CORE
Metadata, citation and similar papers at core.ac.uk
Provided by UW Law Digital Commons (University of Washington)

Washington Law Review

Volume 52 | Number 2

4-1-1977

Dissolution of Marriage—Jurisdiction over Nondomiciliary Service Members: Time to Adopt a New Jurisdictional Analysis—In re Marriage of Ways, 85 Wn. 2d 693, 538 P.2d 1225 (1975); Wash. Rev. Code § 26.09.030 (1975)

Bruce A. Robertson

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

 Part of the Family Law Commons

Recommended Citation

Bruce A. Robertson, Recent Developments, *Dissolution of Marriage—Jurisdiction over Nondomiciliary Service Members: Time to Adopt a New Jurisdictional Analysis—In re Marriage of Ways, 85 Wn. 2d 693, 538 P.2d 1225 (1975); Wash. Rev. Code § 26.09.030 (1975)*, 52 Wash. L. Rev. 369 (1977).
Available at: https://digitalcommons.law.uw.edu/wlr/vol52/iss2/6

This Recent Developments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

DISSOLUTION OF MARRIAGE—JURISDICTION OVER NONDOMICILIARY SERVICE MEMBERS: TIME TO ADOPT A NEW JURISDICTIONAL ANALYSIS —In re *Marriage of Ways*, 85 Wn. 2d 693, 538 P.2d 1225 (1975); WASH. REV. CODE § 26.09.030 (1976).

On November 30, 1973, Raymond A. Ways, a member of the United States Navy on active military duty, filed a petition for dissolution[1] of marriage in a Washington superior court. Ways had been stationed in Washington aboard the USS Enterprise (then undergoing repairs at the Puget Sound Naval Shipyard, Bremerton, Washington) since October 1973, but neither he nor his wife had ever been domiciled in Washington.[2] Ways filed his petition in reliance upon R.C.W. § 26.09.030,[3] a statute allowing members of the armed forces stationed in Washington to petition for dissolution of marriage in the state. On February 2, 1974, sixty-four days after the filing of Ways' petition, the USS Enterprise departed for California, terminating Ways' Washington station.[4]

1. The terms "dissolution" and "divorce" are used interchangeably in this note to describe the termination of marital status by court proceeding. As used, the terms do not connote the determination by the court of any ancillary matters such as child custody, support, and property distribution.

2. The record makes no mention of Ways' domicile as of the date his petition was filed, but the following information is gleaned from the briefs filed in the subsequent Washington Supreme Court appeal. His wife and children were living in Virginia, where they had resided for the previous 14 years. Ways had last lived with his family in December 1972. Navy records indicated Ways' home of record as Silversprings, Maryland, but he had never resided there. Both spouses' automobiles were registered in New Jersey. Ways also voted in New Jersey, although he had left that state as a young man. While stationed in Washington, Ways resided aboard his ship. His plans following the termination of his naval career were unclear. Brief for Respondent at 1, Brief for Appellant at 1–2, *In re* Marriage of Ways, 85 Wn. 2d 693, 538 P.2d 1225 (1975).

3. WASH. REV. CODE § 26.09.030 (1976). The statute reads in relevant part as follows:

> When a party who is a resident of this state or who is a member of the armed forces and is stationed in this state, petitions for a dissolution of marriage, and alleges that the marriage is irretrievably broken and when ninety days have elapsed since the petition was filed and from the date when service of summons was made upon the respondent or the first publication of summons was made, the court shall proceed as follows . . . .

4. The record fails to show whether Ways departed with his ship. The court evidently presumed that he did, stating that Ways "ceased being stationed in Washington when, on February 2, 1974, the USS Enterprise departed for the Alameda, California, area." 85 Wn. 2d at 694, 538 P.2d at 1226.

The court in *Ways* defined "station" as "military post," citing United States v. Phisterer, 94 U.S. 219, 222 (1877). 85 Wn. 2d at 697 n.1, 538 P.2d at 1228 n.1.

Three days after the ship departed Washington, petitioner's wife filed a motion to dismiss for lack of jurisdiction. The Superior Court for Kitsap County denied this motion.[5] Respondent wife next petitioned the Washington Supreme Court for a writ of certiorari to review the order denying the motion to dismiss and for a writ of prohibition to bar further proceedings in the dissolution action.[6] In a 5–4 decision, the Washington Supreme Court reversed. *Held:* Where a petitioning member of the armed forces fails to remain continuously stationed in Washington for ninety days after filing the petition pursuant to R.C.W. § 26.09.030, the superior court is without jurisdiction to enter a decree of dissolution. *In re Marriage of Ways,* 85 Wn. 2d 693, 538 P.2d 1225 (1975).

Ways is the first Washington Supreme Court interpretation of this portion of the state's Dissolution Act of 1973.[7] Prior to the enactment of this statute, Washington law mandated one year's residency in the state before filing for divorce.[8] Residence under the divorce laws has been interpreted by the Washington courts to mean domicile.[9]

In *Ways* the court was presented with the question of whether R.C.W. § 26.09.030 could be upheld insofar as the statute authorizes

5. *In re* Marriage of Ways, No. 61691 (Wash. Super. Ct., Kitsap County, May 17, 1974).

6. Counsel for Mrs. Ways argued in the supreme court proceedings that an action based on R.C.W. § 26.09.030 would deny her due process and equal protection under the fourteenth amendment. It was further argued that such a proceeding would violate art. 2, § 24, of the Washington constitution, which provides that "[t]he legislature shall never grant any divorce." Brief for Appellant at 3. The court summarily dismissed the legislative divorce challenge, stating that the dissolution decree was "not sought or expected from the legislature." 85 Wn. 2d at 695, 538 P.2d at 1226.

7. WASH. REV. CODE ch. 26.09 (1976).

8. *See* ch. 215, § 3, 1949 Wash. Laws 699 (repealed 1973). Under this statute a court was without jurisdiction to dissolve a marriage if the plaintiff had not satisfied the one-year residency requirement, even when the defendant could meet the requirement and had filed a cross-complaint for divorce. *See* Hargreaves v. Hargreaves, 55 Wn. 2d 856, 350 P.2d 867 (1960). A nonresident defendant could obtain a divorce on cross-complaint, however, when a resident plaintiff filed the action. *See* Powell v. Powell, 66 Wash. 561, 119 P. 1119 (1912).

9. Sasse v. Sasse, 41 Wn. 2d 363, 249 P.2d 380 (1952); Mapes v. Mapes, 24 Wn. 2d 743, 167 P.2d 405 (1946). Domicile, for the purpose of divorce jurisdiction, has been defined by the Washington courts to mean physical presence in a state that coincides with an intention to make a permanent home in that state. *See* Thomas v. Thomas, 58 Wn. 2d 377, 380, 363 P.2d 107, 109 (1961). The intention to establish a home in the future in the state does not satisfy the intent requirement. Fiske v. Fiske, 48 Wn. 2d 69, 73, 290 P.2d 725, 728 (1955); Freund v. Hastie, 13 Wn. App. 731, 734, 537 P.2d 804, 807 (1975). All persons are presumed to have a domicile somewhere, and—once established—such domicile continues until another is acquired. *In re* Moore's Estate, 68 Wn. 2d 792, 796, 415 P.2d 653, 656 (1966). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 11–23 (1971).

Washington superior courts to issue dissolution decrees to members of the armed forces not domiciled in the state. The court concluded that domicile of one of the parties is not the only proper basis for dissolution jurisdiction;[10] an adequate "jurisdictional nexus"[11] can also be established when "either spouse has such a relationship to the state as would make it reasonable for the state to dissolve the marriage."[12] The majority decided that being stationed in Washington at the time of filing is not a sufficient basis for divorce jurisdiction,[13] but that an adequate basis for jurisdiction does exist when a member of the armed services remains continuously stationed in Washington from the time of filing until the statutorily prescribed ninety-day waiting period has elapsed.[14] The court thus upheld R.C.W. § 26.09.030 by interpreting it to confer jurisdiction to issue a decree of dissolution only where this minimum requirement has been met.[15] The four dissenting justices disagreed, arguing that the *Ways* dissolution proceedings should be continued and that the statute should be upheld without requiring any jurisdictional basis other than that the service member be stationed in Washington at the time of filing.[16]

Focusing on the questions presented in *Ways,* this note will discuss the issue of jurisdiction of state courts to dissolve a marriage. The legal background of divorce jurisdiction will be presented, including discussion of the generally accepted domicile rule and its recognized exceptions. The analysis of the jurisdictional facts issue presented in the *Ways* decision will be critiqued, with the conclusion that the statute as applied in *Ways* does not meet the requirements of due process and may result in divorce decrees not entitled to recognition under the full faith and credit clause. A suggested analytical approach to these issues will be presented, emphasizing a reconsideration of the

10. 85 Wn. 2d at 700, 538 P.2d at 1230.
11. *Id.* at 699, 538 P.2d at 1229.
12. *Id.* at 698–99, 538 P.2d at 1229. This standard is taken directly from the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 72 (1971).
13. 85 Wn. 2d at 701–02, 538 P.2d at 1230.
14. *Id.* This post-filing, pre-findings period is commonly referred to as a "cooling-off" period. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 13.4 (1968); Rieke, *The Dissolution Act of 1973: From Status to Contract?,* 49 WASH. L. REV. 375, 381 (1974). As Professor Clark states, "[t]he purpose behind such statutes is to require a last-moment pause by the spouses before the final step is taken which will end the marriage, in the hope that they will use this period for attempts at reconciliation." H. CLARK, *supra* at 387.
15. 85 Wn. 2d at 703, 538 P.2d at 1231.
16. *Id.* at 703–04, 538 P.2d at 1231 (Brachtenbach, J., dissenting). Joining in the dissent were Justices Finley, Rosellini, and Hunter.

policy considerations that should influence a court's disposition of the jurisdiction issue. Finally, a proposal for the application of choice of law principles in dissolution actions will be presented as a solution to the problems that remain under R.C.W. § 26.09.030 and other American divorce statutes.

