made only when it was medically impossible for the husband to have fathered the child.[26] The legislature's refusal to enact section 5 of the Uniform Act, and the supreme court's decisions in *Kusior* and *Jackson*, indicate that the historical justification for the conclusive presumption has given way to justifications grounded in social policy[27] since blood tests can disprove paternity. That is, given a certain relationship between husband and wife, the husband is considered to be the legal father and is held responsible for child support. The question of biological paternity becomes irrelevant. The husband is deemed responsible for his wife's child if it was conceived while they were cohabiting, and hence he must bear all the legal burdens of fatherhood.

VII

FAMILY LAW

A. Annulment Jurisdiction

Whealton v. Whealton.[1] The supreme court considered whether a California court had jurisdiction to annul a marriage performed in another state where neither of the parties in the action were domiciliaries of California. The supreme court held that the plaintiff's presence in California was not in itself sufficient for annulment jurisdiction, but that the voluntary appearance of both parties in the action conferred jurisdiction on the court.

The plaintiff, an officer in the United States Navy, married the defendant in Maryland in 1964. About a year later the Navy transferred him to California. On September 3, 1965, he filed an annulment action in the San Francisco superior court. Summons was mailed to the defendant at her home in Maryland, and commencing on September 7, it was published there for four successive weeks.

On October 11 the superior court entered a default judgment annulling the marriage. The defendant then appeared and entered a motion both to set aside the judgment and to permit her to answer

26. *See* Note, 34 S. CAL. L. REV. 104, 108 (1960).

27. The social policies that have been advanced in support of the conclusion presumption are: (1) Stigma of illegitimacy (a refusal to bastardize a child born in wedlock because of its innocence); (2) financial burden (a hesitancy to exonerate the husband because the child might become a financial burden upon the State); and (3) family integrity (a reluctance to disturb what has been termed to be the sacred integrity of the family unit). *See* Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437, 465-67 (1962). For a criticism of these policy reasons, see *id.*

1. 67 Cal. 2d 656, 432 P.2d 979, 63 Cal. Rptr. 291 (1967).

and cross-complain. The court denied the motion, and upon appeal the supreme court reversed.

The supreme court's first ground for reversal was that the entrance of the default judgment was premature. Service by publication is permitted when the defendant resides outside of the state[2] and it is completed at the termination of the required publication period.[3] After completion of service, however, a defendant has 30 days in which to answer.[4] Since the last publication occurred on September 28 and the default was entered on October 11, only 13 days later, the judgment was void.

The supreme court's second ground for reversal was that the trial court lacked jurisdiction to enter the default judgment. Had the plaintiff shown that he had been domiciled in California, he could have relied on a leading court of appeal decision, *Bing Gee v. Chan Lai Yung Gee*,[5] which held that the plaintiff's domicile in California provided ex parte annulment jurisdiction.[6] That court sustained jurisdiction by considering the marital status as a res which was present at the plaintiff's domicile.[7]

Significantly, the supreme court in *Whealton* refrained from analyzing the jurisdictional issue in terms of the presence or absence of a fictional res.[8] Instead, the court directed its inquiry to a determination of "whether due process concepts of fairness to defendant permit plaintiff to choose a forum inconvenient to her absent personal jurisdiction over her."[9] The court held that since the plaintiff's presence in the forum was the only contact the marriage had with California,[10] the inconvenience of travelling to a distant forum

2. CAL. CIV. PRO. CODE §412 (West 1954).

3. *Id.* § 413 (West Supp. 1954). Plaintiff was required to publish the summons weekly for four successive weeks. *Compare id., with* CAL. GOVT. CODE § 6064 (West 1966).

4. CAL. CIV. PRO. CODE § 407(3) (West Supp. 1967).

5. 89 Cal. App. 2d 877, 883-85, 202 P.2d 360, 363-65 (1949); *accord*, Buzzi v. Buzzi, 91 Cal. App. 2d 823, 205 P.2d 1125 (1949).

6. This case follows the position adopted by the *Restatement*, RESTATEMENT OF CONFLICTS §§ 113, 115 (1934). For a general discussion of ex parte annulment jurisdiction, see Comment, *Jurisdiction to Annul*, 6 STAN. L. REV. 153 (1953).

In divorce actions there is a one-year statutory residence requirement. CAL. CIV. CODE §128 (West Supp. 1967). This section does not apply to annulment proceedings. Millar v. Millar, 175 Cal. 797, 806-09, 167 P. 394, 398-99 (1917).

