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Comment

THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE CONTINUING IMPORTANCE OF FERREIRA v. FERREIRA

In Ferreira v. Ferreira, a consolidation of two suits between divorced parents, the California Supreme Court responded to the complex human and legal problems raised by interstate child custody disputes. The case presented an archetypical dispute: one parent, dissatisfied with the arrangement mandated by a divorce decree issued in one state, sought modification of the custody provisions in his own state during a visitation period. The result was a flurry of conflicting suits initiated in succession by the warring parents, each attempting to establish a superior right to custody of the children.

The California Supreme Court attempted to disentangle the custody issues by adding a significant innovation to the established California rule of concurrent jurisdiction in child custody disputes. The court greatly expanded the scope of the forum non conveniens stay, making the stay fully applicable against a California party. Soon afterwards, however, the California Legislative mooted the court's appraisal of the child custody issues considered in Ferreira by its adoption of the Uniform Child Custody Jurisdiction Act. The Legislature's enactment of the Uniform Child Custody Jurisdiction Act codified many of the principles advanced in Ferreira but rejected the concurrent jurisdiction theory the court had there affirmed. Although the outcome of most cases would be the same under either the Act or Ferreira, the Act

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The Uniform Child Custody Jurisdiction Act was enacted by the California Legislature in September 1973, exactly as drafted by the National Conference of Commissioners on Uniform State Laws in 1968. California is the sixth state to adopt the Act after North Dakota (1969), Wyoming (1972), Hawaii (1973), Colorado (1973), and Oregon (1973). There are no published appellate opinions interpreting the Act in any of these states. For a complete discussion of the Act, see Bodenheimer, "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws," 22 Vand. L. Rev. 1207 (1969) [hereinafter cited as Bodenheimer].

Copies of the Act with Prefatory Note and Comments may be obtained from:
National Conference of Commissioners
On Uniform State Laws
1155 East Sixtieth Street
Chicago, Illinois 60637
proceeds from an analytic and conceptual framework that is quite different from that relied on by the California Supreme Court.\(^8\) Ferreira's only importance in the custody area now is as a backdrop for this legislative response. Ferreira, however, remains an important case in California law because the decision appears to mark a landmark change in the law of forum non conveniens.

This Comment will first discuss the problem of interstate child custody and define the interests of the parties involved—interstate children, their parents and the state. The effect of the solutions offered by Ferreira and the Uniform Act on the legitimate interests of the participants will be evaluated and an interpretation of the new Uniform Child Custody Jurisdiction Act offered in light of Ferreira and previous California case law. Finally, the court's extension of the forum non conveniens stay to inconvenient suits initiated by California plaintiffs\(^4\) will be analyzed for its implications outside the area of interstate child custody.\(^5\)

I.
INTERSTATE CHILD CUSTODY JURISDICTION

A. Ferreira: A Difficult Case

The Ferreiras were divorced in Idaho in 1964, the decree granting MS. Ferreira custody of their two male children ages four and five and giving Mr. Ferreira the right to custody for two months each summer.\(^7\) In 1966, both parents were living in California. Ms. Ferreira then remarried and moved to Alabama with the children.\(^6\) Dr. Ferreira un-

\(^3\) Ferreira affirmed the expansive concurrent jurisdiction approach created by Justice Traynor 25 years earlier. See note 38 infra and accompanying text. Recognizing that this approach creates California jurisdiction in many cases which are inappropriate, the court announced strict guidelines for the use of trial court discretion to exercise that jurisdiction. See notes 39-43 infra and accompanying text. The Act, in addition to perpetuating trial court discretion not to exercise jurisdiction, severely curtails the jurisdictional grounds themselves. See notes 49-61 infra and accompanying text. Thus, the Act puts most inappropriate suits beyond California's jurisdiction altogether, and does not rely, as Ferreira does, upon a trial courts' discretion to refuse to hear cases which ought to be decided in another state.

\(^4\) Although the vast majority of suits involve California plaintiffs rather than California defendants, the court's analysis applies equally to both and the doctrine should be applied when either party is a California resident. See note 163 infra.

\(^5\) The court's conclusion regarding the use of the forum non conveniens stay subsequently might be limited to the substantive area of interstate child custody disputes. That conclusion then would be superseded by the forum non conveniens provisions in the Uniform Act. However, as argued later, the reasoning of the court applies to other suits and therefore should control future decisions in other areas as well. See notes 141-56 infra and accompanying text.

\(^6\) Id. at 830, 512 P.2d at 307, 109 Cal. Rptr. at 83.

\(^7\) Id. at 831, 512 P.2d at 308, 109 Cal. Rptr. at 84.
dertook a medical residency in Delaware but returned to California in 1971, bringing the children who were residing with him during their annual summer visit.\(^8\)

Shortly after arriving in California, Dr. Ferreira brought suit to modify the Idaho decree and obtain permanent custody of the children.\(^9\) Ms. Ferreira countered by initiating a similar modification action in Alabama and filing a motion to dismiss the California action on forum non conveniens grounds.\(^10\) The San Francisco Superior Court granted Ms. Ferreira's motion to dismiss, stating that modification should be determined either in Alabama, or wherever Dr. Ferreira resided.\(^11\)

Despite Dr. Ferreira's allegations that the children had been physically mistreated by their stepfather and would be endangered by their return to Ms. Ferreira, the San Francisco court accompanied its dismissal with an order to return the children to their mother.\(^12\) Dr. Ferreira appealed from but did not comply with this order. Instead, he retained custody of the children and moved to Orange County, where Ms. Ferreira then filed a writ of habeas corpus to regain custody.\(^13\) The Orange County court considered Dr. Ferreira's allegations of mistreatment of the children and, following the recommendations of a probation department report, awarded temporary custody to Dr. Ferreira.\(^14\) Ms. Ferreira then sought writs of prohibition and mandamus to compel the Orange County court to vacate its temporary custody order and issue a writ ordering return of the children to her.\(^15\) The court of appeal denied the writ, and the appeal of Ms. Ferreira from that denial was consolidated with Dr. Ferreira's appeal from the San Francisco order returning custody to Ms. Ferreira for decision by the supreme court.\(^16\)

The court reviewed both decisions simultaneously and held that the San Francisco court could not dismiss an action brought by a California resident on forum non conveniens grounds,\(^17\) and further, that the San Francisco court erred by not considering the allegation that the children would be endangered by return to Ms. Ferreira.\(^18\)

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8. Id.
9. Id.
10. Id. at 831-32, 512 P.2d at 308-09, 109 Cal. Rptr. at 84-85.
11. Ms. Ferreira had alleged the following facts in support of her motion to dismiss: (1) Alabama was the more convenient and economical forum; (2) she and the children were domiciled there; and (3) witnesses to and any probation department reports of the home situation were there.
12. Id. at 832, 512 P.2d at 309, 109 Cal. Rptr. at 85.
13. Id.
14. Id.
15. Id. at 833, 512 P.2d at 309, 109 Cal. Rptr. at 85.
16. Id.
17. Id. at 838, 512 P.2d at 313, 109 Cal. Rptr. at 89.
then affirmed the award of temporary custody to Dr. Ferreira\textsuperscript{10} and remanded the entire dispute to the Orange County court.\textsuperscript{20} It observed, however, that on remand the trial court could stay Dr. Ferreira's action for permanent custody on motion by either Ms. Ferreira or the court itself if Alabama were the better forum for resolving the custody dispute.\textsuperscript{21}

B. The Problem of Interstate Children

Ricky and Joey Ferreira are not unique. There are some four million minor children of divorced parents in the United States today, and the number increases by about 300,000 each year.\textsuperscript{22} The growing population of "children of divorce" and the high mobility of their parents have made interstate custody disputes common. Although each court which takes jurisdiction in these disputes ostensibly believes it is acting to protect the interests of the children, too often the result is upheaval, insecurity, and instability.\textsuperscript{23} Psychologists have recognized that children who suffer the trauma of parental strife and divorce have a great need for continuity and stability.\textsuperscript{24} Recognizing the primary importance of stability, some commentators recently have advocated greater protection, if not immutability, of existing decrees.\textsuperscript{25}

The development of the law in custody cases, however, has emphasized the desirability of flexible rules which permit alteration of

\begin{itemize}
  \item 19. Id. at 840, 512 P.2d at 315, 109 Cal. Rptr. at 91.
  \item 20. Id. at 843, 512 P.2d at 317, 109 Cal. Rptr. at 93.
  \item 21. Id. at 840–42, 512 P.2d at 315–16, 109 Cal. Rptr. at 91–92.
  \item 23. See L. DESPERT, CHILDREN OF DIVORCE 202–13 (1953).
  \item 25. Professor Robert Levy suggests that decrees should ordinarily be unmodifiable for at least two years. R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 237 (1969). This view has been accepted by the Commissioners on Uniform Laws. UNIFORM MARRIAGE AND DIVORCE ACT § 409 (U.L.A. 1973). It has also been accepted by The Family Law Section of The American Bar Association. 7 FAM. L.Q. 165 (1973). Psychiatrist and professor of law, Dr. Andrew Watson, maintains that custody decrees "should nearly always be permanent and irrevocable." WATSON, supra note 24, at 197. Professors Joseph Goldstein and Max Gitter conclude that "custody decisions should be final and place the newly designated parent in the same legal position as any other parent." Goldstein & Gitter, ABOLITION OF GROUNDS FOR DIVORCE: A MODEL STATUTE AND COMMENTARY, 3 FAM. L. Q. 75, 88 (1969).

  Professor Joseph Goldstein, Dr. Anna Freud, and Dr. Albert Solnit believe that because the child's need for stability is so vital, it should be the central factor in all types of custody proceedings, even in the initial court determination at the time of divorce. In their view, once granted, any custody disposition would be permanent and would be entitled to all the legal protections of the parent-child relationship. J. GOLDSMITH, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 37 (1973).
\end{itemize}
custody decrees whenever needed.\textsuperscript{26} The response of the United States Supreme Court to the participation of state courts in interminable custody litigation between divorced parents has been unduly restrained.\textsuperscript{27} In a series of cases, beginning with \textit{New York, ex. rel. Haly v. Halvey},\textsuperscript{28} the Court has refused to settle such central questions as: Who may issue custody decrees? Who may modify them? What effect shall courts of one state give to decrees of another?

In \textit{Halvey}, the Court virtually denied any role to the doctrine of full faith and credit in child custody cases by holding that any state could modify a custody decree on any grounds open to the first state.\textsuperscript{29} Since decrees may be modified to protect the child, a court could always overrule a sister state decree simply by making a perfunctory finding of changed circumstances and declaring that a custody change is in

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  \item \textsuperscript{26} See Goldstein, \textit{Psychoanalysis and Jurisprudence}, \textit{77 Yale L.J.} 1053, 1073-74 (1968); Stumberg, \textit{The Status of Children in the Conflict of Laws}, \textit{8 U. Chi. L. Rev.} 42, 56-57 (1940) [hereinafter cited as Stumberg].
  \item \textsuperscript{27} Some decisions of the United States Supreme Court suggest that the interest in maintaining flexibility so that custody decisions can be modified to protect the welfare of the child outweighs the strong constitutional and federal policy of full faith and credit. Justice Frankfurter stated this view in \textit{Kovacs v. Brewer}:
    
    Because the child's welfare is the controlling guide in custody determination, a custody decree is of an essentially transitory nature. The passage of even a relatively short period of time may work great changes . . . in the needs of a developing child . . . [and] the fitness and adaptability of custodians . . . A court that is called upon to determine . . . custody . . . cannot . . . be bound by a prior decree of another court . . .

