INTERSTATE AND MULTISTATE LITIGATION

by

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I. FIRST CONTACT; THE NIGGLING QUESTION OF ETHICS

There are preliminary questions to be asked whenever an attorney is contacted by an out-of-state client, or asked by a local client to appear in an action elsewhere.[1] They contain aspects of practicality and ethics, breaking down into the "can I?" and "should I?" categories, but these are intertwined. The Model Rules of Professional Conduct begin with the admonition that:

> A lawyer shall provide competent representation to the client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1994). The Academy's Bounds of Advocacy admonish similarly. *See* BOUNDS OF ADVOCACY Rule 1 (American Academy of Matrimonial Lawyers 1991).

Family law lawyers must navigate an intricate web of statutory and case law, local rules, rules of thumb, general knowledge of the eccentricities of local judges, and common practice in the locality, in order to competently represent their clients. It probably behooves every practitioner who contemplates taking a case across state

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[1] These materials were originally prepared for the 1999 LEI meeting in Vail, Colorado. Because other speakers at this conference addressed, in detail, the PKPA, the UCCJA, and the UCCJEA, those statutes (and the opportunities and problems they involve) are only skirted in these materials.

lines to pause and consider whether it is possible to adequately deal with the counterpart of such a web in another jurisdiction. In my experience, it is generally wiser to seek local counsel with which to associate in the locale of the litigation.

At the outset, when it appears that a case ***could*** proceed in either of two states, it is critical for counsel to be as certain as possible as to how questions of custody, visitation, child support, spousal support, and property division will be interpreted in the possible jurisdictions.

The classic example is one of timing. In Nevada, community property continues to accrue until the date of final divorce. In California, community property stops accruing on the date of final separation. In Arizona, recent statutory amendments terminate the community on the date one spouse files for divorce. If the couple has been on-again, off-again, and has spent time in any two of those states (or upon separation, one goes to one, and one to another), it is easy to see how very different property divisions would result, depending on the advice given to the spouses during the separation as to where he or she should living at the time of filing.

Other aspects are more subtle. Some states permit the characterization of property in accordance with the law of the jurisdiction in which the parties were resident when the property accrued. *See Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975) (Nevada courts are to consider the divisibility of assets in accordance with the law of the jurisdiction in which those assets accrued). Other states, such as California, have an expressed or implied "quasi-community property" approach, under which all property acquired anywhere is divided as if it had been accrued in the state of divorce. Depending on what had accrued, when, and where, learning and understanding the history of the parties could have serious implications for the division of the marital estate.

What is somewhat counter-intuitive about all this is that the substantive legal issues drives the ethical determination. Specifically, it is necessary for counsel to be aware of how the issues involved in the case could and probably would come out in each potential jurisdiction, in order to squarely address the ethics question of whether it is in the client's best interest to file in another state. Obviously, if the client's best interest would probably be best served elsewhere, the advice should be not to hire that lawyer, and not to proceed in that location.

II. NOW YOU SEE IT, NOW YOU DON'T JURISDICTION

As a matter of territorial imperative, the conventional wisdom is that a state with jurisdiction over a person has jurisdiction over the status of the marriage (i.e., to grant the divorce itself), and over the disposition of all property located within the territorial jurisdiction of the court. Neither, however, is necessarily correct.

It is possible that inadequate local contacts with an out-of-state spouse could be taken by the state court as grounds for denying the divorce itself, if state law is susceptible to such an interpretation. *See Mendez v. Hernandez-Mendez*, ___ N.W.2d ___ , No. 96-1731, (Wis. Ct. App., Aug. 27, 1997), 23 FLR 1507 (BNA Sept. 9, 1997).

It seems that the more typical view, however, is that of "divisible divorce," under which principle jurisdiction to dissolve the marriage does not necessarily carry with it jurisdiction to alter every legal incident of marriage. *Estin v. Estin*, 334 U.S. 541, 68 S. Ct. 1213 (1948). Courts taking an expansive view of the principle consider themselves able to adjudicate at least the marital status, under the theory that the marriage is present wherever either party to the marriage is present. *See*, *e.g.*, *Tiedemann v. Tiedemann*, 36 Nev. 494, 137 Pac. 824 (1913).

And even when a state considers itself empowered to dissolve the marriage, it may decide that it lacks the power to adjudicate ownership of property located in the state. In *Austin v. Dawson-Austin*, 968 S.W.2d 319 (1998), the Texas Supreme Court considered a case in which a very wealthy man separated from his wife and high-tailed it to Texas (which has essentially no alimony, and under the laws of which the enormous appreciation in the value of a company was expected to stay in the husband's hands). He took with him stock certificates in his name for the Minnesota company through which he had made his fortune. The husband immediately bought a home and deposited large sums in Texas banks. He filed for divorce the first day he was able to do so, and obtained a judgment giving him virtually all of the property.

