Texas Long-Arm Jurisdiction in Family Law Cases

Russell J. Weintraub

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by

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THE recently enacted Texas Family Code long-arm provisions, sections 3.26[1] and 11.051,[2] raise substantial problems of construction. This Article first sketches the basic jurisdictional concepts affecting divorce, custody, and support. Particular attention is given to the reasons why personal jurisdiction over a nonresident spouse is important and has been made even more important by *Shaffer v. Heitner*,[3] a United States Supreme Court decision of June 1977. Sections 3.26 and 11.051 and their application are then analyzed in the light of three factors: (1) the purposes

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1. TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1978):

§ 3.26 Acquiring Jurisdiction over Nonresident Respondent

(a) If the petitioner is a resident or a domiciliary of this state at the commencement of a suit for divorce, annulment, or to declare a marriage void, the court may exercise personal jurisdiction over the respondent, or the respondent's personal representative, although the respondent is not a resident or a domiciliary of this state if:

(1) this state is the last state in which marital cohabitation between petitioner and the respondent occurred and the suit is commenced within two years after the date on which cohabitation ended; or (2) notwithstanding Subdivision (1) above, there is any basis consistent with the constitution of this state or the United States for the exercise of the personal jurisdiction.

(b) A court acquiring jurisdiction under this section also acquires jurisdiction in a suit affecting the parent-child relation if Section 11.051 of this code is applicable.

2. *Id.* 11.051:

§ 11.051. Acquiring Jurisdiction Over Nonresident

In a suit affecting the parent-child relationship, the court may exercise personal jurisdiction over a person on whom service of citation is required or over the person's personal representative, although the person is not a resident or domiciliary of this state, if:

(1) the child was conceived in this state and the person on whom service is required is a parent or an alleged or probable father of the child;

(2) the child resides in this state, as defined by Section 11.04 of this code, as a result of the acts or directives or with the approval of the person on whom service is required;

(3) the person on whom service is required has resided with the child in this state; or

(4) notwithstanding Subdivisions (1), (2), or (3) above, there is any basis consistent with the constitutions of this state or the United States for the exercise of the personal jurisdiction.

3. 433 U.S. 186 (1977).

of these sections; (2) the relationship of these sections to Texas Rule of Civil Procedure 108; and (3) the May 1978 United States Supreme Court case, *Kulko v. Superior Court*,[4] which substantially raised the jurisdictional hurdle. Several clarifying amendments to sections 3.26 and 11.051 are suggested. As this Article shows, however, these are but stopgap measures. The proliferating Texas long-arm provisions need to be reworked and consolidated.

I. BASIC JURISDICTIONAL CONCEPTS IN DIVORCE, CUSTODY, SUPPORT

A. *Ex Parte Divorce Without Personal Jurisdiction over a Nonresident Spouse*

Williams I. Williams v. North Carolina[5] (often called *"Williams I"* to distinguish it from another case between the same parties decided three years later[6]) is the base upon which to build any understanding of jurisdiction in family law matters. *Williams I* held that a court in the state where one of the spouses is domiciled can grant a valid divorce. This was so even though the forum state had no other connection with the spouses or the marriage; the forum state was never the marital domicile, did not have personal jurisdiction over the nonresident spouse, and was not the place where any of the events that were grounds for divorce occurred.

Section 3.21 of the Family Code. The domiciliary basis for divorce in Texas is contained in section 3.21 of the Family Code, which permits bringing a divorce suit if either spouse "has been a domiciliary of this state for the preceding six-month period and a resident of the county in which suit is filed for the preceding ninety-day period."[7] Thus, as in most states, Texas builds a durational requirement on the domiciliary basis. Not only must one of the spouses be domiciled in Texas, but also this domicile must be maintained for a specified period of time: six months in the state and ninety days in the county.

Section 3.21 is an unusual statutory provision in that it uses the word "domiciliary" in defining the six-month durational requirement. When a statute uses the word "domicile" or, as in this case, "domiciliary," it is reasonably certain that a meaning synonymous with the technical requirement of domicile is intended. Domicile is one of the key concepts pervading the field of conflict of laws. In order to acquire a domicile of choice in a particular state a person must be physically present in that state with a present, unqualified intention to make it "home," with all the connotations of that word, for an indefinite time.[8]

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4. 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978).
5. 317 U.S. 287 (1942).
6. Williams v. North Carolina, 325 U.S. 226 (1945).
7. TEX. FAM. CODE ANN. § 3.21 (Vernon 1975).
8. White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888) (indefinite time); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18, Comment b (1971) [hereinafter cited as RESTATEMENT] (present intention). *Cf. id.* § 18: "To acquire a domicile of choice in a place, a person must intend to make that place his home for the time at least."

Section 3.21, however, switches to the term "resident" for the ninety-day period that is required in the county in which suit is filed. Resident is a far more common statutory term than domicile. The use of the term, however, raises a threshold question of statutory construction.[9] Does resident mean exactly the same as domiciliary, or does it mean technical domicile plus something else, or, perhaps, simple physical presence without the need for domiciliary intention? The Texas courts have construed resident in the divorce context to mean technical domicile plus actual, physical, continuous living in the county in which suit is filed, with the continuity of this physical presence unbroken except perhaps by a temporary absence.[10] One statutory exception to this continual ninety-day residence requirement is provided in section 3.22.[11] Time spent by a Texas domiciliary outside the state in the service of the armed forces or in other service of Texas or the United States does not break the durational residence required for section 3.21.

Other Bases for Divorce Jurisdiction. Domicile of one of the spouses is sufficient for constitutional divorce jurisdiction, and has sometimes been declared a necessary basis for divorce jurisdiction.[12] The latter, however, is almost surely not true. There are other contacts between a state and one of the spouses that give that state a reasonable interest in determining the marital status of that spouse. A good example is contained in section 3.23 of the Family Code, which provides that persons not previously resident in Texas will be deemed to have acquired a residence in the state for divorce purposes while they are stationed at military installations in Texas.[13]

B. *Why Personal Jurisdiction over a Nonresident Spouse is Desirable*

Although *Williams I* held that jurisdiction over the absent spouse is not necessary for a valid divorce, there are four reasons why personal jurisdiction is either essential or highly desirable.

Collateral Attack. Three years after deciding *Williams I* the Supreme Court indicated that there was something it had forgotten to mention. One spouse, solely on the basis of his or her domicile in the forum, can obtain a valid divorce. If, however, the divorcing court does not have personal jurisdiction over the nonresident spouse, that spouse can make a collateral attack on the divorce court's jurisdictional finding of domicile.[14]

The "domicile of choice" is distinguished from the "domicile of origin" acquired at birth and the "domicile of a minor," the latter two being determined by the domicile of the child's parents. *Id.* §§ 14, 22.

