ward of court save by an application to the Court to that effect, and the infant becomes a ward on the making of the application (g). Once made, a valid order of wardship subsists until the ward attains majority (h) or until the Court, either upon an application in that behalf or of its own motion, orders that any minor who is for the time being a ward of court shall cease to be such (i). The Court's order and jurisdiction continues even though the ward becomes of unsound mind (j).

NOTES

(a) *Re P. (G. E.) (an Infant)*, [1965] Ch. 508; [1964] 3 All E. R. 977, C. A. As to the extent of wardship jurisdiction, see *Re X (a Minor) (Wardship: Restriction on Publication)*, [1975] Fam. 54; [1975] 1 All E. R. at p. 702, C. A., overruling *Latey, J.*, at [1975] Fam. 47; [1975] 1 All E. R. 607 (wardship jurisdiction not exercised to prevent the publication of a book harmful to the ward); *Re D. (a Minor) (Wardship: Sterilisation)*, [1976] Fam. 185; [1976] 1 All E. R. 326 (wardship jurisdiction exercised to prevent sterilisation of 12 year old ward: this was type of case where court should "throw some care round this child"); *Re H. (an Infant)* (1977), *Times*, October 20th; 122 Sol. Jo. 230, C. A. upholding [1977], 121 Sol. Jo. 654 (challenge directed as to whether child should be subject of a care order at all; wardship jurisdiction properly invoked); *Re O. (a Minor)*, [1978] 2 All E. R. 27; [1977] 3 W. L. R. 732, C. A.; and see par. 16 (p. 1123, *post*).

(b) An infant, or minor, is any person who has not yet attained full age. A person attains full age on attaining the age of 18 years (Family Law Reform Act, 1969, s. 1 (1), p. 2414, *post*). Persons of 18 or over but under 21 on

1st January, 1970, attained their majority on that date (*ibid.*). A person who is not of full age may be described as a minor instead of as an infant; *ibid.*, s. 12 (p. 2410, *post*).

(c) *Brown v. Collins* (1883), 25 Ch. D. 56, *per* Kay, J., 60.

(d) *Re E. (an Infant)*, [1956] Ch. 23, *per* Roxburgh J. at p. 26; [1955] 3 All E. R. 174, 176.

(e) *Stuart v. Marquis of Bute, Stuart v. Moore* (1861), 9 H. L. Cas. 440; *Re McCullochs (Minors)* (1844), 6 L. Eq. R. 393.

(f) *Hope v. Hope* (1854), 4 De G. M. & G. 328, 332; *Re H's Settlement, H. v. H.*, [1909] 2 Ch. 260; *Re X's Settlement*, [1945] Ch. 44, 46; [1945] 1 All E. R. 100, 101.

(g) Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (1), (2) (p. 2127); *Re E. (an Infant)*, [1956] Ch. 23; [1955] 2 All E. R. 174; see par. 8, p. 1110, *post*.

(h) Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (2) (p. 2127, *post*).

(i) *Ibid.*, s. 9 (3), and see par. 24, *infra*.

(j) *Vane v. Vane* (1876), 2 Ch. D. 124; *Re Edwards* (1879), 10 Ch. D. 605, C. A.

3. Jurisdiction: British subjects: aliens. It has been said (a) that the Court can "deal with the custody of any child who is a British subject whether by parentage or even (b) by virtue of having a British grandfather". This inherent jurisdiction exists even if the child is born out of the allegiance, and it exists irrespective of where the child may be physically located at the relevant times. It has been exercised irrespective of the fact that one parent was also resident out of the jurisdiction and that there was no property of the child within the jurisdiction. It has been exercised even where the father was dead and the mother and child were both domiciled in a foreign country (c). However, in the case of a minor British subject who is not resident within the jurisdiction, the Court will only exercise its jurisdiction in extraordinary circumstances (d). An alien minor resident in England is to a certain extent a subject of the Crown and accordingly subject to the Court's jurisdiction over minors. A minor alien may, therefore, be made a ward of court if he is domiciled and resident, and if he is resident but not domiciled, in England (e). The Court will exercise its wardship jurisdiction over a stateless alien minor if he is ordinarily resident in England at the time when the wardship proceedings are initiated even though he is, for the time being, outside the Court's territorial jurisdiction (f).

The Court cannot exercise its jurisdiction in respect of a minor whose parent claims diplomatic immunity (g), and a child who has been refused admission to this country by the immigration authorities cannot be made a ward (h).

NOTES

(a) *Harben v. Harben*, 1957 1 All E. R. 379, 381; [1957] 1 W. L. R. 261, 267, *per* Sachs, J.

(b) Referring to *Re Willoughby* (1885), 30 Ch. D. 124.

(c) *Harben v. Harben*, *supra*.

(d) *Re Willoughby* (1885), *supra*; *Nugent v. Vetzera* (1866), L. R. 2 Eq. 704; 35 L. J. Ch. 777.

(e) *Brown v. Collins* (1883), 25 Ch. D. 56, *per Kay, J.*, 62; and see *Re E. (an Infant)*, [1956] Ch. 23; [1955] 3 All E. R. 174; *Re C. (an Infant)* (1956), *Times*, December 14th (foreign infant, Tatiana, in England *en route* for U.S.S.R. with father: Chancery Division, applying usual principles, awarded custody to mother).

(f) *Re P. (G. E.) (an infant)*, [1965] Ch. 568 C. A.; [1964] 3 All E. R. 977.

(g) *Re C. (an Infant)*, [1959] Ch. 363; [1958] 2 All E. R. 656.

(h) *Re Mohamed Arif (an Infant)*; *Re Nirbhai Singh (an Infant)*, [1968] Ch. 643; *sub nom. Re A. (an Infant), Hanif v. Secretary of State for Home Affairs*; *Re S. (N.) (an Infant), Singh v. Secretary of State for Home Affairs*, [1968] 2 All E. R. 145 (so long as immigration officers exercise their statutory powers *bona fide* the process of wardship cannot be used to prevent the immigration authorities from removing an infant from the jurisdiction or be used as a means of reviewing their decisions; originating summonses struck out as abuses of process of the Court).

4. Foreign orders: *forum conveniens*: "kidnapping" cases.—The English Court will act irrespective of the fact that the courts of the country where the child is located may also have jurisdiction to make an order (a). But the English Court will assume control of a foreign infant only if it is the *forum conveniens*. In deciding if it is the *forum conveniens*, it will give consideration not only to the physical convenience of the parties and witnesses but also to the system of law to be applied and whether or not it is the appropriate tribunal to apply it (b). Nevertheless, it has been said that the Court's jurisdiction is one which it "ought to be very slow to leave to be exercised by any other tribunal" (c). The Court is not prevented from dealing with matters touching upon the welfare and happiness of an infant by virtue of the subsistence of a valid order of a foreign court of competent jurisdiction (d): the English Court is not bound by such an order, but must form an independent judgment, giving proper weight to the foreign judgment (e). In wardship cases the Court will pay regard to the orders of foreign courts unless satisfied that to do so would seriously harm the infant (f), as it is bound in duty to protect the child's welfare without being bound to enforce the foreign order or to follow it (g). The welfare of the child concerned is the first and paramount consideration (h). The Court will set its face against any unilateral removal of infants from their home in another country by one parent, and should not countenance wardship proceedings by that parent unless there is good reason to do so (i). But the Court is not concerned with penalising an adult for his conduct, and the action of one party in kidnapping a child is only one of the circumstances to be taken into account, and the weight to be attributed to it must depend upon the circumstances of the particular case (j). Where a kidnapping case is promptly brought to the attention of the English Court the Court may order the return of the child to its own country for the merits of the case to be investigated there, but, whether the English Court makes a summary investigation or embarks on a full-scale investigation, the welfare of the child remains the first and paramount consideration (k). Where there are proceedings relating to the infants pending in a foreign court, the English Court may, upon

receiving appropriate undertakings from the parties, de-ward the infants so that they may be removed into the foreign jurisdiction (*l*). It is not desirable that the English Court should make an order in terms which suggests that it has formed a concluded view as to which parent should have custody (*m*).

NOTES

(a) *In Re B's Settlement*, [1940] 1 Ch. 54; *McKee v. McKee*, [1951] A. C. 352; [1951] 1 All E. R. 942, P. C.; *Re Kernot*, *Kernot v. Kernot*, [1905] Ch. 217; [1904] 3 All E. R. 339.

(b) *Re Kernot*, *supra*. The wishes of the parties may also be a material consideration; *Re An Infant* (1901), *Times*, March 23rd, Russell, J. (mother made infant ward of court; domicile and ordinary place of residence of infant and last joint-home of parents were in Northern Ireland; mother asked for care and control and for order for infant's maintenance against father, who continued to live in Northern Ireland. *Held*: Court should not exercise jurisdiction in absence of concurrence of father, who preferred court of Northern Ireland as the *forum conveniens*; ordered that infant should be handed to father and return to Northern Ireland with him when infant would be de-warded). The issue of whether or not the English Court is the *forum conveniens* is only one of the matters for consideration; *Re T. (an infant)* (1900), *Times*, September 6th, C. A. (when foreign court has made order in divorce proceedings embodying an agreement between the parties as to infant and infant is not returned to foreign country pursuant to agreement, the relative importance of the child's interests, comity of nations and *forum conveniens* are questions of degree in all the circumstances of the case). See also *Re C. (Minors) (Wardship: Jurisdiction)*, [1978] 2 All E. R. 230; [1977] 3 W. L. R. 501, C. A. (children, subject to the jurisdiction of the Californian Court, removed by father and brought to England; on an application for their return to California, *held*: that since it was likely that the Californian Court, applying its test of the "best interests" of the children, would order that the father have custody in England, the English Court should assume jurisdiction; wardship confirmed: care and control to father).

(c) *Re Kernot*, *supra*, per Buckley, J., 1216. But see *Re N. (Infants)* (1966), *Times*, October 27th, Stamp, J. (infants at school in Switzerland when abducted by father; mother, in England, obtained order making them wards of court and requiring father to return them within Court's jurisdiction; father sent cablegram to effect that he had infants in Australia and had obtained *ex parte* order making them wards of court. *Held*: in these circumstances difficult to continue the English order having regard to proceedings in the Australian court, and the English order should not be enforced until further order.)

(d) *McKee v. McKee*, [1951] A. C. 352; [1951] 1 All E. R. 942, P. C.

(e) "What is the proper weight will depend upon the circumstances of each case" (*ibid.*, at pp. 364, 948).

(f) *In Re H. (Infants)*, [1905] 3 All E. R. 906; [1906] 1 W. L. R. 381 per Cross, J. at pp. 912, 388; upheld on appeal [1906] 1 All E. R. 886; [1906] 1 W. L. R. at p. 303, C. A. See also *Re E. (D.) (an Infant)*, [1907] Ch. 287; [1907] 1 All E. R. 320; affirmed on appeal [1907] Ch. 761; [1907] 2 All E. R. C. A.; *Re G. (J. D. M.) (an Infant)*, [1903] 1 W. L. R. 1001, *sub nom. Re G. (an Infant)*, [1900] 2 All E. R. 1135 (English Court will order ward to be returned to person granted interim custody order by Scottish Court if satisfied that Scottish Court is the appropriate one to make final custody order and that ward will not be emotionally or physically prejudiced). Where a foreign court orders the return of infants wrongfully removed from its jurisdiction, the English Court may properly take a general view of the merits of the case without inquiring into all matters in dispute between the parents before ordering whether the infants should remain here or return within the foreign court's jurisdiction. Even if infants brought up in a foreign jurisdiction are removed

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into the jurisdiction of the English Courts without such removal being contrary to an order of the foreign court, then if the removal is by one parent without the knowledge and consent of the other, it is the duty of the English Court—on satisfying itself that no obvious danger would befall the infants if they returned—to order their return to the foreign jurisdiction (*Re T. (Infants)*, [1908] Ch. 704; [1908] 3 All E. R. 411, C. A.). But see also *Re T. A. (Infants)* (1972), 110 Sol. Jo. 78 (mother removed four children from Malta and established home in England with them: on the father's application for their return, held, that where children ordinarily resident abroad had been removed to England by force, stealth or fraud, the Court would order their immediate return to the home country unless positively satisfied that to do so would cause real danger to the mental, physical or moral well-being of the children, and that on the facts such danger existed).

(2) *J. v. C.*, [1970] A. C. 698; [1968] 1 All E. R. 788, H. L., *per* Lord Guest at pp. 701, 812; *per* Lord MacDermott at pp. 714, 824; *per* Lord Upjohn at pp. 720, 828. See also *Hope v. Hope* (1854), De G. M. & G. 328; *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42; *Re B's Settlement*, *supra*; *McKee v. McKee*, *supra*.

(3) *J. v. C.*, *supra*: as to the meaning of "first and paramount consideration" see *ibid.*, *per* Lord MacDermott at pp. 710, 711, 820, 821.

(4) *Re T. (Infants)*, [1908] Ch. 704; [1908] 3 All E. R. 411, C. A.; but see *Re A. (Infants)*, [1970] Ch. 695; [1970] 3 All E. R. 184, C. A.

(5) *Re L. (minors)*, [1974] 1 All E. R. 913; [1974] 1 W. L. R. 290, C. A.

(6) *Re L. (minors)*, *supra*: in July, 1972, an English woman married to a German national, brought the two children of the family from the matrimonial home in Germany to England with the settled intention of leaving the father and living permanently in England with the children. In October, 1972, the father came to England to have the children and the mother made them wards of court and sought their care and control. In July, 1973, Cumming-Bruce, J. after a full investigation of the facts held, that although it was highly desirable that the children should continue to be cared for by their mother their long-term welfare pointed overwhelmingly to a return to Germany in whose courts their future destiny should be decided if there was a dispute between the parties, and he ordered their return. On appeal, held, that where the Court embarked on a full-scale investigation of the facts the principles applicable in a kidnapping case did not differ from those in any other wardship case and that the Judge had applied the proper principles. Buckley, L.J. reviewed the kidnapping cases referred to in note (1), above, and the principles established in *J. v. C.*, *supra*, and continued to 25, 204.

"How, then, do the kidnapping cases fit these principles? Where the court has embarked upon a full-scale investigation of the facts, the applicable principles, in my view, do not differ from those which apply to any other wardship case. The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account and may be a circumstance of great weight: the weight to be attributed to it must depend upon the circumstances of the particular case. The court may conclude that notwithstanding the conduct of the kidnapper the child should remain in his or her care—see *McKee v. McKee*, *supra*; *Re E. (D.) (an Infant)*, *supra* and *Re T. A.*, *supra* where the order was merely interim; or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed—*Re L. (Infants)*, *supra*. Where a court makes a summary order for the return of a child to a foreign country without investigating the merits, the same principles, in my judgment, apply, but the decision must be justified on somewhat different grounds. To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts entered here as examples, and of course not as a complete catalogue of possible relevant factors which are likely to be psychologically disturbing to the child.

particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child. In my judgment, the decision of this court in *Re H. (Infants)*, *supra*, was based upon considerations of this kind. As citations which I have already made disclose, judges have more than once reprobated the acts of 'kidnappers' in cases of this kind. I do not in any way dissent from those strictures, but it would, in my judgment, be wrong to suppose that in making orders in relation to children in this jurisdiction the court is in any way concerned with penalising any adult for his conduct. That conduct may well be a consideration to be taken into account, but, whether the court makes a summary order or an order after investigating the merits, the cardinal rule applies that the welfare of the infant must always be the paramount consideration." Appeal dismissed and the order that the children should return to Germany upheld. See also *Re C. (Minors) (Wardship: Jurisdiction)*, [1978] 2 All E. R. 230; [1977] 3 W. L. R. 501, C. A.; *Re K. (Infants)* (1970), March 6th, unreported, C. A. (welfare of infant remains paramount; children not returned to Ontario where they had been born and brought up). See also *Re M. R. (a Minor)* (1975), 5 Fam. Law 55, C. A. (peremptory order for return of child to California: discretion of court to make such order not confined to kidnapping cases).

(l) *Re S. (Infants)*, (1964), *Times*, August 6th (proceedings pending in American court; mother applied for order de-warding infants, her intention to take infants to United States forthwith and she offered undertaking that father should have access; father did not oppose application and himself offered undertakings).

(m) *In Re L. (Minors)*, *supra*.

5. Proceedings pending and orders made in Scotland.

Although the Scottish Court of Session regards with respect orders of the Chancery Division, it has held itself not bound by an order of the Chancery Division in relation to a ward who was, at the time when the order was made, outside the territorial jurisdiction of the Division (a). Equally, an order of the Scottish Court is not binding on the English Court in wardship proceedings, but where there has been a custody order in relation to the ward by a competent court in Scotland or where divorce proceedings are pending in that country, the English Court is likely to hold that the Scottish Court is the *forum conveniens* to determine the question of care and control (b).

NOTES

(a) *Hoy v. Hoy*, [1968] S. L. T. 413, Session Ct. (mother of infant girl domiciled in England and then resident in Scotland obtained orders from the Chancery Division making the infant a ward of court and restraining her and a domiciled Scot resident in Scotland from marrying. Mother thereafter sought similar order from Court of Session, but the Lord Ordinary refused the

motion. On parties were to interfere v was not fore Division now

(b) *Re G.* (father comm domiciled an with the mot sought the c Court where given leave that such a c for the child (father took he was domi Scotland and instituted by jurisdiction where the fa were pending

6. Powe powers of l Act, 1948, of the High simply rec although th be usefully statutory circumstan prerogative jurisdiction a child is of the High control ov Act (e): th judge in v control in in the loc cised its had been affect a v parents w (g). The in the ex minor ha section 1 to decis since jus satisfied provision care ord

Cases from
Family Law Reporter

Brittain v. Brittain

KEEPING DAD FROM SEEING KIDS COSTS MOTHER CUSTODY, VISITATION RIGHTS

N.C. court finds no need to first hold mother unfit.

North Carolina Court of Appeals finds ample reason to uphold a trial court's order transferring custody of two girls from their mother to their father and denying visitation rights to the mother. The denial of visitation rights, the court says, is of such importance that a special finding of fact must be made to support that conclusion. Here, the mother had been found in contempt of court for secreting the children out of the state, thus preventing the father from exercising his visitation rights. She kept any knowledge of the children's whereabouts from her ex-husband for almost one year. The lower court specifically found that to allow the mother visitation rights would not be in the best interest of the children. The court notes that it has previously affirmed an order denying visitation rights to a mother who fled the state with her children.

The court finds, however, that no specific showing of unfitness is needed to deny the mother custody. Here the lower court found that the mother's new husband in the distant state physically disciplined the children and that the two girls expressed a desire to remain with their father. This, coupled with the mother's taking the children outside the state, is a sufficient change of circumstances to warrant a change of custody absent a showing of unfitness. (Brittain v. Brittain, 10/19/77)

Digest of Opinion: [Text] The trial judge in this case found that plaintiff deliberately violated a court order in order to deprive defendant of his visitation rights, had stayed "at least on a part-time basis" with Hart before they were married; that the children had been physically disciplined by Hart; that they were told by plaintiff to use the surname "Hart" in school and were kept from any contact with their father. The court further found that the children expressed, in open court, a desire to remain with their father. These findings amply support the judge's conclusions that there had been significant change of circumstances affecting the welfare of the children, especially those finding denial of the father's visitation rights and removal of the children from any contact with the father.

Nor do we find merit in plaintiff's contention that custody could not be taken from her without a valid finding that she was unfit. The order of 2 April 1975 finding unfitness was *ex parte*. The order appealed from made no finding of plaintiff's unfitness.

Plaintiff also assigns error in the ruling of the trial court denying her visitation rights. No parent's right of visitation should be denied "unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child." In *re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E. 2d 844, 849 (1971). We consider that a right of visitation is such a fundamental one that its denial in a modification order necessitates special findings of fact to support its denial. See G.S. 50-13.5(i) for similar requirement if original award denies visitation right.

In the case before us the trial court found that plaintiff fled the State with the children in violation of a court order, and that her conduct constituted contempt. Further, the court concluded that any exercise of plaintiff's visitation rights would not be in the best interests of the children. In a somewhat similar case, *Horton v. Horton*, 12 N.C. App. 526, 183 S.E. 2d 794 (1971), this court affirmed the trial court's order denying visitation rights to a mother who fled the State with the children.

It is apparent from the record on appeal that plaintiff-mother loves her two daughters and that her love, at least in part, motivated her in leaving the State with them in violation of the

court order which provided for visitation rights of the defendant-father. The order appealed from denied her the right to visit them. Undoubtedly the trial court reached this decision with reluctance after thoughtful consideration of all the circumstances and based it, as the order concludes, on the best interests of the two children. The court, of course, may, after motion and hearing, amend the order to give visitation rights to the mother under controlled conditions if it is found from competent evidence that visitation with their mother is for the best interest of the young daughters. [End Text] —Davis, J.

(Brittain v. Brittain; NC CtApp, 10/19/77)

SECTIONS OF TEXAS CHILD ABUSE LAW FOUND UNCONSTITUTIONAL

Labeling "abusers" in data bank violates rights; state's right to take emergency custody of children upheld, however.

A three-judge panel for the U.S. District Court for Southern Texas holds that certain provisions of the state's child abuse law violate parents' constitutional rights to due process and to freedom from unwarranted invasion of privacy. The suit seeking declaratory and injunctive relief was brought by a couple against a county child welfare department that seized the children upon a complaint by school authorities that the couple's three children had been abused.

The court first finds that the principles of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny do not require it to abstain from hearing the case. There is no single state proceeding to which the couple can look for relief on constitutional or on any other grounds, the issues presented cannot be raised as a defense in the normal course of judicial proceedings, and due to the "extraordinary and compelling circumstances" present, the court finds an absence of "an opportunity to fairly pursue their constitutional claims in an ongoing state proceeding."

The court agrees that the state has a right to resort to emergency measures when "real, immediate and irreparable physical harm is likely." Citing *Stanley v. Illinois*, 405 U.S. 645 (1972) the court, however, finds it now "clear that there is a fundamental right emanating from the Constitution which protects the integrity of the family unit from unwarranted intrusions by the state." Courts must weigh the interest of liberty and privacy of the parents, the state's interest in protecting children from harm and "the often silent interest of the child."

Weighing those factors the court strikes down the statutory provision which allowed child welfare workers to pick up the children without notice to the parents and without a judicial hearing that such action was necessary. The court also finds the unconstitutional provisions for collecting and storing information in a centralized computer system which labels a parent as child abuser before a judicial determination is made, requiring psychiatric examination of the family without consent, holding a hearing to determine temporary removal without notifying the parents, requiring the parents to seek modification of the original removal order, allowing a suit seeking permanent removal without first determining in a judicial proceeding that such is necessary and, allowing a court to

The preference denies him, as father, equal protection of the laws.

U.S. Supreme Court opinions dealing with sex discrimination do not support the contention that gender is a "suspect" classification for equal protection purposes. In *Frontiero v. Richardson*, 411 U.S. 677, 41 LW 4609 (1973), the Court concluded that classifications based on sex are inherently suspect and must therefore be subjected to strict judicial scrutiny. But, *Frontiero* was only a plurality opinion as to the holding that sex is a "suspect" classification. Moreover, since *Frontiero* the court has retreated from the plurality's analysis, and that holding has not been followed in any subsequent decision. Instead, a new "middle-tier" standard of equal protection review has been fashioned to analyze certain classifications such as gender. It is basically a "means focused" ground of review that subjects the classifications to a more critical examination than they would receive under the differential lower-tier "rational basis" test but, being less stringent than the upper-tier "strict scrutiny" review, it relieves the judiciary of making the numerous value judgments inherent in that analysis. The most recent and by far the strongest enunciation of this new standard is found in *Craig v. Boren*, 429 U.S. 190, 45 LW 4057 (1976).

Even under the heightened review required by the middle-tier analysis, the maternal preference custody provision is constitutional. Unlike *Frontiero*, this is not a situation where the sole purpose for the classification is administrative convenience. Here, the classification serves the undisputedly important objective of assuring that children of divorced parents will be placed in the custody of that parent most apt to provide them with the best care and protection. The gender-based means chosen by the legislature are substantially related to this important objective and the classification scheme is constitutional. It is an old notion that a child of tender years needs a mother more than a father, but this court has not been persuaded that this notion is either unsound or unconstitutional. Consideration of the cultural, psychological, and emotional characteristics that are gender related makes this custodial preference one of "those instances where the sex-centered generalization actually [comports] to fact." See *Craig v. Boren*. The statute's additional paternal preference provision further reinforces this decision. The paternal preference makes clear the essential fact that this statute is not concerned entirely with the "rights" of parents to their children. In addition to, and far beyond, their rights, the paramount purpose of the statute is to serve the welfare and best interests of the child.

This court agrees with the reasoning of the Utah Supreme Court in *Cox v. Cox*, 532 P.2d 994 (1975). There, the court found that "there is wisdom in the traditional patterns of thought that the roles of the mother and father in the family are such that, all other things being comparatively equal, the children should be in the care of their mother, especially so children of younger years * * *."

If the legislature should determine that contemporary social structure demands a change in the traditional family roles that have been part of our culture since its beginnings, it may enact legislation reflecting that change. [End Text] —Simms, J.

Lavender, J., dissents.

(*Gordon v. Gordon*; Okla Sup Ct, 2/7/78)

Entwistle v. Entwistle

LOSS OF CUSTODY POSSIBLE WHEN MOTHER THWARTS VISITATION

Denial ill-serves kids' best interests; mother may be punished for contempt if court finds pattern of willful deprivation.

In an action by the father for contempt and change of custody, the New York Appellate Division, Second Department reverses and remands the lower court's finding that (1) an adjudication of contempt was unwarranted inasmuch as "the husband has not presented

evidence of willful interference with his visitation rights sufficient to support a finding that the wife is guilty of contempt" and (2) modification of the custody provisions was also unjustified since custody orders carry no res judicata effect.

The court finds that the mother represented in the stipulation that if she moved, it would be to Greenwich, Connecticut, "subject to the approval of the court." But she later moved to Illinois without informing the father of her whereabouts, directed the administration of the school where the elder daughter attended not to inform the husband as to where the records were to be sent, and obtained an unlisted Illinois telephone number. In regard to the application for change of custody, the court holds that the mother's acts raise a strong probability that the mother is unfit to act as a custodial parent, since preventing the two children of tender age from seeing their father is inconsistent with their best interests. (*Entwistle v. Entwistle*, 2/27/78)

Digest of Opinion: [Text] The order must be reversed with respect to both questions. As to the adjudication of contempt, we hold that Special Term was gravely mistaken in concluding, as a matter of fact, that the respondent has not willfully interfered with the appellant's visitation rights. Not only did the respondent implicitly represent in the stipulation that if she moved, it would be to Greenwich, Connecticut "subject to the approval of the Court," she also fully admits that, having moved to Illinois, she failed to inform the appellant of her, or the children's, whereabouts.

Indeed, there is reason to believe that the respondent took affirmative action to keep the appellant ignorant of her whereabouts by directing the administration of the school which the elder daughter attended not to inform the appellant as to where the child's school records were to be sent, and also by obtaining an unlisted telephone number. The appellant was forced to employ an investigator to ascertain the location to which his own two children had been removed. Additional support for the conclusion of willful interference is found in the appellant's unchallenged allegation that, long before the New York judgment was entered (which, of course, included respondent's implicit promise to move no further than Greenwich, Connecticut), the very house in Connecticut had, in fact, been sold. Given the short amount of time which elapsed between the entry of the New York judgment and respondent's petition to register it in Illinois, there is strong reason to believe that she never intended to move to Connecticut in accordance with the stipulation, but, in fact, has perpetrated a fraud and a deception upon the court.

The Supreme Court of the United States has consistently held that the right to raise one's children and to be with them, are "[r]ights far more precious * * * than property rights" * * *. If respondent, at the time she entered into the stipulation, did not intend to uphold her obligation thereunder, it would reduce the appellant's visitation rights, as embodied in the New York judgment, to nothing more than an outrageous mockery, "a form of words, valueless" and manifestly devoid of substance (*Mapp v. Ohio*, 367 US 643, 655). Such conduct is to be denounced, and will not be countenanced by this court under any circumstances. If Special Term determines that this pattern of willful deprivation of appellant's visitation rights was intended at the inception, it would constitute grounds for an adjudication of civil contempt (see Judiciary Law, Section 753, subd. A, par. 2). Accordingly, a hearing is required with respect to this question.

We also direct that the hearing include the issues involved with respect to the application for a change of custody due to the visitation improprieties. "As in all custody disputes between divorced parents, the welfare of the children here [has] * * * to come first. * * * But it is readily apparent that the respondent's very act of preventing the two children of tender age from see-

ing and being with their father is so inconsistent with the best interests of the children as per se, raise a strong probability that the mother is unfit to act as custodial parent. As the Appellate Court of Illinois (3d Dist.) correctly observed recently, "the sound public policy [of] this State encourages the maintenance of strong inter-family relationships, even in post-divorce situations" (Frail v. Frail, ___ Ill App 3d ___, 370 NE2d 303, 304 [emphasis supplied]). And in another recent case dealing with the not dissimilar problem of "child-snatching," the Court of Appeals declared: "in the long run, refusal to condone abduction of children will provide better stability for the *** children, who would otherwise remain subject to the exercise of lawless self-help by either of their embattled parents." [End Text] —Rabin, J.

(Entwistle v. Entwistle; NY AppDiv 2dDept, 2/27/78)

**WHERE PROCEDURE IS LIFE-SAVING, NOT
"PROLONGING", CONSENT WILL BE GIVEN**

*Quality of life not to be determining factor
in ordering lifesaving procedures.*

The Massachusetts Probate Court for Essex County, authorizes a guardian ad litem to consent to the performance of the recommended surgery on an infant girl. Looking to the Massachusetts decision of Jones v. Sackewicz, (1977 Adv. Sh (SJC) 2461), and cases in Maine and New Jersey involving the right to disconnect medical devices, the court determines that the cardiac surgery recommended for this deformed and retarded infant is not merely a "life-prolonging" measure, but indeed is for the purpose of saving her life — questions of its quality aside — and therefore should be allowed even over her parents' objections. (In Re McNulty, 2/15/78)

Digest of Opinion: [Text] The plaintiffs are the parents of Kerri Ann McNulty, a minor, born in Lynn Hospital January 4, 1978, in Lynn, said County. On January 10, 1978, the plaintiffs filed a petition seeking the appointment of the male plaintiff as temporary guardian and guardian of said child, and also seeking authorization of the plaintiff as guardian to withhold his consent to further mechanical ventilator treatment to the child by permitting the mechanical ventilator to be disconnected. On the same date the Court appointed the male plaintiff to be the temporary guardian of his said child. The Court also appointed Earl M. Weissman, Esq., as guardian ad litem for said child.

The said Kerri Ann McNulty has been a patient at said New England Medical Center Hospital since January 4, 1978, and was diagnosed as having congenital rubella, sometimes called German measles. As a result the child has serious medical problems including cataracts on both eyes and perhaps additional eye complications. She appears to be deaf, has congenital heart failure and was given a cardiac catheterization which indicated that she had a coarctation of the aorta, i.e., a narrowing of the main artery from the heart which obstructs the flow of blood to the lower half of her body. The child also has respiratory problems and a lung condition which may be due to the rubella and may be partly due to the administration of oxygen. Shortly after her birth she had a tube inserted in her trachea for feeding purposes but that was withdrawn January 23, 1978. She has been bottle fed outside of the isolette since that time and has tolerated such feedings fairly well. She is presently receiving 30 to 35 percent oxygen which is not causing her damage to any significant degree.

It is highly probable that she has some degree of mental retardation, the extent of which cannot yet be determined. While it was first thought the baby would not survive, it now appears that she can survive if properly treated. She is presently receiving proper care and treatment. She does not have a terminal illness.



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quences, as an unmarried person . . . 48 P.S. III, have been judicially interpreted to deny women the right to sue their husbands for injuries negligently inflicted and have therefore failed in their purpose to advance women in this circumstance to a level superior to that occupied by them under the ancient common law.

We believe that interspousal immunity is truly an archaic doctrine whose reason for being has ceased to exist and which requires abolition.

Further, we do not perceive the doctrine of stare decisis as a bar to abrogation of interspousal immunity. The Maine court in MacDonald addressed this question and stated succinctly:

" . . . in matters of tort involving the marital relationship we cannot 'stubbornly, hollowly and anachronistically' stay bound by the 'shackles' of the 'formalisms' of the common law.

. . . by so declaring, we do not undermine the principle of stare decisis. Rather, we prevent it from defeating itself; we do not permit it to mandate the mockery of reality and the 'cultural lag of unfairness and injustice' which would arise if the judges of the present, who like their predecessors cannot avoid acting when called upon, were required to act as captives of the judges of the past, restrained without power to break even those bonds so withered by the changes of time that at the slightest touch they would crumble." [End Text] —Montemuro, J.

