THE STATUS OF FOREIGN CUSTODY ORDERS IN NEW ZEALAND

Two recent decisions of New Zealand Courts raise the question as to the status of orders of a foreign court granting custody of a child to one of the parents. The object of this article is to examine the law governing this topic and make some observations as to its adequacy.

First considered is the court's jurisdiction in custody cases which have some foreign element (Part I). Next, the approach of the English courts to the common situation where children have been "kidnapped" and where a court of a foreign jurisdiction has made a preliminary order will be discussed (Part II). Then the New Zealand law on each of these situations will be evaluated (Parts III and IV). The status of foreign custody orders in other situations will then be discussed (Part V). Finally the effect of mutual enforcement conventions on the present law will be referred to (Part VI).

I. Jurisdiction of New Zealand Courts

The New Zealand courts have jurisdiction under s. 5 (1) of the Guardianship Act 1968 in any one of three cases:

(a) Where any question of custody, guardianship, or access arises as an ancillary matter in any proceedings in which the court has jurisdiction; or

(b) Where the child who is the subject of the application or order is present in New Zealand when the application is made; or

(c) Where the child, or any person against whom the order is sought, or the applicant is domiciled or resident here when the application is made.

Section 5 (2) qualifies the above with a proviso that the court notwithstanding s. 5 (1) *may* decline to make an order if *neither* the person against whom it is sought nor the child is resident here and the court is of the opinion that no useful purpose would be served by making an order, or that in the circumstances the making of an order would be undesirable.

This is a wide jurisdiction and covers the three basic interests which a country may have in a particular child. Firstly, there is the welfare of the child which is of paramount importance (s. 23 of Guardianship Act), and the Supreme Court in its paternal jurisdiction will exercise it over any child which is present in the country. The second basis proceeds on the ground that custody is a question of status and hence is subject to the country where the child and parent/s are domiciled or resident (when the parents are still married the child has its father's domicile, but if they are divorced it has the domicile of the parent with custody). Finally, jurisdiction in custody proceedings as ancillary relief is a necessary corollary to its function

in divorce and nullity proceedings. These bases of jurisdiction will often overlap. As Luxford and Webb point out,[1] s. 5 (1) restates what is commonly understood to be the English situation with the qualification that the Court of Appeal in England has recently disapproved of domicile as a ground for assuming jurisdiction.[2] This is equivalent to 'domicile" under s. 5 (1) (c). "Residence", however, does not have the same disadvantages. It is a question of fact and not as domicile, partially a question of *animus remandi.*

Some of the more important implications of these three heads of jurisdiction should now be examined. It is clear firstly, that under s. 5 (1) (a) the court can exercise its jurisdiction even if the child is resident with one parent overseas.[3] It also imports that the court may order an absent parent to bring a child back into the jurisdiction even though there is no apparent prospect of enforcement if the parent disobeys it.[4] The lack of effective enforcement need not prevent the court from making an order provided that under s. 5 (2) some useful purpose is served by doing so.[5] It may be next mentioned that s. 5 (1) (b) will be invoked most often in the so-called "kidnapping cases", where the child is removed to New Zealand. These will later be the subject of discussion. Finally, under s. 5 (1) (c), a child will still be "resident" in a country although the child has been removed abroad from where the matrimonial home was situated.[6] Kidnapping by one parent cannot change a child's ordinary residence.

The New Zealand jurisdictional position is similar to that taken in America by the Restatement of the Law Second, "Conflict of Laws" (2d) Vol. 1. The Restatement cites *Sampsell* v. *Superior Court*[7] as authority for this proposition. According to Ehrenzweig[8] the Supreme Court of California considered current theories of jurisdiction including the child's domicile, in personam jurisdiction over the parents, and the child's presence within the state and rejected "hard and fast rules" in this field. It also accepted that the courts of two or more states may have concurrent jurisdiction in the interests of the child though it felt that a court would decline such jurisdiction when other states had a more substantial interest in the child.

Again in Wisconsin,[9] prior to a 1959 amendment to the Family Code, the Supreme Court of that state had approved three tests for jurisdiction — (1) The domicile of the child, (2) The presence of the child and (3) Personam jurisdiction over the interested parties to the suit — this would include the situation where custody disputes arose as ancillary relief and where the child was outside the state.[10] Now

1. Luxford & Webb, *"Domestic Proceedings"*, (1969), 209.
2. *Re P. (an infant)* [1965] Ch. 568.
3. *Mitchell* v. *Mitchell* [1963] N.Z.L.R. 999.
4. *Re Liddell's Settlement Trusts* [1936] Ch. 365.
5. See *Scheffer* v. *Scheffer* [1967] N.Z.L.R. 466.
6. *Re P. (an infant)* supra.
7. 32 Cal. 2d 763.
8. *Conflict of Laws* (2nd ed.) 1962, 282.
9. See Scallon, *"Domestic Relations"* (1961) Wis. L. R. 347ff.
10. *Anderson* v. *Anderson* 74 W. Va. 124 — cited by Scallon, n. 9, 349.

a new section[11] overules prior case law and takes a different approach to jurisdiction. The statute now allows Wisconsin courts to assume jurisdiction in two circumstances. The first basis is as ancillary relief, and in this connection there is no requirement that the child be either domiciled or present in the state, as the order can be enforced in the court's in personam jurisdiction against a parent. Secondly, a custody application can be heard if the child is present in the state. The code does not have provision similar to s. 5 (1) (c). As Scallon points out,[12] this omission may have been aimed at preventing suits to harass parents only temporarily within the state, but it may also bar certain other custody disputes which arguably should be heard in that state, such as the situation where one spouse is domiciled in that state. The New Zealand s. 5 (1) (c) is restricted to residence or domicile. Harassment is not thus a factor and it would seem wrong to exclude jurisdiction when both parents or one are resident in the state and the child is out of the jurisdiction, albeit only temporarily.

