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Due Process, Full Faith and Credit, and Family Law Litigation

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DUE PROCESS, FULL FAITH AND CREDIT, AND FAMILY LAW LITIGATION

by

William V. Dorsaneo, III*

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THIS Article discusses the jurisdictional power of state courts to adjudicate family law disputes involving persons who are not domiciliaries or residents of the forum state. It examines a series of recent decisions by the United States Supreme Court and applies their teachings in the context of family law litigation. Particular attention is given to the requirements of the due process clause, the relationship of the due process clause to principles of full faith and credit, and legislative responses to problems commonly encountered by family law practitioners who are in the business of litigating family law disputes in the interstate context. In this regard, the Article analyzes and compares the provisions of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act of 1980 that compel enforcement of sister state child custody determinations with comparable provisions of the Texas Family Code. A principal thrust of the Article is to demonstrate the relationship among these three legislative schemes, which are designed to deal with problems of the "interstate child" who remains trapped in the conflict of laws.

PART A. THE DUE PROCESS CLAUSE AND FAMILY LAW LITIGATION

I. EXTRATERRITORIAL JURISDICTION AND THE DUE PROCESS CLAUSE

   A. The Historical Importance of the Nature of the Action

   Prior to the landmark decision of the United States Supreme Court in Shaffer v. Heitner,1 the method of analysis used to justify the exercise of extraterritorial jurisdiction over a nonresident was based upon the differences among in rem jurisdiction, quasi in rem jurisdiction, and in personam jurisdiction. Since 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. As explained in Shaffer: "[W]hen a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated 'in per-

sonam' and can impose a personal obligation on the defendant in favor of the plaintiff."2 A classic example of a personal judgment is a money judgment enforceable against all of the defendant's property subject to execution.

If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and [such a judgment] does not impose a personal liability on the property owner, since he is not before the court.3 In other words even when a court was unable to exercise personal jurisdiction over a nonresident, the presence of property within the forum was sufficient to support the exercise of jurisdiction over the nonresident property owner. This jurisdiction was limited to the extent of the nonresident's interest in the property when the property was properly subjected to the jurisdiction of the forum court.4 According to the first Restatement of Judgments, a judgment in rem affected the interests of all persons in the property while a judgment quasi in rem affected the interests of particular persons in designated property.5 More significantly from the standpoint of jurisdiction over nonresident property owners' interests in such property, however, was the fact that one variety of quasi in rem jurisdiction did not require the resident plaintiff to have any preexisting claim to an interest in the subject property.6 In the ordinary case the only relationship between the property subjected to jurisdiction and the claim asserted against the nonresident was the defendant's ownership of property in the forum state. The dispute did not need any relationship to the property. The heart of this jurisdictional principle was that, with respect to litigation that otherwise had nothing to do with the property, the nonresident's property could be captured and held hostage through the exercise of legal process directed at the property.

The conceptual scheme based upon differences among personal, quasi in rem, and in rem judgments worked reasonably well in garden-variety tort and contract litigation. Moreover, litigating property disputes where the property is located at the time of the commencement of the litigation and the time of judgment is frequently sensible. Even so, some litigation did not easily fit the three categories.

As least as early as Pennoyer v. Neff,7 Justice Field had concluded that actions that involved the civil status of an inhabitant of the forum state

2. Id. at 199.
3. Id.
4. See Pennoyer v. Neff, 95 U.S. 714, 727-28 (1878). Two reasons are given in the opinion concerning the attachment of the property. First, attachment combined with constructive service (publication) provided a greater assurance that the nonresident would actually receive notice. Secondly, since the jurisdiction depended upon the defendant's ownership of property within the forum, attachment was necessary to preserve jurisdiction.
5. Restatement of Judgments 5-9 (1942).
7. 95 U.S. 714, 733-35 (1878).
could be litigated there, even when the other party was a nonresident who owned no property there and had no ties or relations with the forum state. The action was considered in rem or quasi in rem. Since relatively few proceedings concerning the dissolution of the matrimonial relationship involve only questions of status, this jurisdictional scheme presented situations when, for example, the divorce court had the power to render a divorce decree, but did not have the power to make any other order binding upon the nonresident except orders involving the nonresident's property located in the forum state. This result occurred because the adjudication of questions of support required personal jurisdiction. Conservatorship and custody questions are also encountered in typical dissolution proceedings. The decision as to which category was applicable to them varied. Should a child custody decree binding upon the nonresident require personal authority and jurisdiction over the nonresident? Was the question of conservatorship similar to the question of support, or should it be handled under the rule that only in rem or quasi in rem jurisdiction, based upon the domicile or physical presence of the child in the forum, was necessary? As these questions suggest, the historical method of analyzing the matter in terms of the nature of the action was not particularly helpful in typical domestic relations litigation.

A related problem concerning the method of providing notice to the nonresident appears to have been a byproduct of the scheme that sought to classify actions as either in rem, quasi in rem, or in personam. Since personal service was necessary to support the exercise of personal jurisdiction (absent consent) and since personal service of citation could not be obtained against a nonresident (prior to the development of long-arm statutes establishing a fictional service agent in the forum), the notion developed that personal service upon a nonresident within the state itself conferred jurisdiction. On the other hand, in rem or quasi in rem proceedings, by definition less expansive forms of jurisdiction because of their effect only upon property within the forum, involved other forms of citation, which were generally characterized as constructive service. Some forms of constructive service, such as citation by publication, were not always reasonably calculated under the circumstances to apprise interested parties of the pendency of the action; thus, the parties were not afforded an opportunity to present their objections. Despite the fact that modern due process notions reject the idea that the classification of the action determines the mode of service, the application of the traditional thought process has led some courts and commentators to perpetuate the perceived relationship

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8. See Sgitcovich v. Sgitcovich, 150 Tex. 398, 404, 241 S.W.2d 142, 146 (1951). "While personal service is always necessary if a judgment in personam is to be rendered against a non-resident of a state, who does not voluntarily appear or otherwise consent to some other method of service . . . ." Id. (emphasis added).

9. See Johnson, Citation by Publication: A Sham Upon Due Process, 36 Tex. B.J. 205 (1973).

between the nature of the action and the mode of service.\textsuperscript{11}

\section*{B. The Evolution of Judicial Jurisdiction Theories}

\subsection*{1. Traditional Bases of Jurisdiction}

\textit{a. Domicile of the Defendant.} Domicile in the forum state has traditionally been considered sufficient to render a domiciliary of a state amenable to process issued by its courts.\textsuperscript{12} Moreover, a true domiciliary relationship\textsuperscript{13} rendered a defendant, who was temporarily absent from home, subject to personal jurisdiction even when served in a sister state or abroad.\textsuperscript{14}

\textit{b. Physical Presence of the Defendant.} Another traditional basis for the exercise of personal jurisdiction is personal service upon a nonresident while the nonresident is physically present within the territorial boundaries of the forum state.\textsuperscript{15} This basis for jurisdiction, which has its foundation in the notion that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established,"\textsuperscript{16} was pushed to its humorous limits when it was used to justify service upon an airline passenger in the airspace over state $C$ while he was in flight from state $A$ to state $B$.\textsuperscript{17} At least two common law restrictions have traditionally been placed upon the physical presence basis for personal jurisdiction. If the physical presence occurs in connection with the making of special appearance, the presence has been considered privileged.\textsuperscript{18} This limitation was conceived because the opposite result tended to nullify procedures permitting a limited appearance to challenge an assertion of jurisdiction over a nonresident.\textsuperscript{19} In addition, according to the general rule, presence procured by fraud or trickery is ineffective to support the exercise of personal jurisdiction.\textsuperscript{20} Since due process requires that assertions of jurisdiction over a nonresident be based upon the relationship among the defendant, the forum, and the litigation,\textsuperscript{21} rather than upon the mutually


\textsuperscript{12} Milliken v. Meyer, 311 U.S. 457, 462-63 (1940).

\textsuperscript{13} Technical domicile does not count. McDonald v. Mabee, 243 U.S. 90, 91-92 (1917).


\textsuperscript{15} Brown v. Brown, 520 S.W.2d 571, 574 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).


\textsuperscript{18} Oates v. Blackburn, 430 S.W.2d 400, 402-03 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

\textsuperscript{19} See FED. R. CIV. P. 12; TEX. R. CIV. P. 120a.


\textsuperscript{21} Shaffer v. Heitner, 433 U.S. 186, 204 (1977); see infra notes 64-85 and accompanying text.
exclusive sovereignty of the states, physical presence, without more, may no longer support the exercise of personal jurisdiction over a nonresident.

c. Presence of Property in the Forum State. Prior to Shaffer v. Heitner a divorce court could adjudicate the rights of both spouses in all personal and real property within the court's jurisdiction. In Shaffer the Supreme Court held that the same standard of fairness applies in determining whether jurisdiction can be exercised over property owned by nonresidents. Hence, the proper analysis considers the relationship among the forum state, the defendant, and the litigation. In this regard:

[When claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State. The presence of property may also favor jurisdiction in cases, such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership.

On the other hand, the Court in Shaffer also recognized that in some circumstances the presence of property will not support the forum court's jurisdiction even when the litigation involves claims to the property itself. Such a result may occur, for example, when a spouse moves matrimonial property to a foreign forum in order to secure an award of all the property to himself.

d. Civil Status Determinations. Since 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 nonresident or a citizen of another state. As held by the United States Supreme Court in Williams v. North Carolina, "it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent." The basis for this jurisdiction is the nexus between the domiciliary and the forum, which has an important and

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24. Id. at 208 n.25; see also Note, The Power of a State to Affect Title in a Chattel Atypicaly Removed to It, 47 COLUM. L. REV. 767 (1947).
25. 95 U.S. 714 (1878).
26. Id. at 734-35.
27. 317 U.S. 287 (1942).
28. Id. at 298-99.
legitimate interest in the marital status of its domiciliary.\(^{29}\) By analogy to
cases involving the presence of property in the forum, this jurisdiction tra-
ditionally has been termed quasi in rem in order to accommodate it techni-
cally within the theoretical scheme described in *Pennoyer*.\(^{30}\) Jurisdiction
to alter civil status was expressly recognized in *Shaffer v. Heitner*. In a
footnote the Supreme Court stated that “[w]e do not suggest that jurisdicti-
onal doctrines other than those discussed in text, such as the particular-
ized rules governing adjudications of status, are inconsistent with the
standard of fairness.”\(^{31}\)

From the standpoint of constitutional requirements, domicile is proba-
bly not the only basis for jurisdiction to dissolve the marital relationship.
Extended military service may be sufficient.\(^{32}\) Yet, the determination that
the spouse seeking to invoke the jurisdiction of the forum court is a domi-
ciliary is not purely a question of local law. A judgment in one state is
conclusive upon the merits in every other state, but only when the court of
the first state had power to adjudicate the merits.\(^{33}\) Consequently, the
determination that the resident spouse was a domiciliary may be tested by a
court in a sister state. As stated in *Williams v. North Carolina*:

> The State of domiciliary origin should not be bound by an un-
founded, even if not collusive, recital in the record of a court of an-
other State. As to the truth or existence of a fact, like that of domicil,
upon which depends the power to exert judicial authority, a State not
a party to the execution of such judicial authority in another State but
seriously affected by it has a right, when asserting its own unques-
tioned authority, to ascertain the truth or existence of that crucial
fact.\(^{34}\)

The finding of domicile may be disregarded on the basis of “cogent evi-
dence” to the contrary.\(^{35}\) As explained in *Layton v. Layton*,\(^{36}\) a collateral
attack should not be successful when the defendant making the attack has
already contested the jurisdictional issues in the divorce court.\(^{37}\)

With respect to durational residence requirements, the United States
Supreme Court has held that a one-year residence requirement is constitu-
tional if the requirement is based on grounds other than purely budgetary
considerations or administrative convenience.\(^{38}\) The state’s interest in
avoiding becoming a divorce mill and its interest in seeing that its decrees
be accorded full faith and credit support imposition of a one-year resi-

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\(^{30}\) See supra note 7 and accompanying text.
\(^{31}\) Shaffer v. Heitner, 433 U.S. 86, 208 n.30 (1977). For a full discussion of this foot-
note, see infra text accompanying notes 203-18.
\(^{32}\) See Wood v. Wood, 320 S.W.2d 807, 811 (Tex. 1959).
\(^{34}\) Id. at 230.
\(^{35}\) Id. at 236.
\(^{36}\) 538 S.W.2d 642 (Tex. Civ. App.—San Antonio 1976, writ ref’d n.r.e.).
\(^{37}\) Id. at 647; see also Kellogg v. Kellogg, 559 S.W.2d 126, 128 (Tex. Civ. App.—Tex-
arkana 1977, no writ).
\(^{38}\) Sosna v. Iowa, 419 U.S. 393, 406 (1975).
Questions of custody and conservatorship must be separated from marital dissolution status determinations. The due process fairness analysis is enormously more complex in cases involving suits affecting the parent-child relationship. Most of the difficult problems are presented in this area.  