(Koche v. Koche; CtCommPleas PhiladelphiaCty Pa, 11/25/80)

DECISIONS IN BRIEF

ABORTIONS — APPEALS

The U.S. Court of Appeals for the Second Circuit vacates and remands an order of the U.S. District Court for the District of Connecticut (6 FLR 2221) which held unconstitutional a state regulation providing public funds for abortions only when the mother's life would otherwise be endangered. In light of the recent U.S. Supreme Court decisions in Harris v. McRae, 6 FLR 3055 (1980), and Williams v. Zbaraz, 6 FLR 3071 (1980), both of which held that the Hyde Amendment was not an unconstitutional deprivation of equal protection, plaintiffs complained that Connecticut has not "articulated" the state interest found in McRae and Zbaraz to justify the statutes challenged there, and distinguished those two cases on grounds that they concerned state legislative enactments and not administrative regulations, as here. The court expresses doubt that such distinguishing facts are meaningful, but remands nevertheless to permit the lower court to hear and rule upon these arguments. In doing so, the court notes that the remand might afford the Connecticut legislature an opportunity to consider the abortion regulation and to take action to shed light on the state's interest in restricting funding of abortions. (Women's Health Services, Inc. v. Maher; CA 2, 11/25/80)

COMMUNITY PROPERTY — SEPARATE DEBTS — REIMBURSEMENT

A wife will not be deemed to have consented to her husband's use of community funds to pay his separate debt or to have waived her right to reimbursement simply on the basis of her having signed tax returns containing an interest deduction related to the debt, the California Court of Appeal, First District, rules. The wife appealed from a divorce judgment in which the trial court found that the community was not entitled to reimbursement although a promissory note of \$27,500 executed by the husband and paid to his mother, ostensibly to reimburse her for sending him to dental school, was not a community obligation. The wife claimed a right to reimbursement under California Civil Code §4800(b) (2) on the ground that the sums involved were deliberately misappropriated to the exclusion of her community property interest. Since the trial court did find that the payments were not a

community obligation, the appellate court says, "it is difficult to see any basis upon which appellant's money should have been used to pay respondent's separate debts. Surely, we think, appellant is entitled to reimbursement for having paid part of respondent's separate obligation * * *." The trial court made no finding that the wife ever waived her right to reimbursement or consented to payments made in part with her community funds. The appellate court will not infer that finding when the only support for it is highly dubious — the husband's claim that by signing the returns the wife evinced an intent to pay, as a gift to her husband, half of one of his separate obligations she claims she never knew existed. (Sumner v. Sumner; Cal CtApp 2ndDist, 11/26/80)

CRIMES — CHILD ABUSE — CORPORAL PUNISHMENT

Finding a stepfather not guilty of third-degree assault on his son, the Delaware Family Court for New Castle County decides that the father's act of hitting the son several times with his belt was within the parameters of justifiable conduct under Delaware law. The statute provides that striking a child is justifiable if the person is a parent, guardian, or other person responsible for the care and supervision of a minor, and the force used is not designed to create "a substantial risk of causing death, serious physical injury, disfigurement, extreme pain or mental distress or gross degradation * * *." The only issue relied on by the state was that of "extreme pain." Although that phrase is not defined in the criminal code, the court finds, commentary to the code indicates that "the right of parents to use force to discipline their children is recognized, subject to clear requirements not to cause permanent injury." Although there were bruises on the child's body for a few days after the incident, the court says, there was no permanent injury, and the only evidence of "extreme pain" was that the child cried for five minutes. Consequently, the force used was not improper under the statute, the court concludes. (State v. F.M.B., Jr.; Del FamCt NewCastleCty, 10/2/80)

CUSTODY — JURISDICTION — UCCJA

JOSEPH E. H. v. Jane E. H.
Even though a Pennsylvania mother managed to keep her child in Maryland for about a year (long enough un-

der UCCJA Section 3(a)(1) to acquire a new "home state" there), the Pennsylvania Superior Court holds that a Pennsylvania trial court properly took jurisdiction of the husband's petition to have custody changed to him. Though it accords special importance to the fact that there was a prior Pennsylvania decree in the case, which the mother defied by destroying the husband's visitation before and by her move to Maryland, the appellate court supports the trial court's exercise of jurisdiction on grounds of greater UCCJA Section 2 (a)(2) "significant connection" between the child and Pennsylvania. The most important significant connection, to the appellate court, is the number of years the family resided in Pennsylvania before separation. Thus Pennsylvania's continuing jurisdiction is not separately invoked as a ground for supporting the lower court's entertainment of the case, but is simply counted as one of the several "significant connection" factors. Finally, even though the lower court is held to have been right in assuming and exercising jurisdiction, the appellate court does remand in order to give the mother's counsel more of a fair opportunity to present her arguments. There is some doubt whether the procedure the court used below afforded her proper notice and other aspects of procedural due process. (Joseph E.H. v. Jane E.H.; Pa SuperCt, 12/5/80)

PROPERTY — PROCEDURE — APPOINTMENT OF MASTER

Vacating a lower court order appointing a special master to "determine the nature of the property whether community [or] separate * * * and to recommend an appropriate division of such property and/or alimony," the Nevada Supreme Court declares the state's statute requires a finding of some "exceptional condition" before a master can be appointed. Although the record showed the existence of family homes in Nevada and Colorado, real property in Colorado and Florida, diversified stock ownership and miscellaneous assets including furniture, time certificates, and cash in banks, all totalling approximately \$1,000,000, the court says there was nothing extraordinary about the divorce proceeding, and a reference to a master constitutes an unjustified delegation of the court's decision-making powers. Where, as here, the court says, the court made a general reference of nearly all the contested issues, giving the master authority to decide substantially all the issues in the case, as well as to be the fact finder, the trial court's function becomes that of a reviewing court. "[T]his type of blanket delegation approaches an unallowable abdication by a jurist of his constitutional responsibilities and duties," the court concludes. (Russell v. Thompson; Nev SupCt, 11/19/80)

SUPPORT — LEGITIMACY & PATERNITY

Under Pennsylvania's 1939 criminal support act (repealed and replaced by 18 P.S. 4323), a father's

obligation to make support payments to his illegitimate children terminates when the children reach age 16. However, the Support Act of 1978, 42 Pa. C.S.A. 6704, created an action for civil support. Under this new law, a civil support action must be brought within six years of the birth of the child unless the putative father has voluntarily contributed to the support of the child or has acknowledged his paternity in writing, in which case the action may be brought within two years of any such contribution or acknowledgement. Interpreting the new act, the Pennsylvania Superior Court, Philadelphia District, rules that payments made by a man under a criminal support order were voluntary, and that his acknowledgement of paternity in a written statement of guilt in the criminal proceeding prevented the tolling of the statute of limitations in the civil action. In 1962 the man pleaded guilty to charges of fornication and bastardy and neglect to support a bastard child. He was ordered to pay support to his infant twins until they reached 16. A month after the children's 16th birthday — August 1978 — he petitioned for suspension of the order. In December 1978, the mother filed a civil support action five months and six days after the effective date of the 1978 act to protect her child support rights should the court grant the father's petition. The court did grant the father's petition, but it also decided that the children were entitled to support under the new law. On appeal, the father contended that the civil support action was barred by the statute of limitations because his payments under the criminal support order were not voluntary. Before considering that argument, the court holds that rights created by the civil support act cannot be withheld from persons who only recently acquired those rights and who have not exercised them within the technical time constraints of the act. To make any other determination would require people to adhere to a statute of limitations of which they had no notice and would deny the very purpose of the legislature's creation of this action, the court says. Turning to the father's arguments, the court rejects his contention that the payments were not made voluntarily, but under compulsion and external constraint. The criminal support payments were ordered subsequent to the father's voluntarily pleading guilty and admitting paternity, and he made those payments absent any constraint until the children reached 16, the court reasons. Moreover, the payments were made pursuant to the written statement of guilt. The court agrees with the trial court's holding that the father "acknowledged his paternity in writing both at the time of his guilty plea and every month since when he has made the required support payments. Thus, this action is not barred by the statute of limitations." (Norris v. Beck; Pa SuperCt PhiladelphiaDist, 11/21/80)

porting the general principle that the mother usually is the better custodian for a child of tender years. The mother also advances the following arguments. There is no contention or showing that the mother is an unfit parent; the Little Rock environment would be favorable for the rearing of Rex; the willingness of Beverly to serve as the father's housekeeper may be only temporary and it is doubtful that the father's sister and her husband would sacrifice their home and respective employments in order to move in with the father; the father ordered the mother to make a choice between the home and her employment; the father "has gone from the extreme of drinking and carousing to being an absolute authority on morals" and the father's autocratic behavior would cause an emotional shock to Rex; the alienation of the older children from their mother was caused by the father; the father permitted Paul to have access to a letter from the mother's attorney, causing Paul to criticize his mother and to send her a religious tract; the two older children will be "out of Rex's life" before Rex is 10; the mother may be permitted to take the child out of the state if it is in the best interests of the child.

In seeking to uphold the custody decree of the trial court, the father cites authorities supporting the general principle that in the absence of exceptional circumstances children should not be separated. The father also cites authorities to the effect that the law may look with disfavor upon the removal of a minor child to another state. The father also advances the following arguments: Only he has requested custody of all three children; he and his family are able to take proper care of Rex; if the mother gets custody Rex will spend his days in a day care center but if the father gets custody he will be at home in the care of relatives; both older children love Rex and want him to live with them; the record will not support the mother's claim that he alienated the two older children from her; the mother admits that the father is a good husband, a good provider, and an excellent father; it was the mother who broke up the home; the infrequency of the mother's correspondence with the older children, her failure to visit them, and her general lack of communication with them cast doubt upon the depth of her maternal instincts; the mother told the father that if he were awarded custody of Rex she doubted that she would ever come to see him or the children any more.

In *In re Marriage of Shepherd*, 588 S.W. 2d 174 (Mo.App. 1979), in a situation where both parents were working, this court said: "If the mother is employed and gone from the home as is the father and has no more part in training and helping in the child's development than the father and if everything else is equal, she has no better claim for custody."

The trial court had the duty to determine custody in accordance with the best interest of the child, §452.375 RSMo 1978, and to consider "all relevant factors," including those enumerated in the statute.

What custody arrangement was in the best interest of Rex? That is the issue which confronted the trial court with respect to the portion of the decree under attack by the mother. The question is easy to state and very difficult to answer. Under the standard of appellate review stated in the forepart of this opinion, this court has no firm belief that the trial court's solution was wrong. The mother's appeal has no merit.

On his cross-appeal the father contends that the trial court abused its discretion by failing to require the mother to contribute to the support of the children. At the trial the father testified that in the event the court should award him custody of all three children he would not ask that the mother be ordered to contribute to their support. In dividing the principal marital asset, the equity in the home place, the trial court awarded 2/3 of the equity of \$42,000 to the father and 1/3 to the mother. Neither side offered any evidence with respect to the amount required for the reasonable support of any of the children. Under the foregoing circumstances it cannot properly be said that the trial court abused its discretion in failing to order the mother, in the original decree, to contribute to the support of the children during that period when they are in the custody of the father. See *D.L.C. v. L.C.C.*, 399 S.W.2d 623, 625 (Mo.App. 1977). The father's appeal has no merit. The judgment is affirmed. [End Text] —Flanigan, J.

(James v. James; Mo CtApp SDist, 1/13/81)

LUSTIG v. JUSTIG:

ORDERING JOINT CUSTODY OVER OBJECTION O.K.; UCCJA POINT DECIDED

Non-home state with "connections" has jurisdiction under UCCJA.

One of those rare decisions ordering joint custody over the objection of one parent is affirmed by the Michigan Court of Appeals. A Michigan father kept his son after visitation and moved against the California-residing mother for a custody change. Though the trial of the custody issue focused on the sexual liberality of the remarried mother's new household, the appellate court does not seem overly distracted by it as it carefully examines the question of best interest.

Michigan has an unusual statutory provision listing all the components of best interest and requiring a court to consider and make findings on each one. Since the father sought a modification, the Michigan statute requiring clear and convincing evidence that a change is in the child's best interest applied. However, Michigan statutes



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also have an especially strong provision requiring the affirmation of trial judges' custody decisions unless they are very erroneous. Examining trial court treatment of each of the issues, the appellate court decides that the joint custody decision is unassailable. It was proper for the court to go into the sexual matters along with evidence on all the other pertinent factors.

Nor was it wrong for the trial court to take jurisdiction under the Uniform Child Custody Jurisdiction Act. This particular boy had maintained strong "significant connections" with Michigan after his mother removed him to California. They are sufficient to support Michigan jurisdiction under Section 3(a)(2) of the UCCJA even though it is not the home state. Factors are the father's Michigan residence, the boy's physical presence, his examination by a Michigan psychiatrist, his brother's and grandparents' Michigan residence, and the child's Michigan preference.

The mother argued *forum non conveniens* under UCCJA Section 7, but the appellate court points out that this is a discretionary determination for trial courts. The fact that the mother appeared and put on voluminous testimony indicates it could not have been too inconvenient. The court adds the observations that in a case like this any forum is going to be inconvenient for somebody, and that the mother apparently is quite a traveler anyway. (*Lustig v. Lustig*; 8/28/80, released 12/9/80)

Digest of Opinion: In the 1972 Michigan divorce the mother was given custody of the two boys. A 1972 consent order gave her permission to move them to California, and a 1978 consent order changed custody of Joshua to the father. In 1979, while Jeremy was visiting in Michigan, the father moved the local circuit court for a change of Jeremy's custody to him. The mother appeared in order to contest it and argued that California should decide the case under the UCCJA because Michigan was an inconvenient forum. After a very long trial the court ordered that the parents should have joint legal custody of both children, and that the physical custody of Jeremy be altered between them from year to year, with the matter reviewed after about two years if either party should wish.

[Text] In his motion for temporary custody, plaintiff alleged that defendant permitted Jeremy to come into contact with sex-related objects in the custodial home and was often left alone when the defendant went on vacation. Defendant stated that there were two Flasher dolls in her home (male and female), which had been given as gag gifts at an adult birthday party for her husband, Mr. Habif. Defendant stated that Jeremy would not have had an occasion to come into contact with these things since they were kept in a closet. Joshua, the older child [age 14], viewed these items when he was visiting California in the summer of 1979.

Defendant testified that she and her second husband, Mr. Habif, had vacationed in Tahiti in 1976. They took slides of one another; the defendant was naked from the waist up and Mr. Habif was nude. Defendant stated that these slides were accidentally shown two years later during a family viewing. When this occurred, defendant indicated that she quickly removed the slides from view. Defendant also admitted that she and her husband smoked marijuana in the privacy of their bedroom. [End Text]

They also admitted they had taken five or six vacations without the children, but said they had taken three vacations with them.

As to the effect of depriving Jeremy of the California therapy he was getting, a California psychiatrist testified that he should continue therapy for a year, but admitted on cross-examination that the psychologist doing the therapy in California had said four to six months would be enough. A Michigan psychiatrist

said the only treatment Jeremy needed was education, and his and third grade teacher testified that he had sufficiently overcome dyslexia to be placed back in a normal classroom.

The court decided in *McDonald v. McDonald*, 253 NW2d 678, 4 FLR 2540 (1977), that the UCCJA Section 3 jurisdictional determination requires that the state with the most significant contacts have jurisdiction — i.e., that the rule is one of "maximum contacts" rather than minimum contacts.

[Text] It must first be determined whether the court had jurisdiction to hear the case. In the case at bar, the following factors weigh in favor of the court taking jurisdiction of the case: (1) plaintiff resided in this state; (2) Jeremy was physically present in this state visiting his father at the time of the proceedings; (3) Jeremy had seen Dr. Fischhoff, a Michigan psychiatrist, who made a report about his observations of Jeremy; (4) Jeremy's brother and paternal grandparents reside in Michigan; and (5) Jeremy had expressed a preference to stay in the State of Michigan.

Arguably the aforementioned ties of the parties and their child with the State of Michigan do not constitute maximum contacts with Michigan so as to confer jurisdiction on the Michigan court. California was Jeremy's home state for seven years. Jeremy's mother and maternal grandparents live in California. Medical and school records of the child are located in California. Jeremy's involvement in special educational programs, due to his learning disability, occurred in California.

We conclude that the lower court was authorized to act under MCL 600.653(1)(b); MSA 27A.653(1)(b), because Jeremy and his father have a significant connection with the State of Michigan and there was available in Michigan substantial evidence concerning the child's present or future care. [End Text]

The *forum non conveniens* determination under UCCJA Section 7 is discretionary with the trial court, and under Michigan law, abuse of discretion is a standard not easily satisfied.

[Text] It should be noted that aside from the factors listed in subsection (3) of the statute, inquiries into what would be convenient to the parties and pose a hardship to the defendant are pertinent in determining the appropriate forum. In the case at bar, all the parties would be inconvenienced no matter what forum was selected to resolve the dispute between the parties. In a proceeding of the nature herein, the parties are inconvenienced greatly even if all the parties are located in the same forum. Past activities of the defendant-mother indicate that long distance travel has been a frequent, rather than a rare, occurrence. As far as cost of the proceeding is concerned, it is noted that the trial court ordered the plaintiff-father to pay substantial attorney fees and costs for the benefit of the defendant-mother. Numerous witnesses were called, either personally or by deposition, in a lengthy court proceeding with each side appearing to have a full opportunity to present its side of the case. The defendant was not prejudiced by litigating the case in this state. The court did not abuse its discretion in retaining jurisdiction of the case.

The Child Custody Act of 1970, specifically, MCL 722.23; MSA 25.312(3), and GCR 1963, 517.1 require that the court make findings of facts as to what custody determination will be in the child's best interests. The trial court made specific findings of fact in support of the custody change.

A child's best interest is the guiding factor in child custody disputes. In determining custody the court must consider all factors specified in MCL 722.23; MSA 25.312(3), which provides:

"Sec. 3. 'Best interests of the child' means the sum total of the following factors to be considered, evaluated and determined by the court:

"(a) The love, affection and other emotional ties existing between the competing parties and the child.

"(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

"(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

"(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

"(e) The permanence, as a family unit, of the existing or proposed custodial home.

"(f) The moral fitness of the competing parties.

"(g) The mental and physical health of the competing parties.

"(h) The home, school and community record of the child.

"(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

"(j) Any other factor considered by the court to be relevant to a particular child custody dispute."

The Act also provides that, after weighing these factors, the trial court shall not change the established custody of the child unless clear and convincing evidence is presented that the change is in the best interest of the child. MCL 722.27(c); MSA 25.312(7)(c). * * * In addition, the act provides: "Sec. 8. To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; MSA 25.312(8). * * *

In the case at bar, the court ordered that the parties were to have joint legal custody of Jeremy. A review of the court's findings and the evidence presented is necessary to see whether plaintiff met the burden of proving by clear and convincing evidence that a change of custody was in the best interest of Jeremy. No issue has been raised regarding the joint legal custody of Joshua. * * *

The court, in its findings of fact, discussed the ten factors enumerated in §3 of the Child Custody Act in making its custody modification. The court found that the parties could equally provide Jeremy with the factors to be considered in subsections (a) and (b) of the statute. In discussing subsection (c) of the statute, the court found that the parties could equally provide Jeremy with food, clothing and medical or other remedial care. In addition, while the court indicated that Jeremy was progressing and was treated well in a good program for the boy's learning disability, provided through the efforts of the defendant-mother, the court questioned the need for, and type of, psychological therapy received by the boy.

In regard to subsection (d), the court found that the parties were equal. In discussing this factor, the court did not consider the fact that Jeremy's home for seven years had been in California. The reason for this could be that in the past the parties had cooperated in arranging the child's vacations and plaintiff's visits.

In discussing subsections (e), (f), and (g), the court found the parties equal. At least for the purpose of the goal to be achieved herein, to resolve the custody dispute in the best interests of the child, the matters concerned with moral conduct were properly handled by the court. It would serve no purpose to glorify so-called past transgressions in behavior which, hopefully, will not reoccur in the future. The court then went on to discuss subsection (i), regarding the preference of the child. The court stated that, generally, Jeremy's preference was to live in Detroit so he could live with his brother, Joshua. The court also noted that Jeremy would like to live with both parents if he could.

The trial court then went on to discuss other factors relevant to the custody dispute, as per subsection (j) of the statute. Although defendant contends that some of the court's observations were improper and not based upon direct evidence at trial, the court considered factors relevant to the particular dispute as well as recognizing and being sensitive to the attachment of Jeremy to his brother. * * *

The court's findings were in most respects proper and supported by the record. The record reveals that a change of circumstances had occurred since custody was originally granted to the defendant. Joshua, Jeremy's brother, had moved to Detroit and was living with his father. Jeremy's preference to be with his brother and the reasonableness of this preference was not only the main issue at trial, but was the main circumstance considered by the court. In light of these facts, the court's determination to modify custody was based on clear and convincing evidence. * * *

While the court must consider all the factors specified in MCL 722.23; MSA 25.312(3) in deciding what is in the best interests of the child, such determination is much more difficult than merely tallying runs, hits, and errors in box score fashion following a baseball game. Interpreting hits, runs and errors in the battle of life is much more complex. The trial court during this proceeding had an opportunity to see and hear the witnesses, to observe their demeanor, attitudes and reactions, as well as to weigh the evidence and determine credibility. The findings of fact fully support the court's determination. Additionally, seasoned judicial judgment, while not always spelled out in precise, appropriate words or punctuation marks, often speaks clearly and loudly through the result reached.

The trial judge did not make findings against the great weight of the evidence and did not palpably abuse his discretion. There was clear and convincing evidence to support the determination of the lower court. [End Text] —Cynar, J.

(Lustig v. Lustig; Mich CtApp; 8/28/80, released 12/9/80)

COURT APPROVES JOINT LEGAL CUSTODY, VOIDS JOINT PHYSICAL CUSTODY ORDER

Michigan court distinguishes and defines joint legal and physical custody in context of one parent's unwillingness to comply.

The transfer of physical custody of children from one parent to another on alternate weeks is, in the Michigan Court of Appeals' view, comparable "to the travel of a tennis ball back forth from one side of the tennis court to the other." Concluding that such movement of the children is not in their best interests, the court reverses a trial court's order that commanded such a weekly swap of physical custody between divorced parents.

The court points out that there is a difference between joint legal custody, which is concerned with making decisions that significantly affect the life of a child, and joint physical custody, which is concerned with the child living with the parent. While joint, or alternate, physical custody may have its problems even when one of the parents is not embittered, the court observes, joint legal custody has much to recommend it. The effect of awarding legal custody to one parent can be to deprive the other parent of sharing in decisions relating to the child's education, dental and other health care, and other decisions in the life of the child.

Dissenting Judge Beasley argues that joint custody is not a viable alternative to custody in the mother or custody in the father. When one parent in good faith does not believe that joint custody will serve the best interest of the child, it should not be awarded, he says. The dissent adds that although fault no longer is relevant to divorce, it was relevant to custody in this case, where the cause of the divorce was the father's expressed preference for another woman. (Wilcox v. Wilcox; 9/15/80, released 12/9/80)

Digest of Opinion: The parties were divorced after 11 years of marriage. They had a son from their marriage and a daughter from the mother's first marriage. The father adopted the daughter. A primary reason for the divorce was the father's involvement with another woman. After the parties filed for divorce, the court ordered joint physical custody pending judgment. The judgment of divorce ordered that custody would be in both parents jointly, that the parents either exchange physical custody weekly or agree to an alternative arrangement, and that they communicate with reference to any school, social, or other activities affecting the interests of the children.

order the family to stay together. The child argues that compelling the father to visit now will make him love her and that in time his visits will become voluntary. This may or may not occur, but in any event, it is not up to the court to make such a decision.

California creates in a parent a right and a privilege to visit the child. This right is not, however, reciprocal. The child has cited many cases from California and foreign jurisdictions in which visitation has been compelled, but such compulsion was made on behalf of a parent, not a child.

The child urges this court to create a reciprocal right in children to order visitation and relies on *Stanley v. Illinois*, 405 U.S. 645 (1972), for that proposition. Stanley recognized the constitutional rights in the unwed father to his natural children. The court, however, did not decide whether the right is reciprocal in the child, and such a conclusion does not naturally flow. The Equal Protection Clause provides that unwed fathers and wed fathers must be treated equally. The same applies to children, regardless of the marital status of their parents. However, it has not been interpreted by any court to mean that the parents and the children have the same rights. —Kingsley, Acting P.J.

(Louden v. Olpin; Calif CtApp 2dDist, 4/30/81)

NO DEPENDENCY EXEMPTION ALLOWED FOR CHILDREN IN FOSTER HOMES

*Appeals court disallows exemption under
Section 151 of Internal Revenue Code.*

The U.S. Court of Appeals for the Fifth Circuit upholds the decision of the U.S. Tax Court (6 FLR 2431), and rules in a per curiam opinion that a couple whose children lived in foster homes are not entitled to dependency exemptions under Section 151 of the Internal Revenue Code, even though the husband's estate may be liable to the state of Florida for its payments for foster care. The state, through its Department of Health and Rehabilitative Services, and the federal government, through the Social Security Administration, were the only source of support for the five children.

The taxpayers argued that because the husband's estate will be liable to Florida for state expenditures for the children's foster care, the state's public support payments should be treated as having been received from the taxpayers. Rejecting that argument, the court holds that only support "received" from the taxpayers during the tax year may be considered in determining whether they furnished most of the children's support. (Gulvin v. Com'r, 5/1/81)

Digest of Opinion: [Text] Taxpayers appeal from the Tax Court's decision disallowing their claimed dependency exemption for the 1973 tax year for five of their children who lived in foster homes. The key question for an income tax deduction for a dependent child is whether over half of the child's support was received from taxpayer. Taxpayers contend that, although the state is paying for their children's foster care, the husband's estate will be liable to the state under Florida law for such state expenditures and therefore the state's public support payments should be treated as having been received from the taxpayers. The Tax Court did not think so. Neither do we.

Section 151(a) and (e) of the Internal Revenue Code of 1954 grants a taxpayer an exemption, allowable as a deduction, for each dependent. A dependent includes a son or daughter of the taxpayer "over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer." I.R.C. §152(a)(1). Welfare payments or other types of public assistance payments received by a claimed dependent do not constitute support furnished by the taxpayer. See *Lutter v. Commissioner*, 61 T.C. 685 (1974), aff'd per

curiam, 514 F.2d 1095 (7th Cir.), cert. denied, 423 U.S. 931; 96 S.Ct. 283, 46 L.Ed.2d 260 (1975); *Donner v. Commissioner*, 25 T.C. 1043 (1956).

The parties have stipulated that during 1973 the State of Florida through the Department of Health and Rehabilitative Services and the Federal Government through the Social Security Administration were the sole source of support for these five children.

Even if Mr. Gulvin's estate is potentially liable for the amount of the state's payments, such liability should not be regarded as support having been "received" from the taxpayers. Although we have been cited nothing but Tax Court cases for the propositions asserted by the Government, we think them sound and follow the Tax Court precedent on these points. Something more than an unfulfilled duty or obligation on the part of the taxpayer to support his children is required to satisfy the support requirements of the Internal Revenue Code. *Donner v. Commissioner*, 25 T.C. 1043 (1956). Only support "received" from the taxpayer in the year for which the dependency exemption is claimed may be considered in determining whether over half of a child's support was received from the taxpayer. *McKay v. Commissioner*, 34 T.C. 1080 (1960). Reimbursement of a third party by the taxpayer in a later year for amounts expended by the third party in an earlier year on behalf of the taxpayer's child is not support "received" by the child from the taxpayer and provides no basis for the allowance of a dependency exemption in the earlier year. See *Donner v. Commissioner*, 25 T.C. 1043 (1956). See also *Casey v. Commissioner*, 60 T.C. 68 (1973).

Since the taxpayers did not contribute more than 50 percent of the support of their five children who lived in foster homes in 1973, the Tax Court properly held they were not entitled to claim a dependency deduction for any of those five children. [End Text] —Per Curiam

(Gulvin v. Com'r; CA5, 5/1/81)

Motola v. Motola:

CHILD'S SIX-MONTH ABSENCE DOESN'T END COLORADO CONTINUING JURISDICTION

*Connecticut trial court defers to earlier
Colorado custody order under UCCJA, but
gives temporary emergency stay.*

The Superior Court of Hartford, Connecticut, looks at what it considers two competing lines of interpretation under the Uniform Child Custody Jurisdiction Act and rejects the idea of a best-interest exception to the UCCJA's firm rule of continuing jurisdiction. This means that the court enforces a prior Colorado custody decree over the objection of the mother, who now has the children in Connecticut. Nevertheless, to protect the welfare of the children, the court gives the mother temporary custody for the next 30 days so that she can appeal to the Colorado courts for a ruling that these children's welfare should instead be decided by judges in Connecticut.

The mother argued that the prior Colorado order giving the husband custody should not be effectuated for several reasons. Evidence concerning the children is available in Connecticut, and she argued that their best interest is served by adjudicating their custody where they live. She also contended that the links with Colorado that supported its continuing jurisdiction had dissipated, that Connecticut had become the new "home state," and that continuing jurisdiction considerations must bow to an overall best-interest purpose of the Act.

The court rejects all of these arguments, along with the line of cases that it sees as adopting the idea of a transcendent best-interest exception. The court points

out that the Colorado connections surely have not dissipated, since the husband continues to live there. (Motola v. Motola, 5/7/81)

Digest of Opinion: The mother moves this court to modify a Colorado custody order and give her custody, while the defendant father asks that this court enforce the Colorado order.

[Text] Plaintiff and defendant married in Connecticut in 1969. They moved to Colorado in 1976. Plaintiff initiated an action in March 1978 for dissolution of the marriage. In September 1978 plaintiff, having been granted a pendente lite order for custody of the two minor children, returned to Connecticut and has resided in this state with the children until the present time. In August 1980 the Colorado court dissolved the marriage and granted custody of the children to the defendant. One child was born May 2, 1974, the other August 19, 1977.

Defendant and his counsel, and plaintiff's counsel, were present at the Colorado proceedings. [End Text]

Defendant father argues that this court is powerless to modify the Colorado order unless it is demonstrated that Colorado no longer has UCCJA jurisdiction.

[Text] Plaintiff contends that this fact situation is not one which violates the philosophy of the UCCJA in that the children were not abducted for the purpose of seeking a friendly forum; that the Colorado decree is not entitled to full faith and credit; that Colorado has lost jurisdiction with respect to the issue of custody; that Colorado is an inconvenient forum; and, that it is in the best interest of the children that custody be determined by the state of Connecticut. ***

Defendant continues to reside in Colorado thereby reinforcing his claim that the Colorado court continues to have jurisdiction.

The UCCJA was designed to bring some semblance of order into the existing chaos. In order to do so, the Act had to go further than simply codifying the principle of recognition of out-of-state custody decrees. It had to strengthen the continuing jurisdiction of the state of initial decree; it had to insulate that jurisdiction from out-of-state interference; in other words, it had to bestow legal effect upon that continuing jurisdiction which operates beyond the state borders. Interstate Custody: Initial and Continuing Jurisdiction by Brigitte M. Bodenheimer, Family Law Quarterly Vol. XIV, Number 4, Winter, 1981, page 214. ***

Plaintiff argues that Colorado has lost jurisdiction because it is an inconvenient forum. Plaintiff claims that the children and mother are present in Connecticut so that there is substantial evidence concerning the future care and training more readily available here. Connecticut General Statute Section 46b-97 clearly states that the determination of the more convenient forum is to be made by the court which has jurisdiction under the UCCJA to make an initial or modification decree. Colorado continues to have jurisdiction therefore, it is that court, upon application, which would make the determination concerning the more convenient forum.

Plaintiff further argues that Colorado has lost its jurisdiction and Connecticut has gained jurisdiction because the children have resided in Connecticut for more than six months and it would be in the best interest of the children for Connecticut to assume jurisdiction.

It is true that the children have continuously resided in Connecticut with their mother for a period of eighteen months. Under the definition section of the UCCJA, Section 46b-92(5), "Home State" means the state in which the child immediately preceding the time involved lived with . . . a parent . . . for at least six consecutive months. ***

Under this interpretation the child would have established a new home state thereby giving Connecticut jurisdiction and terminating the Colorado jurisdiction.

This reasoning would allow for a change of jurisdiction every time the child lived with a parent in a state for a period of six months. Child snatching and child hiding would be encouraged in a forum searching journey which could result in constantly changing or, even worse, concurrent jurisdictional chaos.

In keeping with the purpose of the UCCJA the original court of jurisdiction should maintain its jurisdiction unless all parties have left the state and a new home state is established.

The remaining argument of plaintiff is that it is in the best interest of the children that Connecticut assume jurisdiction to modify the Colorado order of custody because it would be detrimental to the children, who have not seen the defendant in eighteen months, to be given over to a stranger without a full hearing in the place which has become their new home. The purpose of the UCCJA is to legally make a reality what is in the best interest of the child.

There are many cases which follow this philosophy set forth in the case of *Settle v. Settle*, 276 OR. 759, 556 Pa. 2d 962, 3 FLR 2256. In that case it is said that the two principal purposes of the UCCJA are to discourage forum shopping and to protect the best interest of the children. It further argues that a close reading of the Act discloses a schizophrenic attempt to bring about an orderly system of decision and at the same time to protect the best interest of the children who may be immediately before the court. *Settle* concludes that when put to the test of a factual situation presenting an irreconcilable conflict between those two interests, the court should read the Act as making predominant the best interests of the children before the court.

Other cases have, faced with difficult decisions involving the best interest of the children followed the *Settle* philosophy. *Ross v. Grubs* 47 OR. App. 631, 614 P.2d 1225, [6 FLR 2823]; *Siegel v. Siegel*, 7 Fam. L. Rptr. No. 15, p. 3009; *Ehr v. Ehr*, 77 Ill. App. 3d 540, 396 N.E. 2d 87, [6 FLR 2127]; *Moore v. Moore*, 379 So. 2d 1153 (La. App. 1980).

The children in Connecticut are very young and have not seen their father, the defendant, in a long time. To them he is a stranger. To remove the children from their mother and from their familiar surroundings without a significant probability of future stability would not be in the best interest of the children and in the years to come, most probably, not in the best interest of their custodial parent. To allow the philosophy expressed in *Settle* to become the law would erode the foundation of the UCCJA and result in the destruction of the concept of continuing jurisdiction and the stability and orderliness which accompanies it.

This court turns to Colorado which has continuing jurisdiction in this case for guidance. Colorado has held that when a foreign court has jurisdiction the Colorado court cannot modify an existing custody decree. It has further held that in an emergency situation such allegation does not confer upon the court the power to modify, but under the doctrine of *parens patriae*, the court would have the power to grant a temporary order to protect the child present in the state. In re *Custody of Thomas*, 36 Colo. App. 96, 537 P.2d 1095. Colorado has also held that if there are significant facts present which raise a genuine concern for the child's welfare it may be proper for the court under its equity powers to permit the child to remain in the temporary custody of a parent pending further action of the foreign court. *Fry v. Ball*, 544 P.2d 402 (Colo. 1975).

The Connecticut court is concerned that removing these young children without the Colorado court having an opportunity to review timely custody studies and without the Colorado court having the opportunity to decide the more convenient forum in accordance with the UCCJA would result in a discontinuity of environment (This term and reasoning is used by James M. Hult in his article "Temporary Custody Under The Uniform Child Custody Jurisdiction Act: Influence Without Modification" 48 University of Colorado Law Review 603.) for the children and not be in their best interest.

It is therefore ordered that temporary custody of the minor children remain in the plaintiff for a period not to exceed thirty days in order to enable the plaintiff to file for a modification of the custody decree in the Colorado court and request the Colorado court to determine if Colorado or Connecticut is the more convenient forum for such modification motion to be heard. All proceedings in this court are continued for a period of thirty days. [End Text] — Hennessy, J.

(Motola v. Motola; Hartford Conn SuperCt, 5/7/81)

and does not serve the concern for providing adequate medical information that lies at the heart of the informed consent requirement. Second, requiring women seeking abortions to read this information may cause many of them emotional distress, anxiety, guilt, and in some cases increased physical pain. Third, the fetal description presents information that most, if not all, woman understand before receiving it. Therefore, this requirement imposes clear burdens on a fundamental right by presenting irrelevant and potentially prejudicial information. Accordingly, a preliminary injunction should be issued as to the 24-hour waiting period and the requirement that the consent form contain a fetal description. —Coffin, C.J.

Dissenting in part: The requirement that the consent form contain information concerning the stage of fetal development does not unconstitutionally burden the abortion decision. —Campbell, J.
(Planned Parenthood League of Massachusetts v. Bellotti, CA 1, 2/9/81)

Parks v. Parks:

UCCJA SECTION 8 "WRONGFUL CONDUCT" PROVISION IMPROPERLY APPLIED

Only forum-shopping unilateral removals meant; court can't decline jurisdiction and decide merits; substantive custody factors court can't ignore.

A useful gloss on Section 8 of the Uniform Child Custody Jurisdiction Act, concerning "jurisdiction declined by reason of (parents') conduct," is provided by the Pennsylvania Superior Court. A trial judge should not have applied it against a mother who unilaterally took her child back to Georgia, the court says, since she came back to Pennsylvania to litigate the matter. Section 8 is only concerned with those parents who "child snatch" in order to better their position in custody litigation.

Nor was it at all logical or lawful, the appellate court says, for the trial judge to declare that he was declining jurisdiction because of the Georgia mother's conduct, and then go on to decide the custody issue in the Pennsylvania father's favor. Neither the UCCJA nor the Pennsylvania intrastate statutory counterpart authorizes this action.

Finally, the judge decided the substantive issue in an unacceptable way, ignoring the factors that must be considered in the "penetrating and comprehensive inquiry" that a custody case requires. It did not consider the fitness of the grandparents who would be caring for the child while either parent worked, and did not consider the living environment that the mother offered. In fact, it placed great reliance on the attractiveness of quarters the father no longer lived in when the case was tried. It placed great emphasis on the fact that the mother had voluntarily relinquished custody to the father by signing an agreement that he admits he tricked her into signing without reading. The court specifically states that while it deplores child snatching generally, this last fact is one of the "considerable mitigating circumstances to lessen the culpability" of the mother's conduct here. (*Parks v. Parks*, 2/13/81)

Digest of Opinion: The couple separated and divorced in Pennsylvania in 1976, giving the mother custody of Becky by separation agreement. In 1977, Mrs. Parks moved to Georgia to live with her aunt and uncle, taking Becky. After summer visitation in 1978, the parties agreed Becky should stay in Penn-

sylvania because that state would let her start first grade immediately and Georgia, which would not, would nevertheless let her start second grade the next year if she had finished first grade.

[Text] In September, just before school began, Mrs. Parks visited her daughter in Kennett Square and, at the end of her stay, prepared to return to Georgia. As her former husband drove her to the airport, he showed her, for the first time, a document he had prepared relating to custody of Becky. The parties had previously discussed this new agreement and Mrs. Parks, thinking the agreement only granted temporary custody to her husband for that school year, readily signed the paper. In reality, this document established permanent custody of Becky in her father.

During the subsequent school year, Becky lived with her father in his one-bedroom apartment in Kennett Square. Mrs. Parks travelled to Pennsylvania three times to visit her daughter. On July 15, 1979, during the fourth and final visit, the parties had a confrontation [which] ended with Mr. Parks ordering his former wife out of the apartment and expressing his intent that she never see Becky again. Mrs. Parks spent the night at her mother's home nearby.

The next day, Mr. Parks took Becky to the home of his sister, Donna Ifert, while he went to work. Mrs. Parks dropped by to take Becky to her regular swimming lesson and, following a phone call to Mr. Parks, Mrs. Ifert released Becky to her mother. Mrs. Parks proceeded immediately to consult legal counsel, whereupon the instant petition to establish custody was filed on her behalf in the Court of Common Pleas, Chester County. The appellant-mother then returned with Becky to Georgia. Hearings on the petition were held on August 14 and 15, 1979. The following day the court entered an order dismissing the mother's petition for lack of jurisdiction, citing "the Uniform Child Custody Jurisdiction Act, 11 P.S. §2309(a), and the Commonwealth Child Custody Jurisdiction Act, 11 P.S. §2409(a)." R.R. iva. The court's order also stated that custody shall be with the father. An opinion in support of the order followed in which the court again stated it denied jurisdiction, citing the Uniform Act, and then proceeded to the merits to establish custody in appellee. This appeal ensued. [End Text]

To the extent that the trial court — which in fact exercised its jurisdiction — was relying on UCCJA Section 8 (Section 2309(a)(11 P.S.)) to deny jurisdiction, that was error.

