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NON-RECOGNITION OF FOREIGN ABANDONMENT DECREES IN UNITED STATES ADOPTION PROCEEDINGS

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United States courts frequently face conflict of laws problems arising from adoption proceedings involving parties from different jurisdictions within the United States.[1] Increasingly, however, these courts have had to deal with conflicts problems on an international scale as growing numbers of Asian-American orphans enter the United States for adoption.[2]

In the recent case of *In re McElroy*,[3] the petitioner initiated proceedings in a Tennessee chancery court to adopt a Korean orphan. The lower court refused to be bound by Korean determinations declaring the child to have been abandoned, and granted custody of the child to her father, a United States citizen. In upholding the lower court's decision, a Tennessee court of appeals considered and then rejected arguments based on the Act of State doctrine, holding that the case involved action not by a sovereign state, but by a subdivision of government, the city of Seoul.[4] In its decision, the court raised, but did not

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1. On adoption in the United States, *see* Taintor, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222 (1954); A. EHRENZWEIG, CONFLICT OF LAWS § 85 (1962); Bodenheimer, *Trends in Adoption Law*, 49 S. CAL. L. REV. 10 (1975).

2. The Amerasian (mixed race) children born in the wake of the Korean and Vietnam wars are often poorly cared-for and ostracized by the societies in which they live. The magnitude of the problem, and the resulting efforts to bring such children to the United States for adoption, are dealt with extensively in, *e.g.*, Kim & Carroll, *Intercountry Adoption of South Korean Orphans: A Lawyer's Guide*, 14 J. FAMILY L. 223 (1975) and Callery, *Children of War: The Problems of Amerasian Children in Vietnam*, 6 CASE W. RES. J. INT'L L. 4 (1973).

On the various legal problems posed by intercountry adoptions in recent years, *see also* Note, *Intercountry Adoptions in California*, 8 U.C.D. L. REV. 241 (1975); Baade, *Interstate and Foreign Adoptions in North Carolina*, 40 N.C. L. REV. 691 (1962); Lifton, *Orphans in Limbo*, SATURDAY REVIEW, May 1, 1976, at 20.

3. No. 288 (Ch. Hamilton County, Tenn. 1974), *aff'd*, 522 S.W.2d 345 (Tenn. Ct. App., E. Sect. 1975), *cert. denied* (Tenn. Sup. Ct., April 21, 1975), *cert. denied*, 423 U.S. 1024 (1975).

4. 522 S.W.2d at 349.

adequately answer, important questions regarding application of the Act of State doctrine to foreign abandonment decrees, and conflicts problems arising in intercountry adoptions. This Comment first summarizes the facts in the *McElroy* case, then analyzes the decision of the appellate court, giving attention to the relevance of the Act of State doctrine to foreign abandonment decrees in United States adoptions. It concludes with a discussion of conflict of laws problems which arise in international adoptions and an analysis of possible solutions emphasizing the best interests of the child.

THE McELROY DECISION

The petitioners, a Tennessee couple, initiated proceedings in Hamilton County, Tennessee chancery court to adopt a Korean-born child who was already in their custody.[5] Soon thereafter, another United States citizen, Richard Taylor, intervened in the proceedings to enjoin the adoption, alleging that the child was his daughter. Taylor testified that in 1966 he had been assigned to army duty in Korea, where he began living with a Korean woman. When he was transferred back to the United States in April 1967, she was about seven months pregnant. A year later, Taylor returned to Korea to marry her and to legitimate the child. Although his daughter promptly received a United States passport as a United States citizen, the Korean authorities did not immediately approve his wife's application for a passport and visa, and Taylor returned to the United States alone in April 1968, expecting his wife and child to follow when the papers were in order. Taylor received no news from his Korean family after mid-1970. Through correspondence with friends and information gathered by the Department of State, he learned that the child had been declared abandoned pursuant to Korean procedures,[6] and had been placed for adoption.

Under Korean law, a child who apparently has been abandoned in the city of Seoul is put in the custody of the Seoul Child Welfare

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5. The child had come to the United States on an Ir-4 visa, issued to orphans to be adopted in the United States. A child eligible for a preference visa as an orphan to be adopted in the United States is a child who is

> under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative . . . and who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from both parents, or for whom the sole or surviving parent is incapable of providing the proper care which will be provided the child if admitted to the United States, and who has in writing irrevocably released the child for emigration and adoption. . . .