2. The Minimum Contacts Doctrine

The modern era of due process analysis begins with Justice Stone's opinion in *International Shoe Co. v. Washington*. From the present day perspective, the importance of the opinion rests on its insistence that in making the jurisdictional determination, a court's power over the defendant's person is not the central concern. Rather the problem is to determine under what circumstances a nonresident may be justly subjected to a local suit when the matter is considered in light of our federal system of government and "traditional notions of fair play and substantial justice." The main difficulty with this more flexible approach is in translating the idea into a course of conduct in the particular contexts in which the problem is likely to arise.

In *International Shoe* the issue was whether a foreign corporation was subject to the jurisdiction of the State of Washington as a result of the conduct of its representatives who sold shoes in the state. Consequently, Justice Stone's often-quoted formula was created in the context of a commercial setting:

But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." The opinion reflects dissatisfaction with a purely quantitative evaluation of the nonresident's activities. The determination of whether subjecting a nonresident to a local suit is fair also depends upon the quality and nature of the activity. In given cases, when a nexus exists between the activity in the forum state and the litigation problem, the forum state's exercise of jurisdiction might be fair and reasonable even though the activity was of a limited character. On the other hand, continuous and systematic activity of a nonresident within the forum ordinarily supports the exercise of jurisdiction, even when the activity did not give rise to the litigation. The due process clause, however, does not support the exercise of jurisdiction over

39. *Id.* at 408-09.
40. *See infra* Part A, III.
41. 326 U.S. 310 (1945).
42. *Id.* at 316; *see* Shaffer v. Heitner, 433 U.S. 186, 203-05 (1977) (discussing *International Shoe*).
43. 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
a nonresident "with which the state has no contacts, ties, or relations." Although the Court in *International Shoe* clearly altered the way in which the jurisdictional analysis is conducted, the minimum contacts test is not particularly illuminating or helpful when concrete problems require its application. The significance of the decision involves its departure from the tradition of a physical power conception of personal jurisdiction. As commentators have noted, "the 'minimum contacts' doctrine has the merit of flexibility and the defect of vagueness."45

Prior to 1970, the United States Supreme Court decided four other cases on the subject of the exercise of personal jurisdiction over nonresidents. In *Perkins v. Benguet Consolidated Mining Co.*46 the Court reiterated that jurisdiction could be asserted against a nonresident when the cause of action did not arise out of the nonresident's activities within the forum state, if the nonresident's other activities in that state were "substantial."47 In *McGee v. International Life Insurance Co.*48 a personal judgment by a California court against a Texas-based insurance company was upheld, because the Texas company sent premium statements to policy holders who resided in California. At the time, *McGee* was thought to support a very broad interpretation of the minimum contacts doctrine such that virtually any contact would support the exercise of jurisdiction over a nonresident.49 This view was quickly eroded by the Supreme Court's elusive opinion in *Hanson v. Denckla*.50 In *Hanson* the Court held that the minimum contacts test of *International Shoe* is not satisfied unless the defendant "purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."51 Thereafter, until its opinion in *Shaffer v. Heitner*,52 the Supreme Court left the resolution of this problem to state and lower federal courts.

Lower courts have fashioned more explicit tests for determining whether the exercise of jurisdiction over a nonresident satisfies due process. Most of these tests were developed in the context of tort or contract litigation. Since the tests purport to be analyses of the due process requirements of the fourteenth amendment, however, they are pertinent to domestic relations cases. A traditional favorite of the Texas Supreme Court is derived from *O'Brien v. Lanpar Co.*53 in which the issue was whether an Illinois judgment was entitled to full faith and credit in Texas. The test, which has

44. 326 U.S. at 319.
46. 342 U.S. 437 (1952).
47. Id. at 447.
51. Id. at 253.
52. 433 U.S. 186 (1977); see infra notes 65-73 and accompanying text.
53. 399 S.W.2d 340 (Tex. 1966).
been frequently repeated by Texas courts of appeals, has three components:

(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. 54

The due process clause does not, however, require a relationship between the defendant's act or transaction in the forum state and the cause of action in all cases. 55 The Supreme Court of Texas recently explained that the O'Brien test has been the subject of some controversy and that "the second prong [of the test] is unnecessary when the nonresident defendant's presence in the forum through numerous contacts is of such a nature . . . as to satisfy the demands of the ultimate test of due process." 56

Lower federal courts have formulated more flexible tests. In Hearne v. Dow-Badische Chemical Co. 57 a federal district court indicated that the application of the minimum contacts doctrine involves a consideration of five factors: (1) the nature and character of the business; (2) the number and type of activities within the forum; (3) whether such activities gave rise to the cause of action; (4) whether the forum has some special interest in granting relief; and (5) the relative convenience of the parties.

Several federal district 58 and state appeals courts 59 have used the Hearne test. Apparently, from the manner in which these other courts have applied this formula, no one factor is essential to each case. In other words, it is not essential that the cause of action arise from or be connected with the activities conducted in the forum when the nonresident's unrelated activities in the forum are substantial. This interpretation provides the Hearne test with the merit of flexibility.

The Fifth Circuit Court of Appeals articulated a method of analysis in

54. Id. at 342 (emphasis added) (quoting Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wash. 2d 106, 381 P.2d 245, 251 (1963)).
Product Promotions, Inc. v. Cousteau\(^60\) that identifies two main factors: "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.'"\(^61\) Although the Cousteau dual test is not explicit in its inclusion of the factors contained in the Hearne test, the opinion clearly indicates that factors of the type mentioned in Hearne are relevant to Cousteau's "minimum contact" and "fair and reasonable" standards. The requirement that the cause of action be related to the minimum contact need not be satisfied in every case. The Cousteau test appears to be the current favorite of federal district courts, and it was even quoted by the Texas Supreme Court in U-Anchor Advertising, Inc. v. Burt\(^62\) with apparent approval. It is now relatively clear that a majority of the Texas Supreme Court does not interpret the due process clause to require a nexus between the minimum contact and the cause of action in all cases. Consequently, when the O'Brien test is advanced for that proposition, it is important to understand that viable counterarguments are available.\(^63\)

3. The Minimum Contacts Doctrine After Shaffer v. Heitner

In a series of cases decided in the late 1970s the United States Supreme Court recast the minimum contacts doctrine and at the same time extended its applicability to what the Court called the in rem wing of Pennoyer v. Neff.\(^64\) In 1977 the Court decided Shaffer v. Heitner.\(^65\) A stockholder's derivative action was instituted in Delaware against Greyhound Corporation and several of its officers who were also stockholders of the corporation. For many of the individual defendants, no showing of any contact with Delaware was made that would support a personal judgment against them. A Delaware procedure called sequestration was used to seize constructively the individual defendants' ownership interests in the Greyhound Corporation. This seizure was accomplished by placing stop transfer orders on the corporation's books. The court's order clearly indicated that the sequestration would be vacated as to any defendant who personally appeared in the action. In other words, the stock was held hostage to compel the personal appearance of the individual defendants who otherwise would forfeit their interests in Greyhound Corporation. After

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60. 495 F.2d 483 (5th Cir. 1974).
61. Id. at 494 (citation omitted).
62. 553 S.W.2d at 762. The Texas Supreme Court opinion also quoted the O'Brien test and apparently applied it to the problem at hand. Since the cause of action was "connected with the contractual obligation . . . partially performable in Texas," no need arose to choose among the due process tests. Id.
63. Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870, 872 (Tex. 1982), quoted supra at text accompanying note 56. The Fifth Circuit has indicated that the due process clause does not require a relationship between the defendant's activities and the cause of action if the activities are "continuous and systematic activities." Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1266-67 (5th Cir. 1981); see also Boyd v. Piper Aircraft Corp., CA-3-80-1151-G (N.D. Tex. Feb. 24, 1981).
64. 95 U.S. 714 (1878).
tracing the development of the minimum contacts doctrine and quoting International Shoe, the Supreme Court recast the doctrine in the following terms: “Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of Pennoyer rest, became the central concern of the inquiry into personal jurisdiction.”\(^6\) This new formulation of the minimum contacts doctrine lends a slightly different emphasis to the method of analysis.

The minimum contacts formula articulated in International Shoe definitively focuses upon the relationship between the defendant and the forum. The character of the litigation and its relationship with the defendant's contacts are also important, primarily because a more extensive number of contacts are required when the litigation is unrelated to them. On the other hand, the interest of the forum state in the litigation has played a somewhat smaller role, especially after Hanson v. Denckla.\(^6\) In Hanson the Supreme Court stated: “The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of [the Due Process standard] will vary with the quality and nature of the defendant's activity . . . .”\(^6\) The Court in Shaffer, however, seemed to place the relationship of the forum to the litigation on a somewhat more equal footing with the relationship between the forum and the defendant. This modified formulation suggests greater emphasis on the forum's interest in adjudicating the controversy.\(^6\) On the other hand, the balance of the Shaffer opinion suggests that the state's interest must be particularly strong when the relationship of the defendant forum is insubstantial.

In Shaffer the argument was made on appeal that because the nonresident defendants held positions as officers and directors of a corporation chartered in Delaware, Delaware's interest in supervising the management of the corporation should give its courts jurisdiction over a stockholder's derivative action although the nonresidents had never set foot in Delaware. In answering this contention, the Supreme Court made two responses, either of which would have been sufficient. First, the Court stated:

This argument is undercut by the failure of the Delaware Legislature to assert the state interest appellee finds so compelling. Delaware law bases jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State. Although the sequestration procedure used here may be most frequently used in derivative suits against officers and directors . . . the authorizing statute evinces no specific concern with such actions . . . If Delaware perceived its interest in securing jurisdiction over

\(^{66.}\) Id. at 204 (emphasis added).
\(^{67.}\) 357 U.S. 235 (1958).
\(^{68.}\) Id. at 253.
corporate fiduciaries to be as great as Heitner suggests, we would expect it to have enacted a statute more clearly designed to protect that interest.\textsuperscript{70}

This reasoning suggests that whether the state has identified a particular interest in adjudicating the controversy must be ascertained from the statutory scheme. The second basis for discounting the importance of Delaware's interest was stated in more traditional terms. Quoting from \textit{Hanson}, the \textit{Shaffer} Court stated that "[t]he issue is personal jurisdiction, not choice of law";\textsuperscript{71} Delaware was not "a fair forum for this litigation."\textsuperscript{72}

The last part of the \textit{Shaffer} opinion discusses whether the nonresidents implicitly consented to suit in Delaware when they acquired shares of stock in a Delaware corporation. In rejecting this contention, the Court concluded that the nonresidents "had no reason to expect to be haled before a Delaware court."\textsuperscript{73}

The next treatment of the minimum contacts doctrine by the United States Supreme Court was \textit{Kulko v. Superior Court}.\textsuperscript{74} In \textit{Kulko} a mother brought suit in California against her ex-husband to obtain custody of two children and to increase his child support obligations. Under a prior separation agreement, the children were to remain with the father most of the year and spend vacations with the mother. The mother was to receive $3,000 for the children's support during the time they resided with her. Although the parents had been married in California while Mr. Kulko was in the armed forces, they lived as husband and wife in New York for thirteen years. After they separated, she moved to California, and he stayed in New York. The father voluntarily sent one of the children with her belongings to California. The California courts considered this act sufficient to support the exercise of in personam jurisdiction over him with respect to both children. The father did not contest the California court's jurisdiction for the purpose of the custody determination. The Supreme Court held that the father's purchase of a one-way plane ticket for his daughter so that she could go to live with her mother was not sufficient to subject him to personal jurisdiction in California with respect to either child. The Court relied heavily upon the limiting language quoted above from \textit{Hanson v. Denckla}. Professor Weintraub has suggested that the \textit{Kulko} holding does not necessarily have application to child custody determinations, because the father did not attempt to appeal the custody issue.\textsuperscript{75}

