THE BASICS OF JURISDICTION: A REMEDIAL COURSE

Three times in the past few months, I have been shocked at the apparent lack of understanding of the most fundamental of case attributes – jurisdiction. This primer is intended to provide a short guide to what must be present for a court to take any action at all in various family law matters.

I. DIVORCE

Subject matter jurisdiction over the marriage itself – and therefore, jurisdiction to grant a divorce – is present as long as the court has personal jurisdiction over ***either*** of the parties to the marriage, and every State is required under the Full Faith and Credit clause of the United States Constitution to recognize decrees entered by other States if those other States had such personal jurisdiction over one party and afforded notice to the other in accordance with procedural due process.[1]

When might a court arguably have jurisdiction to entertain a divorce case but nevertheless decline to do so? When another divorce action is pending elsewhere, and the other court has jurisdiction over a greater number of the incidents of marriage. For example, where a party comes to Nevada and files for divorce, but the other party does not appear here, but initiates a divorce action in the State from which the party came, and that State has jurisdiction over issues of child custody, child and spousal support, and the bulk of the parties' property.

The rationales are the doctrines of comity and abstention,[2] and the Nevada Supreme Court's repeated admonitions against bifurcating divorce actions.[3] Where actions are pending in courts of different states, whether to stay or dismiss one action or the other should be raised by motion.[4] A ruling on whether to stay or dismiss must take into consideration matters outside the pleadings, such as the seriousness of the threat of multiple and vexatious litigation, the convenience of the parties, the status of the foreign actions, and the competing interests of the two forums.[5] Considerations of comity and prevention of multiple and vexatious litigation will most often militate in favor of dismissal

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[1] *Williams v. North Carolina*, 317 U.S. 287 (1942); *see also Sherrer v. Sherrer*, 334 U.S. 343 (1947); *Coe v. Coe*, 334 U.S. 378 (1947).

[2] "Comity," strictly speaking, is a "rule of courtesy by which one court defers to the concomitant jurisdiction of another." Gifis Law Dictionary (Barron's 1984 ed.) at 79. As the dictionary definition further explains, "judicial comity is not a rule of law, but one of practical convenience and expediency based on the theory that a court which first asserts jurisdiction will not be interfered with in the continuance of its assertion by another court . . . unless it is desirable that one give way to the other."

[3] *See*, *e.g.*, *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979); *Smith v. Smith*, 100 Nev. 610, 691 P.2d 428 (1984).

[4] *See*, *e.g.*, *Marriage of Hanley*, 199 Cal. App. 3d 1109 (Ct. App. 1998).

[5] *Engle v. Superior Court*, 140 Cal. App. 2d 71, 82-83 (Ct. App. 1956).

of the later-filed action, unless there is some clear superiority of that action being the one that proceeds.[6]

Whether or not another action has been filed elsewhere makes a difference. In a strictly default divorce situation when ***no*** other action is pending elsewhere, a Nevada court with jurisdiction over only one party can dissolve the marriage, but not adjudicate any rights as to alimony, child support, or child custody without obtaining personal jurisdiction over both parties.[7] Where there ***is*** another action pending, granting a "status-only" divorce effectively bifurcates the action. Since this is forbidden under *Gojack*, one State must defer to the other under principles of comity and abstention.

The full shaggy-dog explanation of the concepts of divorce grounds and jurisdiction is set out in volume one, chapter one, section one of the Nevada Family Law Practice Manual, along with all relevant statutory and case citations.

And, of course, divorce jurisdiction does not answer all questions, since family law cases and issues can arise in a variety of pre-divorce, post-divorce, or entirely non-marital actions. In all such matters, and with increased precision and certitude in the recent age of uniform laws, the governing statutes control when a court may, or may not, act.

II. CHILD CUSTODY – INITIAL JURISDICTION[8]

Perhaps the simplest way of determining the meaning of the initial jurisdiction rule is to see what the drafters were trying to accomplish. As documented in an extensive study by the American Bar Association's Center on Children and the Law,[9] inconsistency of interpretation of the UCCJA[10] and the technicalities of applying the PKPA, resulted in a loss of uniformity among the States. The Obstacles Study suggested a number of amendments which would eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA.