It is considered that the three bases of jurisdiction provide a reasonable and suitable approach, and that a country's interference in any of these circumstances can be prima facie justified. A proviso such as that in s. 5 (2) of our Guardianship Act is a much more satisfactory way than a blanket restriction of dealing with a problem where it is desirable that the courts do not exercise jurisdiction. The state in which a child is present should have power to protect the child. The country which already has jurisdiction over the parties contesting custody can also be a convenient forum to determine custody, and lastly, the court of a child's residence or domicile usually will have a considerable interest in a child's welfare. There is no problem if all three bases of jurisdiction are grounded within the state, but it often happens that these bases are divided and more than one country has concurrent jurisdiction. We must also add the possibility of a country, in which custody jurisdiction is determined by nationality, being involved.

II. The Status of Foreign Custody Orders in the United Kingdom

Where the bases of jurisdiction are divided, the decision of a court of one country may be raised in a further custody application between the same parties in another country. The status of the first custody order then becomes a very relevant consideration.

In New Zealand (as in England[13] and Australia[14]) the only statutory guidance as to what factors should be taken into account in a custody hearing is s. 23 of the Guardianship Act 1968 and the English and Australian equivalents. All these provisions provide that in any custody dispute the court shall regard the welfare of the child as the "first and paramount consideration". However, the English and New Zealand courts have taken divergent views on the weight to be attached to foreign orders.

11. Wisconsin Statutes 247. 05 (1959).
12. Note 9, 349.
13. Guardianship of Infants Act 1925 (15 & 16 Geo. 5 c. 45).

In the United Kingdom it has been accepted that there is in some circumstances a 'primary rule' that when a court of competent jurisdiction has adjudicated upon custody, an English court should at a matter of judicial comity, give effect to it and direct the return of the children to the country of origin without any consideration of the merits of the case. It is worth noting at this juncture that the so called 'primary rule' is not of general application but is only applied in certain situations.

Firstly it has been applied where divorce proceedings are pending in the country where the parents had matrimonial home. Usually the court in the jurisdiction of the matrimonial home will have given interim custody to one of the spouses, but even if there has been no court application as regards custody in the foreign jurisdiction, it may be of importance whether the hearing on the merits should take place in New Zealand, or in the country of the matrimonial domicile. In this situation there is a line of authority in England for the proposition that it would be more appropriate to leave questions of custody to be dealt with on their merits by the same courts which will have the divorce proceedings befort it.[15]

A good example of the first is *Re G. (an infant).*[16] In this case the Court of Session had awarded interim custody to the father, who had previously commenced divorce proceedings in Scotland. The mother at that time had de facto custody of the child. The father then made an application ex parte to the High Court and obtained an interim order that the child be handed over to him. When the matter came before the court for a full hearing the court was asked to make arrangements regarding the care and control of the child until a detailed investigation of the position could be made on its merits. The question then arose whether this investigation should be made in the Scottish or the English court. Buckley J. said; " . . . I think, as between two courts of co-ordinate jurisdiction, one in this country and the other in Scotland, prima facie the right course is for the matter to be investigated in the Scottish court which had seisin of the matter before the proceedings began and which has made the order I have mentioned."[17]

Buckley J. thought that looking at the matter from the point of view of the convenient forum where the merits of the case should be investigated, everything was in favour of the merits being investigated in Scotland where the original order was made. It would be in the Scottish court that the character and behaviour of the parties could be best examined and where the interests of the infant could be best assessed in the light of all circumstances known to the court.

It should not be thought that the mere fact that the foreign court

14. For Australian statutes, see Nygh — "Conflict of Laws in Australia" (2nd ed., 1971), 582, footnote 24.
15. See *Re G. (an infant)* [1969] 2 All E.R. 1135.
16. Idem.
17. Ibid., 1138.

is to have jurisdiction in divorce proceedings, is the basis of the English approach. The divorce proceedings may be uncontested, in which case no balanced view of the relevant evidence would be placed before the court. However in the country of the matrimonial domicile evidence relating to the fitness of the spouses to have custody will be readily available, while it may not be in a foreign jurisdiction. This is the main basis for the English approach, as can be seen from *Re G. (an infant)*.[18]

The second application of the "primary rule",[19] is in the so-called 'kidnapping cases".[20] These are cases in which one parent has removed a child from one country to another either in defiance of a court order or at least without the consent and foreknowledge of the other spouse.

In *Re H. (infants)*,[21] the mother had removed the children to England without the approval of the Supreme Court of New York as provided for in the custody order. Cross J. at first instance did not make a full enquiry into the merits of the case, but thought it proper that the children be sent back to New York where they belonged and where the Supreme Court was already seised of their case.

It was argued on appeal that the judge was precluded by authority from making the order which he did, permitting the children to be removed from the jurisdiction, unless and until he had himself conducted a full enquiry into the merits of the dispute, and had formed his own conclusion that it was in the best interests of the children to commit them to the care of the parent who wished to remove them out of the jurisdiction. It was held, however, by the Court of Appeal, that although the court at first instance had the jurisdiction to make a full enquiry into the merits, it was not bound to do so, and as the judge had satisfied himself that the children would not come to serious harm if they were sent back to New York, he had rightly decided to authorize their return.

This case can be regarded as establishing the "primary rule" as regards "kidnapping cases", and in fact the *'forum conveniens'* cases[22] were developed by analogy from *Re H. (infants)* and later cases following it. Many cases raise both problems or some variation upon them. In *Re T. (infants)*[23] the mother took her children from Canada to England without the consent of the husband but not in defiance of a court order, interim or otherwise. The trial judge regarded this

18. Supra.
19. Cf. *Re B. (infants)* [1971] N.Z.L.R. 143, 144.
20. *Re T. (infants)* [1968] Ch. 704; [1968] 3 All E.R. 411.
Re E. (an infant) [1967] Ch. 287, 761; [1967] 1 All E.R. 329; on appeal, [1967] 2 All E.R. 887.
Re H. (infants) [1965] 3 All E.R. 906; affirmed on appeal [1966] 1 All E.R. 886.
21. [1965] 3 All E.R. 906. (High Court).
22. *Re G. (an infant)* [1969] 2 All E.R. 1135.
Re T. (an infant) [1969] 3 All E.R. 998.
23. [1968] 3 All E.R. 411, C.A.

as a kidnapping case and said that the court should set its face against the unilateral removal of children from their homes, and should not countenance custody proceedings unless there was a good reason to do so. He was also influenced by the consideration that the custody dispute which would most certainly arise could be best dealt with before a Canadian court which would have all the relevant information before it.