8 U.S.C. § 1101(b)(1)(F) (1965).

6. The discussion of the Korean procedures for declaring a child to be adoptable due to abandonment is drawn largely from Kim & Carroll, *supra* note 2.

Department, which places the child with a child-care agency.[7] The child receives a new name, new family registration,[8] and new legal identity from the Seoul family court.[9] Subsequently, a guardian appointed by the mayor is granted full parental power over the child.[10] If an alien wishes to adopt the child,[11] and the child's new guardian consents to the

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7. When children are found and apparently have been abandoned, the Korean police initially conduct an investigation in an attempt to find the child's parents.

8. When a child's family origins cannot be traced, the county chief issues an initial government request that arrangements for adoption be made. This request gives the child care agency the authority to apply for a "family registration certificate." Normally, a child's name is entered in the father's or mother's family registry at birth. Laws of the Republic of Korea, art. 781 (tran. ed. Korean Legal Center, South Korea 1969) [hereinafter Civil Code]. The significance of the family registry is discussed at length in Kim & Carroll, *supra* note 2, at 225. The record is equivalent to a birth certificate, and constitutes legal recognition that the child is the member of a particular family. An unregistered child is legally without a family. The procedures for declaring a child to be an orphan and available for adoption involve the establishment of a new name and a new family registration for the child, with the child as the sole member of an administratively-created family.

9. The child care agency responsible for the child must apply to the local government district office, which in turn must submit copies of statements relating to the discovery of the child and the investigation of family origin to the Family Affairs Division of the Family Court. After judgment, the district office establishes a new family registry for the child and issues a registration certificate, which provides the child with a new legal identity.

10. The guardian (who is appointed pursuant to Law No. 703 of August 31, 1961, Law Pertaining to the Guardianship for Orphans Under Institutional Care, art. 2(1), *discussed in* Kim & Carroll, *supra* note 2, at 228) has full parental power over the child, including the power to consent to adoption. "Parental power" is governed by articles 909–27 of the Civil Code. Parental authority includes the rights and duties of protecting and educating the child (art. 913), designating a place of abode (art. 914), taking disciplinary action (art. 915), and managing property acquired under the name of the child (art. 916). Under article 924, parental power may be lost through adjudication:

> If a father or mother abuses parental authority or is guilty of gross misconduct, or there exists any other cogent reason for not allowing a father or mother to exercise parental power, the court may, upon the application of any of the child's relatives pursuant to the provision of Article 777 or of a public prosecutor, adjudge his or her loss of parental power.

Lost parental powers may be recovered through court decision under article 926:

> When the causes mentioned [in article 924] have ceased to exist, the court may, upon the application of the party concerned or of any of his relatives pursuant to the provision of Article 777, adjudge the recovery of the lost power and right.

Articles 928–940 provide for appointment of a guardian when there is no person with parental authority over the child.

11. Adoption of an orphaned or abandoned Korean child is governed by the Civil Code provisions on adoption, articles 866–908, and by the "Special Law on Adoption of Orphans," Law No. 731 of Sept. 30, 1961, *as amended*, Law No. 1745 of February 3, 1966, *reprinted in* Kim & Carroll, *supra* note 2, at 249 [hereinafter Law No. 731]. The purpose of the law, stated in article 1(1), is to "promote welfare of orphans by simplified procedures through which an alien may adopt an orphan who is a citizen of the Republic of Korea." Aliens who meet all the qualifications set forth in Korean law may apply to the court which has jurisdiction over the domicile of the child they wish to adopt.

adoption,[12] but it is not known whether persons owing the child a legal duty of support exist, notices are published requiring all such persons to appear within fifteen days.[13] The child is considered released for adoption once judicial permission for adoption is given by a three-judge panel of the court.[14]

Pursuant to these procedures, Taylor's daughter had been placed with a child care agency soon after she was found on February 15, 1971. On July 22, 1971, she had received a new name. Two days later, a guardian appointed for her by the mayor of Seoul had signed a document consenting to her emigration to the United States, and transferring her guardianship rights to the Holt Adoption Program, Inc. The chief of the Ma Po district office in Seoul had issued a document at the request of the adoption agency, certifying

> that the following described child is a legal orphan, abandoned by its parents, and that said child is a nonsuccessive orphan in accordance with a census register provided by his district office.[15]