7. 89 Cal. App. 2d at 884-85, 202 P.2d at 364.

8. Whether a res exists for purposes of annulment has fostered numerous abstract and fruitless semantic arguments. The classic argument against the existence of a res is that it is inconsistent for the plaintiff in an annulment action to assert the existence of a res—the marital status—for jurisdictional purposes and at the same time allege that no marital status ever existed.

9. 67 Cal. 2d at 662, 432 P.2d at 983, 63 Cal. Rptr. at 295.

10. The ceremony took place outside of California, and the defendant, the matrimonial domicile, and probably the witnesses were located outside of California.

should fall on the plaintiff. The court indicated that the real justification for the *Bing Gee* holding was the state's interest in the marital status of its domiciliaries.[11] While the defendant's inconvenience is not mitigated merely because the plaintiff is domiciled in the forum, the interest of the state of domicile in the marital status of its domiciliaries is great enough to shift the burden of inconvenience to the defendant.

Although the default judgment was void, the supreme court further held that the defendant's subsequent appearance in the action, which gave the court personal jurisdiction over both parties,[12] was sufficient to provide annulment jurisdiction. Prior to this decision, no California court had considered whether an annulment could be treated as a transitory action in which jurisdiction exists despite the fact that neither party is domiciled in the forum.

In divorce actions, however, California—as well as the majority of other American jurisdictions—bases jurisdiction on the domicile of at least one of the parties.[13] The sole pragmatic reason for a domicile rule in divorce actions appears to be the prevailing choice of law rule, which requires the application of the substantive law of the jurisdiction wherein the action is brought.[14] Without a domicile rule in divorce actions, states could be deprived of determining the marital status of their domiciliaries in terms of their own laws and social policies. Furthermore, the incidence of forum shopping would undoubtedly increase.[15]

In annulment actions, however, the choice of law rule generally requires the application of the law of the jurisdiction wherein the marriage occurred.[16] Since the same substantive law is generally

11. *See* 67 Cal. 2d at 661-62 & n.5, 432 P.2d at 982-83 & n.5, 63 Cal. Rptr. at 294-95 & n.5; *cf.* Williams v. North Carolina, 317 U.S. 287, 298-99 (1942) (ex parte divorce).

12. The court noted that defendant did not merely appear to challenge jurisdiction, but by requesting to answer and cross-complain, made a general appearance. 67 Cal. 2d at 663, 432 P.2d at 983-84, 63 Cal. Rptr. at 295-96; *see* Olese v. Justice's Court, 156 Cal. 82, 103 P. 317 (1909).

13. *See* Crouch v. Crouch, 28 Cal. 2d 243, 249, 169 P.2d 897, 900 (1946); Haas v. Haas, 227 Cal. App. 2d 615, 617-18, 38 Cal. Rptr. 811, 813 (1964); C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 731 (1966). The Supreme Court has never considered whether the domicile of at least one spouse in the divorce state is an essential jurisdictional basis for the granting of a divorce. *See generally* Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel and Borax*, 34 U. CHI. L. REV. 26 (1966).

14. *See* RESTATEMENT OF CONFLICTS § 135 (1934); RESTATEMENT (SECOND) OF CONFLICTS § 71 (Proposed Official Draft 1967).

15. Of course, to the extent a state will treat as a domiciliary a person who has come into the state for a brief period with the purpose of getting a quick divorce and then going home, the interest of the state of "true" domicile is defeated, and forum shopping is encouraged.

16. McDonald v. McDonald, 6 Cal. 2d 457, 459-60, 58 P.2d 163, 163-64 (1936); Estate of Gosnell, 63 Cal. App. 2d 38, 146 P.2d 42 (1944).

applied regardless of where the action is brought, treating annulments as transitory actions will not prejudice the interest of the state of domicile.

While the court held that personal jurisdiction over both parties is sufficient to sustain annulment jurisdiction, it stated[17] that in some cases the doctrine of forum non conveniens[18] may justify a dismissal. Where the exercise of jurisdiction would place undue burdens on the defendant, or where the interests of sound judicial administration so demand, a court may dismiss an action.[19] In the instant case the court indicated that the doctrine was not applicable. The defendant voluntarily appeared in the action and the plaintiff's duties in the Navy limited his access to forums other than California. The court suggested, however, that had jurisdiction been based solely on a territorial power theory, a showing of inconvenience might warrant a dismissal.[20]

Whealton not only sensibly treats annulment as a transitory action, but it also clearly articulates those factors which are relevant in determining whether annulment jurisdiction exists. The supreme court directly confronted the jurisdictional issue in terms of the competing interests of the parties and the forums, and departed from prior cases which had analyzed annulment jurisdiction in terms of conclusory language dealing with the presence or absence of a fictional res.