The classic formulation of the 'kidnapping case" approach is the judgment of Cross J. in *Re E. (an infant)*,[24] which followed *Re H. (infants)*.[25] The child in this case was removed from the U.S. before a court order could be served on the grandfather and aunt, and despite knowledge of American court proceedings. The mother as a result of these procedings obtained temporary custody from a New Mexico court. The child meanwhile remained with the aunt and uncle in England. The aunt had been named in the child's father's will as being fit for and as having precedence as to the custody of the child in the event of his death, which in fact had just occured prior to the "kidnapping". The father had regarded the mother as unfit to have custody.

The aunt then applied to the High Court for *de jure* custody. Cross J. said in a passage approved by the Court of Appeal:[26]

> In modern conditions it is often easy and tempting for a parent who has been deprived of custody by the court of country "A" to remove the child suddenly to country "B" and set up home there. The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. The substitution of self help for the due process of law in this field can only harm the interests of the child generally and a judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child.

Cross J. went on to hold that in the special circumstances of this case, it would be disastrous to take the child from the aunt who now stood in the relation of a mother to the child. Moreover the child had welcomed the aunt with open arms and did not wish to return to America. Implicit in this decision is the fact that the welfare of the child is only consulted to the extent that the foreign order will not be enforced if to do so would cause serious harm to the child. However, we observe that in order to discover whether serious harm may happen to the child if he is removed out of the jurisdiction, there must have been some form of substantive enquiry as by Cross J. As a consequence, one may well wonder what is left of the original approach. Discussion of this issue will be left for the moment, as

24. [1967] Ch. 287, 761, C.A.
25. [1966] 1 All E.R. 886, C.A.
26. [1967] Ch. 287, 289.

it can be best dealt with when making an evaluation of the English treatment of kidnapping.

III. The Status of Foreign Custody Orders in New Zealand in Kidnapping Situations

It will be the aim of this part of the article to consider other cases which may help to shed light upon the problem under discussion, and on the basis of these cases, some observations are made as to whether New Zealand law provides a satisfactory general solution.

(A) The Present New Zealand Law

The basic New Zealand case is now *Re B. (infants).*[27] The parents had their matrimonial home in Australia; the marriage broke down and the mother, without prior warning to the father, brought the children to New Zealand and remained here with her parents. After a visit to New Zealand in which he was unable to obtain access to his children, the husband instituted proceedings for restitution of conjugal rights which had not been heard by the time of the New Zealand custody application. He was granted interim custody of the two children by the Supreme Court of New South Wales. The children were made wards of the court and Roper J. refused to make an immediate order in favour of the father, granting him leave to remove his children out of the jurisdiction and he directed a hearing on its merits.

Counsel for the father made the submission in the Court of Appeal that . . . "although the learned Judge had a discretion in this context he had no evidence before him to justify his departure from what counsel contended was the primary rule, i.e. that a court of competent jurisdiction having adjudicated upon custody, this court should as a matter of judicial comity give effect thereto, and direct the return of the children to Australia without any examination of the merits by a court in New Zealand."

Haslam J. in delivering the judgment of the Court of Appeal recognised that the 'primary rule' as applied to kidnapping cases could have no application in the present case as this was not a situation where the parent disappeared with the children of the marriage to a foreign country in order to defeat a current custody order. He pointed out that the interim order had not been made until the wife had been in New Zealand for some several months and he also thought that compliance would entail disruption of the lives of the children. The case consequently did not contain a kidnapping element but did, however, involve the status of an interim order and questions of comity and *forum conveniens* — the first application of the "primary" rule.

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27. [1971] N.Z.L.R. 143.

Haslam J. went on to say:[28]

The Guardianship Act . . . must first be consulted when seeking guidance in the present situation. Section 33 of the Act declares that the provisions of the Statute shall replace the former rules of common law and of equity in this field "except as otherwise provided" and therefore the recent English authorities . . . can henceforth have only limited application in this country.

He then considered s. 5 of the Guardianship Act 1968 and concluded that the "general tenor" of the statute supported the approach of Roper J. to the problem in the court below, in directing that a hearing should be held on its merits, Haslam J. notes that s. 23 (1) is unqualified in its terms in providing that in *any* procedings where custody is in question, that the court *shall* have regard to the welfare of the child as the first and paramount consideration. He also thought that the next sentence in s. 23 (1) may have particular importance in this case — "The court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child."[29]

When this provision is read in conjunction with s. 33 (1) of the Act, it is clear that the terms of our statute deprive of much of their force, so far as they may ever have been applicable in New Zealand, the dicta in the English cases upon "unilateral movement of children."[30]

Haslam J. cited *Re T. (infants)* and the comment of Cross J. in *Re E. (an infant)* already mentioned.[31] These cases are plainly inconsistent with the Guardianship Act which emphatically expresses that the welfare of the child is to be the first and paramount consideration. The English courts could not quarrel with this proposition if there is a hearing of the case on its merits in view of s. 1 of the Guardianship of Infants Act 1925 which makes the welfare of the child the first and paramount consideration. However, they consider they have a discretion at a preliminary hearing as to whether they will direct a hearing on the merits, send the children back to the foreign jurisdiction and enforce the order of that jurisdiction. This approach is not available here. A New Zealand court must investigate the merits of the case. If it is decided to direct the children to return to their country of origin it will be because in accordance with s. 23, the welfare of the child will be best served by doing so. The only apparent exception to this rule is noted by Haslam J.:

> It would appear that, although in England the prevalence of "kidnapping" cases has reached the proportions of a local problem, the Courts of this country will prefer, in view of the terms of our Guardianship Act, the opinion of the Privy Council delivered by Lord Simonds in *McKee* v. *McKee*,[32]

28. Ibid., 144.
29. This provision will be discussed later.
30. [1971] N.Z.L.R. 143, 145.
31. [1967] Ch. 287, 289.
32. [1951] A.C. 352. [1951] 1 All E.R. 942.

