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CIVIL PROCEDURE—*Keck v. Keck*, Routine or Novel Approach to the Applicability of Full Faith and Credit to Foreign Divorce and Custody Decrees?

At first glance, the recent Illinois Appellate Court case of *Keck v. Keck*¹ does not appear very significant. Judged merely by the holding, the case seems to be little more than an application of pre-existing law to rather commonplace facts. On a closer inspection, however, it may appear to be overly important, a monumental departure from the existing law concerning personal jurisdiction and minimum contacts. The fact of the matter is that *Keck* is neither terribly significant nor completely banal and uninteresting. Its result, the granting of full faith and credit in accordance with the Constitution of the United States² to a Nevada *ex parte* divorce decree, is basically a correct decision, the interest of which lies in the misleading and often questionable reasoning the court used, especially with respect to divorce jurisdiction and *in personam* jurisdiction pursuant to so-called “long-arm” statutes.

The facts of the case are relatively simple. In December of 1967, a Mr. James E. Keck filed a complaint for divorce in the Circuit Court of Cook County on the grounds of constructive desertion and mental cruelty. In February of the following year, his wife, Ms. Dolores F. Keck, filed an answer and a counter-claim for separate maintenance based on desertion. The Kecks had been married since 1948 and had two teenage children. From 1961 until July of 1966, they lived together in Westmont, Illinois. At that time Mr. Keck moved out of the family home and went to live by himself in an apartment located in Chicago, Illinois, the apparent result of a period of marital difficulty stretching over the preceding five years. In October of 1968, Mr. Keck moved his residence to Nevada; and, after being domiciled there for the required time, he began proceedings in order to obtain a divorce. On December 5, 1968, Ms. Keck was served with both a summons and a copy of the Nevada divorce complaint, pursuant to Nevada’s “long arm” statute.³ On December 23, 1968, a hearing was held by the trial court in the Illinois proceedings. The plaintiff, Mr. Keck, was not present. He was thereafter enjoined from going ahead with the Nevada divorce, and an order for temporary alimony and child support was entered against him.

1. 8 Ill. App. 3d 275, 290 N.E.2d 385 (1972).

2. U.S. CONST. art. IV, § 7.

3. NEV. RULES OF CIVIL PROCEDURE, Rule 4(e)(2).

On December 27, the Nevada court entered a divorce decree, giving custody of the two children to Ms. Keck, based on Mr. Keck's complaint. He then entered the divorce judgment into evidence in the Illinois hearing and moved to dismiss. This the trial judge denied, allowing instead Mr. Keck's motion to strike. Thereafter Ms. Keck was awarded separate maintenance, custody of the two children and fifty dollars per week for child support. No alimony was allowed at that time because Ms. Keck was employed. Mr. Keck's petition for divorce was, of course, denied. The Appellate Court reversed, holding that the Nevada divorce was valid and thus entitled to full faith and credit. As such it would act "as a bar to a complaint for separate maintenance because under the Illinois Separate Maintenance Statute . . . the right to order separate maintenance requires the parties then to be married."⁴ The trial court was also instructed to enter a support order based on the Nevada court's grant of custody to the defendant Ms. Keck.

PERSONAL JURISDICTION AND DIVORCE

Although the holding in and especially the result of *Keck* is, in the main, correct, the court committed three rather significant errors in its reasoning. First, it incorrectly believed that a divorce decree must satisfy two prerequisites, domicile of the plaintiff and jurisdiction over the defendant, in order to be entitled to full faith and credit in a sister state. This is in direct conflict with *Williams v. North Carolina*⁵ (hereinafter referred to as *Williams I*), in which the Supreme Court of the United States delineated the guidelines for when a foreign *ex parte* divorce would be entitled to full faith and credit. It discarded the old notion of matrimonial domicile and rested the jurisdictional basis for divorce on the bona fide domicile of either or both of the parties.⁶ Thus a decree of divorce granted by a state to one of its true domiciliaries would be entitled to full faith and credit in a sister state if accomplished with *procedural due process* even if the defendant had not been brought under the court's jurisdiction by being personally served within the state or making a general appearance there.⁷ While a subsequent case⁸ held that the sister state could collaterally

4. *Keck v. Keck*, 8 Ill. App. 3d 275, 282, 290 N.E.2d 385, 390 (1972).

