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State Jurisdiction in Divorce Actions Involving a Non-Resident Spouse.

Linda Bustamente Specht

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State Jurisdiction in Divorce Actions Involving a Non-Resident Spouse

Linda Bustamante Specht

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I. Introduction

In the United States, there were 1,182,000 divorces in 1980, as compared with 264,000 in 1940.[1] The change represents a 3.2% increase per one thousand Americans.[2] It is expected that the proportion of divorced Americans to the general population will continue to increase.[3] Much liti-

1. *See* THE WORLD ALMANAC & BOOK OF FACTS 907 (1984). The increase in numbers reflects a percentage change from 2% to 5.2% per 1,000 population. *See id.* at 907; *see also* BUREAU OF STATISTICS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 80 (1981) (divorce statistics from 1950 to 1979).

2. *See* THE WORLD ALMANAC & BOOK OF FACTS 907 (1984); *see also* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1982, at 1 (1982) (ratio of divorced persons per 1,000 married persons with spouse present climbed from 47 to 114 between 1970 and 1982).

3. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PERSPECTIVES ON AMERI-

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gation has resulted from the increase in divorce and from the former spouses' subsequent attempts to modify custody, alimony, support, or property issues ostensibly resolved in the divorce decree.[4] Many divorce actions today involve a spouse who is not a resident of the state granting the divorce.[5] This not only results in problems of jurisdiction at the time of the divorce proceeding, but also gives rise to disputes in later suits for enforcement or modification of related matters decided in the initial divorce decree.[6]

Consequently, a distinction must be made between divorces involving one non-resident spouse and those involving spouses who are both residents of the same state.[7] Although the State of Texas has jurisdiction over parties who are residents when the proper procedure is followed for service of process,[8] the procedure for properly invoking the court's jurisdiction over a non-resident is much more complex.[9] The court's jurisdiction is, in fact, not simply determined on the basis of procedural rules regarding service, but is also dependent upon due process considerations and constitutional limitations on long-arm legislation.[10]

The purpose of this comment is to examine the evolution of general jurisdictional concepts into what has been described as a "hodge-podge" of

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CAN HUSBANDS AND WIVES 7 (1978) (at least one spouse in 20% of the U.S. marriages involving husband aged 35-44 has previously experienced divorce). The Census Bureau observes that "the proportion of this group affected by divorce will not decrease but rather can be expected to increase further over the next several years." *Id.* at 7.

4. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHILD SUPPORT AND ALIMONY: 1978, at 1 (1979) (statistics regarding child support and alimony). The Census Bureau reports that "three-fifths of the 7.1 million women with children present from an absent father were awarded or had an agreement to receive child support payments in 1978." *Id.* at 1. The Bureau also reports that "14 % of the 14.3 million ever-divorced or separated women were awarded or had an agreement to receive alimony or maintenance payments." *Id.* at 1.

5. *See* Dosamantes v. Dosamantes, 500 S.W.2d 233, 236 (Tex. Civ. App.—Texarkana 1973, writ dism'd) (citing Williams v. North Carolina, 317 U.S. 287, 298 (1945)) (state court has jurisdiction over divorce when one party is domiciled in state though other party is non-resident). *See generally* Note, *The Domestic Relations Exception to Diversity Jurisdiction,* 83 COLUM. L. REV. 1824, 1825-29 (1983) (recognizing traditional entrustment of child custody, divorce, and alimony matters to state courts).

6. *See* Sampson, *Jurisdiction in Divorce and Conservatorship Suits,* 8 TEX. TECH L. REV. 159, 161 (1976).

7. *See id.* at 167-70.

8. *See* TEX. R. CIV. P. 102 (process may be served anywhere within state); *see also id.* 106 (delineates procedure required for service of citation).

9. *See, e.g., id.* 108 (service on non-resident defendant); *id.* 109 (citation by publication where personal service unsuccessful); *id.* 109a (different method of substituted service may be prescribed).

10. *See id.* 108 (explanatory comment reveals purpose of "permit[ting] acquisition of in personam jurisdiction to the constitutional limits").

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law relating to divorce and those matters incidental to it.[11] In addition, this comment will review the current status of divorce jurisdiction in the State of Texas which is manifested in the long-arm statutes and in the case law.

II. General Background on Jurisdiction Law

A. *Traditional Jurisdiction Analysis*

Traditional notions of jurisdiction have been based on the legal distinctions between "in personam," "in rem," and "quasi in rem" actions.[12] Historically, "in personam" actions have been defined as those which seek to adjudicate personal rights of the parties to the action.[13] "In rem" actions have been those seeking to adjudicate rights to things or the status of parties before the court.[14] "Quasi in rem" actions have included those which seek to use the property of specific individuals as the means of bringing those parties before the court[15] and have been neither completely "in rem"

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11. *See* Sampson, *Jurisdiction in Divorce and Conservatorship Suits,* 8 TEX. TECH L. REV. 159, 161 (1976) (author lists ten treatises and law journal articles summarizing topic).

12. *See* Dorsaneo, *Due Process, Full Faith and Credit, and Family Law Litigation,* 36 Sw. L.J. 1085, 1087 (1983). Dorsaneo notes that "[s]ince these historical terms, which differentiate one type of jurisdiction from another, will not be abandoned by lawmakers and cannot be excised neatly from the many places they appear, a present day mastery of the old vocabulary remains important." *Id.* at 1087-88; *see also* Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles,* 1978 DUKE L.J. 1147, 1147-48 (historical development of jurisdictional principles parallels changes in society). Kalo theorizes that "[t]he development and evolution of quasi in rem and in personam jurisdiction principles are in large part a reflection of the constant societal adjustment to the winds of change which have always swept this country." *Id.* at 1147-48. Because the "winds of change" are currently bringing with them an increasing number of divorce actions, along with related matters requiring an understanding of the in rem and in personam concepts, Mr. Kalo's observation is particularly apt today. *See id.* at 1147-48.

13. *See, e.g.,* Bullock v. Briggs, 623 S.W.2d 508, 511 (Tex. App.—Austin 1981, writ ref'd n.r.e.) (in personam jurisdiction exists when action is brought seeking judgment against person properly before the court); Knox v. Quinn, 164 S.W.2d 580, 581 (Tex. Civ. App.—Austin 1942, no writ) (in personam action where personal judgment sought); Lockett v. Shaw, 106 S.W.2d 768, 769 (Tex. Civ. App.—Galveston 1937, no writ) (in personam jurisdiction invoked by party seeking to enforce contract rights); *see also* Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles,* 1978 DUKE L.J. 1147, 1148 (historical concept of in personam jurisdiction involved physical presence of defendant before the court).

14. *See, e.g.,* Perry v. Edmonds, 84 P.2d 711, 713 (Nev. 1938) (adjudication of status of particular thing or subject matter); Gardner v. Union Bank & Trust, 159 S.W.2d 932, 935 (Tex. Civ. App.—Fort Worth 1942, writ ref'd w.o.m.) (probate court adjudication of estate matters deemed in rem); Jones v. Teat, 57 S.W.2d 617, 620 (Tex. Civ. App.—Texarkana) (solemn declaration of status of person or thing), *aff'd on other grounds,* 89 S.W.2d 987 (Tex. Comm'n App. 1936, opinion adopted).

15. *See* Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958) (identifying two types of

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nor purely "in personam" in nature.[16]

Although in personam jurisdiction historically required the physical presence of the defendant who was arrested and brought before the court,[17] procedural devices have been developed for providing a symbolic presence in situations where it is no longer necessary to demand such physical presence.[18] Service is regarded as the appropriate mechanism to effect such jurisdiction over persons when other jurisdictional requirements are met and also has been the talisman used to invoke the court's jurisdiction over the non-consenting, non-resident defendant.[19] In 1878, the United States Supreme Court, in *Pennoyer v. Neff*,[20] not only pronounced the necessity for service in invoking a state court's jurisdiction over the person, but also announced the rules regarding in rem or quasi in rem jurisdiction which were to guide the law in this country for almost a century.[21] Under the holding in *Pennoyer*, a state court could exert its jurisdiction over the non-consenting, non-resident defendant by either of two methods.[22] First, the court could do so by service of process within its jurisdiction or, sec-

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quasi in rem actions). The United States Supreme Court, in *Hanson*, recognized quasi in rem jurisdiction in situations where one party seeks to establish a pre-existing claim in certain property and negate the competing claims of other specified persons. *See id.* at 246 n.12. The Court also acknowledged quasi in rem jurisdiction in cases in which the plaintiff attempts to have property belonging to the defendant applied in satisfaction of the plaintiff's claims. *See id.* at 246 n.12; *see also* Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1159 (jurisdiction based on seizure of defendant's property rather than on his physical presence).