> where the Judicial Committee re-affirmed that the "infant's welfare is the paramount consideration", and that Court in whose jurisdiction the child happens to be "should give effect to the foreign judgment without further inquiry" only when it is "in the best interests of that infant that it (i.e. the Court) should not look beyond the circumstances in which its (i.e. the foreign) jurisdiction was invoked."[33]

With the foregoing in mind, Haslam J. said that although the order of the Australian court was interim in character and was pronounced some seven months after the departure of the mother for New Zealand, as Roper J. pointed out in the court below 'proper weight'[34] would be given to that order when the merits are being investigated by the Supreme Court in New Zealand. Until then the Court thought it undersirable that the children, who had lived in New Zealand for more than a year, should be disturbed and that the welfare of the children required a determination at an early date of the mother's application for custody.

As a result of this case, we must take it that the English approach to the *forum conveniens*/interim custody cases and to "kidnapping cases"[35] is rejected. In either case, there must be a hearing on the merits of the dispute. The only exception to this rule, as mentioned above, is where it is in the best interests of the infant that the court should not look beyond the circumstances in which its jurisdiction is invoked. It is difficult to visualise circumstances to which this exception would apply, but Lord Simonds may have had in mind the situation where a child is temporarily within the jurisdiction and it is vitally important both to prevent the child from leaving the country and to restore the status quo.

The Privy Council decision in *McKee* v. *McKee*[36] which was cited with approval in *Re B. (infants)*[37] had been recognised as law in New Zealand for some time previous to the passing of the Guardianship Act 1968. The parties were American citizens. After they had separated, they made an agreement that neither party should remove their son out of the United States without the written permission of the other party. The husband was granted a divorce and custody of the son. The judgment also affirmed the agreement stated above. Some 2½ years later, the mother was awarded full custody on an application for modification of the original order. While appeals against the order were being heard, the father retained custody and, when the final appeal failed, he took his son to Canada without the permission or knowledge of the mother. She then instituted habeas corpus proceedings in Ontario. The judge before whom the return of the writ came ordered the trial of the issue as to whom should have

33. [1971] N.Z.L.R. 143, 145.
34. As to 'proper weight', see Part III (B) post.
35. Although on a narrow ground it could be said that only the English kidnapping cases were rejected.
36. [1951] A.C. 352.
37. [1971] N.Z.L.R. 143.

custody. The merits of the case were fully investigated and custody was granted to the father by Wells J. This decision was based on the uprightness of the father, and the lack of personal integrity in the mother. Furthermore the child's educational and domestic facilities in Ontario were well provided for. The judgment was upheld in the Court of Appeal for Ontario, but a majority (4/7) of the Supreme Court of Canada reversed the Court of Appeal. The factor which weighed most heavily in the decisions of the Supreme Court of Canada (and of the dissenting judgment of Robertson C. J. O. in the Court of Appeal) was the order of the foreign court and its evasion by the father. The Judge at first instance, expressed himself thus regarding the Californian order:

> As I apprehend the law of Ontario . . . it is only one of the factors which I must consider and the overriding factor which must guide me in my final decision is my view on the evidence of the welfare of the child.

The Supreme Court of Canada and the dissenting judge in the Court of Appeal of Ontario did not dissent from this general proposition but the Supreme Court did not think that there was any authority (or justification) for the view that where facts were found to exist as in the present case, a parent by the simple expedient of taking a child with him across the border for the sole purpose of avoiding obedience to a judgment of an American court became "entitled as of right to have the whole question retried in our courts and to have them reach a new and *independent* judgment as to what is best for the infant". Clearly the majority of the Supreme Court held that the father had no such right.

Lord Simonds in delivering the advice of the Privy Council, which reversed the Supreme Court of Canada, thought this was not the question to be determined. He continued in a passage which should be quoted in full as it has both been cited in many subsequent cases and also because, it is submitted, that it represents what the law should be and actually is, in New Zealand —[38]

> It is possible that a case might arise in which it appeared to a court . . . that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry.[39] It is, however, the negation of the proposition from which every judgment in the present case proceeded, viz, that the infant's welfare is the paramount consideration, to say that where the trial judge has in his discretion thought fit not to take the drastic course indicated to examine all the circumstances and form an independent judgment, his decision ought for

38. [1951] A.C. 352, 363, 4.
39. This section of the passage was cited with approval in *Re B. (infants)*, supra.

> that reason to be overruled. Once it is conceded that the Court of Ontario has jurisdiction in the question of custody and that it need not blindly follow an order of a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so, it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case. It may be that, if the matter comes before the Court of Ontario within a very short time of the foreign judgment and there is no new circumstances to be considered the weight may be so great that such an order as the Supreme Court made in this case, could be justified. If that is, it would not be because the Court in Ontario, having assumed jurisdiction then abandoned it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant.

There was in this case a conspicuous change of circumstances which would easily justify a different conclusion as to what was for the infant's benefit. The son was now older and could be better looked after by the father than before. The case was such that it would justify the variation of the order in any case. Lord Simonds stressed that everything must yield to the paramount consideration of the infant's welfare, the order of a foreign court being no exception — "Comity demands not its enforcement but its grave consideration." Lord Simonds went on to say that —[40]

> There is in fact no *via media* between the abdication of jurisdiction and the consideration of the case on its merits, in which the respect payable to a foreign order must always be in the background.