I. BACKGROUND

A. The Domicile Requirement

For historical reasons, an action to dissolve a marriage in an American court is properly viewed as a statutory proceeding.[17] Because the Constitution does not give the federal government any power to regulate domestic relations, the power to regulate marriage and divorce is reserved to the states, with each state free to enact its own policy regarding the dissolution of marriage.[18] State statutes have varied widely on the issue of the proper grounds for dissolving a marriage,[19]

17. There is no common law or equity divorce jurisdiction. In England the ecclesiastical courts held exclusive jurisdiction to grant separations from bed and board (divorce *a mensa et thoro*) until 1857. Prior to that date absolute divorce (divorce *a vinculo*) was available only through Parliament. Such legislative divorces required a prior divorce *a mensa et thoro* and could be obtained only at great expense. *See* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 622–25 (3d ed. 1922).

Ecclesiastical courts were never established in this country, but the colonial and state legislatures continued the practice of legislative divorce; the Supreme Court upheld the validity of these special acts. *See* Maynard v. Hill, 125 U.S. 190 (1888) (upholding legislative divorce granted to prominent early resident of Washington). This practice was eliminated through the enactment of state constitutional provisions barring legislative divorce. *See, e.g.,* WASH. CONST. art. 2, § 24 ("The Legislature shall never grant any divorce."). Separate maintenance decrees were granted by the chancery courts under equity jurisdiction, but legislative acts were necessary to establish judicial power to issue divorce decrees. *See, e.g., id.* art. 4, § 6 ("The superior court shall have original jurisdiction in all cases . . . of divorce, and for annulment of marriage . . . ."). *See also* Maynard v. Hill, 125 U.S. at 206–09; Tupper v. Tupper, 63 Wn. 2d 585, 587–88, 388 P.2d 225, 227 (1964).

18. The Supreme Court recently described statutory regulation of domestic relations as "an area that has long been regarded as a virtually exclusive province of the States." Sosna v. Iowa, 419 U.S. 393, 404 (1975).

19. For a compilation of the grounds for divorce in all the states as of June 1, 1974, see Freed, *Grounds for Divorce in American Jurisdictions* 8 FAM. L.Q. 401 (1974). As of that date the author listed five jurisdictions with "fault" grounds only (*i.e.,* marital misconduct) and fourteen states (including Washington) where "irretrievable breakdown" is the sole ground. The remaining states include various "no-fault" grounds in their statutes, including incompatibility, living separate and apart (for a period varying from six months in Vermont to five years in Rhode Island), and conversion to an absolute divorce after living apart pursuant to a decree of judicial separation or separate maintenance. *Id.* at 421–23.

Washington has gone further than any other state in limiting the role of the judge in dissolution proceedings. Briefly stated, R.C.W. § 26.09.030 does not include a

but the statutes have almost universally required that jurisdiction be based on the domicile of at least one of the parties.[20]

Although there is disagreement as to the origin of the requirement,[21] the limitation of divorce jurisdiction to domiciliaries of the forum state is clearly linked to the legal classification of marriage as a status.[22] As Justice Field stated in *Pennoyer v. Neff*:[23]

---

provision allowing the judge to dismiss the petition on the basis of his or her finding that the marriage is not irretrievably broken. Even when the respondent denies the petitioner's allegation that the marriage is irretrievably broken, dismissal can be based only upon a finding that the *parties* have agreed to a reconciliation. It is true that dismissal can be based upon a finding that the petitioner was induced to file the petition by fraud or coercion; this dismissal, however, does not relate to the irretrievably broken standard. In other jurisdictions that have adopted a "no-fault" standard, the judge can dismiss the petition when he or she is not convinced that the marriage is in fact irretrievably broken. For a more complete discussion of this aspect of the Washington statute, see Rieke, *supra* note 14. As Professor Rieke points out, in Washington "[t]he determination to dissolve a marriage rests with the spouses, not with the state." *Id.* at 378.

20. For the exceptions to this rule, see notes 44–48 and accompanying text *infra*.

The American Law Institute makes the following statement concerning the use of the word "residence":

> Statutes in the United States rarely speak in terms of domicil but use "residence" instead. Residence is an ambiguous word whose meaning in a legal phrase must be determined in each case. Frequently it is used in a sense equivalent to domicil. On occasion it means something more than domicil, namely, a domicil at which a person actually dwells. On the other hand, it may mean something else than domicil, namely, a place where the individual has an abode or where he has settled down to live for a period of time, but not necessarily with such an intention of making a home there as to create a domicil. The phrase "legal residence" is sometimes used as the equivalent of domicil.
>
> In the absence of evidence of a contrary legislative intent, "residence" in a statute is generally interpreted:
>
> As being the equivalent of domicil in statutes relating to judicial jurisdiction . . . .
>
> As meaning a domicil at which the person in question actually dwells in statutes relating to the competence of a divorce court . . . .

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, Comment k (1971). *See also* W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 14–15 (6th ed. 1971).

21. Tracing the history of the domicile requirement, Justice Frankfurter stated: "The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it." Williams v. North Carolina, 325 U.S. 226, 229 (1945).

A different view was expressed by Judge Hastie in his dissenting opinion in Alton v. Alton, 207 F.2d 667, 681 (3d Cir. 1953): "[T]he rule that divorce jurisdiction will be exercised only by the courts of a state which has a domiciliary connection with the spouses is a creation of nineteenth century American judges." Justice Clark referred to the domicile requirements as "judge-made" and a "bugaboo." Granville-Smith v. Granville-Smith, 349 U.S. 1, 27 (1955) (dissenting opinion). These views, opposing that of Justice Frankfurter, are supported in A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 238–40 (1962).

22. *See* 1 W. NELSON, A TREATISE ON THE LAW OF DIVORCE AND ANNULMENT OF MARRIAGE 41 (1895); E. SPENCER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 311 (1911).

23. 95 U.S. 714, 734–35 (1878) (emphasis added).

> The jurisdiction which every State possesses, to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.

Additionally, early treatises indicate that dissolution actions were viewed as based upon jurisdiction in rem.[24] The underlying analysis was that the marital domicile was the situs of the marital status, or res, and therefore had exclusive jurisdiction over actions affecting the status. Once it became established that a married woman could acquire a separate domicile,[25] however, the in rem label became a source of confusion.[26] Nonetheless, the evolution of the doctrine of divisible divorce[27] has resulted in a judicial approach whereby the

24. 1 W. NELSON, *supra* note 22, at 8, 13; E. SPENCER, *supra* note 22, at 311.

25. The American Law Institute presents the following explanation of the development of the "divided domicile" concept:

> The harshness of the common law rule that a married woman could have no domicil apart from that of her husband . . . first became apparent in the field of divorce. It was unfair that a deserted wife could bring suit for divorce only in the state, however distant it might be, where her husband had chosen to establish his new home. The first step in modifying the rule was to say that a husband, once he had given his wife cause for divorce, no longer enjoyed the power to change her domicil. Her domicil remained in the state where the spouses had last lived together as man and wife, and accordingly the wife could there bring suit for divorce or separate maintenance. The rule was then further liberalized by permitting the wife under such circumstances to acquire a new domicil of her own in any state where she might choose to go. . . . Gradually, the same power was accorded the wife in situations where the spouses had separated by mutual consent rather than because of the fault of the husband.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS §21, Comment d (1971).

26. The confusion revolved around the issue of the validity of divorce decrees outside the divorcing state. Adoption of the divided domicile concept was accompanied by judicial acceptance of ex parte divorce proceedings. The conceptual analysis was that the marital status could be terminated in the plaintiff 's state of domicile and that personal jurisdiction over the defendant in a proceeding in rem was not required. *See* E. SPENCER, *supra* note 22, at 318–19. The state courts adopted conflicting policies concerning the extraterritorial validity of these ex parte decrees, *see id.*, and the Supreme Court finally was forced to decide the question under the full faith and credit clause. *See* note 35 *infra*.