16. *See* Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958) (quasi in rem jurisdiction invoked to determine interests of specified persons in particular property). The Court distinguished quasi in rem from in rem and in personam jurisdiction by providing definitions of each. *See id.* at 246 n.12. An in personam judgment results in a determination of personal liability of one party for the benefit of another. *See id.* at 246 n.12. A judgment in rem "affects the interests of all persons in designated property." *See id.* at 246 n.12; *see also* Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1163 n.93. Quasi in rem actions concern property which is not the subject of controversy and seek to establish the rights of the respective parties (but not the rights of third parties) to such property. *See id.* at 1163 n.93.

17. *See* Lacy, *Personal Jurisdiction and Service of Summons after Shaffer v. Heitner*, 57 OR. L. REV. 505, 509 (1978). Lacy acknowledges: "The theory was that the court could not act unless the defendant was literally and physically subject to the power of the court." *Id.* at 509.

18. *See id.* at 509 (concept of symbolic arrest of defendant through service of process).

19. *See* Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 NOTRE DAME LAW. 587, 589 (1979) (service of process required to invoke court's jurisdiction).

20. 95 U.S. 714 (1878).

21. *See id.* at 733-35; *see also* Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 NOTRE DAME LAW. 587, 587 (1979) (traditional principles were major force in American jurisdiction law for nearly a century).

22. *See* Pennoyer v. Neff, 95 U.S. 714, 727-28 (1878).

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ond, the court could establish jurisdiction through seizure of the defendant's property located within the state upon the commencement of the action.[23] The first method would confer personal jurisdiction over the defendant; the second would establish quasi in rem jurisdiction over the party.[24] Either method could be deemed effective to give a non-resident defendant adequate notice.[25]

Although the doctrines of *Pennoyer,* which have been described as its "territorial imperative,"[26] are no longer wholly intact,[27] *Pennoyer* may now be viewed historically as having, at an early date, recognized the authority of a state court to alter the civil status of its resident despite the non-residency of a party to the suit.[28] After almost a century of prominence, however, *Pennoyer* was modified in 1945 by a new mode of analysis set out in *International Shoe v. Washington.*[29]

B. *Minimum Contacts Doctrine*

In *International Shoe,* the United States Supreme Court instituted a more flexible standard of analysis regarding the question of state court jurisdiction.[30] *International Shoe* required that a non-resident defendant

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23. *See id.* at 727-28 (invalid judgment unless property discovered prior to judgment and was basis for jurisdiction).

24. *See id.* at 727-28.

25. *See id.* at 728.

26. *See id.* at 722 (exclusive jurisdiction and sovereignty of state over persons and property within its boundaries). *See generally* Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. The Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act,* 75 Nw. U.L. Rev. 363, 364 (1980) (state's territorial imperative required literal or symbolic seizure of persons or property to confer jurisdiction).

27. *See* Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. The Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act,* 75 Nw. U.L. Rev. 363, 365 (1980) (territorial imperative vitiated by inherent conflicts and due process concerns); *see also* Shaffer v. Heitner, 433 U.S. 186, 203-04 (1977) (seizure of property located within forum state no longer adequate to confer jurisdiction over owner).

28. *See* Dorsaneo, *Due Process, Full Faith and Credit, and Family Law Litigation,* 36 Sw. L.J. 1085, 1091 (1983). Dorsaneo observes that "[s]ince *Pennoyer v. Neff,* a state court has been able to determine or alter the marital status of one of its citizens even when the other party is a non-resident or a citizen of another state." *Id.* at 1091.

29. 326 U.S. 310, 319 (1945) (minimum contacts analysis necessary to confer jurisdiction).

30. *See* Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process,* 54 Notre Dame Law. 587, 587 (1979). Nordenberg observed the following:

> The contributions of *International Shoe* to the growth of the American law of state court jurisdiction cannot be seriously questioned. The "minimum contacts" test of *International Shoe* provided for a basic change in legal theory when change was desperately needed. It freed courts from the mechanical inquiries of the past and compelled their consideration and discussion of factors bearing upon fairness and justice in dealing with jurisdictional problems.

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have "certain minimum contacts with [a forum] . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[31] The "nexus" requirement imposed by the Court placed greater emphasis on the quality of the required contacts with a forum than on the quantity of such contacts.[32] Subsequent case law applying the minimum contacts doctrine, however, vacillates between a doctrine that is most concerned with the defendant's contacts with the forum[33] and one which is most conscious of the connection between the forum and the cause of action.[34]

C. *Modern Jurisdiction Law*

Shaffer v. Heitner[35] and *Kulko v. Superior Court*[36] are two cases evidencing the modern jurisdiction law. The landmark case of *Shaffer* essentially rendered inconsequential the in personam, in rem, and quasi in rem categorizations of legal proceedings for the purpose of due process analysis.[37] The United States Supreme Court, under the facts in *Kulko,* later deemed a state's interests in adjudication of certain matters as secondary in impor-

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Id. at 587.

31. *See* International Shoe v. Washington, 326 U.S. 310, 316 (1945).

32. *See id.* at 316-17 (quality and nature of defendant's activity must be such to make it fair and reasonable to exercise court's jurisdiction). *But see* Larsen v. Scholl, 296 N.W.2d 785, 788 (Iowa 1980) (Eighth Circuit places equal emphasis on quantity and quality). The *Larsen* court recognized the following three factors which have been identified by Eighth Circuit courts as most important in applying the minimum contacts standard: "(1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts." *See id.* at 788. The court enumerated two additional factors, but deemed them to be of lesser importance: "(4) the interest of the forum state; and (5) the convenience of the parties." *See id.* at 788.

33. *See* Hanson v. Denckla, 357 U.S. 235, 251 (1958) (defendant's minimum contacts with forum prerequisite to exercise of power over him).

34. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (sufficient for jurisdiction that contract sued upon had substantial connection with forum).

35. 433 U.S. 186, 216-17 (1977) (minimum contacts analysis extended to quasi in rem actions). The Court in *Shaffer* determined that even though the presence within the state of property unrelated to the cause of action might be indicative of the defendant's contacts with the forum, the presence of such property would not of itself be a sufficient basis for conferring jurisdiction. *See id.* at 216.

36. 436 U.S. 84, 92 (1978) (factual analysis required to determine presence of "affiliating circumstances") (citing Hanson v. Denckla, 357 U.S. 235, 246 (1958)).

37. *See* Note, *Constitutional Law—Due Process—Jurisdiction—State Court's Exercise of In Rem or Quasi in Rem Jurisdiction Must Satisfy the same "Minimum Contacts" Test that is Applicable to In Personam Jurisdiction,* 9 TEX. TECH L. REV. 126, 139, 144 (1977) (all assertions of state court jurisdiction governed by minimum contacts standard); *see also* Note, *The Constitutionality of Seider v. Roth after Shaffer v. Heitner,* 78 COLUM. L. REV. 409, 421 (1978) (due process standards same for determining "reasonableness" of jurisdiction whether in rem or in personam).

tance to due process considerations which emphasize a defendant's contacts with the forum state.[38] The controversy in *Kulko* involved an attempted modification of child custody and support several years subsequent to the divorce of the parents.[39] The Supreme Court, in its review of the state court's decision, engaged in a fact-sensitive analysis which recognized that, although the parents had married in the State of California, they had never lived there during their marriage.[40] The Court noted that it was only after the Kulko's separation that one of the parties established residence in California.[41] Subsequent to the separation and the granting of custody to the father, the two children decided to live with the mother in California.[42] At that time she sought to modify the custody and support agreement by seeking to invoke the California court's jurisdiction over the non-resident father.[43] In its review of the California decision, the Supreme Court rejected as insufficient the defendant's ties with the forum state and based its decision upon the tests prescribed in *International Shoe* and its progeny.[44]

There are, ultimately, several general statements regarding jurisdiction law which can be made. First, the *Pennoyer* concept of state court jurisdiction over matters affecting its citizens is still valid as to its requirement of proper notice to non-resident defendants.[45] Second, the courts consider a

38. *See* Kulko v. Superior Court, 436 U.S. 84, 97-99, 100 (1978).