9. *See* Reese & Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561 (1953).

10. *See, e.g.*, Beavers v. Beavers, 543 S.W.2d 720 (Tex. Civ. App.—Waco 1976, no writ).

11. TEX. FAM. CODE ANN. § 3.22 (Vernon 1975).

12. *See, e.g.*, Williams v. North Carolina, 325 U.S. 226, 229 (1945) (dictum).

13. TEX. FAM. CODE ANN. § 3.23 (Vernon 1975). The serviceperson's divorce provision was held constitutional in Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807 (1959).

14. Esenwein v. Commonwealth, 325 U.S. 279 (1945). Although Williams v. North Carolina (*Williams II*), 325 U.S. 226 (1945), decided the same day as *Esenwein*, is often cited

Suppose, for example, a Texas husband leaves his wife and children in Texas and goes to Nevada for a "quickie" divorce. He resides in a motel for the requisite six weeks and then, armed with his divorce decree giving his "domicile" as Nevada, he returns to Texas. Thereupon, his wife sues him for divorce in a Texas court. The husband objects on the grounds that he has a valid Nevada divorce to which a Texas court must give full faith and credit. If, however, the wife can bear the burden of proving that the Nevada jurisdictional determination was erroneous because the husband's purported "domicile" in Nevada was a fraud and a sham, then she may do so consistently with full faith and credit. The reason why she may make this collateral attack is that the Nevada court did not have personal jurisdiction over her. This highlights, of course, one reason why personal jurisdiction over a nonresident spouse is highly desirable; it cuts off the possibility of this kind of collateral attack on the basic jurisdictional finding of domicile.[15]

Money Judgments. In order to grant a valid money judgment against the nonresident spouse, the divorce court must have personal jurisdiction over that spouse.[16] In Texas, money judgments incident to a divorce proceeding would include temporary support for a spouse,[17] costs,[18] attorney's fees,[19] and child support.[20] In other states, divorce decrees might include permanent alimony and division of the couple's out-of-state property, including real property. A court with personal jurisdiction over both spouses may validly adjudicate their rights in real estate situated outside the forum.[21] Although there is substantial confusion over whether these nonsitus land decrees are entitled to full faith and credit,[22] a Texas court will, as a matter of comity, recognize interests in Texas land declared by the divorce court of another state if that court had personal jurisdiction over husband and wife.[23] Unfortunately, however, the Texas courts have not issued similar decrees dividing out-of-state land incident to a divorce between Texas spouses.[24]

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for this proposition, *Williams II* involved a collateral attack on a Nevada divorce by the state of North Carolina in a bigamy prosecution.

15. Sherrer v. Sherrer, 334 U.S. 343 (1948).

16. RESTATEMENT, *supra* note 8, § 77(1).

17. TEX. FAM. CODE ANN. § 3.59 (Vernon 1975).

18. *Id.* § 3.65.

19. *See, e.g.*, Goren v. Goren, 531 S.W.2d 897 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dism'd); TEX. FAM. CODE ANN. § 11.18(a) (Vernon 1975) (suit affecting parent-child relationship).

20. TEX. FAM. CODE ANN. § 11.05(5) (Vernon 1975).

21. *See* RESTATEMENT, *supra* note 8, § 55.

22. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 305-10 (1971).

23. McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961).

24. *See, e.g.*, Kaherl v. Kaherl, 357 S.W.2d 622 (Tex. Civ. App.—Dallas 1962, no writ). *But cf.* Lopez v. Lopez, No. 15,788 (Tex. Civ. App.—San Antonio Apr. 20, 1977, no writ) (Mississippi property divided pursuant to agreement of spouses submitting it to forum's jurisdiction); Estabrook v. Wise, 506 S.W.2d 248 (Tex. Civ. App.—Tyler), *judgm't set aside and cause dism'd as moot*, 519 S.W.2d 632 (Tex. 1974) (trial court had jurisdiction to require former husband to convey legal title to mineral rights in land located in Alabama and Florida).

Personal jurisdiction over the nonresident spouse, in order to obtain a valid money judgment entitled to full faith and credit, is especially important in the light of the June 1977 United States Supreme Court decision, *Shaffer v. Heitner.*[25] Before *Shaffer*, when the plaintiff could not obtain personal jurisdiction over a defendant common practice was to search for property of the defendant in the forum. If the plaintiff found property in the state, he could seize the property, prove out his claim, and then apply the proceeds of the judicial sale of the property to his claim, even though his claim against the defendant was unrelated to the property. *Shaffer* signals an end to this practice unless the claim is directly related to the property. For example, a court in a state where property is situated can adjudicate a dispute as to the ownership of the property,[26] at least in cases in which the property has not been brought into the state by the unilateral act of the plaintiff.[27] The court may also be able to adjudicate claims arising from the presence of the property in the state. For example, if the plaintiff is injured because of the negligent maintenance of real estate in the state, the plaintiff can presumably seize the property as a basis for adjudicating his tort action against the absent owner.[28]

Shaffer was a derivative stockholder suit against the directors of a Delaware corporation.[29] The corporation was headquartered in Arizona and engaged in activities in Oregon that subjected it to criminal and civil antitrust penalties. The suit was to recover the damages to the corporation resulting from the illegal activities. All of the directors were nonresidents of Delaware. In order to bring suit in Delaware, the plaintiff stockholder seized the directors' stock, stock options, warrants, and various other rights. The defendants made a special appearance urging that the sequestration of their property violated due process. When the defendants lost in the Delaware state courts they appealed to the United States Supreme Court.

