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INTERSTATE AND FOREIGN ADOPTIONS IN NORTH CAROLINA*

HANS W. BAADE†

A mere two decades ago, Frank W. Hanft of the University of North Carolina Law School felt constrained to take the Supreme Court of North Carolina to task for "Thwarting Adoptions."¹ Probably in good measure due to his eloquent plea for a more benevolent judicial attitude towards adoptions and for a thorough reform of the adoption laws,² the situation today is quite different. North Carolina now has one of the most modern and comprehensive adoption laws in the country. The volume of adoptions in this state has steadily been increasing, reaching a total of 2,213 in 1960.³ The North Carolina State Board of Public Welfare maintains a very active adoption service, and when practical experience indicates the desirability of a change in the law, the legislature is not slow in following the suggestions of the Board.⁴

North Carolina has integrated the adopted child as fully into the bloodstream of the adoptive parents as is possible. G.S. § 48-23, enacted in 1955 but expressly applicable to adoptions granted before, has given the adopted child the right to inherit real and personal

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¹ Hanft, *Thwarting Adoptions*, 19 N.C.L. REV. 127 (1941). Judicial hostility towards adoptions seems to be a fairly common phenomenon in the early history of adoption statutes. See Uhlenhopp, *Adoption in Iowa*, 40 IOWA L. REV. 228, 230 (1955). *But see* note 94 *infra*.

² Hanft, *supra* note 1, at 152-53.

³ NORTH CAROLINA STATE BD. OF PUBLIC WELFARE, BIENNIAL REPORT table 10, at 50 (1958-60). The figure cited in the text refers to adoptions completed through final order between July 1, 1959 and June 30, 1960. The corresponding figure for 1960-61 is 1,955. (Information received from the North Carolina State Board of Public Welfare, Raleigh, North Carolina.)

⁴ In its report, note 3 *supra*, at 49, the Board called attention to the problem of "many children who have remained in foster care because their parents, though not in touch with them and accepting no responsibility for them, refuse to permit their adoption." The Board proposed remedial legislation. N.C. GEN. STAT. § 48-2(3)(b) (Supp. 1961), now seeks to cope with this problem by classifying such children as "abandoned" children who can be adopted without parental consent. See N.C. GEN. STAT. § 48-5 (1950 and Supp. 1961).

property by, through, and from the adoptive parents, and generally places the adopted child in the position of a natural-born child of the adoptive parents born on the effective date of the adoption. The Intestate Succession Act has reconfirmed this quasi-natural born status of the adopted child, and has extended the rights and obligations of this status to children adopted "in accordance with applicable law of another jurisdiction,"⁵ thus obliterating a possibly vexatious conflict of laws problem.⁶ Of course, a man may still make a will leaving nothing to his adopted children, or a bequest limited to the natural-born children of another. But in the absence of such specific intent, G.S. § 31-5.5 gives the pretermitted after-adopted child the same entitlement to an intestate share as it does to the after-born child; and by judicial construction, the words "child" or "children" will as a rule cover adopted children as well.⁷ Finally, it has been held recently that even the anti-lapse statute, although it uses the word "issue," inures to the benefit of the adopted children of a predeceasing devisee.⁸

Perhaps the most significant change, however, has occurred in the attitude of the North Carolina Supreme Court towards adoptions. First, the court has at least by clear implication discarded the outmoded rule that adoption statutes, being in derogation of the common law, have to be strictly construed.⁹ In *Locke v. Merrick*,¹⁰ the court quoted the following language with approval:

"[I]t is well to remember that since the right of adoption is not only beneficial to those immediately concerned but likewise to the public, construction of the statute should not be

⁵ N.C. GEN. STAT. § 29-17 (Supp. 1961).

⁶ It has been held in some states that a child adopted elsewhere is allowed to inherit only to the extent allowed by the law under which he was adopted. However, the great majority of decisions give a child adopted in another state the same rights of inheritance as are enjoyed by children adopted locally. See LEFLAR, CONFLICT OF LAWS 342-43 (1959); Annot., 73 A.L.R. 964 (1931); cf. Annot., 19 A.L.R.2d 960 (1951). See also *In re Dreer's Estate*, 404 Pa. 541, 173 A.2d 102 (1961).

⁷ See *Bullock v. Bullock*, 251 N.C. 559, 111 S.E.2d 837 (1960); Note, 39 N.C.L. REV. 203 (1961). In the *Bullock* case, however, it was held that the word "grandchildren," as used by decedent, failed to include the adopted children of his children. See generally Wehringer, *The Adopted Child Clause in a Will*, 8 Prac. Law. No. 4 (1962), p. 89.

⁸ *Headen v. Jackson*, 255 N.C. 157, 120 S.E.2d 598 (1961), discussed in Note, 40 N.C.L. REV. 650 (1962); see N.C. GEN. STAT. § 31-42.1 (Supp. 1961).

⁹ But see note 11 *infra*.

¹⁰ 223 N.C. 799, 803, 29 S.E.2d 523, 527 (1944), quoting from *Carter Oil Co. v. Norman*, 131 F.2d 451, 455 (7th Cir. 1942).

narrow or technical nor compliance therewith examined with a judicial microscope in order that every slight defect may be magnified—rather, the construction ought to be fair and reasonable, so as not to defeat the act or the beneficial results where all material provisions of the statute have been complied with.”

Then, in *Bennett v. Cain*,¹¹ the court upheld the application of the inheritance provisions of the 1955 amendments to adoptions granted before the effective date of the 1955 act as in conformity with the power of the legislature to determine who shall take the property of a person dying subsequent to the effective date of a legislative enactment. Finally, in the recent case of *Headen v. Jackson*,¹² which extended the benefits of the anti-lapse statute to adopted children of the predeceased beneficiary under a will, a majority of the court quoted the following description of the 1955 amendments by the *North Carolina Law Review*¹³ with approval:

“Here is a simple and clear rule which eliminates all doubt as to the standing and rights of an adopted child. For all legal purposes he is in the same position as if he had been born to his adoptive parents at the time of the adoption. There is no need for any learned and complicated interpretations. Whatever the problem is concerning an adopted child, his standing and his legal rights can be measured by this clear test: ‘What would his standing and his rights be if he had been born to his adoptive parents at the time of the adoption?’ If lawyers and courts will look to this plain language of the statute, and avoid making exceptions not made in this statutory statement, persons adopting children in North Carolina can legally realize what they have hoped for, namely that the child they adopt will become their child, theirs fully, just as if he had been born to them, and without any exceptions and qualifications imposed by law to thwart their purpose.”

It thus seems that Frank Hanft has not pleaded in vain for a

¹¹ 248 N.C. 428, 431, 103 S.E.2d 510, 513 (1958). Somewhat surprisingly, the opinion in this case contains references to “strict construction.”

¹² 255 N.C. 158, 159, 120 S.E.2d 598, 599-600 (1961).

¹³ *A Survey of Statutory Changes in North Carolina in 1955*, 33 N.C.L. Rev. 513, 522 (1955). The quotation by the court omits the footnote referring, *inter alia*, to the article by Professor Hanft cited in note 1 *supra*. See also text at note 55 *infra*.

benevolent judicial attitude towards adoptions. But will this attitude, up to now manifested only with respect to North Carolina adoptions proper, also extend to interstate and foreign adoptions? Such adoptions may be as yet relatively insignificant, at least from a statistical point of view. But the mobility of the population is steadily increasing, and so is the volume of adoptions.¹⁴ It therefore seems likely that interstate and foreign adoptions will acquire added significance for the practicing bar in the not too distant future. The purpose of the following discussion is to indicate some of the problems likely to arise in this connection.

JURISDICTION TO ADOPT: NORTH CAROLINA

The Statutory Basis

G.S. § 48-3, as most recently amended in 1957, provides that any minor child, irrespective of place of birth or place of residence, and whether or not a citizen of the United States, may be adopted in North Carolina. Pursuant to G.S. § 48-4, a petition for adoption may be filed by persons over the age of twenty-one who have resided in North Carolina, or on federal territory within the boundaries of North Carolina, for one year next preceding the filing of the petition. The petition can be filed before the clerk of the superior court of the county (1) where the petitioners reside; (2) where the child resides; (3) where the child resided when it became a public charge; or (4) where the child placing agency having custody over the child is located.¹⁵

Residence or Domicile?