The Tennessee chancery court, however, found that Taylor was in fact the natural father, that he had never abandoned his daughter, that his parental rights had not been "lawfully terminated,"[16] and that he was consequently entitled to custody. A Tennessee court of appeals affirmed,[17] and the Tennessee Supreme Court and United States Supreme Court denied certiorari.[18] Petitioners argued before the court of appeals that the chancery court should have given *res judicata* effect to the Korean determinations of the child's abandonment and adoption status. They maintained that, since compliance with Korean

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12. The consent of the child's guardian must be obtained. The Civil Code requires both "assent" by the child or his legal representative (art. 869) and "consent":

> The person to be adopted shall obtain the consent of his father and mother, and if consent cannot be obtained from the father and mother to the adoption due to death or any other cause, the consent of any other lineal ascendant, if any, shall be obtained (art. 870(1)).
>
> . . . . If the person to be adopted has not attained majority, and he has neither a father nor a mother or any other lineal ascendants, he shall obtain the consent of his guardian. (art. 871).

13. Law No. 731, *supra* note 11, art. 4(2).

14. *Id.* art. 4(3).

15. 522 S.W.2d at 347–48.

16. The court finds . . . that the parental rights of Richard Louis Taylor have not been lawfully terminated. Upon this point the court finds specifically that the father, Richard Louis Taylor, never at any time abandoned said child nor did he ever voluntarily surrender said parental rights nor in any way relinquish said rights voluntarily.

522 S.W.2d at 348.

17. 522 S.W.2d 345 (Tenn. Ct. App., E. Sect. 1975).

18. *Cert. denied* (Tenn. Sup. Ct., April 21, 1975), *cert. denied*, 423 U.S. 1024 (1975).

procedures could be shown, Tennessee courts should defer to the determinations under foreign law, and should refrain from reexamining the issue of whether Taylor's parental rights had been relinquished. In support of this position, they focused on the Act of State doctrine, urging that the Korean determinations leading to the placing of the child with an adoption agency should be considered "acts of state" not open to scrutiny by United States courts.[19]

APPLICABILITY OF THE ACT OF STATE DOCTRINE

The Act of State doctrine requires a court in the United States to refrain from examining the validity of an act of a foreign state "by which that state has exercised its jurisdiction to give effect to its public interests."[20] The court of appeals rejected the McElroys' Act of State argument on the basis of a "subdivision exception" to the doctrine, ruling that action by city officials could not constitute an "act of state":

> In order for action taken by a foreign government to fall within the "Act of State Doctrine," the action must have been taken by the sovereign nation rather than a subdivision of that government. 12 A.L.R.Fed. 339 [sic]
>
> The only action taken in Korea relating to the case at bar was administrative action by officers of the City of Seoul.[21]

The "subdivision exception" suggested by the court of appeals is a novelty in the Act of State area.[22] In fact, the mechanical rule advanced by the *McElroy* court appears to be directly contravened by early cases dealing with expropriation decrees issued by officials of Mexican states, which held explicitly that the decrees were "acts of state"[23] not subject

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19. 522 S.W.2d at 346. Kim & Carroll, *supra* note 2, at 244–48, likewise urge that foreign abandonment decrees should be considered as subject to the Act of State doctrine, at least when the determinations are partially administrative.

20. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965).

21. 522 S.W.2d at 349. The A.L.R. Annotation cited by the court asserts generally that "the word 'state' is normally intended to refer to a sovereign nation rather than to one of the constituent units of a nation having a federal form of government, such as the states of the United States." 12 A.L.R. FED. 739.

22. An analogous rationale has, however, been used to deny sovereign immunity to a governmental subdivision of a foreign state. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 67 (1965).

23. Wells Fargo & Co., Express, S.A. v. Tribolet, 46 Ariz. 311, 50 P.2d 878 (1935) (Mexican state of Sonora); Stark v. Howe Sound Co., 254 App. Div. 919, 5 N.Y.S.2d 551 (3d Dept. 1938), *aff'd per curiam*, 280 N.Y. 622, 20 N.E.2d 1007 (1939), *cert. denied*, 308 U.S. 593 (1939) (Mexican state of Zacatecas); Shapleigh v. Mier, 299 U.S. 468 (1937) (Mexican state of Chihuahua). Acts by colonial governments have also been held to be "acts of state." *See, e.g.*, Naamloze Vennootschap Suikerfabriek "Wono-Aseh"