39. *See id.* at 86-87.

40. *See id.* at 87.

41. *See id.* at 86-88.

42. *See id.* at 88.

43. *See id.* at 88.

44. *See id.* at 91-92 (evolution of concepts from *Pennoyer* to *International Shoe* line of cases prescribes appropriate test). *See generally* Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process,* 54 NOTRE DAME LAW. 587, 621-30 (1979) (analysis of *Kulko* as related to minimum contacts doctrine).

45. *See, e.g.,* Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 315 (1950) (adequate notice must be given defendant); Pasqualone v. Pasqualone, 406 N.E.2d 1121, 1125 (Ohio 1980) ("best possible notice" must be given defendant); Rogers v. Rogers, 441 A.2d 398, 401 (Pa. Super. Ct. 1982) (adequate notice must be given); *see also* Waldron v. Waldron, 614 S.W.2d 648, 650 (Tex. Civ. App.—Amarillo 1981, no writ) (proper notice through service of process). The Texas requirement of proper service was stated in *Waldron* as follows: "[P]ersons or property over which the court has potential jurisdiction [must] be brought before the court by service of process that (1) is consistent with due process and (2) follows, with reasonable strictness, the procedure designed by the state for notification of the pending action." *Id.* at 650. *But see* Lacy, *Personal Jurisdiction and Service of Summons after Shaffer v. Heitner,* 57 OR. L. REV. 505, 511 (1978) (service of summons and due process are unrelated). Mr. Lacy questions the necessity of service of summons as the mandated means of providing a defendant with notice. *See id.* at 509. He observes that mere compliance with service requirements is not sufficient to confer jurisdiction. *See id.* at 510. He also notes that through the use of the long-arm legislation the defendant need not be within the forum state for proper service. *See id.* at 509. Thus, he questions whether service compli-

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statutory basis under the laws of the forum state necessary for exercise of jurisdiction.[46] Third, despite proper notice and a statutory basis for exercise of jurisdiction, such exercise is not valid unless a factual analysis indicates that jurisdiction over the parties comports with the standards of fairness and justice set forth in *International Shoe* and *Kulko*.[47]

III. Jurisdiction in Divorce Actions Involving a Non-Resident

A. *The Divisible Divorce Concept in Theory*

The law regarding state jurisdiction in divorce suits involving a non-resident has developed in a parallel fashion to that of jurisdiction law in general.[48] Its development has been equally fraught with confusion in attempts to separate the status (or "in rem") divorce matters from the related custody and support issues.[49] Accordingly, the concept of "divisible divorce" was established by the United States Supreme Court in *Estin v. Estin*.[50] In *Estin*, the Court gave effect to a state court's ex parte divorce decree,[51] but rendered the decree ineffective as to alimony provisions.[52]

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ance actually accomplishes anything useful. *See id.* at 509. He theorizes that due process does not require the service of summons because an adequate basis for jurisdiction is not dependent upon such service, and it is possible to provide fair notice by other means. *See id.* at 511.

46. *See, e.g.*, Larsen v. Scholl, 296 N.W.2d 785, 787 (Iowa 1980) (statute or rule must authorize exercise of jurisdiction); Howells v. McKribben, 281 N.W.2d 154, 155-56 (Minn. 1979) (jurisdiction depends upon proper statutory authorization); Rogers v. Rogers, 441 A.2d 398, 400 (Pa. Super. Ct. 1982) (long-arm statute of forum must provide statutory basis for exercise of jurisdiction).

47. *See, e.g.*, Larsen v. Scholl, 296 N.W.2d 785, 787 (Iowa 1980) (exercise of jurisdiction must not offend due process principles); Howells v. McKribben, 281 N.W.2d 154, 155-56 (Minn. 1979) (jurisdiction must not offend constitutional principles); Rogers v. Rogers, 441 A.2d 398, 400 (Pa. Super. Ct. 1982) (exercise of jurisdiction must meet constitutional constraints).

48. *See* Rymanowoski v. Rymanowoski, 249 A.2d 407, 412 (R.I. 1969) (traditional notions of due process carried into area of domestic relations).

49. *See* Estin v. Estin, 334 U.S. 541, 545 (1948). The *Estin* Court stated that:

> [a]n absolutist might quarrel with the result and demand a rule that once a divorce is granted, the whole of the marriage relation is dissolved, leaving no roots or tendrils of any kind. But there are few areas of the law in black and white. The greys are dominant and even among them the shades are enumerable. For the eternal problem of the law is one of making accommodations between conflicting interests.

Id. at 545. The result to which the Court referred was the invalidation of the part of the divorce decree which sought to defeat a prior award of alimony. *See id.* at 549.

50. 334 U.S. 541, 549 (1948).

51. *See id.* at 549. In *Estin*, the non-resident spouse was constructively notified and did not appear. *See id.* at 541; *see also* Note, *1947-48 Term of the Supreme Court: Interstate Status of Divorce*, 48 Colum. L. Rev. 1083, 1087-88 (1948) (ex parte divorce decree valid as to effect on marital status); Note, *Alimony Under Separation Decree Not Terminated by Foreign Divorce on Constructive Service*, 47 Colum. L. Rev. 1069, 1070 (1947) (foreign divorce

As a consequence, divorce itself maintained its in rem characterization,[53] but property interests, such as alimony or separate maintenance, were deemed to require "control or power over the persons whose relationships are the source of the rights and obligations."[54]

The divisible divorce view of marriage as a "bundle of incidents" thus separates the issues to be determined by the court into those which are in rem in nature and those which are in personam in nature.[55] The marital status itself, as an in rem incident, is generally terminated by a divorce decree despite the absence of personal jurisdiction over both parties.[56] When the divorce decree also seeks to impose personal liability for child support or alimony in situations where personal jurisdiction is lacking, however, a subsequent challenge to the decree will render that portion of the court's pronouncement invalid.[57] As a result, the parties are left with a valid dissolution of the marital ties, but no resolution of the other incidents of the marriage.[58]

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based on constructive service terminates marriage); Note, *Divisible Divorce,* 76 HARV. L. REV. 1233, 1237 (1963) (severance of marriage by ex parte divorce upheld).

52. *See* Estin v. Estin, 334 U.S. 541, 549 (1948) (court does not have in personam jurisdiction to decide question of alimony where party served by publication and made no appearance); *see also* Note, *Alimony Under Separation Decree Not Terminated by Foreign Divorce on Constructive Service,* 47 COLUM. L. REV. 1069, 1070 (1947) (right to alimony under earlier decree survives dissolution of marriage); Comment, *Support Judgment Survives Nevada Divorce,* 1 STAN. L. REV. 137, 139 (1948) (in personam right to support not altered by ex parte divorce); Note, *Conflict of Laws—Full Faith and Credit—Domestic Separate Maintenance Decree Survives Foreign Divorce,* 2 VAND. L. REV. 109, 109 (1948) (prior judicial determination of husband's personal liability for alimony survives ex parte divorce termination of marital status).

53. *See* Williams v. North Carolina, 317 U.S. 287, 301-02 (1942) (recognition of divorce as a status proceeding).

54. *See* Estin v. Estin, 334 U.S. 541, 548 (1948).

55. *See* Note, *Divisible Divorce,* 76 HARV. L. REV. 1233, 1237 (1963) (marriage as "bundle of incidents").