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[6] *Id*. at 83.

[7] *Simpson v. O'Donnell*, 98 Nev. 516, 645 P.2d 1020 (1982). In the years since this case was decided the various uniform acts governing matters of child support and custody may have altered its holding on those points; if permitted under the uniform acts, the court would gain jurisdiction over those issues irrespective of jurisdiction over the other party.

[8] Much of the information in this and the following section is gone over in detail in "Child Custody jurisdiction in Nevada" (CLE for State bar of Nevada, May 22, 2008, posted at: http://willicklawgroup.com/published_works).

[9] *Obstacles to the Recovery and Return of Parentally Abducted Children* (ABA 1993) ("Obstacles Study").

[10] Uniform Child Custody Jurisdiction Act, the prior NRS ch. 125A.

NCCUSL[11] went back to work and in 1997 issued revisions of the jurisdictional aspects of the UCCJA in a new act, the Uniform Child Custody Jurisdiction ***and Enforcement*** Act, or UCCJEA. The replacement act was intended to provide clearer standards for which States can exercise original jurisdiction over a child custody determination, enunciate a standard of continuing jurisdiction for the first time, and to clarify modification jurisdiction. It also sought to harmonize the law on simultaneous proceedings, clean hands, and forum non conveniens.

Nevada adopted the new act as of October 1, 2003. The revised enactment was intended to eliminate inconsistent state interpretations in several ways, as explained in the preamble to the modified uniform act:

> **1. Home State priority.** The PKPA prioritizes "home State" jurisdiction by requiring that full faith and credit cannot be given to a child custody determination by a State that exercises initial jurisdiction as a "significant connection State" when there is a "home State." Initial custody determinations based on "significant connections" are not entitled to PKPA enforcement unless there is no home State. The UCCJA, however, specifically authorizes four independent bases of jurisdiction without prioritization. Under the UCCJA, a significant connection custody determination may have to be enforced even if it would be denied enforcement under the PKPA. The UCCJEA prioritizes home state jurisdiction in Section 201.
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> **2. Clarification of emergency jurisdiction.** There are several problems with the current emergency jurisdiction provision of the UCCJA § 3(a)(3). First, the language of the UCCJA does not specify that emergency jurisdiction may be exercised only to protect the child on a temporary basis until the court with appropriate jurisdiction issues a permanent order. Some courts have interpreted the UCCJA language to so provide. Other courts, however, have held that there is no time limit on a custody determination based on emergency jurisdiction. Simultaneous proceedings and conflicting custody orders have resulted from these different interpretations.
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> Second, the emergency jurisdiction provisions predated the widespread enactment of state domestic violence statutes. Those statutes are often invoked to keep one parent away from the other parent and the children when there is a threat of violence. Whether these situations are sufficient to invoke the emergency jurisdiction provision of the UCCJA has been the subject of some confusion since the emergency jurisdiction provision does not specifically refer to violence directed against the parent of the child or against a sibling of the child.
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> The UCCJEA contains a separate section on emergency jurisdiction at Section 204 which addresses these issues.

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[11] The National Conference of Commissioners on Uniform State Laws. Now 116 years old, NCCUSL provides States with non-partisan draft legislation intended to bring "clarity and stability" – and most especially, consistency – to various areas of the law. Explicitly supportive of the federal system, members of NCCUSL must be lawyers, and include lawyer-legislators, attorneys in private practice, State and federal judges, law professors, and legislative staff attorneys, who have been appointed by State governments as well as districts and territories to research, draft and promote enactment of uniform State laws in areas where uniformity is desirable and practical.

For the purpose of this primer, the messages are short and simple. If there is a Home State, no further inquiry about the significance of anyone's connections with anywhere else has any relevance. Only if there is ***no*** Home State are such "significant connection" analyses relevant.[12]

The test is considerably different from the personal jurisdiction test for divorce – the statute states on its face that "physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination."[13] Those lawyers who insist on arguing personal jurisdiction matters in child custody proceedings – and those judges who indulge such expositions, as opposed to staying focused on the statutory inquiry – waste the time and money of everyone involved.