The Texas Supreme Court recited United States Supreme Court precedent over a century, noting that in 1877, the Court ruled that states could properly assert jurisdiction over all property within their territories, citing *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877). The Texas Court considered this authority overturned by *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977), which the Texas court read as requiring a "minimum contacts" analysis for the propriety of a Texas court exercising jurisdiction over property located in the state.

The court held:

> [The husband] bought his Dallas home, opened his Texas bank accounts, and brought his Starkey stock certificates to Texas after he separated from [wife]. We do not believe that one spouse may leave the other, move to another state in which neither spouse has ever lived, buy a home or open a bank account or store a stock certificate there, and by those unilateral actions, and nothing more, compel the other spouse to litigate their divorce in the new domicile consistent with due process. One spouse cannot, solely by actions in which the other spouse is not involved, create the contacts between a state and the other spouse necessary for jurisdiction over a divorce action.

968 S.W.2d at 327. The Texas Supreme Court therefore ruled that the trial court had no jurisdiction to determine the parties' respective ownership interests in the millions of dollars in stock, which presumably would be subject to litigation in some other state with superior contacts with both parties.[2]

Austin gives rise to the concern that spouses could each leave the state of last matrimonial domicile, so that ***no*** state had the kind of "minimum contacts" with both parties and their property that the Texas court apparently believed is required.

Cases of this kind do occur, although there does not yet seem to be any appellate authority on the subject. This office was recently contacted by a woman who married a military man in Texas. Both then moved to Germany, where the marriage fell apart. The husband was next assigned to Utah, and the wife, with the children, moved to Nevada. Under the UCCJA, only Nevada at this point has any "Significant connection" to the children, and thus any child-related action should be filed in

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[2] Actually, this poses something of an unknown. The property accrued in Minnesota, but by the time the husband filed for divorce, the wife had long since relocated to California, one of the several other homes they acquired during the marriage. The record is unclear as to whether the husband separated from the wife in California, which would have given that state traditional power to divide assets as the last matrimonial domicile.

Nevada. Under the USFSPA,[3] however, the military retirement benefits can only be divided in Utah, since that is the only state with "federal jurisdiction" sufficient to divide the benefits. The case thus presents the specter of two federal jurisdictional statutes, which require original and exclusive jurisdiction of their issues in two different states.

III. MORE JURISDICTION; THE "OOPS!" GENERAL APPEARANCE

Because of the sort of concerns discussed above, it is always prudent, when possible, to have personal jurisdiction over both parties to the case, especially where there is or may be an interstate effect to the order sought. For example, a divorce litigant who just wants the court to confirm to him his pre-marital out-of-state property has been held required to obtain personal jurisdiction over his out-of-state spouse. *See Johnson v. Johnson*, ___ So. 2d ___, No. 02A01-9603-CH-00061 (Tenn. Ct. App. Nov. 11, 1997), 24 FLR 1058 (BNA Dec. 2, 1997).

Traditionally, it has been true that individuals were held to "consent" to the exercise of jurisdiction over them by a court to the extent that they made a "general appearance" in the case under state law. Recently, however, some holes have developed in that general historical tactic, making the entire area less certain, and the attorneys' jobs more difficult.

Those states that differentiate between general and special appearances usually have a list of cases indicating all the ways in which an unwary litigant can be held to have "requested affirmative relief" and thus made a general appearance. In *Barnato v. Dist. Court*, 76 Nev. 335, 353 P.2d 1103 (1960), the Defendant moved to dismiss the complaint for divorce in addition to moving to quash service of the summons and complaint. The court held that "a defendant who requests relief additional to that necessary to protect him from defective service of process renders his appearance general." *Id*., 76 Nev. at 340.

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[3] Uniformed Services Former Spouses Protection Act 10 U.S.C. § 1408. A divorce decree that does not comply with the jurisdictional limitations of the act is unenforceable; in other words, even if it says the spouse will receive a share of the military retirement benefits, he or she will not be able to collect them.

One special caution for domestic practitioners is the situation in which the attorney is contacted by an out-of-state party (or prospective co-counsel) on the eve of a filing deadline. The immediate urge, of course, would be to call one's opponent and request an extension of time within which to file an illuminating special appearance. Before doing so, consider that there are cases out there in which a party was held to have made a general appearance by merely requesting an extension of time to make an appearance or to answer. *City of Los Angeles v. Eighth Judicial District Court*, 58 Nev. 1, 67 P.2d 1019 (1937).