One might have expected the Supreme Court to have taken either of two polar approaches. Judgment might have been rendered for the defendants on the ground that the unique Delaware rule that made Delaware the situs for sequestration purposes of stock in a Delaware corporation, even though negotiable stock certificates were located outside the state,[30] was too bizarre and unfair to stand due process scrutiny.[31] Alternatively, the plaintiff might have prevailed on the ground that since the state of incorporation should be able to obtain personal jurisdiction over corporate di-

25. 433 U.S. 186 (1977).
26. *Id.* at 207.
27. *See* RESTATEMENT, *supra* note 8, § 82.
28. 433 U.S. at 208. If the forum has an appropriate long-arm statute, personal jurisdiction over the absent owner will also be available to adjudicate claims arising from injuries on the property. *See, e.g.*, Dubin v. City of Philadelphia, 34 Pa. D. & C. 61 (Philadelphia Co. 1938).
29. Some of the defendants were directors of a subsidiary of the Delaware corporation. The subsidiary was a California corporation.
30. DEL. CODE ANN. tit. 8, § 324 (1975); DEL. CODE ANN. tit. 6, § 8-317(1) (1975).
31. Mr. Justice Stevens concurred on this ground. 433 U.S. at 217-19.

rectors in suits alleging breach of their fiduciary obligations to the corporation,[32] it should not matter that Delaware chose to permit assertion of this claim by quasi in rem jurisdiction over the directors' corporate holdings rather than by personal jurisdiction over the directors. The Court, however, used *Shaffer* to deliver a mortal blow to quasi in rem jurisdiction generally, overruling such casebook standards as *Harris v. Balk*.[33] Mr. Justice Marshall's opinion for the Court concluded "that all assertions of state-court jurisdiction [including quasi in rem jurisdiction] must be evaluated according to the standards set forth in *International Shoe* and its progeny."[34]

Without the availability of quasi in rem jurisdiction to seize the property of a nonresident spouse, the importance of obtaining personal jurisdiction over that spouse for enforceable money awards incident to family law litigation is increased. Some money judgments rendered in domestic relations cases are final lump sum awards that easily fit within our notion of full faith and credit. Lump sum judgments in Texas might cover such matters as court costs and attorney's fees.[35] In states that have permanent alimony there may be on occasion a final judgment settling one spouse's rights to future alimony. Some money judgments in family disputes, however, are in the form of modifiable installments. In Texas such judgments might be for child support and in other states for permanent alimony. The installments ordered, usually a monthly amount, are subject to modification in the light of changed circumstances on the motion of either party. The question arises how full faith and credit can be accorded to such modifiable and therefore nonfinal judgments. The answer is that the installments, when they become past due and no longer modifiable under the law of the state that granted them, are entitled to full faith and credit just as are any other money judgments.[36]

It is unclear under the Family Code at what point Texas support orders are entitled to full faith and credit in sister states. Under section 14.08(c)[37] Texas child support payments now become vested and absolute as they fall due and may be modified only prospectively. On the other hand, section 14.09(c)[38] provides that after ten days' notice a judgment in the amount of the unpaid installments may be rendered against a party who has failed to make ordered child support payments. The judgment then "may be enforced by any means available for the enforcement of judgments for debts."[39] A sister state might take the position that the fact that unpaid Texas child support installments may not be modified retroactively does

32. Mr. Justice Marshall's majority opinion casts doubt upon this assertion. *Id.* at 215-16. Mr. Justice Brennan dissented from this portion of the opinion. *Id.* at 219-28.

33. 198 U.S. 215 (1905).

34. 433 U.S. at 212. For the *International Shoe* standards, see text accompanying notes 67 & 68 *infra*.

35. *See* notes 18 & 19 *supra*.

36. Sistare v. Sistare, 218 U.S. 1 (1910).

37. TEX. FAM. CODE ANN. § 14.08(c) (Vernon 1975).

38. *Id.* § 14.09(c).

39. *Id.*

not mean that they are final for full faith and credit purposes until a judgment is rendered pursuant to section 14.09(c).

Although a Texas court cannot award permanent alimony and although permanent alimony awards of other states cannot be enforced under the Texas Uniform Reciprocal Enforcement of Support Act (URESA),[40] a Texas court must give full faith and credit to final, nonmodifiable alimony installments awarded by the court of another state with personal jurisdiction over the obligor spouse.[41]

Divisible Divorce. The "divisible divorce" doctrine, articulated in *Estin v. Estin*[42] and *Vanderbilt v. Vanderbilt*,[43] provides another reason for seeking jurisdiction over a nonresident spouse. If the divorce court does not have jurisdiction over the absent spouse, it cannot determine that spouse's rights to alimony or support. This was the basic compromise worked out by the United States Supreme Court between the needs of the domicile of one spouse to determine the marital status of that spouse and the needs of the former marital domicile to provide support for a spouse and children abandoned there.[44] The converse of this proposition is that if the divorce court has jurisdiction over both spouses, it can settle and, if it wishes, terminate their rights to future support.

One apparent anomaly in the workings of full faith and credit is the last-in-time rule. Occasions arise when two states, each with jurisdiction over both parties, render final and conflicting judgments. If the first judgment was properly pleaded, the judgment second in time has denied full faith and credit to the first judgment. But on a theory akin to "two wrongs do not make a right" it is now the second judgment, the last-in-time, that is entitled to full faith and credit, even in the state that rendered the first judgment.[45]

A good illustration of this last-in-time rule is provided by *Layton v. Layton*.[46] A husband and wife were living in Texas where the husband was serving in the armed forces. They separated and the wife went to Maryland with the children. The husband filed suit for divorce in Texas and the wife was served in Maryland. She made a special appearance in Texas to urge that there was no personal jurisdiction over her, but she lost and did not appeal. A divorce decree was granted to the husband. In the meantime, the wife had started a suit for divorce in Maryland seeking custody of the children, child support, and alimony. While the husband was

40. *Id.* §§ 21.03(6), 21.21.
41. Mitchim v. Mitchim, 518 S.W.2d 362 (Tex. 1975).
42. 334 U.S. 541 (1948).
43. 354 U.S. 416 (1957).
44. The divisible divorce doctrine may be used by the absent spouse's domicile at the time of the ex parte divorce even though this was not the marital domicile. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).
45. RESTATEMENT, *supra* note 8, § 114. *But see* Colby v. Colby, 78 Nev. 150, 369 P.2d 1019, *cert. denied*, 371 U.S. 888 (1962) (refuses to follow Maryland judgment declaring Nevada divorce void).
46. 538 S.W.2d 642 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.), *noted in* 55 TEXAS L. REV. 127 (1976).

temporarily in Maryland, service of process in the Maryland suit was made on his father. The husband made a special appearance in the Maryland court claiming that there was no jurisdiction over him. The husband lost his special appearance and did not take any further part in the Maryland proceedings. After the Texas divorce decree, the Maryland court entered a judgment granting the wife custody of the children, child support, and permanent alimony. The Maryland court held, contrary to the findings in the Texas special appearance proceeding, that the Texas decree was invalid for lack of jurisdiction over the wife. The wife reduced past due installments of child support and alimony to judgment in Maryland and then sued on this judgment in Texas, demanding that the Maryland decree be given full faith and credit. The San Antonio court of civil appeals held that even if Maryland denied full faith and credit to the Texas judgment, this did not justify a Texas court's denying full faith and credit to the Maryland judgment. The husband's remedy for the error of the Maryland court, even an error of full faith and credit proportions, was to appeal the Maryland judgment in a direct attack. He could not let the Maryland judgment become final and then wage a collateral attack on it when enforcement was sought in Texas.