to scrutiny in United States courts. Clearly, acts by "subdivisions" are at least sometimes protected by the Act of State doctrine, and the *McElroy* court was wrong in setting forth a blanket exception. The source of the authority exercised, rather than the title or position of the acting officials, would appear to be the crucial consideration.[24] The primary purpose of the Act of State doctrine is to avoid serious affronts to the sovereignty of other nations and embarrassment to the Executive in the conduct of foreign relations.[25] Thus, the applicability of the Act of State doctrine turns on whether the foreign act was done in the exercise of sovereign power.[26] The act of a local official done solely in the exercise of local jurisdiction, rather than under delegated authority from the national government, might not be deemed an "act of state", since in these circumstances it might be reasonable to assume that the forum's refusal to recognize an act with purely local effect would not constitute a serious affront to sovereignty.

Under this rationale, action of governmental subdivisions might in some cases be exempt from the dictates of the Act of State doctrine. The exception is not established by precedent, however, and *McElroy* was not an appropriate case in which to formulate it. In *McElroy,* the court of appeals expounded a formalistic "subdivision" rule without considering the source of the Korean officials' authority or the importance of their acts to national objectives. The Korean determinations were clearly made under authority granted by the Korean Civil Code, a national "Special Law,"[27] and a presidential decree,[28] which together

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v. Chase National Bank, 111 F. Supp. 833 (S.D.N.Y. 1953) (decree of the governor-general of the Netherlands East Indies); The Janko (The Norsktank), 54 F. Supp. 241 (S.D.N.Y. 1944) (act by colonial government of Curacao).

24. One author has focused on the agency issue by defining an "act of state" as an "exercise of sovereign power by an independent State or potentate, or by its or his duly authorized agents or officers." Mann, *The Sacrosanctity of the Foreign Act of State,* 59 L.Q. Rev. 42 (1943).

25. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (1962), *rev'd* 376 U.S. 398 (1964) and First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), express the Supreme Court's view of the doctrine as rooted in notions of comity between sovereigns and buttressed by judicial deference to the Executive's power to conduct foreign relations. The doctrine has also been viewed as based upon a lack of judicial competence in the area of political questions. See Mr. Justice Brennan's dissent in *First National City Bank. Id.*

26. Cases which focus on the necessary attributes of sovereignty are: Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892 (S.D.N.Y. 1968), *modified on other grounds,* 433 F.2d 686 (2d Cir. 1970), *cert. denied,* 403 U.S. 905 (1971) (acts of the State of Wuerttemberg); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972), *cert. denied,* 409 U.S. 950 (1972). *Compare with* Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962).

27. Law No. 731, *supra* note 11.

28. Presidential Decree No. 3130 of June 29, 1967, The Enforcement Decree for a Special Law on Adoption of Orphans, *cited in* Kim & Carroll, *supra* note 2, at 230.

create a program to deal with a national problem of substantial magnitude, the care of abandoned mixed-race children.[29] The officers responsible were acting in an official capacity, within the structure of an established and recognized government, and in furtherance of national policies.[30] Since city and state officials may often act as agents of national policy, the "subdivision exception" advanced by the *McElroy* court as a mechanical rule would undoubtedly prove unhelpful in future cases as well.

Stronger reasons for rejecting the Act of State characterization of the Korean determinations might have been formulated, however. First, the court might have noted that the declaration of adoptable status was made by a court after judicial proceedings.[31] The Act of State doctrine has typically been applied to executive, administrative, and legislative acts, but not to judicial decisions.[32] The Comments to the Restatement (Second) advance this explanation:

> A judgment of a court may be an act of state. Usually it is not because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to its public interests.[33]

While the Korean determinations might be seen to fit a literal reading of the "public interest" criterion,[34] their characterization as "acts of state" would go far beyond existing cases, which largely involve expropriation of property as a measure of social and political reform. A declaration of adoptability is far less analogous to an expropriation decree than to equity judgments affecting status such as decrees of divorce, custody, incompetency, intestacy, death, and legitimacy,[35] which are subject to forum rules on recognition of foreign judgments, but which have never been subsumed under the Act of State doctrine.

Secondly, the *McElroy* court might have noted that redetermination

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29. *See* note 2 *supra*.

30. *See* Jimenez v. Aristquieta, 311 F.2d 547 (5th Cir. 1962), in which the Act of State doctrine was held inapplicable because the acts were not done in an official capacity.