Section 63 of the *Civil Code* provides: "All marriages contracted without the state, which would be valid by the laws of the country in which the same were contracted, are valid in this state." CAL. CIV. CODE § 63 (West 1954). *Whealton* states that "courts uniformly apply the law of the state in which the marriage was contracted." 67 A.C. at 675, 432 P.2d at 984, 63 Cal. Rptr. at 296. Although apparently no California case has deviated from this rule, other jurisdictions have sensibly recognized exceptions to it. For example, when the annulment action is brought in the state where both parties are domiciled—even though the marriage was contracted elsewhere—if the laws of the forum are in conflict with the laws of the place of celebration, reflecting significant policy differences, the court still might apply local law. *See* Wilkins v. Zelichowski, 26 N.J. 370, 140 A.2d 65 (1958); Cunningham v. Cunningham, 206 N.Y. 341, 99 N.E. 845 (1912). This approach recognizes the paramount interest of the state in the marital status of its domiciliaries. *See* Storke, *Annulment in the Conflict of Laws*, 43 MINN. L. REV. 849, 868 (1959).

One California case mechanically adhered to section 63 and refused to apply California law to a valid Nevada marriage between two California domiciliaries which would have been invalid if contracted in California because the parties were underage. McDonald v. McDonald, 6 Cal. 2d 457, 58 P.2d 163 (1936). Nevertheless, where the sole ground for jurisdiction is the presence of the parties in the forum, there would normally be little reason for a court to feel compelled to apply local law.

17. 67 Cal. 2d at 664-65, 432 P.2d at 984-85, 63 Cal. Rptr. at 296-97.

18. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Price v. Atchison, T. & S.F. Ry., 42 Cal. 2d. 577, 268 P.2d 457, *cert. denied*, 348 U.S. 839 (1954).

19. *Id.*

20. 67 Cal. 2d at 664-65, at 676, 432 P.2d at 984-85, 63 Cal. Rptr. at 296-97.

B. Community Property

Weinberg v. Weinberg.[1] The court extended a wife's protection against her husband's abuse of his right to manage and control their community property. The husband, with both community and separate incomes, used only the community funds to make alimony and child support payments to his first wife and their children. Upon divorce from his second wife, the court ordered these payments to be retroactively apportioned between the husband's separate and community incomes.

With few exceptions,[2] the community property of a California married couple is liable for the husband's debts, including those unrelated to the community.[3] Furthermore, the husband has the legal right—by virtue of his statutory power of management and control of the community property—to discharge these obligations voluntarily using community funds.[4]

The *Weinberg* court pointed out, however, that it does not necessarily follow that the community can never claim reimbursement when the husband has used community property to discharge obligations unrelated to the community. The court stated that the husband's right of management and control of the community property implies correlative duties to his wife.[5] Analogizing his duties to those of a business partner, the court declared that the husband "cannot obtain an unfair advantage from the trust placed in him as a result of the marital relationship."[6]

Having described the nature of the husband's duty to his wife in these general terms, the court proceeded to examine the Weinbergs' financial situation. During the marriage their net worth increased by approximately two million dollars. Of this amount, only $338,000 was community property; the balance was the husband's separate property. The husband used in excess of $130,000 of the community funds to discharge his alimony and child support obligations. The court reasoned that because these continuing obligations had been

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1. 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967).

2. CAL. CIV. CODE § 168 (West 1954).

3. *See* Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641 (1941).

4. *Id.* Sections 172 and 172a of the Civil Code grant the husband management and control of the community personal and real property.

5. 67 Cal. 2d at 563, 432 P.2d at 712, 63 Cal. Rptr. at 16. In several situations a wife has been granted relief where her husband jeopardized her interest in the community property. *See, e.g.*, Vai v. Bank of America, 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961); Fields v. Michael, 91 Cal. App. 2d 443, 205 P.2d 402 (1949). *See generally* 2 B. ARMSTRONG, CALIFORNIA FAMILY LAW 585-706 (1953).

6. 67 Cal. 2d at 563, 432 P.2d at 712, 63 Cal. Rptr. at 16.

originally imposed on the basis of Mr. Weinberg's total forecasted income—separate as well as community—apportionment was appropriate. It would be equally unfair either to charge them wholly to his separate income or to allow him to preserve inviolate his personal estate.