27. In Estin v. Estin, 334 U.S. 541 (1948), the Court held that the full faith and credit clause did not foreclose New York from continuing to enforce a separate maintenance decree that had been awarded to a New York resident before her husband obtained a valid ex parte divorce in Nevada. Justice Douglas explained:

> The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in

termination of the marital status is "treated as if it were *in rem,* while termination of the incidents is treated as if *in personam.*"[28]

The U.S. Supreme Court has never been squarely presented with the question of whether a state dissolution statute not requiring jurisdiction to be based on the domicile of at least one of the parties could be upheld. The leading federal case on this issue is *Alton v. Alton,*[29] where the Court of Appeals for the Third Circuit held that it was a violation of due process for the Virgin Islands to issue a divorce where neither party was domiciled in that territory.[30] The Supreme Court vacated the appeal as moot, based upon a finding that the parties had obtained a divorce in their state of domicile subsequent to the court of appeals decision.[31] The Supreme Court frequently has asserted by way

---

the broken marriage by restricting each state to the matters of her dominant concern.

Id. at 549. The divisible divorce doctrine was expanded in Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957), where the Court held that it was consistent with full faith and credit for New York to award alimony to one of its residents, even though her husband had previously obtained a valid ex parte divorce in Nevada. *But see* Simons v. Miami Beach First Nat'l Bank, 381 U.S. 81 (1965) (husband's ex parte Florida divorce could terminate wife's dower right in Florida real estate). *See* Currie, *Suitcase Divorce in the Conflict of Laws:* Simons, Rosenstiel, *and* Borax, 34 U. CHI. L. REV. 26 (1966); Comment, *Divorce Ex Parte Style,* 33 U. CHI. L. REV. 837 (1966). On the topic of divisible divorce, see generally H. CLARK, *supra* note 14, § 11.4; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 184–87 (1971).

In Perry v. Perry, 51 Wn. 2d 358, 318 P.2d 968 (1957), the Washington Supreme Court refused to give effect to a Massachusetts separate maintenance decree entered prior to the husband's ex parte Washington divorce decree. Professor Clark states that *Perry* is an example of a decision that "erroneously refuses to follow *Estin.*" H. CLARK, *supra* note 14, § 11.4, at 315 n.12.

28. H. CLARK, *supra* note 14, § 11.4, at 316 (1968).

29. 207 F.2d 667 (3d Cir. 1953), *vacated as moot,* 347 U.S. 965 (1954).

30. The *Alton* case involved an attempt to obtain a divorce under a newly enacted Virgin Islands divorce law creating a statutory presumption of domicile when the party seeking the divorce had been physically present in the Virgin Islands for six weeks. The statute also provided that jurisdiction could be based on personal jurisdiction over both the parties, without any further reference to domicile. Mrs. Alton met the six-week requirement; Mr. Alton appeared, but did not contest the divorce. The federal district court judge refused to grant the divorce, however, on the ground that the statute was unconstitutional. The Court of Appeals for the Third Circuit affirmed in a 4–3 decision.

The decision in *Alton* has been criticized as a misapplication of the due process clause. This conclusion stems from the observation that the fifth and fourteenth amendments direct that no *person* be deprived of life, liberty, or property without due process of law. In *Alton* the defendant appeared in court and did not then or later complain that he had been denied due process. Thus, no *person* could properly be said to have been denied due process. *See* Alton v. Alton, 207 F.2d at 680 (Hastie, J., dissenting); Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793, 796 (1958); Rheinstein, *The Constitutional Bases of Jurisdiction,* 22 U. CHI. L. REV. 775, 779 (1955).

31. 347 U.S. 965 (1954). In Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955), the Court was presented with the same issue as in *Alton,* but once again avoided a decision on the constitutional issue by holding that the Virgin Islands legislature had exceeded its congressional grant of power by enacting the divorce statute in question.

of dicta, however, that divorce jurisdiction must be based on domicile.[32]

Closely related to the jurisdiction issue is the question of when a dissolution decree is entitled to recognition under the full faith and credit clause.[33] Recognition of a dissolution decree outside the forum state most commonly becomes an issue when one spouse departs the marital domicile, establishes a domicile in another state, and then obtains a divorce in an ex parte proceeding.[34] The leading cases on the validity of such a decree for recognition purposes are the two decisions of *Williams v. North Carolina*.[35] In *Williams I* the Court held

32. *See, e.g.*, Williams v. North Carolina, 325 U.S. 226, 229 (1945) (Frankfurter, J.) ("Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil."). This oft-quoted dictum was repeated with approval by Justice Rehnquist, also by way of dicta, in Sosna v. Iowa, 419 U.S. 393, 407 (1975).

33. U.S. CONST. art. IV, § 1, provides as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Congressional action pursuant to this provision is codified at 28 U.S.C. § 1738 (1970).

34. *See* Comment, *Divorce Ex Parte Style*, 33 U. CHI. L. REV. 837, 837 (1966). In his dissenting opinion in Williams v. North Carolina, 317 U.S. 287 (1942), Justice Jackson noted that in an ex parte divorce "settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill." *Id.* at 316 (footnote omitted).

35. Williams v. North Carolina, 317 U.S. 287 (1942) [hereinafter cited as *Williams I*]; Williams v. North Carolina, 325 U.S. 226 (1945) [hereinafter cited as *Williams II*]. The *Williams* decisions are based on the following chain of events: After residing in North Carolina for several years with their respective spouses, Mr. Williams and Mrs. Hendrix departed together for Las Vegas, Nevada. They spent six weeks in the Alamo Auto Court, thus satisfying Nevada's pre-filing residency requirement, and then each filed for divorce in the Nevada courts. The divorce decrees were issued in ex parte proceedings; the absent spouses were served by registered mail and publication, but neither entered an appearance. The two were married in Nevada on the day that the latter of the two divorces was granted, and they immediately departed for North Carolina. Upon their return they were charged and convicted of bigamous cohabitation. The Supreme Court of North Carolina affirmed the convictions, and the issue on certiorari to the Supreme Court was whether the convictions were invalid for failure to give full faith and credit to the Nevada divorce decrees. In *Williams I* the Court reversed and remanded, holding that the divorce decrees were entitled to recognition in North Carolina insofar as they were based on the domicile of the divorce-seeking parties. Justice Douglas, writing for the majority, took pains to point out that there was "no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit in another state." 317 U.S. at 302.

On remand the North Carolina court once again convicted, but specifically based its judgment on a finding that at the time the divorce decrees were issued the defendants had not acquired bona fide domicile in Nevada. These convictions were upheld in *Williams II*, with the majority (per Justice Frankfurter) ruling that the North Carolina courts were not foreclosed from reexamining the jurisdictional basis of the Nevada

that any dissolution decree issued where jurisdiction was based on the domicile of the petitioning party is entitled to recognition under the full faith and credit clause.[36] This rule was qualified by the decision in *Williams II,* where the Court held that the judgment need not be recognized if the attacking party can successfully disprove the jurisdictional fact of domicile.[37] In subsequent decisions, however, the Court held that this possibility of collateral attack may be lost under the doctrine of res judicata if the attacking party participated in the original proceedings.[38] The courts have also invoked various theories of

---

decrees: "Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record." 325 U.S. at 234.

36. *Williams I* expressly overruled Haddock v. Haddock, 201 U.S. 562 (1906) (ex parte decree issued by plaintiff's state of domicile not entitled to recognition where divorcing state was not the matrimonial domicile). The Court rejected matrimonial domicile as a troublesome concept requiring the court to determine which party was at fault and often resulting in decrees not entitled to recognition. 317 U.S. at 300–01.

37. The divorcing state's determination of domicile is entitled to a presumption of validity, however, and the attacking party bears the burden of disproving the previous jurisdictional finding. *See* Cook v. Cook, 342 U.S. 126, 128 (1951).

The Supreme Court has not ruled on the question of whether a divorce decree subsequently refused recognition still has validity in the rendering state. In Colby v. Colby, 78 Nev. 150, 369 P.2d 1019, *cert. denied,* 371 U.S. 888 (1962), the Nevada court refused to vacate a Nevada ex parte divorce decree that had been held void in a Maryland separation suit, even though Maryland had personal jurisdiction over both parties.

In Sutton v. Leib, 188 F.2d 766 (7th Cir. 1951), the court of appeals decided such a decree was still valid in the rendering state, citing dicta in various Supreme Court decisions. *Id.* at 768. The Supreme Court reversed this decision on other grounds, 342 U.S. 402 (1952), but expressly rejected the court of appeals' conclusion on the internal validity question. *Id.* at 409. *See also* Rodgers & Rodgers, *The Disparity Between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife,* 67 COLUM. L. REV. 1363, 1364 (1967) (concluding that decree refused recognition may still be valid in rendering state). *But see* Rheinstein, *supra* note 30, at 817–24; Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes,* 9 VAND. L. REV. 1, 14 (1955).

38. Sherrer v. Sherrer, 334 U.S. 343 (1948) (husband could not collaterally attack Florida decree where he had participated in the proceedings but failed to contest jurisdictional fact of domicile of wife in Florida). In Coe v. Coe, 334 U.S. 378 (1948), a companion case to *Sherrer,* the Court held that the issue of jurisdiction is also res judicata where the defendant concedes the jurisdiction of the court.

In Johnson v. Muelberger, 340 U.S. 581 (1951), the Court held that collateral attack by third parties is also barred if such attack is barred by the law of the divorcing state. In *Johnson* an attack by a child of one of the parties to the divorce was held to be barred, on the ground that the law of the divorcing state would not allow such an attack. And, in Cook v. Cook, 342 U.S. 126 (1951), the jurisdictional issue was held to be res judicata as to a subsequent spouse of one of the parties, once again on the basis of the law of the divorcing state.