[Text] The court apparently determined that when Mrs. Parks unilaterally took Becky back to Georgia in July, 1979, she was violating this section. However, the Act is clearly aimed only at deterring parents from surreptitiously spiriting a child into this Commonwealth from another state in order to avail themselves of this Commonwealth's jurisdiction in a custody dispute. "The general purposes of this Act are to . . . deter abductions and other unilateral removals of children undertaken to obtain custody awards." 11 P.S. §2302(a)(5). Mrs. Parks did not file her petition in Georgia and force her former husband to litigate his case therein; rather, she voluntarily submitted her cause to the jurisdiction of the Pennsylvania court where it was most convenient for Mr. Parks. Her actions were thus not taken "to benefit [her] position in a custody hearing." However ill-advised Mrs. Parks' conduct may have been in taking the child without notice to the father, see in 3, infra, her actions were simply not the type which would cause the court to deny jurisdiction under the Act.

After seemingly declining to exercise jurisdiction, the lower court nonetheless proceeded to the merits of the case to determine Becky's best interests. . . .

[Its] summary of the evidence does not represent the "penetrating and comprehensive inquiry" required by our cases. The court failed to explore the home environment offered by both parents for the child, particularly that offered by Mrs. Parks. *Kessler v. Gregory*, 412 A.2d 605 (1979). Nor did the court mention that the father now resides in a new home and no longer lives in the apartment described in the opinion. Further, the court did not consider the fitness of the "surrogate" parents, i.e., those who will care for Becky while the parents must work. *Sipe v. Shaffer*, 263 Pa. Super. 27, 396 A.2d 1359 (1979); *In Re Custody of Neal*, 260 Pa. Super. 151, 393 A.2d 1057 (1978).

DECISIONS IN BRIEF

BIRTH/DEATH RECORDS — ADOPTION — ALIENS

A statute permitting a change of birthplace on birth certificates only for American-born adopted children does not deny equal protection to foreign-born adoptees, the New Jersey Supreme Court decides. Moreover, the court says, the ineligibility of foreign-born adoptees for a change of birthplace under N.J.S.A. 26: 8-40.1 is compelled by the Supremacy Clause. The court points out that Congress has created an exclusive scheme for the administration of immigration and naturalization, and that under that scheme, a birth certificate indicating that a person was born in the United States is prima facie evidence of U.S. citizenship. The state could not change the birthplace on birth certificates of foreign-born persons consistently with the Supremacy Clause, since this would interfere with the federal government's methods for proving citizenship, the court concludes. Even though the court concludes it must affirm denial of the adopting parents' motion for a change of birthplace, it says the petitioning parents did meet the statutory requirement of good cause for the change. The court contemplates that a finding of good cause will be the rule, not the exception, when a child is adopted at such an early age that he is unaware of his adoption. The desire of parents to exercise control over the circumstances in which an adopted child learns that she is adopted is good cause under the statute, the court rules. In light of the potential for emotional harm if a child learns about his adoption at the wrong time and in the wrong way, the child's best interests ordinarily will be served by guarding against this possibility, the court reasons. (In re L.C. and E.R.C.; NJ SupCt, 2/3/81)

COMMON LAW MARRIAGE — WILLS

Finding evidence of a prior undissolved common law marriage, the Texas Supreme Court delays probate of the will of a husband's second wife until the question of the common law marriage can be resolved. Under Texas law, a valid common law marriage consists of three elements: agreeing presently to be husband and wife; living together as husband and wife; and holding each other out to the public as a spouse. Proof of a common law marriage can be shown by the parties' conduct, the court notes. It finds several factors leading it to conclude that the first relationship was an undissolved common law marriage: the parties lived together; the husband testified at one point that he was married; and they executed a deed of trust as husband and wife to purchase a house. Because there is no common law divorce in Texas, the court states that the first marriage could be terminated only by death or a court decree. It finds that neither took place. (Claveria v. Claveria; Tex SupCt, 2/11/81)

CUSTODY — JURISDICTION — UCCJA

A South Dakota court should not have declined jurisdiction as an inconvenient forum under Section 7 of Uniform Child Custody Jurisdiction Act when the reason for the child's physical presence in Arizona was child

snatching. The South Dakota Supreme Court refers to Both v. Superior Court, 590 P2d 920 (Ariz 1979), and Winkelman v. Moses, 279 NW2d 897, 5 FLR 2709 (1979), to reinforce its point that deferring to Arizona (where no litigation is pending) as having "a more recent connection to the children and the father" violates the very purposes of the UCCJA. On the contrary, the court says, UCCJA Section 3(a)(1)(ii) "recent home state" jurisdiction exists in South Dakota and the "unclean hands" provisions of Section 8(a) would bar the exercise of jurisdiction in Arizona if it was attempted. "To sustain the trial court under the circumstances in this case," the court says, "would allow a parent, knowing that marital problems exist and that divorce proceedings are imminent, to preclude a custodial disposition by the court of the marital domicile simply by removing the children to another state." (Ryan v. Ryan; SDak SupCt, 2/11/81)

CUSTODY — JURISDICTION — UCCJA

In a case of child snatcher versus child snatcher, wherein the equities have perhaps grown fuzzy enough, a majority of the Florida Court of Appeal for the First District gives a very broad reading to the "significant connection," "evidence availability," and "emergency" provisions of the Uniform Child Custody Jurisdiction Act, Sections 3(a)(2) and (3). Dealing with a child who is now in Florida because the mother snatched the children back from Idaho in defiance of an Idaho decree that the father got after his pre-litigation unilateral removal of the children, the majority affirms a trial court ruling that the mother and children's recent arrival in Florida did not bar Florida from UCCJA jurisdiction. Though it is not the children's home state under Section 3(a)(1), the majority points out, the children can be said to have a Section 3(a)(2) connection with Florida in that their mother says she intends to stay there. The section does not require that a state have "the most" significant connection, the court says, but only that it have "a" significant connection. The decision also illustrates, as several other recent cases have, the great tactical advantage of getting a custody investigation started in a state where one lands and files. Since "there is, or soon will be, substantial evidence concerning the children's present and future care, protection, training, and personal relationships in Jacksonville," the Section 3(a)(2) evidence-availability factor also counts in Florida jurisdiction's favor. Nor does the "clean hands" provision of UCCJA Section 8 operate against the mother here. The court points out that Section 8(b) says only that "unless it is required in the interest of the child," a state shall not exercise modification jurisdiction in a child-snatcher's favor, and "we think that the introductory phrase provides the trial court with a certain discretionary leeway." The court adds that the Act is after all aimed at effectuating the best interest of children, and that can be more important than the secondary object, the promotion of an orderly system of justice. Finally, the UCCJA Section 3(a)(3) "emergency" jurisdiction is also triggered in this case since the mother has alleged that the children "had been abused

OCT 20 1981

LEWIS H. YADEN, CLERK

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DEFENDANT'S REPLY TO COMPLAINANT'S BRIEF

The defendant, in spite of the fact that her position has been soundly stated in her original memorandum filed herein, feels constrained to comment on the complainant's brief not out of concern for the legal position stated therein, but rather out of concern for the "facts" as stated therein. In fact, what little pertinent legal authority is cited in the complainant's brief wholly supports the position of the defendant that this Court, while having jurisdiction over this matter, should defer to the jurisdiction of the British Court based on the criteria set forth in the Uniform Child Custody Jurisdiction Act (e.g., see Motola v. Motola, 7FLR at 2492 where the Connecticut Court comments that "Colorado continues to have jurisdiction, therefore, it is that Court, upon application, which would make the determination concerning the more convenient forum." See also Lustig v. Lustig, 7FLR at 2196 where it is observed that the party arguing forum non conveniens could not have been too inconvenienced since she had appeared in the distant State and put on voluminous testimony and was quite a traveler anyway. This is interesting to note in light of the fact that counsel for the complainant has stated that he will travel with the complainant to England to take depositions in this matter.)

But it is not for these reasons that the defendant feels called upon to respond to this "brief." This brief takes the approach that if the Judge is led to believe the factual situation to be harsh enough, he will ignore the rules set forth for determining jurisdiction and take jurisdiction over the matter because of some horrible situation that the complainant would lead the Court to believe exists. Counsel for the complainant has stated as facts in his brief those matters which are at the most contentions on their part. Thus the Court is to believe that Mrs. Sheila Middleton performs various sex acts with numerous men in front of the children during those times when she is not in public bars drinking herself into a stupor, and that she takes them on vacations to exotic places where she panders these girls by fixing them up with men in their twenties. It must be in spite of these experiences that the children have been able to thrive so successfully in school and other activities.

The defendant herein has refrained from slinging mud at the father of her children. She has even instructed her counsel that unless it was absolutely necessary, nothing should be mentioned of Mr. Middleton's sexually deviant behavior during their marriage. If any misrepresentations had been made in behalf of the defendant, then they have certainly been pointed out by the complainant in his comments on the characterization of the English Court documents being orders making the children wards of the Court. However, as stated in her brief, the purpose of the proceeding in England is only to establish that the English Courts are willing to make a determination as to the custody of the children. No such determination has yet been made because there has been no proceedings in that Court and no service on the complainant.

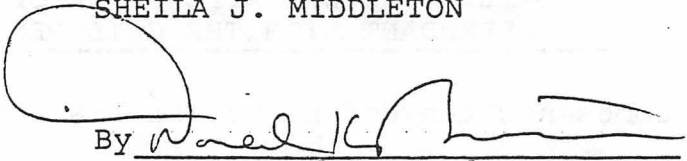
In fact, it is obvious from the approach taken by the defendant that it is her desire to proceed in accordance with the law and to have the Circuit Court of Chesterfield County determine which is the more convenient forum in which to hear the merits of this custody case.

The defendant can only observe that the tenor of the brief filed by the complainant is one of desperation. Allegations range from sexual misconduct to a violation of legal ethics, to representation of fact for which there is no evidence, to a willingness on the part of the complainant to travel to England for the taking of evidence in this case. Obviously, if the complainant, who is seeking to convince us of his superior financial position, is going to undergo the expenditure of time and money to travel to England for the taking of evidence, then certainly he can take the time to go to England to litigate this matter. Even his most material witnesses are present in England. This, as much as anything else, bears on the relative convenience of the forums in this international custody case.

The defendant will also note here her objection to the taking of any further evidence by depositions that is not in support of the Plea to the Jurisdiction. The Court ruled at the hearing that such evidence could be taken that is necessary to prove jurisdiction. (see transcript, page 88, line 21) It is obvious from the complainant's brief and from the evidence presented on September 22, that such would not be the subject of any depositions, but rather the complainant will continue to try to litigate the merits of the case before the Court has had an opportunity to determine jurisdiction. With the time and expense that would obviously be involved,

the defendant objects to the taking of any such depositions,
including depositions offered to be taken in England.

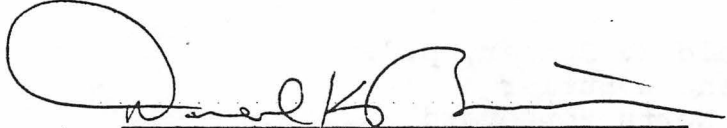
SHEILA J. MIDDLETON

By 
Of Counsel

Donald K. Butler, p.d.
Morano & Butler
526 North Boulevard
Richmond, VA 23220

CERTIFICATE

I hereby certify that a true copy of the foregoing
Defendant's Reply to Complainant's Brief was mailed postage
prepaid this 19th day of October, 1981, to B. VanDenburg
Hall, Esq., Suite 400, Equity Building, 4085 Chain Bridge
Road, Fairfax, VA 22030, counsel for the complainant.


Donald K. Butler

OCT 20 1981

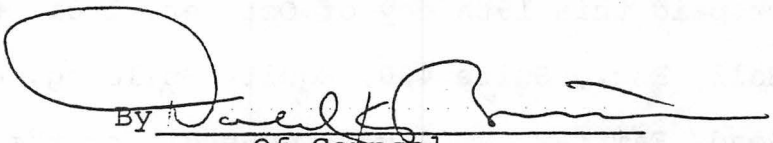
LEWIS H. VADEN, CLERK

RESPONSE TO COMPLAINANT'S MOTION TO
COMPEL PERSONAL APPEARANCE OF
DEFENDANT WITH THE CHILDREN

Comes now the defendant, Sheila Joan Middleton, by counsel, and for her response to the complainant's motion to compel her appearance herein with the children of the parties states that such a procedure is not appropriate until the Court has determined whether or not this Court will be the forum in which the custody case is to be heard.

WHEREFORE, the defendant prays that the complainant's motion be denied.

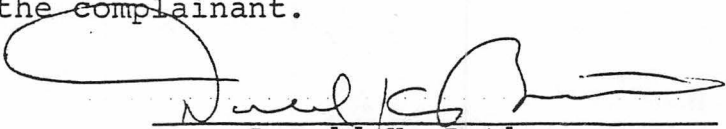
SHEILA J. MIDDLETON

By 
Of Counsel

Donald K. Butler, p.d.
Morano & Butler
526 North Boulevard
Richmond, VA 23220

CERTIFICATE

I hereby certify that a true copy of the foregoing Response to Complainant's Motion to Compel Personal Appearance of Defendant with the Children was mailed, postage prepaid, this 19th day of October, 1981, to B. VanDenburg Hall, Esq., Suite 400, Equity Building, 4085 Chain Bridge Road, Fairfax, VA 22030, counsel for the complainant.


Donald K. Butler

OCT 20 1981

MOTION TO COMPEL PERSONAL APPEARANCE
OF DEFENDANT WITH THE CHILDREN

LEWIS H. VADEN, CLERK



COMES NOW the Complainant, Brian C. Middleton, by counsel, and prays this Honorable Court to order pursuant to §20-134(B) of the Code of Virginia (1950) that further notice be given the Defendant, Sheila Joan Middleton under §20-128 of the Code which shall include a statement directing that she appear personally with the children and declaring that failure to appear personally with the children may result in a decision adverse to her. In support thereof, the Complainant states as follows.

1. §20-134(B) of the Code provides as follows:

"If a party to the proceedings whose presence is desired by the Court is outside this State with or without the child the Court may order that the Notice given under §20-128 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party."

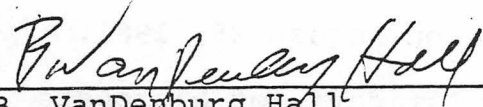
2. Notice was mailed to the Defendant pursuant to §20-128 on August 20, 1981, and the Defendant has conceded on page 2 of her Memorandum in Support of Defendant's Plea to the Jurisdiction that she received that Notice on August 25, 1981. In addition, Complainant has submitted an Affidavit of a process server that he served upon Defendant on September 12, 1981, a copy of said Notice and a copy of Complainant's Motion, proposed Order and Petition for Change of Custody. Both the mailing and the preparation of the papers for service of process were prepared by Complainant's counsel prior to Sheila Middleton's snatching of the children at 1:30 p.m. on September 2, 1981, and did not include a directive for personal appearance.

Complainant submits that the snatching of the children and their removal to England constitute a change in circumstances, in that Defendant has deliberately removed the children from this Court's jurisdiction and the physical custody of the father. Their testimony will be of importance and may be crucial because of the nature of the events which they have witnessed and of which they have personal knowledge. While it may be possible for depositions of the children and the mother to be taken in England, the Complainant believes the Court may wish to observe the demeanor as witnesses of these three persons.

In the circumstances, Complainant believes it would be appropriate to re-notice the Petition for Change of Custody, and seeks an Order of the Court that Complainant include therein the appropriate language to compel Sheila J. Middleton to appear personally with the children at such time and place set by the Court. An appropriate Order is attached.

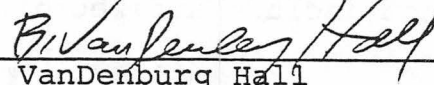
WHEREFORE, the Complainant, Brian C. Middleton, prays the Court to enter an Order pursuant to §20-134(b) of the Code directing that notice be given the Defendant to appear personally with the children Claire and Nicole Middleton at trial on the date and place hereafter to be set by the Court.

BRIAN C. MIDDLETON, Complainant
By Counsel


B. VanDenburg Hall
Counsel for Complainant
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Certificate of Service

I hereby certify that on the 14th day of October, 1981, I mailed, postage-prepaid, a copy of the foregoing Motion to Compel Personal Appearance of Defendant with the Children, together with a proposed Order, to Donald K. Butler, Esquire, Counsel for Defendant, at 326 North Boulevard, Richmond, Virginia 23220.


183. VanDenburg Hall

O R D E R

THIS CAUSE came on to be heard upon the Complainant's Motion to Compel Personal Appearance of Defendant with the Children, in which the Complainant proposes to re-notice his Motion for Change of Custody to include therein a directive that the Defendant, Sheila J. Middleton, appear personally with the parties' children Claire Michelle and Nicole Amie Middleton, at trial on the date and place hereinafter to be set by the Court, and in support thereof the Complaint avers that the children were present in Virginia in his physical custody at the time in August, 1981, when his counsel initially prepared Notice of his Motion for Change of Custody without including a directive for personal appearance. Complainant avers that the children were removed to England on or about September 3 or 4, 1981, by the Defendant/Mother, without his leave and against the wishes of the children. Complainant further suggests that the testimony of the mother and the children is important and may be crucial and the Court may desire to observe their demeanor.

IT APPEARING TO THE COURT that although the circumstances surrounding the removal of the children to England from the father's neighborhood in Virginia have not been established on the record, the Defendant states affirmatively in her pleadings that the children are with her in England; and

IT FURTHER APPEARING that there is reasonable ground to believe that the testimony of the mother and the children will be of great significance in resolving the question of what custody arrangement will best serve the best interests of the children and that demeanor evidence may also be important, now, therefore,

IT IS ORDERED pursuant to §20-134 of the Code of Virginia(1950) that notice be given the Defendant pursuant to §20-128 of the Code including a statement directing that the Defendant Sheila Joan Middleton appear personally with the children, Claire and Nicole Middleton, at _____ o'clock on the _____ day of _____, 1981 in this Court, and that unreasonable failure to appear personally with the children may result in a decision adverse to the Defendant.

ENTERED this _____ day of _____, 1981.

JUDGE

I ASK FOR THIS:

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Brian C. Middleton, Complainant
Suite 400, 4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

SEEN:

Donald K. Butler
Counsel for Sheila Middleton, Defendant
326 North Boulevard
Richmond, Virginia 23220

P R A E C I P E

The Clerk will please place in the file the enclosed original Certificate of Service of the Complainant's Notice, Petition for Rule, Injunctive Order, and proposed Rule to Show Cause which were personally served upon the Defendant, Sheila J. Middleton on September 24, 1981.

BRIAN C. MIDDLETON, Complainant
By Counsel

B. VanDenburg Hall

B. VanDenburg Hall
Counsel for Complainant
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Certificate of Service

I hereby certify that on the _____ day of October, 1981, I mailed, postage prepaid, a copy of the Certificate of Service upon the Defendant, Sheila J. Middleton, of Notice, Petition for Rule, Injunctive Order, and proposed Rule to Show Cause upon Donald K. Butler, Esquire, Counsel for Defendant, at 526 North Boulevard, Richmond, Virginia 23220.

B. VanDenburg Hall
B. VanDenburg Hall

RECEIVED AND FILED

OCT 20 1981

LEWIS H. VADEN, CLERK

[Signature]

CERTIFICATE
ATTESTATION

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention,
Je soussignée a l'honneur d'attester conformément à l'article 6 de ladite Convention,

The document has been served *

La demande a été exécutée

the (date)

le (date)

Thursday 24th September 1981

at (place, street, number)

à (localité, rue numéro)

Flat 6, St Mary's Court, Redley Drive
Norton Clevedon

in one of the following methods authorised by article 5—

dans une des formes suivantes prévues à l'article 5:

☐ (a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention*

a) selon les formes légales (article 5, alinéa premier, lettre a).

☒ (b) in accordance with the following particular method*:

b) selon la forme particulière suivante :

☐ (c) by delivery to the addressee, who accepted it voluntarily.*

c) par remise simple.

The documents referred to in the request have been delivered to:

Les documents mentionnés dans la demande ont été remis à:

—(identity and description of person)

—(identité et qualité de la personne)

Sheila Joan Middleton

—relationship to the addressee (family, business or other):

—liens de parenté, de subordination ou autres, avec le destinataire de l'acte:

Personally

2) that the document has not been served, by reason of the following facts*:

2. que la demande n'a pas été exécutée, en raison des faits suivants :

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement*

Conformément à l'article 12, alinéa 2, de ladite Convention, le requérant est prié de payer ou de rembourser les frais dont le détail figure au mémoire ci-joint.

Annexes

Annexes

Documents returned:

Pièces renvoyées:

In appropriate cases, documents establishing the service:

Le cas échéant, les documents justificatifs de l'exécution:

Copy of process served

*Delete if inappropriate.
Rayer les mentions inutiles.



Done at

Fait à

LONDON

the

le

30-9-81

Signature and/or stamp.

Signature et/ou cachet.

S. Morda

REQUEST

FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

DEMANDE AUX FINS DE SIGNIFICATION OU DE NOTIFICATION A L'ETRANGER D'UN ACTE JUDICIAIRE OU EXTRAJUDICIAIRE

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, November 15, 1965.

Convention relative à la signification et à la notification à l'étranger des actes judiciaires ou extrajudiciaires en matière civile ou commerciale, signée à La Haye, le 15 Novembre 1965.

Identity and address of the applicant
Identité et adresse du requérant

B. VanDenburg Hall, Esquire
Counsel for Brian C. Middleton
Suite 400, 4085 Chain Bridge Rd.
Fairfax, Virginia 22030

Address of receiving authority
Adresse de l'autorité destinataire

Senior Master of the Supreme
Court
Royal Courts of Justice
Strand, London W.C. 2

The undersigned applicant has the honour to transmit—in duplicate—the documents listed below and, in conformity with article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, i.e.:

(identity and address)

Le requérant soussigné a l'honneur de faire parvenir—en double exemplaire—à l'autorité destinataire les documents ci-dessous énumérés, en la priant conformément à l'article 5 de la Convention précitée, d'en faire remettre sans retard un exemplaire au destinataire, savoir:

(identity and address)

Sheila J. Middleton, Fl. 6, St. Mary's Ct. Ridley Dr., Norton Cleveland, Eng., Notice, Petition For Rule, Rule to Show Cause

☐ (a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention.*

a) selon les formes légales (article 5, alinéa premier, lettre a).

☒ (b) in accordance with the following particular method (sub-paragraph (b) of the first paragraph of article 5):

b) selon la forme particulière suivante (article 5, alinéa premier, lettre b): personal service upon

Sheila Joan Middleton, Flat 6, St. Mary's Ct. Ridley Dr., Norton, Cleveland, England

☐ (c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5)*.

c) le cas échéant, par remise simple (article 5, alinéa 2).

The authority is requested to return or to have returned to the applicant a copy of the documents—and of the annexes—with a certificate as provided on the reverse side.

Cette autorité est priée de renvoyer ou de faire renvoyer au requérant un exemplaire de l'acte—et de ses annexes—avec l'attestation figurant au verso.

List of documents

Énumération des pièces

Notice

Petition For Rule

Rule To Show Cause

Done at Fairfax Co., VA the 9/16/81

Signature and/or stamp.

Signature et/ou cachet.

B. VanDenburg Hall

*Delete if inappropriate.
Rayer les mentions inutiles.

(Formerly OBD-116 which was formerly LAA-116;
both of which may still be used)

USM-94
(Est. 11/22/77)

ORIGINAL DOCUMENTS

SUMMARY OF THE DOCUMENT TO BE SERVED
ELEMENTS ESSENTIELS DE L'ACTE
ORIGINAL

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, November 15, 1965.

Convention relative à la signification et à la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale, signée à La Haye, le 15 Novembre 1965.

(article 5, fourth paragraph)

(article 5, alinéa 4)

Name and address of the requesting authority: William E. Kline, Esq., B. Vandenburg Hall, Esq.,
Nom et adresse de l'autorité requérante: Counsel for Brian C. Middleton, Suite 400, 4085 Chain Bridge Road,
Fairfax, Virginia 22030

Particulars of the parties*: Brian C. Middleton, Plaintiff vs. Sheila Joan Middleton,
Identité des parties: Defendant

JUDICIAL DOCUMENT**
ACTE JUDICIAIRE

Nature and purpose of the document:
Nature et objet de l'acte: Notice, Petition For Rule, and Rule To Show Cause against
the Defendant, Sheila J. Middleton, commanding her to appear and show
cause, why she should not be held in contempt of Court.

Nature and purpose of the proceedings and, where appropriate, the amount in dispute:
Nature et objet de l'instance, le cas échéant, le montant du litige: Hearing upon the Petition of Brian C.
Middleton why the Defendant, Sheila J. Middleton should not be held in
contempt of this Court.

Date and place for entering appearance*: September 22, 1981, Circuit Court of Chesterfield
Date et lieu de la comparution:

~~Court which has given judgment**~~

Jurisdiction qui a rendu la décision:

~~Date of judgment**~~

Date de la décision:

~~Time limits stated in the document**~~

Indication des délais figurant dans l'acte:

EXTRAJUDICIAL DOCUMENT**
ACTE EXTRAJUDICIAIRE

~~Nature and purpose of the document~~

Nature et objet de l'acte:

~~Time limits stated in the document**~~

Indication des délais figurant dans l'acte:

* If appropriate, identity and address of the person interested in the transmission of the document.
S'il y a lieu, identité et adresse de la personne intéressée à la transmission de l'acte.

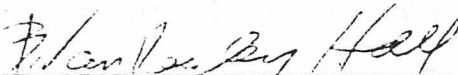
** Delete if inappropriate.
Rayer les mentions inutiles.

NOTICE

TO: Sheila J. Middleton
Flat 6, St. Mary's Court
Ridley Drive
Norton Cleveland, ENGLAND

PLEASE TAKE NOTICE that on Tuesday, September 22, 1981, Brian C. Middleton, by counsel, will move this Honorable Court for a Rule to Show Cause why the defendant, Sheila J. Middleton, should not be held in contempt of this court for violating the Order of September 2, 1981. Hearing to commence at 9:00 a.m.

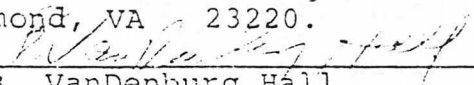
BRIAN C. MIDDLETON
By Counsel



B. VanDenburg Hall
Counsel for Defendant
Suite 400 Equity Building
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703)385-8777

Certificate of Service

I hereby certify that on this 16th day of September, 1981, I mailed, postage-prepaid, by certified, express mail, a true copy of the foregoing documents: Notice, Petition For Rule and Rule To Show Cause upon Ms. Sheila Joan Middleton, Defendant, at Flat 6, St. Mary's Court, Ridley Drive, Norton Cleveland, England; and by regular mail to Donald K. Bulter, Esq., Counsel for Defendant, 526 North Boulevard, Richmond, VA 23220.



B. VanDenburg Hall

PETITION FOR RULE

COMES NOW the plaintiff, Brian C. Middleton, and having been duly sworn deposes and says as follows:

1. That the Circuit Court of Chesterfield County, Virginia entered an Order on the 2nd day of September, 1981 enjoining and restraining the Defendant Sheila J. Middleton from removing "either or both of the children of the parties, namely Claire M. Middleton and Nicole A. Middleton from the Commonwealth of Virginia, the United States of America until further order of this Court". A copy of said Order is attached hereto as Exhibit 'A'.

2: Contrary to this Order, the Defendant, Sheila J. Middleton has removed the children of the parties from the Commonwealth of Virginia and from the United States of America.

WHEREFORE, the Plaintiff, Brian C. Middleton, prays this Honorable Court to enter a Rule to Show Cause against the Defendant, Sheila J. Middleton, commanding her to appear and show cause, if any there be, why she should not be held in contempt of Court.

BRIAN C. MIDDLETON

B. VanDenburg Hall
Counsel for Plaintiff
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Subscribed and sworn to by BRIAN C. MIDDLETON before the undersigned Notary Public as true to the best of his knowledge, information and belief.

Given under my hand this day of , 1981.

My commission expires:

Notary Public

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

BRIAN C. MIDDLETON

Plaintiff,

v.

SHEILA J. MIDDLETON,

Defendant

Chancery Case No. 3305-77

O R D E R

WHEREAS there is now pending before this Court a petition concerning possible change of custody of Claire M. Middleton and Nicole A. Middleton, the infant children of the plaintiff and defendant, it is ADJUDGED, ORDERED and DECREED that the parties are hereby enjoined and restrained from removing either or both of the children of the parties, namely Claire M. Middleton and Nicole A. Middleton from ^{the Commonwealth of Virginia and} the United States of America until the further order of this Court.

ENTER: 9 / 2 / 81

Ernest P. Galt
Judge

I Ask For This:

Chy. O. B. 96-page 435

N. Leslie Saunders, Jr. p.q.
N. Leslie Saunders, Jr.

Certified to be a True Copy:
Ernest P. Galt
Judge

RULE TO SHOW CAUSE

THIS MATTER came on to be heard upon the application of counsel for the Plaintiff, Brian C. Middleton; and

IT APPEARING TO THE COURT from the Petition for Rule which has been sworn to and signed by the Plaintiff, Brian C. Middleton, that entry of this Rule is proper; it is

ADJUDGED, ORDERED and DECREED that this Rule to Show Cause be served upon the Defendant, Sheila J. Middleton, commanding her to appear before this Court on the _____ day of _____, 1981 at _____ and show cause, if any there be, why she should not be held in contempt of this Court.

ENTERED this _____ day of _____, 1981.

JUDGE

I ASK FOR THIS:

B. VanDenburg Hall

B. VanDenburg Hall
Counsel for Plaintiff
Suite 400
4085 Chain Bridge Road
Fairfax, Va. 22030
(703) 385-8777

MOTION FOR RESTRAINING ORDER AND
SUPPORTING AFFIDAVIT

COMES NOW the Complainant, Brian C. Middleton, and prays this Honorable Court to enter a restraining Order prohibiting the Defendant, Sheila Joan Middleton from conduct which threatens harm to the daughters, and in support thereof states as follows.

1. Being duly sworn, the Complainant Brian C. Middleton makes the following supporting statements upon his knowledge or belief. The Complainant has recently used the services of private detectives to determine the character of Sheila Joan Middleton's conduct. In addition, the Affiant has received information as to Sheila Joan Middleton's conduct from the daughters who have themselves witnessed said conduct. Based upon these sources of information, the Complainant believes that Sheila Joan Middleton has exposed herself in the nude to a man, with the children on the premises; she has had sexual intercourse in her apartment with the children in the apartment; she has taken the children with her to other premises where she has had sexual intercourse; during 1981, she has promised the daughters they may have boyfriends when they went on vacation to Portugal and the mother arranged for the daughters to go on dates with men aged 20 and 23 years.

2. The daughters are at sensitive ages. Claire Middleton is 12 years old and Nicole Middleton is 10 years old. The parties' children were taught moral values by the father and it can reasonably be expected that they would be offended and/or adversely affected by being present on premises with knowledge that the mother is having sexual relations, or observing the mother exposing herself nude to a man, or having one of the

mother's lovers make sexual advances to her. Nicole Middleton has already run away from the mother's home. Moreover, both daughters are at present living with the mother against their expressed wishes.¹

3. There is reason, therefore, to fear that one or both of the children may run away from home again if exposed to the mother's promiscuous conduct within their sight or with their knowledge while they are on the same premises, or if sexual advances should be made to one or more of the daughters by the mother's adult men friends. A run away child is exposed to innumerable dangers to her person. The threat of serious harm occurring to the children, if Sheila Middleton continues the pattern she followed in the recent past, is real and imminent. Until this Court can hear and resolve the custody question on the

¹During the children's visitation with their father in his home in Virginia, the mother received notice that the father had commenced litigation to determine whether a change of custody would not be in the children's best interests. The mother came from England to the United States, knowing the children desired to remain with the father during the upcoming school year and, on September 2, 1981, Sheila Middleton approached the children in an automobile, said she wanted to discuss the situation with the daughters and promised they would not have to leave the father's home. When the daughters entered the car, Defendant Sheila Middleton sped off with them and on or about September 2 or 3, 1981, returned them to England against the children's wishes.

basis of evidence of record, no remedy other than a restraining order is available to the Complainant. While the relief requested would restrict the conduct of the Defendant, it would not be unreasonable to grant the relief requested; see De Vito v. De Vito, 3 F.L.R. 2142; Drumm v. Drumm, 5 F.L.R. 2343 (copies attached). In all the circumstances, the relief requested should be granted. Brown vs. Brown, 218 Va. 196 (1977).

WHEREFORE the Complainant, Brian C. Middleton, prays the Court to restrain the Defendant/Mother, Sheila Joan Middleton, from having sexual intercourse in her apartment when either child is present, from having unrelated men stay overnight, from exposing the children to the company of any male with whom Defendant has previously had sexual relations, from exposing herself nude to a man in the presence of either daughter, and from taking either daughter to the home of an unrelated man and staying overnight in his home with the child present on the premises.

Brian C. Middleton
BRIAN C. MIDDLETON
Complainant

STATE OF VIRGINIA

COUNTY OF

Subscribed and sworn to before me this 16th day of

October, 1981.

My Commission expires: August 5, 1983

Michelle S. Saffa
Notary Public

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Complainant
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

RECEIVED AND FILED

OCT 26 1981

LEWIS H. VADEN, CLERK LB

Certificate of Service

I hereby certify that on this 23rd day of October, 1981, I mailed, postage prepaid, a true copy of the foregoing Motion for Temporary Injunctive Order to Donald K. Butler, Esquire, Counsel for Defendant, at 526 North Boulevard, Richmond, Virginia 23220.

B. VanDenburg Hall
B. VanDenburg Hall

RECEIVED AND FILED

OCT 26 1981

LEWIS H. VADEN, CLERK



RESTRAINING ORDER

THIS CAUSE came on upon the affidavit and Motion of the Complainant/Father, Brian C. Middleton, in this action for change of custody to him of his two minor daughters, Claire and Nicole Middleton from the Defendant/Mother, Sheila Joan Middleton. The children were in the home of the father for the summer vacation from school, until the mother on or about August 25, 1981 came to the United States from England, and on or about September 2, 1981, removed the children with her back to England. The allegations which the father makes under oath as grounds for entering a restraining Order are claims that the Defendant, Sheila Joan Middleton, has slept with men with the daughters in their apartment, has taken the children with her to the house of a man where she has slept with him with the children on the premises, has exposed herself nude to a man with the daughters on the premises, and has arranged for the 10 and 12 year old daughters to have dates with men who are 20 and 23 years old. One of the daughters has previously run away from the mother's home, and the daughters are unwillingly in the mother's physical custody, having been tricked into entering an automobile with the mother and returned to England over protests that they desired to

stay with the father. The father now seeks an Order to restrain the mother from activities which he believes pose a danger to the daughters, until such time as the Court can hear the parties' evidence and testimony of witnesses and resolve the question of what custody arrangement will be in the children's best interest. The Complainant further avers that a restraining order is required to avoid imminent danger to the children. He asserts no adequate remedy is otherwise available. The allegations are supported by the father's Affidavit.

IT APPEARING TO THE COURT that adequate grounds have been established to believe there is imminent danger to the daughters' welfare unless a restraining Order of the Court is entered, and that no other remedy is available, it is, therefore,

ADJUDGED, ORDERED and DECREED that the Defendant, Sheila Joan Middleton, is enjoined and restrained, until a final Order on the merits of the custody petition is entered, from having sexual intercourse in her apartment or elsewhere when either child is present on the same premises, from having unrelated men stay overnight when either daughter is present on the same premises, from exposing herself nude to a man when either daughter is present on the same premises, and from exposing the children to the company of any man with whom the Defendant has previously had sexual intercourse.

ENTERED this _____ day of _____, 1981.