The court's characterization of the husband's alimony and child support obligations as continuing obligations based on his separate and community incomes is somewhat misleading. It implies that at the time of the first divorce the trial court determined the amount of alimony and child support payments on the basis of its estimate of the husband's future separate and community incomes. However, inasmuch as divorce dissolves the community, all of the husband's subsequent earnings will be his separate income unless and until he remarries. In determining the amount of alimony and child support payments, a trial court is supposed to take into account the amount and earning power of the husband's property as well as the husband's personal capacity to earn.[7] The Weinberg court was apparently using "separate income" to refer to the former and "community income" to refer to the latter.

Weinberg is the first California case granting a wife relief where her husband attempted to preserve his separate estate by using community property to discharge obligations unrelated to the community.[8] The court's approach, however, is questionable. By focusing on the determination of the amount of the alimony and child support payments, the court appears to have grounded Mrs. Weinberg's right of recovery on its conclusion that her husband's obligations were substantially based on his forecasted separate income. If this is the case, *Weinberg* can have only a limited application.

For example, had Mr. Weinberg been using community funds to pay a tort judgment sustained prior to his second marriage, it would be difficult for his wife to argue that this obligation was based on his separate income. This follows from the fact that tort damages are

7. *See* Hall v. Hall, 42 Cal. 2d 435, 267 P.2d 249 (1954) (alimony); Haldeman v. Haldeman, 202 Cal. App. 2d 498, 21 Cal. Rptr. 75 (1962); Reese v. Reese, 190 Cal. App. 2d 181, 11 Cal. Rptr. 590 (1961) (child support). Together, these constitute his ability to pay.

8. In Provost v. Provost, 102 Cal. App. 775, 283 P. 842 (1929), which the supreme court cited approvingly and quoted from at length, a court of appeal held that where the husband used community property to improve his separate estate, upon divorce his wife was entitled to one half the value of those improvements. If the husband had borrowed money to improve his separate estate and repaid the debt from community funds, the *Provost* court would have undoubtedly reached the same result. Although the expenditures of community funds by the husband in *Weinberg* preserved his separate estate, they did not improve it, and therefore his wife could not argue that *Provost* required her recovery.

generally determined by the plaintiff's injuries, rather than the defendant's ability to pay.[9] It seems clear, however, that reimbursement upon divorce is no less justified than where the husband used community funds to satisfy alimony and child support obligations incurred in a prior marriage; in each case the wife's interest in the community property is equally jeopardized. Certainly the court's emphasis on the husband's duty not to take unfair advantage of his wife would lead to this conclusion.

How broadly this decision will be applied remains to be seen. In light of the court's concern for the protection of the wife's interest in the community property, there seems no reason why it should be limited to any particular class of creditors, or even to premarital debts. Courts extending *Weinberg* to other factual situations, however, will undoubtedly have to grapple with at least two questions which the supreme court did not have to consider.

The first question concerns the extent to which the wife will be reimbursed. The court's conclusion in *Weinberg* that the husband's obligations were based both on his separate and community incomes provided a convenient basis for granting the wife partial reimbursement. In other factual situations, however, if a court is going to grant the wife only partial reimbursement, it will have to do so on some other basis.

The second question involves the characterization of the husband's obligations. In *Weinberg* it was relatively easy to treat the husband's obligations as separate and unrelated to the community. Other types of obligations—particularly those incurred during the marriage—may be difficult to characterize as either the husband's or the community's debts. A court might begin such a determination by inquiring whether the obligations were incurred for the community's benefit.[10]

Despite the difficulties inherent in the supreme court's approach, *Weinberg* seems to demonstrate the court's willingness to afford the wife protection against her husband's generally unqualified right to discharge all of his obligations with community funds.

C. Child Support

1. *Artificial Insemination*

People v. Sorenson.[1] The supreme court declared that a sterile

9. *See, e.g.*, Staub v. Muller, 7 Cal. 2d 221, 60 P.2d 283 (1936).

10. Two community property states, Washington and Arizona, which distinguish between community debts and the husband's debts have used such a criterion. *See* Marsh, *"California Family Law"—A Review*, 42 CALIF. L. REV. 368, 379 (1954).