And in the unusual circumstances supporting an assertion of initial emergency jurisdiction (the child is present here and has been abandoned or an emergency amounting to actual or threatened mistreatment or abuse is presented), it is now clear that such an order only lasts until a State with initial or continuing jurisdiction under NRS 125A.305, 125A.315, and NRS 125A.325, issues an order relating to the matter. Only in the peculiar situation that such other State does not issue any order on the subject within the time specified in our order, does the order either continue or expire, as it provides.[14] And only if that other State ***never*** acts could the emergency order of this State become a final determination, making this State the Home State of the child.[15]

III. CHILD CUSTODY – MODIFICATION JURISDICTION

Once again, the intent of the drafters was pretty clear as to the problem they sought to address, and the solution they reached:

> **3. Exclusive continuing jurisdiction for the State that entered the decree.** The failure of the UCCJA to clearly enunciate that the decree-granting State retains exclusive continuing jurisdiction to modify a decree has resulted in two major problems. First, different interpretations of the UCCJA on continuing jurisdiction have produced conflicting custody decrees. States also have different interpretations as to how long continuing jurisdiction lasts. Some courts have held that modification jurisdiction continues until the last contestant leaves the State, regardless of how many years the child has lived outside the State or how tenuous the child's connections to the State have become. Other courts have held that continuing modification jurisdiction ends as soon as the child has established a new home State, regardless of how significant the child's connections to the decree State remain. Still other States distinguish between custody orders and visitation orders. This divergence of views leads to simultaneous proceedings and conflicting custody orders.

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[12] NRS 125A.305.

[13] NRS 125A.305(3).

[14] NRS 125.335(2)-(3).

[15] NRS 125.335(2).

> The second problem arises when it is necessary to determine whether the State with continuing jurisdiction has relinquished it. There should be a clear basis to determine when that court has relinquished jurisdiction. The UCCJA provided no guidance on this issue. The ambiguity regarding whether a court has declined jurisdiction can result in one court improperly exercising jurisdiction because it erroneously believes that the other court has declined jurisdiction. This caused simultaneous proceedings and conflicting custody orders. In addition, some courts have declined jurisdiction after only informal contact between courts with no opportunity for the parties to be heard. This raised significant due process concerns. The UCCJEA addresses these issues in Sections 110, 202, and 206.

Of the referenced model sections, the key is Section 202, which became NRS 125.315. This new provision defines "Exclusive, Continuing Jurisdiction" (commonly, if oddly, abbreviated as "CEJ"). It provides a few very simple rules by which continuing jurisdiction can nearly always be easily and quickly ascertained.

Once a court here has made a custody determination, only this court has jurisdiction to modify that order, until one of two things happens:

Our court determines that neither the child, nor a parent, nor any person acting as a parent has any significant connection to this State, and that no substantial evidence exists here as to the child's care, protection, training, and personal relationships;

OR

A Court of this State, ***or*** elsewhere, determines that the child, the child's parents, and any person acting as a parent do not reside here.

The comments make it crystal clear that the statutory language is intended to deal with where the people involved ***actually live***, not with any sense of a technical domicile. Regardless of whether a State considers a parent a domiciliary, the State loses exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.

The statutory scheme makes it clear that only the State with CEJ can determine that there is no significant connection remaining. So it simply makes no sense for lawyers to continue filing motions asking our courts to determine that some ***other*** State should not exercise its CEJ. The only thing that could be asked of our Court is the factual determination that all relevant persons do ***not*** reside in the State issuing the earlier order; if any other basis for changing or relinquishing jurisdiction is required, the request must be made in the State issuing the earlier order.

If it has been determined that the original State with CEJ lost that jurisdiction, then the question becomes whether there is a new Home State, which becomes the place where further

custody litigation should take place.[16] Until and unless there is a ***new*** Home State, the ***prior*** Home State is presumptively where any custody-related litigation should proceed.