5. *Williams v. North Carolina*, 317 U.S. 287 (1942).

6. This is an express overruling of *Haddock v. Haddock*, 201 U.S. 562 (1905). *Haddock* required that in order to render a divorce decree entitled to full faith and credit a state other than the matrimonial domicile had to obtain personal jurisdiction over the defendant in addition to being the bona fide residence of the plaintiff.

7. *Williams v. North Carolina*, 317 U.S. 287 (1942).

8. *Williams v. North Carolina*, 325 U.S. 226 (1945).

attack the jurisdictional fact (domicile) upon which the divorce was granted before extending it full faith and credit, a divorce granted *ex parte* at the domicile of one of the spouses would terminate the marital status. Thus the Illinois court could and did quite properly consider whether Mr. Keck had established a bona fide domicile in Nevada. This is a factual question, and the finding that Mr. Keck had established an actual and legitimate residence in Nevada seems to be supported by the record, especially since "the burden of undermining the verity which the . . . decrees import rests heavily upon the assailant."⁹

Up to this point the court's treatment of the issue is basically sound. It goes on to say, however, that personal jurisdiction over the defendant is also necessary before full faith and credit is to be allowed. As previously indicated, in light of *Williams I*, this is erroneous. *In personam* jurisdiction is needed only if the foreign decree is to dissolve the other incidents of marriage, such as support, custody, and alimony, when the forum state views them as property rights in the defendant that are able to survive an *ex parte* proceeding.¹⁰ In *Estin v. Estin*,¹¹ the United States Supreme Court affirmed a New York decision which, while granting full faith and credit to an *ex parte* Nevada divorce, still held the husband liable for alimony payments pursuant to a New York judgment obtained by the wife before the divorce. "The New York judgment," the Supreme Court said, "is a property interest . . . jurisdiction over which . . . only arises from control or power over the persons whose relationships are the source of the rights and obligations."¹² Again, a few years later in *Vanderbilt v. Vanderbilt*,¹³ the Court reaffirmed its position. In that case, the husband acquired the Nevada divorce decree before his wife brought suit in New York State for separation and support. The result, however, was no different. The Court explained:

[S]ince the wife was not subject to its jurisdiction the Nevada divorce court had no power to extinguish any right which she had under the law of New York to financial support from her husband.¹⁴

These same basic considerations apply with regard to child custody,

9. *Id.* at 232, 233.

10. CLARK, LAW OF DOMESTIC RELATIONS, § 11.5, at 316 (1968). Justice Douglas, in his concurring opinion in *Esenwein v. Commonwealth*, 325 U.S. 279, 281 (1944), stated that he was "not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children."

11. 334 U.S. 541 (1948).

12. *Id.* at 548.

13. 354 U.S. 416 (1957).

14. *Id.* at 418.

although the law in this area is more confused.¹⁵ In *May v. Anderson*,¹⁶ the Supreme Court held that a state could not cut off that spouse's right to custody without *in personam* jurisdiction even if the children were domiciled there. Such a decree would not be entitled to full faith and credit.¹⁷

There are three possible explanations why the Illinois Appellate Court thought that personal jurisdiction over the defendant was necessary to give the Nevada decree full faith and credit. The court may simply have erred and been actually mistaken as to the state of the law in this regard. Secondly, the court may not have been really talking about *in personam* jurisdiction at all but rather that procedural due process required by *Williams I* to validate any divorce judgment. In other words, the court's concern may merely have been with the type of service employed and whether it provided reasonable assurance that notice actually be given and received. This possible explanation for the court's behavior does not seem probable since the majority's opinion expressly referred to the defendant being brought under the jurisdiction of the Nevada forum pursuant to its "long arm" statute separately and apart from its consideration of the due process requirement. Finally, the Illinois Appellate Court may have thought that jurisdiction over Ms. Keck was necessary under *May v. Anderson*¹⁸ because the Nevada decree had also granted custody over the children to the defendant. While this may superficially seem to be a strong,

15. The basis upon which jurisdiction is founded for custody is confused and based more on policy than any strict adherence to law. CLARK, *supra* note 10, at 321, states that:

any state which has a substantial interest in the child's welfare has jurisdiction over his custody. The basis for such an interest might be the domicile of the child within the state, his residence there, occasionally even his temporary presence there, perhaps the domicile of one or both parents in the state, or the fact that one or both parents are before the court and subject to its power.