1. 68 A.C. 285, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

man who had consented to have his wife artificially inseminated could not later avoid his legal responsibilities to support the child. Seven years after his marriage, the appellant, Mr. Sorenson, was medically determined to be sterile. Several years later, the appellant and his wife asked a physician to inseminate Mrs. Sorenson artificially, agreeing that they would make no attempt to learn the donor's identity. The agreement further provided:

> We make this request since we realize that Mr. Sorensen is sterile, adequate laboratory tests have been performed, and further because we are extremely anxious to have a child and we feel that our mutual happiness and our well being will be enhanced by this artificial insemination.[2]

After several treatments Mrs. Sorensen became pregnant. During the four years following the birth of the child, Mr. Sorensen represented himself as the child's father and treated the child as his son. However, in September 1964, Mr. Sorensen separated from his wife, later obtaining an uncontested divorce. No support was granted in the divorce decree, but the court retained jurisdiction regarding Mr. Sorensen's possible future support obligations. In the summer of 1966, Mrs. Sorensen, who was ill and could not work, applied for and received county aid for dependent children. Soon thereafter, Mr. Sorensen received a letter from the district attorney's office requesting payment of 50 dollars a month for child support and informing him that it was a crime under Penal Code section 270[3] to refuse to support his child. The appellant had made no support payments since the 1964 separation.

In a case of first impression, the supreme court, reversing the court of appeal,[4] held that the appellant fell within section 270's definition of "father," and that his failure to provide for the child made him criminally liable under that provision. The court's conclusion is compelling. A husband who consents to his wife's artificial insemination, with the understanding that if a child is born it is to be treated as their own, knowlingly undertakes the legal responsibilities of fatherhood and the concomitant criminal liability for nonsupport. It is only reasonable that this obligation have the same permanence as that borne by the natural father, since, as the

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2. A copy of this agreement is on file with the *California Law Review*.

3. Section 270 states in pertinent part that, "A father of either a legitimate or illegitimate minor who wilfully omits without lawful excuse to furnish the necessary [support for the child] is guilty of a misdemeanor . . . ." CAL. PEN. CODE § 270 (West Supp. 1967).

4. People v. Sorensen, 254 A.C.A. 869, 62 Cal. Rptr. 462 (1967).

court pointed out, without the husband's "active participation and consent the child would not have been procreated."[5]

The court did not have to reach the issue of the child's legitimacy[6] in order to find criminal liability under Penal Code section 270. The determination of the appellant's responsibilities was deemed more important than the child's status,[7] and section 270 expressly provides for holding the father liable for nonsupport even though the child is illegitimate.[8]

Nor was the court faced with the situation encountered in the normal paternity controversy. When a paternity question is raised in a civil action, there is usually more than one person who could be held as the legal father. It could be either the husband, who incurs this responsibility because of the marriage relationship, even though he is not the biological father,[9] or the biological father, who might be held responsible even though the mother is married to another.[10] The *Sorensen* case presents no such choice. The court correctly dismissed the possibility of holding the donor of the semen as the lawful father.[11] The only choice is between treating the consenting husband as the legal father and placing the burden of support upon the state.[12]

The court recognized that the statute's provisions should be construed "according to the fair import of their terms, with a view to

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5. 68 A.C. at 291, 437 P.2d at 499, 66 Cal. Rptr. at 11 (1968).

6. Section 621 of the Evidence Code creates a conclusive presumption of legitimacy irrespective of biological paternity if the husband and wife were cohabiting during the time when conception occurred. *See* Jackson v. Jackson, 67 Cal. 2d 245, 430 P.2d 289, 60 Cal. Rptr. 649 (1967). However, no determination was made as to whether that section would be applicable in this case.

New York cases, dealing with the legitimacy issue in the artificial insemination context, have had varying results. In Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963), the court held that the child was illegitimate, but that the husband was liable for the child's support because consent to the insemination implied a promise to support.

In Strand v. Strand, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948), the court found that a child conceived through artificial insemination was not illegitimate and granted visitation rights to the husband in a custody proceeding.

7. 68 A.C. 293, 437 P.2d at 501, 66 Cal. Rptr. at 13.

8. See note 2 *supra*.

9. Hess v. Whitsitt, 257 A.C.A. 618, 65 Cal. Rptr. 45 (1967).

10. If the conclusive presumption of Evidence Code section 621 is not applicable because the husband and wife were not cohabiting at the required time, then Penal Code § 270 would be expressly applicable to the biological father irrespective of the mother's marital status.

11. 68 A.C. 285, 437 P.2d at 501, 66 Cal. Rptr. at 13.