JUDGE

I ASK FOR THIS:

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Complainant
Suite 400, 4085 Chain Bridge Rd.
Fairfax, Virginia 22030
(703) 385-8777

and theories relating to the modification or formation of contracts with doctrines and theories relating to modification of decrees of divorce was error.

The findings of the trial court that the contract entered into by the parties hereto and sought to be enforced herein was oppressive, inequitable and unjust are supported by the evidence. Hence, those portions of the lower court decree purporting to require defendant-appellant to maintain life and health insurance, to provide college education for the child of the parties and to require the payment of alimony both before and after the retirement of the defendant-appellant are reversed. [End Text] —Per Curiam

(Jensen v. Jensen; Idaho SupCt, 12/13/76)

De Vita v. De Vita:

DIVORCED FATHER CAN'T SLEEP WITH GIRL FRIEND WHEN CHILDREN VISIT

Important case distinguished; sexual privacy rights are secondary to children's moral welfare; dissent focuses on lack of predictable effect on children.

A divorced father of seven may feel free to enjoy his new bachelor status with his female companion, but he is not so when his children are visiting him for the weekend, the New Jersey Superior Court's Appellate Division decides. Though the father claimed that this visitation restriction impinges on his constitutional right to privacy, the court explains that the cited cases are "inapposite" and deal with custody rather than a condition attached to visitation. The court admits that nothing is wrong with the presence of a woman during visitation, but does not find it unreasonable to take preventive measures against the detriment to children that a woman remaining overnight might have.

The "best interest and welfare of the child," the court points out, is the pertinent criterion upon which conditions of visitation must be based. "Fundamental personal rights" and "right of privacy" as the New York Court explained in *In re Jane B.*, 380 N.Y.S. 2d 848 (1976), are not abridged by considering whether an environment is suited to the "well-being" of a child. This case along with other decisions cited by the father deal only with "personal rights that did not affect third parties," the court observes, and are therefore distinguishable. While the court makes no determination concerning the morality of the father's conduct, it does conclude that with a balancing of the equities involved, the father would suffer "no great inconvenience" in having to preclude his girl friend from spending the night when his children visited.

Dissenting Judge Antell is unable to agree with the visitation restriction, however, and suggests that the majority's decision rests merely on the mother's fear of possible moral detriment to her children. Instead of forcing the father to "tow the line" with regard to his sexual conduct, the dissent would rather have the court keep sight of his primary duty of maintaining the parent-child relationship. (DeVita v. DeVita, 12/2/76)

Digest of Opinion: [Text] We also conclude that the restriction on defendant's weekend visitations with his children (that his female companion may not spend the night when his children do) was an exercise of discretion and not an abuse thereof. In our review of an issue of custody the conclusions of a

trial judge are entitled great weight and will not be lightly disturbed on appeal. *Shelton v. Sheehan*, 51 N.J. 276 (App. Div. 1951). See also *Schwartz v. Schwartz*, 68 N.J. Super. 223 (App. Div. 1961).

In support of his contention that the imposition of this restriction on his rights of visitation constitutes an impingement on his constitutional right to privacy, defendant cites *Feldman v. Feldman*, 45 App. Div. 2d 320, 358 N.Y.S.2d 507 (1974) and *CC v. CC*, 37 App. Div. 2d 657, 322 N.Y.S.2d 388 (1971).

The cited cases are inapposite. They did not involve mere conditions attached to rights of visitation as here. Rather each involved the more traumatic issue as to whether the mother was to be deprived of custody of the children because of asserted sexual aberrations on her part. When dealing with custody, the burden of proof required to show that a mother is guilty of gross sexual misconduct to the detriment of her children in a heavy one. In *Feldman* and *CC v. CC*, there was no showing that the mothers' activities adversely affected the welfare of the children; therefore, it was held that the mothers were not so "unfit" as to deprive them of the custody of the children. * * *

Griswold, holding that a statute which made the use of contraceptives a criminal offense was an unconstitutional invasion of the right of privacy of married persons, can hardly be said to be relevant to a custody case in which the welfare of the children is paramount. See *In re Jane B.*, 85 Misc.2d 583, 380 N.Y.S.2d 848, 857 (Sup. Ct. 1976). * * *

In *Repetti* the court (also by a vote of 3 to 2) held that the children's visitation to the father's home from 9 a.m. to 9 p.m. on Saturday and Sunday should not be conditioned upon the absence of "another woman to whom * * * (the father) is not related." at p. 573. In the instant case, the judge has also not forbidden the presence of defendant's female companion when the children are visiting during the daytime. But it is certainly not unreasonable to see different implications when the woman remains overnight in the father's home in the presence of the children. * * *

Of greater significance to defendant's contentions concerning the violation of his alleged constitutional right of privacy is the opinion in *In re Jane B.*, supra. In that case the court ordered that the custody of a ten year old child be changed from the mother to the father. It is true that there was specific proof of the mother's aberrant sexual activities (she was a lesbian) and there was some evidence that the child was emotionally insecure. Concededly there is no such evidence in this case. * * * The court in *In re Jane B.*, said: The issue here, however, is not homosexuality; it is solely the best interest and welfare of the child that the Court must consider under the existing circumstances of the case. The cases cited go to "fundamental personal rights" and "right of privacy." The court here is not abridging respondent's fundamental rights or privacy but concerns itself solely with the wellbeing of the child and the questions as to whether the present environment is a proper one for this child and in her best interest. The court distinguished the quoted cases because they only dealt with personal rights that did not affect third parties. * * *

We emphasize that there is no proof here of such gross sexual behavior on defendant's part as was shown in *In re Jane B.*, and in *re J.S. & C.* But the holding in the former case controverts defendant's proposition that the limitation on his weekend right of visitation impinges on his constitutional rights. And *In re J.S. & C.* demonstrates that, in the interest of the children's welfare, courts may limit the right of visitation.

The paramount consideration in custody and visitation cases is for the "safety, happiness, physical, mental and moral welfare of the child." *Fantony v. Fantony*, 21 N.J. 525, 536 (1956). * * * We recognize that the personal wishes of a parent do not govern the conditions of custody. Nevertheless their respective concerns are to be considered, provided they relate to the paramount consideration of the safety, happiness, physical, mental and moral welfare of the child. * * *

It is not for this court to determine what is moral or immoral in this context. Nor do we do so. We merely recognize that in the mother's view the moral welfare of the children is possibly endangered if the trial court's restriction is not upheld. We do not decide whether the mother's views are correct or incorrect

but she has a rightful interest in the moral welfare of the children which is entitled to respect. * * *

In balancing the equities we consider that there is no great inconvenience to the father in precluding his female friend from staying overnight on every other weekend when the children are present in the house. [End Text] —Lynch, J.

Dissent: The threat which awakens the court's protective instincts, evidently, is the "possibility" of "sexual activity on the part of the father and his female friend in his household."

The majority concedes there is no evidence of any psychological harm to the children resulting from this arrangement. But it could have gone farther and acknowledged that this action is taken without any evidence whatever concerning harm of any kind to the children, psychological, emotional, or moral.

My dissent from the decision of the court is made necessary by what I believe to be its faulty application of a basic principle: in matters of custody and visitation "the welfare of the child is the primary, paramount and controlling consideration", and the "legal rights and claims of either parent and the wishes and personal desires" of the parent are secondary. *Fiore v. Fiore*, 49 N.J. Super. 219, 225, 228 (App. Div. 1958). The interest which visitation fosters lies in preserving the child's relationship with the non-custodian parent. * * * By using visitation to make the father toe the line in respects which are not properly any of our concern, the court has lost sight of its first obligation to "strain every effort to attain for the child the affection of both parents rather than one." *Turney v. Nooney*, supra, at 397. [End Dissent]—Aritell, J.

(*DeVita v. DeVita*; NJ SuperCt AppDiv, 12/2/76)

NO-FAULT STATUTE EXCLUDES SPECIFIC MISCONDUCT CONSIDERATION

New Hampshire law limits admission of this evidence to child custody issues and establishing no-fault grounds, though fault is relevant as to alimony.

Though the New Hampshire Supreme Court observes that evidence of specific acts of marital misconduct are admissible under the state's no-fault divorce law where child custody is an issue or to aid in the establishment of irreconcilable differences, the court explains that the statute apparently limits such evidence to these issues only and therefore denies a 50-year-old divorcing wife a chance to introduce evidence of her husband's misconduct in determining a division of property and alimony. But the court cautions that fault as a factor to consider in determining property and support awards is not, as in California, prohibited by the statute in all cases. However, the court has previously held that the statute's intent is to "minimize the acrimony attending divorce proceedings," and finds persuasive the Iowa and Kentucky position that this intent is defeated if fault evidence is permitted in determining alimony. In this instance, the court concludes, the mere fact that the wife is granted a divorce on the basis of irreconcilable differences does not afford her the privilege of introducing evidence of her husband's misconduct for the purpose of property division and alimony. (*Murphy v. Murphy*, 11/30/76)

Digest of Opinion: [Text] Both parties agreed there was no dispute that there was an irremediable breakdown in the marriage. However, the plaintiff attempted to introduce evidence of the misconduct of the defendant leading to the breakdown of the marriage. Defendant's objection to such testimony was sustained by the master subject to the plaintiff's exception. * * *

The plaintiff's exceptions essentially raise * * * [the] two issues. * * * [F]irst, whether the master was in error in excluding evidence of defendant's misconduct where the alleged cause for divorce was irreconcilable differences. * * *

Plaintiff's counsel urged before the master and in his brief and argument here that evidence of defendant's misconduct should have been received as relevant to the determination of property division and alimony award. Prior to the adoption of RSA 458:7-a (Supp. 1975) in 1971, fault was a recognized factor under our decisions to be considered in determining property division and support payments. *Comer v. Comer*, 110 N.H. 505, 508, 272 A. 2d 586, 587 (1970). Unlike some states (see, e.g., M.G.L.A. c. 208, § 1A and § 34 (Supp.); Cal. Civ. Code §§4506, 4509, 4800, 4801; *In re Rosan*, 24 Cal. App. 3d 885, 892, 101 Cal. Rptr. 295, 300 (1972), New Hampshire in adopting "no fault" divorce has not prohibited by statute in all cases fault as a factor to be considered in determining property division and support payments.

However, RSA 458:7a (Supp. 1975) does provide that "In any pleading or hearing of a libel for divorce under this section, allegations or evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue . . . or . . . where it is determined by the court to be necessary to establish the existence of irreconcilable differences." We have stated that the intent of this statute is to "minimize the acrimony attending divorce proceedings." *Desrochers v. Desrochers*, 115 N.H. 591, 594, 347 A. 2d 150, 153 (1975). This intent could be defeated by allowing fault evidence in respect to alimony. *In re Marriage of Williams*, 199 N.W. 2d 339, 345 (Iowa 1972); see Comment, *Kentucky No Fault Divorce: Theory and the Practical Experience*, 13 J. Fam. L. 567, 575 (1973-74). Accordingly, we hold that in a divorce under RSA 458:7-a (Supp. 1975) the trier of fact may properly in his discretion exclude evidence of fault on the issue of alimony. See *Kennard v. Kennard*, 87 N.H. 320, 327, 179 A. 414, 419 (1935). [End Text] —Griffith, J.

(*Murphy v. Murphy*; NH SupCt, 11/30/76)

N.Y. COURT REVERSES DECISION TO RETURN CHILD TO MOTHER

Court of Appeals dissent sees majority opinion as foreclosing any possibility for mother to regain child.

Finding a proceeding for periodic family court review of foster care placement not to be appropriate for the determination of a child's permanent status, the New York Court of Appeals reverses an appellate court's decision to re-vest custody of a child in her mother. (See 2 FLR 2634). A trial court had recommended continuation of foster care and ordered institution of a proceeding to free the child for adoption. The court agrees that the neglect proceedings should be brought to a conclusion and states that the standards which it has recently enunciated in *Bennett v. Jeffreys*, 2 FLR 2788, should be followed. It notes that the appellate court's decision was not reached in accordance with the views expressed in *Bennett*.

Justice Cooke concurs in the result, finding that the appellate court emphasized the interest of the natural mother rather than the best interest of the child.

Dissenting Justice Gabrielli, joined by Justice Wachtler, would find a foster care review proceeding appropriate for the determination of the permanent status of a child. He argues that the majority's decision will foreclose any "real hope the natural mother may have had in regaining the custody of her child." While *Bennett*

relationships to a minor child for imposition of criminal responsibility for nonsupport. * * * [End Text] — Staniforth, J. (People v. Thompson; Calif CtApp 4th Dist, 2/5/79)

Drumm v. Drumm:

**LIMITING VISITATION TO REQUIRE
GIRL FRIEND'S ABSENCE IS PROPER**

*Parties still married; situation cannot
enhance children's upbringing; dissent claims
mother motivated by resentment.*

A father's challenge to a limitation on his visitation to times when it can be conducted without the presence of his female companion whom he intends to marry after obtaining his divorce, is rejected by the Pennsylvania Superior Court, Harrisburg District. The association of the father with his intended while still married to the mother is contrary to the religious upbringing of the children and the lower court believed that this relationship does not enhance their welfare. Thus, the limitation placed on the father's visitation is reasonable and proper in the circumstances and serves the best interests of the children, the court declares.

Dissenting, Judge Spaeth believes the mother's opposition to visitation in the girl friend's presence is motivated by resentment, for the girl friend was the mother's best friend who has stolen the father. He feels the burden of proof should be on the mother, not the father, to prove that the children's welfare would be adversely affected by the girl friend's being present during visitation. The mother offered no proof that the children were adversely affected by the relationship. (Drumm v. Drumm, 2/8/79)

Digest of Opinion: [Text] This is an appeal by a husband-father from an Order of the lower court providing limitations on his rights to visitations with his three children. The appellant contests that part of the lower court order which provided that when he had temporary custody of his children such visitations should be without the presence of the appellant's female companion.

At the time of proceedings in the lower court and argument before our Court, the appellant was still married to the appellee, the mother of the children. A divorce action brought by the appellant was pending. The children were aged thirteen, eleven and eight. In his brief to our Court, the appellant states an intention to marry the female companion whose presence was prohibited during periods of visitation.

Our scope of review in custody cases is quite broad * * *. While we will not nullify the fact-finding function of the hearing judge, we are not bound by deductions or inferences made by the lower court from the facts found. * * * In all cases, the prevailing consideration is the best interests and welfare of the children involved. * * * From our thorough review of the record in the instant case, we are convinced that the lower court did not commit error in establishing the conditions upon custody about which the appealing father complains.

It is well established that a parent may not be denied custody or even visitation solely because of an involvement in a meretricious relationship. * * * Here we are not faced with a denial of visitations by a father, but merely a condition placed upon such visitations, at the mother's request. In our review, we find particularly persuasive the following discussion in the opinion of the lower court: "This is not the first case where such a request has been made of us and we have, on a few occasions, imposed similar conditions upon visitation. In other cases we have denied the request because we felt that the request was motivated more by resentment on the part of the mother than by concern for the welfare of the children. In the case now before us, however, we perceive the situation as being somewhat different because here the mother's concern is something which

does bear considerably upon the welfare of the children. Here we have a mother concerned about how her children are going to react to visitations with their father who is still married to their mother but having a close association with another woman in the light of what they have been taught at home and in church regarding such relationships. We do not think that the courts can say with any degree of certainty that such experiences will not adversely affect the children. Even if the children tell us now that it makes no difference to them, we wonder if it is fair to rely upon the judgment of the children in such matters. It is only recently that we have begun to scratch the surface of the long-range traumatic effects upon our children of what happens to them mentally and emotionally during custody disputes and the ultimate dissolution of the marriage of their parents. One thing is certain — there is nothing in the evidence of this case or of any other that says that such relationships enhance the welfare of the children.

"Moreover, it seems vital to us that the purpose of visitation for the father is to continue or to stabilize the relationship between the father and his children, and we do not think it is unreasonable for him to set aside his own romantic interests during the period of time while he is still married to the children's mother for the period of time when he has the children with him. In our interviews with the children we tried to determine whether the father's relationship with his girlfriend in any way detracts from his attention to his children during their visitations with him. The oldest child was the most responsive. She indicated that her father wouldn't take her out on her last birthday because his girl friend could not be present . . . Interestingly enough, the youngest child was aware of the problem and even she knew that this was wrong . . .

"Under all of the circumstances of this case, we are of the opinion that the condition we have imposed upon the father's visitation with his children is not unreasonable and that their best welfare will be promoted if the condition is imposed at least until the time when the marriage between the father and mother has been legally resolved (sic)."

We find the condition imposed by the lower court to be reasonable and proper in the circumstances of this case, and further, find that it would serve the best interests of the children. Clearly, the trial court's conclusion, in that regard, is supported by ample evidence of record.

The dissent, in suggesting a remand, relies principally upon the conclusion that the appellee mother was motivated "in large part" by feelings of resentment in seeking the condition upon visitation which the lower court imposed. Curiously, the dissent goes on to state: "Not that the mother is to be blamed; quite to the contrary, it would be astonishing if she were not resentful of someone who, while purportedly her best friend, has, as she must see it, stolen her husband and destroyed her family." While the issue of the mother's motivation is essentially irrelevant to the question of what is in the best interests of the children, it should be noted that the lower court specifically found as a fact that the appellee's request was not motivated by resentment. This finding also has ample support in the record. The dissent also notes that there is no evidence to suggest that the father's female companion represents any threat to the children's welfare. This is simply not true, since the record is replete with references to the religious teachings instilled in the children by their parents, which would certainly run contrary to a situation in which their father, while married to their mother, instead keeps the company of another woman. This discussion is not meant to imply a castigation of the appellant's morals or personal life, but merely to illustrate evidence of record, indicating circumstances which would not be in the best interests of the children, and can reasonably be avoided by the condition imposed. [End Text] — Van Der Voort, J.

Dissent: [Text] The children visited their father, but before long a difficulty arose: the mother told the father he could have the children only on condition that one Alice Guise was not present. The father objected to this condition and in October 1976 filed a petition asking the lower court to grant him visitation according to a certain proposed schedule. The mother filed an answer; although the answer objected to some aspects

of the proposed schedule, its principal purpose was that the court should allow visitation only on condition that [t]he [father's] girlfriend, Alice Guise, will not be permitted to be present during any of the visitations until such time as a final decree in divorce is entered in the divorce case instituted by the [father].

The lower court heard testimony in December 1976. At the conclusion of the hearing the court dictated a temporary visitation order; generally, the order allowed visitation on alternate weekends and on certain holidays and during the summer. The court then stated that pending further argument, "we are also going to grant the prayer of the [mother] that the visitations occur outside of the company of Mrs. Guise." Record at 123a. On November 2, 1977, after hearing arguments, the court made its temporary order final. It is this final order from which the father has appealed. ***

Alice Guise is highly educated, with a Ph.D., and the mother of five boys, whose approximate ages are 19, 17 (twins), 13, and 11. Ms. Guise was the mother's best friend, and has known the parties' three children since their birth; the children call her Aunt Alice, and Trevor regards Clay Guise — one of Ms. Guise's youngest boys — as one of his best friends. Ms. Guise was divorced in August 1975. She and the father are in love and intend to get married as soon as the father is divorced.

In its opinion the lower court makes the following statement regarding the mother's request that Ms. Guise not be allowed to be present when the children visit the father.

"This is not the first case where such a request has been made of us and we have, on a few occasions, imposed similar conditions upon visitation. In other cases we have denied the request because we felt that the request was motivated more by resentment on the part of the mother than by concern for the welfare of the children. In the case now before us, however, we perceive a situation as being somewhat different because here the mother's concern is something which does bear considerably upon the welfare of the children. Here we have a mother concerned about how her children are going to react to visitations with their father who is still married to their mother but having "a close association" with another woman in the light of what they have been taught at home and in church regarding such relationships. We do not think that the courts can say with any degree of certainty that such experiences will not adversely affect the children. Even if the children tell us now that it makes no difference to them, we wonder if it is fair to rely upon the judgment of the children in such matters. It is only recently that we have begun to scratch the surface of the long range traumatic effects upon our children of what happens to them mentally and emotionally during custody disputes and the ultimate dissolution of the marriage of their parents. One thing is certain — there is nothing in the evidence of this case or of any other that says that such relationships enhance the welfare of the children."

Lower court slip opinion at 2-3.

I have two differences with this statement; the first concerns the facts; the second, the law.

My difference with the lower court concerning the facts is that I do not share the lower court's opinion of the mother's motivation; in my opinion, her request regarding Ms. Guise was in large part a result of resentment. I have no hesitancy in expressing this opinion, for "[a]lthough we will not nullify the fact-finding function of the hearing judge, we are not bound by deductions or inferences made by the lower court from the facts as found." *Commonwealth ex rel. Ulmer v. Ulmer*, 231 Pa. Superior Ct. 144, 147, 331 A.2d 665, 667 (1974). Moreover, the scope of our review is broad. *** I suggest that as one reviews the record here, the mother's motivation becomes plain. Not that the mother is to be blamed; quite to the contrary, it would be astonishing if she were not resentful of someone who, while purportedly her best friend, has, as she must see it, stolen her husband and destroyed her family. ***

There is another force, in addition to resentment, that we should recognize as behind the mother's objection to Ms. Guise's presence, which has nothing to do with teaching the children about "the family unit" or about "what's right": it is

money. Thus, the mother testified that the father has refused to make any sort of provisions for her future support. Record at 100a. Implicitly, at least, the father admitted this. When asked about the mother's request for support, he answered: "She's a healthy woman, a healthy woman can teach. Alice [Guise] works, I work." Record at 52a. According to the father, the mother said to him that if he would pay what she asked, "[Y]ou can have your divorce tomorrow," and be free to see the children without any restrictions. Record at 39a, 49a — 50a. He also testified that the issue of Ms. Guise's presence did not arise until the master's hearings. Record at 40a. Can there be any doubt about what has happened? The father won't pay what the mother thinks she needs for support. The mother fights back. She contests the action in divorce. She contests his visitation petition. If he wants Ms. Guise and the children on his terms, let him pay what she needs.

Again, I am afraid this may sound harsh to the mother; but it is not so intended, and should not be so understood. To her, the father's conduct must seem selfish in the extreme: After she bears him three children, he leaves her, and wants everything his own way. Furthermore, given the fact that under Pennsylvania law a woman is entitled to no support after divorce, the mother may well have found herself in a most difficult position — one in which she felt compelled to fight back. My purpose, in other words, is to blame no one, but rather simply to observe that when we are asked to decide a case, we should pay attention to the nature of the struggle the parties are engaged in; if we do not, our decision will surely miss the point; and to treat this case as though it involves family unity and moral teaching, instead of resentment and money, is to miss the point.

My difference with the lower court on the law is with respect to burden of proof. As shown by its statement, which has been quoted above, the lower court imposed on the father the burden of proving that his relationship with Ms. Guise — which the court earlier in its opinion characterized as "meretricious" — did not adversely affect the children's welfare. Thus, while making no finding that in fact there was any adverse effect, the court said: "One thing is certain — there is nothing in the evidence of this case or of any other that says that such relationships enhance the welfare of the children." This was error. The law is settled that it was the mother's burden to prove that the children's welfare would be adversely affected by Ms. Guise being present when they visited their father. Thus in *Commonwealth ex rel. Meta v. Cinello*, 217 Pa. Superior Ct. 94, 268 A.2d 135 (1970), it was held that a father may not be denied visitation rights unless the visits would be detrimental to the best interests of the children. In *Commonwealth ex rel. Lotz v. Lotz*, 188 Pa. Superior Ct. 241, 244, 146 A.2d 362, 363 (1958), it was held that "[t]he cases in which visitation rights of a parent have been limited or denied have been those in which severe mental or moral deficiencies of the parent have constituted a real and grave threat to the welfare of the child. And see *Commonwealth ex rel. Sorace v. Sorace*, 236 Pa. Superior Ct. 42, _____ A.2d _____ (1975) which is perhaps the case most in point. There the mother and father were married, but the father left to live with another woman, by whom he had a child. While not condoning his conduct, we nevertheless affirmed an order granting him the right to have his children visit him at his home — not overnight — since the children were "fully aware of the circumstances" and not adversely affected by them.

Here there was no evidence that Ms. Guise represented any threat to the children's welfare; the lower court's failure to find any threat is therefore hardly surprising. The father and his witnesses were uniform in testifying that the children were not adversely affected. See, e.g., Record at 59a (where Ms. Guise says the children treated her no differently than they had over the years), 63a (the friend's testimony), 70a (the minister's). The mother expressed her personal beliefs, see e.g., Record at 77a and 99a ("[W]hen they are with their father they are not learning what I think are basic good moral values right now as long as he's a married man." "I do not think it's healthy for children to see displays between a married person and an unmarried person.") but such expressions, apart from their motivation, fall short of saying that the children were adversely

affected. She offered no evidence the children had ever done or said anything manifesting any adverse influence attributable to Ms. Guise. ***

Since there was therefore no evidence that Ms. Guise's presence would in any way adversely affect the children, the lower court should not have ordered that the father could have the children only if Ms. Guise stayed away. ***

This conclusion, however, should not end our consideration. As mentioned above, when the lower court held its hearing, the father's suit for divorce was in process. The master's report recommended that the father be granted a divorce, and the mother filed exceptions to the report. Since the visitation hearing, the exceptions have been heard and sustained; the father was denied a divorce; the father appealed to this court, and by per curiam order we affirmed the denial. *Drum v. Drum*, Pa. Superior Ct., _____, A.2d _____ (1978) (J. 1140/78). In summary: The divorce was sought on the ground of indignities. The master found that the marriage had deteriorated to a point where it was beyond repair — a finding amply supported by the parties' testimony in the visitation proceeding. However, the court of common pleas held — correctly in our view — that the master's finding did not go beyond showing incompatibility, which under Pennsylvania law is not sufficient reason for divorce. Thus the situation of the parties is very different than it was when they testified in the visitation hearing. The mother has "won": the father must support her, and he cannot marry Ms. Guise. Given this turn of events, the mother's request to the lower court — that the "[father's] girlfriend . . . not be permitted to be present during any of the visitations until . . . a final decree in divorce is entered. . . ." — is no longer responsive to the parties' situation. What is needed now is another look. So far as mutual love and family unity are concerned, the marriage between the parties is over; it nevertheless remains as a legal shell. Now how will the parties plan their lives? And how will the children fit into those plans?

The issues raised by these questions are more acute than were the issues considered by the lower court when it conducted the visitation hearing. Then perhaps something might be said for the lower court's order, if the order were regarded as a temporary expedient. Then it might be said: "After all, does it make so much difference that Ms. Guise can't be present when the children visit their father? The mother's answer to the father's petition shows, and she testified, that as soon as the divorce became final, so far as she was concerned, Ms. Guise was entitled to be present. Record at 91a. Let's just wait a bit. Soon the divorce will be final, and that will settle the matter." Now, however, we know we cannot uphold the order by any such reasoning; the father is not going to get a divorce — at least, not in Pennsylvania. [End Text]—Spaeth, J.

(*Drumm v. Drumm*; Pa SuperCt HarrisburgDist, 2/8/79).

"LACK OF PARENT-CHILD RELATIONSHIP" IS "SERIOUS HARM"; MOTHER UNFIT

Mentally ill mother's past failure to care for and support two-year-old child supports finding of unfitness and termination of parental rights.

Affirming a judgment terminating the parental rights of a two-and-one-half year old child's mother, the New Mexico Court of Appeals rejects the mother's contention that there was insufficient evidence that the child was subjected to serious mental or emotional harm, one of the components of "unfitness," which was the basis of the trial court ruling. "Serious harm" within the meaning of Section 40-7-4(A)(3) means "harm giving rise to apprehension or attended with danger," says the court, citing Texas and North Carolina decisions. Here the mother failed to perform her natural obligation to care for and support her child, as a consequence of which

there is no parent-child relationship. In this court's view the absence of a parent-child relationship constitutes serious harm to the child. So more is involved here than "penalizing" the mother for her misfortune in becoming mentally ill.

Also, the mother's objection that her declarations to a court-appointed psychiatrist were privileged and inadmissible is unsuccessful. Some of it might be privileged, but the mother failed to distinguish. (*New Mexico Health and Social Services Dept. v. Smith*, 1/9/79)

Digest of Opinion: [Text] This appeal involves the termination of the parental right of the mother of a child, approximately 2-1/2 years old at the termination hearing. ***

The child, whose father is unknown, was born October 15, 1975; the child had been in foster care with the H.S.S.D. (Health and Social Services Department) for over two years at the time of the termination hearing in April, 1978. Thus, the child has not lived with his mother most of its life. The reason was the condition of the mother; she had been "unable to discharge her natural responsibilities as a parent due to mental incapacity, hospitalization and incarceration periods, and the use of alcohol."

Dr. Lowe testified as to the mother's mental condition. The trial court found: "Dr. William R. Lowe is a licensed psychologist in the State of New Mexico, and he has over the past three (3) years examined, counselled, and treated Peggy Smith pursuant to court commitment while she was confined to the New Mexico State Hospital, Las Vegas and while incarcerated in the Clovis City Jail, and at the request of personnel of HSSD." Substantial evidence supports this finding.

The mother objected to Dr. Lowe testifying, claiming the privilege stated in Evidence Rule 504(b), against disclosure of confidential communications. ***

Assuming, but not deciding, that communication has the broad meaning asserted by the mother, a part of the communications were in connection with court ordered examinations of the mother's mental condition. Communications made in the course of those examinations were not privileged with respect to the particular purpose of the examination unless the judge ordered otherwise. Evidence Rule 504(d)(2). The judge did not order otherwise. To the extent Dr. Lowe's testimony was based on court ordered examinations, there was no privilege. *State v. Milton*, 86 N.M. 639, 526 P.2d 436 (Ct.App. 1974).

The mother objected to Dr. Lowe's testimony in its entirety. She did not attempt to distinguish between non-privileged testimony and testimony allegedly subject to the privilege. Since the objection went to the entire testimony, the objection was properly overruled. *State v. Carlton*, 83 N.M. 644, 495 P.2d 1091 (Ct.App. 1972).

The termination of the mother's parental right was under §40-7-4, N.M.S.A. 1978. The trial court found the mother was unfit; thus, the specific ground for termination was §40-7-4(A)(3), which reads: "(3) the parent is unfit, that is, the parent has repeatedly or continually neglected or willfully abused the child, or failed or refused to perform the natural and legal obligations of care and support; and because of such parental conduct the minor has suffered serious physical, mental or emotional harm; and such parental conduct will probably continue and the continuation of such parental conduct will probably cause further and serious harm to the minor and the disintegration of the parent-child relationship."

The quoted provision states four components for an "unfit" finding: (a) The parent has repeatedly or continually neglected or willfully abused the child, or failed or refused to perform the natural or legal obligations of care and support. (b) Because of such parental conduct the child has suffered serious physical, mental or emotional harm. (c) The parental conduct will probably continue. (d) The continuation of such parental conduct will probably cause further and serious harm to the child and the disintegration of the parent-child relationship.

The mother asserts that mental illness was an insufficient basis to terminate her parental right. We agree; in this case the

Per Curiam.

This case involves the custody of the two minor sons, ages seven and four, of Richard P. Brown and Virginia S. Brown. The parties separated in January, 1974, and in March, 1974, Mrs. Brown was awarded temporary custody. In November, 1974, she instituted a suit for divorce on the grounds of constructive desertion and cruelty. The husband filed a cross-bill for divorce on the grounds of desertion and adultery and sought custody of the children. On January 2, 1976, after an *ore tenus* hearing, the court transferred custody of the children to Mr. Brown, holding that Mrs. Brown was "not a fit and proper person to have the care and custody of said minor children by reason of an adulterous relationship with the correspondent named in defendant's cross-bill of complaint". Appellant appealed. Thereafter Mr. Brown was awarded an absolute divorce and custody of the children, subject to review by this Court of the matter of custody.

The court certified in narrative form a "written statement of oral testimony" introduced at the hearing which resulted in an award of custody of the children to the father. It recites that Mr. Brown presented evidence concerning his wife's "fitness as a mother and concerning her adulterous relationship with the correspondent named in defendant's cross-bill for a divorce"; and that Mrs. Brown offered testimony "to show her fitness as a mother, such testimony being terminated by the court, it being satisfied that [Mrs. Brown] was fit to care for her children so far as her treatment of the children and their physical care is concerned".

No good purpose would be served by a detailed review of the evidence. Mr. Brown testified and introduced the testimony of a professional investigator, of a personal friend and of a Mrs. Reynolds. Their testimony established that at the time appellant had custody of the children she was living with one Dale Leith. These witnesses also stated that Mrs. Brown was not a good housekeeper; that they observed her apartment in a dirty and unkempt condition; and that the children were not properly cared for in many respects and were neglected.

Mr. Brown testified that his older son had developed a hyperactive condition during the parties' separation; that this

condition appeared to improve while in the father's custody; and that he noted that the child

"particularly and repeatedly pleaded for the return of the Defendant to the household and asked repeatedly why the other man was sleeping with Mommie instead of the Defendant; That the Defendant noted also that [this child] resorted to long periods of silence; That he was irritable with and slapped his brother and then immediately hugged him; and that he otherwise tended to lose control."

Mr. Brown's witnesses testified that the children appeared to improve in health and behavior while he had custody and that they demonstrated more affection for their father than for their mother. Mrs. Reynolds, a divorcee, testified that her relationship with Mr. Brown was that "of lovers", but such relationship was "never obvious in the presence of the children"; and that she planned to marry appellee when his divorce became final.

Appellant offered her testimony and that of a friend, of a fellow employee and of the wife of her employer. Her three witnesses testified that her children were properly cared for and that her home was not dirty.

The court terminated the testimony of appellant designed to establish the fitness of Mrs. Brown as a mother and the quality of her housekeeping. It observed that it was not prepared to find her an unfit mother because "of her general care for the children"; and that it was only interested in hearing testimony on the relationship between Mrs. Brown and Leith. Mrs. Brown then testified and admitted that "Dale Leith lived with her"; that she and Leith were very fond of each other; and that they planned to marry "when free to do so". She testified that her home was clean; that the children were kept clean, well-fed and well-clothed; and that they were happy, healthy and well-behaved children. She said that her older son was hyperactive and was under a doctor's care, receiving all the medication he required.

Following the taking of testimony on September 26, 1975, the court directed Mrs. Brown to have Leith immediately removed from her apartment and continued the matter to October 14, 1975 for argument of counsel. On October 14th, counsel for appellant presented argument in support of her petition for custody. The court then interrogated defendant as to "his plans

upon taking children". W)

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Opinion.

upon taking over custody for providing a proper home for the children". Whereupon the court ruled as follows:

"That the Complainant did maintain in her home together with the minor children of the parties on a permanent basis over an extended period of time the corespondent named in the Defendant's Cross Bill of Complaint filed herein, and that an adulterous relationship existed between them.

"That while the Court was satisfied that the Complainant was otherwise a fit mother and did not find her unfit due to any deficiency in the care of the children while in her custody, the court found, by reason of her adulterous relationship with the corespondent in the same residence of which the minor children also lived, that the Complainant was not a fit and proper person to have the care and custody of the minor children of the parties."

[1] In all custody cases the controlling consideration is always the child's welfare and, in determining the best interest of the child, the court must decide by considering all the facts, including what effect a nonmarital relationship by a parent has on the child. The moral climate in which children are to be raised is an important consideration for the court in determining custody, and adultery is a reflection of a mother's moral values. An illicit relationship to which minor children are exposed cannot be condoned. Such a relationship must necessarily be given the most careful consideration in a custody proceeding.

In *Beck v. Beck*, 341 So.2d 580 (La.App. 1977), the court approved a change in custody to the father from the mother who had recently lived with a paramour. The court said:

"[W]here the mother has recently lived in open and public adultery with her paramour for a substantial period of time, in total disregard of the moral principles of our society, the mother is generally held morally unfit for custody. [Citation omitted].

* * *

"It is within common knowledge and experience that a child learns by example, especially from his parents. Such utter disregard for moral guidance and social standards can have but ill effect on the young son." [Citation omitted]. 341 So.2d at 582. *Accord, Denton v. Meshell*, 335 So.2d 705 (La.App. 1976).

Opinion.

In *In re Marriage of J- H- M- and E- C- M-*, 544 S.W.2d 582, 585 (Mo.App. 1976), the court said:

"Adultery is usually insufficient, without more, to stigmatize a mother an unfit custodian, as the principal relevancy of such activity is its effect upon the child. [Citations omitted]. What we may not condone is exposing the children to adulterous and immoral contacts. This is not to say that moral considerations are not factors in awarding custody [Citations omitted], but critical here is that the mother's affairs were conducted with the children's knowledge and while they were present in the house."