From the standpoint of the relationship of the defendant to the forum, the \textit{Kulko} opinion concludes that the father's acquiescence in his daughter's desire to live with her mother did not constitute a purposeful act because "[a] father who agrees, in the interests of family harmony and his

\textsuperscript{70} 433 U.S. at 214-15.
\textsuperscript{71} \textit{Id}. at 215 (quoting \textit{Hanson}, 357 U.S. at 254).
\textsuperscript{72} 433 U.S. at 215.
\textsuperscript{73} \textit{Id}. at 216.
\textsuperscript{74} 436 U.S. 84 (1978).
\textsuperscript{75} \textit{See} Weintraub, \textit{Texas Long-Arm Jurisdiction in Family Law Cases}, 32 Sw. L.J. 965, 981 (1978).
children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws." 76 Furthermore, the Supreme Court considered the act of acquiescing in the daughter's return an insufficient jurisdictional basis for two other reasons. First, "[t]his single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being 'haled before a [California] court.'" 77 Secondly, the fact that the act involved personal, domestic relations rather than commercial activity designed to produce a commercial benefit apparently was significant. The opinion indicates that noncommercial acts may be viewed differently: "[T]he mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." 78

With respect to the relationship between the forum and the litigation, the Court in Kulko recognized California's legitimate interests, but held that certain legislation already protected those interests. "California's legitimate interest in ensuring the support of children resident in California without unduly disrupting the children's lives, moreover, is already being served by the State's participation in the Revised Uniform Reciprocal Enforcement of Support Act of 1968." 79 Moreover, as in Shaffer v. Heitner, the character of the statute upon which the exercise of jurisdiction was predicated was considered to be of some importance. Kulko also suggests that long-arm provisions should enumerate the specific fact situations in which jurisdiction may be obtained. "California has not attempted to assert any particularized interest in trying such cases in its courts by, e.g., enacting a special jurisdictional statute." 80

After Kulko, two Supreme Court decisions, World-Wide Volkswagen Corp. v. Woodson 81 and Rush v. Savchuk, 82 extended the interpretation of the new minimum contacts formulation to other types of litigation. Of principal importance are the sections of the World-Wide Volkswagen opinion that explain the foreseeability notion mentioned first in Shaffer and restated in Kulko.

In World-Wide Volkswagen Corp. v. Woodson the plaintiffs purchased an Audi in New York. The following year plaintiffs moved to Arizona. "As they passed through the State of Oklahoma, another car struck their

76. 436 U.S. at 94.
77. Id. at 97-98 (citing Shaffer, 433 U.S. at 216).
78. 436 U.S. at 101 (emphasis added).
79. Id. at 98.
80. Id.
82. 444 U.S. 320 (1980).
Audi in the rear," and they were injured. They filed a products liability action in Oklahoma against the manufacturer, the importer, regional distributor, and retailer. The retailer and the regional distributor made special appearances, which were overruled.

The Supreme Court determined that although it was foreseeable that an automobile purchased in New York could arrive in Oklahoma and cause injury there, this foreseeability was not the kind due process envisaged. To be relevant, a different type of foreseeability was required:

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. . . . The Due Process Clause, by ensuring the "orderly administration of the laws" . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

With respect to the relationship between the forum and the litigation and the special interest of the forum in adjudicating the controversy, the Court in World-Wide Volkswagen described the proper analysis:

As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. [International Shoe, 326 U.S. at 316]. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." We have said that the defendant's contacts with the forum State must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" [Id. The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." [Id. at 317]. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see [McGee, 355 U.S. at 223]; the plaintiff's interest in obtaining convenient and effective relief, see [Kulko, 430 U.S. at 92], at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. [Shaffer, 433 U.S. at 211 n.37]; the interstate judicial

83. 444 U.S. at 288.
84. Id. at 297 (citations omitted; emphasis added).
system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see [Kulko, 430 U.S. at 93, 98].

4. Modern Due Process Methodology

In Shaffer v. Heitner the Supreme Court recharacterized the test required by the due process clause in terms of the relationship among the defendant, the forum, and the litigation. In other words, the burden upon the defendant, while always a primary concern, is not the only concern. As the quoted excerpt from the Supreme Court’s opinion in World-Wide Volkswagen v. Woodson indicates, the burden upon the defendant “will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute.” Additional relevant factors include the plaintiff’s interest in obtaining effective relief in a convenient forum, the interstate judicial system’s interest in obtaining “the most efficient resolution of controversies,” and “the shared interest of the several States in furthering fundamental substantive social policies.”

Based upon the foregoing, the proper application of the due process standard of fairness set forth in Shaffer v. Heitner requires that the legitimate interest of the forum state be balanced against the burden upon the nonresident when the litigation is to be conducted in a distant forum. For example, a consideration of the forum’s legitimate interests in the civil status of its inhabitants and in the determination of ownership interests in property within its territorial boundaries will normally mean that divorce decrees may be rendered when one spouse is a true domiciliary and that ownership interests in property may be adjudicated when the property is located within the forum. Moreover, by giving explicit consideration to the legitimate interest of the forum state, the due process fairness standard described in Shaffer v. Heitner is particularly pertinent to custody cases involving the interstate child, because the forum state’s interest is particularly strong when the child’s connection with the forum is significant.

Another significant aspect of the new due process methodology involves the issue of whether the defendant’s conduct and connection with the forum are such that the defendant should reasonably anticipate being haled into court there. Whether the defendant’s activities in relation to the forum indicate that the defendant is or reasonably should be on notice that he or she could be haled into its courts should be taken into account in determining the relationship between the forum and the defendant. Just as the reformulation of the due process standard in terms of the relationship among the defendant, the forum, and the litigation lends an emphasis to the analysis different from the International Shoe “minimum contacts” formulation, the “haled into court” aspect of the new foreseeability principles first enunciated in Shaffer and repeated in Kulko and World-Wide Volkswagen is analogous to the more cryptic “purposeful availment” require-

85. Id.
Considerations such as the quality, nature, and extent of the activity in the forum, the foreseeability of consequences within the forum from activities outside it, and the relationship between the cause of action and the contacts relate to whether it can be said that the defendant's actions constitute "purposeful availment," or in modern terms, whether the defendant's activities in relation to the forum indicate that he or she is on notice that he or she could be haled into its courts. This aspect of the analysis required by the more recent Supreme Court decisions is particularly important for cases involving adjudications of support. In other words, adjudications of support will be controlled principally by the new foreseeability principles introduced in *Shaffer v. Heftner* and applied in *Kulko* and *World-Wide Volkswagen*.

As Part B of this Article explains, the treatment of custody and termination litigation has bedeviled the courts at all levels. Probably as a result of the fact that neither the teachings of *Pennoyer* nor the conceptual scheme embodied in the *International Shoe* opinion (prior to its reformulation in *Shaffer v. Heitner*) handled custody litigation easily, lower courts have struggled with custody cases more than virtually any other species of domestic relations litigation. One result of the confusion has been the passage of uniform state legislation. With respect to custody litigation, federal legislation must also be considered. Parts C and D of this Article consider these problems in detail in the context of the legislation and Texas case law.

### C. The Notice Requirements of Due Process

The Texas Rules of Civil Procedure provide various techniques for service of process upon both residents and nonresidents of Texas. The Texas Family Code addresses the problem of which method of service is available in a family law case. While compliance with the rules of procedure and their statutory counterparts is required, compliance with the notice requirements of due process is also necessary.

The central case on this subject is *Mullane v. Central Hanover Bank & Trust Co.* The case involved the notification by publication of certain beneficiaries to a trust fund. The publication was in accordance with the minimum requirements of New York banking laws, which permitted publication in a local newspaper. The trustee of the trust fund had instituted the action to settle the rights of the beneficiaries in the fund and to validate the trustee's handling of it. The method of notice by publication was challenged by a special guardian appointed pursuant to New York law to protect the beneficiaries' interests.

The guardian argued that the New York court was without power to adjudicate the interests of all persons residing outside New York. The

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The guardian contended that the action was in personam rather than in rem and that, under principles set forth in *Pennoyer v. Neff*; the state was without power to adjudicate beyond its borders. The Supreme Court rejected this argument on the basis that the requirements of the fourteenth amendment do not depend upon whether judicial proceedings to settle fiduciary accounts are termed in rem, quasi in rem, or in the nature of proceedings in rem. The Court concluded: “[t]he interest of each state in providing means to close trusts that exist by grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants . . . .” In other words, the Supreme Court effectively bypassed the opportunity to reconsider the in rem wing of *Pennoyer*.

The Court next considered the adequacy of the notice given the beneficiaries. It identified the beneficiaries’ interest in effective notice and the state’s interest in a practical means of complying with the notice requirements. The Court articulated the general principles of fourteenth amendment notice requirements:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

In considering the subject of citation by publication, the Supreme Court concluded that as a general proposition, publication was not a “reliable means of acquainting interested parties” of the litigation. At least in the context of missing or unknown persons, however, the Court said it had not hesitated to approve publication as being the only practical means. In short, publication is appropriate when it is the only practical means under the circumstances. In the circumstances of a common trust involving great numbers of beneficiaries, “impracticable and extended searches are not required in the name of due process.” Consequently, the Court held that published notice is sufficient with respect to beneficiaries whose location or interests are unknown to the trustee. But in other situations something more than publication is required. For a person whose address is known, the Court stated that the classic method is personal service. Mailed notice to known beneficiaries is a constitutionally sufficient alternative, which the

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89. 95 U.S. 714 (1878); see *supra* notes 7-11 and accompanying text.
90. 339 U.S. at 313.
91. *Id* at 314.
92. *Id* at 315.
93. *Id* at 317-18.
Court considered reasonably calculated to reach the defendant while at the same time not imposing a serious expense burden on the party who instituted the proceeding.

A similar approach was taken in *Armstrong v. Manzo*. After the parents were divorced and the wife remarried, the second husband attempted to adopt the wife's daughter. At the time, Texas law provided that a step-parent adoption could be granted without the natural father's consent when he had failed to contribute to the child's support to the extent of his ability for two years. Consequently, no notice of the proceeding was given to the father. The Supreme Court held that the most rudimentary demands of due process had not been met. Moreover, the fact that the first husband was afforded an opportunity to attack the trial court's determination on the question of support did not matter. The *Armstrong* opinion reiterates the principles set forth in *Mullane*.

The Texas Rules of Civil Procedure provide generally for two types of service that do not involve the personal delivery of the citation to the defendant: citation by publication and citation by registered or certified mail, return receipt requested. Citation by publication has been properly characterized as a sham upon due process. As *Mullane* indicates, publication is such a miserable substitute for actual notice that whenever the respondent's identity is known or may be ascertained by the exercise of reasonable diligence, this method of service should be avoided by counsel and discountenanced by the courts.

As a general proposition, service by registered or certified mail, return receipt requested, is not subject to the same strong criticism. Consequently, the general rule with respect to mailed service is that there is no constitutional requirement that the mailed notice actually be received. Consider *Texas Real Estate Commission v. Howard*, in which a notice letter was returned unclaimed: "Where service of notice by registered mail is expressly authorized by statute, service is effected when the notice is properly stamped, addressed, registered and mailed." 