Custody Award Binding on the Absent Parent. Custody decrees are of course modifiable. Whether such decrees are technically entitled to full faith and credit is debatable.[47] Even assuming they are, this can be an empty requirement in the light of the ease with which a determined court can find "changed circumstances"[48] and thus modify the custody decree. The fact is, nevertheless, that more and more state courts, including the Texas courts, have evidenced a reluctance to modify sister state custody decrees, particularly if the petitioning parent is holding the children in the forum in violation of a sister state decree. The snatch, run, and litigate process that results when parents use children as weapons to inflict wounds on one another has been a national disgrace and many judges have indicated that they will no longer tolerate it.[49]

One difficulty is that *May v. Anderson*,[50] the leading United States

47. *See* Kovacs v. Brewer, 356 U.S. 604, 613 (1958) (Frankfurter, J., dissenting).

48. *See, e.g.*, New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947); Brengle v. Hurst, 408 S.W.2d 418 (Ky. 1966) (can find changed circumstances only three months after sister state decree).

49. *See, e.g.*, Hood v. Hood, 566 S.W.2d 743 (Ark. 1978); Young v. District Court, 570 P.2d 249 (Colo. 1977); Nehra v. Uhlar, 43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168 (1977); Strobel v. Thurman, 565 S.W.2d 238 (Tex. 1978) (Texas court must grant writ of habeas corpus to parent seeking to enforce sister state custody decree unless exceptions of TEX. FAM. CODE ANN. § 14.10 (Vernon Supp. 1978) apply). *See also* UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 8, 13, 14 (placing substantial restrictions on the modification of sister state decrees, adopted in 17 states); Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977). *But cf.* Copple v. Copple, 186 Neb. 696, 185 N.W.2d 846 (1971) (deny "morally unfit" mother's habeas corpus petition); *In re* Marriage of Settle, 276 Ore. 759, 556 P.2d 962 (1976) ("best interests of child" justify modification of sister state custody decree although child was wrongfully removed to the forum).

50. 345 U.S. 528 (1953).

Supreme Court decision on full faith and credit to custody decrees, leaves unclear whether a state can even voluntarily defer to another state's outstanding custody decree and remit an unsatisfied parent to the courts of that state for any modification if the first court did not have personal jurisdiction over the contesting parent.[51] In order to avoid this difficult constitutional debate, it is important that the court awarding custody have personal jurisdiction over both parents.

II. RECENT ENACTMENT OF THE FAMILY CODE LONG-ARM PROVISIONS

A. *Background*

Thus, although one spouse can obtain a valid ex parte divorce, there are many reasons why having personal jurisdiction over the other spouse is important: to cut off collateral attack on the jurisdictional finding of domicile, to obtain a valid money judgment entitled to full faith and credit, and to effect a binding determination of a spouse's support and custody rights. Two recent additions to the Family Code facilitate acquisition of personal jurisdiction over a nonresident: sections 3.26 and 11.051.[52]

Reasons for Special Family Code Long-Arm Provisions. For almost twenty years Texas has had a far-ranging long-arm statute in article 2031b of the civil statutes.[53] This article provides for jurisdiction over nonresident entities for causes of action arising out of their doing business in Texas and then defines "doing business" in the following expansive manner: "[W]ithout including other acts that may constitute doing business, . . . entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State."[54] Although family disputes might be squeezed by ingenious advocacy into the "tort"[55] or "contract" long-arm provisions, and although the peculiar phrase "without including other acts that may constitute doing business" might in time have been construed to be an open-ended inclusion of all events or consequences in Texas that would constitutionally permit personal jurisdiction over nonresidents,[56] the pressing needs of family law litigation made it imperative that there be special long-arm provisions designed for use in the Family Code.

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51. Mr. Justice Jackson, in his dissent, assumed that the holding prevented voluntary recognition. *Id.* at 536-37. Mr. Justice Frankfurter, concurring in the majority opinion, thought voluntary recognition permissible. *Id.* at 535-36.

52. TEX. FAM. CODE ANN. §§ 3.26, 11.051 (Vernon Supp. 1978).

53. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

54. *Id.* § 4.

55. *But see* Taylor v. Texas Dep't of Public Welfare, 549 S.W.2d 422 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) ("tortious act" provision not applicable to alleged nonresident father because sexual intercourse between consenting adults is not a tort).

56. *See* Thode, *In Personam Jurisdiction: Article 2031B, the Texas "Long Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 279, 307-08 (1964).

While sections 3.26 and 11.051 were being drafted, the Texas Supreme Court was amending Texas Rule of Civil Procedure 108 to turn it into a general long-arm provision. Sections 3.26 and 11.051 took effect on September 1, 1975, and the amended rule 108 became effective on January 1, 1976.[57]

Rule 108. Rule 108 provides that the citation with a copy of the petition attached may be served on a defendant absent from the state "by any disinterested person . . . in the same manner as provided in Rule 106."[58] A defendant so served

> shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.[59]

In other words, the long-arm reach of a Texas court is now as long as due process permits.[60]

Rule 108 and Sections 3.26 and 11.051. One problem that arises is the relationship between rule 108 and the long-arm provisions of the Family Code. Two polar views are reasonably arguable. It could be contended that sections 3.26 and 11.051 are exclusively applicable to family law cases and that they supersede and exclude the application of rule 108 to such cases. On the other hand, it is arguable that rule 108 is a general long-arm provision applicable to all causes of action including family law cases, and that there is no inconsistency between rule 108 and the Family Code long-arm provisions, especially in the light of the fact that sections 3.26 and 11.051 each end with a catch-all anything-due-process-permits provision mirroring the breadth of rule 108.

A similar divergence of views is possible concerning the relationship between the specific and the catch-all provisions of sections 3.26 and 11.051. Section 3.26 provides one specific factual situation and section 11.051 three situations in which personal jurisdiction may be obtained over absent parties. Each section then has a provision providing for jurisdiction on "any basis consistent with the constitutions of this state or the United States."[61] A narrow interpretation of these sections would be that the specific provision is controlling on any facts related to it and that the catch-all provision is applicable only in other circumstances. For example, section 3.26, covering jurisdiction over a nonresident respondent in a suit for divorce, an-

57. Long-arm statutes, affecting "procedure," may constitutionally be given retroactive effect. McGee v. International Life Ins. Co., 355 U.S. 220 (1957). *See also* Zeisler v. Zeisler, 553 S.W.2d 927 (Tex. Civ. App.—Dallas 1977, writ dism'd) (assuming without discussion that rule 108 and § 11.051 can be applied retroactively).