56. *See* Estin v. Estin, 334 U.S. 541, 545 (1948) (marital capacity changed); *see also* Comment, *Support Judgment Survives Nevada Divorce,* 1 STAN. L. REV. 137, 140 (1948) (decree altered marital status).

57. *See* Estin v. Estin, 334 U.S. 541, 545 (1948) (other legal incidents of marriage not necessarily changed by divorce decree); *see also* Note, *Divisible Divorce,* 76 HARV. L. REV. 1233, 1239-40 (1963) (states reluctant to alter support obligations).

58. *See, e.g.,* Schroeder v. Schroeder, 430 So. 2d 604, 605 (Fla. Dist. Ct. App. 1983) (ex parte foreign divorce deemed valid as to status determination but ineffective as to alimony matters); Lewis v. Lewis, 404 So. 2d 1230, 1232 (La. 1981) (valid divorce as to marital status but invalid as to alimony and child support); Simpson v. O'Donnell, 654 P.2d 1020, 1021 (Nev. 1982) (severance of marital ties despite court's inability to adjudicate custody, child support, and alimony rights).

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B. *The Divisible Divorce Concept in Practice*

The law subsequent to *Estin* has reaffirmed the in rem "status" categorization of the divorce action itself.[59] In doing so, divorce law has adhered to the historical pronouncements of *Pennoyer,* which recognize a state's interest in determining the status of a resident.[60] In *Shaffer,* the Supreme Court recognized the need for special treatment of divorce actions[61] and thereby made an exception to its general rule of abolishing the distinctions between in personam, in rem, and quasi in rem jurisdiction.[62] The *Shaffer* exception is applicable if two requirements are met.[63] First, there must be a "status adjudication"; second, there must be "particularized jurisdictional rules applicable to the proceedings."[64] *Shaffer,* however, still requires that all exercises of state court jurisdiction are subject to the standards of fair play set out in *International Shoe.*[65]

59. *See, e.g., In re* Marriage of Hudson, 434 N.E.2d 107, 118 (Ind. Ct. App. 1982) (change of marital status regarded as in rem proceeding); Phelan v. Phelan, 443 A.2d 1259, 1262 (R.I. 1982) (in rem termination of marital status upheld); Fox v. Fox, 559 S.W.2d 407, 410 (Tex. Civ. App.—Austin 1977, no writ) (dissolution of marital relationship under in rem proceeding).

60. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1878); *see also* Phelan v. Phelan, 443 A.2d 1259, 1262 (R.I. 1982) (reliance upon "due-process considerations first announced in *Pennoyer*"); Butler v. Butler, 577 S.W.2d 501, 505 (Tex. Civ. App.—Texarkana 1979, writ dism'd) (state court has jurisdiction over marital status of its citizens); Dosamantes v. Dosamantes, 500 S.W.2d 233, 236 (Tex. Civ. App.—Texarkana 1973, writ dism'd) (domicile creates sufficient relationship for state to exercise power). *See generally* Comment, *Jurisdiction Over the Non-Resident Parent in a Suit Affecting the Parent-Child Relationship,* 34 BAYLOR L. REV. 107, 107-10 (1982) (noting *Pennoyer* recognition of state jurisdiction in matters involving personal status despite inability to serve defendant within the state).

61. *See* Shaffer v. Heitner, 433 U.S. 186, 210 (1977) (citing *Pennoyer* accommodation of actions involving personal status through adjudication in plaintiff's home state despite inability to serve the defendant within that forum); *see also* Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko,* 12 U.C.D. L. REV. 229, 240 (1979) (citing recognition in *Shaffer* of divorce as status proceeding and noting two requirements for application of *Shaffer* exception); *Developments in the Law—The Constitution and the Family,* 93 HARV. L. REV. 1156, 1245 (1980) (concluding on basis of *Shaffer* exception for status adjudication that "established jurisdictional principles" remain unchanged).

62. *See* Shaffer v. Heitner, 433 U.S. 186, 208 n.30 (1977) (recognition of status adjudications); *see also Developments in the Law—The Constitution and the Family,* 93 HARV. L. REV. 1156, 1245 (1980) (established jurisdictional rules for dissolving marriages remain intact).

63. *See* Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko,* 12 U.C.D. L. REV. 229, 240 (1979) (requirements for exception enumerated).

64. *See id.* at 240.

65. *See, e.g.,* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (quasi in rem jurisdiction subject to minimum contacts analysis); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (minimum contacts required so as not to offend "traditional notions of fair play

C. *Jurisdiction Law in Texas*

1. Texas Approach to Jurisdiction in General

Texas courts have attempted to adopt a more explicit test than that originally pronounced in *International Shoe.*[66] Texas adopted a minimum contacts-due process analysis in *O'Brien v. Lanpar Co.,*[67] which imposes a tripartite test for determining whether a state court may properly exercise jurisdiction over a non-resident.[68] First, the test seeks to determine whether the defendant has engaged in a purposeful act or transaction within the state.[69] Second, it requires that the cause of action result from the defendant's activity within the state.[70] Third, the test imposes the standard of "traditional notions of fair play and substantial justice."[71] The tripartite test of *O'Brien* still appears to be the predominant form of analysis in Texas.[72]

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and substantial justice"); Weintraub, *Texas Long-Arm Jurisdiction in Family Law Cases,* 32 Sw. L.J. 965, 968-70 (1978) (quasi in rem jurisdiction unavailable to seize property of non-resident spouse after *Shaffer).*

66. *See* O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966) (three-prong test specified for minimum contacts determination) (citing Tyee Constr. Co. v. Dulien Steel Prod., Inc., 381 P.2d 245, 251 (Wash. 1963)); Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 436 (Tex. 1982) (application of *O'Brien* three-prong test).

67. 399 S.W.2d 340, 342 (Tex. 1966).

68. *See id.* at 342. In addition, the Fifth Circuit Court of Appeals has established a minimum contacts analysis composed of two parts. *See* Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974). "First, there must be some minimum contact with the state which results from an affirmative act of the defendant. Secondly, it must be fair and reasonable to require the defendant to come into the state and defend the action." *Id.* at 494.

69. *See* O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966). *O'Brien* requires that "the non-resident defendant . . . must purposefully do some act or consummate some transaction in the forum state." *Id.* at 342.

70. *See id.* at 342. The court stated that "the cause of action must arise from, or be connected with, such act or transaction." *Id.* at 342.

71. *See id.* at 342. *O'Brien* provides that "the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice." *Id.* at 342. As a part of the third component of the test, the court enumerated specific considerations which provide guidance in applying the test. *See id.* at 342. Consideration is "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." *Id.* at 342.

72. *See generally* Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 436 (Tex. 1982) (returning to *O'Brien* test). *But see* Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870, 872 (Tex. 1982) (*"Helicol"* court dismisses second prong of *O'Brien* test and allows non-resident plaintiffs to recover from foreign corporation), *rev'd,* __U.S. __, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984). The court allowed recovery on the basis of jurisdictional powers under the Texas long-arm statute, article 2031b. *See id.* at 872; *see also* TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon Supp. 1982-1983) (jurisdiction extended over non-residents doing business in Texas). Although the decision of the Texas Supreme Court

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2. Obtaining Personal Jurisdiction Over a Non-Resident

Despite the protections offered by the due process standard of fairness, the difficulties resulting from application of the "divisible divorce" concept[73] remain and have made the attainment of personal jurisdiction over a non-resident spouse desirable.[74] Four reasons have been advanced to support the acquisition of personal jurisdiction over a non-resident spouse in a divorce proceeding.[75] One concern has been the possibility of collateral attack on the determination of domicile made by the divorce court, which, if successful, would invalidate the divorce decree.[76] A second concern has been the unenforceability of money judgments against the non-resident spouse in the absence of personal jurisdiction.[77] The third reason

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would seem to negate the uniform mandatory application of all three parts of the *O'Brien* test, the *Helicol* analysis appears to be confined to its facts, particularly in light of reversal by the United States Supreme Court. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, __ U.S. __, 80 L. Ed. 2d 404, 414, 104 S. Ct. 1868, 1874 (1984); *see also* Note, *The Expansion of Long-Arm Jurisdiction in Texas: Hall v. Helicopteros Nacionales de Colombia, S.A.*, 36 Sw. L.J. 1197, 1208-11 (1983) (prospects increased for obtaining jurisdiction over foreign corporations by *Helicol*). Shortly after its decision in *Helicol*, the Texas Supreme Court returned to the tripartite test in Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 436 (1982). In doing so, the court made no reference to the *Helicol* deviation. *See* Note, *The Expansion of Long-Arm Jurisdiction in Texas: Hall v. Helicopteros Nacionales de Colombia, S.A.*, 36 Sw. L.J. 1197, 1211 n.123 (1983) (no reconciliation of *Helicol* and *Siskind* by court). For a discussion of the Texas Supreme Court's decision in *Helicol*, see generally Note, *Civil Procedure—In Personam Jurisdiction—In Personam Jurisdiction May Be Exercised Over A Foreign Corporation Which Has Engaged In Continuous and Substantial Business Transactions in Texas For Causes of Action Unrelated to Those Transactions*, 14 ST. MARY'S L.J. 79, 91-93 (1982).