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95. Id. at 552.
98. Johnson, supra note 9.
99. In Sgitcovich v. Sgitcovich, 150 Tex. 398, 405, 241 S.W.2d 142, 146 (1951), the Texas Supreme Court stated that "[t]o dispense with personal service, the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." See also Wiebusch v. Weibusch, 636 S.W.2d 540 (Tex. Civ. App.—San Antonio 1982, no writ); Forney v. Jorrie, 511 S.W.2d 379, 384 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (when substituted service under rule 106 is available, publication is not appropriate).
100. 538 S.W.2d 429 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).
101. Id. at 433.
II. DISSOLUTION PROCEEDINGS AND THE TEXAS FAMILY CODE

A. Civil Status, Personal Jurisdiction, and Divisible Divorce

A divorce case typically involves questions other than the mere dissolution of the marital relationship. A dissolution of the marital relationship under traditional civil status rules may be based on the domicile of one spouse in the state that granted the divorce, even when there is no personal jurisdiction over the nonresident spouse. Domicile of the resident spouse, however, has not generally been considered a jurisdictional basis for altering the rights of spouses as to property, alimony, or conservatorship so as to bind both parties.

In order to satisfy the legitimate interest of the state in which a domiciliary sought a divorce against a nonresident, the concept of divisible divorce was created as a working compromise. Under this concept, when a court cannot adjudicate all issues that arise in the context of a matrimonial dissolution proceeding because domicile of the resident spouse is not sufficient as a jurisdictional foundation, it may still render an enforceable divorce decree. Resolution of the other matters is left to litigation in jurisdictions where jurisdiction exists. As a practical matter, divisible divorce means that all aspects of a dissolution proceeding are entitled to full faith and credit only when other requirements are satisfied. These other requirements depend upon the particular aspect of the dissolution proceeding under consideration. For example, personal jurisdiction is required for support decrees and the division of matrimonial property located outside Texas. Property located in Texas is also subject to the due process fairness analysis involving the relationship among the defendant, the forum, and the litigation. The presence of the property in Texas, however, will ordinarily give rise to the presumption that Texas is an appropriate forum for the determination of ownership interests in the property. An additional set of requirements has been devised for foreign realty. Finally, custody and termination cases have undergone a complex series of developments that are considered in detail in a later section of this Article.


1. Situational Requirements

A Texas court may acquire personal jurisdiction over a spouse who is

103. See Sampson, Jurisdiction in Divorce and Conservatorship Suits, 8 Tex. Tech L. Rev. 159, 163 (1976): "Thus, personal jurisdiction over both parties is the touchstone for effective resolution of all issues arising upon divorce. Given the nature of today's society, the divisible divorce concept and the resultant impotence of the courts involved often lead to hardship and inequity."
104. See supra text accompanying notes 22-24.
105. See infra text accompanying notes 125-29.
106. See infra Part A, III.
not a Texas resident or domiciliary by invoking the court's long-arm jurisdiction. Section 3.26 of the Texas Family Code provides that if the petitioner is a Texas resident or domiciliary at the commencement of the suit for divorce, the court may exercise personal jurisdiction over the respondent or the respondent's personal representative if: (1) Texas is the last state in which marital cohabitation between the parties occurred, and the suit is commenced within two years after the date on which cohabitation ended; or (2) there is any basis consistent with the Constitution of Texas or of the United States for the exercise of personal jurisdiction.  

Satisfaction of the situational requirements of this long-arm statutory provision are necessary when a resident spouse seeks dissolution of the marital relationship and division of matrimonial property of the type requiring the maintenance of personal jurisdiction. Moreover, as a result of Shaffer v. Heitner, the presence of the property would not itself be a sufficient basis for jurisdiction over a nonresident spouse, but it would be unusual for the state where the property is located not to have jurisdiction, unless the property was atypically removed to Texas from another state.

2. Case Law Construction

The first situational requirement of section 3.26 was construed in Scott v. Scott. Stephen and Catherine Scott were married in California. They subsequently moved to Texas where they lived together as a family unit for approximately four months. When they separated, Mrs. Scott returned to California. Shortly thereafter, Mr. Scott filed suit for divorce in Texas and sought a division of community property. Mrs. Scott was served with process in California. Although the first divorce proceeding instituted by Mr. Scott was dismissed because he had not satisfied the residency requirements of the Texas Family Code at the time of filing, he instituted a subsequent proceeding. After Mrs. Scott was again served in California, she made a special appearance to present a motion to the jurisdiction and a plea in abatement. The court of appeals affirmed the trial court's overruling of the special appearance.

The appellate court concluded that since the parties' marital cohabitation from November 22, 1975, until their separation in February 1976 made Texas the "last state in which marital cohabitation between petitioner and respondent occurred," and the suit was "commenced within two years after the date on which cohabitation ended," the situational requirements of section 3.26(a)(1) were clearly satisfied. The only remaining
question was whether the maintenance of the action comported with the minimum contacts concept and traditional notions of fair play and substantial justice. In concluding that the trial court did not commit reversible error in overruling the special appearance, the appellate court primarily focused upon the fact that Mrs. Scott presented no evidence binding on Mr. Scott or the trial court that she did not have the requisite minimum contacts with Texas. Since the agreed statement of facts reflected that the parties resided in Texas for two and one-half months prior to separation, the appellate court concluded that Mrs. Scott failed to carry her burden of showing that she was not amenable to process. In Fox v. Fox the Austin court of civil appeals, without expressly construing the second situational requirement of section 3.26, determined that there was no basis consistent with the due process clause of the fourteenth amendment for the exercise of personal jurisdiction. While serving in the army and stationed at Fort Hood, Texas, Mr. Fox brought suit for divorce against Mrs. Fox, an Ohio resident. Mrs. Fox was served with personal notice, but failed to appear. The trial court rendered a decree appointing her managing conservator, setting child support, and dividing matrimonial property, some of which was located in Ohio. Mrs. Fox made what she termed a special appearance after the decree was rendered and prayed that all aspects of the proceeding be set aside except the dissolution of the marital relationship. No one questioned the propriety of the special appearance after judgment. After a hearing, the trial court refused to reform the judgment. The appellate court reversed because "[s]imply stated, petitioner [Mrs. Fox] did nothing in Texas and therefore, the district court wrongfully asserted in personam jurisdiction over her." Consequently, the appellate court set aside the trial court's decree with respect to the conservatorship of the children and the division of property located outside Texas.

Comisky v. Comisky involved a similar situation. Benedict Comisky filed suit for divorce in Dallas County. He alleged that he satisfied the residential requirements of the Texas Family Code and that his wife was a resident of New York. Among other things, Mr. Comisky sought a division of property not located within Texas. Mrs. Comisky was served with process in Michigan. When she failed to appear, the trial court granted the divorce, gave Mr. Comisky managing conservatorship of the children, and granted a division of the property located outside Texas. Mrs. Comisky filed a motion for new trial, which the trial court overruled. Mrs. Comisky then appealed by writ of error. The judgment of the trial court was reversed except for the granting of the divorce. Two justices concluded that the required conditions for the exercise of long-arm juris-

114. Id. at 409.
115. Id.
117. TEX. FAM. CODE ANN. § 3.23 (Vernon 1975) (military personnel stationed in Texas).
diction were not alleged. Consequently, the record reflected error, because
the invalidity of the judgment was disclosed by the filed papers. All
agreed that the writ of error appeal constituted a general appearance re-
quiring a remand to the trial court for trial on the merits.118

The "last state of marital cohabitation" basis for personal jurisdiction
over a nonresident is an extremely crude test. Given the concept of di-
visible divorce and the special rules governing suits affecting the parent-child
relationship,119 what is really at issue is whether a division of matrimonial
property should be made in addition to the granting of the divorce. When
the property is situated in the jurisdiction where the divorce proceeding
has been instituted, the analysis set forth in Shaffer v. Heitner addresses the
problem directly. When the property is not located within the territory of
the forum, the analysis should turn upon whether it was removed from the
jurisdiction in which the divorce proceeding is instituted, whether the par-
ties acquired the property while residing together as a family in the forum
state, and whether the nonresident spouse is a resident of the state in which
the property is located. Since special rules are applicable to real property,
the issue will typically focus upon personal property removed from the
state of matrimonial domicile by a spouse who has left the state upon sepa-
ration. When is it fair and reasonable to require the spouse who left the
state of matrimonial domicile to submit to jurisdiction concerning an own-
ership interest in the property that was taken? This question, not the ques-
tion of whether the forum state was the last state of marital cohabitation, is
the important one. In other words, a determination that Texas was the last
state of marital cohabitation and that the suit was commenced within two
years after the cohabitation ended is only a starting point.

3. Additional Requirements for Child Custody or Support

Section 3.26(b) of the Texas Family Code provides: "A court acquiring
jurisdiction under this section also acquires jurisdiction in a suit affecting
the parent-child relation if Section 11.051 of this code is applicable."120
Professor Sampson indicated that section 3.26(b) is merely a cross-refer-
ce to the parent-child long-arm provision and "does not provide addi-
tional substantive rights."121 In other words, a Texas court's exercise of
jurisdiction over a nonresident spouse by way of division of matrimonial
property located outside Texas does not mean that it has jurisdiction to
determine questions of conservatorship and support. One Texas court dis-
cussed the matter in the following terms:

118. See Tex. R. Civ. P. 123;
   Where the judgment is reversed on appeal or writ of error for the want of
   service, or because of defective service of process, no new citation shall be
   issued or served, but the defendant shall be presumed to have entered his ap-
   pearance to the term of the court at which the mandate shall be filed.
See also McKanna v. Edgar, 388 S.W.2d 927 (Tex. 1965); Huggins v. Kinsey, 414 S.W.2d
119. See infra notes 120-24 and accompanying text; infra Part A, III.
121. Sampson, supra note 103, at 199.
In a divorce case where jurisdiction over the non-resident spouse is properly based and established under Section 3.26, and if the factual proof for reliance on Section 11.051 is shown to satisfy the requirements under one of the subdivisions to Section 11.051, then separate proof of minimum contacts is not required for the court to exercise jurisdiction over that part of the suit affecting the parent-child relationship. If the suit is not for divorce under Section 3.26, but is only a suit affecting the parent-child relationship under Section 11.051, then proof establishing one of the subdivision requirements of 11.051 is not dispositive, but requires additional proof of minimum contacts in order to satisfy due process requirements. 122

This conclusion approaches personal jurisdiction as a lump concept and may be inappropriate. 123 For example, does the fact that matrimonial property is located in Texas necessarily indicate that a trial court appropriately can make a support or custody order against a nonresident spouse who has resided with the child in Texas? This all-or-nothing approach is not sensible in light of the complexity of the problem. Each issue should be considered separately:

1. Is it fair and reasonable for the forum to exercise jurisdiction to dissolve the matrimonial relationship?
2. Is it fair and reasonable for the forum to exercise jurisdiction to make a support order imposing a personal liability upon a nonresident?
3. Is it fair and reasonable for the forum to exercise jurisdiction to order a division of matrimonial property binding upon a nonresident spouse?
4. Is it fair and reasonable for the forum to exercise jurisdiction to make a custody determination under the circumstances of the parties, including the child?
5. Is it fair and reasonable for the forum to exercise jurisdiction to make a termination decree under the circumstances of the parties, including the child?

While a "yes" answer to one issue may have an impact on answers to the others, each issue should still be considered separately. Moreover, a Texas decree in which a child custody determination is made probably will not be accorded full faith and credit unless it is made consistently with the Parental Kidnapping Prevention Act of 1980 (PKPA). 124

For the concept of “partial personal jurisdiction,” cf. Sampson, Jurisdiction in Divorce and Conservatorship Suits, 8 Texas Tech. L.Rev. 159, 205 (1976); Weintraub, Texas Long-Arm Jurisdiction in Family Law Cases, 32 Sw.L.J. 965, 981 (1978). See also Tex.R.Civ.P. 120a, which provides, “A special appearance may be made to an entire proceeding or as to any severable claim involved therein.”
C. The Foreign Realty Problem

The traditional rule is that foreign realty is not subject to direct division in a Texas court in connection with or after a divorce. On the other hand, Texas courts have indirectly taken jurisdiction by ordering one of the parties to make a conveyance to the other. While Texas courts have generally concluded that a court cannot directly divest title to real property located in another jurisdiction, when the court has personal jurisdiction over a party, the court may order that party to execute a conveyance of real estate located in another state.