58. TEX. R. CIV. P. 108.

59. *Id.*

60. The note appended to explain the amendment to rule 108 reads: "Its purpose is to permit acquisition of *in personam* jurisdiction to the constitutional limits." Supreme Court of Texas Order of July 22, 1975, Adopting Amendments, at 4.

61. TEX. FAM. CODE ANN. §§ 3.26(a)(2), 11.051(4). (Vernon Supp. 1978).

nulment, or to declare a marriage void, provides for such jurisdiction in the specific situation in which Texas was the state of last marital cohabitation and the suit is commenced within two years after the cohabitation ended. If suit is commenced two years and one month after cohabitation has ended, it can be contended that jurisdiction is not available, even though the one month is not enough to make a difference in the larger due process context.

On the other hand, it can be argued that the specific situations enumerated in the Family Code long-arm provisions are nothing more than a handy checklist of typical circumstances in which jurisdiction will be available over absent parties well within due process limits. The specific provisions are not intended to limit in any way the full due process reach of the sections. This more expansive reading is supported by the fact that both catch-all provisions begin with the admonition that they apply "notwithstanding" the more specific provisions of the prior subdivision or subdivisions.[62]

The Family Code long-arm provisions should be applied to the due process limits. Nothing in the wording of sections 3.26 and 11.051 prevents this. Moreover, the overwhelming tendency, both in Texas[63] and nationally,[64] has been to construe long-arm statutes to their constitutional limits. It might help to insure this construction if the due process catch-all provisions in sections 3.26 and 11.051 were moved to the beginning and the wording were changed slightly. For example, subdivision (a)(1) of section 3.26 and subdivision (1) of section 11.051 should read: "there is any basis consistent with the Constitution of the United States for the exercise

62. *See* Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, no writ). Section 11.051 was held to confer jurisdiction over a mother who had resided in Texas with her children, but had left that state with the children before her husband had filed his suit for divorce and custody in Texas. The court said that section 11.051 provides jurisdiction "if the person on whom service is required has resided with the child in this state, *and even where the section might otherwise be deemed inapplicable*, if there is any basis consistent with the constitutions of this state or the United States for the exercise of personal jurisdiction." *Id.* at 430 (emphasis added). The mother had filed suit for separate maintenance and custody in Illinois, but an Illinois court has ordered her to deliver the children to the father in accordance with the Texas decree. Geesbreght v. Geesbreght, 379 N.E.2d 738 (Ill. App. Ct. 1978). For commentary on sections 3.26 and 11.051, see McKnight, *Husband and Wife, Texas Family Code Symposium Supplement*, 8 TEX. TECH L. REV. 1, 10 (1976); Sampson, *Jurisdiction in Divorce and Conservatorship Suits*, 8 TEX. TECH L. REV. 159 (1976); Smith, *Parent and Child, Texas Family Code Symposium Supplement*, 8 TEX. TECH L. REV. 19, 26 (1976).

63. *See* U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 98 S. Ct. 1235, 55 L. Ed. 2d 763 (1978):

> Article 2031b reaches as far as the federal constitutional requirements of due process will permit. . . . Furthermore, such a construction is desirable in that it allows the courts to focus on the constitutional limitations of due process rather than to engage in technical and abstruse attempts to consistently define 'doing business.'

The court nevertheless held that jurisdiction could not be exercised over the defendant.

64. *See, e.g.*, Woodring v. Hall, 200 Kan. 597, 438 P.2d 135 (1968). *But see* Kramer v. Vogl, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966).

of the personal jurisdiction."[65] Then the remaining subdivisions of sections 3.26 and 11.051 should be introduced with the statement: "Without limiting the effect of subdivision [(a)(1) or (1)], personal jurisdiction is available if:".

Long-Arm Theory. So-called "long-arm statutes" have proliferated in the last thirty years. What is the theoretical basis for such enactments? When can the court of a state reach out its arm, grab a defendant in a distant state, and say "come here and defend yourself or we will render a judgment against you in your absence that is entitled to full faith and credit"? The general form of the answer is easily stated but often difficult to apply to particular situations. A court may exercise personal jurisdiction over a defendant for causes of action arising out of acts the defendant has committed in the state or out of consequences that the defendant has caused in the state by acts that he committed outside the state when, in the light of those acts and consequences, it is reasonable to do so.[66] The landmark United States Supreme Court decision of *International Shoe Co. v. Washington*[67] held that in order to obtain jurisdiction over an absent defendant it is necessary only that the defendant have "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[68]

There is, however, an important counterweight to the expansive spirit of *International Shoe*. *Hanson v. Denckla*,[69] involving a complex estate litigation, indicated that state courts could not completely ignore state lines in obtaining jurisdiction over absent parties. Due process was held still to have a substantial limiting effect on the courts' long-arm reach. Specifically, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[70]

Despite *Hanson*, the trend has been toward more and more long-arm legislation and the new Family Code provisions are part of this trend.

B. *Section 3.26: Nonresident Respondent in Divorce or Annulment*

Section 3.26 is the simpler of the two Family Code long-arm provisions. It provides for jurisdiction over a nonresident respondent in a suit for divorce, for annulment, or to declare a marriage void. Its only specific provision, that the last "marital cohabitation" was in Texas and suit be within two years thereafter, is almost surely within due process limits if "marital cohabitation" is construed to require cohabitation coupled with technical

65. As in rule 108, the reference to the Texas Constitution is removed because the focus is on federal due process limitations.
66. *See* RESTATEMENT, *supra* note 8, §§ 24, 27.
67. 326 U.S. 310 (1945).
68. *Id.* at 316.
69. 357 U.S. 235 (1958).
70. *Id.* at 253.

domiciliary intention[71] or, at least, a long-continued period of actual residence. It cannot validly be applied to a nonresident couple who sojourn in Texas and then go their separate ways. The proper application of section 3.26(a)(1) could be clarified by rewording it to read: "this state is the last marital residence of petitioner and respondent and the suit is commenced within two years after the date on which marital residence ended."

The puzzling part of section 3.26 is subsection (b), which provides: "A court acquiring jurisdiction under this section also acquires jurisdiction in a suit affecting the parent-child relation if Section 11.051 of this Code is applicable." At first glance this seems to mean that section 3.26 does not confer personal jurisdiction over a nonresident respondent for purposes of custody and support; section 11.051 must be used in those suits. This reading may not be necessary and is undesirable. If jurisdiction over the nonresident respondent can be obtained under section 3.26, it should be available for all adjudications that are properly incident to the divorce or annulment. Few adjudications are more important in this context than those affecting custody and child support. Sections 3.26 and 11.051 both have catch-all due process provisions and one should not limit the other.