73. *See, e.g.*, Butler v. Butler, 577 S.W.2d 501, 505 (Tex. Civ. App.—Texarkana 1978, writ dism'd) (divorce challenged where court did not exercise personal jurisdiction over non-resident); Fox v. Fox, 559 S.W.2d 407, 410 (Tex. Civ. App.—Austin 1977, no writ) (appeal of divorce terminating marital relationship under in rem proceeding); Dosamantes v. Dosamantes, 500 S.W.2d 233, 235 (Tex. Civ. App.—Texarkana 1973, writ dism'd) (bill of review sought to set aside divorce judgment).

74. *See, e.g.*, Comisky v. Comisky, 597 S.W.2d 6, 8-9 (Tex. Civ. App.—Beaumont 1980, no writ) (divorce valid where no jurisdiction over question of child conservatorship because minimum contacts not satisfied); Fox v. Fox, 559 S.W.2d 407, 410 (Tex. Civ. App.—Austin 1977, no writ) (in absence of in personam jurisdiction court granted valid divorce but could not adjudicate matters involving "personal obligations"); Weintraub, *Texas Long-Arm Jurisdiction in Family Law Cases*, 32 Sw. L.J. 965, 967-73 (1978) (discussing reasons why personal jurisdiction desirable).

75. *See* Weintraub, *Texas Long-Arm Jurisdiction in Family Law Cases*, 32 Sw. L.J. 965, 967-73 (1978).

76. *See id.* at 967-68 (jurisdiction on basis of domicile of spouse may be collaterally attacked by spouse in absence of personal jurisdiction); *cf. Ex parte* Limoges, 526 S.W.2d 707, 709 (Tex. Civ. App.—Austin 1975, no writ) (successful collateral attack against court's jurisdiction to impose child support obligation where personal jurisdiction absent).

77. *See* Weintraub, *Texas Long-Arm Jurisdiction in Family Law Cases*, 32 Sw. L.J. 965,

advanced for the desirability of obtaining personal jurisdiction over the non-resident is concern with difficulties arising from the divisible divorce concept and application of the "làst in time" rule where two divorce decrees have been rendered.[78] The final argument in favor of acquisition of personal jurisdiction is the reluctance of courts to modify custody decrees and the constitutional issues involved in according such decrees full faith and credit.[79]

Today, in the State of Texas, there is a more pressing fifth reason to acquire personal jurisdiction in divorce actions. An analysis of recent Texas cases indicates that the severance of the marital ties, although an in rem proceeding, may not always survive a subsequent challenge based on failure of the court to exercise personal jurisdiction over the parties.[80]

3. Texas Long-Arm Jurisdiction Legislation

While Texas still adheres to the concept of divisible divorce whereby a valid divorce may be rendered in absence of personal jurisdiction over the non-resident defendant, the Texas Family Code does facilitate obtaining personal jurisdiction over the non-resident spouse in divorce proceed-

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968-71 (1978) (money judgments for support, costs, attorney's fees, and child support require personal jurisdiction).

78. *See id.* at 971-72 ("divisible divorce" doctrine and "last in time" rules make personal jurisdiction desirable). Weintraub identifies the problems encountered in attempting to resolve disputes related to support under the divisible divorce concept. *See id.* at 971. He also notes the "apparent anomaly" of the last in time rule which departs from the general full faith and credit doctrines that require one forum to accord "full faith and credit" to a valid divorce decree of another forum. *See id.* at 971. Under the last in time rule, where one state has failed to accord the other the full faith and credit which it is due, but has instead rendered a second divorce decree involving the same parties, the second decree is given effect in both jurisdictions. *See id.* at 971; *cf.* Dorsaneo, *Due Process, Full Faith and Credit, and Family Law Litigation,* 36 Sw. L.J. 1085, 1129-31 (1983) (recognition of due process and other limits on full faith and credit).

79. *See* Weintraub, *Texas Long-Arm Jurisdiction in Family Law Cases,* 32 Sw. L.J. 965, 972-73 (1978) (questioning application of full faith and credit doctrine in area of custody). Weintraub cites *May v. Anderson* in questioning whether a state court can defer to another state's custody determination and require that a parent who had not been subject to the latter's personal jurisdiction nonetheless go to that forum for any desired modification. *See id.* at 972-73 (citing May v. Anderson, 345 U.S. 528 (1953)); *see also* Durfee v. Duke, 375 U.S. 106, 109 (1963) (doctrine requires state to accord another forum's judgment the res judicata effect it would have in such forum); U.S. CONST. art. IV, § 1 (full faith and credit clause).

80. *Compare* Conlon v. Heckler, 719 F.2d 788, 795 (5th Cir. 1983) (divorce decree valid to sever marital ties despite absence of statute or rule authorizing personal jurisdiction) *with* Heth v. Heth, 661 S.W.2d 303, 305 (Tex. App.—Fort Worth 1983, writ dism'd) (divorce decree rendered invalid by failure to obtain personal jurisdiction through proper service of process).

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ings.[81] Section 3.26 provides for adjudication of actions regarding the marital status of a petitioner who is a resident or domiciliary of the state at the time the action is filed.[82] It subjects the respondent or his personal representative to the personal jurisdiction of the state courts even though he is a nonresident or nondomiciliary if either of two conditions is met.[83] First, Texas must be the last state of marital cohabitation and the suit must be commenced within two years after such cohabitation ended.[84] Alternatively, there may be any basis for the exercise of personal jurisdiction as long as it conforms with the state or federal constitution.[85] There is an "inherent tension" between the more specific requirements and the general provision which purports to extend jurisdiction to constitutional limits.[86] The general requirement is vague, however, and has not been relied upon in case law to broaden the state's scope of jurisdiction beyond the minimum contacts otherwise specified by the statute and in *O'Brien*.[87]

Although section 3.26 was enacted in 1975, two years prior to *Shaffer*, it actually seems to go beyond the requirements imposed by *Shaffer*.[88] In creating section 3.26, the 64th Legislature enacted a long-arm statute based on an identification of minimum contacts which the respondent may have with the State of Texas.[89] Whereas *Shaffer* has exempted status adjudications from strict compliance with the minimum contacts analysis and requires only that such adjudications be based on a standard of fairness,[90] the Texas Family Code provision imposes a minimum contact analysis

81. *See* TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1984).

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *See* Sampson, *Jurisdiction in Divorce and Conservatorship Suits*, 8 TEX. TECH L. REV. 159, 197 (1976) (reconciliation of general and specific provisions difficult).

87. *See, e.g.*, Cossey v. Cossey, 602 S.W.2d 591, 596 (Tex. Civ. App.—Waco 1980, no writ) (no abuse of discretion where court refused jurisdiction though § 3.26 provisions met); Fox v. Fox, 559 S.W.2d 407, 409 (Tex. Civ. App.—Austin 1977, no writ) (finding assertion of in personam jurisdiction by lower court wrongful where no contacts with the state); Dorsaneo, *Due Process, Full Faith and Credit, and Family Law Litigation*, 36 Sw. L.J. 1085, 1107 (1983) (*Fox* court found no basis for jurisdiction consistent with due process despite failure to expressly construe general requirement of § 3.26).