In Estrabrook v. Wise a Texas court of civil appeals held that the trial court had jurisdiction to require a former husband to execute conveyances necessary to vest title to one-half of his interest in foreign realty because the court had in personam jurisdiction. Subsequently, the Texas Supreme Court granted a writ of error on this issue. The case was dismissed as moot at the parties' request, however, after they decided to litigate in the state where the realty was located. Additionally, in making an equitable division of the parties' estate, a Texas court may consider the value of real property located outside Texas when dividing other property.

III. Suits Affecting the Parent-Child Relationship and the Texas Family Code

A. Traditional Treatment of Suits Affecting Parental Rights: Custody, Visitation, and Termination

1. The Quasi In Rem (Civil Status) Approach

Cases concerning conservatorship, visitation, and the termination or establishment of parental rights are difficult to analyze in terms of the in personam, quasi in rem, or in rem categories. Suits affecting the parent-child relationship concern the welfare, care, education, and best interests of children. Analogies to actions concerning ownership interests in real or personal property are only minimally useful. Analogies to commercial litigation between business interests are even less pertinent. Yet, the applica-

126. See Hedley v. duPont, 558 S.W.2d 72, 75 (Tex. Civ. App.—Houston [14th Dist.] 1977), rev’d and remanded on other grounds, 570 S.W.2d 384 (Tex. 1978), on remand, 580 S.W.2d 662 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref’d n.r.e.); McKnight, Division of Texas Marital Property on Divorce, 8 ST. MARY'S L.J. 413, 449, 469-70, 483 (1976). Professor McKnight considers Texas practice an aberration.
127. 506 S.W.2d 248 (Tex. Civ. App.—Tyler), dism'd by agreement, 519 S.W.2d 632 (Tex. 1974).
128. 519 S.W.2d 632 (Tex. 1974). Since other jurisdictions are not likely to apply Texas rules of equitable division or Texas rules of partition of post-divorce property under tenancy in common ideas, the Texas practice of refusing to divide foreign realty directly is an aberration that creates problems. See Estabrook v. Wise, 348 So. 2d 355, 357 (Fla. Dist. Ct. App. 1977), cert. denied, 435 U.S. 971 (1978).
130. See supra Part A, I.
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The application of the traditional scheme required courts to decide whether the action was in rem or in personam. Since the custody of children may be viewed as a status or relationship in which the state has an interest, application of the rules used traditionally to justify the exercise of jurisdiction in actions involving the dissolution of the matrimonial relationship is tempting. The original Restatement of Conflict of Laws adopted this facially simplistic approach. The question of custody was regarded simply as one of status and as such was subject to the control of the courts of the state where the child was domiciled. Thereafter, several courts recognized that the problem was more difficult. In *Sampsell v. Superior Court* Justice Traynor of the California Supreme Court summarized the theories that had been advanced concerning the correct basis for jurisdiction. No question of personal jurisdiction was presented because the defendant had submitted herself to the court's jurisdiction by answering the plaintiff's complaint on the merits. Hence, Justice Traynor's opinion indicates that the summarized theories provide the basis for subject matter jurisdiction. One theory provides that jurisdiction in personam over the children's parents is sufficient. A second theory requires the child to be physically present within the forum state, because a court located in a position of access to the child is most qualified. The third theory is the domicile theory of the original Restatement. Justice Traynor basically concluded that since it is in the interest of the child for some court to have jurisdiction, a flexible approach to the problem is required. Aside from the listing of the various approaches taken by other courts, Justice Traynor actually avoided the difficult questions of personal jurisdiction and enforceability of a custody decree in a sister state.

The Restatement (Second) of Conflict of Laws follows the majority opinion in *Sampsell*. It adopts three alternative grounds of judicial jurisdiction: (1) domicile of the child; (2) physical presence of the child; or (3) personal jurisdiction over the parents. A comment to the Restatement (Second) provides that the court may decline to entertain the suit if the court concludes that the best interest of the child requires it.

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133. 32 Cal. 2d 763, 197 P.2d 739 (1948).
134. 197 P.2d at 746.
136. 197 P.2d at 746-48.
137. Restatement (Second) of Conflict of Laws § 79 (1971).
138. *Id.* comment.
2. The Personal Jurisdiction Approach

In a much maligned opinion, *May v. Anderson*, the United States Supreme Court considered the question of whether personal jurisdiction over a nonresident parent is required in the making of a child custody decree. In a plurality opinion authored by Justice Burton, this matter was given the following treatment:

[W]e have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is bound by the Wisconsin award of custody.

. . . . We find it unnecessary to determine the children's legal domicile because, even if it be with their father, [in Wisconsin], that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession.

Although Justice Burton did not mention the due process clause, his opinion could be read as authority for the proposition that a decree adjudicating custody must be based on personal service in the forum state or the equivalent minimum contacts on the part of the nonresident parent.

Despite the fact that Justice Frankfurter's concurring opinion did not adopt this method of reasoning, for a time Justice Burton's plurality opinion received acceptance as authoritative in Texas.

3. Continuing Jurisdiction in the Interstate Context

Texas courts have recognized the concept of continuing jurisdiction for suits affecting the parent-child relationship. Section 11.05 of the Texas Family Code provides that when a court acquires jurisdiction of a suit affecting the parent-child relationship, jurisdiction is retained for all matters concerning the custody and support of the child. Generally, the court of continuing jurisdiction has continuing exclusive jurisdiction. Texas courts have now held that section 11.05 refers only to courts within the

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139. 345 U.S. 528 (1953). The plurality opinion did not consider the best interests of the children. For this and other reasons, the case has received unceasing criticism. See H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 326 (1968) ("In short, the case . . . is an aberration . . . ."); see also Hazard, May v. Anderson: Preamble to Family Law Chaos, 45 VA. L. REV. 379 (1959).

140. 345 U.S. at 533-34.


143. TEX. FAM. CODE ANN. § 11.05 (Vernon 1975).
State of Texas and therefore has no extraterritorial application. In so
holding, the Dallas court of civil appeals in Crockett v. Crockett expressly
disapproved the views expressed by two other intermediate appellate
courts.

In Crockett suit was instituted in Texas against a nonresident father who
had failed to pay child support as ordered by an Ohio divorce decree. The father appeared specially and argued that the Ohio court had continu-
ing exclusive jurisdiction based on section 11.05. This contention was re-jected by the Dallas court of civil appeals. The court might possibly have
concluded that both the Texas and Ohio courts had jurisdiction to enforce
the Ohio decree. Under these circumstances, however, precluding enforce-
ment in Texas by the application of a principle inserted in the Family Code for the apparent purpose of avoiding internal conflicts among Texas trial courts would not be sensible.

Less than one year after the Crockett decision, a different panel of the
Dallas court of civil appeals decided Oliver v. Boutwell. The precise
posture of that case involved the attempted modification of a conservator-
ship order rendered in Texas. The nonresident respondent, who had been
gone from Texas for more than a year, was held subject to jurisdiction
pursuant to section 11.051 and the requirements of due process. While the phrase “continuing jurisdiction” is not used in the part of the opinion enti-
tled “In Personam Jurisdiction,” the opinion clearly indicates that the
existence of the prior Texas decree was a central factor in the determina-
tion that the Texas court had jurisdiction to adjudicate the controversy.

Under the heading “Subject-Matter Jurisdiction,” the opinion states that
in passing section 11.05, the legislature granted Texas courts continuing
subject matter jurisdiction to modify their conservatorship decrees with re-
spect to nonresident children. The Boutwell opinion concludes by rec-
nognizing that the Texas Legislature's enactment of section 11.052 in
1979 imposed limits upon the exercise of continuing jurisdiction.

146. 589 S.W.2d at 760. The petitioner filed suit to hold the respondent in contempt of the Ohio decree, to recover alleged arrearages in child support, and to modify the provisions of the decree relating to child support and visitation.
147. The principal purpose of the concept in the intrastate context is to make certain that a court rendering an order in a suit affecting the parent-child relationship is aware of prior litigation concerning the child. See id. at 763.
149. Id. at 395-96 (“Appellee's custody of her child, as well as appellant's access to his child, is defined by the terms of a Texas decree.”).
150. Id. at 398. “Section 11.05 was enacted against a background of cases holding that” the child who was the subject of the conservatorship proceeding had to be a resident of Texas or present within Texas. Id. (citing Ex parte Birmingham, 150 Tex. 595, 244 S.W.2d 977 (1952)).
152. 601 S.W.2d at 398.
The opinion of a Houston court of civil appears in *Kelly v. Novak* further muddied the waters. The parties were divorced in November 1978 by a Texas court. The mother was appointed managing conservator of a minor child, and the father was afforded liberal visitation rights. Subsequently, in April 1979, the mother remarried and moved out of Texas, apparently to the State of Washington. Richard Novak, her former spouse, filed a motion to modify on October 1, 1979. Since Mrs. Kelly defaulted, the trial court awarded Mr. Novak materially better visitation provisions. This decree was entered on December 14, 1979. A motion to set aside the judgment was filed, heard, and denied before thirty days had expired from the entry of the December 14th order.

On the subject of continuing jurisdiction, the appellate opinion states: "Section 11.052 . . . prohibits a court from exercising its continuing jurisdiction if the managing conservator and the child have been residents of another state for more than six months before the action was filed." Reasoning from the enactment of section 11.052, the court of civil appeals concluded that the legislature recognizes the concept in the interstate context. Citing *Oliver v. Boutwell*, the court stated: "While there is a conflict in Texas authority on the subject of extra-territorial application of continuing jurisdiction, we conclude that continuing jurisdiction can confer in personam jurisdiction over a non-resident defendant so long as the defendant is provided with notice and opportunity to be heard."

Several consequences follow from identification of the concept of continuing jurisdiction as a subject matter jurisdiction principle. Decrees rendered by courts having no jurisdiction over the subject matter are considered void and subject to collateral attack. The traditional rule is that subject matter jurisdiction cannot be waived or conferred by agreement. These principles may be out of place in the context of the interstate application of continuing jurisdiction.

Similarly, when the concept of continuing jurisdiction is singled out as a separate doctrine accompanying the principles of in personam jurisdiction, which themselves depend upon the relationship among the defendant, the forum, and the litigation, the concept takes on an importance that is out of proportion. The real issue should be whether it is fair and reasonable for the jurisdiction to continue. This determination will depend upon the nature of the subsequent proceeding and upon the relationship of the nonresident to the forum. The existence of a prior decree is an added factor and should not be elevated to doctrinal levels. Both the Uniform Child Cus-
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B. The Suit Affecting the Parent-Child Relationship Long-Arm Provision

1. In General

The principal statutory section under which a nonresident may be subjected to jurisdiction in a suit affecting the parent-child relationship is Texas Family Code section 11.051. It provides that when the respondent is not a Texas resident or domiciliary, a court may acquire in personam jurisdiction pursuant to a special long-arm statute if:

(1) the child was conceived in Texas and the person on whom service is required is a parent or an alleged or probable father of the child;
(2) the child resides in Texas as a result of the acts or directives or with the approval of the person on whom service is required; (3) the respondent has resided with the child in this state; or (4) . . . there is any basis consistent with the constitutions of Texas or the United States for the exercise of personal jurisdiction.

The passage of the statute was prompted by the opinion of the Texas Supreme Court in Mitchim v. Mitchim, in which the court recognized "that the minimum contacts concept of in personam jurisdiction is peculiarly suited to matrimonial support cases." The court in Mitchim identified two prerequisites to the exercise of personal jurisdiction over a nonresident respondent: (1) a statute that authorizes the service of citation or other form of due process notice upon the nonresident; and (2) satisfaction of the constitutional requirement that the relationship among the defendant, the forum, and the litigation satisfy the fairness test of Shaffer v. Heitner. Texas had a general long-arm statute at the time the Mitchim case was decided. Since the general statute was drafted principally to deal with standard tort and contract litigation, some believed that a statute specially suited to family law matters was required. Similarly, at the time of the Mitchim decision, a rule of civil procedure provided for the service of nonresident notice upon a defendant who was not a Texas resident. The rule now explicitly provides:

A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as

160. Id. Although § 11.051 is a more specialized statute than the California provision criticized in Kulko, it does contain a broad catchall category that may be subject to the same criticism in terms of its notice giving character.
161. 518 S.W.2d 362 (Tex. 1975).
162. Id. at 365.
163. 433 U.S. 186 (1977). Since Mitchim was decided before Shaffer, the opinion does not speak in precisely these terms.
if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.¹⁶⁶

Despite the literal wording of the rule, some scholars doubted that it could be used to subject a nonresident to the jurisdiction of a Texas court on the theory that amending the "substantive law" by rule was beyond the power of the Texas Supreme Court.¹⁶⁷ Prior to amendment of the rule, case authority concluded that the rule was not applicable to actions other than litigation involving domiciliaries who were temporarily absent from Texas or proceedings properly classifiable as in rem or quasi in rem under the conceptual scheme discussed in Pennoyer v. Neff.¹⁶⁸ Consequently, a special jurisdictional statute was proposed by a group of notable scholars¹⁶⁹ and passed by the Texas Legislature.