The decision in *McKee* v. *McKee* was followed in New Zealand by Stanton J. in *Re Woodhams (infants).*[41] This was another kidnapping case. The mother and her lover had brought the children to New Zealand without informing the father beforehand and in breach of a New South Wales court order. The father applied for a writ of habeas corpus. Stanton J. thought at first that it was anomalous that he should be asked to reverse a judgment of a New South Wales court, relating to parties who are domiciled in that country and he was at first disposed to relinquish jurisdiction. He found, however, . . . "that the Judicial Committee of the Privy Council in *McKee* v. *McKee*[42] had ruled in a similar case (that) it was the duty of the court in the country where the children were, on application being made to it, to accept jurisdiction and to decide for itself who should have custody, giving only to the order of the foreign court such weight as was due to it, as one of the facts which must be taken into account."[43]

40. [1951] A.C. 352, 365-366.
41. [1952] G.L.R. 313.
42. [1951] A.C. 352.
43. [1952] G.L.R. 313, 314.

Stanton J. found in favour of the father, and *McKee* v. *McKee* was accepted with some misgivings. It must be remembered that if he had declined jurisdiction as he had at first contemplated, the father would have been deprived of actual custody, (the mother having de facto custody), unless or until the mother re-entered Australia, at which time she could take action to have the order enforced. At the time when this case was decided, the English line of authority on "kidnapping cases" was still some distance in the future and the only immediately apparent choices were an examination on the merits or declining jurisdiction.

In *Re H. (infants),*[44] quite a different (and it is submitted) erroneous interpretation was placed on the Privy Council's decision in *McKee* v. *McKee.* Cross J. at first instance said —[45]

> The essence of the matter, therefore, is this —that Cartwright J. (in the Supreme Court of Canada in *McKee* v. *McKee*), was saying that in, what I may call for short a 'kidnapping case", the judge in the court of the jurisdiction to which the child has been improperly removed, has no right to inquire into the merits of the case. The Privy Council rejected that view of this matter and said it *was a question for the discretion of the judge whether or not to go into the merits of the case.*

With all respect this seems to be a misunderstanding of what was said by Lord Simonds in *McKee* v. *McKee.* He said in the passage already quoted[46] that it was possible that a case may arise in which it appeared to the court that it was in the best interests of the infant that it should not look beyond the circumstances in which its jurisdiction was invoked, and thus give effect to the foreign judgment without further enquiry. It is submitted that Lord Simonds meant that if such a case did arise the court should still decide the case on familiar principles(i.e. have regard to the child's welfare as being of paramount consideration), and the welfare of the child would demand enforcement of the foreign order without further enquiry. As recognised by the Court of Appeal in *Re B. (infants)*[47] this is an exception to the general rule that there must be a hearing on the merits, and justifiable on the ground that the child's welfare is best served by doing so. It seems clear that Lord Simonds did not mean to say that the courts should have a discretion in this context. On the contrary, he thought the exception to the general rule, that there should be an inquiry on the merits, was an exceptional and 'drastic course'.

Thus, on a correct interpretation of *McKee* v. *McKee,* an approach to foreign custody orders is maintained within the framework of the requirement that the child's welfare is of paramount importance. It

44. [1966] 1 All E.R. 886 (Court of Appeal).
45. [1965] 3 All E.R. 906 at 914.
46. [1951] A.C. 352 at 363-64.
47. [1971] N.Z.L.R. 143.

allows for exceptional situations when it is in the best interests of the child that the merits are not investigated and stipulates that 'proper weight' should be given to the existence of the foreign order. Both these considerations are reiterated in *Re B. (infants).*[48])Furthermore under s. 23 conduct is relevant as far as it affects the welfare of the child. Consequently a 'kidnapping' parent should have his conduct tell against him. Despite this, it will later be seen that the kidnapping may in fact benefit the guilty spouse due to a possible change of circumstances attendant upon delay in bringing the matter to court. The question arises as to whether this provides a satisfactory general solution to kidnapping cases.

(B) The Adequacy of the N.Z. Approach

There are two preliminary points that should be mentioned. Firstly the local situation is different here from that in England. There, with many nearby countries, it is very easy and inexpensive to remove a child out of the jurisdiction. We have only one close country that need be considered, Australia, with whom a mutual enforcement agreement is being proposed.[49] The number of parents bringing their children from other countries must be fairly limited due to cost and long distances.

Secondly, although the English kidnapping approach is designed to give flexibility[50] in the law and to do justice inter partes it does have the fundamental objection of sometimes producing quite the opposite effect. For instance, even though there is a plain kidnapping situation, there may be a change of circumstances the result of which is that the child's welfare is best served by remaining with the kidnapping parent.

The English test used to justify the non-enforcement of the foreign order is the existence of "serious harm" to the child but in order to ascertain this, some form of hearing of the case on its merits is required. If this is done, there is little left of the original rule unless we start distinguishing between degress of completeness of investigation on the merits. Thus in *Re E. (an infant),*[51] both Cross J. at first instance and the Court of Appeal, made an exhaustive investigation of all the evidence available and concluded that serious harm would result if the foreign order were enforced. In other cases only a very cursory examination of the evidence, except as it relates to the circumstances of the kidnapping, has been made.

We may observe the same phenomena in cases where English courts have enforced foreign orders. It can be seen that the courts, while purporting to enforce foreign orders without making an enquiry on the merits, sometimes in fact make a very full investigation and

48. Idem.
49. This will be considered later.
50. By giving a discretion whether to examine on the merits.
51. [1967] Ch. 287, 761; C.A.

then justify their decision on the grounds that they are enforcing the foreign order which they are enjoined to do by the English kidnapping cases. An example of this is *Re T.(infants)*[52] where the court of first instance made a "full deployment of all the facts and evidence", of which the Court of Appeal did not disapprove, while in *Re H. (infants)*,[53] the court did not look much beyond the bare facts, concentrating mainly on the kidnapping in breach of the United States order. It is hard ,therefore, to find any consistency in these English cases. The extent of a court's investigation may be extremely brief, or it may, on the contrary, be very full, but is still justified as enforcement of the foreign order.