It would, of course, be a rare case in which Texas would be the state of last marital residence and one of the specific provisions enumerated in subdivisions (1) through (3) of section 11.051 were not applicable. Nevertheless, such a case could occur. For example, if the child were born in Texas six months after the husband and wife had moved to Texas but the birth was after the father had left the state, the abandoned wife certainly ought to have jurisdiction over the father for both divorce and child support. To fit the case within subdivisions (1) through (3) of section 11.051 would, however, be difficult. To avoid this problem, section 3.26(b) should be amended to read: "A court acquiring jurisdiction under this section also acquires jurisdiction over the respondent to affect the parent-child relation. For additional provisions conferring jurisdiction in a suit affecting the parent-child relation, see Section 11.051."

C. *Section 11.051: Nonresident Party in Suit Affecting Child Custody and Support*

Section 11.051 is more complex than section 3.26. It contains three specifically enumerated situations that are intended in the vast majority of cases to be safely within due process limits. As compared with the provisions of section 3.26, however, it is easier to apply the checklist provisions in an unconstitutional manner, and the second specific provision is seriously circumscribed by *Kulko v. Superior Court*.[72]

The three specific situations are: (1) the child was conceived in the state, and the person on whom service is required is a parent or probable father;

71. *See* Scott v. Scott, 554 S.W.2d 274, 277 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ), holding that section 3.26(a)(1) confers jurisdiction over a nonresident wife who had resided with her husband in Texas for two and one half months.

72. 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978).

(2) the child "resides" in Texas within the meaning of section 11.04[73] "as a result of the acts or directives or with the approval of the person on whom service is required"; and (3) the person on whom service is required has resided with the child in Texas.

The checklist provisions must be applied with care to avoid exceeding due process limits. For example, the first provision provides jurisdiction when the child was conceived in Texas and the defendant is a parent or probable father. This is designed to cover the typical case in which jurisdiction is desirable and fair: the defendant has impregnated a Texan in Texas and has left the state. If the provision is applied literally, however, it could apply unconstitutionally to a nonresident couple honeymooning in Texas who leave Texas after the honeymoon. Section 11.051(1) should be clarified by adding the italicized words: "conceived in this state *while at least one parent was a resident of this state*."

Section 11.051 contains no internal time limitation similar to the two-year limit of section 3.26. *Corliss v. Smith*[74] held that exercise of jurisdiction under section 11.051 over a mother who had been absent from the state with her children for over three years would be a violation of due process, even though the mother had resided with the children in Texas, the section 11.051(3) circumstance, and the children had been conceived in Texas, the section 11.051(1) circumstance. This result would certainly have been sound if the suit were an original custody action and is sound even though *Corliss* involved a motion by the husband to amend a prior Texas custody decree.

The court noted that "[n]o contention is made that jurisdiction can be had pursuant to section 11.05 of the Family Code."[75] That is the section conferring "continuing jurisdiction" on a court that once has acquired jurisdiction of a suit affecting the parent-child relationship. Perhaps the claim of continuing jurisdiction under section 11.05 was not made because the first proceeding in *Corliss* was before the enactment of section 11.05.[76] The concept of "continuing jurisdiction," however, existed in Texas long before section 11.05.[77] Nevertheless, it would have been an abuse of discretion to utilize this continuing jurisdiction on the facts of *Corliss*. The

73. This cross-reference to § 11.04 creates additional complications. *See* section III(B) of the text *infra*.

74. 560 S.W.2d 166 (Tex. Civ. App.—Tyler 1977, no writ).

75. *Id.* at 170.

76. *See, e.g.*, Zeisler v. Zeisler, 553 S.W.2d 927, 928 n.1 (Tex. Civ. App.—Dallas, 1977, writ dism'd): "Appellant does not rely on the concept of continuing jurisdiction under Tex. Family Code Ann. § 11.05 (Vernon Supp. 1976), since the divorce decree was issued before enactment of Title 2 of the Code in 1973." In *Zeisler* the court held that it had jurisdiction under section 11.051 to increase support payments although all parties had resided out of Texas for about four years. The court thought this justifiable because Texas was the last marital domicile, although it noted that this was not required for application of section 11.051, and no other forum was more convenient for both parties in the light of the fact that at the time of the suit the mother and children resided in Georgia and the father in Florida. 553 S.W.2d at 930.

77. *See, e.g.*, Tharp v. Tharp, 438 S.W.2d 391 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ dism'd) (continuing jurisdiction to make provision for child support).

proper forum for the father's attempt to drastically increase his visitation rights was Nebraska, where the mother and children had resided since they left Texas. The court's reasoning is cogent in noting that section 11.06 of the Family Code provides for intrastate transfer of a suit affecting the parent-child relationship if the child has principally resided for six months or more in a county other than the one in which the action was instituted. The court then states:

> We see no reason why the same considerations should not be applied in an interstate context involving section 11.051. Therefore, in determining whether to assert jurisdiction, when the undisputed proof shows that the child and the managing conservator have resided in a foreign state for six months or more before the suit was filed, we think a presumption arises that the Texas courts no longer constitute convenient and/or competent forums to adjudicate claims affecting the parent-child relationship and have lesser interest in protecting the welfare of the child than the foreign state, and are consequently unwarranted in asserting jurisdiction in the absence of sufficient proof to overcome the presumption.[78]

III. KULKO V. SUPERIOR COURT

A. *Kulko and Section 11.051*

Mr. and Mrs. Kulko had their marital domicile in New York for thirteen years and were the parents of a daughter and a son. They agreed upon a separation. The wife moved to California where, coincidentally, they had been married while both were New York domiciliaries but while the husband was there briefly en route to overseas military duty. Under the separation agreement the children were to remain with the father during most of the year and spend vacations with the mother. The father agreed to pay $3,000 a year in child support for the brief periods when the children were with the mother. The mother obtained a Haitian divorce which incorporated the terms of the separation agreement. The wife appeared in person in Haiti and the husband filed a power of attorney and submission to jurisdiction. After obtaining the Haitian divorce the mother returned to California. The daughter told her father that she wished to live with her mother and her father acceded to her wishes. He purchased a one-way ticket to California for her and allowed her to take her personal belongings. About two years later, the son, without his father's knowledge or permission, flew to California using a ticket provided by his mother. The mother now had the responsibility of caring for the children during most of the year and found the $3,000 child support payments, designed for different circumstances, inadequate. She brought suit against the father in California to establish the Haitian divorce decree as a California judgment, to modify the judgment to obtain full custody of the children, and to increase the father's child support obligations. The father made a special appearance claiming that California could not constitutionally assert per-

78. 560 S.W.2d at 173.

sonal jurisdiction over him so as to affect his support obligations. The California courts ruled against the father, holding that there was surely jurisdiction with regard to the daughter's support obligations because the father had voluntarily sent her to California. Also, since there was jurisdiction over the father with regard to one child, it was only fair and reasonable that there should be jurisdiction over him with regard to his support obligations for both children.