In *In re* Englund's Estate, 45 Wn. 2d 708, 277 P.2d 717 (1954), the Washington Supreme Court ruled that a stranger to the divorce decree cannot collaterally attack its validity unless the decree "affected some right or interest which he had acquired prior to its rendition." *Id.* at 715, 277 P.2d at 721. In many other states third parties are allowed to attack the decree, regardless of when their interests accrued. *See, e.g.,* Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E.2d 135 (1949). For a compilation

estoppel to prevent collateral attack.[39]

In the *Williams* decisions the necessity of conditioning recognition upon domicile was explained in terms of policy rather than doctrine. Rejecting the in rem classification of divorce actions,[40] the *Williams I* Court defended the domicile requirement as necessary in light of the "rightful and legitimate concern" of each state, as a sovereign, for the marital status of persons domiciled within its borders.[41] Noting that the institution of marriage touches "basic interests of society,"[42] the Court in *Williams II* explained that "[d]omicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."[43]

---

of cases involving issues of collateral attack not yet decided by the Supreme Court, see C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 1047–48 (2d ed. 1976).

It is important to note that the *Sherrer* principle applies only to collateral attack upon the termination of the marital status. Ancillary matters, such as custody, alimony, and support, cannot be conclusively settled by a court unless it has personal jurisdiction over both of the parties. *See* note 27 *supra*.

39. The Supreme Court held in Johnson v. Muelberger, 340 U.S. 581 (1951), that under the full faith and credit clause the law of the divorcing state must be used to determine whether collateral attack on the decree will be allowed. Regarding the question of estoppel, however, the forum state is free to apply its own law, usually without regard to the law of the state that issued the divorce decree. For an extensive discussion of the various theories of estoppel to attack divorce decrees applied in American jurisdictions, see H. CLARK, *supra* note 14, § 11.3.

Two Washington cases should be noted. In Wampler v. Wampler, 25 Wn. 2d 258, 170 P.2d 316 (1946), the court held that a party who procures a divorce decree in another state is not estopped to assert its invalidity in a subsequent action to adjudicate the sole issue of marital status. But in *In re* Tamke's Estate, 32 Wn. 2d 927, 204 P.2d 526 (1949), the court held that the rule in *Wampler* does not apply when the party is asserting the invalidity of the decree in order to gain a "private right"—there, the right of a woman to administer the estate of a man from whom she had gained a Nevada divorce.

For a discussion of the application of equitable estoppel principles to the question of the continuing validity of a decree refused recognition, see Rosenberg, *How Void Is a Void Decree, or The Estoppel Effect of Invalid Divorce Decrees*, 8 FAM. L.Q. 207 (1974).

40. 317 U.S. at 297.

41. *Id.* at 298. *See also* Rieke, *supra* note 14, at 379 ("The question is not whether the public has *an* interest in marriage contracts but whether 'the state is a third party whose interests take precedence over the private interests of the spouses.' ") (Quoting Posner v. Posner, 233 So. 2d 381, 383 (Fla. 1970)).

42. 325 U.S. at 230.

43. *Id.* at 229. With recognition hinging upon domicile under the *Williams* decisions, many commentators have concluded that the requirements of due process and full faith and credit are coextensive in dissolution actions. *See* Rodgers & Rodgers, *supra* note 37, at 1370 & n.56 (listing "distinguished authorities [who] have expressed the view that the jurisdictional criteria relevant to the two great clauses are identical"). Professors von Mehren and Trautman state:

> Jurisdiction to adjudicate and recognition of foreign judgments are not merely different ways of formulating a single problem; they are separate, though inter-

B. Other Bases for Dissolution Jurisdiction

There are recognized exceptions to the domicile requirement. Arkansas statutes require only a showing of residency, defined as physical presence in the state for a minimum of three months.[44] The Arkansas Supreme Court has upheld the statute,[45] but in some cases the courts of other states have refused to recognize Arkansas dissolution decrees.[46]

Several states have enacted statutes granting access to the divorce courts to members of the armed forces stationed in the state for a prescribed length of time, with no requirement of any showing of domicile.[47] State courts have upheld these statutes,[48] and there are no re-

---

related, questions. In the United States the two issues have tended to coalesce because the full faith and credit clause of the federal constitution is taken to require jurisdiction in the rendering state court as a prerequisite to compulsory recognition in other states.

von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1126 (1966).

44. ARK. STAT. ANN. §§ 34–1208 to 1208.1 (1962). But in Graham v. Graham, 254 Ark. 646, 495 S.W.2d 144 (1973), the Arkansas Supreme Court held that the petitioning spouse had not satisfied the statutory requirement of residence upon a showing that he had lived in a motel room in Arkansas, maintained a Louisiana mailing address, and had visited Louisiana several times during his alleged period of residence. *See also* note 20 *supra.*

45. Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793 (1958) (reversing lower court ruling that the statute was unconstitutional). In the course of its discussion the Arkansas court expressly rejected the notion that due process requires domicile to be the sole basis for the exercise of divorce jurisdiction. 318 S.W.2d at 797. As to the question of full faith and credit, the court conceded that under *Williams I* a decree issued on a basis other than domicile might be refused recognition in other states, but argued that the full faith and credit clause did not affect the internal validity of the decree. *Id.* at 796. *See also* 58 MICH. L. REV. 128 (1959); 12 VAND. L. REV. 924 (1959).

46. *See* Ford v. Ford, 286 So. 2d 385 (La. App. 1973) (Arkansas decree not entitled to recognition where petitioner lived in hotel in Arkansas but commuted to work in Louisiana each day); Winters v. Winters, 111 So. 2d 418 (Miss. 1959) (Arkansas decree not entitled to recognition where petitioner returned to Mississippi immediately upon receiving decree). *But see* Reeves v. Reeves, 209 So. 2d 554 (La. App. 1968) (husband could not collaterally attack Arkansas divorce decree where he had filed an appearance in the Arkansas proceeding).

47. *See, e.g.,* ARIZ. REV. STAT. ANN. § 25–312 (1976); NEB. REV. STAT. § 42–349 (1974); N.M. STAT. ANN. § 22–7–4 (Supp. 1975); TEX. FAM. CODE ANN. tit. 1, § 3.23 (Vernon 1975). These statutes are based upon an apparent recognition of the difficulties service members often encounter when seeking to establish, change, or prove their place of domicile. *See* Lauterbach v. Lauterbach, 392 P.2d 24, 26 (Alas. 1964); W. REESE & M. ROSENBERG, *supra* note 20, at 43–44; 28 WASH. L. REV. 161 (1953).

Another rationale was stated as follows by the Texas Supreme Court in Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807, 811 (1959):

> The State of Texas is hardly less concerned with the domestic relations of persons required to live in this state indefinitely under military orders, oftentimes for a period of years, with the protection and support of their children and their property interests, and the adjustment of their marital responsibilities at stake than it is

ported cases involving nonrecognition of decrees issued to service members under these statutes.

The *Restatement (Second) of Conflict of Laws* states: "A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses, neither of whom is domiciled in the state, if either spouse has such a relationship to the state as would make it reasonable for the state to dissolve the marriage."[49] The *Restatement* further provides that "few definite statements can be made as to what relationships with a state, other than domicile, will suffice," but residence by one of the spouses in a state for a "substantial period, such as a year," is suggested as an adequate jurisdictional basis.[50]

For several years legal scholars have favored the proposition that domicile of one of the parties is not an absolute prerequisite to divorce jurisdiction.[51] Noting the difficulties inherent in the domicile concept,[52] the commentators have suggested various alternative juris-

---

with the similar problems of those who have acquired a domicil here in the orthodox sense. In many cases, if not in the majority, the courts of this state only can deal adequately with these problems and afford appropriate relief.

See also Lauterbach v. Lauterbach, 392 P.2d at 26.

48. Lauterbach v. Lauterbach, 392 P.2d 24 (Alas. 1964); Craig v. Craig, 143 Kan. 624, 56 P.2d 464 (1936); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958); Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807 (1959). Each of these cases held that divorce jurisdiction could be based upon the satisfaction of a statutory requirement of one year of *continuous* stationing in the state by a nondomiciliary member of the armed services.

49. § 72 (1971).

50. *Id.*, Comment b.

51. *See, e.g.*, Leflar, *Conflict of Laws and Family Law*, 14 ARK. L. REV. 47 (1959–60); Stimson, *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory*, 42 A.B.A.J. 222 (1956); Sumner, *supra* note 37, at 12–19.