31. Although administrative agencies also took part in the process, Korean law clearly views the termination of parental rights as a matter for adjudication. *See* text at notes 7–14 *supra*. American courts also treat adoption as a type of equity decree issued following judicial proceedings. A. EHRENZWEIG, *supra* note 1, at § 51.

32. *See* the definitions of the Act of State doctrine in, *e.g.*, Mann, *supra* note 24; Note, *Acts of State and the Conflict of Laws*, 35 N.Y.U. L. REV. 235 (1960).

33. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41, Comment (d) (1965).

34. *Cf.* Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (The Boll Case) (Netherlands v. Sweden), [1958] I.C.J. 55 (concurring opinion of Judge Lauterpacht, concerning protection of children as a matter of *ordre public*).

35. *See* A. EHRENZWEIG, *supra* note 1, at §§ 50–52, 73, 86.

of the child's adoptability would be unlikely to cause an affront to Korean sovereignty or embarrassment to the Executive in the conduct of foreign relations. Korean law provides that parental rights may be regained by petitioning the court.[36] Thus, even in a Korean court, the termination of Taylor's parental rights might have been open to modification. The Civil Code, in fact, permits revocation or annulment of completed adoptions,[37] on grounds which would not be adequate in common law countries.[38] Consequently, it is unlikely that modification of an abandonment determination by a United States court, even on equitable grounds other than those specifically permitted under Korean law, would be viewed as the type of serious affront to sovereignty which the Act of State doctrine was designed to obviate.

Finally, the *McElroy* court might have focused on Tennessee's regulatory power to prescribe criteria for a finding of abandonment. In the typical Act of State case, the exclusive power of the foreign state to regulate the conduct, rights, or status in question is essentially recognized.[39] The forum takes jurisdiction over the case on the premise that it is competent to apply the foreign law designated by its conflicts rules. The parties generally concede that foreign law would normally apply and that the foreign decree will be determinative unless it is found to be invalid under "higher" principles of international law, forum "public policy" notions of fundamental fairness, or the "real" foreign law.[40] When the foreign law (as manifested by the foreign governmental act) is challenged on these grounds, the Act of State doctrine operates to prevent deviation from choice of the foreign law as governing the issue.[41]

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36. Civil Code, *supra* note 8, art. 926.

37. Civil Code, *supra* note 8, art. 883.

38. *See* discussion in Blom, *The Adoption Act 1968, and the Conflict of Laws*, 22 INT'L & COMP. L.Q. 109, 120 (1973); De Nova, *Adoption in Comparative Private International Law, in* ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE, 1961(III) RECUEIL DES COURS 69.

39. While most cases merely imply that the forum state does not affirmatively claim the power to regulate the conduct and that the law of the foreign state would normally apply, some opinions set forth this assumption explicitly. *See, e.g.*, Shapleigh v. Mier, *supra* note 23, in which a decree was challenged as invalid under the law of the acting state:

> Petitioners concede that the expropriation decree, if lawful and effective under the Constitution and laws of Mexico, must be recognized as lawful and effective under the laws of the United States, *the sovereignty of Mexico at the time of that decree being exclusive of any other.* [Emphasis added.]

299 U.S. at 471.

40. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41, Comments (b) (violation of international law), (f) (violation of law of acting state), and (g) (violation of United States public policy).

41. The choice-of-law function of the Act of State doctrine has been noted in *e.g.*, H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS, 673–77 (2d ed. 1976); Norton, *Reflections on the Act of State Doctrine: A Fifth Wheel in Conflicts of Laws*, 10

A paradigmatic case to illustrate this choice-of-law function of the Act of State doctrine is *Sabbatino*.[42] In that case, as in other expropriation cases, the application of the accepted rule that the lex situs determines title to property was challenged on the grounds that the foreign expropriation decree was invalid:

> Under the ordinary rules of conflict of laws, title to this sugar would be determined by the law of Cuba, namely, the decree of expropriation. . . . The appellees, however, attack this decree as invalid under (1) the municipal law of Cuba, (2) the public policy of the forum, and (3) the rules and principles of international law.[43]

The Supreme Court invoked the Act of State doctrine to require recognition of the Cuban decree, in effect reaffirming the applicability of the lex situs rule.