See also *L.H.Y. v. J.M.Y.*, 535 S.W.2d 304 (Mo.App. 1976) and Wadlington, *Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 Va.L.Rev. 249 (1977).

[2] In the instant case, there was testimony that the relationship between Mrs. Brown and Mr. Leith had an adverse impact on the parties' two children. Their adulterous relationship was admitted. They were openly cohabiting in the presence of her two young children. The court found as a fact that appellant had maintained her home under these conditions over an extended period of time. The court therefore ruled that this adulterous relationship rendered Mrs. Brown an unfit and improper person to have the care and custody of these children.

The decision of the trial judge is peculiarly entitled to respect for he saw the parties, heard the witnesses testify and was in closer touch with the situation than this Court, which is limited to a review of the written record. We are further handicapped here by the absence of a transcript of the testimony and a record of the interrogation of Mr. Brown by the trial court "as to his plans upon taking over custody for providing a proper home for the children."

[3] Although the trial court did not specifically recite in its order or in its certification of testimony that it found that the best interest of the children required a transfer of their custody from the mother to the father, it is obvious that it did so conclude. In this review we presume that the trial judge thoroughly weighed all the evidence and decreed custody as he believed would be in the best interest of the children. We cannot

find, under the circumstances requiring reversal and and two minors who have been twenty months.

Opinion.

find, under the circumstances of this case, abuse of discretion, requiring reversal and another transfer of the custody of these two minors who have been living with their father for the past twenty months.

Affirmed.

ERNEST P. GATES
JUDGE

12th Judicial Circuit
County of Chesterfield
City of Colonial Heights
JUDGES CHAMBERS

D. W. MURPHEY
JUDGE

CHESTERFIELD, VIRGINIA 23832

October 27, 1981

Mr. B. VanDenburg Hall
Suite 400, Equity Building
4085 Chain Bridge Road
Fairfax, Virginia 22030

Re: Middleton v. Middleton 3305-77

Dear Mr. Hall:

The Court overrules the defendant's Plea to the Jurisdiction. The Court has continuing jurisdiction. The Court declines because the circumstances are convenient for this matter to be disposed of in Virginia.

Since the attorney for the complainant will be in England in November, it will be convenient for him to take the evidence he needs to pursue his case.

The complainant may take evidence in England to pursue his allegations seeking a change in custody of the infant children of the parties and the awarding of a restraining order against the defendant.

The Court will take under advisement complainant's Motion for Restraining Order until evidence is taken in England to support the motion. The Court will require a hearing, with notice to opposing counsel, before this motion is acted upon.

Sincerely,

Ernest P. Gates

EPG:fm
cc: Mr. Donald K. Butler

B. VANDENBURG HALL

ATTORNEY AT LAW
SUITE 400 EQUITY BUILDING
4085 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

B. VANDENBURG HALL

PHILIP A. WELLS *
WILLIAM E. KLINE

AREA CODE 703
385-8777

* ALSO MEMBER D.C. BAR

6 November 1981

Donald K. Butler, Esq.
Morano & Butler
526 North Boulevard
Richmond, Virginia 23220

Re: Middleton v Middleton
In Chancery No. 3305-77
In the Circuit Court of Chesterfield County, Virginia

Dear Mr. Butler:

This is just a brief note to inform you that I have retained, on behalf of Brian C. Middleton, the following law firm in England to act as local counsel there, at least for the purpose of taking the depositions which are now scheduled for November 12, 1981 in Darlington:

Freeman, Daly & Jacks
11 Victoria Road
Darlington, Co. Durham
England
Phone: 66221

This firm apparently has its main office in Durham at the following address:

26A Old Elvit
Durham, England DH 13HN

I suggest that if you or your English associate/counsel wishes to contact this firm that I call Tony Turnbull, Esquire at telephone number 03 8564 843 in Durham. He and I have discussed this matter at some length.

I am proposing the following schedule for the taking of on November 12th in the office of Freeman, Daly & Jacks in Darlington:

Donald K. Butler, Esq.
November 6, 1981

Page 2

Sheila Joan Middleton	9:30 a.m..
Claire Michelle Middleton	11:00 a.m.
Nicole Amie Middleton	12:30 p.m.
Duncan Laws	2:00 p.m.
Mrs. Amy Mulhearn	
(Mr. Brian Middleton's Mother)	3:00 p.m.
Kenneth Brown	4:00 p.m.

Enclosed are notice of depositions setting out the above more formally. While I will be happy to accomodate by changing the hours of the proposed depositions, since I previously wrote you suggesting November 12, 1981, as the date, you have not objected to this date, and since you promised that if Judge Gates would allow depositions that you would produce your client and her children without our having to subpoena them in England, I am proceeding at some considerable expense to go to Darlington, England and to take these six depositions there; I will be happy to rearrange the times on November 12th so long as I do get to take these six depositions on November 12th in Darlington. I will be happy to start work earlier and/or to work late to meet others' schedules on the 12th and will do some depositions on the 13th of November if you want to do some for your side of the case and we cannot do them on the 12th.

Please confirm that this schedule is allright.

My address and phone number in London will be:

Chelsea House
11 Oakley Street
Chelsea, London, SW 3 5NN
Tel. 01-352-9115

Also my secretaries will know, within reason, where to reach me most of the times that I will be in England.

Thank you for your cooperation.

Sincerely yours,

Brian VanDenburg Hall
B. VanDenburg Hall

vmr /
cc: Clerk, Circuit Court of
Chesterfield County, Va.
Tony Turnbull, Esq.
26A Old Elvit
Durham, England
Mr. Brian C. Middleton

RECEIVED AND FILED

NOV 10 1981

211

219

LEWIS H. VADEN, CLERK

RECEIVED AND FILED

NOTICE OF DEPOSITION

NOV 10 1981

TO: Sheila Joan Middleton
c/o Donald K. Butler, Esquire
MORANO & BUTLER
Counsel for Defendant
526 North Boulevard
Richmond, Virginia 23220

LEWIS H. VADEN, CLERK
SR

PLEASE TAKE NOTICE that pursuant to Rule 4:5 and 4:12 of the Rules of the Supreme Court of Virginia, complainant, by counsel, will take the deposition of Nicole Amie Middleton, whose address is Flat 6, St. Mary's Court, Ridley Drive, Norton Cleveland, England upon oral examination before a Notary Public or any other person authorized to administer oaths and to take testimony on Thursday, November 12, 1981 at 12:30 p.m. in the offices of Freeman, Daly & Jacks, 11 Victoria Road, Darlington, Co. Durham, England, for the purpose of discovery and/or use as evidence in the above-styled cause.

BRIAN C. MIDDLETON
By Counsel

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Complainant
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Certificate of Service

I hereby certify that I have this 5th day of November, 1981, mailed, postage prepaid, a true copy of the foregoing Notice of Deposition to Donald K. Butler, Esquire, MORANO & BUTLER, Counsel for the Defendant, at 526 North Boulevard, Richmond, Virginia 23220.

B. VanDenburg Hall
B. VanDenburg Hall

NOV 10 1981

NOTICE OF DEPOSITION

LEWIS H. VADEN, CLERK
AR

TO: Sheila Joan Middleton
c/o Donald K. Butler, Esquire
MORANO & BUTLER
Counsel for Defendant
526 North Boulevard
Richmond, Virginia 23220

PLEASE TAKE NOTICE that pursuant to Rule 4:5 and 4:12 of the Rules of the Supreme Court of Virginia, complainant, by counsel, will take the deposition of Sheila Joan Middleton, whose address is Flat 6, St. Mary's Court, Ridley Drive, Norton Cleveland, England upon oral examination before a Notary Public or any other person authorized to administer oaths and to take testimony on Thursday, November 12, 1981 at 9:30 a.m. in the offices of Freeman, Daly & Jacks, 11 Victoria Road, Darlington, Co. Durham, England, for the purpose of discovery and/or use as evidence in the above-styled cause.

BRIAN C. MIDDLETON
By Counsel

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Complainant
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Certificate of Service

I hereby certify that I have this 5th day of November, 1981, mailed, postage prepaid, a true copy of the foregoing Notice of Deposition to Donald K. Butler, Esquire, MORANO & BUTLER, Counsel for the Defendant, at 526 North Boulevard, Richmond, Virginia 23220.

B. VanDenburg Hall
B. VanDenburg Hall

NOV 10 1981

NOTICE OF DEPOSITION

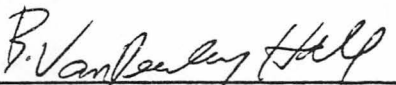
TO: Sheila Joan Middleton
c/o Donald K. Butler, Esquire
MORANO & BUTLER
Counsel for Defendant
526 North Boulevard
Richmond, Virginia 23220

LEWIS H. VADEN, CLERK

SK

PLEASE TAKE NOTICE that pursuant to Rule 4:5 and 4:12 of the Rules of the Supreme Court of Virginia, complainant, by counsel, will take the deposition of Claire Michelle Middleton, whose address is Falt 6, St. Mary's Court, Ridley Drive, Norton Cleveland, England upon oral examination before a Notary Public or any other person authorized to administer oaths and to take testimony on Thursday, November 12, 1981 at 11:00 a.m. in the offices of Freeman, Daly & Jacks, 11 Victoria Road, Darlington, Co. Durham, England, for the purpose of discovery and/or use as evidence in the above-styled cause.


BRIAN C. MIDDLETON
By Counsel



B. VanDenburg Hall
Counsel for Complainant
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Certificate of Service

I hereby certify that I have this 5th day of November, 1981, mailed, postage prepaid, a true copy of the foregoing Notice of Deposition to Donald K. Butler, Esquire, MORANO & BUTLER, Counsel for the Defendant, at 526 North Boulevard, Richmond, Virginia 23220.


B. VanDenburg Hall

NOV 10 1981

NOTICE OF DEPOSITION

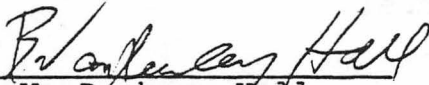
TO: Sheila Joan Middleton
c/o Donald K. Butler, Esquire
MORANO & BUTLER
Counsel for Defendant
526 North Boulevard
Richmond, Virginia 23220

LEWIS H. VADEN, CLERK

BR

PLEASE TAKE NOTICE that pursuant to Rule 4:5 and 4:12 of the Rules of the Supreme Court of Virginia, complainant, by counsel, will take the deposition of Mrs. Amy Mulhearn, whose address is 123 Kennedy Gardens, Billingham Cleveland, England, upon oral examination before a Notary Public or any other person authorized to administer oaths and to take testimony on Thursday, November 12, 1981 at 3:00 p.m. in the offices of Freeman, Daly & Jacks, 11 Victoria Road, Darlington, Co. Durham, England, for the purpose of discovery and/or use as evidence in the above-styled cause.

BRIAN C. MIDDLETON
By Counsel


B. VanDenburg Hall
Counsel for Complainant
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Certificate of Service

I hereby certify that I have this 5th day of November, 1981, mailed, postage prepaid, a true copy of the foregoing Notice of Deposition to Donald K. Butler, Esquire, MORANO & BUTLER, Counsel for the Defendant, at 526 North Boulevard, Richmond, Virginia 23220.


B. VanDenburg Hall

NOTICE OF DEPOSITION

RECEIVED AND FILED

TO: Sheila Joan Middleton
c/o Donald K. Butler, Esquire
MORANO & BUTLER
Counsel for Defendant
526 North Boulevard
Richmond, Virginia 23220

NOV 10 1981

LEWIS H. VADEN, CLERK
BR

PLEASE TAKE NOTICE that pursuant to Rule 4:5 and 4:12 of the Rules of the Supreme Court of Virginia, complainant, by counsel, will take the deposition of Mr. Duncan Laws, whose address is c/o Nationwide Investigations, Collingwood Building, Collingwood Street, Newcastle-upon-Thyne NE1 1JF, England upon oral examination before a Notary Public or any other person authorized to administer oaths and to take testimony on Thursday, November 12, 1981 at 2:00 p.m. in the offices of Freeman, Daly & Jacks, 11 Victoria Road, Darlington, Co. Durham, England, for the purpose of discovery and/or use as evidence in the above-styled cause.

BRIAN C. MIDDLETON
By Counsel

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Complainant
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Certificate of Service

I hereby certify that I have this 5th day of November, 1981, mailed, postage prepaid, a true copy of the foregoing Notice of Deposition to Donald K. Butler, Esquire, Counsel for the Defendant, at 526 North Boulevard, Richmond, Virginia 23220.

B. VanDenburg Hall
B. VanDenburg Hall

NOTICE OF DEPOSITION

NOV 10 1981

TO: Sheila Joan Middleton
c/o Donald K. Butler, Esquire
MORANO & BUTLER
Counsel for Defendant
526 North Boulevard
Richmond, Virginia 23220

LEWIS H. VADEN, CLERK
BR

PLEASE TAKE NOTICE that pursuant to Rule 4:5 and 4:12 of the Rules of the Supreme Court of Virginia, complainant, by counsel, will take the deposition of Mr. Kenneth Brown, whose address is c/o Nationwide Investigations, Collingwood Building, Collingwood Street, Newcastle-upon-Thyne NE1 1JF, England upon oral examination before a Notary Public or any other person authroized to administer oaths and to take testimony on Thursday, November 12, 1981 at 4:00 P.M. in the offices of Freeman, Daly & Jacks, 11 Victoria Road, Darlington, Co. Durham, England, for the purpose of discovery and/or use as evidence in the above-styled cause.

BRIAN C. MIDDLETON
By Counsel

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Complainant
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

Certificate of Service

I hereby certify that I have this 6th day of November, 1981, mailed, postage prepaid, a true copy of the foregoing Notice of Deposition to Donald K. Butler, Esquire MORANO & BUTLER, at 526 North Boulevard, Richmond, Virginia 23220.

B. VanDenburg Hall
B. VanDenburg Hall

B. VANDENBURG HALL

ATTORNEY AT LAW
SUITE 400 EQUITY BUILDING
4085 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

AREA CODE 703
385-8777

B. VANDENBURG HALL

PHILIP A. WELLS *
WILLIAM E. KLINE

November 12, 1981

* ALSO MEMBER D.C. BAR

Judge Ernest P. Gates
Circuit Court of Chesterfield County
P. O. Box 57
Chesterfield, Virginia 23832

Re: Middleton v. Middleton
In Chancery No. 3305-77

Dear Judge Gates:

Today, I received from Donald K. Butler, Esquire, endorsed Orders embodying your Honor's rulings on September 22, 1981, in Middleton v. Middleton, and your letter opinion in this cause dated October 27, 1981.

These orders overrule Defendant's Plea to the Jurisdiction, permit the taking of evidence in England by deposition, take under advisement Complainant's Motion for Restraining Order, and set a date certain by which Defendant must respond to Complainant's Request for Admissions. I ask that these Orders be entered by the Court.

I would appreciate it if you would instruct the Clerk to send a copy teste of each of these orders to me and to Mr. Butler. Thank you.

Very truly yours,

Philip A. Wells
Philip A. Wells
for B. Vandenburg Hall

Encls.

cc: Donald K. Butler, Esq.
Counsel for Defendant
MORANO AND BUTLER
526 N. Boulevard
Richmond, VA. 23220

RECEIVED

NOV 16 1981

CHESTERFIELD CIRCUIT COURT
JUDGES CHAMBERS

O R D E R

THIS CAUSE came on to be heard upon the 22nd day of September, 1981, upon Complainant's Petition for Change of Custody and Defendant's Plea to the Jurisdiction, upon this case being reinstated, upon Defendant's Memorandum in Support of Plea to the Jurisdiction, upon Complainant's opposition to the Plea to the Jurisdiction and Complainant's Brief in support thereof, upon Defendant's Reply to Complainant's Brief, upon testimony, upon argument of counsel, and upon the Court taking these briefs and memorandum under advisement, and

IT APPEARING that this Court has continuing jurisdiction, the circumstances are convenient for this matter to be disposed of in Virginia and the complainant's attorney will be in England in November, 1981, when complainant may take evidence in England to pursue his allegations seeking a change in custody of the infant children of the parties and the awarding of a restraining order against the defendant; it is, therefore,

ADJUDGED, ORDERED and DECREED that the Defendant's Plea to the Jurisdiction be, and it hereby is, overruled, and it is further

ADJUDGED, ORDERED and DECREED that the parties may take evidence in England by deposition in November, 1981, relating to all of the allegations complainant has made in connection with his seeking a change in custody of the infant children of these parties and his request for an award of a restraining order against the defendant, it is further

ADJUDGED, ORDERED and DECREED that the Court will
take under advisement complainant's Motion for Restraining
Order until evidence is taken in England to support the motion,
AND this cause is continued.

ENTERED this 16th day of November, 1981.

Ernest P. Gates
JUDGE ERNEST P. GATES

SUBMITTED:

Chy OB

97 page 332

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for father/Brian C. Middleton
4085 Chain Bridge Road, Suite 400
Fairfax, Virginia 22030
(703) 385-8777

SEEN ~~and~~ objected to:

MORANO AND BUTLER
526 North Boulevard
Richmond, Virginia 23220
(804) 353-4931

By: Donald K. Butler

Donald K. Butler

O R D E R

THIS CAUSE came on to be heard upon the 22nd day of September, 1981, upon Complainant's Petition for Change of Custody and Defendant's Plea to the Jurisdiction, and the Court took under advisement the question of its jurisdiction and suspended the date for Defendant to respond to Complainant's Request for Admissions until the question of jurisdiction should be ruled upon; and

IT APPEARING that the Court overruled Defendant's Plea to the Jurisdiction by letter opinion on October 27, 1981, and that a time ought to be set within which a response is due to the Request for Admissions, it is, therefore,

ORDERED that Defendant shall respond to Complainant's Request for Admissions on or before twenty-one (21) days from the entry of this Order.

ENTERED this 16th day of November, 1981.

Ernest R. Gales
JUDGE

chy DB 97 page 334

I ASK FOR THIS:

B. VanDenburg Hall
Counsel for Complainant
4085 Chain Bridge Road, Suite 400
Fairfax, Virginia 22030
(703) 385-8777

SEEN:

MORANO AND BUTLER
526 North Boulevard
Richmond, Virginia 23220

By

Donald K. Butler
Donald K. Butler

RULE TO SHOW CAUSE

THIS MATTER came on to be heard upon the application of counsel for the Plaintiff, Brian C. Middleton; and

IT APPEARING TO THE COURT from the Petition for Rule which has been sworn to and signed by the Plaintiff, Brian C. Middleton, that entry of this Rule is proper; it is

ADJUDGED, ORDERED and DECREED that this Rule to Show Cause be served upon the Defendant, Sheila J. Middleton, commanding her to appear before this Court on the 8th day of December, 1981 at 9:00 A.M. and show cause, if any there be, why she should not be held in contempt of this Court.

ENTERED this 24th day of November, 1981.

Ernest P. Gates
JUDGE

chy 0B 97 page 459

I ASK FOR THIS:

B. Vandenburg Hall
B. Vandenburg Hall
Counsel for Plaintiff
Suite 400
4085 Chain Bridge Road
Fairfax, Va. 22030
(703) 385-8777

11-25-81
141 Sheriff City
of Richmond

To Judge Gates
 Date 11/24 Time 3:40 A.M.
 P.M.
 WHILE YOU WERE OUT
 M. Mr. Hall 3305-77
 of or Mr. Wells
 Area Code 703 & Exchange 385-8777

TELEPHONED	<input checked="" type="checkbox"/>	PLEASE CALL	<input type="checkbox"/>
CALLED TO SEE YOU	<input type="checkbox"/>	WILL CALL AGAIN	<input type="checkbox"/>
WANTS TO SEE YOU	<input type="checkbox"/>	URGENT	<input type="checkbox"/>
RETURNED YOUR CALL		<input type="checkbox"/>	<input type="checkbox"/>

Message Shila Middleton
Present Show Cause
to Judge
Set for Dec. 8 9 AM Operator

* Serve on Donald Butler, Atty.

I questioned call.
Mr. Wells in this office.

Attach this note to
 Show Cause Order of 11-24-81
 Judge Gates wanted Order
 served on Donald Butler,
 atty. for Shila Middleton

John F. Daffron
Judge

November 25, 1981

Mr. B. VanDenburg Hall
Suite 400
4085 Chain Bridge Road
Fairfax, VA 22030

Dear Mr. Hall:

Enclosed you will find a copy of Show Cause Order entered by Judge Gates, on November 24. Since time is short as to the date Defendant is to appear, I am taking \$2.00 out of our cash so that I can send the papers on to the Sheriff of Richmond. Will you please send us a check payable to Clerk of Circuit Court for \$2.00 to reimburse us with a note letting us know what it is for.

Sincerely,

(Mrs.) Bessie V. Richter
Deputy Clerk

Enc.

NOV 25 1981

DEFENDANT'S RESPONSE TO
PLAINTIFF'S REQUEST FOR ADMISSIONS

LEWIS H. VADEN, CLERK

Now comes the defendant, pursuant to Rule 4:1 of the Rules of the Supreme Court of Virginia, and in response to the Request for Admissions filed by the plaintiff states the following:

1. The defendant admits that she has had sexual intercourse on occasions with Mike Davis but never in the presence of the children.

2. The same as the answer to No. 1.

3. John Clay and his wife have been friends of the defendant since she was ten years of age and Mr. Clay was the groomsman at the wedding of the plaintiff and the defendant. The suggestion that the defendant has had sexual intercourse with John Clay is absurd and of course, denied.

4. Gordon Brough and his wife have been family friends of the defendant since she was twenty years of age. The allegations that the defendant has had sexual intercourse with him is also absurd and therefore, denied.

5. Alistair Chafer was recruited by the Allied Chemical Corporation at the same time as the Plaintiff, and he and his wife became friends of the parties as two married couples living in Richmond, Virginia, as fellow employees and fellow British citizens. Again, the absurd and preposterous allegation that there was sexual intercourse between the defendant and Alistair Chafer is denied.

6,7,8 and 9. These allegations can only be the product of a twisted mind and are absolutely denied.

10. It is denied that Claire was to be sent to live with Mrs. Dinsdale. In order to enroll her at the Ian Ramsey Comprehensive School in Fairfield, the defendant registered her address as 1A Quebec Road, Hartburn, Cleveland, because that address was in the school district of that school. This, of course, was done in the interest of Claire's welfare, and Claire knew perfectly well that she was not going to live with Mrs. Dinsdale.

11. Nicole has never left home and has never been refused the right to live with her father because she has never requested permission to live with her father.

12. This is untrue and therefore denied.

13. It is denied that the defendant has lied to the plaintiff about the date of the end of the school term. At the beginning of the 1981 summer vacation, the defendant made an error as to the end of the school term. The error was not intentional and was corrected.

14. As the defendant would have no way of knowing the contents of a telephone conversation of which she was not a party, this allegation is neither admitted nor denied.

15. Admitted.

16 and 17. Neither child informed the defendant that they did not wish to return to England with her. It is admitted that the defendant told Claire that if she would get into the car in order to talk and have a drink of coke, the defendant would return her to her father if she desired. While in the car, both children expressed the desire to return to England with the defendant. The remainder of the

allegations contained in the Request for Admissions Nos. 16 and 17 are denied insofar as they are inconsistent with these statements.

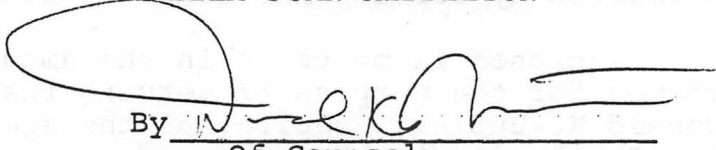
18. Denied.

19. Denied as totally absurd. The children are obviously intelligent enough to know the difference between clothing purchased in England and clothing purchased in America. Besides, the defendant has at all times endeavored to maintain in the children respect and love for their father and has done nothing to shed him in a bad light as he has done by making the absurd allegations that are contained in these Request for Admissions.

20. The children have always been told that they have a choice as to where they wish to live. However, it is denied that there was a specific agreement that they would live with their father upon reaching the age of ten years.

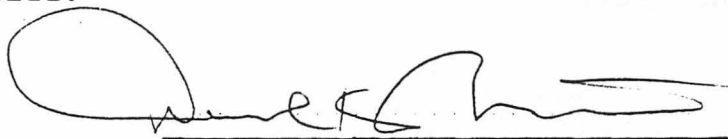
SHEILA JOAN MIDDLETON

Donald K. Butler, p.d.
Morano & Butler
526 North Boulevard
Richmond, VA 23220

By 
Of Counsel

CERTIFICATE

I hereby certify that a true copy of the foregoing Response to Request for Admissions was mailed this 24th day of November, 1981, to B. VanDenburg Hall, Esq., Suite 400, Equity Building, 4085 Chain Bridge Road, Fairfax, VA 22030, counsel for the plaintiff.


Donald K. Butler

B. VANDENBURG HALL

ATTORNEY AT LAW
SUITE 400 EQUITY BUILDING
4085 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

AREA CODE 703
385-8777

B. VANDENBURG HALL

PHILIP A. WELLS *
WILLIAM E. KLINE

*ALSO MEMBER D.C. BAR

November 24, 1981

Clerk, Circuit Court for the
County of Chesterfield
P.O. Box 125
Courthouse
Chesterfield, VA 23832

Re: Middleton v. Middleton
In Chancery No. 3305-77

Dear Sir:

I spoke today on the telephone with the secretary to the judges who will obtain your file and present the Petition for Rule to Show Cause and the Rule to Show Cause to Judge Gates in this cause and to ask him on my behalf to please sign the Rule to Show Cause and set it to be heard at 9:00 a.m. on December 8, 1981. I also asked that if Judge Gates signed the Rule to Show Cause, that it be served upon Sheila Middleton by serving her counsel, Donald K. Butler, Esquire.

Enclosed is my check in the amount of \$2.00 made payable to you for the purpose of serving the Rule to Show Cause upon Donald K. Butler, Esquire, as the agent of and the attorney for Sheila Middleton. His address is 526 North Boulevard, Richmond, Virginia 23220.

Thank you for your cooperation.

Sincerely yours,

B. VanDenburg Hall
B. VanDenburg Hall

cdm

Enclosure

RECEIVED AND FILED

NOV 30 1981

LEWIS H. VADEN, CLERK

N O T I C E

TO: Sheila Joan Middleton
c/o Donald K. Butler, Esquire
MORANO & BUTLER
526 North Boulevard
Richmond, Virginia 23220

PLEASE TAKE NOTICE that on Tuesday, the 8th day of December, 1981, or as soon thereafter as counsel may be heard, Plaintiff, by counsel will move the Court in accordance with his Motion to Compel Personal Appearance of Defendant with the Children to enter an Order directing the Defendant to appear with the children for the purpose of taking their depositions at the offices of Plaintiff's counsel located at 4085 Chain Bridge Road, Suite 400, Fairfax, Virginia 22030, starting at 2:00 p.m. on December 23rd, 1981. A copy of this pleading was previously mailed to you on October 14, 1981. You may wish to be present and defend your interests, as they may appear.

BRIAN C. MIDDLETON
By Counsel

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Plaintiff
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia
(703) 385-8777

RECEIVED AND FILED

NOV 30 1981

LEWIS H. VADEN, CLERK
[Signature]

Certificate of Service

I hereby certify that I have this 24th day of November, 1981, mailed, postage prepaid, a true copy of the foregoing Notice to Donald K. Butler, Esquire, MORANO & BUTLER, Counsel for Defendant, at 526 North Boulevard, Richmond, Virginia 23220.

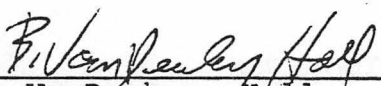
B. VanDenburg Hall
B. VanDenburg Hall

N O T I C E

TO: Sheila Joan Middleton
c/o Donald K. Butler, Esquire
MORANO & BUTLER
526 North Boulevard
Richmond, Virginia 23220

PLEASE TAKE NOTICE that on Tuesday, the 8th day of December, 1981, at 9:00 a.m., or as soon thereafter as counsel may be heard, Brian C. Middleton, by counsel, will move the Court in accordance with the attached Motion for Custody Pendente Lite to enter an Order awarding pendente lite custody to the father and directing the Defendant to bring the children to Virginia to turn them over to the father's physical custody. You may wish to be present and defend your interests, as they may appear.

BRIAN C. MIDDLETON
By Counsel


B. VanDenburg Hall
Counsel for Plaintiff
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

RECEIVED AND FILED

NOV 30 1981

LEWIS H. VADEN, CLERK

Certificate of Service

I hereby certify that I have this 24th day of November, 1981, mailed, postage prepaid, a true copy of the foregoing Notice and its attached Motion for Custody Pendente Lite to Donald K. Butler, Esquire, MORANO & BUTLER, Counsel for Defendant, at 526 North Boulevard, Richmond, Virginia 23220.


B. VanDenburg Hall

NOV 30 1981

LEWIS H. VADEN, CLERK

MOTION FOR CUSTODY PENDENTE LITE

A

COMES NOW the Plaintiff, Brian C. Middleton, by counsel, and prays the Court to award pendente lite custody to him of the parties minor children, Claire Michelle Middleton and Nichole Amie Middleton, and in support thereof states as follows.

1. During the children's visitation with their father in Virginia this year, Sheila J. Middleton came to Virginia with a confederate, promised the children that if they entered her automobile they would not be compelled to return to England, and, contrary to her promise, sped away and returned the children to England.

2. Albeit that the incident described in Paragraph 1 above occurred on or about September 2, 1981, which was near the end of the visitation period, the Plaintiff's Petition for Change of Custody had been served upon her, and Defendant was motivated by a desire to remove the children from this Court's jurisdiction and from availability here to give testimony in this cause.

3. Prior to the departure of Sheila Middleton from the United States on or about September 4, 1981, removing the children with her to England, this Court had, on September 2, 1981, entered an order restraining both parties from removing the children from Virginia and from removing the children from the United States. Sheila Middleton had prior knowledge that the Order had been entered, and she flouted it.

4. The moral climate in which the Defendant keeps the children is detrimental to the children.

5. The children desire to attend school in Virginia this

year and to remain in the father's custody. Their wishes should not be ignored.

6. There is reason to believe that one or both the children may run away from the mother/Defendant. Defendant does not deny that Nichole has run away in the past. Nichole's reason for running away was that the mother would not allow her to live with her father. A reoccurrence would place the child or children in circumstances dangerous to their safety.

7. In 1977 the parties agreed that Defendant should have custody of the daughters until they attained the age of 10 years, and then the father should have custody. The agreement, embodied in the divorce decree entered in the Court on October 19, 1977, did not contemplate that the mother would have custody under the instant circumstances after both daughters are over 10 years of age, and the mother is living a promiscuous life openly before them. Moreover, the Defendant on one hand claims the rights of a custodial agreement and decree entered in this Court while she flouts its September 2, 1981 restraining order. She does not come before this Court with clean hands, and should not enjoy the benefits of the October 19, 1977 custodial order of the Court until she purges herself of contempt of the September 2 Order. Defendant can purge herself of contempt only by surrendering the children again into the father's custody.

8. Plaintiff has done all things possible to proceed speedily to trial and permit the Court to make a permanent award based upon current circumstances. Defendant has been the cause of repeated delays, challenging the Court's jurisdiction, interposing nonexistent wardship orders in England as cause for this Court not to act, etc. The children should not be deprived of the benefits of the father's home and attendance in Virginia

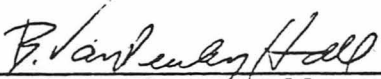
schools which they heartily desire while the mother engages in delaying tactics. The best interests of the children will best be served by placing them in the father's custody, pendente lite, for all the above reasons.

9. The place of transfer of custody of the children to the father should be in Virginia. If the father travels to England, he will in all likelihood be served with process which will begin multiple litigation which the Uniform Child Custody Jurisdiction Act was intended to discourage. Therefore, the mother should be ordered to bring the children to Virginia; otherwise, the transfer of custody should be made by the father sending some one to England to travel with the children to Virginia. It would be preferable for them to travel to Virginia with the mother.

10. The order restraining the parents or their agents from removing the children from Virginia or the United States should continue in effect to prevent a repetition of what is briefly described above in Paragraph 1.

WHEREFORE the Plaintiff prays the Court to enter an Order awarding the father pendente lite custody of the children of the parties, Claire Michelle Middleton and Nichole Amie Middleton, and ordering Sheila Joan Middleton to bring the children to Fairfax, Virginia, and hand them over to their father on a day and at a time to be designated by the Court.

BRIAN C. MIDDLETON, Plaintiff
By Counsel


B. VanDenburg Hall
Counsel for Plaintiff
4085 Chain Bridge Road, Suite 400
Fairfax, Virginia 22030
(703) 385-8777

RULE TO SHOW CAUSE

THIS MATTER came on to be heard upon the application of counsel for the Plaintiff, Brian C. Middleton; and

IT APPEARING TO THE COURT from the Petition for Rule which has been sworn to and signed by the Plaintiff, Brian C. Middleton, that entry of this Rule is proper; it is

ADJUDGED, ORDERED and DECREED that this Rule to Show Cause be served upon the Defendant, Sheila J. Middleton, commanding her to appear before this Court on the 5th day of November, 1981 at 10:00 A.M. and show cause, if any there be, why she should not be held in contempt of this Court.

ENTERED this 5th day of November, 1981.



I ASK FOR THIS:

B. VanDenburg Hall

B. VanDenburg Hall
Counsel for Plaintiff
Suite 400

4085 Chain Bridge Road
Fairfax, Va. 22030
(703) 385-8777

SERVE:

Donald K. Butler, Attorney for
Sheila J. Middleton
526 North Boulevard
Richmond, VA

Judge
JUDGE

A COPY, TESTE:

Lewis H. Vaden, Clerk

By Bessie T. Richter
Deputy Clerk

B. VANDENBURG HALL

ATTORNEY AT LAW
SUITE 400 EQUITY BUILDING
4085 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

AREA CODE 703
385-8777

B. VANDENBURG HALL

PHILIP A. WELLS*
WILLIAM E. KLINE

December 1, 1981

*ALSO MEMBER D.C. BAR

Mrs. Bessie V. Richter, Deputy Clerk
Circuit Court for the County of Chesterfield
Chesterfield, Virginia

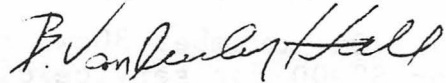
Re: Middleton v. Middleton
Rule to Show Cause

Dear Madam:

This is in response to your letter of November 25th. I enclose the check for \$2.00 which you advanced from your own cash so that you could send the Rule to Show Cause to the Sheriff of Richmond. I want you to know that I appreciate your courtesy and efficiency in handling this matter, which will be heard December 8.

Thank you.

Sincerely,



B. VanDenburg Hall

Enclosure
Check \$2.00

RECEIVED AND FILED

DEC 2 1981

LEWIS H. VADEN, CLERK

BR

County of Chesterfield

LEWIS H. VADEN
CLERK



CIRCUIT COURT
CHESTERFIELD, VIRGINIA

ERNEST P. GATES
JUDGE

D. W. MURPHEY
JUDGE

John F. Daffron
Judge

December 11, 1981

Mr. B. VanDenburg Hall
Suite 400, Equity Building
4085 Chain Bridge Road
Fairfax, VA 22030

Dear Mr. Hall:

Enclosed you will find your check for \$2.00 which you sent at my request of November 25 to reimburse us for the Sheriff's fee on service of the Show Cause in the case of Brian C. Middleton vs. Sheila Joan Middleton.

On November 30 we received a letter from you with a check for \$2.00 for service of the Show Cause which I thought was the check I had requested, therefore took it as my reimbursement.

I believe everything is now clear on this matter.

Sincerely,

(Mrs.) Bessie V. Richter
Deputy Clerk

Enc. check

B. VANDENBURG HALL

ATTORNEY AT LAW
SUITE 400 EQUITY BUILDING
4085 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

AREA CODE 703
385-8777

B. VANDENBURG HALL
PHILIP A. WELLS *

*ALSO MEMBER D.C. BAR

December 16, 1981

Mrs. Bessie V. Richter
Deputy Clerk
Circuit Court for the
County of Chesterfield
P.O. Box 125
Courthouse
Chesterfield, VA 23832

Re: Middleton v. Middleton
In Chancery No. 3305-77

Dear Mrs. Richter:

Please associate the attached Motion for Christmas Visitation and proposed Order with your file in this cause and try to forward it to Judge Gates for 2:00 p.m. on Thursday, December 17, 1981.