    356 U.S. 604, 612 (1958) (Frankfurter, J., dissenting) (decided on other grounds).
  \item \textsuperscript{29} “(I)is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or depart from it as does the State where it was rendered.” \textit{330 U.S. 610, 615 (1947).} In every state, a court may modify a custody decree whenever changed circumstances are shown. Since a custody decree is thus not a final judgment, full faith and credit requires only that the second state not modify the decree unless the first state could do so. However, because of the liberal interpretation of changed circumstances by courts seeking to modify out-of-state decrees, the prevailing interpretation of \textit{Halvey} by the commentators is that full faith and credit offers no restrictions on a court wishing to modify an out-of-state decree. \textit{See Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev.} 153 (1949); \textit{Reese, Full Faith and Credit to Foreign Equity Decrees, 42 Iowa L. Rev.} 183 (1957); \textit{Comment, Custody Decrees—Full Faith and Credit, 2 Ark. L. Rev.} 78 (1948); \textit{Note, Child Custody Decrees—Interstate Recognition, 49 Iowa L. Rev.} 1178 (1964).
\end{itemize}

Although Congress is empowered to enact legislation to implement the full faith and credit clause, it has deferred continually to the Supreme Court's interpretation of the clause and is likely to continue to do so. \textit{See U.S.C. §§ 1738-39 (1964).}
the child's best interests. As Justice Rutledge warned in his concurring opinion, 30 Halvey has sanctioned unending litigation, the pirating and manipulation of children by disputing parents, and unseemly competition between states. 31 Parental self-help has flourished, and the law of interstate child custody has degenerated toward the "rule of seize and run." 32

States have taken different positions not only on the substantive grounds for custody modification, but also on the jurisdictional bases for entertaining these actions. 33 The failure of state law to respond to the child's need for continuity and stability is thus compounded by the possibility of multiple litigation under conflicting state rules. In Ferreira, the California Supreme Court followed the "concurrent jurisdiction" approach popularized by its decision in Sampsell v. Superior Court, 34 which allows the courts of both the state issuing the original decree and the state where the child is physically present to modify the custody decree. The Uniform Child Custody Jurisdiction Act which supersedes Ferreira, however, ends the flexible jurisdiction approach in California. The Act contains a restrictive but rational system of allocating jurisdiction which is one step toward a uniform national policy of jurisdiction to protect interstate children involved in custody litigation.

C. Solutions to the Problem of Interstate Children: Ferreira versus The Uniform Child Custody Jurisdiction Act

The plight of interstate children presents a difficult theoretical problem which has attracted considerable scholarly attention. Although they differ in their emphasis, the numerous discussions of interstate custody law in the cases and commentary all focus on the over-

31. See Bodenheimer, supra note 2, at 1215.
33. In 1964, prior to the drafting of The Uniform Child Custody Jurisdiction Act, Professor Ratner identified five principal jurisdictional positions from the morass of cases and commentary. For a full discussion of these conflicting theories, see Ratner, supra note 28.
34. See also Ratner, Legislative Resolution of the Interstate Child Custody Problem—A Reply to Professor Currie and a Proposed Uniform Act, 38 S. Cal. L. Rev. 183, 196-205 (1965). The Uniform Act follows some of the ideas proposed in Professor Ratner's model statute but creates more flexibility in jurisdiction. See notes 49-61 infra and accompanying text.
35. 32 Cal. 2d 763, 197 P.2d 739 (1948). The approach in Sampsell has also been adopted by the Second Restatement of Conflicts. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79, at 237 (1971).
lapping but distinguishable interests of the children, the parents, and the state.\textsuperscript{35}

All discussions agree that in an interstate custody dispute the interests of the children are paramount. To increase the probability that a custody decision will be in the best interests of the child, the case should be decided in the court with greatest access to the relevant evidence. Once decided, the child's need for stability should protect that decision from modification unless unusual circumstances warrant evaluation of the changed circumstances.

Parents, too, have significant interests at stake which are similar to, but separable from those of the children. First is direction of the suit to a forum which is fair to both parties. Jurisdiction should be predictable and not subject to the arbitrary control of either party acting to gain a tactical advantage. To deter self-help and its reward of tactical advantage, parental violations of decrees should be punished and parental respect for visitation rights encouraged by consistent enforcement of valid decrees. The single exception to the enforcement of valid decrees should be an action for temporary custody in a state where the child is present and needs protection from immediate and substantial physical danger.

Finally, the state or public interests in the economical use of judicial resources and cooperation between, as well as respect for, state tribunals dictate that issues fairly resolved in one forum should not be redetermined by a second court, nor should two courts concurrently exercise jurisdiction. Courts claiming jurisdiction should jointly determine the best forum to decide custody, and full faith and credit should be given to issues resolved in that hearing. The achievement of these objectives necessitates a uniform national policy of jurisdiction.

This part examines each of these three interests to be accommodated in interstate child custody disputes and compares the\textit{Ferreira} and Uniform Act approaches. The analysis shows that the superseding legislative response is a better accommodation of the interests of all concerned.

\textsuperscript{35} Many of the analyses focus on three broad interests: the welfare of the child, the improper or illegal conduct of the parents (usually shorthanded by the phrase, "unclean hands"), and the need for respect and cooperation between courts of different states. The\textit{Ferreira} analysis focuses directly on these three interests of the parties to the exclusion of their other interests. For discussions emphasizing the importance of the welfare of the child, see Stansbury, \textit{Custody and Maintenance Law Across State Lines}, 10 LAW \\& CONTEMP. PROB. 819 (1944) and Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948); "unclean hands" of the litigants, Ehrenzweig, \textit{Interstate Recognition of Custody Decrees}, 51 MICH. L. REV. 345 (1953) [hereinafter cited as \textit{Interstate Recognition}] and Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P.2d 833 (1958); and comity between states, Currie, \textit{Full Faith and Credit, Chiefly to Judgments: A Role for Congress}, 1964 SUP. CR. REV. 89 and Zillmer v. Zillmer, 8 Wis. 2d 637, 100 N.W.2d 564, 101 N.W.2d 703 (1960).
I. Protecting the Interests of the Interstate Child

With the rationale of protecting the child's welfare, Ferreira permits a California court to exercise its discretion to modify custody decrees in two situations when another state might be a better forum: if the resident parent files for modification during a lawful visitation period; or, if the parent proves that the child would be endangered by enforcement of the existing decree, even at a time of unlawful custody. By contrast, the Uniform Child Custody Jurisdiction Act prohibits modification on these bases alone.

a. Jurisdiction Predicated on the Physical Presence of the Child

The opinion in Ferreira reiterates that "[t]he leitmotif of all the cases dealing with child custody is that the primary, paramount, and controlling consideration is the welfare of the child." Reflecting this attitude, the California rule since 1948 has been that the physical presence of the child is sufficient to confer jurisdiction on a California court to modify a custody decree. The court recognized in Ferreira, however, that if exercise of jurisdiction on that basis were not strictly limited, the interests in regulating the parents' conduct and maintaining good relations with other states' courts would be defeated. Thus, the court directed that physical presence jurisdiction should be exercised only when the court believes that its interest in the welfare of the child is more substantial than that of any other state. Since instability is harmful to the child, the trial court should respect the out-of-state decree by awarding temporary custody to the parent then entitled to custody under the existing decree.

36. See notes 49-74 infra and accompanying text.
38. See Sampsell v. Superior Court, 32 Cal. 2d 763, 777, 197 P.2d 739, 748-49 (1948). The opinion discusses the broad state interest in child welfare which permits the exercise of concurrent jurisdiction by three forums: (1) the state where the child is domiciled; (2) a state with in personam jurisdiction over the child's parents; and (3) the state where the child is physically present. Sampsell reasoned that since the welfare of the child was the paramount consideration, using any one of these three theories to limit jurisdiction to a single forum might result in inappropriate decisions by courts not situated to protect the child's best interest. The court opted for extreme flexibility in its jurisdictional theory to give California jurisdiction in all cases where California could possibly be the best forum. Sampsell then relied on the discretion of trial courts not to exercise jurisdiction in those cases where another state was the best forum.
39. 9 Cal. 3d at 834, 512 P.2d at 310, 109 Cal. Rptr. at 86.
40. Id. at 833, 512 P.2d 310, 109 Cal. Rptr. 86, quoting Sampsell v. Superior Court, 32 Cal. 2d 763, 779, 197 P.2d 739, 750 (1948).
41. Id. at 835-36, 512 P.2d at 311-12, 109 Cal. Rptr. at 87-88.
42. Id. at 829, 512 P.2d at 307, 109 Cal. Rptr. at 83.
43. Even where granting temporary custody to the nonresident results in the child
There is one loophole in this formulation: the resident parent without permanent custody could file for modification at the beginning of a visitation period during which he or she is temporarily entitled to custody. When the California court then makes an award of temporary custody pending modification proceedings either in California or the forum awarding the original decree, it might leave the children with the resident parent since he or she is then, although only temporarily, entitled to custody under the original decree. In the end, the children might remain with the resident parent beyond the end of the visitation period if the court does not order them returned to the nonresident parent before resolution of the modification issue. If the nonresident parent were unsuccessful in the trial court, relief on appeal could be illusory. By the time an appeal were decided, the children's need for stability might well dictate that they remain with the resident parent who sought to modify the decree.

The California Supreme Court appears not to have closed this loophole. It did specifically commend those trial courts which have returned children to the nonresident parent when modification proceedings were filed by a resident at the end of a visitation period. It also pointed out that the same need to avoid a deterrent to visitation required that except in compelling circumstances, presence in California should not be a basis for modifying a custody decree during a visitation period. But by leaving it in the discretion of the trial court to leaving California to reside with the nonresident parent, the court should enforce the foreign decree pending modification. This rule would then force the resident parent, even if successful in the present suit, to attempt to enforce his modification decree in the home state of the parent entitled to custody under the existing decree. Id. at 836 n.11, 512 P.2d at 311 n.11, 109 Cal. Rptr. at 87 n.11.


45. In Ferreira, the father's retention of custody was predicated on danger to the children and not merely that he had filed during a lawful visitation, so the case is distinguishable from cases where custody is based solely on physical presence. Ferreira illustrates, however, the substantial time span that may be involved for final resolution of the dispute through the appellate process. Despite Ms. Ferreira's attempts to obtain a decision as quickly as possible through the use of preemptory writs, the court's decision followed institution of the initial suit by over two years.

46. The Ferreira children had been living with their father for two years by the time the California Supreme Court decision was reached. As this comment goes to print, no formal action has been taken since the court's decision. The modification suit is still pending in the Orange County court and the children remain with Dr. Ferreira.

47. 9 Cal. 3d at 835 n.10, 512 P.2d at 311 n.10, 109 Cal. Rptr. at 87 n.10.

48. The court recognizes that filing for modification during the lawful visitation period creates the same risks as filing after the visitation:

[A] parent with whom a child is visiting in another jurisdiction ordinarily should not be permitted, except in clearly compelling circumstances, to use the occasion to seek to divest the other parent of a judicially decreed right of custody. To permit this would place a premium on the abuse of the right of
exercise modification jurisdiction in “compelling circumstances” when California’s only contact with the custody dispute is that the child is then in the state, it has left open the possibility of the scenario above.

As a result, not only may the custody issue be reopened in a California court, but if the trial court obeys the letter but not the spirit of Ferreira, “compelling circumstances” can be construed unfairly to require the nonresident parent to readjudicate custody in California. And even if the California court stays modification there so that it is finally adjudicated in the foreign tribunal, the children may have been allowed to remain in California so long that either they must once again be uprooted and returned to the nonresident parent, or to avoid that, left with the resident parent who otherwise would not have had a compelling case for custody. The one step that the court could have taken to preclude these results—the denial of jurisdiction based only on the physical presence of the child in California—it refused to take.

The Uniform Child Custody Jurisdiction Act has taken that step. Physical presence of a child in California, even during a lawful visitation period, does not alone confer jurisdiction. This change prevents a court from disregarding a foreign decree to the extent of allowing the children to remain with the petitioning parent if the resident parent petitions for modification during his visitation period.