The first situation described in section 11.051 as appropriate for the exercise of long-arm jurisdiction is conception of a child in Texas when the nonresident respondent is "a parent"¹⁷⁰ or "an alleged father."¹⁷¹ The theory is apparently analogous to the commission of a tort by the nonresident in Texas. It is not quite based on a tortious conduct thesis, however, because conception alone is sufficient under the literal terms of the statute. On the other hand, the argument has been convincingly made that situations will arise in which the mere conception of the child in Texas is not a sufficient basis for the exercise of jurisdiction in the absence of other factors.¹⁷²

The second situation is also analogous to a tort law long-arm rationale. Basing jurisdiction upon the presence of the child in Texas with the approval of the person on whom service is directed or upon the acts or directives of the nonresident, is roughly similar to exercising jurisdiction over a nonresident manufacturer who places into the stream of commerce defective goods that ultimately come to Texas and cause injury.¹⁷³ Kulko v. Superior Court casts substantial doubt upon the literal sufficiency of this section 11.051 subsection in child support cases.¹⁷⁴ Custody litigation in-

¹⁶⁶. Id. (emphasis added). The supreme court added the emphasized portion of the rule effective Jan. 1, 1976.
¹⁶⁷. See Baade, Rule 108: A Dissent, 38 Tex. B.J. 988, 988 (1975). "I submit that this amendment is an impermissible extension of the Texas long-arm statute[s]. The rule-making power of the Supreme Court of Texas may only be used for the establishment of rules 'not inconsistent with the laws of this State.'" Id. (quoting Tex. Const. art. V, § 25).
¹⁶⁹. The text of § 11.051 was discussed or drafted by Professors Russell Weintraub, John J. Sampson, Eugene Smith, and Hans Baade. See Sampson, supra note 103, at 188.
¹⁷⁰. "'Parent' means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated." Tex. Fam. Code Ann. § 11.01(3) (Vernon 1975).
¹⁷². Sampson, supra note 103, at 202.
¹⁷⁴. See supra notes 64-85 and accompanying text.
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volves more complex issues that are perhaps not controlled by the Kulko analysis, which is at least partially based upon the assumption that a less onerous but effective alternative, the Uniform Reciprocal Enforcement of Support Act (URESA), exists.

The third situation, basing jurisdiction over the nonresident respondent upon a prior residence of the nonresident with the child in Texas, also cannot be taken literally. It is obviously overbroad when considered in the context of a wide range of hypothetical cases in which the connection with Texas has been severed for some time and not reestablished by the nonresident.

The fourth section provides little guidance because it does not specify what other situations constitute sufficient bases under the United States and Texas Constitutions for the exercise of long-arm jurisdiction over nonresidents. Moreover, the factors a trial or an appellate court should use in making the determination are not set forth in the last section.

In summary, when section 11.051 provides specific information, the information is frequently misleading. When it gives general guidance, the guidance is too vague to be of assistance.

In 1979 the Texas Legislature added sections 11.045 ("Original Jurisdiction") and 11.052 ("Exceptions to Continuing Jurisdiction") to chapter 11 of the Texas Family Code. These sections supplement section 11.051, but do not supersede it.175

2. Child Support Cases

In Zeisler v. Zeisler the spouses obtained a Texas divorce in 1971. The court awarded the wife custody and ordered the husband to pay child support. In 1972 the mother and child moved to Georgia. Thereafter, apparently in 1972 or 1973 the father moved to Florida. The father continued to make his support payments through the Dallas child support office in accordance with the terms of the divorce decree. In 1976 the mother, basing jurisdiction on section 11.051, brought a suit affecting the parent-child relationship against the nonresident father to secure an increase in child support payments. These facts satisfy the situational requirements of section 11.051 without difficulty; the trial court concluded, however, that the father’s special appearance should be sustained. On appeal, the Dallas court of civil appeals reversed.

Considerations of convenience cannot be cited to support assumption of personal jurisdiction here, but, on the other hand, no other forum is shown to be more convenient for both parties. Moreover, since Texas is the state of last matrimonial domicile, no other state has both a superior interest and clear authority to enforce appellee’s obligation to support his child. . . . Since appellee’s obligation to support the

175. The 1979 amendments bear a facial resemblance to the UCCJA. For an explanation of why this resemblance is misleading, see infra text accompanying notes 333-45. For further discussion of the 1979 amendments, see infra text accompanying notes 403-20.
child arose in Texas and until now has been regulated and defined by a Texas decree ordering him to make payments in Texas, we conclude that requiring him to respond in Texas to a suit to increase the amount of those payments does not offend "traditional notions of fair play and substantial justice."

...[T]he noncustodial parent should be subject to continuing personal jurisdiction of the state of last matrimonial domicile, at least as long as a currently enforceable order of that state requires support payments to be made there. The opinion of the appellate court clearly indicates that the father did not assert a forum non conveniens plea. Also, the court of civil appeals apparently would have considered the matter differently if the parties had resided elsewhere as a family unit.

Zeisler is probably erroneous when considered in light of Shaffer, Kulko, and World-Wide Volkswagen. The connection between the Zeislers and the forum had been severed for approximately four years. The relationship between the forum and the action for an increase in child support to be paid by a nonresident to a nonresident, who had not lived in Texas for four years, was not such that Texas had any special interest in granting relief. Moreover, what could Mr. Zeisler have done to structure his conduct to avoid litigation in Texas? Perhaps an action to enforce the Texas decree as initially rendered could be distinguished from the type of relief requested in Zeisler.

Another case decided by the Dallas court of civil appeals distinguishes Kulko on its facts and takes a very liberal view of the jurisdictional question. In Crockett v. Crockett the spouses married in Texas in 1963. Until 1966 they resided in Dallas where two children were conceived. Thereafter, the couple and the children moved to Austin, Texas, and then to Ohio. In 1974 the parents returned to Texas and announced that they wanted a divorce. The mother stayed in Texas after the announcement, while the father returned to Ohio and obtained an Ohio divorce. In 1977 the mother sued in Texas to hold the father in contempt of the Ohio decree, to recover alleged arrearages in child support, and to modify the provisions of the decree. After service, the father appeared specially and the special appearance was sustained. On appeal, the court of civil appeals found that Kulko did not control the outcome because: "(1) the parties were married in Texas; (2) the parties lived for several years as man and wife in Texas; (3) both children were conceived in Texas; (4) both children were born in Texas; (5) the respondent resided with the children in Texas;" (6) the children stayed in Texas with their mother after the divorce; and

177. Id. at 930-31.
178. Id. at 928.
179. See Tex. Fam. Code Ann. § 11.052 (Vernon Supp. 1982-1983), which contains exceptions to continuing jurisdiction and provides that the exceptions do "not affect the power of the court to enforce and enter a judgment on its decree."
181. Id. at 759-60.
(7) the father came to Texas to visit. The court of civil appeals also noted that section 11.051 is a special jurisdictional statute, which demonstrates a particularized and definite interest of Texas in adjudicating the family dispute in its courts.182

Perry v. Ponder183 involved issues of support and conservatorship. In 1978 an Alabama couple was divorced by an Alabama decree giving custody to the mother. In September 1978 the mother moved to Texas with the child. The mother and child resided in Texas thereafter. In early 1979 the father obtained a modification decree from the Alabama divorce court, granting him custody of the child. After service was attempted on the mother, she filed a suit in Texas alleging that the Alabama modification decree was void. She also sought an order from the Texas court that the father should be ordered to make monthly child support payments. The trial court sustained the father's special appearance in Texas based on lack of sufficient contacts with Texas to support the exercise of jurisdiction. With respect to the child support obligation, which the mother sought to have the Texas court impose, the appellate court sustained the trial court's judgment. Despite the fact that the mother and the child had resided in Texas for a period of approximately ten months at the time the mother's action was instituted, the Dallas court of civil appeals concluded that as to the support issue, the case was controlled by Kulko.

Since the father had not directed or approved the mother's act in bringing the child to Texas, the situational requirements of subsection (2) of section 11.051 were not satisfied. Hence, the only subsection of section 11.051 that could support the exercise of jurisdiction was the last one.184 Apparently, the father had no contacts, ties, or relations with Texas, other than the fact that his ex-wife and his child had moved to Texas. Unless some form of negative conduct may suffice, such as the failure to make support payments, the exercise of jurisdiction would offend due process. Since the Uniform Reciprocal Enforcement of Support Act is as applicable to the support issue in Perry as it was in Kulko, URESA, an alternative that is less onerous to the father, probably satisfies the legitimate interest of Texas with respect to the question of support. The more interesting question, however, is whether the matter of conservatorship is viewed differently.

3. Conservatorship Litigation

Suits affecting the parent-child relationship include determinations of both possessory and managing conservatorship.185 Much of the litigation concerning section 11.051 concerns custody determinations. In Corliss v.

182. Id. at 762.
184. See supra text accompanying note 160.
185. TEX. FAM. CODE ANN. § 11.01(5) (Vernon 1975) provides: "'Suit affecting the parent-child relationship' means a suit brought under this subtitle in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought."
Smith the litigants were divorced in Dallas County in 1972. Thereafter, the mother left the state in November 1972. In December 1976 the father filed his petition seeking what amounted to a request for divided custody. The children had resided with their mother in Nebraska during the four-year period between the date she and the children left Texas and the filing of the father's petition. With the exception of one time in 1974, the father did not visit, see, or communicate with his children during this interval. Under these circumstances, the appellate court held that requiring the wife to come into Texas and defend the action would not be fair or equitable. Corliss is principally interesting for the guidance it gives for other fact situations. The opinion establishes a six-month absence rule after which "a presumption arises that the Texas courts no longer constitute convenient and/or competent forums." In addition, the opinion indicates that a Texas court should attempt to determine whether full faith and credit will be given the Texas decree in the state where enforcement will be necessary.

The reasoning enunciated in Corliss was followed by the San Antonio court of civil appeals in Oubre v. Oubre. The parties had been inhabitants of Bexar County where their child was born. In June 1975 they were divorced in Bexar County. Mrs. Oubre was made managing conservator. After the divorce, both continued to reside in Bexar County, where child support was paid and custody and visitation rights were exercised. Mrs. Oubre moved to Florida in January 1978, shortly before the father filed a motion to modify by changing custody or enlarging his visitation rights. Since the mother and child were gone less than one month, Oubre presented a situation entirely different from Corliss.

In both Corliss and Oubre the courts of civil appeals concluded that the ability of the forum state to reach a result that will conform to the child's best interests is the paramount consideration in the jurisdictional analysis. Ordinarily, the courts in the state of the child's domicile are in a better position to determine the best interests of the child, since the evidence will most likely be better developed in that state. A related factor is the availability and relative convenience of the parties and witnesses, who usually include the parents, the child, domestic relations counselors, and the child's teachers, doctors, ministers, and neighbors. Accordingly, when the undisputed proof shows that the child and managing conservator have resided outside Texas for six months or more before suit is filed, the presumption arises that the Texas courts are no longer convenient or competent forums to adjudicate claims affecting the parent-child relationship, have lesser interests in protecting the welfare of the child than the foreign

187. Id. at 173.
188. A similar result was reached on somewhat similar facts in Miller v. Miller, 575 S.W.2d 594 (Tex. Civ. App.—El Paso 1978, no writ).
190. Id. at 365.
state, and are consequently unwarranted in asserting jurisdiction in the absence of sufficient proof to overcome the presumption.