52. Perhaps the most effective criticism of the domicile requirement was presented by Judge Hastie, dissenting in Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 965 (1954), where he argued that domicile is a "highly technical concept depending upon the proof of the mental attitude of a person toward a place." *Id.* at 682–83. He further stated that the use of domicile as the exclusive basis for divorce jurisdiction rested upon the presumption of "a stable and intimate attachment of both spouses to a single community which in fact and alone has a genuine interest in their relationship." *Id.* at 682. He disputed the validity of this presumption in our "increasingly mobile" society, wherein "community attachments [are] less intimate and less lasting than heretofore." *Id.*

Judge Hastie further pointed out that quite often spouses establish separate domiciles after estrangement. Noting that under *Williams I* a state may properly base divorce jurisdiction upon the domicile of one of the parties, he argued that the divided domicile concept allows the divorcing state to completely ignore the domestic policy of the other state, as well as the interest of the absent spouse. *Id.* at 683. Arguing that the domicile concept "exaggerates the theoretical interest of the technical domicil of the plaintiff" at the expense of the absent spouse, Judge Hastie concluded that the concept had become a "potential source of injustice." *Id.* at 683.

Another common criticism of the domicile requirement is that it encourages per-

dictional bases, including the place where the marriage was pronounced,[53] personal jurisdiction over the parties,[54] and the previously mentioned residency and military station grounds.[55]

II. THE DECISION IN *WAYS*

The first step in the majority's reasoning in *Ways* was to reject the notion that domicile of one of the parties is an absolute prerequisite for dissolution jurisdiction.[56] The court reasoned that domicile implies a relationship between person and place, termed this relation the jurisdictional nexus,[57] and concluded that a sufficient nexus is also assured under the *Restatement* test,[58] *i.e.*, "either spouse has such a relation to the state as would make it reasonable for the state to dissolve the marriage."[59]

The court's decision to accept a jurisdictional nexus other than domicile was clearly justified. The doctrinal arguments previously advanced in support of the domicile requirement have been discredited by the courts and commentators.[60] Furthermore, it has been shown that in many cases the domicile requirement defeats the very policy interests that the concept is said to protect.[61] The need for al-

jury on the question of intent to remain permanently in the forum state. *See* Granville-Smith v. Granville-Smith, 349 U.S. 1, 27–28 (1955) (Clark, J., dissenting). *See also* Currie, *supra* note 27, at 26.

53. New York law previously authorized divorce jurisdiction on this basis. For a defense of this approach, see David-Zieseness v. Zieseness, 205 Misc. 836, 129 N.Y.S.2d 649 (1954) (state statute giving courts jurisdiction to dissolve marriage where parties were married within state is constitutional). *See also* Sumner, *supra* note 37, at 21.

54. *See* Sumner, *supra* note 37, at 16 (suggesting that physical presence of parties can be combined with new choice of law rule as alternative basis for jurisdiction). *See also* Currie, *supra* note 27, at 48; notes 92–105 *infra*.

But see Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948) (personal jurisdiction over parties not constitutionally permissible basis for divorce jurisdiction, unless one party was domiciled in state). *See also* Andrews v. Andrews, 188 U.S. 14 (1903) (decree issued by court having personal jurisdiction over both parties not entitled to recognition where neither spouse was domiciled in divorcing state).

55. *See* notes 44–48 and accompanying text *supra*.

56. 85 Wn. 2d at 698–99, 538 P.2d at 1228.

57. *Id.* at 699, 538 P.2d at 1229.

58. *Id.*

59. *See* note 49 and accompanying text *supra*.

60. *See* notes 21–25, 30, 44–55 and accompanying text *supra*.

61. *See* notes 40–43 and accompanying text *supra*. Justice Rutledge, dissenting in *Williams II*, noted that there are strong arguments favoring a restriction of divorce actions to states having a substantial relation to the marriage, but equally strong arguments favoring transient actions for individuals seeking the benefit of "liberal" divorce policies. He concluded that the domicile requirement, as presently applied, compromised both of these interests. 325 U.S. at 256–57.

ternative jurisdictional bases is also supported by the discriminatory effect of the domicile requirement upon members of the armed forces stationed outside their state of domicile.[62]

The majority next turned to the Washington statute, interpreting it to contain a ninety-day post-filing stationing requirement. The majority adopted this strained, if not unjustified, construction of R.C.W. § 26.09.030[63] on the premise that, as interpreted, the statute would

62. *See* note 47 *supra*.

It may be significant that R.C.W. § 26.09.030 requires only that the service member be "stationed" in Washington. Military stationing orders are designated as either temporary (TDY) or permanent (PCS). A permanent change of station may be of uncertain duration, and as a general rule PCS orders authorize dependents and personal belongings to be moved at government expense. Temporary duty, on the other hand, may be assigned only up to a maximum of 180 days, and TDY orders generally do not authorize the movement of dependents or personal belongings. Interview with Chief Petty Officer Carstensen, Military Pay Supervisor, HQ 13th Naval District, in Seattle, Washington (Feb. 7, 1977).

A service member on TDY orders to a Washington station will establish only a slight nexus with this state. Presently, however, it is possible for a member of the armed forces to petition for dissolution of marriage on his or her day of arrival in this state and be entitled to a decree if the temporary duty extends for 90 days after the date of filing. Such a result does not seem to accord with the principle of limiting dissolution actions to those persons having a "reasonable relation" to the state.

63. The majority in *Ways* asserted that R.C.W. § 26.09.030 was "somewhat ambiguous." 85 Wn. 2d at 701, 538 P.2d at 1230. Justice Brachtenbach, writing for the four dissenting justices, stated: "Contrary to the majority opinion, I find nothing ambiguous in the statute." *Id.* at 704, 538 P.2d at 1231. On the face of the statute, *see* note 3 *supra*, it would appear that the dissent is correct. Clearly the service member must be stationed in Washington when filing the petition, but beyond this requirement the statute does not in any way qualify the procedures following the filing of the petition. The statute does not mention any sort of continuing requirement of either stationing or physical presence.

The majority further stated that the statute "appears to be an adaptation of section 302(a)(1) of the Uniform Marriage and Divorce Act." 85 Wn. 2d at 701, 538 P.2d at 1230. Section 302 of the 1970 version of that Act (current when the Dissolution Act of 1973 was drafted) differs from R.C.W. § 26.09.030 in that it explicitly states that the court must find that "one of the parties has been a resident of this state, or is a member of the armed services who has been stationed in this state, for 90 days next preceding the commencement of the proceeding or the entry of the decree." The Uniform Act is also distinguishable in that it applies the 90-day requirement to residents as well as to service members stationed in the state. UNIFORM MARRIAGE AND DIVORCE ACT § 302(a)(1) (1970 version).

It is submitted that the Uniform Act does not decisively indicate legislative intent. If the drafters of the Washington statute were referring to section 302, one must assume that they deliberately changed the language to avoid the 90-day stationing requirement. Moreover, R.C.W. § 26.09.030 is substantially different from section 302 in scope; for instance, the Washington statute makes provision for transfer of the cause to the family court, or for counseling at the request of one of the parties or at the court's direction. Section 302 of the Uniform Act contains no similar provisions. These fundamental differences between the two acts indicate that the Uniform Act was used as a reference rather than a guide.

In defense of the court, it should be noted that the Dissolution Act contains no severance clause. Thus, the court was faced with the choice of either invalidating the entire statute or adopting a construction that required what the majority believed to

require an adequate jurisdictional nexus.[64] The court supported this premise by referring to the pre-filing residency requirements commonly employed in state dissolution statutes,[65] and the ninety-day period specified in the Uniform Marriage and Divorce Act.[66] What the court did not adequately discuss, however, was how or why ninety days' presence in the state satisfied the newly adopted "reasonable relation" test. Certainly there are factors other than the length of one's residence that are at least equally relevant when evaluating the relation between a state and one seeking dissolution of a marriage. Obvious candidates for consideration include the location of the petitioner's property, children, and creditors.

The majority also failed to explain adequately why the ninety-day jurisdictional nexus would avoid the problem of nonrecognition in the courts of other states. No case authority was cited, and the *Williams* decisions,[67] as well as recent Supreme Court dicta,[68] suggest that divorce jurisdiction must be based on domicile in order to be assured recognition under the full faith and credit clause.[69] Additionally, the

---

be an adequate jurisdictional nexus.

The 1974 version of section 302 of the Uniform Act (drafted subsequent to the drafting of the Washington Dissolution Act of 1973) reads in relevant part as follows:

> (a) The . . . court shall enter a decree of dissolution of marriage if:
>
> (1) the court finds that one of the parties, at the time the action was commenced, was domiciled in this State, or was stationed in this State while a member of the armed services, and that the domicil or military presence has been maintained for 90 days next preceding the making of the findings . . . .

UNIFORM MARRIAGE AND DIVORCE ACT § 302(a)(1) (1974 version), *reprinted in* M. PAULSEN & W. WADLINGTON, STATUTORY MATERIALS ON FAMILY LAW 13 (2d ed. 1974). This version differs from the 1970 Act in that the 90-day period must be satisfied after filing the petition, thus eliminating the option available under the previous draft.

The court in *Ways* rejected the notion that R.C.W. § 26.09.030 contained a 90-day continuous physical presence requirement that could be used as a nexus for jurisdiction. 85 Wn. 2d at 701 n.2, 538 P.2d at 1230 n.2. *But see* WASH. REV. CODE § 26.09.150 (1976) (no sooner than six months after entry of a decree of legal separation, upon motion of either party, the superior court *shall* convert the separation decree to a decree of dissolution of marriage).

64. 85 Wn. 2d at 700–02, 538 P.2d at 1230–31.