The Act presents an elaborate jurisdictional scheme designed to protect the child’s welfare—the central consideration of the Act. The Act seeks to ensure the reliability of the initial child custody determination and then limits the modifiability of that decree, thus promoting continuity and stability. Jurisdiction to modify a custody decree is allowed only in the court with greatest access to the relevant information. Information may be exchanged initially between courts to determine the best forum; then, all existing evidence is forwarded to that court. Full faith and credit is given to its custody decisions. Subsequent modification is permitted only by the state formulating the

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visitation and make it difficult for parties to agree on the free movement of the child from one parent to the other. Id. at 842, 512 P.2d at 316, 109 Cal. Rptr. at 92, quoting Bergen v. Bergen, 439 P.2d 1008, 1015 (3d Cir. 1970).

49. (2) Except under paragraphs (c) and (d) of subdivision (1), 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.

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

CAL. CIV. CODE § 5152(2)-(3) (West Supp. 1974).


51. See Bodenheimer, supra note 2, at 1218.

52. See note 113 infra and accompanying text.
initial decree, unless that state no longer has significant ties to the child and his family.

The Act establishes two main places of initial jurisdiction: the "home state" of the child and a state with a "significant connection" to the child and the custody contends.\(^{53}\) The "home state" is defined as the state in which the child has most recently resided for at least six consecutive months.\(^{54}\) The extension of jurisdiction to a state with "significant connection" is phrased in general terms.\(^{55}\) This flexibility enables the Act to provide for fact situations too diverse to anticipate. The Commissioners\(^{56}\) admonish, however, that effectuation of this paragraph "more than any other provision of the Act requires that it be interpreted [restrictively] in the spirit of the legislative purposes expressed in section [5150]."\(^{57}\)

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53. (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 if the conditions as set forth in any of the following paragraphs are met:
(a) 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 six 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.
(b) It is 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.


54. (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 six consecutive months, and in the case of a child less than six 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 six-month or other period.


55. CAL. CIV. CODE § 5152(1)(b) (West Supp. 1974). For the text of the statute, see note 53 supra.

56. Like those to The Uniform Commercial Code, the Comments to The Uniform Child Custody Jurisdiction Act by the drafting Commissioners on Uniform State Laws are important to the interpretation of the provisions of the Act.

57. UNIFORM CHILD CUSTODY JURISDICTION ACT § 3, Comment [hereinafter cited as COMMISSIONERS' COMMENTS].

The general purposes of the Act allow a state to have "significant connection" jurisdiction only in situations when none of the general purposes will be adversely affected.

(1) The general purposes of this title are to:
(a) Avoid jurisdiction 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.
(b) 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.
(c) Assure that litigation concerning the custody of a child take place
Even with a restrictive application of the significant connection concept, jurisdiction may exist in more than one forum. However, two forums can never concurrently exercise jurisdiction under the Act's provisions. The Act does provide for emergency jurisdiction when

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.

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

(e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards.

(f) Avoid relitigation of custody decisions of other states in this state insofar as feasible.

(g) Facilitate the enforcement of custody decrees of other states.

(h) 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.

(i) To make uniform the law of those states which enact it.


58. (A) A court of this state shall not exercise its jurisdiction under this title 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 title, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under 5159 and shall consult the child custody registry established under 5165 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with Sections 5168 through 5171. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.


(1) A court which has jurisdiction under this title to make an initial or modification decree may 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.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:
the child is endangered and for subsidiary jurisdiction when no forum has jurisdiction under the other provisions, but its provisions on modification jurisdiction strictly curtail relitigation of custody decrees. Only the state which issued the existing decree may modify it, unless that state no longer has jurisdiction “substantially in accordance” with the Act.

(a) If another state is or recently was the child’s home state.
(b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants.
(c) If substantial evidence concerning the child’s present or future care, protection, training, and personal relationships is more readily available in another state.
(d) If the parties have agreed on another forum which is no less appropriate.
(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in Section 5150.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this title if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorney’s fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

_id. § 5156.

59. See notes 62-76 infra and accompanying text.
60. (1) A court of this state . . . has jurisdiction . . . if . . .
(d)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), (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.


61. (1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have juris-
b. Jurisdiction Predicated on Danger to the Child

The second exception to the enforcement of valid foreign decrees permitted under Ferreira was that a court could exercise jurisdiction to modify a decree at any time the resident parent could show that "substantial harm" to the child would result from enforcement of the existing decree. Because the court anticipated that parties would simply allege harm in the same perfunctory manner that changed circumstances are often alleged, it required that the injury to the child be substantial and that the allegations be supported by affidavit. The court further directed that the proceedings ordinarily be stayed after the award of temporary custody to the resident parent to await the modification decision of the court in the sister state. The discretion of the trial court to decide the case on the merits was reserved, however.

The Act embodies a much more limited theory of jurisdiction based on danger to the child. This temporary jurisdiction exists only when the neglect or abuse is so serious that, in lieu of seeking juvenile court jurisdiction, the superior court must act immediately to protect the child. The Act requires that:

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.

The Commissioners' Comments to this section indicate that only the most serious cases of dependency under the applicable juvenile court jurisdiction under jurisdictional prerequisites substantially in accordance with this title or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.

(2) If a court of this state is authorized under subdivision (1) and Section 5157 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with Section 5171.


62. The requirement of allegation and proof that the child's health or safety will be "jeopardized" [demands] . . . that such showing encompass competent proof of some substantial harm to the child.

9 Cal. 3d at 837, 512 P.2d at 312, 109 Cal. Rptr. at 88 (footnote omitted).

63. "It has been stressed repeatedly, that this limitation [of requiring a finding of changed circumstances] enables any court to reach the desired result by either finding or denying a change of circumstances," A. EHRENZEIG, CONFLICT OF LAWS 290 (1962) [hereinafter cited as EHRENZEIG CONFLICTS]. See also G. STUMBERG, CONFLICTS ON THE CONFLICTS OF LAWS 352-353 (1956) [hereinafter cited as STUMBERG CONFLICTS]; Morrill v. Morrill, 83 Conn. 479, 491, 77 A. 1, 6 (1910).

64. 9 Cal. 3d at 837, 512 P.2d at 312, 109 Cal. Rptr. at 88.

65. Id. n.15, 512 P.2d at 312 n.15, 109 Cal. Rptr. at 88 n.15.

66. Id. at 829, 512 P.2d at 307, 109 Cal. Rptr. at 83.

67. Id. at 842, 512 P.2d at 316, 109 Cal. Rptr. at 92.

68. CAL. CIV. CODE § 5152(1)(c) (West Supp. 1974).
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[This subsection] retains and reaffirms parens patriae jurisdiction, usually exercised by a juvenile court, which a state must assume when a child is in a situation requiring immediate protection. This jurisdiction exists when a child has been abandoned and in emergency cases of child neglect . . . . This extraordinary jurisdiction is reserved for extraordinary circumstances . . . . When there is child neglect without emergency or abandonment, jurisdiction cannot be based on this paragraph.

The Act thus observes Ferreira's directive that the superior court must be able to protect neglected minors when they become seriously endangered. However, "emergency jurisdiction" under the Act only permits changes in temporary custody to protect the child without the ordinary referral to the juvenile court. Unlike Ferreira, it does not allow issuance of a permanent custody decree of modification of an existing foreign decree.

69. CAL. WELF. & INST'NS CODE § 600 (West 1973).
70. The gravity of the danger is similar to that required for removal of a child from parental custody by the juvenile court under legislation proposed by California State Senator Arlen Gregorio. Cal. Sen. Bill 1485 (Jan. 7, 1974). Senator Gregorio does not advocate changing the jurisdictional grounds of the juvenile court, but as in the Uniform Child Custody Jurisdiction Act, he urges that the grounds for changing the custody of the child be dramatically abridged. Senate Bill 1485 provides that custody can be changed only when there is: "an immediate and substantial danger to the physical health of the child, and there are no reasonable means by which the child's physical health may be protected without removing the child from parental custody."

71. COMMISSIONERS' COMMENTS, supra note 57, at § 3.
72. The superior court is really sitting as a special juvenile court when exercising this parens patriae emergency jurisdiction. The juvenile court, after finding a dependent child to be in its jurisdiction, may make temporary custody determinations in certain cases. CAL. WELF. & INST'NS CODE § 726 (West 1973). However, see note 70 supra. The juvenile court cannot, however, permanently alter a divorce custody decree.


While this limitation on emergency jurisdiction is not specified in the Act, such an interpretation is required to preserve the consistency and purpose of the Act. Professor Brigitte Bodenheimer, who acted as Reporter for the Uniform Act, states that in her opinion, it was the "legislative intent" of the Commissioners to limit emergency jurisdiction power to allow only temporary custody provisions to be made for children abandoned in California or subject to an immediate and substantial danger from a
A major reason that the Act provides for emergency jurisdiction is to affirm the existing jurisdiction of the juvenile court over interstate children who are endangered within California. California, like many states, has very broad statutes defining the juvenile court power to intervene in families. Since the Uniform Child Custody Jurisdiction Act covers all "custody proceedings," and specifically includes "child neglect and dependency proceedings," without the emergency clause

source within California. Letter from Brigitte Bodenheimer to the author, February 5, 1974, on file with the California Law Review.

In addition to the Reporter's assertion that the Uniform Law Commissioners did not intend emergency jurisdiction to be a basis for permanent modification of custody decrees, the logic and purposes of the Act itself compel such a conclusion. For instance, the Act creates an innovative interstate registry to facilitate the nationwide enforcement of decrees.

The clerk of each superior court shall maintain a registry in which he shall enter all of the following:

1. Certified copies of custody decrees of other states received for filing.
2. Communications as to the pendency of custody proceedings in other states.
3. Communications concerning a finding of inconvenient forum by a court of another state.
4. Other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this state or the disposition to be made by it in a custody proceeding.


To funnel all information to the forum court and to encourage the cooperation of courts, several other sections provide for the creation, preservation and delivery of evidence to custody courts throughout the nation. CAL. CIV. CODE § 5167 (West Supp. 1974) (testimony to be taken in other states); Id. § 5166 (certified decrees to be forwarded to other courts or interested persons); Id. § 5168 (hearings or studies to be conducted in other states); Id. § 5169 (evidence to be forwarded to other forums); Id. § 5170 (all records to be preserved and forwarded to any state later taking jurisdiction.) This elaborate system to insure reliable decrees would be bypassed if a court with emergency jurisdiction could also issue a permanent decree.

Additionally, when a custody proceeding is pending in another state, a court cannot modify the decree (see note 58 supra and accompanying text) whether or not the state with the pending suit made the initial decree. This flat prohibition would be contradicted if a court with emergency jurisdiction could modify a decree, without regard to a pending suit, solely on the ground that the child was physically endangered.

Finally, the purpose section directs that the Act be construed to promote the general purposes stated. "This title shall be construed to promote the general purposes stated in this section." CAL. CIV. CODE § 5150(2) (West Supp. 1974).

For the remainder of the general purposes section, see note 57 supra.

The Commissioners state that "[e]ach section must be read and applied with these purposes in mind." COMMISSIONERS' COMMENTS, supra note 57, at § 1. Thus, the restrictions on the power of emergency jurisdiction are compelled to refrain from contradicting any of the general purposes.

73. See CAL. WELF. & INST'NS CODE §§ 600, 726 (West 1973). See also notes 70-72 supra and accompanying text.

74. (3) "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for dissolution of marriage, or legal separation, and includes child neglect and dependency proceedings . . . .

CAL. CIV. CODE § 5151(3) (West Supp. 1974).
there might be a question whether the juvenile court could act when an interstate child is involved. Rather than expanding the power of the superior court to modify child custody decrees, however, the section is meant strictly to limit even the temporary parens patriae power over neglected children. The limitation applies whether that power is exercised by a superior court or by a juvenile court.

Interpreting emergency jurisdiction to include power to issue decrees would vitiate the main intention of the Act. Although the existence of danger to the child necessitates court intervention, the Act recognizes that such protection need not take the form of a permanent custody decree issued by a forum that is not the child's home state and does not have substantial ties to the parties.