16. 345 U.S. 528 (1953).

17. *Id.* at 536. Frankfurter's concurring opinion implied that full faith and credit does not apply to custody and that "the child's welfare . . . has such a claim upon the state that its responsibility is obviously not foreclosed by a prior adjudication reflecting another's state's discharge of its responsibilities at another time." This view is not at all opposed, however, to the traditional notion of full faith and credit. As Chief Justice Marshall said in *Hampton v. McConnel*, 3 Wheat. 234, 235 (1818), "the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." Since a custody as well as an alimony judgment is not a final determination and may be modified with regard to changing circumstances and since a decree need be given no more final or conclusive effect in the forum than in the state where rendered, a custody determination may be modified by a sister state. *People ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

18. 345 U.S. 528 (1953).

logical possibility, there is not the slightest hint anywhere in the court's opinion that such a consideration entered into their thinking at all.

PERSONAL JURISDICTION AND MINIMUM CONTACTS

The second error that *Keck* made was in its finding that the Nevada court did acquire personal jurisdiction over the defendant Ms. Keck, whether it actually needed it or not being immaterial. The Illinois court apparently assumed that the Nevada "long arm" statute effectively subjected Ms. Keck to its power. On this very point, the court made its position clear:

[S]he was personally served with both a summons and a copy of the Nevada divorce complaint. . . . Such service was pursuant to the Nevada 'long arm' statute . . . and thereby brought the defendant under the jurisdiction of the Nevada court.¹⁹

However, the majority failed to consider one of the essential prerequisites for *in personam* jurisdiction—relationship (i.e., minimum contacts). The court correctly observed that such service of process as was rendered to Ms. Keck more than adequately satisfied the due process requirement for notice,²⁰ but nowhere did the court discuss Ms. Keck's contacts with the state of Nevada and whether they were or were not sufficient to satisfy the requirement of minimum contacts. The Supreme Court of the United States, in *International Shoe Co. v. Washington*,²¹ decided that:

[I]n order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'²²

Thus it is not enough that service of process constitute actual notice if there are not sufficient contacts between the defendant and the forum. It then becomes essential for the defendant to purposefully avail himself "of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."²³

19. *Keck v. Keck*, 8 Ill. App. 3d 275, 280, 281, 290 N.E.2d 385, 388 (1972).

20. *People ex rel. Loeser v. Loeser*, 51 Ill. 2d 567, 572 (1972):

The requisites of due process are satisfied if the manner of effecting service of summons gives reasonable assurance that notice will actually be given and the person against whom the action is brought is given reasonable time to appear and defend on the merits.

21. 326 U.S. 310 (1945).

22. *Id.* at 316.

23. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *accord*, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *see also* *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952); *Travelers Health Assn. v. Virginia*, 339 U.S. 643 (1950).