The typical Act of State case, in which the foreign state's regulatory powers are recognized as exclusive, should be contrasted with cases in which the forum state affirmatively claims to regulate the conduct in question. The Restatement (Second) provides this analysis:

> When the state of the forum has its own basis of jurisdiction to control or regulate the conduct in question, the case becomes one of conflict of jurisdiction. . . . In these circumstances, it is the criteria indicated in § 40 [Limitations on Exercise of Enforcement Jurisdiction] rather than the act of state doctrine, that resolve the conflict of jurisdiction.[44]

For example, the Act of State doctrine does not apply when property which a foreign state claims to expropriate is deemed by the court to have its situs in the forum state. Thus, a number of recent cases have traced title to intangible property under United States law rather than under the Cuban law on the grounds that the situs of the property, according to United States precedent, was in the United States.[45] The

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Houston L. Rev. 1 (1972); Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087 (1956); Comment, *International Conflict of Laws — Title to Chattels — Act of State Doctrine*, 58 Mich. L. Rev. 100 (1959); Note, *Acts of State and the Conflict of Laws*, 35 N.Y.U. L. Rev. 234 (1960); Restatement (Second) of Foreign Relations Law Of The United States § 41, Comment (c).

42. 307 F.2d 845 (1962), *rev'd* 376 U.S. 398 (1964).

43. 307 F.2d at 854.

44. Restatement (Second) of Foreign Relations Law Of The United States § 41, Comment (j). Problems with the use of the term "jurisdiction" to describe the reach of legislative power are noted in H. Steiner & D. Vagts, *supra* note 41, at 892.

45. *E.g.*, Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966) (shares and deposits in New York bank); Menéndez v. Saks, 485 F.2d 1355 (2d Cir. 1973), *cert. granted sub nom.* Alfred Dunhill of London v. Republic of Cuba, 416 U.S. 981 (1974), *rev'd* 425 U.S. 682 (1976) (accounts receivable from N.Y. importers); Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972)

Act of State doctrine was held inapplicable although the foreign act of expropriation purported to affect the property in question. In these cases, as evidenced by the forum's conflicts rules, the forum's governmental powers encompassed regulation of the transfer of title to such property.

In *McElroy,* the exclusive right of the foreign state to exercise regulatory powers over the matter was not conceded. Tennessee could advance two important reasons for claiming to prescribe standards for the determination of abandonment in *McElroy*. First of all, Taylor was a United States citizen and domiciliary. An abandonment decree would have the effect of terminating his parental rights and changing his status as a parent. United States laws encompass such regulation regarding its domiciliaries.[46] To this extent, United States laws conflict with foreign laws which purport to terminate parental rights to a child domiciled abroad, when one of the parents is a United States citizen. The conflict originates in the double-edged nature of an abandonment decree, which necessarily purports to affect the status of both parent and child.

Secondly, Tennessee could legitimately claim that Tennessee law must regulate the "adoptability" of a child for the purpose of Tennessee adoption proceedings. Thus, the Tennessee court might assert that although the Korean determinations were sufficient to release the child for emigration to the United States, they were not adequate for Tennessee to grant an adoption to the McElroys. This regulatory power would be seen as stemming directly from Tennessee's jurisdiction over the parties in an adoption proceeding.[47] Thus, a conflict could be seen

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(U.S. trademark); Oliva v. Pan American Life Insurance Co., 448 F.2d 217 (5th Cir. 1971) (contractual rights); Palicio v. Brush & Bloch, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd,* 375 F.2d 1011 (2d Cir.), *cert. denied,* Brush v. Republic of Cuba, 389 U.S. 830 (1967) (accounts receivable; U.S. trademark); United Bank Ltd. v. Cosmic Int'l, Inc. 392 F. Supp. 262 (S.D.N.Y. 1975) (accounts receivable from N.Y. importers). *See also* J. Zeevi & Sons v. Grindlays Bank (Uganda), 37 N.Y.2d 221, 333 N.E.2d 168 (1975), 371 N.Y.S.2d 892, *cert. denied,* 423 U.S. 866 (1975) (Ugandan order countermanding payment under an irrevocable letter of credit by a New York agent). Most of these cases focus on the "extraterritorial" reach of the decrees and the inability of the foreign government to enforce. The "extraterritoriality" language seems to substitute for an assertion that the foreign nation is attempting to exercise exorbitant legislative power. *See* H. Steiner & D. Vagts, *supra* note 41, at 853. *See also* A. Von Mehren & D. Trautman, The Law Of Multistate Problems 59 (1965).

46. *See* discussion in Taintor, *Adoption in the Conflict of Laws,* 15 U. Pitt. L. Rev. 222, 225–7 (1954).