In *Ferreira*, the California Supreme Court affirmed the emergency jurisdiction of the Orange County Superior Court and its decision to award temporary custody to Dr. Ferreira based on affidavits detailing mistreatment of the children and a probation department report. These affidavits might not have been sufficient to establish emergency jurisdiction and a change of temporary custody under the Act which requires adequate information of substantial abuse or neglect in order to establish emergency jurisdiction. A court appraising the facts of *Ferreira* under the Act might have required an out-of-state probation department report substantiating the allegations, since any evidence of mistreatment would have been in Alabama. This requirement protects the out-of-state resident from unfounded or overzealous allegations of danger to the child.

The Act's limited emergency jurisdiction solution is a substantial improvement over the physical presence and emergency jurisdiction provisions of *Ferreira* in protecting the welfare of the child who is in California. The Act rejects physical presence as a sufficient basis for jurisdiction, but does protect the child from any proven risk of immediate harm by allowing the court to issue a temporary custody de-

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75. 9 Cal. 3d at 832, 512 P.2d at 309, 109 Cal. Rptr. at 85.

76. Emergency jurisdiction cannot be established without evidence of substantial danger to the child. See notes 62-72 *supra* and accompanying text. Evidence of the mistreatment of the children and unfitness of the mother's home might require an investigation by the Alabama probation or welfare department pursuant to § 5168, which authorizes hearings or studies to be conducted in a state where the evidence is most easily accessible. California courts have used out-of-state reports even before passage of the Act. See Wheeler v. Wheeler, 34 Cal. App. 3d 239, 109 Cal. Rptr. 782 (1973). However, the Act would probably make such evidence mandatory to establish emergency jurisdiction.

77. Just as before *Ferreira* parties alleged "changed circumstances" whenever they requested a state to modify an out-of-state decree, after that decision, parties would similarly allege "danger to the child" and emergency jurisdiction based on personal affidavits. See note 63 *supra* and accompanying text.
Since California has no legitimate interests over an interstate child with only transient contacts in the state except to safeguard the child's health while the child is physically present, the Act's prohibition of permanent modification appears to be a wise legislative choice.

The Act also does a better job than Ferreira of vindicating the child's interest in stability. Unlike Ferreira, the Act recognizes that the child's interest in stability is crucial and warrants evaluation as a prime factor independent of all other considerations. It protects this interest by directing the suit back to the "primary jurisdiction" because "the court most likely to decide correctly is the court having maximum access to the relevant evidence." Probably the greatest boon of the

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78. Of course, there will be some cases in which, all things considered, the interests of the parties, the state, and the child would be better accommodated by modifying an out-of-state decree as would have been possible under Ferreira, but not under the Act. More pointedly, in some cases it might be better to substitute a California court's judgment for the decision of the court of another state. See Bodenheimer, supra note 2, at 1211-12. However, the child's interest in stability and continuity, and the interests of the parties and state, which presently are often defeated under the Ferreira approach, indicate that the Act's decision to err on the side of unmodifiability and limitation of jurisdictional power is a wise one. For an analogous argument with respect to unwarranted changes in custody from the natural parents to the state foster care system and the resultant injury to the child's stability interests, see Mnookin, supra note 70, at 622-26.

79. 9 Cal. 3d at 836, 512 P.2d at 312, 109 Cal. Rptr. at 88.

80. This is particularly so since California courts have demonstrated their inability to refrain from improperly exercising jurisdiction. See, e.g., Titus v. Superior Court, 23 Cal. App. 3d 792, 100 Cal. Rptr. 477 (1972); Marlowe v. Wene, 240 Cal. App. 2d 670, 49 Cal. Rptr. 831 (1966); Crabtree v. Superior Court, 197 Cal. App. 2d 821, 17 Cal. Rptr. 763 (1961); Leathers v. Leathers, 162 Cal. App. 2d 768, 378 P.2d 833 (1958); In re Kosh, 105 Cal. App. 2d 418, 233 P.2d 598 (1951).

81. See notes 24-26 supra and accompanying text.

82. "Primary jurisdiction" means jurisdiction to issue or modify decrees under the "home state," "significant connection," or "best interest" provisions of the jurisdiction section. Cal. Civ. Code §§ 5152(1)(a), (b), (d) (West Supp. 1974). See notes 53-60 supra and accompanying text.

83. Bodenheimer, supra note 2, at 1221. See also Ratner, supra note 28, at 809; Stumberg, supra note 26, at 36. Although Ferreira similarly warns against disrupting the lives of children needlessly (9 Cal. 3d at 835, 512 P.2d at 311-12, 109 Cal. Rptr. at 87-88), directs that these types of suits should be directed back to the forum of primary jurisdiction, and thus encourages the same results as the Act, the Act is not dependent upon the exercise of trial court discretion to accomplish this result. See Bodenheimer, supra note 2, at 1236-38. A decision by the Wisconsin Supreme Court, Zilmer v. Zillmer, 8 Wis. 2d 657, 100 N.W.2d 564, modified 101 N.W.2d 703 (1960), is illustrative of the proper judicial response to an allegation of danger to the child to be expected under the Act. In that case, custody of two young children was granted to the mother in Kansas, the place of the marriage and the divorce. While the children were temporarily residing with the grandparents in Wisconsin, the grandparents filed for modification of the decree on the grounds of the mother's former mental illness which they alleged constituted a continuing danger to the child. Although noting that Wisconsin had a duty to protect the children and probably had jurisdiction to modify the decree, the Wisconsin Supreme Court refused to exercise modification jurisdiction. Instead, the court ordered that temporary custody be granted to the grand-
Act is that no longer are the child's interests left at the mercy of trial court discretion.

2. The Interests of the Parents

The interests of the parents may be difficult to separate from the interests of the children at first, since it is assumed that the only legitimate parental interest in gaining custody of the child is in offering the child a better home environment. However, there are several other parental interests: (1) Decision by a forum which was chosen in a manner fair to all parties; (2) A forum whose past decisions indicate the reward of proper parental conduct in custody disputes; (3) The right to visit the children if custody is awarded to the other parent; and (4) The enforcement of decrees and deterrence of parental self-help or other violations of existing decrees.

The choice of forum is crucial to the parental contestants in a child custody determination. First, there is always the possibility that favoritism will bias the court's decision towards the local parent. Second, and more significantly, the custody decision is peculiarly dependent on the personal values of the judge, and so the same case might easily be decided differently by a different judge. If there are parents for a period of sixty days during which they were to institute a modification suit in Kansas. The grandparents were to retain custody pending a final outcome of that modification proceeding. If the Kansas court were to reaffirm its decree, or the grandparents at any time fail diligently to pursue modification, the original Kansas decree would be reinstated. If Kansas modified its decree, the new decree would be enforced in Wisconsin.

In commenting upon his opinion for the Wisconsin Supreme Court, Justice Fairchild said:

There was an atmosphere of cooperation rather than competition. The Wisconsin courts assumed that the Kansas court would make as wise a decision as could be made with the information available. The Kansas court decided the matter with the assurance that its decision would be respected and enforced in Wisconsin.

Bodenheimer, supra note 2, at 1238.

84. "(T)here is always the suspicion that even a judge will be a little more sympathetic with a constituent." Bodenheimer, supra note 2, at 1211. See also Foster and Freed, Children and The Law, 2 Fam. L.Q. 40, 49 (1968).

85. The standard for deciding custody between two parents is the "best interests" of the child. This vague standard requires a judge first to predict the child's future development with either parent—predictions which psychologists find impossible to make with any certainty. Even if accurate predictions were possible, the judge can only rely on his own values to evaluate the alternatives. He must weigh such possibly conflicting values as emotional maturity, psychological adjustment, creativity, intellectual achievement, financial security, patriotism and citizenship. One California court has frankly admitted that the judge's personal values are determinative in the divorce custody decision.

Necessarily, the judge whose duty it is to make such a [custody] decision views the matter in light of his own attitude and experience, realizing as he must that someone else, equally wise, might see the matter differently.
regional differences in the prevailing attitudes and values of judges, a party might reasonably expect a substantial advantage if he could choose the state which will hear the case. The only way to protect both parents’ interest in the choice of forum is to insulate that choice from control by either of them. It is particularly important that choice of forum should be independent of all parent conduct designed to gain a tactical advantage by having physical possession of the child in the state of his residence.

Once a forum is selected to hear the dispute, due process requires that notice be given to all parties reasonably expected to assert an interest in the child, and they should be afforded a meaningful opportunity to be heard. All parties given a meaningful opportunity to be heard should be bound to the decree to avoid wasteful relitigation which is in neither parent’s interest and threatens the stability of the child.

Finally, each parent, at least in the abstract, has an interest in having existing decrees respected by the other. To this end, a parent who wrongfully has obtained the child should be denied any tactical advantage therefrom when the court acts. This is necessary to protect either parent from becoming the victim of a custody determination prejudiced by the other parent’s willingness to violate an existing decree, or to “seize—and run.”

The only parental interests Ferreira focused on specifically were the deterrence of self-help and encouragement of parental respect for decrees. The court approved the general policy of refusing to re-examine foreign decrees when the moving party was guilty of “misconduct or malfeasance,” and particularly condemned the practice of defying a sister state decree by abducting the child or retaining custody after a lawful visit had ended. Despite the attention Ferreira paid to these manifestations of “unclean hands,” the doctrine has not been
consistently applied in California.\textsuperscript{93} Further, the court affirmed that "the application of the doctrine of clean hands in interstate custody disputes is a decretory matter in any case."\textsuperscript{93}

The Act responds more fully than does \textit{Ferreira} to the parental interests described. The jurisdictional system directs the dispute to a forum not under the arbitrary control of either party.\textsuperscript{94} Due process notice and a meaningful opportunity to be heard are guaranteed to all interested parties.\textsuperscript{95} Decrees of any state are enforceable if issued with jurisdiction in substantial accordance with the Act.\textsuperscript{96} Substantive provisions concerning visitation, support, and mutability of decrees are contained in the Uniform Marriage and Divorce Act\textsuperscript{97} so are not included in the Uniform Child Custody Jurisdiction Act.

Another strength of the Act is its codification of the "clean hands doctrine."\textsuperscript{98} Section 5157(1) gives the court discretion to decline ju-
risdiction even when there is no existing custody decree if the moving party has acted in an objectionable manner. Subsection 2 differentiates between unlawful removals or retentions of the child and other less serious violations of custody decrees. In the former circumstances, refusal of jurisdiction is mandatory unless the resulting harm to the child outweighs the parental misconduct. In the latter, the court has broader discretion to hear or refuse the case. Subsection 3 adds a financial deterrent to parental self-help by allowing the court to impose the opposing party's expenses on the party violating the existing decree.

The Act thus protects a number of parental interests which Ferreira overlooks. The Act strengthens the "clean hands doctrine," and extends it to undesirable behavior which technically is not a violation of a previous decree. As a result the Act goes further than Ferreira in vindicating the parents' individual and shared interests.

3. The Interests of the State

The state's interests in interstate child custody disputes overlap many of those of the children and the parents discussed above. The primary interests that are an independent concern of the state are promoting the efficiency of its judicial proceedings and respect for and cooperation with the judicial processes of other states. Limited judicial resources and overcrowded court calendars require that issues previously decided should not be re-examined and that two forums should not concurrently exercise jurisdiction. The promotion of mutual respect for state judicial proceedings requires that competition for jurisdiction be eliminated. Decrees should be responsibly made, respected, exercised its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(3) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorney's fees, incurred by other parties or their witnesses.


101. This provision should be construed similarly to the emergency jurisdiction section where the threat to the child must be very serious before the court will intervene even temporarily. See text accompanying note 71 supra.

and enforced nationally. Cooperation in exchanging information among states is necessary to determine the best initial forum to hear the case, to funnel all relevant information to that forum, and to provide for the respect and national enforcement of decrees.

Ferreira recognized the need to promote cooperation and deference, but did not go far enough in attempting to find a solution. The court relied on the good faith of all courts to defer to each other in appropriate cases. Its underlying assumption was succinctly stated in Sampsell:

[There is no reason why courts of one state should not be able to "assume with confidence that the courts of the other jurisdiction will act with wisdom and sincerity in all matters pertaining to the welfare of this child."