While the statute expressly provides that the adopted child does not have to be a domiciliary or even a resident of North Carolina, the situation with respect to the adoptive parents is somewhat less clear. They must "have resided" within the state, or on federal ter-

¹⁴ It is estimated that there were approximately 91,000 adoptions in the United States in 1957, and approximately 96,000 in 1958. 1959 STATISTICAL ABSTRACT OF THE UNITED STATES 292; 1960 *id.* at 293. In North Carolina, adoptions increased from 1,442 in 1955-56 to 2,213 in 1959-60. See note 3 *supra*. While there were only thirty-three interstate adoptions and four foreign adoptions in North Carolina between July 1, 1958 and June 30, 1960, see NORTH CAROLINA STATE Bd. OF PUBLIC WELFARE, BIENNIAL REPORT 53-54 (1958-60), these figures do not include out-of-state or foreign adoptions by residents of North Carolina. Between January 1, 1957 and December 31, 1961, eighty-four foreign children were adopted in North Carolina. (Information received from the North Carolina State Board of Public Welfare, Raleigh, North Carolina.)

¹⁵ N.C. GEN. STAT. § 48-12 (1950).

ritory within the state, for one year before filing their petition.¹⁶ "Residence" is a rather elusive term of art which has often been construed to signify domicile, especially in matters pertaining to status.¹⁷ Thus, the Supreme Court of North Carolina has held:

In order to constitute residence as a jurisdictional fact to render a divorce decree valid under the laws of this State there must not only be physical presence at some place in the State but also the intention to make such locality a permanent abiding place. There must be both residence and *animus manendi*.¹⁸

Like the adoption statute, the statute here construed merely required that a party must "have resided" within the state for a fixed period of time. Probably in view of this decision the Attorney General has expressed the opinion that as used in the adoption statute, "residence" in substance means "domicile."¹⁹

It seems that such a view could derive some further support from the recent case of *Martin v. Martin*,²⁰ involving the construction of a statutory provision which equated residence at a military installation or reservation within the state to residence therein sufficient for divorce purposes.²¹ The court held that under this statute, servicemen could now establish a domicile within North Carolina even though they resided in military installations or reservations, but that domicile nevertheless remained a jurisdictional requirement in divorce actions by or against servicemen.

¹⁶ N.C. GEN. STAT. § 48-4(c) (1950).

¹⁷ See *Hughes v. Industrial Comm'n*, 69 Ariz. 193, 211 P.2d 463 (1949); *In re Webb's Adoption*, 65 Ariz. 176, 177 P.2d 222 (1947); *Johnson v. Smith*, 94 Ind. App. 619, 180 N.E. 188 (1932); *Krakow v. Department of Public Welfare*, 326 Mass. 452, 95 N.E.2d 184 (1950); *Greene v. Willis*, 47 R.I. 375, 133 Atl. 651 (1926); *Cribbs v. Floyd*, 188 S.C. 443, 199 S.E. 677 (1938); see generally *Reese & Green, That Elusive Word "Residence,"* 6 VAND. L. REV. 561, 569-71 (1953); Note, 33 N.C.L. REV. 697 (1955); Note, 33 N.C.L. REV. 680 (1955).

¹⁸ *Bryant v. Bryant*, 228 N.C. 287, 289, 45 S.E.2d 572, 574 (1947), construing N.C. GEN. STAT. § 50-6 (1950).

¹⁹ Letter From the Attorney General of North Carolina to Dr. Ellen Winston, August 27, 1953 (on file in the North Carolina State Board of Public Welfare, Raleigh, North Carolina), abstracted in *HESTER, DIGEST OF INTERPRETATIONS OF THE ADOPTION LAW OF NORTH CAROLINA* 2 (rev. ed. Ligon 1961).

²⁰ 253 N.C. 704, 118 S.E.2d 29 (1961), discussed in Note, 40 N.C.L. REV. 343 (1962); *Domestic Relations, Ninth Annual Survey of North Carolina Case Law*, 40 N.C.L. REV. 529, 532 (1962).

²¹ N.C. GEN. STAT. § 50-18 (Supp. 1961), discussed in *Comments on North Carolina 1959 Session Laws*, 38 N.C.L. REV. 176 (1960).

However, there appears to be one rather basic distinction between the construction of statutes granting jurisdictions for divorce actions, and those establishing the jurisdictional prerequisites for adoption proceedings. There is eminent, although not necessarily persuasive, authority for the proposition that a state cannot consistently with due process base its jurisdiction to grant divorce on anything less than the domicile of at least one of the spouses.²² For better or worse, this authority has been followed in North Carolina in the recent *Martin* case, and in so far as this decision can be read to be an interpretation of the "law of the land" clause of the North Carolina state constitution, that is the end of the matter. Consequently, if reference to "residence" in divorce legislation is interpreted to mean anything less than domicile, this will necessarily result in the invalidity of such legislation. Thus, construing "residence" to mean "domicile" here merely serves the purpose of saving the constitutionality of a statute by restrictive interpretation.

It is submitted that before this process of interpretation can be applied to the adoption statute, it has to be demonstrated that unless so interpreted, the statute is unconstitutional. In other words, whether "residence," as used in the adoption statute, means physical presence or domicile depends on whether the assumption of jurisdiction to grant adoptions on the basis of physical presence alone is a constitutionally valid exercise of legislative power. If so, it is submitted, residence as used in the adoption statute means physical presence and nothing more.

Behind this inquiry looms the larger question whether anything less than the domicile of both the adopted and the adoptive parents within the state will suffice for jurisdictional purposes—whether the statute, even if restrictively interpreted, is constitutional in so far as it purports to confer jurisdiction to adopt children who are neither domiciliaries nor residents of North Carolina. There is some indication that it might be argued that since adoption changes the status of both the adoptive parents and the adopted child, only the state in

²² *Williams v. North Carolina*, 325 U.S. 226, 229 (1945) (Frankfurter, J.); *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954); *Jennings v. Jennings*, 251 Ala. 73, 36 So. 2d 236 (1948). *But see* *Wheat v. Wheat*, 229 Ark. 842, 318 S.W.2d 793 (1958); *David-Zieseness v. Zieseness*, 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954); *Baade & Williams, Constitutional Checks on Collusive Invasion of Jurisdiction in Matrimonial Actions*, 4 DUKE B.J. 55 (1954); *Rheinstein, The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775 (1955).

which both are domiciled will have jurisdiction to grant adoptions.²³

On closer analysis, this latter contention seems wholly untenable. Status is affected by marriage and by annulment; neither requires a jurisdictional basis founded in domicile. Custody decrees significantly affect status relationships; it seems clear that residence alone of one of the spouses and the presence of the child or children will suffice for jurisdictional purposes.²⁴ And even under the conservative North Carolina rule, reaffirmed in the *Martin* case, the domicile of one of the parties within the state will suffice to confer jurisdiction to adjudicate the status of both spouses in a divorce proceeding.²⁵

The Test of Constitutionality

Furthermore, since adoption is a statutory innovation unknown to the common law, common law conceptions of jurisdiction can hardly be imported into the law of adoption without a prior analysis of adoption statutes and their underlying purposes. Such an approach would seem to be all the more indicated in view of the recent case of *State v. Hales*,²⁶ where the constitutionality of a statute creating a new offense was upheld, *inter alia*, on the ground that as shown by an exhaustive investigation conducted by the court itself, forty-four states had enacted statutes dealing with the same offense; that some of these were very similar to the North Carolina statute; and that none of these enactments by sister states had been held to be unconstitutional. The court appears to have considered these facts as "manifest" proof that the North Carolina statute "has a rational, real and substantial relation to the end to be accomplished."²⁷

A survey of adoption statutes indicates that twenty-seven states and the District of Columbia have jurisdictional requirements for adoption proceedings which are substantially identical with those of the North Carolina statute, *i.e.*, the residence of the adoptive parents within the state.²⁸ Eleven states assume jurisdiction to grant adop-

²³ See text at notes 67-72 *infra*.