12. This choice is important from the standpoint of the child's welfare. If the support obligation is placed on the husband as opposed to the state, the amount would vary according to the husband's ability to contribute. The state generally contributes a fixed amount at a subsistence level that will terminate at an earlier age. For a discussion of public support for dependent children, see C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 66-71 (1966).

effect its objects and promote justice."[13] The primary objective of section 270 is not to punish, but rather to secure support for the child from the legally responsible parent, and thereby spare the public the burden of that support.[14] There being no distinguishing factors of legal significance between one who agrees to have his wife artificially inseminated and one who agrees to adopt a child,[15] the court quite reasonably concluded that section 270 should apply to the former as well as to the latter.

This is not the first time that the court has construed the term "father" to encompass more than strict biological paternity. The distinction between legal and biological fatherhood[16] has already been drawn in cases holding the husband liable for child support even though he was not the biological father of the child.[17] The *Sorensen* court clearly fulfilled the legislative purpose and added a logical extension to the earlier case law by expanding the concept of legal fatherhood to include a husband who consents to his wife's artificial insemination.

2. *Reciprocal Child Support*

Elkind v. Byck.[1] The court held that by adopting the Uniform Reciprocal Enforcement of Support Act (URESA)[2] Georgia disclaimed any desire that sister states give full faith and credit to her final lump-sum child support decrees. Chief Justice Traynor's opinion indicates, however, that if faced with the question, the court would not grant full faith and credit to a decree which attempted to determine permanently the question of child support.

In *Elkind*, the plaintiff and the defendant had obtained a divorce in Georgia in 1957. In the divorce proceedings, during which a guardian ad litem represented their child,[3] the parties agreed to a lump sum settlement of the father's obligation to support the child.[4]

13. 68 A.C. at 285, 437 P.2d at 499, 66 Cal. Rptr. at 11 (1968) (quoting CAL. PEN. CODE § 4 (West 1955)).

14. 68 A.C. at 292, 437 P.2d at 500, 66 Cal. Rptr. at 12.

15. Note, 64 COLUM. L. REV. 376, 380 (1964).

16. Jackson v. Jackson, 67 Cal. 2d 245, 430 P.2d 289, 60 Cal. Rptr. 649 (1967); Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

17. Hess v. Whitsitt, 257 A.C.A. 618, 65 Cal. Rptr. 45 (1967).

1. 68 A.C. 466, 439 P.2d 316, 67 Cal. Rptr. 404 (1968).

2. *See* GA. CODE ANN. §§ 99-901-22 (1968).

3. Elkind v. Byck, 255 A.C.A. 754, 761, 63 Cal. Rptr. 448, 453 (1967). Compare Guillermo v. Guillermo, 43 Misc. 2d 763, 252 N.Y.S.2d 171 (1964), where failure to adequately provide for the child's interest was the basis of nonrecognition of the decree.

4. Elkind v. Byck, 255 A.C.A. 754, 756, 63 Cal. Rptr. 448, 449 (1967).

Under Georgia law, such a decree may not be modified.[5] In 1965, the plaintiff, then residing in New York with the child, sought additional child support from the father, who then resided in California. She filed her petition in New York, and it was forwarded to the superior court in the county of the defendant's residence for proceedings under California's URESA provisions.[6] This court, refusing to "conjure up some original interpretation of the Georgia law,"[7] held that the prior lump sum settlement was entitled to full faith and credit, and therefore denied the application.[8]

The California supreme court reversed. Giving an original interpretation of Georgia law, the court ruled that by its adoption of URESA in 1956—which, in Georgia, provides that the applicable duty of support is that of the state in which the obligor is present during the period for which support is sought[9]—Georgia implicitly withdrew any claim that her nonmodifiable decrees be recognized as such beyond her borders.[10] Observing that the subsequent Georgia divorce decree "[c]learly . . . does not purport to deprive the courts of the obligor's residence of the power to impose a duty of support in accordance with their law,"[11] the supreme court held that the defendant's duty of support should be redetermined in accordance with California law. By thus finding the Georgia decree modifiable in the courts of the defendant's domicile, the court avoided the question whether California would give full faith and credit to a child support decree rendered with the desire and expectation that it would be conclusive upon the parties wherever they might later reside.[12]

Though the ground upon which the supreme court decided *Elkind*—that Georgia did not claim full faith and credit for her

5. GA. CODE ANN. § 30-222 (Supp. 1967); Daniel v. Daniel, 216 Ga. 567, 118 S.E.2d 369 (1961). Georgia seems to be the only state to grant nonmodifiable child support decrees. Yarborough v. Yarborough, 290 U.S. 202, 222 n.17 (1933) (dissenting opinion of Stone, J.); A. EHRENZWEIG, CONFLICT OF LAWS 280 (1962); R. CRANTON & D. CURRIE, CONFLICT OF LAWS 589 (1968).