It is also necessary to stress that the question of jurisdiction is a "snapshot" taken at the moment of filing the action. In the language of the comments, "jurisdiction attaches at the commencement of a proceeding." The way NCCUSL put it: "If State A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the State prior to the conclusion of proceeding. State B would not have jurisdiction to hear a modification unless State A decided that State B was more appropriate under Section 207."[17]

And once lost, CEJ ***stays*** lost. If the custodial parent and child return to Nevada before some other State makes the requisite finding (that all persons had left) and assumes jurisdiction, then Nevada remains the only place where a modification motion could be filed. But when all relevant persons have left, and the ***non***-custodial parent returns here, there is no such effect. Or, as NCCUSL put it: "Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the State, the non-custodial parent returns."

And yet I have seen a judge convene a lengthy, costly "evidentiary hearing," despite those facts being agreed by all parties, to determine "what ought to be done," when the resolution was a clear matter of law based entirely on the absence of jurisdiction.

IV. CHILD SUPPORT – INITIAL JURISDICTION

The Uniform Interstate Family Support Act ("UIFSA") has been adopted in ***every*** State. Nevada adopted it in 1997 as NRS Chapter 130; the additional federally-mandated provisions are contained in NRS chapters 31A, 125B, and 425. Like the UCCJEA did with the federal PKPA, it follows up on a federal enactment with a similar purpose and construction.[18]

Notably, the rules governing support and custody operate independently of one another. The courts of this State might be called upon to enforce a child support obligation against someone found here, or filing here, while having no jurisdiction over custody matters.[19] The obligor parent can

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[16] NRS 125A.325.

[17] Our statutes list Section 207 as NRS 125A.365 – "Inconvenient Forum," which contains the laundry list of reasons why a State that has jurisdiction might choose not to exercise it. But such questions are beyond the scope of this paper, which is solely concerned with jurisdiction.

[18] *See* 28 U.S.C. § 1738B (1994) (Full Faith and Credit for Child Support Orders Act, or "FFCCSOA").

[19] *See Vaile v. District Court*, 118 Nev. 262, 275, 44 P.3d 506, 515 (2002) ("Simply because a court might order one party to pay child support to another in the exercise of its personal jurisdiction over the parties does not permit the court to extend its jurisdiction to the subject matters of child custody and visitation"); *see also Kulko v. California*, 436 U.S. 84, 91-92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978) (where a defendant is subject to a State's

always be sued for child support where that parent lives,[20] because child support is set by the court with personal jurisdiction over the paying parent.

NCCUSL put significant energy into trying to harmonize the provisions of the UCCJEA with those of the Uniform Interstate Family Support Act, adopted in Nevada as NRS ch. 130. It is not always possible, given the very different jurisdictional foundations, but the intention is there, which is why so many of the definitional and other provisions read so similarly. Still, distinctions remain.

For example, while the child custody jurisdictional rules are deliberately child-centered, the jurisdictional rules for support initiation are deliberately expansive, and titled "Extended Personal Jurisdiction."[21] There are multiple bases for exercise of child support jurisdiction over a non-resident obligor:

1. Personal service of summons or other notice of the child support proceeding within this State.

2. Submission by the obligor to the jurisdiction of this State by consent, by entering a general appearance or filing a responsive document having the effect of waiving any contest to personal jurisdiction.

3. Having resided with the child in this State.

4. Having resided in this State and providing prenatal expenses or support for the child.

5. The child resides in this State by acts or directives of the non-resident.

6. The non-resident obligor engaged in sexual intercourse here, and the child may have been conceived thereby.

7. Any other basis "consistent with the Constitution of this state and the Constitution of the United States for exercise of personal jurisdiction."

It is for that reason (among others) that Mr. Vaile submitted himself to the jurisdiction of the courts of Nevada for the setting of a child support order, even though his divorce *Complaint* contained a fraudulent assertion of residency and Nevada had no jurisdiction over questions of child custody.

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jurisdiction, his rights in the matters ancillary to divorce may be determined by its courts).

[20] *See* NRS 130.201(1)-(2); *see also*, *e.g.*, Prof. John J. Sampson, "UIFSA: Ten Years of Progress in Interstate Child Support Enforcement" (Legal Education Institute National CLE Conference on Family Law, Aspen, Colorado, 2003) at 184 (Prof. Sampson was the official Reporter for the UIFSA legislation for the National Conference of Commissioners for Uniform State Laws, which created it).