Thank you for your continued cooperation in this matter.

Sincerely yours,

B. VanDenburg Hall
B. VanDenburg Hall

BVH/sds
Encl.

CC: Brian Middleton
Donald K. Butler, Esquire

RECEIVED AND FILED

DEC 17 1981

LEWIS H. VADEN, CLERK
BR

In the Matter of CLAIRE MICHELLE MIDDLETON and NICHOLE AMIE MIDDLETON (Minors)
And In the Matter of the Law Reform (Miscellaneous Provisions) Act 1949
And In the Matter of the Guardianship of Minors Act 1971 and 1973

Between:

SHEILA JOAN MIDDLETON

Plaintiff

and

BRIAN CARTER MIDDLETON

Defendant

Before the Honourable Mrs. Justice Butler-Sloss sitting in chambers at Newcastle
Upon Tyne on the 23rd day of November 1981

Upon hearing Counsel for the Plaintiff

IT IS ORDERED that the children ~~nam~~ Claire Michelle Middleton and Nichole Amie Middleton
do remain Wards of this Court during their minority or until further order.

AND It Is Ordered that the said children do remain in the interim care and control
of the Plaintiff.

AND It Is Ordered that the Defendant by himself, his servants or agents or otherwise
be restrained from interviewing, taking or seeking to take depositions from the said
children until the hearing of the cause or until further order.

AND It Is Ordered that a Welfare report on the children be prepared as a matter of
urgency and a copy of such report be made available to this Court and to the Circuit Court
of Chesterfield County, Virginia, America and to the Defendant

IT IS FURTHER ORDERED that there be no order for costs save that the Plaintiffs costs
be taxed on a common fund basis in accordance with schedule 2 of the Legal Aid Act 1974.

Dated this 23rd day of November 1981

TO THE DEFENDANT BRIAN CARTER MIDDLETON

TAKE NOTICE that if you fail to obey this order you will be guilty of Contempt and may
be liable to be committed to prison.

Dated this 23rd day of November 1981

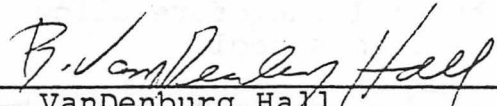
NOTICE AND MOTION FOR CHRISTMAS VISITATION

TO: Sheila Joan Middleton
c/o Donald K. Butler, Esquire
Counsel for Defendant
526 North Boulevard
Richmond, VA 23220

PLEASE TAKE NOTICE that on Thursday, December 17, 1981, at 2:00 p.m., or as soon thereafter as counsel may be heard, the undersigned will move and request Judge Gates of this Honorable Court at its Courthouse in Chesterfield, Virginia, to enter an order in the above-styled cause granting visitation to the Complainant/Father, Brian C. Middleton, with his two children from Saturday, December 19, 1981, at 10:00 a.m. until Tuesday, January 5, 1982, at 10:00 a.m. The airline tickets for these two round-trip trip fares have already been purchased and reservations were made by the Complainant for British Airways Flight No. 277 leaving London at 11:30 a.m. on December 19, 1981, and on Flight No. 276 leaving Dulles Airport near Washington, D.C. at 8:45 p.m. on January 4, 1982, for London.

Brian C. Middleton
By Counsel

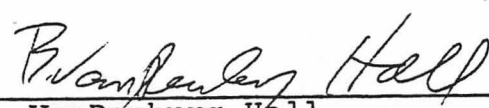
RECEIVED AND FILED


B. VanDenburg Hall
Counsel for Complainant/Father
4085 Chain Bridge Road, Suite 400
Fairfax, Virginia 22030
703-385-8777

LEWIS H. VADEA, CLERK
BK

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of December, 1981, mailed, postage prepaid, a true copy of the foregoing Notice and Motion for Christmas Visitation to Donald K. Butler, Esquire, Counsel for Defendant, 526 North Boulevard, Richmond, Virginia 23220.


B. VanDenburg Hall

4463 Euan Mae Court
Annandale, Va. 22003
December 11, 1981

B. Van Denburg Hall
4085 Chain Bridge Road #400
Fairfax, Virginia 22030

Dear Mr. Hall,

Please find attached a copy of the invoice and tickets for Claire and Nicole Middleton to fly from London to Washington on Saturday, December 19, 1981, and returning on Monday, January 4, 1982.

The tickets and passports have been sent today, Friday, December 11, 1981, by Express Mail to my brother in London who will meet Sheila Middleton at Heathrow Airport. His name and address is:

Peter C. Middleton
19 Keble Close
Pound Hill,
Crawley, Sussex Tel. (293) 883-769

Reservations have been made with British Airways for Sheila Middleton on the same dates and flights as the children. British Airways confirmed they will keep the reservation open for Sheila Middleton until December 14, 1981, or until flight date if she contacts a travel agency about ticketing.

I contacted Claire's school, Ian Ramsey by telephone, and they confirmed that the school will break for Christmas on Thursday, December 17, 1981, and will start the winter term on January 6, 1982. The dates of the flight will therefore allow them to visit me without missing any days from school.

British Airways has told me that the reservations should be cancelled 24 hours in advance for me to receive a refund. Please ensure that Mr. Butler is aware of the refund policy and to ask him to ensure that he informs you at least 24 hours in advance in the event Sheila Middleton decides to not allow the children to leave England.

Sincerely,


Brian Middleton

ms
attachment

VIP TRAVEL AGENCY-ALEXANDRIA
100 NORTH ROYAL STREET-ALEXANDRIA, VA. 22314
(703) 836-4660



ES PERSON: MR

ITINERARY/INVOICE

DATE: 11 DEC 81

PAGE: 1

08093

R: MIDDLETON/CLAIRE MS
MIDDLETON/NICHOLE MS

DEC 81 - SATURDAY
AIR LV LONDON LHR 1130 AM BRITISH AIR FLT:277 COACH CLASS
AR WASHINGTON DULLES 245 PM NON-STOP LUNCH

4 JAN 82 - MONDAY
AIR LV WASHINGTON DULLES 845 PM BRITISH AIR FLT:276 COACH CLASS

5 JAN 82 - TUESDAY
AR LONDON LHR 845 AM NON-STOP DINNER

AIR TICKETS FOR MIDDLETON CLAIREMS	TKT NBR	BA7068585587	756.00
AIR TICKETS FOR MIDDLETON NICHOLEMS	TKT NBR	BA7068585588	378.00
SUB TOTAL			1,134.00
TOTAL AMOUNT DUE			1,134.00

REMARKS-
POSSIBLY TRAVELLING WITH MS SHEILA MIDDLETON

ISSUED BY **BRITISH AIRWAYS** **1254** **PASSENGER TICKET AND BAGGAGE CHECK** **7068:585:587**

ATC **FLIGHT COUPON 1** **DATE OF ISSUE 11 DEC 81** **ISSUED IN EXCHANGE FOR** **VIP TRAVEL AGCY**
NAME OF PASSENGER **MIDDLETON/CLAIRE MS** **NOT TRANSFERABLE** **DATE AND PLACE OF ORIGINAL ISSUE** **ALEXANDRIA VA**
YOUR CODE **125 714 65 077** **49 53210 3/R5JXGX**

1/2	0000 FOR PASSAGE BETWEEN PORTS OUTLINES	CARRIER	FLIGHT	CLASS	DATE	TIME	STATUS	FARE BASIS/TRY DESIGNATOR	NOT VALID BEFORE	NOT VALID AFTER	ALLOW
FROM	LONDON	LHR	BA	277	M	19DEC	1130A	OK Y03			
TO	WASHINGTON DULLES	BA	276	M	4JAN	0435P	OK YL3				
TO	LONDON	LHR									
TO	--VOID--										
TO	--VOID--										

FARE CALCULATION **UKL 390.00LON BAWAS195.00L BALON195.00L TL390.00L 756.00US**
TAX 0.00US **FORM OF PAYMENT** **CHECK REFUND TO VIP ONLY**

TOTAL **USD 756.00**
NET **USD 756.00**
11000011
000001100000006111

1 125 7068585587 4

DO NOT MARK OR WRITE IN THE WHITE AREA ABOVE

ORDER

THIS CAUSE came on to be heard on this 17th day of December, 1981, upon the Complainant's Notice and Motion for Christmas visitation, and upon argument of counsel; it is, therefore,

ADJUDGED, ORDERED and DECREED that the Complainant/Father be, and he hereby is, granted visitation with his two children, Claire Middleton and Nicole Middleton, from 10:00 a.m. on Saturday, December 19, 1981, until Tuesday, January 5, 1982, at 10:00 a.m., and that the Defendant must deliver the parties' two children to the Complainant's brother, Peter B. Middleton, at the ticket office for British Airways at Heathrow Airport, London, England, at 10:00 a.m. on Saturday, December 19, 1981.

The defendant by her attorney objects.
ENTERED this 17th day of December, 1981.

Ernest P. Gates
JUDGE

chg OB 97 page 724

I ASK FOR THIS:

B. VanDenburg Hall

B. VanDenburg Hall
Counsel for Complainant/Father, Brian Carter Middleton
4085 Chain Bridge Road, Suite 400
Fairfax, Virginia 22030
703-385-8777

SEEN: *and objected to:*

Donald K. Butler

Donald K. Butler
Counsel for Defendant/Mother, Sheila J. Middleton
526 North Boulevard
Richmond, Virginia 23220
804-353-4931



Dear Sir (Madame)

I am very upset about all of this.

I have settled in my school very well and have many new friends

I love my mother and father very much. But I have lived hear most of my life. Although I love America alot, I do not want war to leave my home, mother and family.

I love my dad and I really like seeing him. I ~~real~~ really hope I can see my dad still. I do not want to upset my dad ever.

Yours Sincerely

Claire Middleton

x x x x x x x

By air mail
Par avion

3305-77



Judge
Circuit Court,
Chesterfield County,
Virginia,
U. S. A.

file
Middleton
v.
Middleton

case Middleton
v.
Middleton

Flat 6,
Ridley Court,
Norton,
Cleveland,
England.

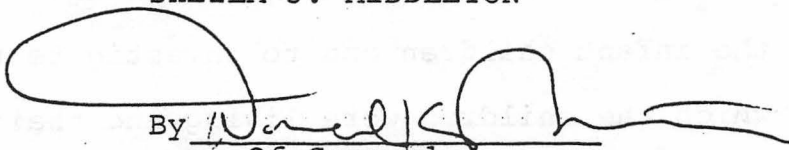
Dear Sir or madam, I am writing to you
to ask you to please help me keep my
children. I do not know anything about
the law, but I do know that America
is fair and democratic in its view on
families especially children. My name
is Mrs Sheila Middleton and my plea
to you, the Judge in charge of my case
to please listen to me, not as a number
in a case but just as a mother who for
7½ years has had her children age
12 years and 10 years living in England
with her. I used all my resources and
my families to come to America and
bring my children home with me.
as the children have always been

NOTICE

TO: Brian C. Middleton
c/o B. VanDenburg Hall, Esq.
Suite 400, Equity Building
4085 Chain Bridge Road
Fairfax, VA 22030

PLEASE TAKE NOTICE that at the hearing of this matter on December 29, 1981, at 9:30 a.m., I will appear before the Honorable Ernest P. Gates and move the Court to continue this hearing for a period of thirty (30) days for the reasons stated in the attached Motion.

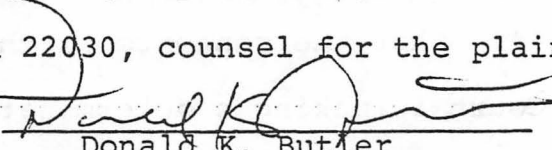
SHEILA J. MIDDLETON

By 
Of Counsel

Donald K. Butler, p.d.
Morano & Butler
526 North Boulevard
Richmond, VA 23220

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice was mailed this 23rd day of December, 1981, to B. VanDenburg Hall, Esq., Suite 400, Equity Building, 4085 Chain Bridge Road, Fairfax, VA 22030, counsel for the plaintiff.


Donald K. Butler

RECEIVED AND FILED

DEC 28 1981

LEWIS H. VADEN, CLERK


DEC 28 1981

LEWIS H. VADEN, CLERK

MOTION FOR CONTINUANCE

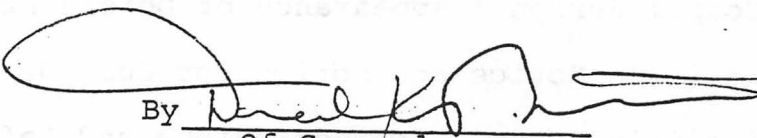
Now comes the defendant, by counsel, and moves the Court to continue this matter for a period of thirty (30) days from December 29, 1981, for the following reasons:

1. That on November 23, 1981, the English Court entered an Order for a report to be made by the Welfare Department in England as to the allegations made by the plaintiff herein concerning the defendant's fitness to have custody of the infant children and to investigate the environment in which the children were living and their desires as to where they wanted to live.
2. That on December 22, 1981, counsel for the defendant in Virginia learned from her counsel in England that an investigation is in process and that a report of the investigation is to be prepared on or before January 11, 1982, and forwarded to this Court.
3. That allowing for mailing, the Court should receive the welfare report some time in the latter part of January.
4. That the contents of the report will be of help to the Court in making a determination, if not as to the ultimate question of custody, then as to what further steps this Court should take in making the custody determination.
5. That a continuance of the custody hearing for a period of thirty (30) days should allow sufficient time for the report to be completed and forwarded to this Court.

WHEREFORE, the defendant prays this matter be continued for a period of thirty (30) days or to a date some time

thereafter convenient to counsel and the Court.

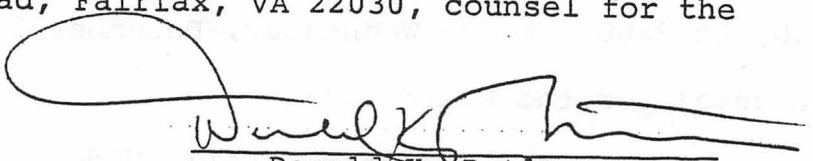
SHEILA J. MIDDLETON

By 
Of Counsel

Donald K. Butler, p.d.
Morano & Butler
526 North Boulevard
Richmond, VA 23220

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion for Continuance was mailed this 23rd day of December, 1981, to B. VanDenburg Hall, Esq., Suite 400, Equity Building, 4085 Chain Bridge Road, Fairfax, VA 22030, counsel for the plaintiff.


Donald K. Butler

O R D E R

THIS CAUSE came on upon a Notice and Plaintiff's Motion to Compel Personal Appearance of Defendant with the Children; upon Plaintiff's Notice and Motion for Custody Pendente Lite; upon Plaintiff's Request for Admissions and Defendant's Response thereto; upon testimony of Plaintiff and his wife; and upon argument by counsel for both parties, it is hereby

ADJUDGED, ORDERED and DECREED that Plaintiff's Motion to Compel Personal Appearance of Defendant with the Children be, and it hereby is granted but modified as follows:

(a) the Defendant, Sheila Middleton, shall, at her expense, present herself in the law offices of counsel for the Plaintiff at Suite 400, 4085 Chain Bridge Road, Fairfax, Virginia 22030, at 2:00 p.m. on Wednesday, December 23, 1981, to be deposed by counsel for the Plaintiff;

(b) the Defendant, Sheila Middleton, shall, at the expense of the Plaintiff, cause the parties' daughter, Claire Middleton, to be presented in the said law offices of counsel for the Plaintiff at 3:00 p.m. on Wednesday, December 23, 1981, so that Claire Middleton can be deposed by counsel for the Plaintiff; and

(c) the Defendant, Sheila Middleton, shall, at the expense of the Plaintiff, cause the parties' daughter, Nicole Middleton, to be presented in the said law offices of counsel for the Plaintiff at 4:00 p.m. on Wednesday, December 23, 1981, so that Nicole Middleton can be deposed by counsel for the Plaintiff;

and it is further

ADJUDGED, ORDERED and DECREED that the Plaintiff's Motion for Custody Pendente Lite be, and it hereby is, denied at this time; and it is further

ADJUDGED, ORDERED and DECREED that the child custody trial in this cause be, and it hereby is set to be heard in this Court at its courthouse in Chesterfield, Virginia, at 9:00 a.m. on Tuesday, December 29, 1981, at which time both parties may present the testimony of witnesses and argument of counsel.

ENTERED this 29th day of December, 1981.

Wm. E. Tate
December 8, 1981

Ernest P. Gates
JUDGE ERNEST P. GATES

SUBMITTED:

Chy B.B. 98 - page 19

B. Vandenburg Hall
B. Vandenburg Hall
Counsel for Father/Brian C. Middleton
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
703-385-8777

SEEN *and objected to:*

Donald K. Butler
Donald K. Butler
MORANO and BUTLER
526 North Boulevard
Richmond, Virginia 23220
804-353-4931

IN THE HIGH COURT OF JUSTICE CG 621 of 1981

FAMILY DIVISION

PRINCIPAL REGISTRY

IN THE MATTER OF CLAIRE NICHELE MIDDLETON AND

NICHOLE ARIE MIDDLETON (MINORS) AND IN THE

MATTER OF THE LAW REFORM (MISCELLANEOUS PROVISION

ACT 1949 AND IN THE MATTER OF THE GUARDIANSHIP

OF MINORS ACT 1971 AND 1973

B E T W E E N:

SHEILA JOAN MIDDLETON

Plaintiff

-and-

BRIAN CARTER MIDDLETON

Defendant

AFFIDAVIT OF WILLIAM ANDREW GOYDER

J. R. waite & Alsop,

11 Duke Street,

Darlington.

This Affidavit is filed on behalf of the
Plaintiff

FAMILY DIVISION

PRINCIPAL REGISTRY

IN THE MATTER OF CLAIRE MICHELLE MIDDLETON AND NICHOLE AMIE

MIDDLETON (MINORS) AND IN THE MATTER OF THE LAW REFORM

(MISCELLANEOUS PROVISIONS) ACT 1949 AND IN THE MATTER OF

THE GUARDIANSHIP OF MINORS ACT 1971 AND 1973

B E T W E E N:

SHEILA JOAN MIDDLETON

Plaintiff

-and-

BRIAN CARTER MIDDLETON

Defendant

I, WILLIAM ANDREW GOYDER make oath and say as follows:-

1. I am the Solicitor having the conduct of this application on behalf of the Plaintiff. I am a Partner in the firm of J. R. Waite & Alsop, 11 Duke Street, Darlington, County Durham.

2. On the 26th day of August 1981 I was consulted by the Plaintiff Sheila Joan Middleton of 6 Ridley Court, Norton, Cleveland, the Plaintiff herein who had on the previous day received in the post a Petition for Change of Custody in the Circuit Court of Chesterfield County, Virginia, U.S.A. (Chancery No: 3305-77) and associated documents. I exhibit the said Petition and associated documents marked W.A.G. 1.

3. I was instructed that the parties were married in Stockton on Tees, on the 17th February 1962 and emigrated to the U.S.A. in 1967. They lived together in Richmond, Virginia from 1967 until they separated in 1974. There are two children of the marriage Claire Michelle Middleton born 4th September 1969 and Nichole Amie Middleton born 9th September 1971 (hereinafter referred to as "the children"). The Plaintiff in 1974 returned to England and the Defendant remained in the U.S.A. He divorced the Plaintiff in 1977 in the Circuit Court of the County of Chesterfield, Virginia in 1977. By consent custody was granted to the Plaintiff under an agreement. I exhibit hereto copies of the Final Decree and Custody Agreement marked W.A.G. 2, dated 31st May 1977. I am informed by the Plaintiff and verily believe that the Final Decree contains a typing error in that custody of the children was granted to the Plaintiff not to the Defendant.

4. Since 1974 the children have lived with the Plaintiff at Ridley Court, Norton, Stockton on Tees, and have attended local schools. They have visited the Defendant in the U.S.A. by agreement for five weeks every year during the Summer holidays of 1978, 1979, 1980 and he has remarried and lives at 4463 Eden Mae Court, Annandale, Virginia, U.S.A. In 1981 the children went to the U.S.A. on the 24th July, and it was agreed that they would return to Heathrow Airport on the 31st August 1981 at 9 a.m. on Flight BA 276M, but they did not do so. The first information that the Plaintiff had of the Defendant's intention to keep the children in America was when she was served by post with

the Petition for Change of Custody on the 25th August.

The children were due to return to school in Stockton on Tees on the 2nd September. After telephoning the Defendant the Plaintiff made arrangements to fly to America and arrived there on the 31st August to consult local Lawyers. After taking legal advice she returned to England with the children on Friday, 4th September 1981. On that day I was instructed to issue wardship Proceedings and to seek the protection of this Honourable Court for the said children.

5. As a result of legal advice given to her by Attorneys in the State of Virginia, the Plaintiff on the 17th September 1981 made an application that the Judge of the Circuit Court of Chesterfield County (hereinafter referred to as "the Virginia Court") should decline the jurisdiction to hear the Petition for Change of Custody in favour of these Wardship Proceedings. I exhibit marked W.A.G. 3 a copy of the said application, Plea to the Jurisdiction, Memorandum in Support, and Reply to Complainant's Brief.

6. On the 4th November 1981 I was informed by telephone that the Virginia Court dismissed the Plaintiff's application that the Court should decline jurisdiction and granted leave to the Defendant to take depositions from witnesses to be used in evidence in the proceedings. A copy of the Judge's decision letter dated 27th October 1981 is exhibited hereto marked W.A.G. 4.

7. On the same day I was informed by Freeman Daly and Jacks, Solicitors of 11 Victoria Road, Darlington, that they had received instructions from Mr. B. Vanden Burg

Hall of 4085 Chain Bridge Road, Fairfax, Virginia, the Attorney representing the Defendant that Mr. Hall would arrive in Darlington on the 11th November 1981 and that Notices would shortly be served requiring the Plaintiff to attend the Office of Freeman Daly and Jacks at 9.30 a.m. on the morning of the 12th November, and the children at 11.30 and 12.30 respectively to permit Mr. Vandenburg Hall to take depositions from them.

8. On the 5th November 1981 I informed the Defendant's Solicitors by letter that the Plaintiff and the children would not attend to give depositions despite their request.

9. On the 6th November 1981 I was informed on the telephone by Mr. Donald K. Butler of Morano and Butler 526 North Boulevard, Richmond, Virginia the Attorney representing the Plaintiff that if the Plaintiff failed to participate in providing depositions in accordance with the Defendant's request the Defendant would be granted an immediate Custody Order by reason of the Plaintiff's default, and that it was likely that the Virginia Court would relieve the Defendant of the responsibility of paying maintenance to the Plaintiff for the children.

10. It is apparent from the submissions made by the Defendant in the Virginia Court and from the Request for Admissions exhibited hereto and marked W.A.G. 5 that the Defendant has made untrue and distressing allegations about the Plaintiff's sexual behaviour since the parties were divorced, allegations which accuse her in particular of engaging in sexual activities when the children were present. The Plaintiff instructs me that these allegations

are false and the product of the Defendant's imagination. She further instructs me that the children are and were content and secure with her until the Defendant informed them in August 1981 of his wish that they should remain with him. Her evidence will be supported (inter-alia) by that of a close friend Mr. Michael Davies, her family, Mr. John wall the Minister of the local Methodist Church, and Dr. J. R. Thornham her General Practitioner. It is evident from the Request for Admissions that Mr. Vandenburg Hall intends to question both the Plaintiff and the children about the Plaintiff's sexual behaviour and about the childrens feelings for their mother and father. The Plaintiff is appalled by and totally denies all allegations of sexual impropriety and wishes to defend herself in the Wardship Proceedings according to the rules of evidence and procedure of this Honourable Court.

11. The Plaintiff was granted an Emergency Legal Aid Certificate on the 8th September 1981 and a full Legal Aid Certificate (nil contribution) on the 15th October 1981. She is a person of limited financial resources, relying upon the maintenance of 200 U.S. Dollars received monthly from the Defendant and her income from her employment with the Durham County Council Education Department. She would not have been able to go to America to bring home the children or to instruct American Lawyers to advise her on the proceedings brought in the Virginia Court were it not for the loan to her by her uncle of a substantial sum of money which is now spent. By contrast the Defendant, who is a Vice-President of the United

Virginia Bank, Wahsington D.C. is a wealthy man who can afford to carry on litigation in the United States.

12. The Plaintiff has been reduced to a state of severe anxiety by reason of the duplication of and conflict between the legal proceedings concerning the children and the expense of contesting the proceedings in the Virginia Court. She is worried by the distress which the children will suffer if they are subjected to examination and cross examination on the allegations made by the Defendant. Further I am informed by the Plaintiff and verily believe that the Defendant is likely to accompany his Attorney to this Country to instruct him in taking depositions, and that he may attempt to remove the children from the jurisdiction of this Court and return them to America which would secure to the Defendant a significant advantage since it would force the Plaintiff to continue to defend his proceedings in the Virginia Court.

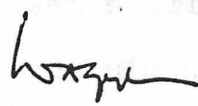
13. It is submitted that it is oppressive and contrary to the welfare of the children that the Plaintiff and the children should be subjected to questioning by the Attorney for the Defendant, since this may prejudice the Wardship Proceedings before this Honourable Court and will cause distress to the children and unnecessary expense to the Plaintiff. It is further submitted that it is vexatious of the Defendant to pursue his application in the Virginia Court knowing that the children are now wards of the English Court and that the Plaintiff, the children and the majority of witnesses reside in Stockton on Tees, England.

14. I therefore seek on behalf of the Plaintiff the protection of this Honourable Court in restraining the Defendant from taking any further steps affecting the children in the Virginia Court until further order, in particular from requiring the Plaintiff or the children to submit to the taking of depositions before the Defendant's Attorney, and from attempting to remove the children from the care and control of the Plaintiff or from the jurisdiction of the Court.

Sworn at Darlington

in the County of Durham

this 9th day of November 1981



Before me,

John C. Witty

A Commissioner for Oaths

This Affidavit is filed on behalf of the Plaintiff.

The Exhibit
A
Ept
12-29-81


NOTICE AND MOTION FOR CUSTODY

TO: Sheila Joan Middleton
c/o Donald K. Butler, Esquire
Morano & Butler
526 North Boulevard
Richmond, Virginia 23220

PLEASE TAKE NOTICE that on Tuesday, the 29th day of December, 1981, at 9:00 a.m., or as soon thereafter as counsel may be heard, Brian Carter Middleton, by counsel, will move this Honorable Court for the entry of an Order granting him permanent custody of the parties' daughters, Claire Michelle, age 12, and Nichole Amie Middleton, age 10, directing the Defendant to bring these two children to Annandale, Virginia to turn them over to the Plaintiff/father's physical custody, and ordering the defendant to pay to the plaintiff a reasonable amount per month as child support plus a reasonable amount for attorney's fees and costs. You may wish to be present and to defend your interests, as they may appear. Testimony will be offered by the Plaintiff and you are welcome to come and offer testimony.

RESPECTFULLY SUBMITTED,

BRIAN CARTER MIDDLETON
Plaintiff/father
By Counsel


B. VanDenburg Hall
Counsel for Plaintiff/father
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

RECEIVED AND FILED

DEC 29 1981

LEWIS H. VADEN, CLERK

BR

Certificate of Service

I hereby certify that I have this 27th day of December, 1981, mailed, postage prepaid, a true copy of the foregoing Notice and Motion for Custody to Donald K. Butler, Esquire, Morano & Butler, Counsel for Defendant, at 526 North Boulevard, Richmond, Virginia 23220.

NEWCASTLE UPON TYNE COUNTY COURT

Memorandum

Office 56 Westgate Road Newcastle upon Tyne NE1 5UR

Telephone 20558

From The Chief Clerk

To His Honour Judge Ernest Gates
Circuit Court, Chesterfield County
Chesterfield
Virginia 23832
U.S.A.

Your reference WAG/AW

Our reference SL/MT

Date 19 January 1982

copy to

J R Waite and Alsop
~~11 Duke Street~~
Darlington
Co Durham.

Your Honour

SHEILA JOAN MIDDLETON v BRIAN CARTER MIDDLETON
81 M 2118

Please find enclosed herein a Welfare Officer's
report compiled by Mr Stephen G Ray, Divorce Court
Welfare Officer.

The above matter is due to be heard in your Court
on Thursday the 28th day of January 1982.

J. Laycock
Yours faithfully,

RECEIVED

JAN 25 1982

CHESTERFIELD CIRCUIT COURT
JUDGES CHAMBERS

22

HIGH COURT OF JUSTICE (FAMILY DIVISION)

MIDDLETON -v- MIDDLETON

Report in relation to the Welfare of the Children:-

Claire Michelle MIDDLETON - Aged 12 years
Born 4th September, 1969

Nicole Amie MIDDLETON - Aged 10 years
Born 9th September, 1971

Persons Interviewed:-

The Plaintiff - Mrs. Sheila Joan MIDDLETON
Flat 6,
Ridley Court,
Norton,
Stockton.

Mr. Allen - Headmaster of Harrowgate School

Mrs. Woods - Headmistress of Ian Ramsey School

Mr. Michael Davis - Male associate of Mrs. Middleton
Parkgate,
S. Wirral,
Cheshire.

I have also spoken with both children in private, and I have seen copies of all relevant Court papers regarding this case.

STEPHEN G. RAY,
Divorce Court Welfare Officer.

SGR/EG
5th January, 1982

60 Marsh House Avenue,
Billingham,
Cleveland.

RECEIVED

JAN 25 1982

1. Home circumstances

Mrs. Middleton and the two children, Claire and Nicole, reside in a three bedroomed flat in Norton which is rented from a Housing Association. It is a first floor flat, and the development as a whole is compact and situated within its own grounds. Material conditions within the home itself are of a very high standard indeed, and it is quite clear that the children are well provided for in terms of their environment.

2. Mrs. Middleton

Since her divorce some years ago Mrs. Middleton has remained essentially as the head of a single-parent family unit. She is employed in the capacity of a nursery nurse at the Harrowgate School in Stockton. Both children have attended this school, although the eldest Claire, has now moved on to a Comprehensive School. The hours of work, however, of Mrs. Middleton enable her to continue to transport Claire to and from school as she continues to do with Nicole who remains on the same premises as her. The work and education needs of the family, therefore, fit in neatly together.

As an employee Mrs. Middleton is spoken of highly by her headmaster, Mr. Allen. She is considered to possess exceptional qualities in dealing with children and clearly has a natural gift for the work. She is a highly valued and respected member of the school staff as a whole, and as far as Mr. Allen and the rest of his staff are concerned her character and behaviour are beyond reproach. Moreover, the passage of the two children through the school has also enabled Mr. Allen to observe Mrs. Middleton's qualities as a parent. Once again the comments are totally positive with Mrs. Middleton impressing as a parent.

This assessment ties in fully with my own impressions of Mrs. Middleton. Her concern for her children is clearly the paramount consideration in her life-style and the rapport between mother and daughters is excellent. Consequently I believe that a well settled and very healthy family unit is in existence with the children receiving maximum stimulation from their mother and responding accordingly.

These comments contrast starkly with the nature of the allegations made by her former husband which focus particularly on deviant sexual behaviour by Mrs. Middleton with no regard to the interests of the children. These allegations are strongly denied by Mrs. Middleton, and there is no visible evidence from the contacts I have made in my enquiries which would indicate that anything was amiss in

the family unit. In fact, the complete opposite is the case.

Mrs. Middleton does not deny the existence of a relationship, however, and that, in fact, is with Mr. Davis who I have had the opportunity of meeting. Currently, residing out of the area he stays with the family about once a fortnight on a weekend and has recently spent Christmas and New Year with them. I have been impressed with Mr. Davis who clearly has a serious commitment to Mrs. Middleton and the children, and he does not strike me as a man who would act in any way against the interests of Claire and Nicole. The acid test of this must be their attitude to him, and this is one of warmth and affection. I make this comment having seen them together, and also on the basis of comments that the girls have made to me in private. There is, therefore, in existence a stable and positive relationship, albeit at a distance, and one which is viewed seriously by both adults concerned and managed within the context of the children's interests. Consequently, there would seem to be nothing that might cause the Court concern in this direction. Given these observations I would not seek to develop any further Mrs. Middleton's denial of her former husband's allegations which are clearly fully dealt with in the Court papers. I will now comment on the children themselves.

3. Claire Michelle (aged 12 years)

Claire now attends Ian Ramsay Comprehensive School, regarded as the best State Secondary School in Stockton, and to gain entrance to which she was registered as living with an auntie. She has never in reality moved from her mother's home. Her starting at the new school was delayed when her father kept her in America following her holiday there, and for many children this might have caused some problems. Not for Claire. Mrs. Woods, her headmistress, reports that she settled in immediately despite the upheaval she had been through. She is confident and has excelled as a pupil in her first term. In fact, Mrs. Woods feels that she has adjusted to school far better than many other children who have a standard family set up behind them.

It is clear, therefore, that Claire is very well adjusted; a feature which comments fundamentally on the upbringing that her mother has provided. My own direct contact with her has only served to confirm this. She is bright, communicates well and is, in my opinion, fully settled with her mother. She is able to discuss recent events very sensibly and has left me in no doubt that she wishes to remain with her mother.

There is no doubt that she loves her father, and she is saddened by the series of events which have led up to this Court case, but there is no doubt in her mind that the foreseeable future should be spent with her mother.

4. Nicole Amie (aged 10 years)

My comments in relation to Claire are fully mirrored with Nicole. She is well adjusted and stable, exudes confidence, and is settled and doing well at school. There is nothing untoward in her behaviour there and, as with Claire she clearly has an excellent relationship with her mother. Commenting on both girls, Mr. Allen, Nicole's headmaster, expressed to me the wish that all of his pupils were like the two girls as, in such a situation, his school would be so much easier to run.

In talking with Nicole I was impressed with the mature and sensible attitude which she has to the present dispute between her parents. Her feelings echo those of her sister, and I am left in no doubt that she wishes to remain with her mother and is very happy there, whilst regretting that the orderly access to her father has been soured by recent events. Both she and her sister are adamant that they had no desire to remain in America after their holiday.

5. Opinion

The situation before the Court is essentially a sad one for the two children concerned. They love both of their parents and feel that their ongoing relationship with their father owes much to their mother who has done her best over the years to encourage their Trans-Atlantic focus. So much so, in fact, that she has always left it open to them to choose to move away and live with their father if it would make them happy. That remains the case despite recent events.

The fact is however, that Claire and Nicole have been happy and settled with the situation as it has been for some years now. Recent events have clouded this and they are both aware that their happy medium may never be re-established. Yet, despite this fact and the resultant pressures they have a clear focus on the life-style that they wish to maintain and that is to remain with their mother. They are happy here and have no wish to be uprooted. There is no resentment of their father, but some lack of understanding at his recent actions which they do not feel are in their interests at the present time. Seldom have I encountered two such level-headed children of this age, and I feel that the Court can give considerable weight to their feelings.

cont/.....

Moreover, there is no doubt that Mrs. Middleton is an exceptionally capable parent, and I am at a loss to see how her retaining custody of the children could have any deleterious effects on their welfare. Accordingly, and combining this feature with the feelings of the children themselves, the Court may well feel that the custodianship of Claire and Nicole should continue to be vested in Mrs. Middleton.

HIGH COURT OF JUSTICE (FAMILY DIVISION)

MIDDLETON -v- MIDDLETON

Report in relation to the Welfare of the Children:-

Claire Michelle MIDDLETON - Aged 12 years
Born 4th September, 1969

Nicols Amie MIDDLETON - Aged 10 years
Born 9th September, 1971

Persons Interviewed:-

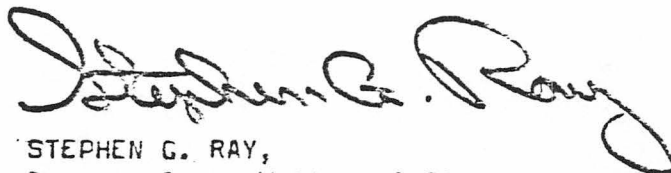
The Plaintiff - Mrs. Sheila Joan MIDDLETON
Flat 6,
Ridley Court,
Norton,
Stockton.

Mr. Allen - Headmaster of Harrowgate School

Mrs. Woods - Headmistress of Ian Ramsey School

Mr. Michael Davis - Male associate of Mrs. Middleton
Parkgate,
S. Wirral,
Cheshire.

I have also spoken with both children in private, and I have seen copies of all relevant Court papers regarding this case.