6. CAL. CIV. PRO. CODE § 1670 (West 1955). For a description of the procedure, see W. BROCKELBANK, INTERSTATE ENFORCEMENT OF FAMILY SUPPORT 36-65 (1960). This avoids the plaintiff having to expend the time and expense of a personal appearance, Annot. 42 A.L.R.2d 768, 781-82 (1955), and avoids extraditing the defendant where he has failed in his support obligations. Sinclair v. Sinclair, 196 Tenn. 538, 268 S.W.2d 573 (1954). The procedure increases the ability of the needy to enforce support obligations. *See* Note, 48 CORNELL L.Q. 541 (1963).

7. Elkind v. Byck, 255 A.C.A. 754, 762, 63 Cal. Rptr. 448, 453 (1967).

8. *Id.*

9. GA. CODE ANN. § 99-907(a) (1968).

10. 68 A.C. at 471-73, 473, 439 P.2d at 310, 67 Cal. Rptr. at 406.

11. *Id.* at 471.

12. *See* Industrial Comm'n v. McCartin, 330 U.S. 622 (1947).

decree—is one which the United States Supreme Court has used to settle full faith and credit questions,[13] it is a ground that has come under attack. Commentators[14] have noted that the effect of one state's decree in another state is a federal question, and not one that the rendering state's legislature can determine. They argue that under the act of Congress implementing the full faith and credit clause,[15] if a judgment has the effect of precluding further recovery in a rendering state, it should have the same effect outside the state. One scholar who finds this conclusion unavoidable has called for a congressional amendment to the Judicial Code to exempt child support decrees from the provisions of full faith and credit.[16] Under *Elkind*, subject to the limitation that the law of the obligor's presence governs,[17] the spread of URESA to nearly all[18] of the states has provided a substitute that substantially accomplishes the same result.[19]

In *Yarborough v. Yarborough*,[20] the United States Supreme Court held that a South Carolina minor was precluded from obtaining additional support from her father by the fact that South Carolina owed full faith and credit to a prior Georgia decree which provided for a lump-sum settlement of the father's obligations.[21] There, the father was still a domiciliary of Georgia. The Court specifically reserved the question whether South Carolina could impose further obligations upon the father should he leave Georgia and take up his domicile in South Carolina.[22]

Yarborough has long been attacked,[23] largely on the ground stated in Justice Stone's dissent, that the support of its minor domiciliaries is a subject in which a state has an exceptionally strong

13. *See id.*

14. *See* Currie, *Full Faith and Credit, Chiefly to Judgments; A Role for Congress*, 1964 SUP. CT. REV. 89, 111; Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 161-62 (1949); *accord* Sistare v. Sistare, 218 U.S. 1 (1910).

15. 28 U.S.C. § 1738 (1964).

16. Currie, *supra* note 14, at 118.

17. A small number of states have adopted modified forms of URESA whereby the obligee may elect to have her law applied to determine the obligor's duty of support. *See* Note, 1965 DUKE L.J. 356, 361 & n.30; *see, e.g.*, CAL. CIV. PRO. CODE § 1670 (West 1965). *See also* Bjorgo v. Bjorgo, 402 S.W.2d 143 (Tex. 1966). The overwhelming majority of states, like Georgia, apply the law of the obligor's presence.

18. Forty-nine states, the District of Columbia, Guam, and Puerto Rico have adopted URESA. New York's uniform act is sufficiently similar to URESA to permit reciprocity with other states. 9C U.L.A. 1-2 (1957).

19. *See* 68 A.C. at 472, 439 P.2d at 320, 67 Cal. Rptr. at 408.

20. 290 U.S. 202 (1933).

21. *Id.* at 212-13.

22. *Id.* at 213.

23. *See, e.g.*, Ehrenzweig, *Interstate Recognition of Support Duties*, 42 CALIF. L. REV. 382, 385 (1954).

interest which should not be subject to frustration at the hands of another state, regardless of the policy that state might adopt for its own domiciliaries.[24] Indeed, the *Second Restatement of Conflicts* has expressed its approval of this reasoning.[25] With *Elkind* the California supreme court seems to have prepared the ground for a wholesale overruling of *Yarborough*.