88. *Cf.* Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C.D. L. REV. 229, 230 (1979) (*Shaffer* recognized status exception to general rule requiring minimum contacts of defendant with forum).

89. *See* McKnight, *Commentary on Title 1, Texas Family Code Symposium Supplement*, 8 TEX. TECH L. REV. 1, 10 (1976). Mr. McKnight observed: "This section provides for an extension of personal jurisdiction by way of minimum contacts of the respondent with the state of Texas in relation to obligations of the respondent incurred here to allow the courts of this state to enforce those obligations." *Id.* at 10.

90. *See* Shaffer v. Heitner, 433 U.S. 186, 208 n.30 (1977) (rules governing adjudication of status subject to standard of fairness).

which can only be dispensed with if there is another basis consistent with the Texas or United States constitutional requirements of due process.[91]

4. Three Components of Personal Jurisdiction

Despite the availability of such long-arm legislation, the attainment of personal jurisdiction is not assured by mere compliance with its requirements[92] of the requisite minimum contacts or a basis consistent with the state or federal constitution.[93] The assertion of personal jurisdiction requires both enabling legislation and a mechanism for giving adequate notice.[94] The statutory authority needed to confer personal jurisdiction over a non-resident respondent is dependent upon the mechanisms provided in the Texas Rules of Civil Procedure regarding service of process.[95] Furthermore, service of process must meet with the requisite formalities for giving adequate notice to the respondent,[96] or a judgment may not be had.[97]

a. Enabling Legislation

The enabling legislation required to obtain personal jurisdiction is provided by sections 3.26 and 11.051 of the Texas Family Code and the

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91. *See* TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1984).

92. *See, e.g.,* TEX. FAM. CODE ANN. §§ 3.52-.53 (Vernon Supp. 1984) (requirements for service of process); McKnight, *Commentary on Title 1, Texas Family Code Symposium Supplement,* 8 TEX. TECH L. REV. 1, 11 (1976) (service of process or citation by publication required); Kronzer, *In Personam Jurisdiction and Due Process of Law—Problems and Developments,* CURRENT PROBLEMS IN PROCEDURE A-26 (1981) (divorce and family law suits require personal service or permissible substitute).

93. *See* TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1984).

94. *See* Mitchim v. Mitchim, 518 S.W.2d 362, 365 (Tex. 1975) (approving extraterritorial service of process and observing deficiency in May v. Anderson, 345 U.S. 528 (1953)). In *Mitchim,* the Texas Supreme Court observed that "[t]he Wisconsin statute authorizing extraterritorial service of process did not purport to confer personal jurisdiction over the party thus served." Mitchim v. Mitchim, 518 S.W.2d 362, 365 (Tex. 1975).

95. *See, e.g.,* TEX. FAM. CODE ANN. §§ 3.52-.53 (Vernon Supp. 1984) (formal notice requirements necessary); McKnight, *Commentary on Title 1, Texas Family Code Symposium Supplement,* 8 TEX. TECH L. REV. 1, 11 (1976) (two acceptable methods of formal notice specified); Kronzer, *In Personam Jurisdiction and Due Process of Law—Problems and Developments,* CURRENT PROBLEMS IN PROCEDURE A-26 (1981) (personal or substituted service mandated in family law suits).

96. *See, e.g.,* Scucchi v. Woodruff, 503 S.W.2d 356, 360 (Tex. Civ. App.—Fort Worth 1973, no writ) (requirement of notice by prescribed method followed with reasonable strictness); City of Corpus Christi v. Scruggs, 89 S.W.2d 458, 460 (Tex. Civ. App.—San Antonio 1935, no writ) (no personal jurisdiction in absence of strict compliance); Kimmell v. Edwards, 193 S.W. 363, 364 (Tex. Civ. App.—Fort Worth 1917, no writ) (statutory requirements regarding citation and service must be strictly followed). *But see* TEX. R. CIV. P. 124 (waiver of process or appearance by respondent may waive notice requirement).

97. *See* TEX. R. CIV. P. 124 (requirements for judgment).

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amended rule 108.[98] Although the enabling legislation requires the acquisition of personal jurisdiction, its absence has not been deemed fatal to the adjudication of marital status.[99] In *Conlon v. Heckler,*[100] the Social Security Administration refused to recognize a Dallas County divorce decree, which purported to sever marital ties between Judy and Michael Conlon as well as establish Michael's paternity of Judy's daughter, Trisha.[101] Michael had been personally served with process in Vermont pursuant to the divorce action instituted in Texas by Judy.[102] The Fifth Circuit Court of Appeals, applying Texas law, determined that although Michael had been personally served, there was no long-arm provision at the time to confer personal jurisdiction on the court.[103] The court upheld the divorce decree as it purported to sever the marital relationship between the parties.[104] It refused, however, to recognize the divorce court's determination of the paternity issue in the absence of personal jurisdiction.[105]

Conlon serves as both an illustration of the necessity of enabling legislation for purposes of conferring personal jurisdiction and of the "survivability" of the divorce itself despite the absence of such personal jurisdiction.[106] The *Conlon* case remains a vivid illustration of a category of cases wherein the lack of personal jurisdiction has not been deemed fatal to the adjudication of marital status.[107]

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98. *See* TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1984) (long-arm provision for acquiring jurisdiction over non-residents in divorce actions); *id.* § 11.051 (Vernon Supp. 1984) (long-arm provision regarding jurisdiction of non-residents in matters affecting the parent-child relationship); Uniform Child Custody Jurisdiction Act, ch. 160, §§ 1-12, 1983 Tex. Gen. Laws 691 (amendment to Family Code); TEX. R. CIV. P. 108 (extending acquisition of in personam jurisdiction to constitutional limits).

99. *See* Conlon v. Heckler, 719 F.2d 788, 794 (5th Cir. 1983) (no enabling long-arm statute available).

100. 719 F.2d 788 (5th Cir. 1983).

101. *See id.* at 792. There was a question as to whether a common law marital relationship actually existed, but the divorce was granted nonetheless. *See id.* at 792 n.2.

102. *See* Conlon v. Schweiker, 537 F. Supp. 158, 162 (N.D. Tex. 1982), *aff'd sub nom.* Conlon v. Heckler, 719 F.2d 788 (5th Cir. 1983).

103. *See* Conlon v. Heckler, 719 F.2d 788, 794 (5th Cir. 1983). Service had been in compliance with rule 108 prior to the 1976 amendment which extended its scope. *See id.* at 794; *see also* TEX. R. CIV. P. 108. *See generally* Bishop, *International Litigation in Texas: Service of Process and Jurisdiction,* 35 Sw. L.J. 1013, 1026 (1982) (post-1976 version of rule expands scope of rule to constitutional limits of due process). Neither was there a grant of power under article 2031b, as it is not applicable to paternity suits. *See* Conlon v. Heckler, 719 F.2d 788, 795 (5th Cir. 1983) (citing Taylor v. Texas Dep't of Pub. Welfare, 549 S.W.2d 442, 442 (Tex. Civ. App.—Fort Worth 1977, no writ)).

104. *See* Conlon v. Heckler, 719 F.2d 788, 795 (5th Cir. 1983) (dissolution of marital relationship valid despite failure to obtain personal jurisdiction).

105. *See id.* at 798.

106. *See id.* at 795-98.