What are Ms. Keck's contacts with the state of Nevada? A very generous estimation would be that they are almost nonexistent. She was not served in that state. In fact, as far as the record shows, she was never in Nevada at all. At the very least, she failed to carry on any activities there nor did she maintain any sort of domicile. The only contacts she had with that state whatsoever were through her husband who went there without her and through the Nevada process served on her in Illinois. Never before have the Illinois courts allowed facts such as these to subject an individual to a foreign jurisdiction, even under its own "long arm" statute²⁴ which "contemplates the exertion of jurisdiction over non-resident defendants to the extent permitted by the due process clause."²⁵ The two most important cases which deal with the problem of minimum contacts and the Illinois statute are *Nelson v. Miller*²⁶ and *Gray v. American Radiator and Standard Sanitary Corp.*²⁷ The *Nelson* case dealt with section 17(b) of the Illinois statute, covering tortious acts committed within the state. There a delivery man's actions in Illinois causing the plaintiff's injuries were held sufficient to subject a Wisconsin appliance dealer to Illinois' jurisdiction. "While he was here," the court reasoned, "the employee and the defendant enjoyed the benefit and protection of the laws of Illinois, including the right to resort to our courts."²⁸ This test for establishing minimum contacts (i.e., invoking the benefits and protections of the forum) was expanded to the fullest possible extent in *Gray*. The defendant therein had manufactured a defective valve in Ohio, which was later built into an hot water heater in Pennsylvania. This heater was thereafter sold to an Illinois resident and eventually exploded within that state. This series of events constituted the only contact the foreign corporation had within Illinois; yet the Supreme Court of Illinois refused to apply a "mechanical formula" and instead made "the *relevant* inquiry . . . whether [the] defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum."²⁹ Under such a test, the *Gray* court had no trouble finding sufficient contacts.

The question now remains whether Ms. Keck's conduct can in any way be deemed to have invoked the benefits of Nevada law. The an-

24. ILL. REV. STAT. ch. 110, § 17 (1971).

25. *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill. 2d 432, 436, 176 N.E.2d 761, 763 (1961).

26. 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

27. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

28. *Nelson v. Miller*, 11 Ill. 2d 378, 390, 143 N.E.2d 673, 680 (1957).

29. *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill. 2d 432, 440, 176 N.E.2d 761, 765 (1961).

swer must obviously be no. She was never under the protection of the Nevada courts and did nothing to indicate a desire or willingness to be so. By staying out of the state entirely, by not appearing in the divorce proceedings being conducted there, her actions indicate, if anything, a revoking instead of an invoking of Nevada's legal protection. In fact, under a very similar fact situation, another Illinois Appellate Court failed to find sufficient minimum contacts. In *Hawes v. Hawes*,³⁰ the court held that where the wife maintained no matrimonial domicile, never resided and committed no act within the forum, and failed to follow her husband into the state, sufficient minimum contacts with the state *did not exist* to support jurisdiction of the trial court concerning custody and alimony questions.³¹ The wife therein had been personally served pursuant to section 17(1)(e) of the Illinois "long arm" statute. The couple had been living together in Michigan, but the wife failed to accompany her husband into Illinois. Plaintiff argued that the statute covered such a situation since, technically, Ms. Hawes could have been found to have deserted her husband in Illinois' jurisdiction by not coming with him. However, the court held that there was not a sufficient nexus between the state and the defendant to meet the constitutional requirement. Mr. Hawes' argument that the *Gray* case, by analogy, provided such a connection was rejected on the ground that the defendant had in no way availed herself of the protection of Illinois law.

PERSONAL JURISDICTION AND CUSTODY

The third error committed by *Keck* was in granting full faith and credit to that part of the Nevada divorce which had awarded to Ms. Keck the custody of the children. Lacking those minimum contacts with the defendant which are needed in order to subject her to its power, the Nevada court was therefore without jurisdiction to litigate the custody of the children. Personal control over either the defendant or the children themselves is needed in Illinois in order to grant child custody. Both were absent in *Keck*.³² In fact, in *Hawes v. Hawes*,³³ the Illinois Appellate Court vacated that portion of an Illinois divorce decree granting custody and alimony on the ground that it was obtained without such jurisdiction. On the other hand, *People*

30. 130 Ill. App. 2d 546, 263 N.E.2d 625 (1970).

31. *Id.* at 548, 263 N.E.2d at 627.

32. Since the children were always with Ms. Keck, the same considerations with respect to minimum contacts with Nevada would apply to them.

33. 130 Ill. App. 2d 546, 263 N.E.2d 625 (1970).

*ex rel. Loeser v. Loeser*³⁴ extended full faith and credit to a foreign judgment which had also awarded custody but which had managed to acquire *in personam* jurisdiction over the defendant spouse.³⁵ The significance of *Keck's* error in this regard, however, is mitigated by the fact that the result would have been no different even if the court had vacated that portion of the divorce decree which dealt with custody since both the Illinois trial court and the Nevada divorce court had placed the custody of the children in the hands of the defendant. Thus Ms. Keck did not attempt to have the custody ruling overturned. She wanted the Nevada judgment to be denied full faith and credit in its entirety. This being the case, the Illinois Appellate Court's error was one only of form and not substance.