65. *Id.* at 699, 538 P.2d at 1229. *See also* note 47 *supra*. It should be noted that, when employed in connection with a requirement of domicile, a pre-filing residency requirement may be interpreted to be nonjurisdictional. *See* Sosna v. Iowa, 419 U.S. 393, 418 (1975) (Marshall, J., dissenting); Hammond v. Hammond, 45 Wn. 2d 855, 278 P.2d 387 (1954) (interpreting Idaho law). *See also* H. CLARK, *supra* note 14, § 11.2, at 285 n.1; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 70, Comment d (1971).

The constitutionality of a one-year pre-filing residency requirement was upheld in Sosna v. Iowa, 419 U.S. 393 (1975).

66. *See* note 63 *supra*.

67. *See* notes 35–37 and accompanying text *supra*.

68. *See* note 32 *supra*.

69. The recognition issue has been approached cautiously in the other decisions

court did not discuss the underlying motive for nonrecognitior interest of another state in applying its own social policy to the . riage. Such an interest would appear to be a distinct possibility unde. a law requiring no contact between the state and the marriage beyond the petitioner's presence for ninety days.

The shallow analysis presented under the reasonable relation test appears to be a result of previous judicial experience with the domicile requirement. Both jurisdiction and recognition have hinged upon this single determination without consideration of other underlying factors.[70] Furthermore, under the divided domicile concept[71] the courts have been plaintiff-oriented, restricting their analysis of the jurisdictional nexus to the relation of one party, usually the petitioner, to the state.[72] It is undoubtedly true that in the ordinary dissolution action, with both spouses domiciled in the forum state, there is no real need to investigate further the relation of the parties to the state. But when the forum state is the domicile of only one of the spouses, or when jurisdiction is based on a nondomiciliary standard such as ninety days' presence in the state, there is no longer any assurance that the "reasonable relation" will in fact exist.

The *Ways* proceedings present an excellent example of the undesirable results that may be achieved under R.C.W. § 26.09.030. If the petitioner had remained stationed in Washington an additional twenty-six days, the statutory requirements would have been met, thus giving a Washington superior court jurisdiction to dissolve the marriage. Under prevailing judicial policy Washington law would have been

upholding statutes with nondomiciliary bases for divorce jurisdiction. In Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020, 1023–24 (1958), the New Mexico court appeared to rely on the fact that the defendant had appeared, thus protecting the decree from collateral attack by the defendant under the rule of Sherrer v. Sherrer, 334 U.S. 343 (1948). In Lauterbach v. Lauterbach, 392 P.2d 24 (Alas. 1964), the Alaska court did not discuss the recognition issue. In Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807, 810–11 (1959), the Texas court distinguished the *Williams* decisions by noting that the rendering state's (Nevada's) statute also required domicile. The Texas court also expressed confidence that decrees issued under the statute would be entitled to recognition on the grounds that one year of continuous military presence implied a relation or nexus that was the equivalent of domicile. 320 S.W.2d at 811.

It may be significant that a statutory requirement of one year of continuous stationing insures that the armed forces member is on permanent duty in the state. *See* note 62 *supra*. On the other hand, a service member may be on temporary orders for more than 90 days and can therefore meet the Washington statutory requirement.

70. *See* note 52 *supra*.
71. *See* note 25 *supra*.
72. *See* note 52 *supra*.

applied[73] without any further consideration of the state's connection with the parties or interest in the matter to be resolved. Such a proceeding would be difficult to defend when one considers that the parties had never lived in Washington as husband and wife, that in fact Mrs. Ways was living in Virginia with the couple's children, and that the only conceivable interest of Washington in the marriage would have been based upon the petitioner's ninety-day presence under military orders.

Opposing this argument is the fundamental problem at hand, that is, the inability of service members to obtain a dissolution of marriage when stationed outside their state of domicile. In the following part, a proposed solution to this problem, emphasizing the use of choice of law concepts in dissolution proceedings, will be discussed.

III. A SUGGESTED APPROACH TO DISSOLUTION JURISDICTION

The following analysis is an attempt to better accommodate the legal doctrines and policy considerations that underlie dissolution jurisdiction. This analytical model is based on the premise that the present judicial approach to dissolution jurisdiction, typified by the *Ways* decision, fails to separate the issues of due process, full faith and credit, and choice of law.[74] Accordingly, each of these issues will be considered separately. Finally, the model will be applied to the *Ways* fact situation, with the result compared to that achieved by the court in *Ways*.

73. *See* notes 92–105 and accompanying text *infra*.

74. In his dissent in Alton v. Alton, 207 F.2d 667, *vacated as moot*, 347 U.S. 965 (1954), Judge Hastie stated:

> The due process question in divorce jurisdiction which we have to decide is whether it is fair for a state and its courts to adjudicate the merits of a petition for the dissolution of a particular marriage. The problem of the full faith and credit cases is to what extent a second state must subordinate its notions of policy about a marital matter in which it wants to have a voice to what a sister state has already decided.

Id. at 684. Judge Hastie further suggested that the domicile rule has led to a failure on the part of the courts to recognize that jurisdiction and choice of law are distinct problems. *Id.* at 685. The suggested approach presented here is based on Judge Hastie's analysis. Many others, however, have discussed the adoption of an approach to dissolution jurisdiction roughly paralleling that presented here. *See, e.g.*, Seidelson, *Interest Analysis and Divorce Actions*, 21 BUFF. L. REV. 315 (1972); Sumner, *supra* note 37; von Mehren and Trautman, *supra* note 43; *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 966–76 (1960); 58 MICH. L. REV. 128 (1959).

A. Due Process and Convenience of the Forum

As previously explained, a variety of factors have led the courts and commentators to view jurisdiction to dissolve a marriage as sui generis.[75] Dissolution of marriage has not been defined as an in personam action,[76] and consequently many of the due process considerations that have developed in conventional in personam jurisdiction

75. *See* notes 17–28 and accompanying text *supra*.

The *Restatement (Second) of Conflict of Laws* (1971) discusses judicial jurisdiction under three general topics: jurisdiction over persons (§§ 24–55), jurisdiction over things (§§ 56–68), and jurisdiction over status (§§ 69–79). Jurisdiction over status is in turn divided into titles covering jurisdiction for divorce, jurisdiction to entertain other marital suits, jurisdiction for adoption, and jurisdiction over custody. Other than the requirement of notice and opportunity to be heard, the *Restatement* presents no general rules covering jurisdiction over status. This absence of broad doctrinal statements reflects the fact that the state courts have developed a separate jurisdictional analysis for each of the various actions affecting status. The evolution of these distinct jurisdictional rules can be directly related to the unique policy considerations associated with each of these adjudications of status.

76. The need to protect the interest of the state in the marital relations of its domiciliaries is most often cited as the reason for not treating divorce as an in personam action. *See* notes 40–43 and accompanying text *supra*. A central inquiry here is the extent to which the present approach to divorce jurisdiction serves to frustrate rather than to protect this interest. *See* notes 86–89 and accompanying text *infra*.

Professor Ehrenzweig has pointed out that treating dissolution of marriage as an ordinary in personam action "could, on the one hand, trap a defendant on a pleasure or business trip in a state with a hospitable divorce law; and, on the other hand, force the plaintiff to hunt his opponent all through the country to serve him with process." A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 237 (1962). The first of these objections would be met with the application of choice of law principles. *See* notes 92–105 *infra*. As for the service of process problem, an increasing number of states are amending their long-arm statutes to include coverage of domestic relations issues. *See* Hines v. Clendenning, 465 P.2d 460 (Okla. 1970); Mitchim v. Mitchim, 518 S.W.2d 362 (Tex. 1975); Comment, *State Court Jurisdiction: The Long-Arm Reaches Domestic Relations Cases*, 6 TEX. TECH. L. REV. 1021 (1975); Note, *Long Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289 (1973). *Cf. In re* Miller, 86 Wn. 2d 712, 548 P.2d 542 (1976); *In re* Marriage of Dunkley, 15 Wn. App. 775, 551 P.2d 1394 (1976).

As part of the recently enacted Uniform Parentage Act of 1976, the Washington long-arm statute was amended to include "the act of sexual intercourse within this state with respect to which a child may have been conceived" as the basis for the assertion of personal jurisdiction over a nonresident party. Ch. 42, § 22, 1975–76 Wash. Laws 2d Ex. Sess. 176 (codified at WASH. REV. CODE § 4.28.185(e) (1976)).

The Washington legislature is currently considering legislation proposing that the state's long-arm statute, WASH. REV. CODE § 4.28.185 (1976), be amended to include the following additional ground for exercising personal jurisdiction over a nonresident:

> (e) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

S.B. 2291, 45th Wash. Legis. (1977) (identical proposals in H.B. 180 and H.B. 410). This proposed amendment was drafted by and introduced at the request of the Washington Judicial Council. Interview with Karl Tegland, Staff Attorney, Washington Judicial Council, in Seattle, Washington (Feb. 10, 1977).

have not been applied to divorce actions.[77] Similarly, the doctrine of forum non conveniens has not been considered when a court decides whether to hear a dissolution action. Nonetheless, the due process concept of fundamental fairness and the doctrine of forum non conveniens seem especially relevant to the divorce jurisdiction question.