107. *See id.* at 795; *see also* Comisky v. Comisky, 597 S.W.2d 6, 9 (Tex. Civ. App.—

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b. Minimum Contacts

A closer look at the Texas courts' treatment of status adjudication reveals that personal jurisdiction may also fail due to factual circumstances which do not satisfy the requisite minimum contacts.[108] The courts have combined the requirements specified in section 3.26 with the *O'Brien* test[109] and the "affirmative act" requirements of *Kulko* in refusing to exercise jurisdiction over matters relating to custody and child support.[110] Failure to meet such requirements, however, will not invalidate the portion of a divorce decree which severs the marital ties, as illustrated in *Comisky v. Comisky.*[111] In *Comisky,* a Texas appellate court affirmed the judgment of the trial court which granted a divorce from a non-resident wife, recognizing it as an in rem proceeding.[112] It did so while declaring that the lower court's assumption of personal jurisdiction over the non-resident spouse offended "traditional notions of fair play and substantial justice" according to the tenets of *International Shoe* and *O'Brien.*[113] The appellate court also sought to apply the standards of section 3.26, but was unable to do so due to an inadequate statement of facts.[114] Consequently, the court was unable to satisfy the requisites for personal jurisdiction, but upheld the divorce decree nonetheless.[115] A similar result was reached in

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Beaumont 1980, no writ) (divorce upheld despite lack of personal jurisdiction); Fox v. Fox, 559 S.W.2d 407, 410 (Tex. Civ. App.—Austin 1977, no writ) (severance of marital ties successful in absence of in personam jurisdiction); Risch v. Risch, 395 S.W.2d 709, 711 (Tex. Civ. App.—Houston 1965, writ dism'd) (divorce affirmed despite absence of personal jurisdiction), *cert. denied,* 386 U.S. 10 (1967).

108. *See* Comisky v. Comisky, 597 S.W.2d 6, 9 (Tex. Civ. App.—Beaumont 1980, no writ) (facts do not meet requisites for minimum contacts with forum).

109. *See* Cossey v. Cossey, 602 S.W.2d 591, 596 (Tex. Civ. App.—Waco 1980, no writ) (refusal to exercise jurisdiction due to insufficient basis, per *O'Brien,* to adjudicate child custody dispute).

110. *See* Bergdoll v. Whitley, 598 S.W.2d 932, 935-36 (Tex. Civ. App.—Austin 1980, no writ) (no affirmative act taken by non-resident defendant to justify exercise of in personam jurisdiction).

111. *See* Comisky v. Comisky, 597 S.W.2d 6, 9 (Tex. Civ. App.—Beaumont 1980, no writ) ("factual context" indicates lack of minimum contacts to confer personal jurisdiction, but divorce upheld); *see also* Fox v. Fox, 559 S.W.2d 407, 410 (Tex. Civ. App.—Austin 1977, no writ) (status adjudication upheld where minimum contacts not satisfied for in personam jurisdiction); Risch v. Risch, 395 S.W.2d 709, 711 (Tex. Civ. App.—Houston 1965, writ dism'd) (divorce affirmed despite absence of minimum contacts to support in personam jurisdiction), *cert. denied,* 386 U.S. 10 (1967).

112. *See* Comisky v. Comisky, 597 S.W.2d 6, 9 (Tex. Civ. App.—Beaumont 1980, no writ) (severence of marital ties affirmed despite factual context insufficient to support finding of minimum contacts for personal jurisdiction).

113. *See id.* at 9.

114. *See id.* at 7-9.

115. *See id.* at 9.

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the case of *Fox v. Fox*,[116] where a Texas appellate court again affirmed a marriage dissolution, but deemed the trial court incapable of resolving the matters requiring personal jurisdiction where the necessary contacts between the non-resident spouse and the state were not present.[117]

Minimum contacts analysis in future cases will be affected by the recent Texas adoption of the Uniform Child Custody Jurisdiction Act (UCCJA),[118] which shifts the focus of analysis from the parents to the child and eliminates the requirement of personal jurisdiction over both parents for adjudication of custody matters.[119] The necessity of personal jurisdiction in other divorce-related matters is otherwise recognized by current judicial authority,[120] which continues to uphold the dissolution of marital ties despite the absence of minimum contacts between the defendant and the state.[121]

c. Proper Method of Providing Adequate Notice

The issue of notice to a non-resident spouse has been the subject of much debate in recent years.[122] Although the defendant may have actual notice when he becomes aware of the suit through any means, actual notice has not been deemed adequate in Texas.[123] Consequently, the rules of procedure provide several mechanisms which make it possible to acquire personal jurisdiction over non-residents.[124]

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116. 559 S.W.2d 407, 410 (Tex. Civ. App.—Austin 1977, no writ) (marriage dissolution valid despite absence of minimum contacts necessary to invoke in personam jurisdiction of court).

117. *See id.* at 409-10.

118. *See* TEX. FAM. CODE ANN. §§ 11.51-11.75 (Vernon Pamphlet Supp. 1984).

119. *See id.* § 11.53.; *see also* Sampson & Tindall, *The UCCJA Comes to Texas—As Amended, Integrated and Improved,* 46 TEX. B.J. 1096, 1104 n.69 (1983) (in personam jurisdiction over both parents not required for adjudication of child custody).

120. *See* Conlon v. Heckler, 719 F.2d 788, 796 (5th Cir. 1983) (divorce decree rendered in absence of personal jurisdiction not conclusive as to all incidents of marriage).

121. *See* Dorsaneo, *Due Process, Full Faith and Credit, and Family Law Litigation,* 36 Sw. L.J. 1085, 1105 (1983) (divisible divorce concept in Texas).

122. *See, e.g.,* Mitchim v. Mitchim, 518 S.W.2d 362, 365 (Tex. 1975) (recognizing use of extraterritorial service of process on individuals); Bishop, *International Litigation in Texas: Service of Process and Jurisdiction,* 35 Sw. L.J. 1013, 1025-28 (1982) (attempting to reconcile Rule 108 and long-arm legislative provisions for personal jurisdiction); Dorsaneo, *Jurisdiction Over The Person And Service Of Process,* ADVANCED CIVIL TRIAL COURSE K-43-44 (1982) (distinguishing long-arm statutes from Rule 108).

123. *See, e.g.,* Heth v. Heth, 661 S.W.2d 303, 305 (Tex. App.—Fort Worth 1983, writ dism'd) (actual notice not sufficient); Shanbaum v. Janssen, 582 S.W.2d 590, 591 (Tex. Civ. App.—Dallas 1979, no writ) (court's jurisdiction not invoked by actual notice); Clayton v. Newton, 524 S.W.2d 368, 372 (Tex. Civ. App.—Fort Worth 1975, no writ) (actual notice insufficient).

124. *See, e.g.,* TEX. FAM. CODE ANN. § 3.521 (Vernon Supp. 1984) (citation by publica-

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The failure to give notice as specifically required by rules of procedure has been deemed fatal by Texas courts.[125] In *Heth v. Heth,*[126] service of citation in a Texas divorce action was attempted on Nancy Heth at her residence in Connecticut.[127] Despite the fact that there had been no motion for substitute service, a copy of the petition was left with Nancy's eighteen-year-old daughter.[128] Thereafter, the Texas court entered a decree severing the marital ties and imposing child support obligations on James Heth.[129] Nancy Heth appealed, complaining of the lack of jurisdiction of the divorce court.[130] The court of appeals found that the Texas divorce court was "without power to act even with respect to the in rem aspects of the divorce" due to a failure to serve Nancy personally as required by the Texas Rules of Civil Procedure.[131] The decision in *Heth* brings to the forefront the importance of utilizing the proper procedural mechanisms for adequate notice.[132]

As noted in *Heth,* it is the proper use of the appropriate mechanisms for

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tion in divorce cases); TEX. R. CIV. P. 108 (personal service on non-resident); *id.* 109a (substitute service provision).

125. *See* Heth v. Heth, 661 S.W.2d 303, 305 (Tex. App.—Fort Worth 1983, writ dism'd) (neither in personam nor in rem jurisdiction invoked where failure to use proper procedure for adequate notice).

126. 661 S.W.2d 303 (Tex. App.—Fort Worth 1983, writ dism'd).

127. *See id.* at 303.

128. *See id.* at 303. Although Nancy made a special appearance and a plea to the jurisdiction which the court sustained, James Heth proceeded with the Texas divorce action, making no further attempt at personal service. *See id.* at 303. He later contended that there was actual notice to Nancy by service upon her daughter, and that she acknowledged such notice by her special appearance in Texas. *See* Brief for Appellee at 6, Heth v. Heth, 661 S.W.2d 303 (Tex. App.—Fort Worth 1983, writ dism'd).