The English approach must also be subject to a further qualification. It is a well recognised premise of the conflict of laws[54] that courts will not automatically enforce orders which are regarded as infringing public policy. Such a situation would occur when the custody laws of a particular country gave the father custody as of right or where a spouse guilty of adultery, was totally barred from custody.[55] These cases involve special considerations and a court would normally abdicate its responsibility if it automatically enforced such orders.

Three main arguments are raised in favour of an approach which allows the enforcement of foreign orders without an examination on the merits. Firstly, there is the view that as a matter of judicial comity the judgment should be enforced. Secondly ,that "kidnapping" of children should be discouraged, and thirdly, that it is unfair to subject an innocent spouse, out of whose possession the child has been taken, to another full hearing — especially in disadvantageous circumstances (e.g. lack of witnesses and the fact that the innocent spouse no longer has de facto custody).

The argument of "comity" between nations can be shortly disposed of. Ehrenzweig[56] notes that —

> Comity between nations, if justifiable anywhere in conflict of laws certainly has no room in the law of custody.

To decide a case on the grounds of comity is inconsistent with the welfare of the child being of paramount importance. It is not correct to subordinate the welfare of the child to such a consideration as comity. The principle is probably overworked and it often disguises the fact that in other areas there may be good policy reasons why foreign judgments should be enforced. Comity is important in the sphere of enforcement of foreign money judgments, but surely it cannot be suggested that the same principles should apply to custody

52. [1968] Ch. 704.
53. [1966] 1 All E.R. 886.
54. Cheshire, *Private International Law* (8th ed., 1970) chapter 6.
55. Ehrenzweig, *Recognition of Custody Decrees Rendered Abroad*, 2 Am. J. Comp. Law. (1953) 167, 176.
56. Ibid., 174.

disputes. A money judgment is *res judicata,* while a custody order is always open to review, and even more importantly, it is a pronouncement as to how the child's welfare may best be served. This view is given support by the judgment of Lord Upjohn in *J.* v. *C.*[57] He says —[58]

> But many authorities make it plain that, even if there were in existence some order of a foreign court so that a question of "comity" arises, yet in the case of custody of infants our courts have an independent duty to investigate the facts and make an order based on English principles notwithstanding that foreign order.

His Lordship cites *McKee* v. *McKee*[59] as authority, and says that a court will pay "proper regard" to the foreign order. The above remarks are plainly inconsistent with the Court of Appeal's approach to kidnapping cases, although he cites *Re E. (an infant)*[60] without commenting on this problem. The members of the House did not, unfortunately, discuss this area of the law.

The second and third arguments do have justification, but it is submitted that the disadvantages already mentioned tend to outweigh these points; in any case such considerations are discouragement of kidnapping and injustice to the party with de jure (but not de facto) custody may be explored within the compass of the New Zealand approach. This can best be seen by reference to a very recent case here concerning foreign orders. In *C.* v. *C.*[61] a Canadian court had made a custody order in favour of the mother; the father brought the child here and applied to the Supreme Court for a custody order.

Speight J. first considered the case on its merits under the Guardianship Act and decided that the child's welfare would be best served by remaining with the mother; thus dealing with the matter purely under the Guardianship Act, he did not hesitate to find for the mother. He, however, went on to say:—[62]

> I think the existence of the Canadian order, however, is also of some considerable relevance. There are two factors. In the first place the existence of such an order is by no means irrelevant. There is of course the New Zealand Court of Appeal decision in *Re B. (infants),*[63] the effect of which is that there is no automatic enforcement of foreign orders and the proper course is to do what I have done, namely to consider the matter on its merits. Other things being equal, however, *it is desirable in my view that orders of foreign courts should be given some weight in circumstances such as the present.*

57. [1970] A.C. 668.
58. Ibid., 720.
59. [1951] A.C. 352.
60. [1967] Ch. 761.
61. [1973] 1 N.Z.L.R. 129.
62. Ibid., 130, 131 (emphasis added).
63. [1971] N.Z.L.R. 143.

In the present case there was a conflict of evidence as to the conduct of the parties towards the child. The husband alleged bad behaviour against the child but by taking the child to New Zealand he had prevented the wife from putting her Canadian evidence in rebuttal of the allegations before the court. The fact that the innocent party out of whose care the child had been removed could be disadvantaged in such a way was advanced as an argument in favour of the English "kidnapping approch". Speight J. said that such considertions were relevant under our law and as a consequence he thought that:—[64]

> . . . the findings of the foreign court which considered the same matters on a prior occasion should be given some weight, greater or less depending, among other things, on the status of the court, the type of hearing, whether it was a full one or a mere formality, and the similarity or otherwise of the laws of the country in question.

He noticed that the Canadian court was of equal status, the original custody application and the subsequent variation were fully investigated by the court, and that the principles of custody were the same as in New Zealand inasmuch as the child's welfare was the paramount consideration. He thought there was "considerable persuasive value" in the earlier decision of the Canadian Court as evidence that on the situation which was then in existence and was considered by the court at the time of its judgment, it was thought that the child's welfare was best served with the mother.

He went on to say that courts must regard such a decision as of substantial assistance, especially because the difficulty of obtaining evidence at such a distance might lead to the encouragement, in a time of fast international travel, of kidnapping cases. He therefore concluded that if he had any doubts, "the existence of this order in the circumstances described would certainly help to tip the balance."[65]

(C) Summary and Conclusions

Thus our courts will in practice take into account such factors as the innocent party being disadvantaged and the necessity of discouraging kidnapping cases. The judgment of Speight J. in *C.* v. *C.*[66] leaves no doubt that these are relevant considerations. The existence of a foreign order by a court of comparable jurisdiction and acting on similar principles, will be of "considerable persuasive value" in indicating how the child's welfare could best be served. The persuasive value of a foreign judgment will be a particularly strong indication of how the child's welfare may be best served when the matter comes before the court within a short time of the previous decision and/or where there has been no plainly evident change in circumstances. Another

64. Ibid., 131.
65. Idem.
66. [1973] 1 N.Z.L.R. 129.

result of *C.* v. *C.* is that the existence of a foreign order may have the added effect of tipping the balance in favour of a parent when there are still doubts as to the welfare of the child.