Experience casts great doubt on the wisdom of the court's judgment. While full faith and credit has never been granted to foreign custody decrees by California courts, Sampsell required that the foreign decree be given "due consideration" on grounds of comity. The

103. See Bodenheimer, supra note 2, at 1220.
104. Id. at 1243.
105. 9 Cal. 3d at 833, 512 P.2d at 310, 109 Cal. Rptr. at 86.
106. Id.
107. 32 Cal. 2d 763, 779, 197 P.2d 739, 750 (1948) (citation omitted).
108. In Ferreira itself the Orange County court granted temporary custody to Dr. Ferreira by finding that the children would be endangered by returning them to Alabama pursuant to the existing decree without an investigation of the mother's home in Alabama. Surely this is not the kind of detached, impartial resolution of competing custody claims that the court envisioned.
109. Several states including Kansas (Moyer v. Moyer, 171 Kan. 495, 233 P.2d 711 (1951) ), Connecticut (Boardman v. Boardman, 135 Conn. 124, 137, 62 A.2d 521, 527 (1948) ), and New York (Bachman v. Mejias, 1 N.Y.2d 575, 580, 136 N.E.2d 866, 868, 154 N.Y.S.2d 903, 907 (1956) ) have explicitly repudiated the application of full faith and credit to foreign custody decrees. Many more probably follow this view. EHRENZWEIG CONFLICTS, supra note 63, at 291.

The explanations for repudiating the application of full faith and credit vary greatly. Courts have said that: custody decrees are not "final"; the interests and welfare of the child are paramount; custody decrees govern personal as distinguished from property rights; the state is a necessary party to a custody action; or the prior decree did not include the child as a necessary party. See Note, Jurisdictional Bases of Custody Decrees, 53 HARV. L. REV. 1024, 1029 (1940).

Although the theoretical explanations are inconsistent and confusing, the emergent theme is that the child should not be bound to the results of a prior custody action between his parents. This "feeling" of many courts reflects two basic anomalies in custody proceedings: the child is not ordinarily allowed to choose his custodian and his or her preferences and interests are not represented by counsel other than the parents'. These rejections of the child's interest in participating fully in proceedings which determine where he will reside and whose commands he must obey arguably constitute a denial of due process. On this theory, it is also arguable that a grant of full faith and credit to a foreign decree made at a hearing where the child's interests were not represented by counsel would also be a denial of the child's constitutional rights.

effect given the decree, however, was wholly discretionary.\textsuperscript{111} \textit{Ferreira} affirmed this posture of sporadic comity—the court should enforce some foreign decrees “as a matter of comity” and re-examine others.\textsuperscript{112} This formulation does give courts the flexibility to modify any decree which is believed no longer to be in the child’s best interest. But if courts do not act with the “wisdom and sincerity” with which they are credited by Justice Traynor, the children’s and the state’s interests discussed above will suffer.

The Act makes a comprehensive attempt to accommodate all these state interests. It requires, for instance, that full faith and credit be given to foreign decrees if issued by states having jurisdiction in substantial conformance with the Act.\textsuperscript{113} Decrees are binding on all parties given reasonable notice and the opportunity to be heard, even when there is no personal jurisdiction over the party.\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} 9 Cal. 3d at 833, 512 P.2d at 310, 109 Cal. Rptr. at 86.
\item \textsuperscript{113} CAL. CIV. CODE § 5162 (West Supp. 1974).
\item \textsuperscript{114} A custody decree rendered by a court of this state which had jurisdiction under Section 5152 binds all parties who have been served in this state or notified in accordance with Section 5154 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this title. CAL. CIV. CODE § 5161 (West Supp. 1974).
\end{itemize}

The Act thus narrowly interprets \textit{May v. Anderson}, 345 U.S. 528 (1953), the Supreme Court decision which required personal jurisdiction over the child or the parent with custody of the child in order for the state to issue a valid custody decree. In doing so the Commissioners concurred with the analysis by Professor Clark who calls \textit{May} an anomaly and urges that it be “overruled at the earliest possible opportunity.” CLARK, \textit{supra} note 27, at 326.

Consequently, the Act makes no requirement of personal jurisdiction: “a state is permitted to recognize a custody decree of another state regardless of lack of personal jurisdiction, as long as due process requirements of notice and opportunity to be heard have been met.” COMMISSIONERS’ COMMENTS, \textit{supra} note 57, at § 13. Professor Hazard and other commentators have criticized \textit{May} chiefly because it guarantees child stealing, multiple litigation, and instability since the statutory and constitutional limits of personal jurisdiction often preclude binding all parties to an adoption or divorce custody decree even by the best forum. See Hazard, \textit{May v. Anderson}, \textit{Prelude to Family Law Chaos}, 45 Va. L. Rev. 379 (1959).


The Commissioners restricted \textit{May v. Anderson} because the technical requirement
The Act's categorical rule of full faith and credit neglects to make an exception for emergency jurisdiction necessary to serve the state's interest in protecting an endangered child who is subject to proceedings pending in another state. However, a child could still be protected from return to a dangerous environment by two methods. The Act does not end the parens patriae power and jurisdiction of state courts to protect children from imminent danger. Second, juvenile court jurisdiction to make temporary custody decisions for "depend-

of in personam jurisdiction conflicts with two major goals of the Act: validity of the initial custody decision and stability for the child. These goals first require that all interested parties be informed of and included in the litigation. Next, the litigation must be maintained in a forum which has access to the evidence necessary for comprehensive evaluation of the child's interests. Finally, all notified parties must be bound by the decision, removing the possibility of relitigation. Full faith and credit would be of little consequence if a party could relitigate custody in his own state simply by avoiding personal jurisdiction in the more convenient forum.

The Act's interpretation of May, even if subsequently disapproved by the United States Supreme Court, does not create a problem in California because of its flexible and all-inclusive long-arm statute. Cal. Code Civ. Pro. § 410.10 (West 1973). However, since some states do not have general long-arm statutes, the failure of the Act to create a long-arm statute which would acquire in personam jurisdiction over absent parties might prove an egregious error. If the Supreme Court later affirms the Act's narrow interpretation of May, then there is no problem. However, if the court later holds that May stands for the much broader proposition that in personam jurisdiction is necessary to bind parties to custody decrees, then the Act's attempt to bind all parties notified and served will be without effect.

The best amelioration of the possible conflict between May v. Anderson and the Act is the enactment of long-arm jurisdiction statutes. See Note, Long-Arm Jurisdiction in Alimony and Custody Cases, 73 Colum. L. Rev. 289, 316 (1973). This solution is not complete since it does not remove the constitutional restriction on personal jurisdiction that parties must have sufficient "minimum contacts" with the state to be personally bound. International Shoe Co. v. Washington, 326 U.S. 310 (1945). A state long-arm statute might not constitutionally grant personal jurisdiction over parties such as Dr. Ferreira whose past contacts with the forum state have been very slight. (Dr. Ferreira was never a resident of Alabama or a party to a custody determination there and never violated an existing decree in Alabama.) However, the constitutional reach of a long-arm statute would probably be stretched very far to avoid the evils of child stealing, multiple litigation, and instability for the child. The decision of the Commissioners not to include a long-arm statute in the Act is unfortunate. One justification for the omission is that the long-arm statute doesn't circumvent the whole problem since some parties may be constitutionally beyond the reach of in personam jurisdiction, therefore, the long-arm provision should not be included at all. Bodenheimer, note 2 supra, at 1232-33. Needless to say, this reasoning is unconvincing. For further discussion of May and the Act's response to the May problem, Bodenheimer, supra note 2, at 1231-35.

115. In the Ferreira case, if a custody proceeding had been pending in Alabama, the home state of the children, when the California action was filed, Civil Code Section 5155 would have flatly prohibited the exercise of jurisdiction. There is no exception for "emergency" jurisdiction granted by Section 5152(1)(c). See notes 68-74 supra and accompanying text.

116. See note 71 supra and accompanying text.

117. For a discussion of the duty and inherent power of a court to protect endangered children regardless of the other jurisdictional or equitable doctrines, see Titcomb v. Superior Ct., 220 Cal. 34, 29 P.2d 206 (1934).
ents" of the court is still available although it should be used only in the "emergency" cases of child neglect where temporary jurisdiction is created in the custody court.\textsuperscript{118}

The Act also serves the state's interest in avoiding competitive suits by directing that a California court cannot exercise its jurisdiction if an action is already pending in another forum with jurisdiction in substantial conformity to the Act.\textsuperscript{119} The policy against simultaneous custody proceedings is so strong that the Commissioners advocate a degree of deference even to proceedings undertaken without proper jurisdiction.\textsuperscript{120}

Some California cases seem to indicate that there is another legitimate state interest in interstate custody disputes: protecting residents from other states' courts which act unwisely or unfairly in interstate child custody disputes.\textsuperscript{121} This is a mistaken, retaliatory notion. There is, however, a legitimate state interest in ensuring that relief is not denied its residents because of the difficulty of bringing suit in foreign forums.\textsuperscript{122} However, this state interest has been transmuted into a resident's absolute right of access to the courts of his state, and virtual immunity from the operation of the forum non conveniens doctrine.\textsuperscript{123}

In \textit{Ferreira}, the court recognized that the interests of the child, parent, and state all would be defeated if a court exercised its jurisdiction to the full extent allowed by \textit{Sampsell}.\textsuperscript{124} In response, the court created a new doctrine of forum non conveniens stay which is essential in interstate child custody cases under \textit{Sampsell}—type jurisdictional rules.\textsuperscript{125} Although the Uniform Child Custody Jurisdiction Act has solved the problem for interstate custody suits, California's broad rules of in personam jurisdiction make the new stay useful in all substantive areas. The second part of this Comment argues that the court intended the stay designed in \textit{Ferreira} to be applied generally and that this is a highly desirable development in California law.

\textsuperscript{118} The Act limits the exercise of emergency jurisdiction by the superior court or juvenile court acting to protect endangered children. See notes 71-72 \textit{supra} and accompanying text. The specific reservation of limited parens patriae power in Section 5152(1)(c) should not be overturned when it conflicts with the more general prohibition of simultaneous proceedings on comity grounds in Section 5155. For the text of the statute, see note 58 \textit{supra}.

\textsuperscript{119} See note 58 \textit{supra} and accompanying text.

\textsuperscript{120} \textit{COMMISSIONERS' COMMENTS, supra} note 57, at § 6.


\textsuperscript{122} See text accompanying note 138 \textit{infra}.

\textsuperscript{123} See text accompanying notes 134-147 \textit{infra}.

\textsuperscript{124} See text accompanying notes 76-79 \textit{supra}.

\textsuperscript{125} See note 127 \textit{infra}. 

II.

FORUM NON CONVENIENS

The most significant effect of the California Supreme Court's decision in Ferreira is likely to be its creation of a powerful procedural device with possible application in many areas of the law—the forum non conveniens stay. Unless subsequently interpreted to apply only in child custody cases, Justice Tobriner's inventive expansion of forum non conveniens in California is codified in section 410.30 of the Code of Civil Procedure which applies to all substantive areas except those covered separately by specific forum non conveniens statutes. See text accompanying notes 141-156 infra. Ferreira's interpretation of section 410.30 should also apply generally with the same exception for areas with specific statutes, such as interstate child custody which is now controlled by the Uniform Act's forum non conveniens section. Cal. Civ. Code § 5156 (West Supp. 1974). For the text of this statute, see note 58 supra.

126. Forum non conveniens in California is codified in section 410.30 of the Code of Civil Procedure which applies to all substantive areas except those covered separately by specific forum non conveniens statutes. See text accompanying notes 141-156 infra. Ferreira's interpretation of section 410.30 should also apply generally with the same exception for areas with specific statutes, such as interstate child custody which is now controlled by the Uniform Act's forum non conveniens section. Cal. Civ. Code § 5156 (West Supp. 1974). For the text of this statute, see note 58 supra.

127. The court in Ferreira created a broad rule for the stay:

[The court may not dismiss an action if a party is a California resident, but it may stay an action involving a California resident if it concludes that the controversy can be better resolved in a foreign forum.]