²⁴ *In re Hughes*, 254 N.C. 434, 437, 119 S.E.2d 189, 191 (1961), discussed in *Domestic Relations, Ninth Annual Survey of North Carolina Case Law*, 40 N.C.L. REV. 529, 531 (1962).

²⁵ *Williams v. North Carolina*, 317 U.S. 287 (1942); *Bryant v. Bryant*, 228 N.C. 287, 45 S.E.2d 572 (1947).

²⁶ 256 N.C. 27, 122 S.E.2d 768 (1961).

²⁷ *Id.* at 31-32, 122 S.E.2d at 772.

²⁸ ALASKA COM. LAWS ANN. § 21-3-11 (1949); ARIZ. REV. STAT. ANN. § 8-102(a) (1956); CAL. CIV. CODE § 221 (1954); CONN. GEN. STAT. REV. § 45-63 (Supp. 1961); DEL. CODE ANN. tit. 13, § 903 (1953); D.C. CODE ANN. § 16-201 (1961); ILL. ANN. STAT. ch. 4, § 9.1-2 (Supp. 1961); IND. ANN. STAT. § 3-115 (Supp. 1961); KY. REV. STAT. § 199.470 (1959); LA.

tions if either the child or the adoptive parents are resident;²⁹ and two states require that the child be a resident.³⁰ The remaining jurisdictions either seemingly assume jurisdiction to grant adoption regardless of residence, or have no jurisdictional clauses in their adoption statutes. No state requires both the adoptive parents and the child to be residents.

Thus, the "residence" of the adoptive parents within the state is the solitary jurisdictional basis for adoptions in more than one-half of all states and territories, and a sufficient jurisdictional basis in no less than three-fourths of all states and territories of the United States. So far as can be ascertained, none of these statutory assertions of jurisdiction to adopt has been held to be unconstitutional to date; and it seems hard to imagine that such well-nigh uniform jurisdictional standards could or would be stricken down as violative of due process.

Modern Adoption Procedures

However, even quasi-uniformity is not necessarily equivalent to proof of correctness; and it seems appropriate to seek some explanation for the apparent consensus—further evidenced, for instance, by the Uniform Adoption Act³¹—that the residence of the adoptive

REV. STAT. ANN. §§ 9:422, :423 (1950); MICH. STAT. ANN. § 27.3178(541) (1948); MINN. STAT. ANN. § 259.21 (1959); MISS. CODE ANN. § 1269-02 (1942); MONT. REV. CODES ANN. § 61-204 (Supp. 1961); NEB. REV. STAT. § 43-102 (1960); NEV. REV. STAT. § 127.060 (1957); N.J. STAT. ANN. § 9:3-20 (Supp. 1961); N.C. GEN. STAT. § 48-4 (1950); N.D. REV. CODE § 14-11-08 (1960); OKLA. STAT. ANN. tit. 10, § 60.4 (Supp. 1961); R.I. GEN. LAWS ANN. § 15-7-4 (1956); S.C. CODE § 10-2581 (1952); TENN. CODE ANN. § 36-105 (Supp. 1961); UTAH CODE ANN. § 78-30-8 (1953); VA. CODE ANN. § 63-348 (Supp. 1960); W. VA. CODE ANN. § 4755 (1961); WIS. STAT. ANN. § 48.81 (1957); WYO. COMP. STAT. ANN. § 1-708 (Supp. 1961). Several of these statutes are cast in terms of venue; and a number of them provide for jurisdiction to grant adoptions in the absence of petitioners' residence in some exceptional cases, typically where the petitioner is a blood relative or where the child is in the custody of a state agency of child welfare.

²⁹ ALA. CODE tit. 27, § 1 (1958); IOWA CODE ANN. § 600.1 (Supp. 1961); MASS. ANN. LAWS ch. 210, § 1 (1955); MO. ANN. STAT. § 453.010 (1952); N.H. REV. STAT. ANN. § 461:1 (1955); N.M. STAT. ANN. §§ 22-2-1, -3 (1953 and Supp. 1961); N.Y. DOM. REL. LAWS § 113; PA. STAT. ANN. tit. 1, § 1 (Supp. 1960); S.D. CODE § 14.0405 (Supp. 1960); VT. STAT. ANN. tit. 15, § 434 (1959); WASH. REV. CODE § 26.32.040 (1951).

³⁰ ARK. STAT. ANN. § 56-102 (1947); ORE. REV. STAT. §§ 109.310, .318 (1959).

³¹ UNIFORM ADOPTION ACT § 4. This act is currently in force in Montana and Oklahoma. See note 28 *supra*.

parents within the state is both a sufficient and the most satisfactory jurisdictional requirement for adoption proceedings.

The reasons for this preference are indicated by the structure of modern adoption procedures as prescribed in contemporary adoption legislation, including the North Carolina statute. The paramount interest is that of the child; the proceedings are designed to place—or to retain—children with parents who can “give them good homes and loving care.”³² Manifestly, the future happiness of the child—once its natural parent or parents are willing to place it for adoption or have abandoned it—depends primarily upon the ability and the willingness of the prospective adoptive parents to give the child a good home and loving care. This, in turn, can in all likelihood be determined most satisfactorily in the community where the prospective adoptive parents live.

Modern adoption legislation, including the North Carolina statute, provides two basic safeguards to ensure the adequacy of the determination that the prospective adoptive parents meet the necessary qualifications. First, at the time of the filing of the petition for adoption, the court orders an investigation by the county superintendent of public welfare or by a licensed child-placing agency to determine whether the child is a proper subject for adoption, and whether the proposed foster home is suitable for the child.³³ Upon the examination of the report of the agency or agencies charged with this investigation, the court may issue an interlocutory decree of adoption which gives the care and custody of the child to the prospective adoptive parents.³⁴ Secondly, when the child has been so placed, the court “must order the county superintendent of public welfare or a licensed child-placing agency to supervise the child in its adoptive home.”³⁵ The final order of adoption may not be entered until the child has resided with the petitioners for a period not less than one year,³⁶ and if at any time during such probationary period the court is informed that circumstances are such that the child should not be given in adoption to the petitioners, it may dismiss the proceedings.³⁷

³² N.C. GEN. STAT. § 48-1 (1950).

³³ N.C. GEN. STAT. § 48-16 (Supp. 1961).

³⁴ N.C. GEN. STAT. § 48-17 (1950).

³⁵ N.C. GEN. STAT. § 48-19 (Supp. 1961).

³⁶ N.C. GEN. STAT. § 48-21 (Supp. 1961).

³⁷ N.C. GEN. STAT. 48-20 (Supp. 1961). This statutory scheme corresponds to that of the UNIFORM ADOPTION ACT §§ 9, 11, and to the recommendations of the U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, PUB.

By far the most important investigation is the one which ultimately determines the fate of the child on a basis of a trial period of home life with the petitioners.³⁸ This investigation can, of course, only be made where the petitioners reside; it also necessitates some degree of constant supervision during the trial period. While the state where the petitioners reside might not be the only place from which such an investigation can be judicially ordered and supervised, it obviously is by far the most convenient place therefor.³⁹ Consequently, it seems apparent that a modern adoption statute of the North Carolina type which provides for jurisdiction to adopt where the petitioners reside has a rational, real and substantial relation to the end to be accomplished: the furthering and protection of the welfare of the child through the provision of a suitable home. It seems clear that such a statute is not violative of due process.

The above discussion has merely shown that due process does not require that both the adoptive parents and the child be domiciled in the state where the adoption is effected. But will anything less than the domicile of the adoptive parents or the child suffice? And, to what extent does North Carolina have jurisdiction to grant adoptions where a necessary party, such as a parent, is domiciled in another state and does not participate in the adoption proceedings? More specifically, can a foreign domiciliary be adjudged in an "ex parte" adoption proceeding to have abandoned his child?