In conclusion, it is considered that taking all the considerations mentioned into account, the New Zealand approach to kidnapping cases is preferable. It does mean that a party out of whose custody the child has been taken is subjected to some expense which may or may not be recovered from the other party. However, it is much more flexible and avoids possible injustice that may arise where the welfare of the child is not considered to the same extent.

As mentioned previously, the parent who kidnaps a child may benefit from doing so, since because of delays in getting the custody application before a court here, there may have been a change of circumstances in the interval. This cannot be regarded as a criticism of the treatment suggested in this article as it is equally a problem in England or elsewhere. The only difference is that an examination on the merits takes longer after the application has come before the court.

The problems of inflexibility could be clearly seen in America in the years between the publication of the First Restatement and its replacement by the Restatement Second.[67] The American courts while adhering nominally to the Restatement approach, as reported by Professor Beale,[68] which provided for the enforcement of all foreign orders (subject to modification for circumstances happening after the event), justified departure from this rigid doctrine by either basing their decision on a lack of foreign jurisdiction or by finding a change of circumstances if need be. They also developed a "clean hands" policy to deal with kidnapping cases and refused to enforce foreign decrees which were based on foreign law unacceptable in the United States. Hard and fast rules in this area of the law must be unsatisfactory.

IV. Foreign Interim Orders and Forum Conveniens

As already mentioned,[69] English courts have enforced interim foreign orders and/or sent the children back to the jurisdiction from which they came, when divorce proceedings are pending in that country. The rationale for this is that it would be more appropriate to leave questions of custody to be dealt with on their merits by the court of the matrimonial domicile, which will have all the relevant evidence as to fitness for custody before it — the *forum conveniens.* We have already seen that since the judgment of the Court of Appeal in *Re B. (infants)* that this is not the law here. What we are presently concerned with is whether our law on this point is open to criticism, and if so, what other solutions can be offered.

67. Ehrenzweig, n. 55, 170.
68. See also Beale, "Conflict of Laws" (1935).
69. Part II ante.

(A) The Merits and Difficulties of the English Approach

At first sight, it is considered that the rationale of the English approach is sound, although in practice its procedural inconsistencies are open to criticism. If the divorce petition in the matrimonial domicile is contested, much information as to the suitability of the spouses as parents, relevant in custody hearing, is revealed. Alternatively if the divorce hearing is uncontested or if there are no proceedings pending, the fact that the custody application is being adjudicated on by the court of the matrimonial domicile means that both spouses have the fullest opportunity of laying before the court every relevant circumstance and are able to call all necessary witnesses.

In *Re D. (infants)*,[70] which was decided before the commencement of the Guardianship Act 1968, Wilson J. refused a writ for habeas corpus because the wife already had divorce proceedings in train in a Queensland court, which had awarded interim custody. Queensland was the *forum conveniens*. He also thought that habeas corpus was an inconvenient means of settling disputes as a custody application should not be decided in an arbitrary manner as is contemplated by the rules governing the issue of that writ. He went on to say —[71]

> They [questions of custody] are of the utmost importance. They require for a proper decision the fullest information about the respective parents and homes, their associates and their general fitness to bring up children to the best advantage of those children.

It is clear that Wilson J. declined jurisdiction because the matter was before a Queensland court but the decision left the father with de facto custody. The clear implication is that the wife should wait until the Queensland court had dealt with the divorce petition and custody. At that stage, Wilson J. obviously contemplated that some proceedings could be brought. The case has no value as authority since the passing of the Guardianship Act 1968, since a judge cannot now refuse jurisdiction, but it is a good illustration of the rationale of this approach.

As Buckley J. said in *Re G. (an infant)*,[72] the principle is a prima facie one only. This meant that the judge has a discretion, but how should he exercise it? One can easily think of circumstances in which the rule should be inapplicable. The children of the marriage may for instance, as in *Re B. (infants)*,[73] have remained for such a period of time in a country that it is contrary to their welfare to remove them out of its jurisdiction, and in this situation consideration of *forum conveniens* must be of lesser importance. An interim order may be reversed when a petition is heard on its merits, and consequently, in some cases, disruption must result. In most *forum conveniens* cases

70. [1969] N.Z.L.R. 865.
71. [1969] N.Z.L.R. 865.
72. [1969] 2 All E.R., 1135 at 1138.
73. [1971] N.Z.L.R. 143.

the children have not remained so long with one parent as to make it extremely undesirable to enforce foreign orders but such situations do exist in which the welfare of the children demands an early determination of the custody application. It is submitted that the English law does not sufficiently distinguish these quite different situations.

In conformity with what has just been said, it can be argued that the discretion should be exercised in favour of a full hearing of the merits when, as in *Re B. (infants)* and as in most other cases, an immediate determination of the custody dispute is required. This, however, admits the welfare of the child as the basis on which to exercise the discretion. Moreover, it cannot be suggested that this is the actual English practice, since welfare[74] is one of the many considerations, which include comity and justice inter partes. But even granted that the exercise of the discretion is determined by welfare, we are still faced with the problem that arose in kidnapping cases — can one determine welfare without a full hearing?

The case of *Norman* v. *Norman* (No. 1)[75] shows a compromise solution to this problem. The father, contrary to an agreement with the mother, removed their children from school in Switzerland and took them to Australia where he was living. The wife obtained an ex parte order from the High Court of Justice in England for the return of the children. The husband applied to the Australian court for a determination of custody on its merits.

A preliminary hearing was held to determine whether the case should be heard on its merits in Australia or whether the children should be sent back to England. So far, the present case does not differ from the English authorities.