47. An abandonment determination is an integral part of an adoption proceeding if the consent of the natural parent has not been obtained. H. Clark, The Law Of Domestic Relations In The United States 629 (1968); Tenn. Code Ann. §§ 36–110 (Supp. 1975). Common law countries, by contrast to civil law countries, have tended to apply forum law to all aspects of an adoption proceeding, taking the approach that the adjudicatory jurisdiction of the court is coextensive with choice of forum law. As a Canadian scholar has argued:

> [I]f an adoption is not the exercise of private rights by the will of the parties, but an implementation by the court of the social policies of the State, then it is logically

to exist over whether Tennessee or Korea should enunciate the definition of "adoptability."

Given the conflicting assertions of power to regulate the parent-child relationship between Taylor and his daughter, application of the Act of State doctrine to force recognition of the Korean decree would clearly be inappropriate. The conclusive presumptions of the Act of State doctrine should not be misused through application to abandonment decrees. Use of the doctrine means disregard of the reasonable interests that more than one state, including the forum, have in issuing standards applicable to the matter; furthermore, it paradoxically risks making the decree immune to modification regardless of the equities involved, and regardless of whether the order would have been subject to reconsideration if both abandonment and adoption proceedings were carried out in a single court. The Korean determination in *McElroy* should be dealt with under normal conflicts principles which permit the significance of opposing interests to be taken into account.

ABANDONMENT IN THE CONFLICT OF LAWS

Conflict of laws problems arise in the *McElroy* situation essentially because the termination of the parent-child relationship involves the interests and rights of several persons: the parents, the child, and the adoptive parents, who are each subject to the protection of different laws based upon nationality or domicile. A foreign country such as Korea, which depends on the smooth functioning of adoption programs in order to handle a major internal welfare problem, has a strong interest in arriving at a final determination of a domiciliary's adoptability and in expediting adoption abroad. The exercise of governmental authority rests upon a duty to protect the best interests of a child domiciliary and upon a need to protect the public welfare in general.[48] The concern of a forum in the United States, by contrast, is to protect the United States natural parent from summary termination of parental rights, and the potential adoptive parents from the hazards of a later challenge to the validity or fairness of the adoption proceedings once the forum's adoption decree has been finalized.[49]

In light of these circumstances, the question of whether a foreign

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unnecessary to apply any foreign law, which would reflect only the social policies of the foreign country and not those of the forum.

Blom, *supra* note 38, at 123. *See also* De Nova, *supra* note 38, at 75–112, on the distinction between the common law "jurisdictional" approach and the civil law "choice of law" approach.

48. Taintor, *supra* note 46, at 225; Boll Case, [1958] I.C.J. 55.

49. TENN. CODE ANN. §§ 36–101 (1966) sets forth these interests, in addition to the aim of protecting the "best interests" of the child.

decree of abandonment should receive recognition in a United States adoption proceeding does not have an obvious answer. It is clear that basic principles for determining whether to recognize a foreign decree or judgment do not satisfactorily explain the decisions of United States courts regarding the recognition of "extralitigious" decisions such as adoptions and custody decrees.[50] Although recognition of a foreign judgment is ordinarily granted if the rendering court had jurisdiction, the procedures were fair, and the result is not repugnant to the forum's "public policy,"[51] commentators note that recognition of custody decrees, for example, appear to be affected by lesser factors such as a petitioner's nationality or the general incompatibility of foreign standards with the forum's substantive law.[52] Usual notions of "comity" appear to carry less weight than in other contexts.[53]

In *McElroy,* the Tennessee court may have been influenced to deny recognition to the Korean determinations by at least two such factors. First, although Taylor had lost touch with his daughter, he clearly had not evinced a settled intent to forgo all parental rights. Intentional, permanent relinquishment is the Tennessee standard for judicial termination of parental rights.[54] Given proof of the facts in Taylor's case, recognition of the Korean decree would have been incompatible with Tennessee standards. Secondly, Taylor was a United States citizen. The court may therefore have been more solicitous of protecting him from a deprivation of parental rights than if he had been Korean. Since both of these factors — the petitioner's citizenship and the substantive standards of the forum — have been given weight in custody cases, they could reasonably be considered relevant, by analogy, to abandonment decrees.