[21] *See* NRS ch. 130, Article 2 (Jurisdiction).

The uniform acts go a long way toward avoiding a "Catch-22" of an obligor by providing limited immunity – a party participating in a UIFSA proceeding has immunity from both accidental appearance and from service of civil process while litigating the UIFSA proceedings or while physically present to participate in them.[22] A similar provision is included in the UCCJEA,[23] so it should not be possible to "boot-strap" a child custody case onto a child support case, or vice-versa; rather, it is necessary to have independent jurisdiction under the respective statute to conduct proceedings on that subject.

V. CHILD SUPPORT – MODIFICATION JURISDICTION

The rules for modifying child custody orders, on the one hand, and child support orders, on the other, are radically different. As set out above, when all parties leave the State establishing a ***custody*** order, the Home State of the child becomes the central inquiry. Not so for a child ***support*** case. When all parties have left the State with CEJ over child support, they are both entitled to ***enforce*** the support anywhere they choose to register it. In order to ***modify*** it, however, each has precisely the same burden – to register in and move to amend where the ***other*** party (custodian or non-custodian) happens to be living.[24]

As with the custody statutes, establishment of jurisdiction to modify a child support order is a matter of a "snapshot" taken at the moment of commencement of proceedings.[25] As stated by the Nevada Supreme Court in 2007, "Jurisdiction to modify a foreign support order is properly determined by the residence of the parties at the time a motion to modify is filed."[26]

Unfortunately, the order was not published, and is therefore not formally citable as authority,[27] but there is no reason to expect any different ruling the next time the matter goes up on appeal. NCCUSL modified UIFSA in 2001 to clearly provide that for UIFSA, as for the UCCJEA, jurisdiction is determined by the parties' ***actual physical*** residence at the time a motion to modify is

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[22] NRS 130.314.

[23] NRS 125A.265.

[24] NRS 130.611. If ***all*** parties move to Nevada, the courts here may also modify the order. NRS 130.613.

[25] *See*, *e.g.*, *Goddard v. Heintzelman*, 875 A.2d 1119 (Pa. Super. 2005); *Welsher v. Rager*, 491 S.E.2d 661 (N.C. App. 1997); *Child Support Enforcement Division of Alaska v. Brenckle*, 675 N.E.2d 390 (Alaska 1997).

[26] *Smith v. Smith*, No. 46036 (Order of Reversal and Remand, Feb. 13, 2007).

[27] SCR 123.

filed.[28] The Nevada Legislature adopted those amendments in 2007.[29] Any contrary reading would be antithetical to the "certainty and predictability" that the provisions are intended to create, contrary to the case law that exists, and lead to interpreting the two statutes differently from one another for no valid purpose.

Despite this, a number of Nevada attorneys have attempted to manipulate matters by having their clients flee the State after registration of a child support order and filing of a modification motion here, and have actually gone into court claiming that the post-commencement relocation of their clients has an effect on the jurisdiction of the court. Mystifyingly, at least a couple of judges in this State have actually entertained such arguments, and resolved the question of jurisdiction based on the ***post***-commencement relocation of the party resisting the support modification.

Any such argument is improper. The relocation of any party after filing of a motion to modify child support is entirely irrelevant to the jurisdiction of the court. No such argument should ever be made, or entertained.

It should also be made clear that once child support has been established elsewhere, not ***every*** aspect of the support order may later be modified. The 2001 amendments made it clear that the duration of child-support obligation is fixed by the controlling order.[30] In other words, the original time frame for support is not modifiable unless the law of the issuing State provides for modification of its duration. If the duration of child support was age 21 in the State from which the original order came, then the age for emancipation is 21 here, even if everyone has moved to Nevada, where the age is 18 (or 19, if still in high school).[31]

While slightly off-topic, one recurring error bears additional mention here. The State issuing a spousal support order is the ***only*** State that can ever modify that spousal support award, even if no one still remains in the issuing State, and even if all parties have now moved to the same other State.[32]

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[28] In the words of the official comment: "the time to measure whether the issuing tribunal has continuing, exclusive jurisdiction to modify its order, or whether all parties and child have left the State, is explicitly stated to be at the time of filing a proceeding to modify the child support order." Any "intent" to change residence at any moment after the actual filing of a motion is entirely irrelevant to the analysis.