CONCLUSION

Keck is a case which its own inherent ambiguity precludes from becoming either an aberration or a pioneer. It skirts both significance and mere error, never quite totally embracing either. While it correctly held that the plaintiff's foreign divorce decree was entitled to full faith and credit, it partially based its decision on a non-existent requirement of personal power over the defendant. Moreover, the court then erred in finding such personal jurisdiction without the necessary relationship with the forum, treating instead service of process pursuant to a state's "long arm" statute almost as a substitute for or a conclusive presumption of minimum contacts. While *Keck* was incorrect in holding that the custody provision of the Nevada judgment was entitled to full faith and credit, it was a mistake without meaning since the result would have been no different if that portion of the decree had been vacated. Either way, Ms. Keck would have been awarded custody over the children. The court was correct in holding the valid foreign divorce to be a bar to ordering separate maintenance;³⁶ but even

34. 51 Ill. 2d 567 (1972).

35. Illinois, of course, follows the usual rule that a custody decision is never final and always reopenable if the circumstances warrant it. *Id.* at 569-70; *accord*, *People ex rel. Morris v. Morris*, 44 Ill. 2d 66, 254 N.E.2d 478 (1969); *Faris v. Faris*, 35 Ill. 2d 305, 220 N.E.2d 210 (1966); *People ex rel. Stockham v. Schaedel*, 340 Ill. 560, 173 N.E. 172 (1930). As indicated in *supra* note 17, this is not contrary to the mandate of the full faith and credit clause of the Constitution.

36. *Knowlton v. Knowlton*, 155 Ill. 158, 39 N.E. 595 (1895), held that a valid foreign *ex parte* divorce was a complete bar to a separate maintenance action brought after the divorce had been granted. This result was substantially weakened in *Pope v. Pope*, 2 Ill. 2d 152, 117 N.E.2d 65 (1954). Therein the husband had not obtained the divorce until after his wife had already been awarded a judgment for support. The court held that the foreign decree, although valid as to capacity to remarry, did not terminate the wife's right to support unless made with personal jurisdiction over both parties. A separate maintenance decree will be cut off by a valid foreign divorce only where the

though such would probably not have precluded an award for alimony,³⁷ the question was not even raised because the trial court had found Ms. Keck not to be entitled to alimony since she was working.

The real interest of the case is in the way it treated a foreign forum's acquiring of personal jurisdiction without having or without even discussing minimum contacts. The implications of such a ruling could have been considerable, going, as it would, right into the teeth of previous United States Supreme Court rulings. It may have signified the next step in the erosion of the principles laid down in *Pennoyer v. Neff*.³⁸ It could also have been simply an error, the inevitable product of ambiguity. However, since personal jurisdiction was not really required for the results obtained, the significance of the court's discussion in that area is reduced, while still something more than a mere curiosity, to something less than it might otherwise have been.

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foreign court had personal jurisdiction over both spouses or where the divorce was obtained at the insistence of the party whose rights are involved, *Harper v. Rooker*, 52 Ill. 370 (1869); *Earles v. Earles*, 343 Ill. App. 447, 99 N.E.2d 359 (1951); or where the defendant appeared or was personally served, *accord*, *Buck v. Buck*, 337 Ill. App. 520, 86 N.E.2d 415 (1949); *Shaw v. Shaw*, 332 Ill. App. 442, 75 N.E.2d 411 (1947).

Of course, if there are to be no support payments a valid divorce renders meaningless any order for mere separate maintenance.

37. In *Darnell v. Darnell*, 212 Ill. App. 601 (1918), the court held that where a divorce has been granted in another state which did not have jurisdiction over the defendant, the complainant may afterward sue for support and maintenance in Illinois if the defendant resides or has property there.

38. 95 U.S. 714 (1877): To have validity, a personal judgment must be personally served within the state or the defendant must appear.