In *Oliver v. Boutwell*\(^{191}\) the issue was the jurisdiction of a Texas court to modify a Texas custody decree with respect to a child and a parent who had become nonresidents. After a 1975 divorce, the mother moved to Mississippi with the child in 1977. The move made the father's exercise of his monthly visitation privilege difficult. Consequently, approximately thirteen months after the mother's move to Mississippi, he filed a motion to modify the Texas decree by increasing his access from thirty hours per month to approximately three months per year. The mother was served and entered a special appearance. After the mother prevailed in the trial court, the father appealed.

Since the situational facts of subdivisions (1) and (3) of section 11.051 were satisfied, the only question on appeal was whether due process was offended. The court of civil appeals held that due process was not offended, because the child had been conceived and born in Texas, and the mother exercised managing conservatorship under a Texas decree. The opinion rejects the method of analysis used in *Corliss*. In strong terms, the opinion states that the relative convenience of the parties and witnesses, a balancing of the interests of Texas and a foreign state in maintaining the litigation, the length of absence of the nonresident from Texas, and a consideration of whether the foreign state would afford the Texas decree full faith and credit are not germane to the question of in personam jurisdiction under section 11.051.\(^ {192} \) In short, *Oliver* rejects the six-month absence rule and apparently concludes that a nonresident managing conservator will have difficulty prevailing at a special appearance hearing in connection with proceedings instituted in Texas to modify a Texas decree when the party seeking the modification decree takes a moderate position. For example, if the husband's request had been considered as a request for joint custody because of the duration of the increased period of visitation, the six-month rule of Family Code section 11.052(d)(1) would change the result obtained in the *Oliver* case. On the other hand, if the modification motion is considered as not concerning the appointment of a managing conservator, the problem becomes more difficult to resolve. Section 11.052(a)(2) provides that a Texas court may not exercise jurisdiction to modify "any part of the decree if all of the parties and the child have established and continue to maintain their principal residence outside this state."\(^ {193} \) Section 11.052 apparently does not serve as a limitation on the exercise of continuing jurisdiction for visitation questions when one of the parties remains in Texas. This section, however, was not in effect when the trial court ordered the dismissal of the *Oliver* case.\(^ {194} \) The conclusion in *Oliver* that convenience, the balancing of the interests of concerned states,

\(^{191}\) 601 S.W.2d 393 (Tex. Civ. App.—Dallas 1980, no writ).

\(^{192}\) *Id.* at 397.


\(^{194}\) 601 S.W.2d at 398.
and the length of absence are not relevant concerns is subject to strong criticism. Indeed, these concerns are most relevant and frequently control the due process analysis.

In Cossey v. Cossey\(^{195}\) the Waco court of civil appeals concluded that a trial court did not abuse its discretion in refusing to assume jurisdiction. Mr. Cossey filed suit in September 1978 for divorce, property division, and custody of the parties' two minor children. His petition contained jurisdictional allegations that satisfied the situational requirements of sections 3.26 and 11.051 of the Family Code.\(^{196}\) Mrs. Cossey filed a special appearance motion "for the reason the Respondent and her children are residents of the State of Louisiana and were so domiciled at the time of the filing of Petitioner's Original Petition herein."\(^{197}\) At the hearing, the following facts were developed: (1) for five years prior to December 1977 the parties lived with the children in Waco, Texas; (2) Mrs. Cossey moved to Louisiana in December 1977, but she left the children in Texas with their father; (3) the children visited their mother after she moved to Louisiana, and in March 1978 the husband delivered the children and all their belongings to Mrs. Cossey in Louisiana; (4) the children continued living in Louisiana until June 1979; (5) in July 1978 Mrs. Cossey filed a petition in Louisiana for legal separation, custody of the children, and division of community property, and by temporary order, the Louisiana court granted Mrs. Cossey custody of the children on the date the petition was filed; (6) Mr. Cossey filed his Texas action in September 1978; (7) by May 1978 the parties thought they had reached a settlement of all disputed matters under which the Texas court would finalize the matrimonial litigation on an agreed basis; (8) at about this time, Mrs. Cossey left on a two-week trip to Europe, during which time she agreed to let the children stay with their father on the "express understanding that he would return the children to her upon her return;"\(^{198}\) (9) when she returned, he declined to return the children, but the sixteen-year-old male child returned to Louisiana of his own accord.

In analyzing the factual background in the context of the Family Code's situational requirements, the court of civil appeals first determined that Texas was the last state of marital cohabitation and that the mother had resided with the children in Texas. Hence, satisfying the literal language of the Family Code's long-arm provisions presented no problem. The appellate court concluded, however, that the trial court did not abuse its discretion in refusing to proceed with any part of the case because the question of divorce was not contested; most of the witnesses on the proper-

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196. He alleged that Texas was the last state of marital cohabitation between the parties and that suit was filed within two years after the cohabitation ended. TEX. FAM. CODE ANN. § 3.26(1) (Vernon Supp. 1982-1983). He also alleged that the respondent had resided in Texas with the children. See id. § 11.051(3).
197. 602 S.W.2d at 592.
198. Id. at 595.
ties to be divided "[were] likely [to] come from Louisiana;"\textsuperscript{199} the main dispute between the parties was the custody of the children and the "witnesses on this issue [were] likely [to] come from Texas and Louisiana;"\textsuperscript{200} and although the parents apparently overreached with the children, Mr. Cossey did more overreaching. Perhaps the most significant factor concerning the question of custody was the fact that initially the father delivered the children voluntarily to Louisiana, and then he subsequently violated his agreement to return them voluntarily after Mrs. Cossey returned from Europe.

In \textit{Cossey} the court did not cite \textit{Corliss} or any other family law precedent. Instead the court of civil appeals relied upon the last prong of the \textit{O'Brien v. Lanpar}\textsuperscript{201} formulation in reaching its conclusion that the lower court made a sensible due process analysis of the matter. Equitable considerations favored Mrs. Cossey on the custody issue. The court also made no mention of Family Code section 11.045, apparently because it was not in effect on the date of the special appearance hearing.\textsuperscript{202} Since the children had established a principal residence in Louisiana in March 1978 and Mr. Cossey's suit was filed in Waco on September 11, 1978, neither \textit{Corliss} nor section 11.045 would apparently preclude the trial court from exercising original jurisdiction because not quite six months had passed.

\textit{Perry v. Ponder}\textsuperscript{203} is a most significant Texas court opinion on the subject of the exercise of personal jurisdiction over a nonresident in domestic relations litigation. It involved a relatively typical scenario. In June 1978 an Alabama couple divorced in Alabama. The court awarded custody to the mother and she then moved with the child to Texas. After the father obtained a change of custody in May 1979 from the Alabama court,\textsuperscript{204} the mother instituted litigation in Texas to obtain a Texas decree making her managing conservator. She also sought a child support order. The father was served in Alabama with nonresident notice.\textsuperscript{205} He then made a special appearance in Texas.\textsuperscript{206} At the special appearance hearing the testimony reflected that, at most, the father knew about and acquiesced in the mother's plans to move the child to Texas; the father testified that he did not consent to the move. Based on this testimony, the trial court sustained the special appearance and dismissed the litigation. On appeal, the mother contended that the trial court had jurisdiction under both subdivisions (2) and (4) of Family Code section 11.051.

The mother argued that "the court's ability to reach a result that would promote the child's best interest" was paramount, particularly since the child had resided in Texas for approximately ten months. Consequently,

\begin{footnotesize}
\begin{enumerate}
\item[199.] \textit{Id.} at 596.
\item[200.] \textit{Id.}
\item[201.] See supra text accompanying note 54.
\item[202.] TEX. FAM. CODE ANN. § 11.045 (effective June 13, 1979).
\item[203.] 604 S.W.2d 306 (Tex. Civ. App.—Dallas 1980, no writ).
\item[204.] \textit{Id.} at 311. Apparently, the Alabama modification decree was a default judgment.
\item[205.] TEX. R. CIV. P. 108.
\item[206.] \textit{Id.} 120a.
\end{enumerate}
\end{footnotesize}
Texas was the most convenient forum from the standpoint of witnesses and the evidence. Moreover, the mother argued that Texas had an interest in providing an effective means of redress for its resident. As a second argument, the mother urged that the trial court should have exercised subject matter jurisdiction.\footnote{604 S.W.2d at 311-12.} Predictably, the father cited \textit{Kulko}\footnote{See supra notes 74-80 and accompanying text.} and argued that his contacts, ties, or relations with Texas were even more attenuated than were Mr. Kulko's contacts with California. With respect to the claim for support, the court of civil appeals concluded that the due process requirements had not been satisfied. The main import of the opinion, however, involves its treatment of due process as applied to conservatorship.

The first holding of the court on the custody issue was “that due process permits adjudication of the custody of a child residing in the forum state without a showing of ‘minimum contacts’ on the part of the nonresident parent.”\footnote{604 S.W.2d at 313.} Second, with respect to due process, the court held:

[If the [notice] requirements of due process and applicable procedural rules are met, a Texas court has “personal jurisdiction” over the nonresident within subdivision (4) of Section 11.051 to adjudicate the custody issue, even though it may not have such jurisdiction to render a personal judgment enforcing or imposing affirmative duties on the nonresident.\footnote{Id at 313-14.}]

The court’s third holding was that the court had no power to make a binding custody adjudication based on subject matter jurisdiction alone.\footnote{Id at 314.}

The position of the Dallas court of civil appeals that due process may be satisfied in custody litigation without satisfaction of the minimum contacts test rests on several bases. The court discussed the historical treatment of the adjudication of status as an in rem proceeding. The status exception, however, was discussed in modern terms. The court did not interpret the footnote reference to status in \textit{Shaffer v. Heitner}\footnote{433 U.S. 186, 208 n.30 (1977); see supra notes 64-85 and accompanying text.} as a continuation of in rem thought patterns. Instead, the focus was upon the forum’s interest in the litigation: “[A] family relationship may be among those matters concerning which the forum state may have such an interest that its courts may reasonably make an adjudication affecting that relationship, even though one of the parties to the relationship may have had no personal contacts with the forum state.”\footnote{604 S.W.2d at 316.} For strong policy reasons, a nonresident parent’s lack of personal contacts does not “outweigh the state’s vital interest in the welfare of children residing within its borders.”\footnote{Id at 316.} On the other hand, when “the child and the parent seeking to invoke the court’s powers have only a tenuous relation with the forum state, the court may properly decide that the best interest of the child requires it to defer to the courts of...
another state having a more substantial interest and better access to rele-
vant information.\textsuperscript{215} The court also noted the existence of the Uniform
Child Custody Jurisdiction Act and articulated the premise that the princi-
pies of the UCCJA may be adopted by Texas courts to the extent that they
are consistent with Texas decisions.