As outlined above, the North Carolina statute requires the adop-

NO. 394, LEGISLATIVE GUIDES FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE ADOPTION OF CHILDREN 25-28 (1961).

³⁸ As a practical matter, the first investigation must be made in two different places if the child does not reside in the same place as the petitioners. However, the investigation of the suitability of the child for adoption is in all probability not much more than a mere formality, especially if the child is in a foster home or has been placed for adoption by its parent or parents. Information needed in this connection can easily be obtained from public welfare or child-placing agencies in other states; the natural parent or parents will have an opportunity to rebut or amplify conclusions drawn therefrom at the proceeding which precedes the interlocutory order of adoption.

³⁹ UNIFORM ADOPTION ACT § 4, Commissioners' Note, in 9 U.L.A. 30 (1957): "The reason for [prescribing that adoption proceedings be brought where the petitioners reside] is to place the emphasis on getting the best parents for the child. It is believed that the courts of the state where the parents reside will be better able to judge the adoptive home and adoptive parents than a court in a state foreign to the new parents." See also U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, *op. cit. supra* note 37, at 22-23: "It is recommended that adoption proceedings be brought in the court of the county or district where the petitioners reside. This represents the consensus so far of social workers and lawyers who have participated in the development of these guides and is harmonious with a provision in the Uniform Adoption Act."

tive parents to have been residents for at least one year before the application can be filed, and further requires the child to have lived in the petitioners' home for an additional year before the final decree is granted. Consequently, the adoptive parents will have resided in North Carolina for more than two years, and the child, for more than one year, before the final decree is granted. In the usual case, both the adoptive parents and the child will therefore in all probability be domiciled in North Carolina. However, this is not necessarily always the case; the adoptive parents may have taken up residence in North Carolina merely for a fixed period of time for reasons of employment, training, and the like. In such cases, the prospective adoptive parents might have had a home but no domicile in North Carolina.

It seems rather difficult to conceive of a constitutional objection to jurisdiction to grant adoptions in cases where both the adoptive parents and the child have had their home in the state for more than one year, and where the adoptive parents have been residents for more than two years. Manifestly, the state of residence has both a sufficient interest in the relationship, and adequate opportunity to do what is right between the parties. It is therefore submitted that an interpretation of the residence requirement in G.S. § 48-4(c) in the sense of physical presence alone is both in keeping with the purposes of the adoption statute and constitutionally valid. This conclusion appears all the more inescapable in view of the obvious consequences of a holding that the residence requirement in the adoptions statute means domicile. Such a holding would enable prospective adoptive parents who at the time of the proceedings have virtually no present connections to North Carolina but a more or less fictitious domicile of origin⁴⁰ to initiate adoption proceedings in the state, and to frustrate one of the basic policies of the adoption statute, *i.e.*, the constant supervision of the adoptive family before a final change of status is decreed. It is for this very reason that the residence requirement in the Delaware adoption statute has been held to signify physical presence and not domicile⁴¹—a conclusion which, it is submitted, is equally valid for North Carolina.

⁴⁰ See, *e.g.*, *Israel v. Israel*, 255 N.C. 391, 121 S.E.2d 713 (1961). Unfortunately, the Attorney General seems to be unaware of the practical consequences of his opinion that the residence requirement of G.S. § 48-4(c) signifies domicile. See the opinions abstracted in *HESTER, op. cit. supra* note 19, at 2-3 (Nos. 10-13).

⁴¹ *In re Goodman's Adoption*, 121 A.2d 676, 677-78 (Del. Orphan's Court 1952). See also *Van Matre v. Sankey*, 148 Ill. 536, 36 N.E. 628 (1893);

Nonresident Necessary Parties

The North Carolina adoption statute provides that as a rule the consent of the parents, parent, or guardian of the child is an indispensable prerequisite for adoption proceedings.⁴² However, there are two exceptions from the rule that the consent of the natural parents is necessary. G.S. § 48-6 dispenses with the consent of the father of an illegitimate child which has not been legitimated; and G.S. § 48-5 provides that parents and guardians are not necessary parties to adoption proceedings if there has been a finding of abandonment. If there has not been a finding of abandonment by a court of competent jurisdiction prior to the adoption proceeding, such a finding can be made by the court in the adoption proceeding or, if the child is under the jurisdiction of a juvenile court or a domestic relations court, by the court having jurisdiction over the child. If the finding is to be made by the court in the adoption proceeding, there must be written notice of not less than ten days to the parents, parent, or guardian. A juvenile court or a domestic relations court, on the other hand, can proceed "after due notice" to the necessary parties.⁴³

If there is a denial of abandonment, this issue of fact is determined by the superior court, as generally provided in G.S. § 1-273 for cases where an issue of fact is raised before the clerk of court. G.S. §§ 48-7(b) and (c) provide, respectively, that service on nonresident necessary parties for the purpose of a determination of abandonment can be made by service of process on nonresidents as provided in G.S. § 1-104 if their address is known or can be ascertained, and by publication and summons as provided by G.S. §§ 1-98 and -99 where such address cannot be ascertained.

These provisions present no difficulty if the nonresident parent or guardian who is served by notice or publication actually becomes a party to the adoption proceeding. G.S. § 48-28 provides that after the final order of adoption has been signed, the parties to the proceeding or their privies may not later question the validity of the adoption proceeding because of any defect or irregularity, jurisdic-

In re Adoption of Duren, 355 Mo. 1222, 200 S.W.2d 343 (1947); *Appeal of Wolf*, 10 Sad. 139, 13 Atl. 760 (Pa. 1888); *Annot.*, 170 A.L.R. 403 (1947). None of the decisions to the contrary cited in note 17 *supra*, are based on purportedly constitutional considerations; several proceed from the view, now abandoned in North Carolina, that adoption statutes have to be strictly construed since they are in derogation of the common law.

⁴² N.C. GEN. STAT. § 48-7 (1950 and Supp. 1961).

⁴³ N.C. GEN. STAT. § 48-5(b) (Supp. 1961).

tional or otherwise. In the recent case of *Hicks v. Russell*,⁴⁴ it was held that a nonresident father who had participated in the proceedings to the extent of appointing local counsel and obtaining a consent order granting additional time to answer an allegation of abandonment, was irrevocably bound by the orders and judgments entered in the adoption proceeding and estopped by law from challenging the validity thereof. Even without the benefit of a specific statutory provision to this effect, the court had held that adoption proceedings are conclusive as to all persons who are parties thereto, as well as their privies.⁴⁵

But what if the nonresident parent or guardian chooses to ignore the summons? Can his right be cut off by an ex parte determination of abandonment? It seems clear that due process requires at least an honest effort to give actual notice, and a real chance to contest the issue of abandonment.⁴⁶ But so far as can be ascertained, there is no binding authority for or against the proposition that personal service within the jurisdiction (with respect to nonresidents) is required to cut off the right of unco-operative parents or guardians across state lines.

It might be contended that such a requirement is implicit in *May v. Anderson*.⁴⁷ There, Justice Burton (speaking for only four Justices) held that a decree depriving a nonresident parent of custody is not entitled to full faith and credit in the absence of personal jurisdiction over such parent.⁴⁸ However, even if it is assumed that, as summarized above, Justice Burton's opinion represents the holding of the Court, this is not necessarily relevant to the problem at hand. First, the *May* case dealt with full faith and credit, not jurisdiction under the due process clause; and, as pointed out below, there is some ground for the view that adoption decrees are not entitled to full faith and credit in any case.⁴⁹ Secondly—and much more importantly—there appear to be some basic distinctions between custody and adoption.

All that is ordinarily necessary for an award of custody of chil-

⁴⁴ 256 N.C. 34, 123 S.E.2d 214 (1961).

⁴⁵ *In re Blalock*, 233 N. C. 493, 509-10, 64 S.E.2d 848, 859-60 (1951); *Wilson v. Anderson*, 232 N.C. 212, 220-21, 59 S.E.2d 836, 843 (1950); *Locke v. Merrick*, 223 N.C. 799, 802, 28 S.E.2d 523, 526 (1944).