First, the considerations of fundamental fairness demanded by due process would require a court to consider the position of the respondent spouse.[78] Under the prevailing analytical approach the courts are completely petitioner-oriented, there being no requirement that the court consider the relation of the nonpetitioning spouse to the forum state.[79] This approach tends to deny the equal interest of the respondent spouse in the matter to be adjudicated, *i.e.*, the continuation or

77. *See* Leflar, *supra* note 51, at 50; Rodgers & Rodgers, *supra* note 37, at 1364, 1390; von Mehren & Trautman, *supra* note 43, at 1129–33; *Developments in the Law—State-Court Jurisdiction, supra* note 74, at 971.

Service of process by publication is authorized in divorce cases under the terms of WASH. REV. CODE § 4.28.100(4) (1976). *See also id.* § 26.09.010(1); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 69 (1971).

78. The leading Supreme Court decisions on judicial jurisdiction are Pennoyer v. Neff, 95 U.S. 714 (1877); International Shoe Co. v. Washington, 326 U.S. 310 (1945); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); and Hanson v. Denckla, 357 U.S. 235 (1958). Analyzing these decisions and their application to the state's long-arm statute, the Washington Supreme Court announced the following three factors that must coincide if jurisdiction is to be entertained:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wn. 2d 106, 115–16, 381 P.2d 245, 251 (1963). *See* Trautman, *Long-Arm and Quasi in Rem Jurisdiction in Washington,* 51 WASH. L. REV. 1 (1975).

Further support for the application of these due process concepts to dissolution actions may lie in the Washington Supreme Court's decision in Ace Novelty Co. v. M. W. Kasch Co., 82 Wn. 2d 145, 508 P.2d 1365 (1973). In deciding whether the exercise of quasi in rem jurisdiction was appropriate, the court applied the due process standards established for in personam jurisdiction. As Professor Trautman notes, "[c]ertainly one reading of the opinion is that if a defendant is not subject to in personam jurisdiction, as through the long-arm statute, he may not be reached through a quasi in rem analysis." Trautman, *supra* at 30. This analysis of the *Ace Novelty* decision supports the general proposition that the due process standards established for in personam actions may be more broadly applied to the spectrum of judicial actions.

79. It should be remembered that personal jurisdiction over both spouses is required to settle ancillary matters such as child custody, support, and property rights. *See* note 27 *supra*. *But see* Simons v. Miami Beach First Nat'l Bank, 381 U.S. 81 (1965) (dower right extinguished by ex parte divorce decree).

termination of the parties' marital status.[80]

Second, the doctrine of forum non conveniens, as applied in in personam actions, requires a court to consider the convenience of the forum to all the parties.[81] Once again the present practice in dissolution actions is not to look beyond the petitioner, disregarding the equal interest of the respondent spouse. This often presents the nonpetitioning spouse with what has been termed "the unpalatable option either of appearing in the action to contest the merits, very likely at great expense and inconvenience, or of suffering an uncontested default judgment destroying completely the marital relation."[82] Furthermore, this failure to consider the convenience of the forum is inconsistent with the public policy favoring the preservation of marriages.[83] It seems anomalous to provide for counseling and other marriage-saving procedures without also providing for some inquiry into whether the respondent will be able to participate.

The fundamental question here is whether a forum should be supplied to determine the viability of our most basic social institution. Given the repercussions of such a determination, the courts should consider the relation of the forum state to both parties. Any time the forum state is not the domicile of both spouses, the court should fur-

80. Some commentators have argued that the absent spouse does not have a protectable interest in the proceeding, on the premise that termination of the marital status does not deprive one of a viable right. *See* Comment, *Divorce Ex Parte Style,* 33 U. CHI. L. REV. 837, 840 (1966). Professor Currie argues that society cannot force people to live together and that an ex parte decree terminates a marriage that exists in name only. Currie, *supra* note 27, at 29. The first argument seems to overlook the effect of status termination on such rights as that of inheritance; and the latter might be answered by arguing that whether the marriage is viable is best determined by a procedure that affords a reasonable opportunity for participation by both spouses.

81. After tacit recognition of the doctrine in Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wn. 2d 106, 381 P.2d 245 (1963), the Washington Supreme Court expressly embraced the doctrine of forum non conveniens in Werner v. Werner, 84 Wn. 2d 360, 526 P.2d 370 (1974). The court stated:

> The doctrine of forum non conveniens contemplates the discretionary declination of jurisdiction where, in the court's view, the difficulties of litigation militate for the dismissal of the action subject to a stipulation that the defendant submit to jurisdiction in a more convenient forum.

Id. at 370, 526 P.2d at 377–78. *See also* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 154–60 (1971); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971).

82. *Developments in the Law—State-Court Jurisdiction, supra* note 74, at 973.

83. *See* WASH. REV. CODE § 26.09.030(3)(b) (1976) (Dissolution Act provisions authorizing transfer of dissolution actions to family court or referral to counseling service); *id.* ch. 26.12 (Family Court Act). Family court jurisdiction may be invoked "for the purpose of preserving the marriage by effecting a reconciliation between the parties or for amicable settlement of the controversy between the spouses so as to avoid further litigation over the issue involved." *Id.* § 26.12.100.

ther inquire into the *actual* existence of the relation between person and place upon which jurisdiction must be based.[84] Whatever connection is found to exist must be weighed against any evidence of probable unfairness or inconvenience. The result of this balancing process should be a decision on whether to supply a forum that more nearly meets the requirements of due process.[85]

B. Recognition

As previously noted, the domicile requirement has been defended on the ground that it serves to protect the interest of each state in the marital status of its domiciliaries.[86] Under the *Williams* decisions the full faith and credit clause requires recognition to be given when jurisdiction is based on the domicile of one of the parties.[87] This rule, plus the failure to consider choice of law in divorce actions,[88] results in a proceeding that completely ignores the interest that any jurisdiction other than the forum state may have in the proceeding.[89]

Fundamental here is the relation of the forum state to the controversy at hand.[90] The prevailing approach is to define this relation in only one way—the domicile of one party, or in the case of R.C.W. § 26.09.030, the presence of an armed forces member in the state for ninety days. This is often an inadequate measure of the actual interests at stake, especially when children, property, and the nonpetitioning spouse may well be located outside the forum state.

84. The American Law Institute states:

> A distinction may ultimately be drawn between situations where both spouses are subject to the personal jurisdiction of the divorce court and where there is jurisdiction over only one spouse. One or more jurisdictional bases may be found adequate for the granting of a divorce in the first situation and inadequate in the second.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 72, Comment b (1971). This statement appears to take into consideration the suggested balancing approach.

85. This conclusion is based in part on the assumption that a court utilizing this due process analysis will also take into consideration choice of law issues. *See* notes 92–105 and accompanying text *infra*. The due process decision, *i.e.*, whether supplying a forum meets the tests of fairness and convenience, must be separated from the choice of law decision. The latter determination, involving the choice of which social policy to apply to the matter, must be based on contacts more significant than those required to supply a forum. *See* Rodgers & Rodgers, *supra* note 37, at 1390–92; Seidelson, *supra* note 74, at 319.

86. *See* notes 41–43 and accompanying text *supra*.

87. *See* notes 35–37 and accompanying text *supra*.

88. *See* notes 92–105 and accompanying text *infra*.

89. *See* Stimson, *supra* note 51, at 225; von Mehren & Trautman, *supra* note 43, at 1131.

90. *See* note 74 *supra*.

Recognition of a dissolution decree should hinge upon *actual* respect for the interest of other states in the proceeding. This test would force the original forum to decide what *actual* interest or justification it has for applying its social policy to the marriage. Such a decision would be based upon all the relevant factors, including where children and property are located, where the parties lived as husband and wife, and where the repercussions of terminating the marriage will fall.

Applying this expanded analysis, a court may well decide that another state has a greater interest in the matter. Under the existing judicial approach there is no effective mechanism, other than the refusal of jurisdiction, allowing for the accommodation of this greater interest. Denying jurisdiction, however, may in effect leave many parties without a remedy. This class of persons would include those discriminated against by the domicile requirement, including service members.[91] A possible solution to this problem is supplying a forum, but employing a choice of law rule in deciding what social policy to apply.

C. *Choice of Law*

The failure to consider choice of law in marriage dissolution actions[92] appears to be a result of the traditional doctrinal approach to dissolution jurisdiction—in rem jurisdiction based on domicile as the situs of the marital status or res.[93] This development has also been explained in terms of policy:

> Upon the stability of the home and the security of the family might be said to depend much of the social and economic stability of the entire society. Because of this integral relationship, a domiciliary state claims a powerful interest in seeing that if the marriages of its citizens are to be severed at all, they should be severed only in its own courts and in accordance with its own law.[94]

91. *See* note 47 *supra*. *See also Developments in the Law—State-Court Jurisdiction*, *supra* note 74, at 976.

92. As Professor Currie notes, "[o]utside the swamp of divorce, it is common for a disinterested forum to entertain an action based on foreign law." Currie, *supra* note 27, at 48. *See also* von Mehren & Trautman, *supra* note 43, at 1129 (examples of other types of actions in which choice of law has not been considered).