The court's holding is reconcilable with *Yarborough* to the extent that it is limited to the proposition that the Georgia decree is not entitled to full faith and credit when the obligor has left Georgia, since Georgia herself has effectively disclaimed any expectation that her lump-sum settlements be given such recognition. This leaves intact the *Yarborough* holding that Georgia may demand full faith and credit for a decree involving a Georgia obligor.

Though the *Elkind* decision can be read simply as an interpretation of URESA's effect upon Georgia law, the court's opinion may well signal its readiness to deny full faith and credit to the law of an obligor's state, if observance of that law would prevent California from adequately providing for a child's support. Echoing Justice Stone's dissenting opinion in *Yarborough*,[26] the court contrasted the continuing parent and child relationship with the terminated marriage relationship involved in alimony:

> [T]he *federal system* now espouses the principle that no state may freeze the obligations flowing from the continuing relationship of parent and child. [citation omitted]. The states now share the power over that relationship to the extent of the obligor's presence in each . . . .[27]

This language, together with Justice Traynor's citation[28] to custody cases, particularly to Justice Frankfurter's dissenting opinion in *Kovacs v. Brewer*,[29] may foreshadow a reinterpretation of the full faith and credit clause to provide an exception based upon a state's paramount interest in the welfare of its children.

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24. *See* 290 U.S. at 214, 215, 220, 225.

25. *See* RESTATEMENT (SECOND) OF CONFLICTS § 103 (Proposed Off. Draft 1967): "A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of a sister State." While adopting Justice Stone's reasoning, the Restatement unaccountably extends the rule to judgments in general. *See* Note, 54 CALIF. L. REV. 282 (1966).

26. 290 U.S. at 227.

27. 68 A.C. at 472, 439 P.2d at 320-21, 67 Cal. Rptr. at 410-11 (emphasis added).

28. *Id.* at 473, 439 P.2d at 321, 67 Cal. Rptr. at 411.

29. 356 U.S. 604, 613 (1958).

It may seem academic to argue the basis of Justice Traynor's decision, given the fact that all of the states now accept modification of their child support decrees beyond their borders, but if the opinion is merely an interpretation of URESA, then most states will continue to be limited in the protection of their children to the law of the father's presence. If, however, the opinion heralds an exception to the full faith and credit principle based on the state's interest in the welfare of its domiciliary children, then the interested state has justification for asserting its own law to protect its children. Thus, in the *Yarborough* situation where the father remained in Georgia and the child was in another state, URESA would be of no help, since most states apply the law of the father's domicile. The interest concept, on the other hand, would suggest applying the law of the child's state.

The obvious problem raised by the interest analysis is that of securing jurisdiction over the obligor where use of URESA is undesirable. This might be the case if the obligor's state had more restrictive support provisions than those of the obligee's state, and the obligee was not provided an election. Unless URESA is changed to provide that the obligee's state law governs or at least that the obligee may—as in California—elect the law of his presence,[30] a new variant of jurisdiction will have to be applied to implement the interest analysis in its full form. Given the recognition of the substantial interest of the child's state justifying denial of full faith and credit, it would seem that the same interest could provide the basis for acquiring jurisdiction over an absent obligor.[31]

The question of full faith and credit to child support decrees is significant in its possible effects upon the protection afforded illegitimate children. Some states provide that a duty of support to an illegitimate child may end in a settlement barring later claims by the child.[32] Most states under URESA would be bound to recognize such a rule as the controlling law of the obligor's state, even though the child was now in another state and in need. The interest analysis alternative to the full faith and credit clause, however, would allow a

30. See note 17 *supra*. *See* Ehrenzweig, *supra* note 23, at 387-90 & n.51.

31. Such a development might include comparative state interest and contacts, *see* Note, 44 TEXAS L. REV. 814, 818 nn.37, 40 (1966); *cf.* Atkinson v. Superior Ct., 49 Cal. 2d 338, 316 P.2d 960 (1957), or possibly jurisdiction on the basis of the long-arm concept of tort actions—where the cause of action accrues. *See* Ehrenzweig, *supra* note 23, at 396; *cf.* Owens v. Superior Ct., 52 Cal. 2d 822, 345 P.2d 921 (1959); Allen v. Superior Ct., 41 Cal. 2d 306, 259 P.2d 905 (1953).

32. *See* EHRENZWEIG, *supra* note 5, at 280.