⁴⁶ See *Carpenter v. Forslee*, 103 Ga. App. 758, 120 S.E.2d 786 (1961).

⁴⁷ 345 U.S. 528 (1953). See generally Hazard, *May v. Anderson: Preamble to Family Chaos*, 45 VA. L. REV. 379 (1959).

⁴⁸ 345 U.S. at 533-34. See *Lennon v. Lennon*, 252 N.C. 659, 114 S.E.2d 571 (1960).

⁴⁹ See note 59 *infra*.

dren in a broken home to one parent to the exclusion of the other is proof that the welfare of the child will be better served by such an arrangement. The faults, if any, of the losing parent are relatively insignificant. In any case, custody decrees are usually modifiable upon proof of changed circumstances; and it has been suggested that the real rationale of *May v. Anderson* was the refusal to countenance Ohio's denial of modification of a prior sister-state custody decree.⁵⁰

On the other hand, an adoption decree is final. To use the emotive language of Justice Burton, it cuts off "rights far more precious . . . than property rights."⁵¹ But the position of the objecting parent is incomparably stronger in an adoption proceeding than in a custody dispute. Ordinarily, his refusal to consent is the end of the matter. Only for the gravest of faults, such as abandonment and persistent refusal to support, can a parent lose his child through an adoption effected against his will. The likelihood that the facts will be grossly distorted in an ex parte proceeding is rather small, for modern adoption legislation provides for a mandatory examination of the circumstances of the child and of his fitness for adoption even before the interlocutory decree.⁵² Furthermore, since abandonment is a ground for dispensing with the consent of the delinquent parent to adoption under the law of most states,⁵³ the danger of "forum shopping" appears to be minimal.

Above all, however, comes the consideration that, as a practical matter, personal service on the abandoning parent is a contradiction in terms. The answer might be that jurisdiction to adopt can then be exercised, consistently with *May v. Anderson*, at the last domicile of the abandoning parent.⁵⁴ However, this would not only restrict the opportunities of abandoned children to find a new home, but also seemingly put a premium on accidental incest. It seems clear that the provision of a suitable forum for the adjudication of aban-

⁵⁰ Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 766-69 (1961).

⁵¹ 345 U.S. at 533.

⁵² N.C. GEN. STAT. § 48-16 (Supp. 1961); UNIFORM ADOPTION ACT § 9.

⁵³ See, e.g., CAL. CIV. CODE § 224; COLO. REV. STAT. ANN. § 4-1-6(2)(b) (1953); DEL. CODE ANN. tit. 13, § 908 (1953); ILL. ANN. STAT. ch. 4, §§ 9.1-1, -8 (Supp. 1961); ME. REV. STAT. ANN. ch. 158, § 37 (1954); MISS. CODE ANN. § 1269-02 (1942) (petitioner must, however, prove diligent search and inquiry after natural parent); MONT. REV. CODES ANN. § 67-130 (1947); N.M. STAT. ANN. § 22-2-6 (1953); TENN. CODE ANN. § 36-110 (1961); W. VA. CODE ANN. § 4755 (1961).

⁵⁴ *May v. Anderson*, 345 U.S. 528, 533 (1953): "[W]e have before us the elemental question whether a court of a state, where a mother is neither

donment, coupled with procedure designed to convey actual knowledge, reinforced by independent investigatory procedures to prevent abuses, and prevented by uniformity of practice from becoming a forum shopping device, strikes a fair balance between the interests involved. In any event, the scales should be tipped on the side of the child. In the *Hicks* case, the court quoted the following language of the North Carolina adoption statute with approval: "When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this chapter should be liberally construed." ⁵⁵

In conclusion, it is submitted that North Carolina can constitutionally cut off the rights of a nonconsenting parent in an ex parte adoption proceeding where a determination of abandonment is made, provided that there has been an honest effort to give the out-of-state parent notice of such proceeding.

RECOGNITION OF SISTER-STATE ADOPTIONS

At present, adoption procedure everywhere in the United States is analogous to judicial proceedings, culminating in a court order.⁵⁶ This, however, has not always been the case. Common law jurisdictions began to enact adoption statutes only around the middle of the last century (the original North Carolina statute was passed in 1873);⁵⁷ and until quite recently, adoption could be effected in various jurisdictions by contract, deed, or notarial act.⁵⁸ Possibly because of the novelty of adoption as such and in view of these divergencies in adoption procedures, it is not quite clear whether adoption orders are entitled to recognition in sister states by virtue of the full faith and credit clause of the United States Constitution.⁵⁹

Nevertheless, of course, adoptions effected in sister states are as a rule recognized throughout the United States.⁶⁰ What are the

domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her in personam."

⁵⁵ *Hicks v. Russel*, 256 N.C. 34, 39, 123 S.E.2d 214, 218 (1961), quoting N.C. GEN. STAT. § 48-1(3) (1950).

⁵⁶ See Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715, 725 (1950); statutes cited in notes 28-30, 53 *supra*.

⁵⁷ Act of March 3, 1873, N.C. Pub. Laws 1872-73, ch. 155.

⁵⁸ In Louisiana, a person over the age of seventeen can still be adopted by notarial act. LA. REV. STAT. ANN. § 9:461 (Supp. 1961).

⁵⁹ Cf. *Hood v. McGehee*, 237 U.S. 611 (1915). See also LEFLAR, *op. cit. supra* note 6, at 342.

⁶⁰ See generally 1 EHRENZWEIG, CONFLICT OF LAWS 85-88, 182-85 (1959);

minimum jurisdictional prerequisites for such recognition? One school of thought, represented, for instance, by the late Professor Taintor, maintains that any adoption decreed by a court which has *personal* jurisdiction over the petitioners and the adopted, and which affords procedural due process to the parent or parents whose consent it holds not to be required, should be recognized by sister states.⁶¹ The other, more conservative school, which includes the authors of the *Restatement of the Conflict of Laws*, would limit jurisdiction to adopt (and consequently, the power to grant adoptions which will be recognized by sister states) to the state which (a) is the domiciliary state of either the adopted child or the adoptive parents, and (b) has personal jurisdiction over either the adopted child or its guardian.⁶² One of the authors of the *Restatement*, the late Professor Beale, went even further than that. He stated that "jurisdiction to adopt would seem to depend strictly on common domicile of both parties, since the status of both is affected." However, he conceded that "in many cases less has been required."⁶³

The Blalock Case

In *In re Blalock*,⁶⁴ decided in 1951, the North Carolina court indicated its preference for the rule advocated by Professor Beale, or at least that of the *Restatement*. The facts, so far as they are material in this connection, are as follows: an illegitimate child born to a woman domiciled in North Carolina was first sought to be adopted by a couple named Carter. Upon their petition and with the written consent of the mother, the domestic relations court awarded custody over the child to the Carters. The Carters then started adoption proceedings before the clerk of the superior court. An interlocutory order of adoption was issued, but the Carters later abandoned their plans with respect to the child and turned her over to the welfare department. The interlocutory order was thereupon revoked. Some time later, the welfare department turned the child over to the

GOODRICH, *CONFLICT OF LAWS* 446-52 (3d ed. 1949); LEFLAR, *op. cit. supra* note 6, at 340-43; STUMBERG, *CONFLICT OF LAWS* 336-40 (2d ed. 1951); Taintor, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222 (1954). North Carolina has expressed its legislative policy in favor of the recognition of sister-state and foreign adoptions. See text at note 15 *supra*.

⁶¹ Taintor, *supra* note 60, at 249-50, 266.

⁶² RESTATEMENT, *CONFLICT OF LAWS* § 142 (1934); RESTATEMENT (SECOND), *CONFLICT OF LAWS* § 142 (Tent. Draft No. 4, 1957).

⁶³ 2 BEALE, *CONFLICT OF LAWS* 713-14 (1935).

⁶⁴ 233 N.C. 493, 64 S.E.2d 848 (1951).

McGowens, who also wished to adopt her. There was an understanding that the child was to be adopted in accordance with North Carolina law. Nevertheless, the McGowens took the child with them to Illinois, where they lived, and kept her there. They did not immediately institute adoption proceedings in Illinois.