129. *See* Heth v. Heth, 661 S.W.2d 303, 304 (Tex. App.—Fort Worth 1983, writ dism'd).

130. *See id.* at 305. Shortly thereafter and prior to the Texas court of appeals decision in the matter, Nancy Heth was granted a Connecticut decree which also purported to grant a divorce. *See* Letter Brief for Appellant at 1, Heth v. Heth, 661 S.W.2d 303 (Tex. App.—Fort Worth 1983, writ dism'd). The Connecticut decree also purportedly disposed of all property, custody, and support issues. *See* Record at 8-12, Heth v. Heth, No. 28-02-86 (Conn. Super. Ct. Aug. 2, 1983). The Texas court of appeals, without mention of the Connecticut decree, declared the Texas decree entirely void. *See* Heth v. Heth, 661 S.W.2d 303, 305 (Tex. App.—Fort Worth 1983, writ dism'd).

131. *See* Heth v. Heth, 661 S.W.2d 303, 305 (Tex. App.—Fort Worth 1983, writ dism'd) (court order for substituted service required in absence of personal service).

132. *See id.* at 305; *see also In re* Marriage of Peace, 631 S.W.2d 790, 794 (Tex. App.—Amarillo 1982, no writ) (new divorce trial granted where no diligent effort made to determine non-resident's whereabouts prior to service by publication); Waldron v. Waldron, 614 S.W.2d 648, 651 (Tex. Civ. App.—Amarillo 1981, no writ) (divorce decree invalid where procedure for notification not followed with reasonable strictness); Johnston v. Johnston, 575 S.W.2d 610, 612 (Tex. Civ. App.—San Antonio 1978, no writ) (defective return to service on default judgment renders divorce decree invalid).

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notice, and not the notice itself, that has been deemed indispensible.[133] Although one commentator has questioned the continuing validity of requiring strict compliance with rules regarding service of summons,[134] the courts are reluctant to take such a liberal view in the absence of statutory justification for so doing.[135]

Lack of personal jurisdiction as a result of failure to follow the appropriate notice requirements will result in the invalidation of both the in rem adjudication of marital status and the in personam adjudication of related matters, although such lack of jurisdiction due to other deficiencies will not render the divorce itself invalid.[136] The significance of proper service of process has been recently emphasized by the state's non-uniform adoption of the UCCJA.[137] Although Texas has dispensed with the require-

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133. *See* Heth v. Heth, 661 S.W.2d 303, 305 (Tex. App.—Fort Worth 1983, writ dism'd) (actual notice not sufficient to "activate the potential jurisdictional powers" of court); Grasz v. Grasz, 608 S.W.2d 356, 357-58 (Tex. Civ. App.—Dallas 1980, no writ) (notice not synonymous with formal citation and inadequate to require appearance and answer); Clayton v. Newton, 524 S.W.2d 368, 372 (Tex. Civ. App.—Fort Worth 1975, no writ) (compliance with rule necessary as actual knowledge does not bring party into court); Scucchi v. Woodruff, 503 S.W.2d 356, 360 (Tex. Civ. App.—Fort Worth 1973, no writ) (method prescribed for giving notice exclusive and must be followed with "reasonable strictness").

134. *See* Lacy, *Personal Jurisdiction and Service of Summons after Shaffer v. Heitner,* 57 OR. L. REV. 505, 508-11 (1978) (service of summons not required by due process). Mr. Lacy cites *Shaffer* for the proposition that service of summons within a jurisdiction is not sufficient to confer jurisdiction over a defendant who may be "found" within the state. *See id.* at 509. He also notes that service within a state is no longer necessary due to the adoption of long-arm statutes conferring jurisdiction. *See id.* at 509. The question then becomes whether service of summons bears any relation to jurisdiction, and he determines that it does not. *See id.* at 509. It is on this basis that he questions the justification for requiring strict compliance with "formalities of issuing and serving summons." *See id.* at 509.

135. *Compare* Heth v. Heth, 661 S.W.2d 303, 305 (Tex. App.—Fort Worth 1983, writ dism'd) (proper service of process required) *with* Perry v. Ponder, 604 S.W.2d 306, 315 (Tex. Civ. App.—Dallas 1980, no writ) (service of process unnecessary in child custody determination under Uniform Child Custody Jurisdiction Act where reasonable notice given). It must be noted that the decision in *Perry* was prior to the adoption in Texas of the Uniform Child Custody Jurisdiction Act (UCCJA) and was a suggestion that Texas courts adopt the principles of the Act. *See* Perry v. Ponder, 604 S.W.2d 306, 321 (Tex. Civ. App.—Dallas 1980, no writ). The UCCJA has since been adopted by the Texas legislature and became effective on September 1, 1983. *See* TEX. FAM. CODE ANN. §§ 11.51-11.75 (Vernon Pamphlet Supp. 1984). There is, however, a non-uniform provision in the Act, as adopted in Texas, which requires conformity with Texas law regarding service and answer. *See id.* § 11.55.

136. *Compare* Heth v. Heth, 661 S.W.2d 303, 305 (Tex. App.—Fort Worth 1983, writ dism'd) (improper service renders all aspects of divorce decree invalid) *with* Conlon v. Heckler, 719 F.2d 788, 793 (5th Cir. 1983) (divorce decree valid in absence of personal jurisdiction due to lack of enabling legislation).

137. *See* TEX. FAM. CODE ANN. § 11.55 (Vernon Pamphlet Supp. 1984); *see also* Sampson & Tindall, *The UCCJA Comes to Texas—As Amended, Integrated and Improved,* 46 TEX. B.J. 1096, 1104 (1983) (describing provisions of UCCJA as adopted in Texas).

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ment of personal jurisdiction in adjudication of custody disputes, it has altered the uniform law by engrafting a requirement of proper service of process.[138] Service, therefore, is still deemed necessary in a status adjudication even though personal jurisdiction may not be required.[139]

IV. Conclusion

The divisible divorce concept rests on the premise that personal jurisdiction is not necessary for the in rem adjudication of divorce, allowing the divorce to survive where personal jurisdiction has not been properly invoked. Although personal jurisdiction may be lacking due to an inadequate legislative grant of power to confer jurisdiction or due to lack of the requisite minimum contacts with the forum, the in rem divorce is deemed to be valid. The courts have, however, identified one exception wherein the divorce does not survive. That exception arises when the formal procedures for notice have not been strictly followed.

Although the Texas legislature has provided family law practitioners with ample long-arm provisions regarding divorce and the parent-child relationship,[140] the Texas legal practitioner must be aware of the necessity of strict compliance with procedural mechanisms to invoke the court's jurisdiction properly.[141] Unless the courts become more liberal in their requirements of strict compliance with the rules regarding service of summons or the legislature makes statutory provisions dispensing with formalities of notice, an unwary practitioner may find that, not only has he failed to protect his client's interests in the areas requiring personal jurisdiction over a non-resident, but that he has procured an invalid divorce decree for his client.

138. *See* TEX. FAM. CODE ANN. § 11.55 (Vernon Pamphlet Supp. 1984). The non-uniform UCCJA amendment to § 11.55 of the Texas Family Code provides for notice to a non-resident in a "manner reasonably calculated to give actual notice," but mandates that it be in accordance with the Texas Rules of Civil Procedure or with the law of the place where service is to be made. *See id.* § 11.55. As of this writing, there are no Texas cases construing the UCCJA.

139. *See id.* at 695.

140. *See* TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1984) (long-arm provisions for divorce); *id.* § 3.521 (provision for citation by publication); *id.* § 11.051 (long-arm provisions for parent-child relationship); TEX. FAM. CODE ANN. §§ 11.51-11.75 (Vernon Pamphlet Supp. 1984) (Texas adoption of UCCJA).

141. *See, e.g.,* TEX. R. CIV. P. 108 (long-arm provision extending personal jurisdiction to constitutional limits); *id.* 109 (citation by publication where personal service unsuccessful); *id.* 109a (different method of substituted service may be prescribed).

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