9 Cal. 3d at 838, 512 P.2d at 313, 109 Cal. Rptr. at 89.

It might be argued that the forum non conveniens stay description was only dictum in Ferreira and that the court's expansion of the doctrine was meant to apply only to interstate child custody suits. The argument is that the quotation of the court from Thomson indicates that different rules may be created for different subject areas and thus that the Ferreira rules apply only to that particular subject area:

Granting a stay . . . is a matter addressed to the sound discretion of the trial court. "In exercising its discretion, the court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party and of avoiding unseemly conflicts with the courts of other jurisdictions. It should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of the witnesses, or the stage to which the proceedings in the other court have already advanced."

9 Cal. 3d at 841, 512 P.2d at 738, 109 Cal. Rptr. at 91, quoting Thomson v. Continental Insurance Co., 66 Cal. 2d 738, 427 P.2d 765, 59 Cal. Rptr. 101 (1967) (citation omitted) (emphasis added). However, the further analysis by the court shows that the nature of the subject matter determines the way in which discretion is to be exercised, not whether or not the court has the power to consider the motion at all.

Although the considerations listed in Thomson remain relevant to a stay of an interstate custody case on grounds of forum non conveniens, the court's discretion to deny such stays must be narrowly exercised to avoid encouraging unlawful abduction or retention of children.

9 Cal. 3d at 841, 512 P.2d at 315, 109 Cal. Rptr. at 91.

Thus, although Thomson is referred to with approval as the last forum non conveniens case, the decision in Ferreira should be read to abolish the pending suit requirement and allow a forum non conveniens stay motion to be considered at the discretion of the court in all cases.

In Ferreira, Ms. Ferreira filed her suit in Alabama after Dr. Ferreira had initiated his San Francisco action, and although she tried to serve process, Ms. Ferreira could not possibly have gotten jurisdiction over Dr. Ferreira since Alabama had no long-arm statute. The former requirement of a pending suit, never even referred to in the court's discussion, would be a completely pro forma matter if the defendant, upon being served in the California suit, had only to file a subsequent suit related to the same cause of action in his home state with no possibility of getting jurisdiction over the plaintiff. As will be shown, the reasoning of the court concerning the need for the forum non

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rum non conveniens will strengthen the equity considerations upon which the doctrine is based, and produce far-reaching changes in California procedure.

Forum non conveniens, until Ferreira, has been of little practical value in California. The doctrine was adopted by judicial decision in 1954, although ten years earlier the California Supreme Court had recognized it as an equitable [doctrine] embracing the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried elsewhere.

With its adoption of forum non conveniens, the California Supreme Court accepted the United States Supreme Court's interpretation that the doctrine was applicable only after personal jurisdiction had been established. Under this rule, filing of a forum non conveniens motion constituted a general appearance and a waiver of any objections to in personam jurisdiction. Thus the defendant was forced to litigate

conveniens stay in interstate child custody is equally applicable elsewhere, and the development is a much needed step towards the equitable management of its docket by California courts.

128. The forum non conveniens doctrine permits a court to dismiss or stay an action, in its discretion, when the exercise of jurisdiction would be unfair to the parties or unduly burdensome to the court and taxpayers. The doctrine, however, does not permit a court to upset the plaintiff's choice of forum unless there are substantial reasons to reject the suit and a better alternative forum is available. Witkin suggests thirteen specific factors involving the interests of the parties and the public which California courts should evaluate in making a forum non conveniens decision. B. Witkin, California Procedure, Jurisdiction, § 174, at 442 (1954). Witkin's analysis is adopted as the intent of the 1969 codification of forum non conveniens in California and is included in The Judicial Council Comment to the forum non conveniens section. Cal. Code Civ. Proc. § 410.30 comment (West 1973). For a full discussion of the doctrine, see Ehrenzweig Conflicts, supra note 63, at 120-37; H. Goodrich, Handbook of the Conflict of Laws 16 (4th ed. 1964); Annot., 90 A.L.R.2d 1109 (1963); Annot., 48 A.L.R.2d 850 (1956); Barrett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380 (1947) [hereinafter cited as Barrett]; Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908 (1947); Dainow, The Inappropriate Forum, 29 Ill. L. Rev. 867 (1935).


130. Leet v. Union Pac. R.R., 25 Cal. 2d 605, 609, 115 P.2d 42, 44 (1944). Although the doctrine was recognized as valid in general, the court rejected its application to the case before it because of the constraints of a United States Supreme Court decision on actions under the Federal Employees' Liability Act (Miles v. Ill. Cent. R.R., 315 U.S. 698 (1942)). The California Supreme Court did not reconsider the applicability of forum non conveniens until Price v. Atchison, T. & S.F. Ry. Co., 42 Cal. 2d 577, 268 P.2d 457 (1954). In Price, the court easily distinguished Leet on the ground that that result was compelled by the Supreme Court holding in Miles, and unequivocally adopted the doctrine. 42 Cal. 2d at 581, 268 P.2d at 459.

his objections to jurisdiction prior to his claim of forum non conveniens.

In 1969, forum non conveniens was codified in California. At the same time, the California Legislature created a special appearance for the purpose of making a forum non conveniens motion. This allowed parties to litigate a forum non conveniens objection first and reserve the right to object to jurisdiction later. However, two elements of the doctrine have severely curtailed its usefulness: (1) the inapplicability of the forum non conveniens dismissal against a California resident; and (2) the applicability of the forum non conveniens stay only when a prior, similar action is pending and the plaintiff does not have control of that suit. The court in Ferreira ingeniously circumvented the limitation on the use of a dismissal by eliminating the restrictions as applied to a forum non conveniens stay, and, in effect, elevated the stay to the status of a conditional dismissal. Twenty years after its introduction in California, forum non conveniens may finally have become a potent weapon for California practitioners.

**A. The Limited Scope of the Forum Non Conveniens Dismissal**

Ferreira affirmed the first major limitation on forum non conveniens in California, that an action cannot be dismissed on forum non conveniens grounds if either party is a bona fide California resident. The inequity which can flow from such a rigid rule is well illustrated by Thomson v. Continental Insurance Co., which announced the

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132. When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just. CAL. CODE CIV. PROC. § 410.30(a) (West 1973).

133. (a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

1. To quash service of summons on the ground of lack of jurisdiction of the court over him.

2. To stay or dismiss the action on the ground of inconvenient forum.

(d) No default may be entered against the defendant before expiration of his time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant. CAL. CODE CIV. PROC. § 418.10 (West 1973).

134. See note 127 supra. Ferreira bases its holding on both the statutory language and the prior decisional law (mostly in tort cases). 9 Cal. 3d at 838, 512 P.2d at 313, 109 Cal. Rptr. at 89.


In Thomson, Justice Peters obviously was concerned about the ability of a California resident to recover his losses from a Texas insurance company which had refused to reimburse the plaintiff for damage to his Texas property. Id. at 740-41, 427
absolute determinacy of residence. In Thomson, the court held that forum non conveniens did not permit dismissal of an action by a California resident although all equitable considerations in the case pointed to Texas rather than California as the convenient and fair forum. The rationale offered by the court in Thomson was:

"[T]his state is concerned with the welfare of California residents and has a "decided interest in assuring that its citizens are not denied damages because of the inconvenience or expense of bringing suit in a distant jurisdiction.""

Thomson has engendered debate on both the wisdom and constitutionality of the resident's immunity from forum non conveniens dismissal. Ferreira affirmed this limitation on the forum non conveniens dismissal, but the court avoids the unfairness of the Thomson rule by expanding the applicability of the forum non conveniens stay. This innovation accommodates both the local interest in having California courts open to the claims of California residents and the interests of defendants in having those claims litigated in a convenient forum.

B. Expansion of the Forum Non Conveniens Stay

In Ferreira, the court indicated that a forum non conveniens stay should be granted whenever a trial court is persuaded of its necessity equitable considerations. This development was contemplated

P.2d at 767, 59 Cal. Rptr. at 103. The opinion focuses primarily on: (1) the hardship to the California resident if he cannot sue in his home state and (2) the policy of California courts to be open to resident claims. The court did not directly consider the potential unfairness to nonresidents or the inability of trial courts to avoid exercising jurisdiction in inconvenient suits involving a California resident. Ferreira is a further development of Thomson which more successfully accommodates the interests of the plaintiff, the defendant and the court. See text accompanying note 147 infra.

136. For a criticism of Thomson and an argument for use of residency as only one of a number of factors to be considered in the forum non conveniens determination, see Note, The Proper Role of the Residence Factor in Forum Non Conveniens Motions, 45 S. Cal. L. Rev. 249 (1972) [hereinafter cited as Proper Role].

137. The court concluded that an action for property damage by a California resident against a Texas insurance company could not be dismissed on forum non conveniens grounds despite the fact that the contract was made in Texas; the insured property was real property located in Texas; the alleged damage occurred in Texas; the witnesses for both the plaintiff and the defendant were located in Texas; and jurisdiction was obtained over the defendant corporation only because of its limited contacts with California through its agents doing business in the state. 66 Cal. 2d at 741-742, 427 P.2d at 768, 59 Cal. Rptr. at 104.

138. 66 Cal. 2d at 742, 427 P.2d at 768, 59 Cal. Rptr. at 104 (citations omitted).

139. This decision is unsound ... [t]he Thomson holding tends to defeat the policy consideration underlying the doctrine of forum non conveniens, as well as violating the privileges and immunities clause of the Federal Constitution. Proper Role, supra note 136, at 249.

140. 9 Cal. 3d at 841, 512 P.2d at 315, 109 Cal. Rptr. at 91.

141. See note 127 supra.
by the California Legislature. The Legislature had good reason to empower the judiciary to develop the doctrine in such a manner because its expansion of California's jurisdiction to its constitutional limits ensured that many more inappropriate suits would be brought in California.

Prior to Ferreira, grant of a stay usually had been premised on the contemporaneous existence of two suits on the same cause of action. Usually issued only in favor of earlier proceedings commenced, a few courts had issued stays in deference to subsequent suits. But even when an identical suit was pending in another and better forum, a stay formerly was unavailable in cases where the pending suit could be dismissed or stayed because the plaintiff controlled the litigation in that forum. In Thomson, after reversing the forum non conveniens dismissal of the California plaintiff's action, the court directed that his action might also be protected from a stay on remand, "since plaintiff has informed this court that he will endeavor to

142. The comment to Section 410.30 of the Code of Civil Procedure assumes that a court has power to issue a stay at any time without the requirement of a pending suit. See text accompanying note 149 infra.

The Ferreira development of forum non conveniens is strikingly similar to the Wisconsin forum non conveniens statute which was quoted extensively in the comments to section 410.30. It allows only a stay, and lists residency of the parties as only one factor in the balancing process. "Residence of the parties is relevant but does not alone control the decision to . . . [stay] unless that decision is otherwise in balance." Wis. Stat. Ann. § 262.19 comment at 80 (West Supp. 1973).

The Judicial Council Comment to Section 410.30 also cites the Restatement (Second) of Conflicts proposed draft, which has a similarly open-ended codification of the doctrine:

A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action, provided that a more appropriate forum is available to the plaintiff. Restatement (Second) of Conflict of Laws, § 84 (Proposed Official Draft, part I, ch. 4, 1967). The comment to that section indicates that a liberal interpretation of the doctrine was intended by the drafters of The Restatement (Second). See note 150 infra and accompanying text. However, none of the three law review discussions of California's forum non conveniens doctrine published since the codification discuss the stay at all or whether or not the Thomson interpretation of the stay had been superseded. Ryan and Berger, Forum Non Conveniens in California, 1 Pac. L.J. 532, 553 (1970) [hereinafter cited as Ryan and Berger]; Proper Role, supra note 136; Note, Forum Non Conveniens in California: Code of Civil Procedure Section 410.30, 21 Hastings L.J. 1245, 1251-53 (1970) [hereinafter cited as Forum Non].