The United States Supreme Court, in a six-to-three decision, Mr. Justice Marshall writing for the Court, reversed the California judgments and held that exercising personal jurisdiction over the father violated due process. The father's acquiescence in his daughter's desire to live with her mother was not enough to subject him to California jurisdiction. A contrary finding "would discourage parents from entering into reasonable visitation agreements."[79] "To make jurisdiction in a case such as this turn on whether [the father] bought his daughter her ticket or instead unsuccessfully sought to prevent her departure would impose an unreasonable burden on family relations . . . ."[80] Mr. Justice Marshall found controlling the famous language in *Hanson v. Denckla*:

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposely avails [him]self of the privilege of conducting activities within the forum State . . . ."[81]

There are two respects in which *Kulko* seems to restrict the availability of personal jurisdiction in family law cases. First, the facts of *Kulko* seemed reasonably favorable to the mother's obtaining jurisdiction over the father. The father did after all purchase the one-way ticket for his daughter and send her to California with her personal belongings. *Kulko* would not be as troublesome if the contacts with California resulted solely from the mother's unilateral acts. Secondly, and perhaps more significantly, Mr. Justice Marshall's reliance on *Hanson v. Denckla* gives that case renewed emphasis as an important limitation on state court jurisdiction.

Kulko seriously circumscribes the use of section 11.051(2), which purports to confer jurisdiction over an absent party in a suit for support or custody when the child resides in Texas "as a result of the acts or directives or with the approval of the person on whom service is required." To say that in *Kulko* the daughter was in California "as a result of the acts . . . or with the approval" of her father does not strain language beyond its normal meaning. In order to change the obligation of support a rather extreme case will apparently now be needed to obtain jurisdiction over an absent father who sends a child to live with the mother in Texas when the father has no other contacts with Texas. It should still be possible to ob-

79. 98 S. Ct. at 1698, 56 L. Ed. 2d at 142.
80. *Id.* at 1700, 56 L. Ed. 2d at 145.
81. *Id.* at 1698, 56 L. Ed. 2d at 142 (quoting from Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

tain jurisdiction over the absent father if he sends the wife and child into Texas promising to join them later, but then does not come and leaves his family stranded without support.[82]

Kulko does not necessarily have the same circumscribing effect in suits affecting the parent-child relationship if the object is not to change the support obligation. Mr Kulko "did not contest the court's jurisdiction for purposes of the custody determination."[83] This could mean two quite different things. First, it could mean simply that Mr. Kulko conceded that California had sufficient contacts with the children and their mother to make an ex parte decree affecting custody.[84] Secondly, it could mean that Mr. Kulko did not contest the assertion of personal jurisdiction over him for the limited purpose of making a custody decree binding on him, thus avoiding the *May v. Anderson*[85] problems that would otherwise result. In other words, California could have jurisdiction over Mr. Kulko for some purposes affecting the parent-child relationship, such as custody, but not for others, for example, changing the support obligation. This distinction makes sense on the facts of *Kulko*. Mr. Kulko had acceded to a de facto change in custody and it was only reasonable to enable California to make the change binding on him de jure. Moreover, one of the reasons that Mr. Justice Marshall gave for the result was that an alternative remedy was available to modify, and enforce as modified, the support obligation: the Uniform Reciprocal Enforcement of Support Act (URESA).[86] The Act, however, could not be used to modify an existing custody award.

It may also be that *Kulko* does not impose the same limitations on jurisdiction over a nonresident parent if the purpose of the suit is to enforce existing support obligations rather than increase those obligations.[87] It is true that now URESA is available as a remedy.[88] Perhaps, however, Mr. Kulko had sufficient "minimum contacts" with California so that jurisdiction would "not offend 'traditional notions of fair play and substantial justice' "[89] in the light of the substantially less onerous impact on Mr. Kulko of enforcing an existing obligation as contrasted with increasing that obligation. Mrs. Kulko could then have demanded full faith and credit for her California judgment for arrears rather than having to rely on URESA remedies.

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82. *Cf.* Lea v. Lea, 18 N.J. 1, 112 A.2d 540 (1955) (father who sent his wife and children to New York was "domiciled" there for the purpose of obtaining jurisdiction over him to award alimony and support to the abandoned wife and children).

83. 98 S. Ct. at 1695, 56 L. Ed. 2d at 139.

84. *See* RESTATEMENT, *supra* note 8, §§ 79(a) & (b) (custody jurisdiction exists if the child is either domiciled in the forum or present there).

85. *See* text accompanying notes 50-51 *supra*.

86. *See* section III(C) of the text *infra*.

87. *See* Boyer v. Boyer, 57 Ill. App. 3d 555, 373 N.E.2d 441 (1978) (decided before *Kulko*, holding that resident mother can obtain personal jurisdiction over father still resident at former marital domicile but that jurisdiction is limited to enforcing arrears and does not extend to modification).

88. UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 2(b) (1968 revised version), § 2(f) (1950 version).

89. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Because of these uncertainties as to the scope of *Kulko*, it may be well to leave the last clause of section 11.051(2) alone for the time being while recognizing that it cannot be applied literally when the object is to increase existing support orders.

B. *The Reference in Section 11.051(2) to Section 11.04*[90]

Whether section 11.051(2) is applicable to the *Kulko* fact situation is not clear. Subdivision 2 would apply only if the child resided in Texas "as defined by Section 11.04." If the Haitian divorce were regarded as valid and as having appointed a "custodian of the child" (the father), the child would not reside in Texas under subdivision 5 of section 11.04(c) because the custodian did not reside in Texas. Subdivision 4 would not apply because the adult "having care and control of the child" was a parent. It is perhaps arguable that the child resides in Texas under subdivision 3 of section 11.04(c) if: (1) the provision regarding parents who "do not reside in the same county" applies when one parent resides in Texas and another outside Texas, and (2) the separation agreement included in the Haitian divorce is not regarded as the appointment of a "managing conservator [or] guardian," either because the provision in subdivision 3 referring to a managing conservator or guardian refers only to the appointment of such persons by a Texas court or because the Haitian divorce decree is considered invalid for this purpose.