93. *See* Rieke, *supra* note 14, at 380 n.23; von Mehren & Trautman, *supra* note 43, at 1177; Comment, *Jurisdiction Versus "Choice-of-Law" in Divorce Actions*, 25 ROCKY MTN. L. REV. 51 (1952).

94. *Developments in the Law—State-Court Jurisdiction*, *supra* note 74, at 968.

These rationales, however, overlook the demonstrated frustration of at least one state's social policy when the forum state is not the domicile of both spouses.[95] Moreover, the absence of choice of law has encouraged forum shopping,[96] collusion,[97] and perjury[98] in divorce actions.

The major obstacle to the adoption of a choice of law rule in dissolution actions is the lack of any single standard that can be applied successfully in every case.[99] The commentators have considered various relationships, but their lack of agreement suggests the need for a more flexible standard.[100]

It is submitted that the answer may lie in the adoption of an approach similar to that used in contract actions. Marriage has often been characterized as a civil contract,[101] and although the analogy should not be extended too far,[102] there are sufficient similiarities to

95. *See* notes 52 & 61 and accompanying text *supra*.

96. *See* Currie, *supra* note 27, at 26; *Developments in the Law—State-Court Jurisdiction, supra* note 74, at 973.

97. *See* Currie, *supra* note 27, at 55–56. As Professor Currie points out, under the rule in Sherrer v. Sherrer, 334 U.S. 343 (1948), a husband and wife can obtain a "virtually unchallengeable divorce on grounds not recognized by their home state." Currie, *supra* note 27, at 55.

98. *See* note 52 *supra*. For a discussion of the lawyer's ethical problem in this context, see A. EHRENZWEIG, *supra* note 21, at 242.

99. Professor Currie lists the following factors that may weigh against the adoption of choice of law in dissolution actions: (1) the loss of expertise of specialized courts in the "home" state; (2) discrepancies between theory and practice, including the problem of divorce laws that give judges discretion to issue decrees where cause is shown; (3) lack of adequate safeguards for the state's policy of preserving marriages; and (4) the unavailability of conciliation services provided for under some state divorce laws. Professor Currie further states that a state might decide to express a policy opposing the application of its divorce laws in foreign courts. Currie, *supra* note 27, at 51–53. *See* R. WEINTRAUB, *supra* note 81, at 194; *Developments in the Law—State-Court Jurisdiction, supra* note 74, at 969.

These commentators seem to overlook the ease with which divorce seeking parties can completely evade the application of the domestic policy of their domiciliary state. For a more complete analysis, reaching the conclusion that a disinterested forum could adopt formal choice of law rules for the determination of both status termination and the award of alimony, see Seidelson, *supra* note 74.

100. *See, e.g.*, Stimson, *supra* note 51, at 294–95 (discussing as possible rule of reference the law of the place where cause of action arose); Sumner, *supra* note 37, at 20–22 (law of the place where the wrong was committed, law of the matrimonial domicile, and law of the place of marriage); Comment, *supra* note 93, at 55 (law of the place where wrong occurred). Certainly the suggestion of using the law of the place of the wrong, or of the place where the cause of action arose, is inappropriate under more recent divorce laws with "no-fault" grounds. *See* note 19 *supra*.

101. For a discussion of the concept of marriage as a contract, see Rieke, *supra* note 14, at 375–77. For samples of premarital contracts, including provisions for future ownership of property, support, expectations of the marriage, and arbitration provisions, see Sheresky & Mannes, *A Radical Guide to Wedlock*, SATURDAY REVIEW, July 29, 1972, at 33; Ms., June 1973, at 63–64, 102–03.

102. The primary distinction is the role of the state, which for reasons of public policy controls the formation and dissolution of the contractual relation, as well as

justify the application of similar choice of law rules.

The Washington Supreme Court has adopted[103] the *Restatement (Second) of Conflict of Laws* rule that contract rights and duties should be determined by the law of the state that has "the most significant relationship to the transaction and the parties."[104] The *Restatement* lists several standards that a court might consider in deciding the issue,[105] and it would not appear difficult to translate these standards into analogous contacts in the context of the marital relationship. For instance, place of contracting would become place of marriage, and place of performance would become place where the parties lived together as husband and wife. The *Restatement* also calls for the consideration of the respective domicile or residence of each party, and this could easily be expanded to include consideration of the location of children and property.

D. An Application of the Suggested Analysis

In order to test this suggested approach to dissolution actions, the fact situation presented in *Ways* will be used.[106] It will be assumed, however, that the petitioner had remained stationed in Washington an additional twenty-six days, thus satisfying the statutory requirements.

The court would first be forced to decide whether to supply a forum. This decision would be based on a balancing of the factors relevant to fairness and convenience, as measured by the relative relation of each party to the forum. A factor in favor of supplying a forum would be the petitioner's status on active military duty in the state, including consideration of the difficulties encountered by members of

---

imposing obligations on the parties once the marital relation is established. *See* Rieke, *supra* note 14, at 375–77. *See also* Maynard v. Hill, 125 U.S. 190, 210 (1888) (quoting Chief Justice Marshall that marriage contract is not within meaning of constitutional provision prohibiting impairment of contractual obligations).

103. Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wn. 2d 893, 425 P.2d 623 (1967). *See also* Werner v. Werner, 84 Wn. 2d 360, 526 P.2d 370 (1974) (extension of "most significant contacts" approach to tort case); Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn. 2d 806, 459 P.2d 32 (1969) (application of "most significant contacts" test to suretyship contract). *See generally* Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27 (1976).

104. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971).

105. The *Restatement* lists five factors: the place of contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, and place of business of the parties. *Id.* § 188(2).

106. *See* note 2 and accompanying text *supra*.

the armed services when attempting to establish a domicile where stationed.[107] Factors weighing against supplying a forum would include the great inconvenience of the forum for Mrs. Ways, taking into consideration the hardships of providing for the care of the couple's children, possibly arranging for absence from work, and financing the costs of traveling to and remaining in Washington. A deciding factor, however, might be the nature of the petitioner's military duty in Washington. The record indicates that Ways remained in Washington less than five months and did not establish any significant relation to this state.[108] On this basis a court might well conclude that the due process concerns of fairness and convenience argued against supplying a forum.

Assuming arguendo that the court decided in favor of supplying a forum, the next inquiry would center upon the relative interest of this or any other state in the marriage to be dissolved. Clearly Washington's interest in the marriage would be found to be slight, the presence of the petitioner in the state for ninety days providing little justification for the application of Washington's social policy. Resorting to the recommended choice of law rule, the court would almost certainly conclude that Virginia had "the most significant relation to the transaction and the parties," and that a decree of dissolution based on Washington law would threaten Virginia's predominant interest in the marriage.

It might be argued that the Washington court would encounter difficulties in applying an unfamiliar divorce law. The divorce laws, however, have become increasingly uniform,[109] and the problem of unfamiliarity is common to all choice of law actions. Furthermore, the petitioner's inability to return to Virginia to pursue the action in Virginia courts must be considered.

Either disposition of the case under this method of analysis would appear to be preferable to the probable result under the prevailing approach. A decision not to supply a forum would reflect a conclusion that the petitioner's tenuous relation to the state did not outweigh the unfairness and inconvenience to the respondent. Moreover, assuming

107. *See* note 47 *supra*.
108. 85 Wn. 2d at 694, 538 P.2d at 1226; Brief of Appellant at 1–2; Brief of Respondent at 1.
109. *See* note 19 *supra*.

a decision to supply a forum, the action would be decided under the law of that state having the greatest interest in the marriage.[110]

IV. CONCLUSION

The Washington legislature and supreme court should be commended for attempting to overcome the discriminatory effect of the domicile requirement on divorce-seeking service members. In this regard the court's acceptance of an alternative jurisdictional basis for dissolution actions is certainly a significant step. The *Ways* decision, however, evidences the continuing influence of judicial experience with the domicile requirement, with the court failing to analyze adequately the due process, full faith and credit, and choice of law issues involved in dissolution actions.

Adoption of the analytical method suggested here would admittedly be without precedent in American courts. Divorce laws, however, have changed dramatically in recent years, and there is a strong need for the courts to work a similar change in the prevailing jurisdictional analysis. Until such a change occurs, Washington courts acting under R.C.W. § 26.09.030 may often be guilty of what the Supreme Court has termed "officious intermeddling in matters in which another State has a paramount interest."[111]

Bruce A. Robertson

110. It might be argued that the adoption of this suggested analysis will result in the application of repressive, fault-oriented divorce statutes in favor of the more progressive Washington law. Certainly this is a valid concern, but it must be balanced against a realization that the present approach frustrates the purposes of both personal autonomy and valid state interests in the dissolution action. Personal autonomy is hardly served by an analytical approach that completely ignores the interest of the respondent spouse in the dissolution proceedings. Furthermore, it seems difficult to justify the application of Washington's social policy when this state will not be forced to contend with any of the consequences of dissolving the marriage. Finally, the solution to repressive social policies should be based upon statutory reform rather than defective jurisdictional analyses.

111. Sosna v. Iowa, 419 U.S. 393, 407 (1975).