145. See, e.g., cases cited in Ehrenzweig Conflicts, supra note 63, at 129.

In Ferreira, Ms. Ferreira did not commence her suit in Alabama until after she had been served in Dr. Ferreira's San Francisco suit. See text accompanying note 10 supra. Although Alabama had jurisdiction to modify the Idaho decree, Dr. Ferreira could not be bound to the modification decree unless he voluntarily submitted to jurisdiction, since Alabama had no long-arm statute. Thus the filing of Ms. Ferreira's suit in Alabama was totally without effect on Dr. Ferreira who refused to submit to Alabama jurisdiction.
have the Texas action dismissed or stayed pending outcome of the California suit."\textsuperscript{146}

Ferreira's treatment of the forum non conveniens stay does not include either of these two requirements.\textsuperscript{147} The court states that:

[b]oth the terms of section 410.30 and the prior decisional law . . . distinguish between the dismissal of an action on grounds of forum non conveniens, and the stay of an action on that ground; the court may not dismiss an action if a party is a California resident, but it may stay an action involving a California resident if it concludes that the controversy can be better resolved in a foreign forum.\textsuperscript{148}

At no time in its discussion of the stay does the court refer to a pending suit elsewhere or to the control of any other suit by the plaintiff or defendant. Rather, the court adopts what the legislature intended in the codification of the doctrine:

[A] state court which finds itself to be an inappropriate forum . . . [may] stay the action pending institution of suit and service of process upon the defendant in a more convenient forum.\textsuperscript{149}

\textsuperscript{146} 66 Cal. 2d at 747, 427 P.2d at 771, 59 Cal. Rptr. at 107.

Thomson and the other cases cited in Ferreira were all disputes in which two suits were pending. In these cases, the court had to accommodate both the convenient forum policy and the comity policy of avoiding conflicting results and unseemly competition between states. It was in reference to protecting this comity policy that the court, in Thomson, further restricted the use of the stay. However, the inconvenient forum policy, which would require that the suit be stayed if the other forum were believed to be more appropriate, remained unsatisfied. Ferreira's adoption of an expanded forum non conveniens doctrine accommodates both policies.

\textsuperscript{147} There is a possible alternative explanation of Ferreira to that urged in this Comment: that Ferreira abolished the requirement of a pending suit for issuance of the stay. Effectuating both the policies of forum non conveniens and avoidance of competition between courts, the court in Ferreira could simply have been lowering the threshold of the definition of what constitutes a "pending suit," holding that even the unripened possibility of an identical suit in a better forum was sufficient basis upon which to grant a stay, since such stay could later be vacated if the other suit did not go to judgment. Not all failures to reach judgment in the pending suit should signal reinstatement of the California action. If the defendant's lack of cooperation with the plaintiff in the better forum is the cause, then the California suit should be reinstated. However, if the failure to reach judgment is because the defendant could not get independent jurisdiction over the plaintiff in the better forum and the plaintiff refused to press his claim there, the California stay should not be vacated.

Forum non conveniens should not depend upon technicalities. The mere suggestion of a better forum coupled with the possibility of another suit should, for policy reasons, be sufficient basis upon which to issue a stay. The defendant's attempt to transfer the plaintiff's inconvenient suit to a better forum should not depend upon what the provisions are of that state's long-arm statute. Rather, it should depend directly on the equitable analysis of the convenience of plaintiff's choice of forum. The defendant's intention to submit to jurisdiction in a better forum as indicated by his motion to stay should be an adequate ground to pass the threshold and issue a stay. Predicating the acceptance of the stay motion on the technical requirement of jurisdiction in another forum would defeat the forum non conveniens policy of California without advancing any legitimate state interests.

\textsuperscript{148} 9 Cal. 3d at 838, 512 P.2d at 313, 109 Cal. Rptr. at 89 (emphasis added), 149. CAL. CODE CIV. PROC. § 410.30 comment at 494 (West 1973).
This interpretation of the forum non conveniens is in accord with the Second Restatement which contains a similarly open-ended formulation of the doctrine.\textsuperscript{150}

Further, although the application of the stay to the facts of Ferreira is superseded by the Uniform Child Custody Jurisdiction Act, the court clearly demonstrated that its intention was that trial courts would issue stays whenever the need existed:

Ordinarily the California court should exercise its discretion to issue a stay of the proceedings in this state to permit a final adjudication in the state of the parent entitled to custody under existing decrees.\textsuperscript{151}

Instead of a forum non conveniens stay that is applicable only rarely, application of the stay, at least in child custody cases, was intended by the court to be the rule, not the exception: "the court's discretion to deny . . . stays in interstate child custody suits must be narrowly exercised. . . ."\textsuperscript{152}

The court's dramatic expansion of the forum non conveniens stay is clouded by one ambiguity. The opinion refers to a suit filed in Alabama by Ms. Ferreira after the San Francisco suit was filed by Dr. Ferreira but before his Orange County action was initiated. The court, however, cannot have given any significance to the question of the Alabama suit in issuing the stay\textsuperscript{153} or it would have consulted the parties to verify its existence.\textsuperscript{154}

The new dimensions of the forum non conveniens stay are almost identical to those of the conditional dismissal, the most frequently used form of the forum non conveniens doctrine. To ensure that a fair alternative forum is available, the forum non conveniens dismissal is conditioned on the moving party's stipulation to waive any jurisdiction.

\textsuperscript{150} \textit{Restatement (Second) of Conflict of Laws § 84, comment (e) at 253 (1971).}
\textsuperscript{151} 9 Cal. 3d at 842, 512 P.2d at 316, 109 Cal. Rptr. at 92. \textit{Ferreira} illustrates that the issuance of a stay is not predicated on the continuing jurisdiction of the court issuing the original custody decree. If the home court of the foreign parent were always the court which issued the decree, the continuing jurisdiction of that court technically would constitute a prior pending action in another state. However, the state of residence of the foreign parent (Alabama in \textit{Ferreira}) is often not the decree rendering state (Idaho), so the state of residence cannot be assumed to be the state with continuing jurisdiction.
\textsuperscript{152} \textit{Id.} at 841, 512 P.2d at 315, 109 Cal. Rptr. at 92.
\textsuperscript{153} The court refers to the Alabama action in its summary of facts introducing the case, \textit{Id.} at 832 n.5, 512 P.2d at 309 n.5, 109 Cal. Rptr. at 85 n.5. However, no further reference is made to the Alabama action in the discussion of the forum non conveniens stay and its application in child custody or other types of suits.
\textsuperscript{154} The attorneys for both parties have stated that Dr. Ferreira was never served with process in the Alabama proceeding. Interviews with Mr. K. Lambert Kirk and Mr. John O. Stansbury, Attorneys for Dr. and Ms. Ferreira, respectively, by telephone from Berkeley, California, December 13, 1973.
tional objection (such as the running of the applicable statute of limitations) and to cooperate with the new suit (as by accepting service of process and so forth). Like the conditional dismissal, the stay can be imposed at the discretion of the trial court whenever fairness and convenience considerations dictate.\(^\text{155}\)

Unlike the conditional dismissal, however, the stay can be applied against a California resident. Another difference between the conditional dismissal and the stay is that the stay offers greater opportunity for the court’s equitable management of the out-of-state suit. Under a conditional dismissal, the court may not fully anticipate the difficulties of litigating in the alternative forum and may not require sufficient stipulations of cooperation by the defendant. Unforeseen circumstances also may arise which greatly increase the plaintiff’s burden in proceeding in the better forum. In such cases a party whose suit has been stayed can return to the California court to seek further concessions from his opponent or to resume proceedings in California.\(^\text{156}\)

If the moving party has fulfilled the requirements of the conditional dismissal, however, the California trial court may no longer be able to offer a remedy. The stay gives the California court greater flexibility than the conditional dismissal to maintain jurisdiction over the parties until an appropriate final outcome is reached.

The language and context of the Ferreira discussion of the forum non conveniens stay imply that the new development of the doctrine is to be generally applicable. Since the statute interpreted in Ferreira is, on its face, one of general applicability, it is difficult to argue that the court intended to carve out a single substantive exception in applying the doctrine without explicitly so stating. This interpretation gives California courts an important tool to avoid deciding inconvenient suits brought into California under the contemporaneously enacted long-arm statute which stretches jurisdiction to its constitutional limits.

C. Indications of the Stay’s General Applicability in the Law Prior to Ferreira

Several developments prior to Ferreira further indicate that the court there was correcting flaws in the forum non conveniens doctrine,

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155. See note 128 supra.

156. The staying court retains jurisdiction over the parties and the cause; it can render, enforce, and modify orders for temporary custody of the children; it can compel the foreign parent to cooperate in bringing about a fair and speedy hearing in the foreign forum; it can resume proceedings if the foreign action is unreasonably delayed or fails to reach a resolution on the merits. In short, the staying court can protect the welfare of the children and the interests of the California resident pending the final decision of the foreign court.

9 Cal. 3d at 841, 512 P.2d at 315, 109 Cal. Rptr. at 91 (citation omitted).
as well as proposing solutions to the problems in child custody disputes. The trend of the court's jurisdiction decisions has been to increase the importance of forum non conveniens consideration.\textsuperscript{157} Buckeye Boiler Co. v. Superior Court, decided in 1969, greatly extended the state's power to entertain suits when the preponderance of convenience factors indicates California the best for forum.\textsuperscript{158} Analytically, Buckeye is not compatible with Thomson\textsuperscript{159} the leading case on forum non conveniens. Thomson held that even when the convenience factors overwhelmingly point to another state as the best forum, California will not dismiss an action if one of the parties is a California resident.\textsuperscript{160} The aftermath of the decision in Buckeye, and criticism of Thomson by commentators\textsuperscript{161} may have led the court to expand the stay to accommodate both the plaintiff's interests in fairness and the convenient forum interests of the state and the defendant.

Other jurisdictions, traditionally unsympathetic to the doctrine when applied to residents, have also reversed their position. In 1972, the highest court in New York overruled its longstanding prohibition against invoking forum non conveniens if one of the parties was a New York resident: "[i]t has become increasingly apparent that a greater flexibility in applying the doctrine is not only wise but, perhaps, necessary."\textsuperscript{162} The New York court cited Delaware and New Jersey as states which had recently recognized the need for liberalizing the applicability of forum non conveniens.\textsuperscript{163}

\textsuperscript{157} The first traces of the intermingling of forum non conveniens and jurisdiction can be found as early as 1957 in cases where forum non conveniens factors were used to justify quasi in rem jurisdiction. See, e.g., Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957). Forum non conveniens then became directly applicable to jurisdiction questions, and the importance of the forum non conveniens factors grew from merely a "relevant" criterion (Empire Steel Corp. v. Superior Court, 56 Cal. 2d 823, 366 P.2d 502, 17 Cal. Rptr. 150 (1961) ) to a decisive determinant (Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969)).

\textsuperscript{158} Once the threshold of sufficient activity by the defendant has been passed, the question [of jurisdiction] . . . involves both a consideration of fairness to the plaintiff . . . and a determination of whether . . . the forum state is what Professor Ehrenzweig has termed a "forum conveniens." 71 Cal. 2d 893, 899, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). For discussion of the relationship of forum non conveniens and jurisdiction in California, see Note, Forum Non, supra note 142 at 1251-53.

\textsuperscript{159} 66 Cal. 2d 738, 427 P.2d 765, 59 Cal. Rptr. 101 (1967).

\textsuperscript{160} See notes 135-137, supra and accompanying text.

\textsuperscript{161} See, e.g., Proper Role, supra note 136.


\textsuperscript{163} Id. at 361, 278 N.E.2d at 623, 328 N.Y.S.2d at 403. The New Jersey and Delaware decisions imply that forum non conveniens applies whether the state resident is the defendant or the plaintiff. The defendant's motion to dismiss on the ground of forum non conveniens was granted where the defendant was the resident in the New Jersey case and where the plaintiff was the resident in the Delaware case. Although the New York suit involved the more typical case of a resident plaintiff, the New York
A recent decision by England's highest court, the House of Lords, steadfastly insisted that forum non conveniens was not available in English courts but held that a stay of the English proceedings was compelled under a 100-year old statute.\textsuperscript{164} Despite its rejection of the "radical solution"\textsuperscript{165} of forum non conveniens, the court's interpretation of the stay is indistinguishable from the United States interpretation of forum non conveniens.\textsuperscript{166}

Finally, the 1969 California codification of forum non conveniens has never prohibited the court from developing the doctrine. And the broad language of the statute\textsuperscript{167} indicates legislative approval

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rule embraces the New Jersey decision and applies to resident defendants as well.