In February 1950, the mother of the child brought proceedings in North Carolina in the domestic relations court, seeking to recover custody. Although there seemingly was no service in this action upon the McGowens, they put in what they thought was a special appearance, challenging the jurisdiction of the North Carolina domestic relations court on the basis, *inter alia*, that the minor child was a resident and domiciliary of Illinois and thus not subject to the jurisdiction of the North Carolina courts. The McGowens now immediately commenced adoption proceedings in Illinois and obtained a final order of adoption there in May 1950. The mother of the child was served by mail but did not appear.⁶⁵ The Illinois order of adoption was also set up in bar to the jurisdiction of the North Carolina domestic relations court.

The domestic relations court, the superior court, and, finally, the North Carolina Supreme Court all held that since the child had never lost her domicile in North Carolina, the Illinois adoption was void. The supreme court observed that the adopters had failed to inform the Illinois court as to the fact that the child had become a ward of a North Carolina domestic relations court, as to the circumstances under which they had obtained possession of the child or their assurances given in this connection, and as to their removal of the child from North Carolina without obtaining the permission of any North Carolina court or agency.⁶⁶ Furthermore, the court added, there was no allegation of facts which would work a change in the domicile of the child; and the findings of the Illinois adoption

⁶⁵ See the transcript of the Illinois adoption proceedings in Record, pp. 18-26, *In re Blalock*, *supra* note 64.

⁶⁶ The court placed some reliance upon G.S. § 110-52 which prohibits the removal of children from the state for the purpose of placement in foster homes or child-caring institutions without first obtaining the consent of the State Board of Public Welfare, and upon G.S. § 110-55 which makes violation of this prohibition a misdemeanor. 233 N.C. at 509, 64 S.E.2d at 859. However, G.S. § 110-52 does not in terms prohibit the removal of a child from the state for adoption purposes. Note, incidentally, G.S. § 14-320 makes it "unlawful for any person to separate or aid in separating any child under six months old from its mother for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the State for such purpose, without the written consent of either the county superintendent of public welfare of the county in which the mother resides, or of the county

court were limited to the facts alleged by the adopters. The court concluded:⁶⁷

Hence, we hold that the conclusions of law made by the trial court that the child has never lost her domicile in the State of North Carolina and that the purported adoption of the child in the State of Illinois is void and of no effect, are well founded and proper.

The Conflict of Laws, by Joseph H. Beale, Vol. 1, Chapter 2, on the subject of Domicile, declares that every person must have a domicile of origin; that this domicile comes into being as soon as the child becomes at birth an independent person; that this domicile is retained until it is changed in accordance with law; that if the child be illegitimate it takes its mother's domicile . . . ,⁶⁸ that there can be no change of domicile without an intention to acquire the new dwelling as a home, or as it is often phrased, without an *animus manendi*. Hence "an unemancipated infant, being *non sui juris*, cannot of his own volition, select, acquire, or change his domicile." . . .⁶⁹

Moreover, the Conflict of Laws, *supra*, Vol. 2, on the subject of adoption, states that jurisdiction to adopt would seem to depend strictly on common domicile of both parties, since the status of both is affected.

A judgment obtained in another State may be challenged in this State by proof of fraud practiced in obtaining the judgment which may have prevented an adverse trial of the issue, or by showing want of jurisdiction either of the subject matter or as to the person of the defendant.⁷⁰

in which the child was born, or of a private child-placing agency duly licensed by the State Board of Public Welfare; but the written consent of any of the officials named in this section shall not be necessary for a child when the mother places the child with relatives or in a boarding home or institution inspected and licensed by the State Board of Public Welfare. Such consent when required shall be filed in the records of the official or agency giving consent. Any person or agency violating the provisions of this section shall, upon conviction, be fined not exceeding five hundred dollars (\$500.00) or imprisoned for not more than one year, or both, in the discretion of the court." It seems that this statutory prohibition is not generally known and has frequently been ignored.

⁶⁷ 233 N.C. at 510-11, 64 S.E.2d at 860.

⁶⁸ Citing *Thayer v. Thayer*, 187 N.C. 573, 122 S.E. 307 (1924).

⁶⁹ Citing *Allman v. Register*, 233 N.C. 531, 64 S.E.2d 861 (1951); *Duke v. Johnston*, 211 N.C. 171, 189 S.E. 504 (1937); *Thayer v. Thayer*, *supra* note 68.

⁷⁰ Citing *Crescent Hat Co. v. Chizik*, 223 N.C. 371, 26 S.E.2d 871 (1943).

Strictly speaking, the court only held that the adoption of a North Carolina domiciliary in a sister state will not be given effect here, if (1) the parents have not consented to the adoption, have not been personally served in the out-of-state adoption proceeding, and have not voluntarily appeared therein; (2) the child is a ward of the North Carolina courts and the latter have not consented to his removal from the state; and (3) the fact of such judicial custody is not disclosed to the court which grants the adoption. In any case, there is no specific holding that both the adopters and the adopted have to be domiciled in the state granting the adoption, for the quotation from Beale includes the doubting words "would seem." However, the record clearly shows that the adopters were domiciled in Illinois.⁷¹

It might be added that the language of the court would seem unduly broad in another respect: the "purported" adoption was plainly not void and of no effect in Illinois because the adopted was not domiciled there. The Illinois adoption statute then in force permitted the adoption of nonresidents, and the exercise of such adoption jurisdiction over nonresidents has been upheld by the Supreme Court of Illinois.⁷²

But there still remains at least the rather strong implication that an adoption granted by a sister state will only be recognized in North Carolina if the adopted was domiciled within the granting state at the time of the adoption. It might not be too late to challenge such a rule—as, it is submitted, it should be challenged. But the burden of persuasion would at the present seem to rest on those who contend that the domicile of the adopted in the granting state is not a prerequisite for the recognition of sister-state adoptions in North Carolina.

RECOGNITION OF FOREIGN ADOPTIONS

There are at least two significant differences between sister-state and foreign adoptions in the conflict of laws. First, even where

⁷¹ Record, pp. 4, 6-7, 9-11, 16, *In re Blalock*, 233 N.C. 493, 64 S.E.2d 848 (1951).

⁷² *Hopkins v. Gifford*, 309 Ill. 363, 369, 141 N.E. 178, 181 (1923): "There is nothing in the [adoption] statute of Illinois which prohibits the adoption by residents of this State of a child not a legal resident thereof." This, incidentally, is the decision from which the North Carolina court indirectly quoted the passage set out at note 10 *supra*. Note, however, that Illinois probably has a more stringent test for the recognition of sister-state adoptions than it has for jurisdiction to adopt under its own statutes. *Brown v. Hall*, 385 Ill. 260, 58 N.E.2d 781 (1944). For a discussion of adoption in violation

foreign adoptions are effected through court order, they are manifestly not entitled to full faith and credit under the United States Constitution.⁷³ Secondly, while the only procedure for the adoption of minors currently available in the United States is a judicial proceeding, this is by no means the case throughout the world. As stated in a recent comparative study of the adoption laws of fifteen countries by the Department of Economic and Social Affairs of the United Nations:

In all the countries studied, adoption is considered a solemn act, and one which, in some way, must be approved by the authorities.

An adoption may be the result of a court order; a deed or exchange of consents, ratified by a court order; a deed or exchange of consents, ratified by a competent authority; or a decision of an administrative authority.⁷⁴

The Impact of Immigration Law

While foreign adoptions are thus not entitled to full faith and credit, and many of them would not qualify under the full faith and credit clause even if so entitled, there is nevertheless strong federal policy in favor of the recognition of at least some foreign adoptions.

of the custody laws of a sister state, see Note, *The Ellis Case—Some Aspects of Adoption in the Conflict of Laws*, 32 ST. JOHN'S L. REV. 292 (1958).