While it would be tempting for counsel seeking to assert jurisdiction over an out-of-state defendant to seize upon the tactic of ***offering*** such a stipulation to extend time, it is not reliable – courts have selectively declined to hold parties to that standard on the basis that "it would be fundamentally unfair to construe such a request as a general appearance." *Brown v. District Court*, Order Granting Petition for Writ of Prohibition (No. 19557, Mar. 30, 1989) (citing *Sun Valley Ford v. District Court*, 97 Nev. 467, 634 P.2d 464 (1981) (no general appearance in making motion to associate out-of-state attorneys)).

Traditionally, clever (or lucky) counsel have been able to secure a general appearance by out-of-state opponents by ***forcing*** them to litigate one matter, and thus getting them to make a general appearance so that jurisdiction can be asserted for all purposes.

For example, in the military context, military members are protected by federal law from being forced to litigate division of the military retirement in any state unless they are current residents or domiciliaries of that state, or consent to the jurisdiction of the court.[4] *See* 10 U.S.C. § 1408(c)(3), the USFSPA. The tactic used by a "left-

[4] The jurisdictional test is to be applied as of the time the action is brought. For a current divorce, that could be after the member left the state by reason of duty assignment, and the caution is even more applicable in partition cases. According to most courts that have ruled on the question, the jurisdictional test is to be applied at the time the partition action is filed, as opposed to considering what jurisdiction was established during the original divorce. Oddly, the federal courts have been willing to permit state-court long-arm jurisdiction where the states themselves find they cannot exercise it. *See, e.g.,Tarvin v. Tarvin*, 232 Cal. Rptr. 13 (Cal. Ct. App. 1986); *Kovacich v. Kovacich*, 705 S.W.2d 281 (Tex. Ct. App. 1986); 187 Cal. App. 3d 56, 232 Cal. Rptr. 13 (Cal. Ct. App. 1986); *Messner v. District Court*, 104 Nev.

behind" spouse is to assert a claim for child support, or spousal support, or even custody, perhaps making the terms requested so onerous that the member has no choice but to defend against the action in that state.[5] *See*, *e.g.*, *Kildea v. Kildea*, 420 N.W.2d 391 (Wis. App. 1988) (military member, forced to defend core domestic issues, held to have "consented" to the jurisdiction of the state court for purposes of the USFSPA; *In re Marriage of Parks*, 48 Wash. App. 166, 737 P.2d 1316 (Wash. Ct. App. 1987) (similar); *In re Marriage of Fairfull*, 161 Cal. App. 3d 532, 207 Cal. Rptr. 523 (Cal. Ct. App. 1984) (similar). Even a botched "special appearance" can constitute a general appearance sufficient to give the court authority to divide retired pay under the Act. *See Seely v. Seely*, 690 S.W.2d 626 (Tex. Ct. App. 1985). It does not necessarily work in all places.[6]

Of course, this tactic is not restricted to military cases. For many years, cases at the trial level have permitted primary custodial spouses to remove themselves and the children to another state, and invoke that state's jurisdiction over the children within the state to force the left-behind parent to litigate child custody in the new state. Once the left-behind parent appeared, the moving parent typically demanded

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759, 766 P.2d 1320 (1988); *contra*, *Lewis v. Lewis*, 695 F. Supp. 1089 (D. Nev. 1988); *Delrie v. Harris*, 962 F. Supp. 931 (D.W. La. 1997).

[5] This is not to say that the tactic is in any way improper. The supposed "anti-forum-shopping" rule in 10 U.S.C. § 1408(c)(3) is not only unnecessary for the purpose expressed, but actually leads to exactly the sort of forum-shopping it was meant to prevent. *See Proposed Amendments to the Uniformed Services Former Spouses Protection Act, 1990: Hearings on H.R. 3776, H.R. 2277, H.R. 2300, and H.R. 572 Before the Subcomm. on Military Personnel and Compensation of the House Comm. on Armed Services*, 101st Cong., 2nd Sess. (1990) (Statement of Marshal S. Willick, Chairman of Subcommittee on Federal and Military Pension Legislation, Committee on Federal Legislation and Procedures, Section of Family Law, on Behalf of the American Bar Association, April 4, 1990, at 5).

[6] In California, one appellate district has decided that the USFSPA essentially gives the member power to make a general appearance for all purposes under state law while still reserving the right to separately "consent" or not to the court's exercise of jurisdiction over the division of military retirement benefits, despite his active appearance in, and litigation of, issues of custody, visitation, and support. *Tucker v. Tucker*, 226 Cal. App. 3d 1249, 277 Cal. Rptr. 403 (1991).

litigation of all issues, invoking both "judicial economy" and the "general appearance" made by a left-behind spouse who attempts to ensure access to the children in a new state.