STEPHEN G. RAY,
Divorce Court Welfare Officer.

SGR/EG
5th January, 1982

60 Marsh House Avenue,
Billingham,
Cleveland.



MISS JEAN T. SMITH
DIRECTOR

CHESTERFIELD-COLONIAL HEIGHTS
DEPARTMENT OF SOCIAL SERVICES

P. O. BOX 27
CHESTERFIELD, VIRGINIA 23832

TELEPHONE
804-748-2070

March 2, 1982

Ernest P. Gates, Judge
Circuit Court
Chesterfield, VA 23832

Dear Judge Gates:

Re: Middleton
vs.
Middleton
Chancery #3305-77

Enclosed is the requested study in the above custody matter.

Sincerely,

Nan McKenney
(Mrs.) Nan McKenney
Social Work Supervisor

Suzanne Fleming
(Miss) Suzanne Fleming
Senior Social Work Supervisor

/cd

Enclosure

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MAR 3 1982

CHESTERFIELD CIRCUIT COURT
JUDGES CHAMBERS



Vincent M. Picciano
Director of Court Services

FAIRFAX COUNTY JUVENILE & DOMESTIC RELATIONS
DISTRICT COURT

19th JUDICIAL DISTRICT
COURTHOUSE, 4000 CHAIN BRIDGE ROAD, FAIRFAX, VIRGINIA 22030
COURT SERVICES

MAR 1 1982



(703) 691-2342

February 25, 1982

Mrs. Nan McKenny
Soc. Wk. Supervisor
Chesterfield - Colonial Heights
Department of Social Services
Post Office Box 27
Chesterfield, Virginia 23832

RE: Mr. and Mrs. Brian C. Middleton

Dear Mrs. McKenny:

Enclosed is the report of the home investigation you requested.

If I can be of any further assistance, please contact me at 691-3241.

Sincerely,

Barbara A. Crowling

Barbara A. Crowling
Custody Investigator

Kathleen Meredith

Kathleen Meredith
Director, Domestic
Relations Unit

BAC:KM/baw

Enclosure

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT

FAIRFAX COUNTY, VIRGINIA

CUSTODY REPORT

RE: CLAIRE M. MIDDLETON
DOB: 09/04/69

CASE FILE NUMBER: 91-069-P/Q

NICHOLE A. MIDDLETON
DOB: 09/09/71

PARENTS: BRIAN C. MIDDLETON
SHELIA J. MIDDLETON

STEP-PARENT: ANGELA L. MIDDLETON

This matter was referred to the Fairfax County Juvenile and Domestic Relations District Court for a custody investigation and report by the Chesterfield Circuit Court in Chesterfield, Virginia. The request was received on January 6, 1982. The father of the children lives in Fairfax County while the mother and children live in England. An investigation of the mother's home has been conducted in England.

BACKGROUND: (As related by Brian and Angela Middleton)

Brian and Shelia Middleton were married on February 17, 1963 in Stockton-On-Tees, England. They moved to the United States in 1967, to Chesterfield County, Virginia. Claire was born on September 4, 1969 and Nichole was born on September 9, 1971, both in Richmond, Virginia.

Shelia left her husband in 1974 and returned to England with the children. Mr. Middleton attempted a reconciliation and was not successful. They were divorced in 1977 in Richmond, Virginia. Custody of the children was awarded to their mother.

Mr. Middleton married Angela in May of 1979 in Las Vegas, Nevada. He had visited the children in England once or twice a year until they were both old enough to fly to the United States unaccompanied, in 1978. He then began to pay for their visits to the United States each summer for four to six weeks while they were not in school.

During the children's visit in the summer of 1981, they both expressed a desire to remain with their father and Angela. They had done so previously, but Mr. Middleton had thought it best to wait until they were older and better able to make their own choice.

Mr. Middleton then filed a custody petition in August of 1981. He and his wife enrolled them in school in Fairfax County. On September 2, 1981 Shelia Middleton took the children from outside their father's home and returned to England with them. The mother was ordered to appear in court with the children on September 22, 1981, and she did not do so.

FATHER:

Brian C. Middleton was born on May 11, 1940 in Stockton-On-Tees, England. His mother and a brother both reside in England.

He has contact with them approximately once a month.

Brian received a B.S.C. from the University of Manchester in England and a M.B.A. from the University of Richmond in Virginia.

After moving to the United States in 1967, he began working for Allied Chemical Corporation in Chesterfield County, Virginia where he worked until 1972 when he began working for the United Virginia Bank in Richmond, Virginia. In 1978 he was transferred to Alexandria where he is the Senior Vice President, Manager of the Northern Region Operations of United Virginia Bank. His annual income is \$41,000.00, working 9:00 - 5:00, Monday - Friday.

He described both his physical and mental health as "very good". He enjoys working on various crafts. He also does "wood work" i.e., he recently "finished off" the basement of the house.

Brian married Shelia in February, 1963 and they were divorced in 1977. He married Angela in May, 1979. He has visited with his children at least once each year since the divorce and sends \$250.00 each month for child support. He stated that he has also paid for his daughters' transportation whenever they visited and during their visits, he buys them between \$600.00 and \$800.00 worth of clothes.

FATHER'S STATEMENT:

Mr. Middleton stated that he feels he and his wife can give his children "better financial and physical support" and a better "home environment" than their mother. He believes he can offer "intellect and guidance" and a "good future." He can give "love and affection" as well as "material things."

Brian said that Sheila is "not well educated" and "is living in an immoral existence." She takes the girls to bars with her and has a "number of men staying nights with her." He does not feel she is providing a good home environment for the children. She is "immature" and "useless in homemaking skills."

STEP-PARENT:

Angela L. Middleton was born on January 13, 1946 in Pennsylvania. Her parents and two sisters reside in Pennsylvania and she has contact with them every one to two weeks.

Angela graduated from high school and attended school through United Virginia Bank for two years. She works for United Virginia Bank as the manager of the credit department at the Alexandria office. She has been employed with United Virginia Bank for the past seventeen years. Her annual income is \$23,000.00. She works from 9:00 to 5:00, Monday through Friday.

She described her physical and mental health as excellent, saying she "feels very good about herself." She enjoys skiing, knitting, sewing and painting. She has helped Claire and Nichole make doll house furniture and pottery.

Angela was married to Edward Hefferman in 1964 and was divorced in 1969. There were no children born during their marriage. She married Brian Middleton in May, 1979.

STEP-PARENT'S STATEMENT:

Angela Middleton stated that she has a "very open relationship" with Nichole and Claire. She feels they are "being subjected to things that they shouldn't be" such as "being taken to bars" with their mother. Nichole and Claire have told Angela about "men their mother brings home."

She feels Sheila is very domineering and makes the girls pity her. The girls expressed a desire to remain with them but were concerned about "who will take care of mommy". She feels they are subjected to "mental abuse" by their mother.

Mrs. Middleton said that she and her husband can offer a "good family environment" one that is "more secure." She sees Sheila as being a "self-centered, immature person" and feels that she "uses" the children.

DESCRIPTION OF CHILDREN: (As related by Mr. and Mrs. Middleton)

Claire Middleton is described by both her father and Angela as being "very bright, attractive, and athletic." They feel she gets along well with others and "makes friends easily." They described her as being "a leader and an organizer." Mrs. Middleton does feel that in spite of these characteristics, Claire is "unsure of herself" because of the way her mother causes her to feel.

Nichole Middleton is described as being of a "larger build than Claire" and also "very bright." She does not "make friends as easily as Claire" and is "less outgoing." She enjoys sports and needlework.

MIDDLETON HOUSE:

Mr. and Mrs. Middleton live in a townhouse in, what appeared to be, an upper to middle-class area of Annandale, Virginia.

There is a living room, dining room, kitchen, two full baths, two half baths, three bedrooms, and a large recreation room downstairs. There is also a small, fenced in yard off the recreation room, accessible by sliding glass doors. One of the bedrooms is for Claire and Nichole Middleton, furnished with a bed, a dresser, a large closet and a T.V. One bedroom, which could be made one of the girls', is presently a craft room. There were many different types of crafting materials and some articles that the girls have made on their visits.

Housekeeping standards were very good when I visited.

There is a pool within the townhouse complex and Wakefield Park, a large recreational center, is close by. Stores are easily accessible within walking distance.

The schools that the children would attend are in walking distance of the Middleton's home. The schools in Fairfax County have a reputation for being of the best in the nation.

COLLATERAL CONTACTS:

Walter N. Street, Jr. is President of the United Virginia Bank Northern Region and has worked with Mr. Middleton for over four years. He knew Mr. Middleton while he was working in Richmond, Virginia. Mr. Street stated that Mr. Middleton is "reliable" and has "often expressed a desire to have his children with them." Mr. Street also knows Mrs. Middleton and though he has never met Nichole and Claire, he believes the Middletons "would make a very good home for them."

Mrs. Elizabeth Carlson, a neighbor of the Middleton's, has two sons close to the ages of Nicole and Claire. When the girls visited, the four children "got along very well" according to Mrs. Carlson. She feels the Middletons' parenting skills are more than adequate and when she has seen Mr. and Mrs. Middleton with the two girls, they all appeared to be "very happy." Mr. and Mrs. Carlson have known the Middletons for "almost three years" and they express their desire to have the girls with them "very often."

CONCLUSIONS:

Based on my interviews and observations, Mr. and Mrs. Middleton could provide a healthy, educational and loving environment. They appeared to be capable, both financially and emotionally, of caring for Nichole and Claire Middleton. Their desire to gain custody of the girls seemed to be in the interest of the children as well as their own wishes to have the girls with them.

Respectfully submitted,

Barbara A. Crowling

Barbara A. Crowling
Custody Investigator

Kathleen Meredith

Kathleen Meredith 2/25/82
Director, Domestic
Relations Unit

BAC:KM/baw

02/25/82

B. VANDENBURG HALL

ATTORNEY AT LAW
SUITE 400 EQUITY BUILDING
4085 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

AREA CODE 703
385-8777

B. VANDENBURG HALL
PHILIP A. WELLS*
WILLIAM E. KLINE

*ALSO MEMBER D.C. BAR

March 26, 1982

Mrs. Bessie Richter, Clerk
Circuit Court of Chesterfield County
P.O. Box 125
Chesterfield, Virginia 23832

Re: Middleton v. Middleton
In Chancery No. 3305-77

Dear Mrs. Richter:

Please associate the enclosed Complainant's Brief with the home study made in Virginia and your file on the above-styled cause and forward it to Judge Gates for his consideration.

Thank you for your cooperation in this regard.

Sincerely yours,

B. Vandenburg Hall
B. VanDenburg Hall

by *[Signature]*

cdm

Enclosure

cc: Donald K. Butler, Esquire
Brian C. Middleton

RECEIVED AND FILED

MAR 29 1982

LEWIS H. VADEN, CLERK

OR

V I R G I N I A:

IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY

BRIAN C. MIDDLETON

Complainant,

VS.

SHEILA JOAN MIDDLETON,

Defendant.

)
)
)
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) IN CHANCERY NO. 3305-77
)
)
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COMPLAINANT'S BRIEF

B. Vandenburg Hall
Counsel for Complainant,
Brian C. Middleton
Suite 400
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

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V I R G I N I A:

IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY

BRIAN C. MIDDLETON

Complainant,

vs.

SHEILA JOAN MIDDLETON,

Defendant.

IN CHANCERY NO. 3305-77

COMPLAINANT'S BRIEF

The Complainant/father, Brian C. Middleton, submits this brief in support of his motion for permanent custody of the parties' minor children, Claire and Nicole Middleton.

I. STATEMENT OF BACKGROUND FACTS

1. This cause was initiated in 1977 upon a Bill of Complaint filed by the Complainant/father for a divorce. Complainant/father was granted a decree of divorce, and custody of the parties' two minor children was given to the Defendant/mother, Sheila Joan Middleton, with visitation at "reasonable times and places" awarded to the father. The case was reinstated upon the motion of the Complainant/father by an Order entered on September 14, 1981, to consider the Father's Petition for Change of Custody. On September 2, 1981 on Complainant/father's motion, the Court entered an injunctive order restraining and enjoining both parties from

removing either or both of their children from the Commonwealth of Virginia or the United States of America until further order of this court. Contrary to this order, the Defendant/mother did remove these children from Virginia and the United States.

2. Pursuant to Rule 4:11 of the Rules of the Supreme Court of Virginia, on September 22, 1981 the Complainant/father filed a Request for Admissions with this Court and had the Defendant/mother properly served.

3. The Defendant/mother's responses to the Complainant/father's Request for Admissions (R/A) are as follows:

(i) R/A #1: You, Sheila J. Middleton, have had sexual relations with a single male named Mike Davies on numerous occasions while my children, Claire and Nicole Middleton, were present in the home.

A: The mother admits she had sexual intercourse with Mike Davies, but never in the presence of the children. She does not deny she had sexual relations with him on numerous occasions while these children were present in the home.

Thus R/A Number 1 is deemed admitted.

(ii) R/A #14: On Saturday, August 30, 1981, the child, Claire, informed your sister, Linda Watson, by telephone that she wished to remain with her father, Brian C. Middleton, in America and that she did not want her mother to escort her back to England from America.

A: As the Defendant has no way of knowing the contents of the telephone conversation to which she was not a party, the allegation is neither admitted nor denied.

(iii) R/A #15: You, Sheila J. Middleton, were present in the home, Flat 6 Ridley Court, when your sister called the children by telephone on Saturday, August 30, 1981.

A: The mother admits that she was present in the home with her sister when she called the children by telephone on Saturday, August 30, 1981.

Therefore, reading Request for Admissions Numbered 14 and 15 together plus Rule 4:11, the defendant/mother knew or at least could have found out and was obliged to find out that Claire Middleton wanted to remain with her father as of August 30, 1981 and that Claire did not want to be taken back to England. In other words, R/A Number 14 is deemed admitted.

(iv) R/A #20: At the time of divorce in 1977, Sheila J. Middleton made a verbal agreement with the father, Brian C. Middleton, that she would allow the children to live with their father in America, upon reaching the age of 10 years if the children so desired.

A: The children have always been told they have a choice as to where they wish to live.

In view of the evidence submitted by the father, by the testimony of his neighbor, a neighbor's child, a co-worker, his wife and himself, it is clear that:

a. The father has a very good and suitable three bedroom home in Fairfax County, Virginia where these children have many friends their age. They have visited their father in Virginia for extended periods every summer since their mother took them back to England. These children are now ages 12 and 10.

b. These children love to be with their father and step-mother in and around their home.

c. The father is a fit parent; in fact there is no indication whatsoever that he is otherwise and the mother has been given more than ample opportunity to present any evidence she might have to try to prove otherwise by deposition if she had any such evidence.

d. The schools and the area in which the father and his wife live offer many advantages. The schools here are quite good. The nearby pool, parks, museums, colleges, and many other opportunities combine to make the area near where the father lives a delightful place to live.

e. These children were very happy with their father in Virginia and indicated that they wished to remain with him here where they were born and initially raised.

f. The defendant/mother refused to allow these children to be deposed either in England or in Virginia where they could have expressed their thoughts in general and in particular their desire to live with their father. If these children would have stated that they wanted to live with their mother, why wouldn't their mother allow them to be deposed?

The father sought and obtained from this Court an Order giving him Christmas visitation for a period in December, 1981 when these children would not be in school. The mother was made aware of this order by her counsel and the father both bought and made available the airplane tickets to take these children from England to the U.S. and to return them to England.

The mother refused to honor this court order, refused to allow these children to visit their father for Christmas and has made it clear that their father cannot visit his children at all in the future except in England. The mother has also been interfering with telephone visitation. The mother is attempting to alienate these children from their father.

The home study done in Virginia clearly indicates that it would be appropriate for the father to be granted the custody of these minor children. While the home study done in England favors the mother, it does not take into account even the basic facts which are either admitted or deemed admitted

in the Request for Admissions.

In particular, as shown above, the mother is deemed to have admitted that she has "had sexual relations with a single male named Mike Davies on numerous occasions while my children, Claire and Nicole Middleton, were present in the home." The mother did not deny this.

In view of the paragraph immediately above, the part of the home study done in England which begins with the last paragraph on its page 2 and which states, in part, that:

"...there is no visible evidence from the contacts I have made in my inquiries which would indicate that anything was amiss..." is sheer nonsense. Even the English home study found that Mr. Davies: "...stays with the family about once a fortnight on a weekend and has recently spent Christmas and New Years with them." What does the author of the home study think they are doing?

In view of all of the above, it is clearly in the best interests of these children that they be awarded the custodial care of their father.

II. LEGAL ARGUMENT

The issues before this court are firstly whether or not there has arisen a significant change in circumstances since the Court's award of custody to the mother which adversely affects the general welfare and the best interests of the children, and secondly, is it in their best interest that their

custody be awarded to their father. Your Complainant/father contends that the Defendant/mother's answers to the Request for Admissions filed in this cause, does in fact present evidence to show that there has been a significant change in circumstances, since the Court awarded custody of the parties' minor children to the mother. These changes in circumstances adversely affect the children's well-being and it would be in the best interests of the children to have entered an Order changing the custody of the parties' minor children from the mother to the father.

First, the Complainant/father submits that the Defendant/mother admitted having had sexual intercourse with Mike Davies, but never in the presence of the children. Yet, she does not deny she had sexual relations with him on numerous occasions while the children were present in the home; and therefore by not denying that she had sexual intercourse while the children were present in the home, she is deemed to admit that also under 4:11 of the Supreme Court's Rules. The case of Brown vs. Brown, 218 Va 196, 239 S.E. 2d 89 (1977), held that evidence of an adulterous relationship by the custodial mother which was being conducted in the presence of the children established sufficient evidence of changed circumstances to transfer custody of the parties' minor children to the father on the ground that the mother was not a fit and proper person.

Further the court went on to state that "the moral climate in which the children are to be raised is an important consideration and an illicit relationship to which minor children have been exposed cannot be condoned."

Secondly, the Defendant/mother contended that she had no way of knowing the contents of the telephone conversation between her sister and her child, Claire on August 30, 1980. Then she said that she could neither admit nor deny that Claire had stated to the Defendant/mother's sister that she wished to remain with her father in America. Yet, the Defendant/mother in the very next statement of the Request for Admissions, admitted that she was present in the same home in England where her sister called her children by telephone on Saturday, August 30, 1980 and that her sister was right there.

Rule 4:11 of the Supreme Court Rules states, in part, that "an answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny."

Clearly the Defendant/mother, as required by Rule 4:11, could not give lack of information or knowledge as reason for failing to admit or deny unless the defendant states that she made reasonable inquiry, and therefore she was under a duty

to ask her sister for this information. She was in her sister's home and the information was readily obtainable by the defendant. Therefore it is submitted that one of the parties' children, Claire, did state on August 30, 1981, that she wanted to remain here in Virginia. She did not want their mother to return her, to pick her up and take them to England. By the Defendant/mother's improper answer she is deemed to have admitted these facts. These admissions by the mother are conclusive on this issue and cannot as a matter of law be rebutted by the hearsay in the home study done in England. Rule 4:11.

Thirdly, the Complainant/father submits that the parties' minor children are old enough to express their wishes in this case and offers the Defendant/mother's answer to statement Number 20 of the Request for Admissions filed in this case to support this claim. She responded in her answer that "The children have always been told they have a choice as to where they wish to live." It has been held that the stated preferences of a 10 and 11 year old child were relevant in child custody proceedings, In Re Marriage of Bowen, 219 N.W.2d 683. Here these children are ages 12 and 10. They both wish to live with their father and their mother has agreed that they "have a choice as to where they wish to live," i.e. with their mother or their father. Their wish to live with their father should be honored by the Court, particularly since they are relatively bright children.

The Defendant/mother has clearly shown her contempt for this court first by taking these children out of Virginia in violation of this Court's Order dated September 2, 1981 which enjoined both parties from doing so and secondly, by refusing to even grant Christmas visitation after this Court ordered it and round-trip plane tickets were made available by the father.

Most importantly, the Defendant/mother has made it clear that she will not ever again allow these children to visit with their father in the United States even though they were born and initially raised here and have been visiting him here in his home for extended periods every summer since Defendant/mother returned to England.

III. Denial of Visitation

Courts have long recognized that the denial by the custodial parent of court ordered visitation rights given to non-custodial parents give to the non-custodial parent a cause of action. The reason the courts have recognized this right is not because it is a violation of a court order but rather because such a denial strikes at the very reason of visitation and is inimical to the welfare of the child.

The purpose of Court ordered visitation in cases such as this where unhappy differences have led to a divorce is so that the issue of the marriage might still enjoy a parental relationship with both parents.

It is for that reason that courts insist that the custodial parent observe scrupulously the rights of visitation awarded the non-custodial parent. The Oregon court observed

that "Every boy, or girl for that matter, need and needs desparately, both a father and mother, all the time not just part of the time." (Hughes v. Hughes, 178 P.2d 170 (1947) that courts ask the question "why is that right of visitation so important?" and in answer to its own question answered "It is not solely to gratify parental yearning. Basically, it is for the welfare of the Child." (op.cit. at 175).

The court is very aware of what it must do in either awarding custody or visitation. It does not make such decisions lightly or easily and the Court is aware that in its arrogance of wisdom it will surely cause great emotional distress to one parent if not to both. Perhaps this dilemma has been no better expressed than in the case known as In Re: Krauthoff, 191 No.App. 149, 177 S.W. 1112, wherein the Judge observed, with regard to custody,

"herein we are asked to exercise our jurisdiction as a Court of Chancery in the adjudication of an exceeding difficult, embarrassing, and important question, one that affects the most sacred feelings and reaches the profoundest depths of the human heart -which of the two separated parents shall be awarded the custody of their child. It is an unwelcome task, fraught with heavy responsibility. In its performance, however careful and sympathetic we may be, we must walk with heavy tread into the very sanctum sanctorum of parental affection, and, laying hands upon the jewel there enshrined, make such disposition of it as, in our finite wisdom, its best interest may seem to require. It is a painful duty, from which every well-regulated mind must shrink, since its performance has to do, not only with the tender relations of parent and child, but involves the future course of a human life, and perhaps may have an influence upon the destiny of an immortal soul."

It is clear from this that the Judges are aware of their heavy duty and therefore do not approach it in a frivolous vain, but rather bend all their judicial wisdom to the solving of a problem which is, in its essence, insoluble.

The Court went on to state that:

"...The custody of a child is rather in the nature of a trust reposed in the parent. It is a qualified right, given for the discharge of important trusts, and is upheld and secured only so long as the duties of that trust are faithfully carried out. Purington v. Jamrock, 195 Mass. 196, loc. at 201, 80 N.E. 802, 18 L.R.A. (N.S.) 926; In Re Moore, 11 Irish Common Law Reports, 1; Hochheimer on the Custody of Infants (2d Ed.24....")

The Courts know that generally speaking only one parent can have custody and that the child will not have "both a father and a mother all of the time" therefore the Courts try within the limits of wisdom and geography to provide a two parent atmosphere by giving the non-custodial parent a right of visitation.

The Colorado Court has made it clear that a child has a right to a conflict free two parent relationship even when the parents cannot themselves live without conflict and must sever the bonds. That Court, in affirming an award of divided custody (9 months with mother, 3 with father) quoted with approval from the Washington state court when in 1946 the question of modification of a custody award came before it. the Court observed that:

"' In determining what is for the best welfare of a child, of tender years..., the courts must consider not only food, clothing, shelter, care,

education, and environment, but must also bear in mind that every such child 'is entitled to the love, nurture, advice, and training of both father and mother, and to deny the child an opportunity to know, associate with, love and be loved by either parent, may be a more serious ill than to refuse it in some part those things which money can buy;' Brock v. Brock, 123 Wash. 450, 212 P. 550, 551 where in an order for alternating custody was upheld." Searle vs. Searle, 172 P.2d 837, 840. (1)

It is because the courts know that the two parent relationship is to be desired and where ever possible provided for, that they have, in cases where the custodial parent has thwarted that child's entitlement to a two parent relationship by denial of visitation to the non-custodial parent, modified decrees of custody to alter the custodial parent.

Such decisions span the years and the geography of this country. A few citations will clearly demonstrate this.

The California Court in the case of Moffat vs. Moffat, 612 P.2d 967 (1980) stated "the deliberate sabotage of visitation rights not only furnishes ground for modification, it is a significant factor bearing on the fitness of the custodial parent." Fully in line with this, is the Idaho case of Thurman v. Thurman, 245 P.2d 810 (1952) in which the Court, observed "Modification of a decree awarding custody of minor children to a parent who is a fit and

proper person to have such custody is proper where it appears that the custodial parent has contrived to prevent the other parent from seeing and visiting such children in the manner and spirit provided for in the Decree, and shaken their love and affection for the other parent. Swenson v. Swenson, 101 Cal. App. 440, 281 P.674."

In a leading Pennsylvania case on this matter, the Court observed that:

"When a custodial parent so obstructs the visits between the child and the non-custodial parent that the best interests of the child are no longer being served, a change of custody is warranted. Moreover, an obstruction of the right to visit the child is especially serious where, as in the present case, a court visitation order has been entered. A custodial parent who willfully ignores a visitation order and obstructs the child's visits with the non-custodial parent is little different from the parent who ignores a court order awarding custody and by force or trick snatches the child from the other parent. In both instances, extra legal means are used to defeat the other parent's established legal rights. Such conduct will not be tolerated by this court."

Research has revealed few cases in this area of denial of visitation which have been decided by the Supreme Court of Virginia. See the cases of Branham v. Raines, 209 Va. 702, 167 S.E.2d 355 (1969) and Carpenter v. Carpenter, 220 Va. 299, _____ S.E.2d _____ (1979).

There are local Virginia cases at the Circuit Court and Juvenile and Domestic Relations District Court levels which have awarded custody to the father when the mother was the

custodian of the child or children and she had denied a substantial amount of visitation. In the case of Engelking v. Engelking, In Chancery No. E-442-1 which was decided by Judge Sheffield in the Circuit Court of the City of Richmond he changed custody of three children, ages 14, 13, and 11 to the father and sentenced the mother to one year in jail for denial of visitation. She had moved to Oregon taking the children with her after two years of denying substantially all visitation and several court hearings.

In the case of In Re Tonya Michelle Cheek, in the Circuit Court of the City of Alexandria, Judge Kent changed custody of a 2 1/2 year old illegitimate daughter to the father in part because of a very substantial denial of any visitation with the child by the mother. The Juvenile Court had also given the mother a jail sentence as well as changed custody in this case. She then appealed and Judge Kent affirmed the change of custody. See also the following cases: Calhoun v. Calhoun (New York), 79 NYS 2d 702 (1948); Dimmitt v. Dimmitt (Missouri), 150 S.W. 1107 (1912); Johnson v. Johnson (Washington) 433 P.2d 217 (1967); Kellogg v. Kellogg (Oregon), 213 P.2d 172 (1949); Pamela J.K. v. Rogers D.J., 419 A2d 1301 (1980); Rutstein v. Rutstein (Missouri), 324 S.W.2d 560 at 763 (1959); and Wheeler v. Wheeler (Washington), 222 P2d 400 (1950).

IV. Alienation by Custodial Parent Against
Non-Custodial

The Courts have been equally as strong in dealing with instances where one of the parents seeks to poison the mind of a child against the other parent, especially when the party taking action is the custodial parent. This issue, like the prior one, has reached the courts often. Some of the decisions are cited below:

In the aforecited Idaho case of Thurman v. Thurman, the court observed that "the acts and conduct of the custodial parent resulting in the alienation of the love and affection which children naturally have for the other parent, is a vital and very serious detriment to the welfare of such children, and is ground for modification of the Decree with respect to such custody. Johnson v. Johnson, 102 Ore. 407, 202 P. 722; Delle v. Delle, 112 W. 512, 192 P. '966, 193 P. 569; Ritch v. Ritch, Texas Civil Appeals 195 S.W.2d 205; Rowe v. Rowe, Missouri Appeal, 20 S.2d 545; McCloud v. McCloud, Texas Civil Appeal, 9 S.W.2d 141; Capland v. Capland, Missouri Appeal 227 S.W. 894; Meffert v. Meffert 118 Ark. 582, 177 S.W. 1; Albertus v. Albertus, 178 Iowa 1124, 160 N.W. 830."

See also the cases of: Brown v. Brown (Texas), 500 S.W.2d 210 (1973); Jane Doe, Petitioner v. John Doe, Respondent, Matter of Proceeding for Support, etc. (New York) 378 NYS2d 269 (1975); Johnson v. Johnson, 102 Oregon 407, 202 P.722 (1921), Luethans

v. Luethans, 243 S.W. 801 (1951); Moffat v. Moffat (California), 612 P.2d 967 (1980); Olson v. Olson, Missouri Appeal, 184 S.W.2d 768; Peer v. Peer, 205 S.W.2d 909 (1947); Shepard v. Shepard, Missouri Appeals 194 S.W.2d 319; Sherwood v. Sherwood, 56 Iowa 608 (1881); and Williams v. Williams, Missouri Appeal, 211 S.W.2d 740.

The question of alienation of affection of a child from her non-custodial parent has recently come up in the English courts. In the case known as Re: F, (a minor) (Wardship: Appeal) the Appeals Court stated that:

"in the instant case, the most important factors were: (a) the choice between the father and grandmother, rather than a father and a mother, (b) that the grandmother's household was aging and childless, while the father was much younger and already contained another child; and (c) that the attitude of the grandmother, in contrast of that of the father, shows that the probability was that the grandmother would alienate the child from the father. Although the Judge has taken those factors into consideration, he had failed to give enough weight to them, particularly (b) and (c), or to the Welfare Officer's opinion that it would be better for the child to be with her father. Those factors were so overwhelming in favor of an Order giving care and control to the father that they should prevail unless the court were satisfied with the father and step-mother were unfit to have care and control of the child."

(1979) 1 All E.R. 417.

In the aforecited Missouri case of In Re Krauthoff, the Court stated that:

"In the case of In Re Taylor, 59 Eng. Rep. 846, it is said that 'to have a child grow up without filial respect for its parent will

have the worst possible effect upon the mind of the child! In Carpenter vs. Carpenter, 149 Mich. 138, 112 N.W. 748, it is held that any act in the part of the mother which tends, or will tend, to cause the child to lose respect for its father will be deemed sufficient cause to transfer the custody of the child to the father. In English v. English, 32 N.J. Eq. 738, loc.cit. 748, 749, it is said that if any influence is exerted over the child by its mother, or by those about it, to prejudice the child's mind against the father, it is an abuse of trust." (op.cit. 122).

V. Disregard For The Law

The custodial parent is and remains in contempt of the Orders of the Court in that the custodial parent is contravening the rights of visitation of the non-custodial parent.

Such disregard and disrespect for the lawful orders of the court of competent jurisdiction must be taken into account by this court in ruling on the petition of modified custody.

It has long been held that a contemptuous attitude towards the lawful orders of a court bears on the fitness of the custodial parent to retain custody of the child.

Certainly it cannot be in the best interest of a child to be raised in an atmosphere of contempt and disregard for the law. No parent who directly or indirectly, through themselves or through others, is openly contemptuous of the law, presents a very proper role model for the child to follow.

Any and all such contemptuous actions by a parent shows that such parent is unfit to have the care, custody and control

of a child since such a parent will nurture the child to view the law as something to be observed only at its convenience.

Courts have long viewed such activities by a parent as demonstrating unfitness and furnishing grounds for a change in custody.

The Washington Court in addressing this question observed that "In the instant case, Mr. Sweeny's conduct was not solely a matter of violating a court Order or disrespect for the court. That alone is a serious matter and might very well bear upon the determination of a parent's fitness to discipline, instruct and care for a child, certainly, a lack of respect for the courts, for law and order, may quite conceivably set an example not conducive to good citizenship or to a well-adjusted character or personality on the part of a child" Sweeny v. Sweeny, 262 P.2d 207 (1953) at 213. See also the cases of: Burns v. Burns (Kansas), 276 P.2d 301 (1954); Rutstein v. Rustein, supra; Shepard v. Shepard (Missouri), 194 S.W.2d 319 (1946); Stapley v. Stapley (Arizona), 485 P.2d 118(1971); Williams v. Williams, 211 S.W.2d 740 (1948).

VI. Primary Consideration Is Child's Welfare

Virginia's rule is that "the welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children." Mullen v. Mullen, 188 Va. 259, 49 S.E. 2d 349 (1948).

Similarly and more recently, the Supreme Court of Virginia in a case which granted custody to the father stated that: "As we have repeatedly said in determining custody, we are concerned first and foremost with what is best for the child. Always, the primary and controlling consideration is the child's welfare. All other matters are secondary." Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976). This is the rule generally in the United States. The United States Supreme Court has stated that: "Virginia law, like that of probably every state in the Union requires the court to put the child's interest first." Ford v. Ford, 371 U.S. 187, 9 L.ed. 2d 240, 244, 83 S.Ct. 273 (1962). See also 17A Am.Jur. Divorce and Separation, §818 (1957).

Similarly, the Supreme Court of Virginia stated, in affirming a lower court's award of custody of two boys, ages 5 and 3, to their father that:

The legal guidelines applicable in this case are firmly established. Code §31-15 (Repl. Vol. 1973) provides that the court, in a child custody case, shall give primary consideration to the welfare of the child and that there shall be no presumption of law in favor of either parent. There is a rebuttable inference, however, that when both parents are fit and other things are equal the mother, as the natural custodian, should be awarded legal custody of an infant of tender years. Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976). When the mother's home and the father's home are equally suitable for raising the children, we have held that "other things are equal" and that custody should be given to the mother. Lundeen v. Struminger, 209 Va. 548, 550, 165 S.E.2d 285, 287 (1969). But if the mother's home, evaluated on the basis of warmth and stability, rather than material

advantages, is not as suitable as that of the father, then custody should be awarded to the father. White v. White, 215 Va. 765, 768, 213 S.E.2d 766, 768 (1975). See Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976), where we affirmed the award of custody to the father where there as evidence that the best interests of his infant son would be served by having the child continue to reside with him.

Clark v. Clark, 217 Va. 924, 926, 234 S.E.2d 266, 268 (1977).

Again in 1977, the Supreme Court, in affirming a Circuit Court opinion which had granted custody of two daughters, aged 4 and 2, to their father, stated similarly as follows:

"the primary and controlling consideration is the child's welfare."

This latter case also said that:

"Comparing the quality of care offered by two parents, the courts are guided by histories of past performance and prospects for future performance."

McCreery v. McCreery, 218 Va. 352, 354, 355, 237 S.E. 2d 167 (1977).

The Clark and McCreery cases supra, speak of a "rebuttable inference" which is such that when both parents are fit and other things are equal, the mother, as the natural custodian, should be awarded legal custody of an infant of tender years.

In this case, it is clear that "other things are not equal." First because the mother is conducting an adulterous relationship in the presence of the children. Brown v. Brown, supra. In addition, the children want to live with their father; they are being denied even visitation with their father; their mother is in

contempt of this court; and the mother is alienating these children from their father.

Furthermore, the father offers a two parent home in an area which has many advantages; he is a respected man in the community with an excellent job; these children are happy with their father; and the mother has not submitted any evidence to rebut any of the above, even though she has been given an opportunity both near her home in England and also in Virginia to submit evidence to this court by deposition.

Thus, not only are things unequal, but there are strong reasons why these children should be awarded the custodial care of their father.

In addition, it is noteworthy that the most recent legislature passed House Bill Number 691, which amends Section 20-107. Among other things, this Bill abolishes the "rebuttable inference" mentioned above. This Bill passed the House of Delegates by a vote of 85 to 11 and it passed the Senate by a vote of 28 to 10. While it shows the sentiment of our legislature, it can not become effective until July 1, 1982; the Governor has not yet signed it.

Since the Court may have some concern about whether an English court will enforce its order, were this Court to grant custody to the father, the following is submitted.

It does appear that England's court will, in effect, give comity to a Virginia Court's decision on custody. See Re H(Infants), 1 All England Reports 886 (1966); 3 All E.R. 906 (1976).

It is also clear that Virginia's laws are substantially the same as those in England on the subject of custody. In the case of Oehl v. Oehl, 221 Va. 618, 272 S.E. 2d 441 (1980) wherein the Supreme Court of Virginia granted comity to a decision on the custody of a child which had been made by a Court in England it stated in effect, that the Virginia Court should conduct a three-fold inquiry in order to decide whether it should grant comity to an English court's decision on custody. Those three questions are:

- "(1) Did the foreign court have jurisdiction over the parties and the subject matter?
- (2) Was the procedural and substantive law applied by the foreign court reasonably comparable to that of Virginia?. and
- (3) Was the foreign order based upon a determination of the best interests of the child?"