The majority of cases involve resident plaintiffs because the plaintiff is more likely to bring suit in the state of his residence for his own convenience.

Some early cases indicated that the doctrine was not available for resident defendants to object to the plaintiff's choice of forum. Analytically, however, there is no reason to treat a resident defendant's forum non conveniens motion differently than a nonresident's motion. The better rule is to apply the doctrine without regard to whether the state resident is the plaintiff or the defendant. See, \textit{e.g.}, Barrett, \textit{supra} note 128 at 413-14.


Section 24(5) of the Supreme Court of Judicature Act, 1873 was restated in similar form in the present statute, section 41 of the Supreme Court of Judicature (Consolidation) Act, 1925. \textit{Id.} at 811. In reinterpreting the statute, but refusing to adopt forum non conveniens, the House of Lords seems to be adhering to form over substance in the finest conservative traditions of stare decisis. Lord Reid, in summarizing the reason for the old English rule (which he liberalizes but refuses to overturn), stated:

\textit{My Lords, with all respect, that [statement of the English rule] seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races.}

\textit{Id.} at 811.

165. \textit{Id.} at 810.

166. \textit{Gulf Oil Corp. v. Gilbert}, 330 U.S. 501 (1947). The statutory rule endorsed by the House of Lords applies the same balancing test which is used in the United States: great weight is given to the plaintiff's choice of forum, but the defendant can rebut that choice by showing that another forum, not unjust to the plaintiff, is available and that the public and private interests in convenient and fair proceedings would be substantially impaired in the present forum. "The Atlantic Star" \textit{supra} note 164, at 813. \textit{See also Price v. Atchison, T. \& S.F. Ry. Co.}, 42 Cal. 2d 577, 268 P.2d 457 (1954).

It appears that the House of Lords failed to understand the doctrine of forum non conveniens, at least as developed in the United States. "According to . . . [the doctrine of forum non conveniens], whatever the law may say about jurisdiction, the parties will be compelled . . . to litigate in the forum which in all the circumstances seems to the court the most appropriate one." The "Atlantic Star", \textit{supra} note 164, at 816-17. This formulation looks only at the public interest in preventing complex, foreign-connected suits from clogging the crowded courts. It ignores the first principle stated in \textit{Gulf Oil}: "The plaintiff's choice of forum should rarely be disturbed. . . ." 330 U.S. 501, 508 (1947). See note 128 \textit{supra}. This may explain why the House of Lords felt it was rejecting the forum non conveniens doctrine while, in fact, it was applying it.

167. See note 132 \textit{supra}. 
of prior judicial interpretations. Further judicial development of the forum non conveniens doctrine is a legitimate exercise of judicial power: the rule is court-created; it pertains to a procedural matter and to the management of a court's own calendar, issues of peculiarly judicial competence.

In Ferreira the California Supreme Court has created a new forum non conveniens stay which appears to be generally applicable to all subject matter areas not precluded by specific statute. Other courts have recently taken similarly expansive steps with the forum non conveniens doctrine because the reasons to do so are compelling in light of overcrowded courts and increasingly liberalized jurisdiction. If the conclusion of the stay's general applicability is accepted, it is then instructive to explore the practical effects of the new doctrine on California suits.

D. Practical Effects of the New Forum Non Conveniens Stay

The stay developed in Ferreira should have substantial impact on California practice. The advantages of the stay, especially that of avoiding most litigation of the issues in personam jurisdiction presents, should induce an expanded reliance on the doctrine by the parties. The potential applicability of the stay to most suits and the equitable control it allows the trial court should vastly increase its use.

The 1969 statute allows a special appearance to argue the broader forum non conveniens motion and reserves the right later to contest jurisdiction. It is in the parties' interests to argue forum non conveniens before jurisdiction. Since the motion is a matter for trial court discretion, it is more difficult to reverse a ruling on forum non conveniens. Further, such a ruling could not be appealed to the United States Supreme Court.

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168. 9 Cal. 3d at 838, 512 P.2d at 313, 109 Cal. Rptr. at 89.
169. [T]he California Legislature has neither restricted nor enlarged California's existing forum non conveniens doctrine. Presumably the state legislature concluded that it was desirable to leave it to the courts to establish the precise conditions under which such a dismissal [or stay] will be granted.
171. See note 133 supra and accompanying text.
172. Appellate review of rulings on forum non convenience motions is reserved for capricious rulings or unconstitutional discrimination by the fact-finding court. In the principal Supreme Court case, Gulf Oil Corp. v. Gilbert, the Court stated, "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The [forum non conveniens] doctrine leaves much to the discretion of the court to which plaintiff resorts . . . ." 330 U.S. 501, 508 (1947). In Price v. Atchison, T. & S.F. Ry. Co., 42 Cal. 2d 577, 583-84, 268 P.2d 437, 461 (1954) the California Supreme Court emphasized that "the injustices and the burdens on local courts and taxpayers . . . require that our courts . . . exercise their discretionary power to decline to proceed in those causes of action which . . . may
States Supreme Court because, unlike jurisdiction, forum non conveniens does not present a federal question. Therefore, both parties may save significant time and expense if a forum non conveniens motion is the first step in litigation. The state's interest in avoiding expensive and unnecessary litigation on jurisdiction and granting speedy relief to substantive claims coincides with the parties' interests.

Despite the creation of the special appearance and the possible advantages to the parties, the effect of the 1969 codification on litigation was minimal because of the severe restrictions on the forum non conveniens doctrine. However, after Ferreira's expansion of the stay, the initial step in a suit should be litigation of a forum non conveniens stay motion. A non-resident thereby may avoid the tactical dilemma between coming to California to fight jurisdiction or waiting at home to attack jurisdiction collaterally because he may move successfully to have the California action stayed.

However, the Ferreira expansion may give a non-resident defendant an unexpected advantage by allowing him two chances to contest California jurisdiction. It is now possible for the defendant to make a special appearance to request a forum non conveniens stay in every
case, as long as he is willing to submit to suit elsewhere.\textsuperscript{176} The defendant thus would first make a special appearance to move for a forum non conveniens stay. If the motion is granted, all is well.\textsuperscript{177} If the motion is denied, the defendant would retreat to his home forum without objecting to jurisdiction\textsuperscript{178} and regroup forces for his collateral attack on the California default judgment which would be entered against him. Collateral attack would still be available because there can be no res judicata effect given to jurisdiction when the party appears under a special appearance statute. And the California holding on forum non conveniens does not decide personal jurisdiction. Full faith and credit by defendant's home court to California's forum non conveniens decision does not preclude litigation of jurisdiction, and, of course, that forum is not bound to a finding of personal jurisdiction made \textit{ex parte} by a California court. The state where the collateral attack on the California judgment is launched must then decide if California's exercise of jurisdiction was constitutional.\textsuperscript{179} While California's jurisdiction statute could not be found unconstitutional since it is based on the United States Constitution, a state court could find California's interpretation unconstitutional.\textsuperscript{180}

The second court, however, would probably interpret California's special appearance statute to preclude later attack on jurisdiction if the defendant had appeared there to raise a forum non conveniens objection. Although the forum non conveniens motion could not be deemed a general appearance under California Code of Civil Procedure section 418.10, a court could conclude that the defendant waived any

\textsuperscript{176} The only limitations on the use of the stay are the general restrictions on the forum non convenience doctrine. See note 128 supra.

\textsuperscript{177} A victory on the forum non conveniens stay may carry with it a series of equitable orders from the court which may even include paying the plaintiff's added expenses to litigate in the defendant's home state. See note 156 supra. However, the grant of the stay is much safer from appeal than a denial of jurisdiction. See note 172 supra.

\textsuperscript{178} Since a court is much more likely to decide on equitable grounds that the suit would be better tried elsewhere than to admit that it lacks power to decide that kind of suit, there is virtually no chance of winning a jurisdictional objection if the defendant has already lost on his forum non conveniens motion. There is another reason why a court would probably be more willing to grant a forum non conveniens stay than to sustain a motion to quash for lack of jurisdiction. When it issues a stay, the court preserves its jurisdiction and thus, its power to compel the defendant's cooperation with plaintiff's suit in another forum. On the other hand, if California dismisses jurisdiction, there is no guarantee that the plaintiff will be able to bring suit anywhere.


\textsuperscript{180} The Georgia Supreme Court, for example, found an application of its own long-arm jurisdiction statute unconstitutional in a case where the constitutional fairness considerations of due process seem much clearer than in \textit{Buckeye Boiler}. Young v. Morrison, 220 Ga. 127, 137 S.E.2d 456 (1964). Such courts could reasonably be expected to judge the constitutionality of California's jurisdiction differently in some cases.
defenses and objections available to him but not raised at the special appearance. Therefore, a defendant that litigated forum non conveniens but left California without objecting to jurisdiction, even though he could have done so at the section 418.10 special appearance, might be estopped from attacking jurisdiction collaterally when the plaintiff brings suit to enforce the default judgment.

The Judicial Council Comment to the statute already contemplates that the forum non conveniens objection would be filed only after an objection to jurisdiction was denied, although the statute does not so state. To avoid uncertainty and judicial attempts to limit the effect of the special appearance statute after Ferreira, the California Legislature should amend the statute to close this loophole.

CONCLUSION

Ferreira clearly poses the problems involved in determining jurisdiction over the "interstate child." Despite its cogent analysis and formulation of strict guidelines, the court refused to depart from the familiar theme of trial court discretion. The cases illustrate that the problem of interstate child custody offers an irresistible mire for regional chauvinism and second-guessing. Reliance on trial court discretion has not been a workable solution.

The Uniform Child Custody Jurisdiction Act offers the best accommodation of the interests to be protected in interstate custody proceedings. The Act tightly restricts trial court discretion and creates new avenues for interstate cooperation. The California Legislature is to be commended for its prompt response to the problems illuminated

181. Section 418.10 also permits [a defendant] to object on inconvenient forum grounds to the court's exercising its jurisdiction over him if his challenge to jurisdiction should be denied. Cal. Code Civ. Proc. § 418.10 comment (West 1973).

182. Since litigation of a forum non conveniens motion is preferred to litigation of a jurisdiction motion, the statute should continue allowing the defendant to raise the forum non conveniens objection first. Only if he fails also to raise the jurisdictional objection within the time allowed for the special appearance objections should he be deemed to have waived any jurisdiction objections. This solution avoids the problem of forcing litigation of jurisdiction first and precludes the defendant from getting a free objection to jurisdiction.

An amendment to Section 418.10(a) which would accomplish this might read:

(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either:

(1) to quash service of summons on the ground of lack of jurisdiction of the court over him, or

(2) to stay or dismiss the action on the ground of inconvenient forum. A motion under subparagraph (2) of this subsection shall constitute a consent to jurisdiction unless the defendant also serves and files a notice of a motion under subparagraph (1) of this subsection within the time period prescribed in this subsection.
in *Ferreira* and its adoption of the best available solution to these problems.

*Ferreira's* expansion of the forum non conveniens stay satisfactorily answers the need for court discretion to reject jurisdiction. The "necessity"\(^{183}\) of the forum non conveniens doctrine has been enhanced by the adoption of long-arm statutes encouraging forum shopping in transitory actions. The stay is an improvement in California law because it focuses litigation on the more straightforward doctrine of forum non conveniens and away from the technical doctrine of in personam jurisdiction. Additionally, the number and extent of expensive appeals is diminished. The forum non conveniens stay is the most flexible jurisdictional tool available. It invites courts fully to exercise equitable control over litigation and thereby achieve the goals of the forum non conveniens doctrine. It is to be hoped that California courts will accept the invitation.

_Randall R. McCathren_

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