Recent developments indicate that this may not work reliably in child custody cases, however; at least two courts have now ruled that it would defeat the purpose of the UCCJA to put the left-behind parent on the horns of the dilemma of choosing "to relinquish participation in the custody determination or to waive his or her jurisdictional objection to the resolution of monetary issues." *See Taylor v. Jarrett*, ___ P.2d ___, No. 1 CA-SA 98-0110 (Ariz. Ct. App. May 26, 1998), 24 FLR 1449 (BNA, July 14, 1998); *In re Fitzgerald and King*, 46 Cal. Rptr. 2d 558 (Ct. App. 1995). Those courts have allowed the out-of-state parents to fully litigate custody issues without any finding that the parents made a general appearance.

IV. THE "GOTCHA" CASES

There is the ever-popular trap-door spider approach. At least in some states, a court's jurisdiction over a person who is personally served within the borders of the state is *not* limited by any kind of "minimum contacts" analysis. The long-arm statute is inapplicable in such a case, and the court has full jurisdiction over the parties and all incidents of their marriage. *Cariaga v. District Court*, 104 Nev. 544, 762 P.2d 886 (1988); *see also Burnham v. Superior Court of California*, 495 U.S. 604, ___ S. Ct. ___ (1990) (same ruling in California case).

It seems possible that an inveigled and served defendant ***might*** have a protest recognized under the doctrine of *forum non conveniens*, but that is an unenviable defense to be forced to assert. *See Cariaga*, *supra*; *Martin v. DeMauro Constr. Corp.*, 104 Nev. 506, 761 P.2d 848 (1988) (insufficient showing that Hong Kong more convenient than Nevada).

Cases suggest that the most niggling of details can determine when the forum state will decide that its assertion of jurisdiction is constitutional. In *Rutherford v. Rutherford*, ___ P.2d ___ (Ariz. Ct. App. No. 1 CA-CV 98-0224, Dec. 8, 1998), 25 FLR 1093 (BNA, Dec. 22, 1998), the Arizona court determined that the trial court could hear a child support case against an Ohio-resident father, who was served with process while visiting the child in Arizona. There, the court rejected the father's claim of unfairness, saying a minimum contacts analysis was "unnecessary" where

he was personally served in the state, and disregarding his complaint that he was only in Arizona because the mother would not send the child to Ohio for visitation. On this last point, the appellate court was apparently swayed by evidence because the father had "been in Arizona on other occasions," and at the moment he was served, he was with friends, indicating that the trip was "at least partly for pleasure." The lesson to be learned, apparently, is that a defendant who does not want jurisdiction exercised over him in a state he visits better not have any fun while there.

V. NEGOTIATION OVER STATE LINES

Even picking up the phone and chatting with an opposing party, or counsel for that party, in another state, could be dangerous. Anecdotal accounts continue to suggest that trial-level judges often treat letters, and even phone calls, into a jurisdiction as sufficient "entry" into a state to justify the exercise of jurisdiction over an out-of-state Defendant. *See*, *e.g.*, *Vasey v. Vasey*, No. D 207762 (Eighth Judicial District Court, Clark County, Nevada) (modification of California divorce decree at request of now-resident former wife, despite former husband's complete lack of contact with forum state, apparently based on his writing letter to court protesting the exercise of any jurisdiction over him).

Yet, such cases fly in the face of case law, often in the same states, indicating that interstate negotiations between counsel are insufficient to give the courts of the forum state jurisdiction over the non-resident Defendant. *See Milton v. Gesler*, 107 Nev. 767, 819 P.2d 245 (1991) (where parties divorced in California, and one moved to Florida, and the other to Nevada, Nevada courts could not exercise jurisdiction over former husband absent a "general appearance" by way of requesting affirmative relief.

VI. COLLECTIONS AND CLEAN-UP

Much could be made of the methods of collecting a judgment in another state. Generally, there are two methods for collection of money from out of state debtors. When there is available cash (employment, or bank accounts) the most successful method of collection is using the local Sheriff's office in the state in which the judgment was obtained (after obtaining an order reduced it to judgment) and garnishing out-of-state banks or employers via the postal system.

When there is real property involved, the methodology is more expensive and quite a bit more difficult.

1. Obtain a exemplified copy of the Order granting monies reduced to judgment
2. Obtain a local attorney in the same **county** (very important) as the debtor. That attorney must domesticate and record the judgment in that state. It is usually necessary to either give a percentage (average 35%) to the attorney doing the collection work, or pay hourly for all work done. However, many out-of-town attorneys will only perform the recordation of the judgment and will not actively do any collection work; however, recording the judgment wherever the debtor lives prevents the debtor from selling, encumbering or otherwise releasing the property without satisfying the judgment. At that point, it becomes a matter of patience.

VII. CONCLUSION

Anytime there is a state border involved in the history of a case, from the time of marriage through the date of decree, it is necessary for the practitioner to carefully consider all the different opportunities – and lurking dangers – in the interstate possibilities, before taking the plunge. This is one area in which careful thought before committing to a course of action can be the salvation of a client's case.

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