The Supreme Court in Oehl, supra, went on to say:

"When Virginia courts find affirmative answers to all three questions, they should grant comity to the foreign order unless, since the time it was entered, a change in conditions justifies modification in the interest of the child."

"Addressing the first inquiry, we note that Mr. Oehl does not deny that the English court had subject-matter jurisdiction or that Mrs. Oehl properly invoked that jurisdiction. Nor does he contest the thesis that, by responding to lawful service of process, he submitted his person to the jurisdiction of that court. We have held that a court which has in personam jurisdiction over both parents may enter a child custody order even in the absence of the child, Gramelspacher v. Gramelspacher, 204 Va. 839, 134 S.E.2d 285 (1964)."

In this Middleton case, as in the Oehl, supra, Mrs. Middleton does not deny that this Virginia Court has jurisdiction. She has filed pleadings in this case by counsel and has submitted her person to the jurisdiction of this Court. Further, this Court has already ruled, in effect, that it has jurisdiction to decide this custody cause and that it is a convenient forum especially in view of the fact that Mrs. Middleton could have submitted her evidence to this court by taking depositions in England near her home while Mr. Middleton's attorney was in England.

As to the second inquiry, the Supreme Court stated that:

"...Virginia courts should grant comity to any order of a foreign court of competent jurisdiction, entered in accordance with the procedural and substantive law prevailing in its judicatory domain, when that law, in terms of moral standards, societal values, personal rights, and public policy, is reasonably comparable to that of Virginia."

"Virginia's jurisprudence is deeply rooted in the ancient precedents, procedures, and practices of the English system of justice. A substantial portion of '[t]he common law of England' and the 'writs, remedial and judicial, given by a statute or act of Parliament, made in aid of the common law' have been legislatively incorporated in the law of this Commonwealth. Code §§1-10 and -11. As the record in this case illustrates, the prevailing English rules of procedure comport favorably with the concept of procedural due process as that concept has evolved in this State and Nation. And nothing in the substantive law of child custody and parental rights of visitation applied by the English court is contrary to our own law."

The Supreme Court then concluded as follows:

"...Finding affirmative answers to each of the questions in the three-fold inquiry we have

pursued, we hold that the chancellor erred in refusing to grant comity to the English order. It follows that he also erred in predicating suspension of spousal and child support payments upon denial of comity. The order appealed from will be reversed. The cause will be remanded for the entry of a new decree vacating the June 30, 1978 order, granting comity to the English Order, and reinstating the former spousal and child support award nunc pro tunc June 30, 1978."

This recent ruling by the Supreme Court of Virginia will probably be of some assistance in convincing an English court that it should similarly grant comity to an order of this Court on the issue of custody.

VII. Conclusion

For all of the above reasons, the Complainant/father respectfully requests that this Honorable Court grant him custody of the parties' two minor daughters.

Respectfully submitted,
BRIAN C. MIDDLETON
Complainant/father
By Counsel

B. VanDenburg Hall
B. VanDenburg Hall
Counsel for Complainant/father
Suite 400, Equity Building
4085 Chain Bridge Road
Fairfax, Virginia 22030
(703) 385-8777

RECEIVED AND FILED

MAR 29 1982

Certificate of Service

LEWIS H. VADEN, CLERK

I hereby certify that I have this 25th day of March, 1982, mailed, postage prepaid, a true copy of the foregoing Brief to Donald K. Butler, Esquire, MORANO & BUTLER, Counsel for Defendant/mother, at 526 North Boulevard, Richmond, Virginia 23220.

B. VanDenburg Hall
B. VanDenburg Hall

12th Judicial Circuit

County of Chesterfield
City of Colonial Heights

JUDGES CHAMBERS

CHESTERFIELD, VIRGINIA 23832

April 7, 1982

ERNEST P. GATES
JUDGE

D. W. MURPHEY
JUDGE

Donald K. Butler, Esq.
Morano & Butler
526 North Boulevard
Richmond, Virginia 23220

In re: Middleton
vs. #3305-77
Middleton

Dear Mr. Butler:

Do you wish to respond to Mr. Hall's brief filed on March 26, 1982? If so, please do so within ten days and thereafter arrange a hearing date with the court for you and Mr. Hall.

Sincerely yours,

Ernest P. Gates, Judge

EPB/wgwc

cc: B. Vandenburg Hall, Esq.
4085 Chainbridge Road
Fairfax, Virginia 22030

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

BRIAN C. MIDDLETON

Complainant,

v.

SHEILA JOAN MIDDLETON

Defendant.

CHANCERY NO. 3305-~~37~~

DEFENDANT'S BRIEF

Donald K. Butler
Counsel for Defendant
526 North Boulevard
Richmond, Virginia 23220
(804) 353-4931

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However, the situation seriously deteriorated the summer of 1981, when, at the conclusion of the prearranged summer visit with their father, Mr. Middleton refused to return the children to England at the conclusion of visitation as prearranged. On August 25, 1981, the mother received by mail a copy of the Notice of a proceeding pending in this Court for a change in custody. A telephonic communication with the father revealed that he had no intentions of returning the children. Thereupon, Mrs. Middleton traveled to this country and retrieved her children back into her lawful custody and returned them to England.

Upon learning that Mrs. Middleton had done this, Mr. Middleton immediately had counsel appear ex parte before this Court and obtain a restraining order enjoining her from removing the children from the Court's jurisdiction. However, neither this order nor any notice of that hearing was ever served upon her and she had no knowledge of it until she returned to England. The only evidence of her knowledge of this order was inadmissible as hearsay, and the Court so ruled.

After this Court ruled on the defendant's jurisdictional motions, evidence has been presented in the form of testimony from witnesses on behalf of the complainant and in the form of reports of social workers in England and in Fairfax County. Counsel for the defendant provided a copy of the England report to counsel for the complainant. However,

counsel for the defendant does not have the benefit of the Fairfax County report, but for the purposes of this brief assumes that it reports favorably on the suitability of Mr. Middleton's home and the environment in which the children would be placed if custody were awarded to him. Indeed, Mr. Middleton's evidence, unrefuted by the defendant, shows that the physical environment that will be provided to the children in his custody is quite suitable and that he has adequate income to provide for their material needs. In fact, this is all that his evidence shows.

On the other hand, the report from England on the mother and the children shows that the home, schools and environment are all suitable, that the children are thriving therein and are well-cared and provided for, and that while they love their father, they prefer to remain in England and with their mother.

ARGUMENT

The defendant will not cite the endless number of cases that stand for the proposition that in determining custody, the best interests of the children controls. The central issue in this case is the fitness of the mother to continue to have custody of her children. While the complainant herein has the terrific burden of proving unfitness since the mother has previously been awarded custody and he is seeking a change in custody, the defendant maintains that the evidence shows that not only is she not unfit, but that the children's welfare is better served by their custody

being awarded to her and that there is some question of the father's fitness.

The allegations made by Mr. Middleton throughout these proceedings and his initial Petition are of particular significance in view of the nature of those allegations, their obvious design, and the absolute lack of any evidence in support thereof. Among other things, Mr. Middleton has accused the mother and custodian of his impressionable children of the following:

1. That she has taken into her home an unknown number of lovers, strangers to her children, over the past five years and has appeared in the nude in the presence of men on a number of unspecified occasions in the presence of the children.

2. That she has excepted monies and gifts from numerous men in exchange for sexual favors and that such gifts were made known to the children.

3. That she has invited a number of policemen into her home for the purpose of sexual intercourse while the children were present.

4. That she has brought into their home unknown males for the purpose of sexual intercourse and has caused fear and mental anguish in the children because of the presence of those unknown males in her home.

5. That she has no hobbies and spends her leisure time in public bars.

6. That she provided the children with boyfriends ages

20 and 23, on a recent vacation in Portugal.

7. That Nicole has run away from home several times because she desires to live with her father.

8. That both children have expressed a desire to be in the custody of their father.

9. That she does not have a college education and works as a nursery school teacher's aide.

Counsel cannot help but note the "quality" of these allegations and the total lack of any evidence in support of any of them except the last, for what that is worth. One must question the fitness of a parent who would accuse the other of such heinous conduct without any basis whatsoever. Were the allegations fabricated to make out an obvious case of unfitness, in the hope that because of the geographical and financial barriers, the defendant would be unable to refute them? Is the complainant's strategy here to make the accusations, knowing that there is not evidence to support them, but hoping that the Court would be so easily misled that it would believe there had to be some basis for the allegations just because they were made?

Apparently the complainant had one or more of these designs in mind when he unilaterally withheld the children at the children at the conclusion of visitation and in violation of the terms of the custody decree. One can only imagine his surprise when Mrs. Middleton showed up here and retrieved the children back into her lawful custody.

He must have been further miffed when the Court requested a social report on Mrs. Middleton's and the children's situation and it showed that there was absolutely no validity to his serious and damaging allegations.

Because of this total lack of any factual basis for the allegations of misconduct that have been made by Mr. Middleton, it is no wonder that in his brief he grabs at procedural straws and seeks to discredit the homestudy done in England.

The complainant wants us to accept his wishful thinking that the children desire to live with him, and in order to prove that, he seeks to have us fall into some procedural trap in the Requests for Admissions. So, while it is obvious from the homestudy and the letters of the children to the Court that they desire to remain with their mother, the complainant wants the defendant to be deemed to have technically admitted that the children have expressed a desire to live with him. How is this conclusion reached? The complainant would have us reach it by making certain presumptions regarding a telephone conversation that took place on August 30, 1980, between Claire and the sister of the mother. By not making an effort to determine from the sister the contents of that telephone conversation, the complainant would have us deem the mother to have admitted that its contents were an expression on the part of Claire that she wanted to live with her father. The complainant further seeks to bolster his position by pointing out that the mother has admitted that the children

have always been told that they had a choice as to where they wish to live, but there appears to be lacking any evidence as to what that wish is except for the homestudy report from England.

Lastly, the complainant concludes that procedurally, the mother is deemed to have admitted his allegations of her promiscuity and exposing the children to the numerous men with whom she has had sexual encounters. This conclusion is somehow carved out of her failure to give an answer to his requests for admissions satisfactory to the complainant, although she denies involvement with anyone except Mike Davies.

With regard to the Mike Davies "affair," the defendant has admitted intimacy with him, and only him, and the homestudy bears this out. While the homestudy is attacked as being blindly done, as the complainant's brief points out, the relationship with Mike Davies is reported. However, because it does not corroborate the ludicrous allegations of promiscuity made by the complainant, he would have us disregard it entirely.

In view of the fact that by the mother's own admissions, it has been proved that she has had intimate relations with Mike Davies on occasions while the children were in the home, the father seeks to apply the case of Brown v. Brown, 218 Va. 196, 239 Southeastern 2nd 89(1977), to the facts in this case. Complainant cites that case as standing for the

proposition that evidence of an adulterous relationship by the custodial mother conducted in the presence of children establishes sufficient evidence of changed circumstances to transfer custody of the children to the father on the ground that the mother is not a good and proper person to maintain custody. Not only is that case distinguishable on the facts, but it does not state the proposition that the complainant attributes to it.

In Brown, the custodial mother was living with a male to whom she was not married. Further evidence in the case indicated that Mrs Brown was not a good housekeeper and that the children were not cared for in many respects and were neglected. One child had developed a hyperactive condition during the separation which improved while in the father's custody, and the improvement in health and behavior of the children while in his presence was also observed by witnesses in the case.

In stating its disapproval of this living arrangement, the Supreme Court of Virginia stated as follows:

"In the instant case, there was testimony that the relationship between Mrs. Brown and Mr. Leith had an adverse impact on the parties' two children. Their adulterous relationship was admitted. They were openly cohabiting in the presence of her two young children. The Court found as a fact that appellant had maintained her home under these conditions over an extended period of time. The Court therefore ruled that this adulterous relationship rendered Mrs. Brown an unfit and improper person and an improper person to have the care and custody of these children." Brown at page 200.

Therefore, the Brown case stands for the proposition that a custodial parent who provided an immoral climate for

the children which has an adverse impact upon them may be deemed to be unfit to have their care and custody. In the instant case, there is absolutely no evidence of any adverse impact on the children of Mrs. Middleton's relationship with Mr. Davies. Whether or not this is because she is not living with her paramour, as was Mrs. Brown, is not clear, but that is also another significant distinction between these two cases. The homestudy reflects that the environment is suitable and that the children are well adjusted and happy. These facts certainly do not square with those in Brown.

Finally, it is interesting to note two other reasons set forth by the complainant for a change in custody. First, he says that because the mother has attempted to alienate the children from him, that this should be another reason for changing the custody, and numerous cases are cited in support thereof. The defendant adopts that legal argument, but would point out that the facts show that it is the father who has sought to alienate the children from the mother. He is the one who has tried to proselytized them into saying that they wanted to live with him; he is the one who has accused her of unspeakable conduct for which there is no factual basis. Certainly, he did not expect that the children could be shielded from the knowledge of these allegations.

Secondly, he states that her attempts to deny him visitation is another basis for a change in custody; that

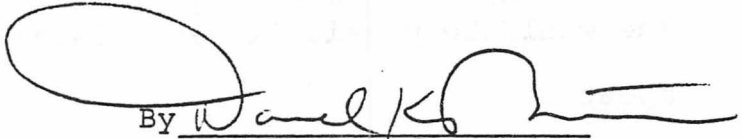
her flaunting of the lawful orders of the Court is an indication of her unfitness. However, the facts point out that it was the father who initiated the flaunting of the court orders by retaining the children here rather than returning them to England. If he wanted to institute custody proceedings, he could have done so in a lawful manner by abiding by the present orders of the Court. However, as stated above, he undoubtedly felt that if he retained the children here, that she would be physically and fiscally unable to do anything about it.

SUMMARY

Counsel for the defendant cannot help but observe the tragedy of this entire proceeding and the recent events. Here obviously are two very bright young girls who have been happy and well adjusted living with their mother and maintaining substantial contact with their father in spite of the fact that they are an ocean apart. The children have expressed to the social worker in England that they love their father and want to continue to have as much contact with him as possible, and there is absolutely nothing to keep that from happening. Contrary to what Mr. Middleton has alleged and may think, Mrs. Middleton has no desire to cut off his contact with his children for the very reason that the children desire to maintain this relationship with him. However, somewhere along the line, he has decided upon a course of conduct that has forced her to become very defensive in guarding her position as the custodian of these children.

The Court and Mr. Middleton can rest assured that she will comply with the orders of this Court regarding any visitation orders that may be entered. Hopefully, once the matter is resolved, Mr. Middleton will also favor the Court with obedience of its orders and the children will be able to enjoy this summer with him and his present wife without the cloud of this unpleasant litigation hanging over them.

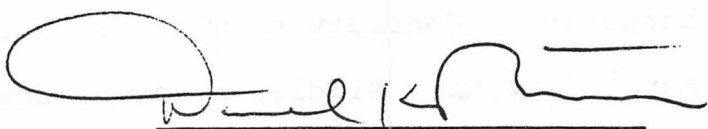
SHEILA JOAN MIDDLETON

By 
Of Counsel

Donald K. Butler, p.d.
Morano & Butler
526 North Boulevard
Richmond, VA 23220

CERTIFICATE

I hereby certify that a true copy of the foregoing Defendant's Brief was mailed, postage prepaid, this 16th day of April, 1982, to B. VanDenburg Hall, Esq., Suite 400, 4085 Chain Bridge Road, Fairfax, VA 22030, counsel for the complainant.


Donald K. Butler

RECEIVED AND FILED

APR 19 1982

LEWIS H. VADEN, CLERK
BR

3305-77

LAW OFFICES
MORANO AND BUTLER
526 NORTH BOULEVARD
RICHMOND, VIRGINIA 23220

DONALD K. BUTLER
JAMES F. MORANO, JR.
CHARLES L. ROGERS

TELEPHONE (804) 353-4931

April 26, 1982

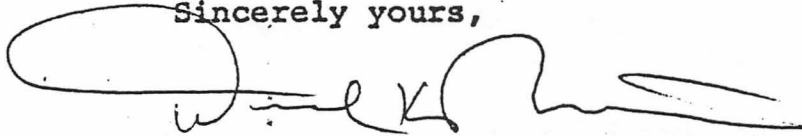
B. VanDenburg Hall, Esq.
Suite 400, Equity Building
4085 Chain Bridge Road
Fairfax, VA 22030

Re: Middleton v. Middleton

Dear Mr. Hall:

Now that my response to your brief has been filed, I believe Judge Gates wants us to set a date for oral argument. If you will give me your avoid dates, I will schedule the hearing and call you to confirm the time.

Sincerely yours,



Donald K. Butler

DKB/aas

cc The Honorable Ernest P. Gates, Judge

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APR 27 1982

CHESTERFIELD CIRCUIT COURT
JUDGES CHAMBERS

J. R. WAITE & ALSOP

SOLICITORS
AND COMMISSIONERS FOR OATHS

ALSO UNDER THE STYLE OF
HEWITT, BROWN-HUMES & HARE

J. E. BROWN-HUMES

A. S. HARE, LL.B.

D. C. PATTISON

C. HEWITT, LL.B.

W. A. GOYDER, M.A., LL.B.

D. B. CUNNINGHAM

CONSULTANTS

J. R. DIXON F. ALSOP

YOUR REF.

IN YOUR REPLY PLEASE QUOTE

WAG/AW

11 Duke Street,
Darlington,
Co. Durham

DL37RY

TELEPHONE: 66074/5

11th June 1982

Dear Sir,

file
Re: Middleton -v- Middleton
Chancery No: 3305 - 77

At the request of Mr. Butler we enclose herewith Mrs. Middleton's Affidavit of today's date.

Yours faithfully,
J. R. Waite & Alsop
J. R. WAITE & ALSOP

His Honour Judge E. Gates,
12th Judicial Circuit,
County of Chesterfield,
City of Colonial Heights,
Judges Chambers,
Chesterfield,
Virginia 23832,
United States of America.

RECEIVED

JUN 14 1982

CHESTERFIELD CIRCUIT COURT
JUDGES CHAMBERS

enc.

335
ALSO AT: 5 MARKET PLACE, BISHOP AUCKLAND. Telephone: 604691-5
9 CHURCH STREET, SHILDON. Telephone: 2163 & 2936
21 DALTON WAY, NEWTON AYCLIFFE Telephone 316170

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF

CHESTERFIELD

Chancery No: 3305 - 57

BRIAN C. MIDDLETON

Complainant

-v-

SHEILA JOAN MIDDLETON

Defendant

AFFIDAVIT OF THE DEFENDANT

J. R. Waite & Alsop,

11 Duke Street,

Darlington,

County Durham,

England.

Solicitors for the Defendant

AFFIDAVIT

I, SHEILA JOAN MIDDLETON, housewife, of Flat 6, Ridley Court, Norton, Stockton on Tees, Cleveland, England MAKE OATH and say as follows:-

1. I am the Defendant in these proceedings for a variation of the custody order relating to the children Claire Michelle Middleton and Nichole Amie Middleton hereinafter referred to as the children.

2. I have been informed by Mr. Donald Butler my Virginia Attorney that the Learned Judge in these proceedings the Honourable Ernest Gates has requested from the Bench that I should supply written representations within 14 days from the 2nd day of June 1982 as to my willingness to comply with any orders which the American Court may make, and that no final order is to be made in these proceedings until such representations are received.

3. As already explained in my Affidavit sworn on the 20th day of November 1981 in the proceedings in the Newcastle Upon Tyne District Registry of the High Court of Justice (Family Division) No. WG 621/81 and exhibited hereto marked "SJM 1" I am powerless to give any undertakings, expression of future intention, or promises with regard to relinquishing "my" custody of the said children of the family since those children are no longer in my custody. They are in the custody of the High Court of Justice (Family Division) and I am advised that it is that Court and that Court alone which can make any decision with regard to their custody whilst the said children are within the jurisdiction of the English Court.

4. If this Honourable Court were to make an order in favour of the Complainant then under English law the Complainant would have to apply to the High Court of Justice (Family Division) for the effective custody of the said children, and for leave to remove them from the jurisdiction.

5. At present, according to the order of the English Court dated the 23rd day of November 1981 I have the care and control of the said children. Accordingly I promise and agree to do everything in my power to ensure that the children maintain contact with the Complainant according to such rights of visitation which may be granted to him by this Honourable Court.

6. In order to permit the temporary removal of the children from the jurisdiction of the English Court I will of necessity have to make an application to the High Court of Justice (Family Division). I am prepared so to do. I am advised however and verily believe that the English Court will not grant leave for the children to be removed from the jurisdiction unless it is absolutely clear that the Complainant will return them to me at the end of the period of visitation.

7. I am anxious that my representations should not in any way cause offence to or appear disrespectful of the Learned Judge the Honourable Ernest Gates or of the Circuit Court of Chesterfield County. However, I would respectfully urge the Court to have regard to the fact that my motivation has always been governed by what I regard to be in the best interests of the children.

Sworn at Darlington

in the County of Durham

this 11th day of June 1982

Before me,

J G Middleton.

[Signature]

Solicitor/Commissioner for Oaths

Empowered to Administer Oaths

FAMILY DIVISION

PRINCIPAL REGISTRY

IN THE MATTER OF CLAIRE MICHELLE MIDDLETON AND

NICHOLE AMIE MIDDLETON (MINORS) AND IN THE MATTER OF THE

LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1949 AND IN THE

MATTER OF THE GUARDIANSHIP OF MINORS ACT 1971 AND 1973

B E T W E E N:

SHEILA JOAN MIDDLETON

Plaintiff

-and-

BRIAN CARTER MIDDLETON

Defendant

I, SHEILA JOAN MIDDLETON, Nursery School Assistant,

make oath and say as follows:-

1. I live at Flat 6, Ridley Court, Norton, Cleveland.

I am employed as a Nursery School Assistant.

2. I married Brian Carter Middleton on the 17th February 1962 at Yarm Road Methodist Church, Stockton on Tees, Cleveland.

3. We have two children Claire Michelle Middleton born on the 4th September 1969 and Nichole Amie Middleton born on the 9th September 1971.

4. In 1967 we emigrated to the United States of America because of my husband's wish to obtain employment there.

we lived in Richmond, Virginia, until 1974. The marriage broke down, and I returned to England in 1974. The Defendant remained in the United States of America, and commenced divorce proceedings in the Circuit Court of Chesterfield County Virginia (Chancery No: 3305/77) in 1977. The final Decree was granted in August 1977 on the grounds of a one year separation. Custody of the agreement between the parties dated 31st May 1977. Under the same agreement the Defendant was allowed reasonable rights of visitation.

5. The children who have dual Anglo/American Citizenship have lived exclusively and continuously in England with me since separation in 1974. Since the Summer of 1978 the children have spent their Summer holidays with their father in the United States, and until this year the arrangement has worked satisfactorily. Claire attends the Ian Ramsey Comprehensive School, Hartburn, Stockton on Tees, and Nichole attends Harrogate Primary School, Stockton. Claire is top of her class, and Nichole is normally approximately third in her class. Both girls are doing well at school, and take part in a wide variety of school activities including skating, swimming, gymnastics, drama and Church activities.

6. As part of the agreement in divorce proceedings the Defendant pays maintenance of 200 dollars per month to me for the children. There are no arrears of maintenance under this agreement. I wish to make it clear that despite the divorce, the Defendant and I have remained

on reasonable terms and have normally been able to discuss matters affecting the children in an amicable way.

7. On the 24th July 1981 the children left England to spend their Summer holidays with the Defendant in accordance with our usual arrangement. The normal pattern is for him to meet them at the Airport in the United States, and at the end of the holiday he telephones me to confirm that he is to see them off at the agreed time and to arrange for me to meet them at Heathrow Airport. This year I expected them to return to Heathrow at 9 a.m. London time off British Airways flight BA276M.

8. However, on the 25th August 1981 I received by post a Notice of Motion by the Defendant in the Circuit Court of Chesterfield County with a petition in the same Court

~~a Change of Custody.~~ The hearing date for the Motion was the 22nd September 1981. I had received no communication whatsoever from my husband about any decision of his to apply for a variation of the custody order, and I did not know whether he intended to return the children as agreed previously to commence their new school term on the 2nd September. I subsequently received a telephone call from the Defendant who stated that the children would not be returning home, and they did indeed not arrive at Heathrow Airport. On the telephone the Defendant informed me that he considered that the children's future lay in America. He is now a Vice-President of the United Virginia Bank, Washington D.C., he has remarried and lives in a comfortable house at 4463 Eden Mae Court, Annandale, Virginia.

9. By the 31st August 1981 it was apparent to me that the Defendant would not voluntarily return the children to my lawful custody, and that he intended to retain them pending the outcome of his application to the Virginia Court. Accordingly on that date I flew to the United States with my Uncle Mr. John Gibbs of 12 Woodfield Road, Faling, London West 5, who had agreed to assist me in ensuring that the children returned to England in time for the new school term. After taking legal advice in Washington on Tuesday, 1st September, we drove to Annandale. We parked the car in the street outside the house, and soon afterwards the children came out. We talked to them and they informed us that they had been left alone, both the Defendant and his wife having gone to work. We asked the children to get into the car to talk to us. They were naturally amazed to see us, but we suggested that they should come round the corner to have a coke to talk matters over. Claire agreed to do so and I promised her that there would be no question of forcing them the return to England if they wanted to stay in America. We then went to a Restaurant where we had a long discussion with the children, both of whom decided that they wished to return home with me. They both realized the complications which would follow if they tried to contact the Defendant before returning home, but we took steps to inform him and that the children were safe and well and in my care and control. We flew back to England on the night of Thursday, 3rd September. Soon after we arrived at Heathrow Airport on the following day, Friday 4th September, the children

were made wards of Court. I then took them home and they were able to go back to school on Monday, 7th September, having only missed the first three days of term.

10. Following the discussions with my American Attorneys they filed an Answer to the Petition for Change of Custody denying the allegations made against me and also filed a Plea to the Jurisdiction asking that the Defendant's Petition be dismissed on the grounds that the Virginia Court lacked jurisdiction or that it should decline jurisdiction. The Defendant presented evidence to the hearing before the Virginia Court on the 22nd September 1981, and the Court then asked that before further evidence was heard legal memoranda should be filed on the jurisdictional issue. Such memoranda were duly filed and on the 27th October 1981, Judge Ernest Gates overruled my Plea to the Jurisdiction. He held that the Virginia Court had continuing jurisdiction because the circumstances were convenient for the matter to be disposed of in Virginia. He further ruled that the Attorney for the Complainant (Mr. Middleton) was entitled to take depositions from myself and witnesses including the children in England during November since he had indicated to the Judge that he would be in England at that time in any event.

11. On the 4th November 1981 I was informed by my Solicitor that the Virginia Court had dismissed my application to decline jurisdiction and granted leave to the Defendant to take depositions from the children and myself. On the same day I was informed that the Defendant's Attorney, Mr. Vandenburg Hall had sent a

telephone message to my Solicitors stating that he wished to see me at the Offices of Freeman Daly & Jacks, Solicitors of Darlington at 9.30 a.m. and that he wished to see the children at 11.30 and 12.30 respectively.

I instructed my Solicitor that the giving of such evidence would be distressing for the children, and prejudicial to my case, since I was fully aware of the nature of the questions which were to be put to me, having seen a copy of the Defendant's Request for Admissions in the Virginia proceedings. My Solicitors took Counsel's Opinion and subsequently informed Mr. Vandenburg Hall that we were not prepared to comply with their request.

12. On the 6th November 1981, I was informed by my Solicitor that my American Attorney was very concerned about the consequences which might follow if the children and I did not take part in the deposition taking. Mr. Butler advised my Solicitors that it was likely that the Virginia Court would grant an immediate Custody Order by reason of my default and that it was also likely that the Defendant would thereby be relieved of the responsibility of paying maintenance to me for the children.

13. In his Request for Admissions in the Virginia proceedings the Defendant has made a number of allegations of sexual impropriety against me. I do not dispute that I have had sexual relations with my friend, Mr. Michael Davis.

I have known him for two and a half years. He is a Mechanical Engineer who came to work in the Teesside area in February 1979. We have been going steady for many months, and it is correct that he stayed the night at

weekends at my home from time to time. He was made redundant in early 1981 and moved to Chester where he now works. I do not dispute that sexual intercourse took place but this was always in private. I do not understand why the Defendant objects to me having a normal sex life and he never objected to us having sexual intercourse during the marriage on the grounds that the children were in the same house. I have never had sexual intercourse in the presence of children, nor have I appeared in the nude in the presence of men or accepted monies and goods from men in exchange for sexual favours in the presence of the children as he alleges. I am horrified by the allegations made against myself and Michael Davis in particular, which appear to be fabrications of the Defendant's imagination resulting from his discussions with the children while they have been in America. In fact the children are very fond of Michael, and we go to stay with him from time to time in Chester.

14. Likewise I totally deny the allegations that I have had sexual relations with Mr. John Clay, Mr. Gordon Brough, and Mr. Alistair Chaffer. The mere fact that these men are mentioned demonstrates the wildness of the allegations against me, since the men whose names are mentioned are former family acquaintances. I have seen John Clay and Gordon Brough from time to time during the past few years, but I deny the allegations made by the Defendant in respect of them. Alistair Chaffer was a friend of ours when we lived in Richmond, Virginia, and

I last saw him in 1974. I have no idea where he now lives. I also deny the allegation that I have brought unknown males to the house for the purpose of sexual intercourse causing fear and mental anguish to the children, or inviting Policemen to the house for the purpose of sexual intercourse. Once again it seems that the Defendant has allowed his imagination to feed upon information supplied to him by the children, leaving him to draw inferences from the facts which are both offensive and untrue.

15. I wish also to deal with the allegation made by my husband that Claire was sent to live with her Aunt, Mrs. Dinsdale. It is correct that in order to enroll her at the Ian Ramsey Comprehensive School, Fairfield, Stockton on Tees, I registered her address as 1A Quebec Road, Hartburn, Cleveland, the address of her Aunt, as that address is in the catchment area of the Ian Ramsey Comprehensive School. I think that this is the best school in Stockton and I only did this with the interest of Claire in mind. Claire knew perfectly well that she was not going to live with her Aunt, Mrs. Edna Dinsdale and she will confirm if necessary that she was in no doubt about the reason for her being enrolled under the different address. I appreciate that it may have been improper for me to give her Aunt's address, but it was suggested by the Headmaster of the school at which I work that I should do this to ensure that Claire went to a good school. I also deny that Nichole has ever left home. There is no truth in this

allegation at all. I also dispute that either of the children has ever expressed a wish to live with their father either in Virginia or elsewhere. I also deny that I lied to Mr. Middleton about the date of the ending of the School Term. The children normally visit America for approximately five weeks during the Summer holidays. I accept that in a letter written to him at the beginning of the 1981 Summer holiday I may have made a mistake about the date of the School Term end. I realized the mistake after I had written to him but at that time it was too late to alter the travel arrangements which had already been made. He still saw the children for a full five weeks during the Summer of 1981.

16. The Defendant also wishes me to admit that the children have in various telephone conversations told me that they wish to live in America. I agree that there was a telephone conversation soon after I received the Petition for Change of Custody. I was very emotional and upset at the time, and I do not clearly remember the conversation but I do remember that the children great pressure to make statements to the effect that their future lay in the United States of America. It seemed to me that this was an idea that their father had tried to impress upon them. In fact when I arrived in America, Nichole's first words were "If Daddy knows your here word war Three will break out". We then had a discussion, leading to a longer discussion in the car and I was quite satisfied after talking to both children that they wanted to come home with me.

It is quite wrong to suggest, as the Defendant does, that the children were unwilling to return to England. Further I have always tried to encourage the children to think well of their father, and any presents which he has sent to the children, whether in the form of money or clothing, have always been passed on to them. Due to the difference between American and English clothes for girls, there have been times when the children have thought that the clothing sent to them from America has not been suitable, but I have always tried to shield the Defendant from this knowledge because I was grateful to him for showing an interest in the children.

17. The Defendant has suggested that there was a specific verbal agreement that I would allow the children to live with their father in America upon reaching the age of 10 years if this was their wish. There was no such verbal agreement but I have always told the children and their father that if they expressed a strong wish to live with him I would not wish to prevent them. However, at the present time they are content with me and I think it is in their best interests that they should remain with me for the time being.

18. In conclusion I wish to add that I totally reject the implication in all the allegations made against great pressure to make statements to the effect that their future lay in the United States of America. It seemed to me that this was an idea that their father

had tried to impress upon them. In fact when I arrived in America, Nichole's first words were "If Daddy knows your here word war Three will break out". We then had a discussion, leading to a longer discussion in the car and I was quite satisfied after talking to both children that they wanted to come home with me. It is quite wrong to suggest, as the Defendant does, that the children were unwilling to return to England. Further I have always tried to encourage the children to think well of their father, and any presents which he has sent to the children, whether in the form of money or clothing, have always been passed on to them. Due to the difference between American and English clothes for girls, there have been times when the children have thought that the clothing sent to them from America has not been suitable, but I have always tried to shield the Defendant from this knowledge because I was grateful to him for showing an interest in the children.

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18. In conclusion I wish to add that I totally reject the implication in all the allegations made against me by the Defendant that I am a person of low moral of the Order of the Court, and the pending application, it was impossible for them to comply with this Request.

20. I believe that I can provide a secure and happy home for the children as I have done continuously since their birth. I do not believe that it would be in their best interest for them to move to America at this stage in their education and upbringing. I feel that the manner in which the Defendant attempted to retain the children in the United States of America, and the litigation which he is now pursuing in that Country is not in the best interests of the children, and that it is oppressive and prejudicial to the Wardship proceedings before this Honourable Court that I should be required to give evidence in the Defendant's Virginia proceedings. I also feel that it is vexatious of him to pursue those proceedings knowing that as soon as the children returned to this Country I applied that they should be made Wards of Court, and that all future questions regarding their care and control should be decided by this Honourable Court.

Sworn at DARLINGTON

J. F. MIDDLETON

in the County of DURHAM

this 20 day of November 1981

Before me, GEORGE N. ROBSON

Freeman, Daly & Jacks

Solicitors · Commissioners for Oaths

J B JOHNSON R N B METCALFE LL B.
J FREEMAN D I PERKINS LL B.
F A JACKS S O STAPLEY BA

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S.T.D. CODE 0385

Also at 11, Victoria Road, Darlington DL1 5SP

Please call for Mr Turnbull

OUR REF AT/ET
YOUR REF WAG/JW

11th November 1981

Messrs. J.R. Waite & Alsop,
Solicitors,
11, Duke Street,
Darlington,
Co. Durham.

Dear Sirs,

re: Middleton -v- Middleton

We refer to the Writer's telephone conversation with Mr. Coyder this morning and confirm that we have been instructed by Mr. Middleton's American Attorney, Mr. B. Vandenburg Hall to request you to sign forthwith a Consent to Vacate the Interim Injunction which your Client obtained on Monday. In addition he requires you to produce your Client and the two Children at our Darlington Offices tomorrow at the times previously stipulated to enable the Depositions required in the Virginian Court proceedings to be taken.

We are instructed further to notify you that if you are not prepared to do as Mr. Hall requests, and in that regard we confirm Mr. Coyder's refusal, then Mr. Hall will be obliged to return to this country at a later date at your Client's expense or alternatively will seek an Order from the Virginian Court requiring your Client and the two Children to return to Virginia to enable Depositions to be taken there.

Finally, we confirm that at this stage we have no instructions to accept service of any proceedings.

Yours faithfully,
FREEMAN, DALY & JACKS
G. A. T. Jacks

This is the exhibit referred to marked S.J.M.1. referred to in the

Affidavit of Sheila Joan Middleton.

Sworn at

DARLINGTON

in the County of

DURHAM

Before me,

GEORGE N. ROBSON

Commissioner of Oaths.

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

Chancery No: 3305 - 57

BRIAN C. MIDDLETON

Complainant

-v-

SHEILA JOAN MIDDLETON

Defendant

EXHIBIT "SJM 1"

This is the exhibit referred to and marked "SJM 1"
referred to in the Affidavit of Sheila Joan Middleton.

Sworn at Darlington in the County of Durham
this 11th day of June 1982

Before me,


Solicitor/Commissioner for Oaths

J. R. Waite & Alsop,
11 Duke Street,
Darlington,
Co. Durham.
England.

Solicitors for the Defendant