If the cross-reference to section 11.04 is retained in section 11.051(2), section 11.04(c)(4) should be amended to remove the words "other than a

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90. TEX. FAM. CODE ANN. § 11.04 (Vernon 1975 & Supp. 1978).

§ 11.04. Venue

. . . .

(c) A child resides in the county where his parents (or parent if only one parent is living) reside, except that:

(1) if a managing conservator has been appointed by court order or designated in an affidavit of relinquishment, or if a custodian for the child has been appointed by order of a court before January 1, 1974, the child resides in the county where the managing conservator or custodian resides;

(2) if a guardian of the person has been appointed by order of a county or probate court and a managing conservator has not been appointed, the child resides in the county where the guardian of the person resides;

(3) if the parents of the child do not reside in the same county and neither a managing conservator nor a guardian of the person has been appointed, the child resides in the county where the parent having care and control of the child resides;

(4) if the child is under the care and control of an adult other than a parent and (A) neither a managing conservator nor a guardian of the person has been appointed or (B) the whereabouts of the managing conservator or the guardian of the person is unknown or (C) the person whose residence determines the residence of the child under this section has left the child under the care and control of the adult, the child resides where the adult having care and control of the child resides;

(5) if a guardian or custodian of the child has been appointed by order of a court of another state or nation, the child resides in the county where the guardian or custodian resides; or

(6) if it appears that the child is not under the care and control of an adult, the child resides where he is found.

parent." Unless this is done, none of the subdivisions of section 11.04(c) will cover the situation in which the managing conservator lives outside Texas and sends the child to live in Texas with the other parent. Without this amendment it may be impossible to acquire personal jurisdiction over the nonresident managing conservator under section 11.051 except, perhaps, under subdivision 4, the due process catch-all provision. It may, however, be better simply to delete from section 11.051(2) the cross-reference to section 11.04. Section 11.051(2) would then read: "the child resides in this state as a result of the acts . . . ." This would leave the word "resides" for judicial construction in the light of the purposes of section 11.051 and limit section 11.04 to the purpose for which it was designed, to provide for intrastate venue.

C. *The Uniform Reciprocal Enforcement of Support Act (URESA) as a Remedy*

Mr. Justice Marshall's majority opinion in *Kulko* was influenced by the availability of URESA as a remedy to the California mother.[91] Justice Marshall indicated that the mother could file a petition for support under URESA in California, have the California court send a copy of the petition to New York, and then have New York obtain jurisdiction over the father and order him to pay increased support.

The use of URESA when Texas is the "responding state" may now be more congenial to a petitioner who wishes to use his or her own attorney[92] to press the claim. Section 21.03(15) of the Texas statute now permits appointment of "an attorney designated by the court," in addition to district and county attorneys.

D. *Kulko and Catch-All Due Process Provisions*

Mr. Justice Marshall remarks in his opinion that "California has not attempted to assert any particularized interest in trying such cases in its courts by, *e.g.*, enacting a special jurisdictional statute."[93] This is a reference to the fact that California's long-arm statute does not enumerate specific fact situations in which jurisdiction may be obtained but states simply that the California courts may exercise in personam jurisdiction over absent parties on "any basis not inconsistent with the Constitution."[94]

How a state necessarily manifests less "interest" in obtaining jurisdiction over nonresidents by having a simple anything-due-process-permits long-arm statute, rather than attempting to set out in detail all the specific situations in which due process is available, is difficult to understand. Section

91. 98 S. Ct. at 1700-01, 56 L. Ed. 2d at 145-46.

92. Whether a URESA petitioner may use private counsel when the Act does not contain a provision for such representation, is a question that has seldom been litigated. *See* Ball v. Haughton, 377 N.E.2d 78 (Ill. App. 1978) (petitioner's use of private attorney is improper basis for dismissing URESA action); *cf.* Davis v. Davis, 246 Iowa 262, 67 N.W.2d 566 (1954) (private counsel permitted under Uniform Support of Dependents Law).

93. 98 S. Ct. at 1700, 56 L. Ed. 2d at 145.

94. CAL. CIV. PROC. CODE § 410.10 (West 1973).

11.051 does combine three specific provisions with a final catch-all provision. This seems a very weak reed upon which to rest an argument that *Kulko* does not apply to a Texas case that falls within one of the specific section 11.051 provisions.

IV. CONCLUSION

Personal jurisdiction over out-of-state parties remains either essential or highly desirable for many family law adjudications. *Kulko* indicates that the limits on long-arm jurisdiction in such matters are narrower than many had thought desirable and possible in the light of modern social realities—a more mobile population and the greater ease of travel and communication. Nevertheless, there is no need for despair. The full scope of *Kulko* is uncertain. It may not apply with the same force to changes in custody or to judgments that seek merely to enforce existing support obligations.

This Article has suggested several clarifying amendments to sections 3.26 and 11.051. Very soon, however, Texas must undertake the far more substantial task of reviewing, consolidating, and overhauling its proliferating long-arm provisions. All long-arm provisions should be collected in a single statute. At present there are two general multi-purpose long-arm provisions, rule 108 and article 2031(b), the specialized Family Code provisions in sections 3.26 and 11.051, a nonresident motorist statute,[95] and numerous other provisions designed to provide jurisdiction over nonresidents.[96] Finding them all is difficult. They do not form an integrated, logical, and fair system of extraterritorial jurisdiction.

Such an all-purpose long-arm statute, should contain an introductory section that, like rule 108, makes it clear that jurisdiction reaches to the due process limits. As a handy check list, the statute then should describe frequently recurring situations in which extraterritorial personal jurisdiction is desirable and fair and make it clear that this enumeration does not limit the full due process scope of jurisdiction. In addition, the doctrine of forum non conveniens should be codified to make clear that Texas courts need not, indeed should not, always exercise their jurisdiction over nonresidents to the limits of due process. The statute should also guide a wise and enlightened forum non conveniens discretion.[97]

Texas courts and lawyers deserve simpler and more coherent long-arm legislation.

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95. TEX. REV. CIV. STAT. ANN. art. 2039a (Vernon 1964).

96. *See, e.g., id.* arts. 2033a, 2033b, & 2033c (Vernon 1964); *id.* art. 2039b (Vernon Supp. 1978).

97. A good starting point for forum non conveniens legislation is the statute suggested in Comment, *Forum Non Conveniens: The Need for Legislation in Texas*, 54 TEXAS L. REV. 737, 758-60 (1976).

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