[29] *See* NRS 130.205(a) (2007 amendments); SB 77 § 17 (2007 Legislature).

[30] *See*, *e.g.*, *Robdau v. Commonwealth, Virginia Dept. Social Serv.*, 543 S.E.2d 602 (Va. App. 2001).

[31] NRS 130.611(3); NRS 130.613. And the reverse is true as well, of course. If, for example, the State issuing the original child support order has a termination date like ours of 18 (or 19 if still in high school), that date applies no matter where the custodian, non-custodian, or child move subsequently. In my recent experience, one particularly ineducable member of the Nevada Bar wasted a year of everyone's time and money trying to defeat Nevada jurisdiction so his client could re-file in Oregon, to get a couple years more child support, even though it was legally impossible for her to do so. Unfortunately, the judge – who did understand the rule – never publicly identified the absurdity of the ploy, and allowed him to play it out all the way to trial.

[32] NRS 130.2055.

So lawyers should not file, and judges should not entertain, motions to modify alimony orders entered elsewhere.

VI. DIVISION OF MILITARY RETIREMENT BENEFITS AS PROPERTY

There is one additional oddity that bears repetition in this jurisdiction primer, which has arisen in the modern world of increasing federalization of traditional State regulation of domestic relations law. Specifically, when a Court intends to divide military retired pay as the community property of a member and a spouse, another requirement besides traditional subject matter and personal jurisdiction is in play.

In enacting the Uniformed Services Former Spouses Protection Act,[33] Congress was concerned that a forum-shopping spouse might go to a State with which the member had a very tenuous connection and force defense of a claim to the benefits at such a location.

Accordingly, the USFSPA included special jurisdictional rules that must be satisfied in military cases to get an enforceable order for division of the benefits as property. In ***other*** public and private plans, ***any*** State court judgment valid under the laws of the State where it was entered is generally enforceable to divide retirement benefits; this is not true for orders dividing military retirement benefits as property. The rules do not restrict alimony or child support orders, which will be honored if the State court had personal and subject matter jurisdiction under its own law.

In a military case, an order dividing retired pay as the property of the member and the former spouse will only be honored by the military if the issuing court exercised personal jurisdiction over the member by reason of: (1) residence in the territorial jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court.[34]

These limitations override State long-arm rules, and must be satisfied in ***addition*** to any State law jurisdictional requirements. Cases lacking such jurisdiction can go forward, but they will not result in enforceable orders as to the retirement benefits. The statute effectively creates an additional jurisdictional requirement, which for lack of a better title can be called "federal jurisdiction."[35]

The essential lesson of this jurisdictional point (for the spouse) is to ***never*** take a default divorce against an out-of-state military member if seeking to divide the retirement benefits. The resulting judgment will not be enforceable; if valid jurisdiction under both State and federal law

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[33] 10 U.S.C. § 1408 *et seq.*

[34] 10 U.S.C. § 1408(c)(4).

[35] A full explanation of "federal jurisdiction," what it is and how to get it, is set out in detail in the article "Divorcing the Military: How to Attack, How to Defend," posted at: http://willicklawgroup.com/published_works.

cannot be achieved, then the action may have to be dismissed and re-filed in the State in which the military member resides.

VII. CONCLUSIONS

It makes little sense to spend time or money arguing about the merits of cases when the court lacks jurisdiction to act on the subject at all. Lawyers should ***always*** focus on the existence or non-existence of jurisdiction as to the subject sought to be brought before the court when initiating (or responding to) any new matter.

And judges should consciously consider their jurisdiction to proceed before wading into the merits of cases, with sufficient knowledge of the jurisdictional rules both to understand what they should not do, and to ignore legally fatuous arguments based on indefensible attacks on their legitimate jurisdiction. If the agreed facts resolve a jurisdictional question, one way or another, the merits can be addressed; if not, the court should focus on convening such proceedings as are necessary to make the factual determinations that permit the jurisdictional call to be made promptly, economically, and correctly.