The novelty lies in that the discretion was exercised by Smithers J. in accordance with the welfare of the children. Another interesting feature was that counsel for the mother treated the consideration of *forum conveniens* and whether generally the welfare of the children was best served by returning to England as two separate issues, although perhaps not too much weight should be attached to this. Counsel for the mother firstly submitted that the United Kingdom was the *forum conveniens* for an examination on the merits. He next contended that the *welfare* of the children required their return to Switzerland or England and a hearing in England.

The factual situation was different from the usual cases in which *forum conveniens* is an issue, inasmuch as there was an attempt by a spouse to have the court sanction the removal of the children from the country in which divorce proceedings were likely to take place (as actually happened).[76] In any case, Australia, as Smithers J. also concluded, was the *forum conveniens*. The extent of stability of the

74. Only "serious harm" is relevant.
75. (1968) 12 F.L.R. 29 (Supreme Court of Australian Capital Territory).
76. *Norman* v. *Norman* (No. 2) 12 F.L.R. 39.

father's medical practice was an issue that could be best tried in Australia. It was also important that the mother come to Australia to see whether the husband was financially and otherwise stable with a view to a possible reconciliation. Smithers J . also thought that the child's welfare was best served by the application being held in Australia. They had settled into orderly social surroundings and they would suffer loss of continuity of education and emotionally by being disturbed prematurely. The interests of the children also demanded that the wife should come to Australia where she could best make up her mind about reconciliation. Smithers J. concluded —[77]

> I think, therefore, that in the interests of the children it is essential that the issues in this case be tried in this Territory.[77]

B. A Suggested New Zealand Approach to the Status of Interim Orders and Forum Conveniens

As a result of *Re B. (infants)*, it would not be argued that *Norman* v. *Norman* (No. 1) is the law here, however superficially attractive. For present purposes, the basic proposition of that case is accepted that every custody dispute must be heard on its merits. Any other solution would need legislative amendment or the Court of Appeal overuling its own decision. In coming to this conclusion the writer is influenced by the impossibility of formulating any criteria (except welfare) by which to guide a judge in the exercise of his discretion as to whether to order a full inquiry on the merits.

Although we must accept that welfare of the child is of first and paramount importance, it is submitted that the existence of a foreign interim order is not irrelevant. In fact, Haslam J. in *Re B. (infants)*,[78] said that the existence of a foreign interim order may be given "proper weight" when a hearing of the merits is held. An analogy may also be drawn with kidnapping cases where the existence of a foreign order is a very relevant consideration. It is suggested that it is a consideration relevant to the child's welfare that a custody application be heard in conjunction with contested divorce procedings or in the country where, even though divorce proceedings are not in progress, the greatest amount of information is available to determine the welfare of the child. As already mentioned,[80] the welfare of the child needs the fullest consideration of the fitness of the parties to have custody and this evidence will initially be best obtained in the country of the matrimonial domicile whose courts may have awarded interim custody whether in connection with divorce proceedings or otherwise.

The effect of this suggested approach is that it adds a further element into the balancing process which will determine the welfare of the child. The importance which the existence of a foreign order may have, will vary from case to case, and in particular circumstances

77. Ibid., 35.
78. [1971] N.Z.L.R. 143, 145.
80. Part IV(A).

when for instance, the children have been settled in a country for some time, it will be of minor importance. But this does not detract from the general proposition that a court should be able to place substantial weight on the existence of a foreign order when determining the welfare of a child. Ehrenzweig [81] has criticised the attitude taken in *McKee v. McKee* as uncompromising, but this danger can be avoided without going outside s. 23 and reported cases if the method proposed above is adopted.

V. The Status of Foreign Custody Orders in Other Proceedings

This is an area of the law about which there seems to be virtually no discoverable authority. But it is submitted that some sort of general approach may be suggested on the basis of the authority already discussed. We will assume that either the respondent in the application and/or the child is present in New Zealand. Otherwise there are difficulties in enforcement and the possible use of the proviso to s. 5 (2) of the Guardianship Act arises.

In accordance with *Re B. (infants)*[82] *and C.* v. *C.*[83] the hearing would not strictly be an application for variation of an order but a de novo application. This should not prevent the court from looking at the foreign order as possessing persuasive value; as evidence that in the earlier application the court thought that the child's welfare was best served with the other spouse (assuming that the original application was decided on principle similar to our law). A New Zealand court might well be unwilling to vary the foreign order unless there were a clear change of circumstances that would justify this course; or, for some special reason, it would be wrong to give approval to the foreign order in question. What Speight J. said in *C.* v. *C.* about the difficulty of obtaining all the evidence which was available before the court making the first order gives added weight to their approach. We may await with interest, a reported New Zealand decision on this point.

VI. Postcript — "Mutual Enforcement Conventions"

At the present time there is discussion between the Australian and New Zealand Governments as to the possibility of a convention providing for the mutual enforcement of custody orders. If this scheme is introduced, it will mean that a custody order will be automatically enforced by a New Zealand court but the court will still have jurisdiction to grant a variation of the order on change of circumstances. In effect, an Australian order will be treated as if it were a New Zealand order. In kidnapping situations, the usual course would be to simply enforce the Australian order, but it is still open to a court to find that there is a change of circumstances in exceptional cases and give

81. Note 55, 177.
82. [1971] N.Z.L.R. 143.
83. [1973] 1 N.Z.L.R. 129 (Foreign orders are not automatically enforceable).

custody to the kidnapping parent as in *McKee* v. *McKee*. Likewise in the interim custody situation, a New Zealand court could make use of its powers of variation where it is manifestly contrary to the welfare of the child to enforce the interim order as in *Re B. (infants)*.[84]

Finally, although mutual enforcement conventions with a country such as Australia are perhaps the best solution in this area of the law, it is not possible to make use of this generally; many countries do not base their custody orders on the same principles. In these situations the status of such foreign orders will be determined by the principles as outlined in this paper.

D. J. S. LAING*

84. [1971] N.Z.L.R. 143.

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