⁷³ While there are as yet few published decisions of courts in the United States and none in North Carolina on the recognition of foreign judgments, there is little doubt that subject to rules basically similar to those governing the recognition of the judgments of sister states, judgments of foreign courts will be recognized in this country. See generally Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950), and with respect to the recognition of foreign adoption decrees, *Zanzonico v. Neeld*, 17 N.J. 490, 111 A.2d 772 (1955). For a thoughtful discussion of the various theories advanced in favor of the recognition of foreign judgments, see Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. REV. 44 (1962).

⁷⁴ *Comparative Analysis of Adoption Laws*, U.N. Doc. ST/SOA/30, at 6 (1956). This study covers the following countries: (1) in Europe: Denmark, France, Greece, Poland, Switzerland, the Soviet Union, Great Britain, and Yugoslavia; (2) in North America: the United States (Alabama, California, Michigan, and New York), and Canada (Quebec, Ontario, and Saskatchewan); (3) in Latin America: Argentina, Bolivia, Guatemala, Peru, and Uruguay. See also McVeety, *Comparative Study of Laws of Adoption of Minors*, 47 WOMEN L.J. No. 2 (1961), p. 13; see generally L'ADOPTION DANS LES LÉGISLATIONS MODERNES (2d ed. Ancel 1958). For a comparative survey of conflict of law rules governing adoption, see 1 RABEL, *THE CONFLICT OF LAWS* 677-705 (2d ed. Drobnig 1958). For an English translation of a German adoption proceeding, see reference in note 87 *infra*.

As amended in 1957, the Immigration and Nationality Act⁷⁵ has recognized for immigration purposes "a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years." Foreign adoptions by United States citizens stationed abroad in the armed services or on government or government-encouraged programs are recognized for the purpose of expediting the naturalization even of alien adoptees who have never resided within the United States.⁷⁶

Furthermore, since 1957 there has been legislation favoring the immigration of alien orphans who have been lawfully adopted abroad or will be adopted in the United States by a United States citizen and spouse.⁷⁷ As made permanent by the Act of September 26, 1961, this legislation defines an eligible orphan as

an alien child under the age of fourteen . . . who is an orphan because of the death or disappearance of both parents, or because of abandonment, or desertion by, or separation or loss from, both parents, or who has only one parent due to the

⁷⁵ 8 U.S.C. § 1101(b)(1)(E) (1958). See generally AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 119-20 (2d ed. 1961); GORDON & ROSENFELD, IMMIGRATION LAW AND PROCEDURE 166-67 (1959).

⁷⁶ 8 U.S.C. § 1434 (1958), as amended, 8 U.S.C.A. § 1434(c) (Supp. 1961).

⁷⁷ 8 U.S.C. § 1101(a), (b) (1958), as amended, 8 U.S.C.A. §§ 1101(a), (b) (Supp. 1961). For a summary of this legislation, see AUERBACH, *op. cit. supra* note 75, at 494-97; GORDON & ROSENFELD, *op. cit. supra* note 75, at 175-79. See also *Montgomery v. Ffrench*, 299 F.2d 730 (8th Cir. 1962), upholding the denial of a non-quota immigration visa under the 1959 Act to a Korean orphan adopted by proxy by United States citizens in Korea, for failure of the adoptive parents to establish to the satisfaction of the Attorney General that they would be able to care properly for the child. This determination was held to be committed to agency discretion and thus not subject to judicial review. *Id.* at 735. The court apparently assumed that the adoption was governed by and valid under Korean law. Under Article 19 of the Korean Law Concerning the Application of Laws of 1898, as amended, the prerequisites of adoption are governed with respect to each party by the laws of his or her nationality; the effects of the adoption and its dissolution are governed by the law of the nationality of the adoptive parents. Pursuant to Article 8 of the same law, the form of adoption proceedings is governed by the *lex loci actus*. See CHIN KIM, PRIVATE INTERNATIONAL LAW 368-74 (1960). Under article 878 of the Korean Civil Code, adoption takes effect upon notification to the Personal Status Registration Office by written application of all parties, attested by two witnesses. It thus seems that an adoption by proxy is—or at least was—possible under Korean conflicts law and substantive law. (The Law of 1898 has recently been repealed by the revolutionary government; the text of the new statute governing the conflict of laws was not available at the time of this writing. For information concerning Korean law, the author is indebted to Mr. Myong-Joon Roe, a graduate student from Korea at the Duke University School of Law.)

death or disappearance of, abandonment, or desertion by, or separation or loss from the other parent, and the remaining parent is incapable of providing care for such orphan and has in writing irrevocably released him for emigration and adoption.⁷⁸

Such a child is eligible for preferential treatment under the immigration laws if adopted abroad only on condition that "the petitioner and spouse personally saw and observed the child prior to or during the adoption proceedings."⁷⁹ In other words, foreign adoptions by proxy are strongly discouraged.⁸⁰

The Immigration and Nationality Act specifically provides that the adoptive parents of eligible alien orphan adoptees and other eligible alien adoptees are "parents," "mothers," and "fathers" for all purposes of immigration law.⁸¹ It seems clear that these provisions establish an overriding federal policy to the effect that all adoptions by United States citizens abroad which create a preferred status under the Immigration and Nationality Act are entitled to recognition throughout the United States.⁸²

This conclusion is of considerable practical importance, for under the 1957 legislation, as amended, a total of 9,620 foreign orphans came to the United States, including 3,281 from Korea, 1,386 from Italy, 1,234 from Greece, and 1,204 from Japan.⁸³

Other Foreign Adoptions

But what of adoptions which do not thus qualify under the Immigration and Nationality Act? The Attorney General has repeatedly expressed the opinion that re-adoption in North Carolina would be both permissible and desirable; he has further taken the view that in a North Carolina adoption proceeding, the foreign

⁷⁸ 75 Stat. 650 (1961), 8 U.S.C.A. § 1101(b)(6) (Supp. 1961).

⁷⁹ 75 Stat. 650 (1961), 8 U.S.C.A. § 1101(b)(i) (Supp. 1961).

⁸⁰ The requirement quoted at note 79 *supra* was inserted into the act at the suggestion of the Department of Health, Education and Welfare to overcome "the risk and abuses attendant upon proxy adoptions." Letter From the Secretary of Health, Education and Welfare to the Chairman of the House Committee on the Judiciary, July 13, 1961, reprinted in House Comm. on the Judiciary, *Amending the Immigration and Nationality Act and for Other Purposes*, H.R. Doc. No. 1086, 87TH CONG., 1ST SESS. 8, 10 (1961). Cf. *Montgomery v. Ffrench*, 299 F.2d 730, 731 n.1 (8th Cir. 1962).

⁸¹ 8 U.S.C. § 1101(b)(2) (1958).

⁸² Cf. *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *United States v. Pink*, 315 U.S. 203 (1942).

⁸³ See House Comm. on the Judiciary, *supra* note 80, table at 22.

adoption order could supply the consent required under G.S. § 48-7.⁸⁴ The North Carolina State Board of Public Welfare has accordingly supervised the re-adoption in North Carolina even of alien children adopted abroad who were by virtue of such adoption eligible for the preferred immigration status described above.⁸⁵

So far as can be ascertained the Supreme Court of North Carolina up to now had no occasion to deal with foreign adoptions directly. However, the question of the effects of a foreign adoption was posed indirectly in *In re Adoption of Hoose*,⁸⁶ which was decided in 1956, *i.e.*, prior to the above-described changes in immigration and nationality law. Here, a child had been adopted in Germany and in accordance with German procedural and substantive law by an officer in the armed forces of the United States and his wife.⁸⁷ The husband was then stationed in Germany, but was transferred to the Pentagon shortly after the completion of adoption proceedings. After living with the adopted child for a short time in Maryland, the adopting couple decided that due to the state of the wife's health, the child could not properly be taken care of by them. The Maryland child welfare authorities recommended the placement of the child for adoption by others. Through mutual friends, the adoptive parents located another armed forces couple, who had been residing in Elizabeth City, North Carolina, for about a year and a half. The adoptive parents turned over the child to the latter couple, transfer-

⁸⁴ Letter From the Attorney General of North Carolina to Paul E. Monroe, June 12, 1956, abstracted in HESTER, DIGEST OF INTERPRETATIONS OF THE ADOPTION LAW OF NORTH CAROLINA 1 (rev. ed. Ligon 1961).