In light of this analysis, it is apparent that the willingness of a United States court to recognize a foreign abandonment decree is likely to be closely tied to substantive forum policies. In particular, the forum's attitude toward preservation of "parental rights" may be highly relevant. Many United States courts, including Tennessee, place strong emphasis on the importance of "parental rights." A natural parent is deemed to have rights to a child which are so fundamental that they can only be terminated by an unequivocal showing of intentional, permanent relin-

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50. A. Ehrenzweig, *supra* note 1, at 180.

51. *Id.* at 160; A. Von Mehren & D. Trautman, *supra* note 45, at 842–943 *passim;* Restatement (Second) of Conflict Of Laws § 98 (1971).

52. *See* Ehrenzweig, *supra* note 1, at 283–87; Reese, *Full Faith and Credit to Foreign Equity Decrees,* 42 Iowa L. Rev. 183 (1957).

53. *See* H. Steiner & D. Vagts, *supra* note 41, at 1038–40.

54. Ex parte Wolfenden, 48 Tenn. App. 433, 348 S.W.2d 751 (1961); "Abandonment, to warrant a court in allowing adoption over the protest of the natural parent, must be unequivocal." *Id.* at 444; Fancher v. Mann, 58 Tenn. App. 471, 432 S.W.2d 63 (1968).

quishment.[55] The court may weigh the "best interests" of the child only after the natural parent's rights have been terminated.[56] A number of commentators, however, have noted new trends in United States adoption law which demonstrate an increased willingness on the part of courts to balance parental rights against the interests of the allegedly abandoned child.[57] The purpose is to focus greater attention on a child's need for stability and on the depth of the attachment which a child may develop over time for a "psychological parent." This approach often involves giving more weight to objective factors such as period of separation from the natural parent or failure of the parent to provide support, and less weight to the subjective criterion of the parent's actual intent to permanently give up the child.

Recognition of a foreign abandonment decree that is challenged by the natural parent may turn on which of these standards is espoused. If forum law focuses on the inviolability of parental rights, the forum court will probably be skeptical of a foreign decree which purports to terminate the rights of the parent under less rigorous standards, particularly if the natural parent is a United States citizen. Minor deviations from United States procedures may raise due process or public policy objections. The foreign proceedings will be particularly suspect if notice was by publication abroad rather than by actual service, as in *McElroy*.[58] The more weight the court gives to the child's interests and to objective criteria of neglect, however, the more reasonable it would seem for the court to recognize determinations by authorities in the country where the child was domiciled. Growing emphasis on the child's interests would logically result in greater deference to the foreign jurisdiction's power to protect the welfare or its domiciliaries. Increased recognition of foreign abandonment decrees would not, of course, prevent the forum court from granting custody to the natural parent based on the "best interests" of the child, or from modifying the decree on the grounds that the foreign state itself would permit reexamination.

CONCLUSION

A forum which emphasizes the "best interests" of a child in addition to the actual intent of the parent in abandonment proceedings is likely to grant recognition to foreign abandonment decrees more readily than a

55. H. CLARK, *supra* note 47, at 631.

56. *Id.*

57. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 19–34 (1975); *see also* H. CLARK, *supra* note 47, at 630–36.

58. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 69, 98. The type of notice required may vary depending upon the nature of the right involved. *See id.* § 98, Comment (d).

forum which adheres to the inviolable parental rights theory. It is also more likely to give weight to the smooth functioning of international adoption programs and to a child's need for stability as specific grounds for recognition.[59] Since the substantive content of the forum's standards are likely to remain an important factor in the recognition of foreign abandonment decrees,[60] adoption agencies and adoptive parents that are concerned with avoiding challenges to foreign abandonment determinations by natural parents might advance their cause by urging acceptance of new, more flexible forum policies regarding the termination of parental rights. The focus should not, however, be on inappropriate tools such as the Act of State doctrine, which are narrowly designed to serve other purposes, but rather on substantive changes in forum policies and in the conflicts rules which reflect them.

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59. For discussion of the child's psychological needs, *see* Bodenheimer, *supra* note 57, at 20; Note, *Child Abandonment: The Botched Beginning of the Adoption Process*, 60 YALE L.J. 1240 (1951).

60. Adherence by the United States to an international convention, such as the Hague Convention of Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions of 1965, which would require the application of choice of law principles in determining whether the child has been adequately released for adoption, is unlikely in the near future. On the Hague Convention's approach to "consents and consultations," *see* Blom, *supra* note 38, at 139.