⁸⁵ Of the eighty-four adoptions in North Carolina between January 1, 1957 and December 31, 1961, twenty-one were agency placements approved by the North Carolina State Board of Public Welfare through the International Social Service or the Catholic Refugee Committee. In twelve of these cases, the child was first adopted abroad and then re-adopted in North Carolina. Sixty-three placements were made independently of an agency, twelve with non-relatives and fifty-one with relatives. Several of these non-agency adoptions were also re-adoptions of children already adopted abroad. (Information supplied by the North Carolina State Board of Public Welfare, Raleigh, North Carolina.)

⁸⁶ 243 N.C. 589, 91 S.E.2d 555 (1956).

⁸⁷ See the transcript of an English translation of the German adoption proceeding in Record, pp. 7-12, *In re Adoption of Hoose*, *supra* note 86. The adoption of German children in Germany by citizens of the United States poses some intricate problems of German conflicts law; see DOMKE, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW RELATIONS 77 (Bilateral Studies in Private International Law No. 4, 1956); the decision of the Kammergericht (Supreme Court of West Berlin) of July 31, 1959, reported in 1960 NEUE JURISTISCHE WOCHENSCHRIFT 248 with note Beitzke. Of the eighty-four foreign children adopted in North Carolina between 1957 and 1962, thirty-nine were from Germany. (Information supplied by the North Carolina State Board of Public Welfare, Raleigh, North Carolina.)

ring their rights and obligations of custody and support by a "Statement of Intent" in which they also undertook to assist the second couple in the adoption of the child. The latter filed an adoption petition in North Carolina. The state of the adoptive mother's health improved, and the adoptive parents now changed their minds. In a timely motion to intervene in the adoption proceedings, they revoked their consent to the North Carolina adoption.⁸⁸

The main question to be decided by the North Carolina court was whether the actions of the adoptive parents constituted an abandonment of the child so as to obviate the necessity of parental consent.⁸⁹ However, since the "parents" were, if anything, adoptive parents, the determination of this question—which was ultimately resolved in favor of the original adoptive parents—could only proceed from the assumption that the German adoption was valid and effective in North Carolina. But the validity of the German adoption was not challenged, and the fact of this adoption is not mentioned in the supreme court opinion proper but only in the statement of facts.⁹⁰

Nevertheless, it seems clear that there was no reason to doubt the validity of the foreign adoption, although the adopters were obviously not domiciled in Germany at the time of the adoption. Even though the *Hoose* case offers strong indication that foreign adoptions will be recognized, on principle in North Carolina, it should be noted that in the instant case, the child was obviously domiciled in Germany at the time of the adoption, and that the German domestic relations court having jurisdiction over the child expressly approved the adoption contract.⁹¹

In conclusion, it is submitted that adoptions effected in foreign countries will be recognized in North Carolina at least when (1) (a) the adopted person was domiciled within the state granting the adoption at the critical time and (b) there is unequivocal consent to the adoption by the natural parents or by the court having custody powers over the adopted. It is further submitted that such adop-

⁸⁸ In North Carolina, consent to adoption can be revoked only within six months, and not after the interlocutory decree. This salutary rule obviates a large number of problems presently vexing other jurisdictions. See Comment, *Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy*, 28 U. CHI. L. REV. 564 (1961).

⁸⁹ Cf. note 4 *supra*.

⁹⁰ 243 N.C. at 590-91, 91 S.E.2d at 565-56.

⁹¹ The child was born in Berlin, was slightly over two years old at the time of adoption, and was at that time under the guardianship of the Berlin welfare authorities. See Record, pp. 9-10, *In re Adoption of Hoose*, 243 N.C. 589, 91 S.E.2d 555 (1956).

tions will also be recognized if (2) the adoption is recognized by federal law for immigration and nationality purposes.

CONCLUSION

The Supreme Court of North Carolina has had few occasions to deal with adoptions in the conflict of laws. The following conclusions are therefore mainly based on analogies drawn from the few reported cases, and on deductions from the general approach of the North Carolina court to questions of status in the conflict of laws.

First, it seems reasonably certain that an adoption outside the United States will be recognized if the adopted was domiciled within the granting state or country at the critical time—provided, of course, that the adoption is valid under the latter's law.

Secondly, in spite of a dictum to the effect that a sister-state adoption will be recognized only if both the adopted and the adopters were domiciled within the granting state at the critical time, there is some ground for the belief that a sister-state adoption granted by the state of the domicile of the adopted will be recognized even if the adopters were domiciled elsewhere. This conclusion would seem compelling if the above statement as to foreign adoptions is correct, for obviously, a foreign adoption will not be treated more favorably than a sister-state adoption.

Thirdly, North Carolina's statutory jurisdiction to adopt is quite broad. There is no requirement as to domicile or even residence of the adopted, and the only jurisdictional requirement is the residence (not the domicile) of the adopters within the state for one year immediately preceding the adoption. There may be some reason to fear that the North Carolina Supreme Court will hold the purportedly constitutional jurisdictional requirement of domicile in status matters to be applicable to adoption as well. If so, adoptions where neither the adopters nor the adopted are domiciled in North Carolina will probably be subject to collateral attack. However, for the reasons set forth above, it is believed that upon proper analysis of the structure and purposes of modern adoption legislation, and of the protection granted to the various interests affected, the court will take an approach which is more consonant with its present attitude of favor towards adoption legislation. It is therefore hoped that the court will sustain the jurisdictional provisions of the statute, including the assertion of jurisdiction to adjudicate abandonment by nonresident parents or guardians.

What are the practical implications of this situation for counsel in adoption proceedings and in disputes concerning the validity of adoptions? First, it is suggested that, wherever appropriate, the court granting the adoption be invited to make a finding that the adopted or the adopters are domiciled in North Carolina. Secondly, every attempt should be made to procure the voluntary appearance of, or at least personal service on, all necessary parties in the adoption proceeding.

When a foreign, sister-state, or North Carolina adoption is collaterally attacked and all jurisdictional prerequisites have not been met, there still are some possibilities for obtaining at least limited recognition of the adoption. The most obvious line of argument is that the adoption is *res judicata* as to all parties and their privies and that even where there is no *res judicata* as to an indispensable element of jurisdiction, equitable estoppel or laches now bar collateral attack.⁹² Furthermore, in the unlikely event that the North Carolina court should see fit to adopt the harsh jurisdictional requirement of the domicile of both the adopters and the adopted, a doctrine of *divisible adoption* might be advanced with some hope of success. It might be contended that the state of the domicile of the adopted has the power to confer upon him the status of an adopted child, and that the law of the domicile of the adopters has the power to confer upon them the status of adoptive parents. Thus, it might be contended, while an adoption in the state of the adopters' domicile cannot sever the bond between a child domiciled elsewhere and his natural parent or parents, it can still create the adoptive parent-child relation, at least in so far as this is beneficial to the adopted.⁹³ Finally, especially in succession cases, an adoption which is otherwise invalid for jurisdictional or other defects might nevertheless be valid as an agreement conferring certain benefits, akin to a contract to make a will.⁹⁴

⁹² See generally Bailey, *Adoption "By Estoppel,"* 36 TEXAS L. REV. 30 (1957).

⁹³ *Locke v. Merrick*, 223 N.C. 799, 802-03, 28 S.E.2d 523, 526 (1944). See also Taintor, *supra* note 60, at 238 & nn. 95-98.

⁹⁴ See Bailey, *supra* note 92, at 31. For a lucid discussion not limited to conflict of law problems, see Miller, *The Lawyer's Place in Adoption*, 21 TENN. L. REV. 630 (1951). Note, incidentally, that in neighboring Tennessee, courts have traditionally favored adoptions. *Id.* at 633-37. Is this an accident of history, or does it reflect a basic difference in the attitudes and customs of the people of North Carolina and Tennessee? We may well doubt that the latter is the case.