After concluding that the factual circumstances of the case met the jurisdic-
tional standards of the UCCJA in several respects, the court stated its
fourth holding:

Accordingly, we hold that the trial court should not have sustained
the father's special appearance and dismissed the suit for lack of con-
tacts by him with the state of Texas, but should have inquired into the
circumstances of the parties and the child for the purpose of determin-
ing whether the child and the mother have been in Texas long enough
to give this state a sovereign's interest in and responsibility for the
child's welfare and to provide access to sufficient evidence to make an
informed decision concerning the child's best interests. If the court
determines on this basis that due process has been satisfied, the court
should then inquire as to whether the child's interests would be better
served by an adjudication of custody by the courts of [another
state].\textsuperscript{216}

In its fifth holding the court found that although a court does not have
jurisdiction to render a personal judgment for support, it has jurisdiction
to bind a nonresident by a custody decree if he has had the notice and
opportunity to be heard required by due process, and if the court finds that
it is a proper forum to determine the best interests of the child.\textsuperscript{217} Finally,
the court held that since section 11.051 was probably intended as an asser-
tion of jurisdiction in the broadest sense consistent with due process, sub-
division (4) of section 11.051 is to be interpreted as a statutory basis
supporting the exercise of due process jurisdiction over a nonresident as
that matter is analyzed in the court's other holdings.\textsuperscript{218}

With respect to the 1979 amendments to the Texas Family Code, the
court of civil appeals first took the view that although sections 11.045,
11.052, and 11.053 are generally consistent with the reasoning used to evis-
cerate the plurality opinion in \textit{May v. Anderson}, no exact correspondence
exists between the statutory sections and the rules of decision formulated
by the court on the issue of the extent of due process jurisdiction. Second,
the court tended to characterize sections 11.045 and 11.052 as subject mat-
ter jurisdiction provisions. This characterization presumably means that
any decree rendered under circumstances that violate the provisions is sub-
ject to collateral attack, that the statutory requirements cannot be waived,
and that whatever subdivision (4) of section 11.051 does in terms of conferr-
ing broad due process jurisdiction, subject matter jurisdiction principles
embodied in sections 11.045 and 11.052 serve as bulwarks limiting the ex-

\textsuperscript{215} \textit{Id.} at 317.
\textsuperscript{216} \textit{Id.} at 318.
\textsuperscript{217} \textit{Id.} at 322.
\textsuperscript{218} \textit{Id.} at 323.
exercise of judicial power. Since a subject matter jurisdiction characterization appears to have been entirely unnecessary to the Perry result, perhaps this reasoning will not survive in subsequent opinions. Third, the interpretation of subdivision (4) of section 11.051 as being sufficiently broad to support the exercise of conservatorship jurisdiction in Perry accomplishes what approximates adoption in Texas of sections 3 and 12 of the UCCJA concerning the binding effect of original Texas custody decrees upon nonresidents. In this sense, Perry closes the gap between pure UCCJA jurisdictions and Texas law before the Perry decision.

Unfortunately, Perry has no writ history. Its holdings will not be examined by the Texas Supreme Court until another case with similar facts arises. Whether the opinion will withstand attack cannot be predicted. Perry may be vulnerable in its reliance upon the rephrasing of the personal jurisdiction test stated in Shaffer v. Heitner. The Shaffer opinion emphasizes the relationship among the defendant, forum, and litigation. Perry stretches the new formula to its breaking point.

4. Termination Litigation

Very little appellate litigation has involved the termination of parental rights when the respondents are nonresidents of Texas. While a termination case is clearly a suit affecting the parent-child relationship, no definite answer exists to the question of whether due process requires personal jurisdiction or whether notice and an opportunity to be heard are sufficient. In the Restatement (Second) of Conflict of Laws termination is categorized as a status determination not requiring personal jurisdiction over a nonresident respondent. While this simplistic approach may be subject to question in light of Shaffer and Kulko, Shaffer's footnote 30 could support the conclusion that the old practice has not been superseded in termination cases.

At least one Texas case has attempted to address these questions. In In re M.S.B., a mother filed suit to terminate the parental rights of the nonresident father. The father and mother had been divorced in 1970 in West Virginia. The West Virginia decree appointed the mother managing conservator of the child and ordered the father to make child support payments of sixty dollars per month. In 1977 the West Virginia court entered an order modifying the father's visitation rights. On or about March 1, 1977, the mother and the children moved to Texas. On August 22, 1978, the mother, who had remarried, filed a termination proceeding. The father

222. 433 U.S. 186 (1977); see supra notes 64-73 and accompanying text.
223. 436 U.S. 84 (1978); see supra notes 74-80 and accompanying text.
made a special appearance objecting to the jurisdiction of the court. The
trial court held that it had no jurisdiction and dismissed the suit.

Apparently, the only contact the father had with the State of Texas was
the move by his ex-spouse and children to Texas. Although a Texas court
ordered the father to pay child support, he did not appear in the prior
Texas proceeding to contest the modification of the West Virginia child
support decree. As a result, ascertaining the jurisdictional base upon
which the Texas support order rests is difficult. Moreover, nothing in the
opinion suggests that the father had violated the original West Virginia
decree or the subsequent Texas modification decree. Regardless of
whether he violated the original order or the Texas modification decree,
such a violation does not appear necessary to the result reached on the
jurisdictional issue.

In summary, the court of civil appeals held that the trial court erred in
dismissing the mother's suit because the termination proceeding was a suit
affecting the parent-child relationship. Additionally, the factual situa-
tion fits within the provisions of Texas Family Code section 11.045225
because the State of Texas was the principal residence of the child at the time
the termination proceeding was commenced. In other words, the San
Antonio court of civil appeals treated section 11.045 as an affirmative grant
of jurisdiction that applies to all suits affecting the parent-child relation-

While this result may ultimately be standard practice, the approach
taken by the San Antonio court misreads Shaffer and Perry. In Shaffer the
basic due process test is phrased in terms of the relationship among the
defendant, the forum, and the litigation. While footnote 30 indicates that
"particularized rules governing adjudications of status" are not necessarily
inconsistent with the due process standards of fairness, an approach as-
suming that a litmus test can replace consideration of the relationship
among the defendant, the forum, and the litigation is too simplistic. With
respect to Perry, the majority opinion does not interpret the references to
status in Shaffer as implying that status is a res supporting quasi in rem or
in rem jurisdiction. Rather, the forum's special interest in affecting the
relationship of Texas residents to nonresidents through an adjudication
makes the state's exercise of judicial power reasonable, even though one of
the parties may have no significant personal contacts with the forum.

225. Id. at 706.
227. 611 S.W.2d at 706.
228. Id.
229. Id.
More significantly, perhaps, is the related conclusion that termination cases should be analyzed in the same terms as custody cases. The majority opinion in *Perry* contains no suggestion that this result is appropriate. First, the court in *Perry* held that since *May v. Anderson* was not an obstacle, subdivision (4) of section 11.051 could be interpreted in light of the policies of the UCCJA. The UCCJA is not applicable to termination proceedings. While the *Perry* opinion also refers to the *Restatement (Second) of Conflict of Laws* and traditional concepts of status adjudication, the entire discussion is in the context of custody litigation, not termination of parental rights. Section 11.045 of the Texas Family Code is broad enough to encompass support litigation, custody litigation, and the termination of parental rights. The *Perry* court, however, explicitly recognized that support litigation is subject to the due process analysis undertaken by the United States Supreme Court in *Kulko*.

Should termination cases be analyzed like custody cases or like support cases? The stated basis for distinguishing between support and custody cases in *Perry* is that a support claim is like a claim for debt, which imposes a direct obligation to pay money. Custody decrees are characterized as largely negative, because they reduce the rights of the nonresident, rather than increase the nonresident's obligations. While assimilating custody and termination on this basis is tempting, several other important reasons lead to a different conclusion. First, termination, unlike custody, is final. It is a form of punishment imposed upon bad people. Viewed in this manner, the termination of parental rights can hardly be minimized, because the decree could rationally be characterized as largely negative. Secondly, while the best interest of the child is a paramount concern in both types of litigation, termination proceedings frequently involve the competing interests and antagonism of warring parents. When private parties institute termination proceedings, an element of spite is frequently involved. Thirdly, the United States Supreme Court has clearly indicated on numerous occasions that parental rights are of constitutional proportions, especially in the context of termination litigation. Finally, a less onerous alternative is available when the best interest of the child warrants a modification of parental rights. The less onerous alternative is the custody proceeding itself.

5. Interim Conclusion

Although Texas courts have done an admirable job in attempting to deal with the Texas Family Code provisions concerning interstate conservatorship litigation, as the foregoing summary reflects, the current situation is far from satisfactory. Neither section 11.051 nor the 1979 amendments to the Texas Family Code serve to clarify sufficiently fundamental questions concerning when a Texas court may exercise jurisdiction...
to render an initial or a modification decree in a custody case. The principal lesson taught by the case law on these subjects is that anyone who is involved in an interstate custody dispute must have an ample supply of money to finance the jurisdictional controversies that are sure to precede or supersede a consideration of the merits. As Parts C and D of this Article indicate, Texas should seriously consider the adoption of the Uniform Child Custody Jurisdiction Act in order to eliminate at least some of the complexity, confusion, and concomitant expense inherent in a nonuniform approach to the problem.

PART B. FULL FAITH AND CREDIT, DUE PROCESS, AND FAMILY LAW LITIGATION

I. FULL FAITH AND CREDIT AND DUE PROCESS

A. The Full Faith and Credit Doctrine

The Constitution of the United States provides: "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." With respect to judicial proceedings in sister states, a federal statute provides that they "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

The full faith and credit doctrine was explained in Durfee v. Duke:

The constitutional command of full faith and credit, as implemented by Congress, requires that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." Full faith and credit thus generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it.

The full faith and credit clause and its statutory counterpart have been applied rigorously in the enforcement of money judgments regardless of the underlying cause of action. Nevertheless, instances exist in which the need for national uniformity has been outweighed by the local policies of a forum state where enforcement is attempted. As one state court

234. U.S. Const. art. IV, § 1.
237. See Fauntleroy v. Lum, 210 U.S. 230, 237 (1908) (judgment of sister state based on gambling transaction constituting misdemeanor in forum state entitled to full faith and credit); Rumpf v. Rumpf, 150 Tex. 475, 482, 242 S.W.2d 416, 420 (1951) (foreign alimony decree entitled to full faith and credit despite fact that alimony is contrary to Texas public policy).
239. See Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 546 (1935): "It has often been recognized by this Court that there are some limitations upon the extent
asserted: "In interpreting the full faith and credit clause, courts must reconcile the apparent simplicity of this statutory and constitutional language with the complexity of interstate relations in a federal system. This reconciliation has been especially difficult in domestic relations cases in general and in custody litigation in particular."240

B. Limits on Full Faith and Credit: Relationship to Due Process and Other Defenses

Several bases are recognized for the refusal of a forum state to accord full faith and credit to a judgment or decree rendered in a sister state. The most significant of these bases is an inquiry into the jurisdiction of the foreign court to adjudicate the merits. Justice Jackson expressed the matter in the following terms:

The qualification means little more than that before receiving a judgment with conclusive effect a court may make sure whether it is the genuine judgment it purports to be. Of course, if a tribunal has not jurisdiction to render a judgment valid by the tests of due process, it is without validity at home and is entitled to no credit abroad. To give conclusive effect to such a judgment would in itself be a denial of due process.241

Other bases for refusing to accord full faith and credit have been recognized. For example, only final judgments of a sister state are entitled to full faith and credit.242 A judgment that has been procured by fraud may be impeached in an action brought for its enforcement in Texas "when the same fraud would have been a defense in an action brought on the judgment in the state in which it was rendered."243 In addition, the foreign judgment may be dormant or barred entirely by the law of limitations.244

242. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 107 (1971): "A judgment will not be recognized or enforced in other states insofar as it is not a final determination under the local law of the state of rendition." Although there is some authority to the contrary, the local law of the state of rendition should determine whether the judgment is final. See Moody v. State, 547 S.W.2d 958, 959 (Tex. 1977) (per curiam); Van Natta v. Van Natta, 200 S.W. 907, 907-08 (Tex. Civ. App.—Amarillo 1918, writ ref'd). "We think therefore that we should give to this Indiana judgment the effect it would be given by the courts of that state, and that the effect of the appeal on the finality of the judgment and its admissibility in evidence . . . is to be determined by the laws of the state of Indiana." Id. at 907.
244. See TEX. REV. CIV. STAT. ANN. art. 5530 (Vernon 1958).

Every action upon a judgment or decree rendered in any other State or territory of the United States, in the District of Columbia or in any foreign country, shall be barred, if by the laws of such State or country such action would there be barred, and the judgment or decree be incapable of being otherwise
With respect to dormant foreign judgments not barred by limitation, one court held that the right to enforce the judgment "means a right of enforcement which exists at the time suit is begun here, and not a mere possibility of enforcement in the future which depends upon a further proceeding and showing of fact, and a further exercise of judicial discretion as to whether execution may issue on such judgment."  

II. FAMILY LAW LITIGATION

A. Application to Alimony Decrees

A Texas court is required to give full faith and credit to foreign alimony decrees with respect to past due installments that may not be modified retroactively. As in the case of other money judgments, the standard articulated in *International Shoe* and its progeny must be satisfied before a state has judicial jurisdiction to render an alimony decree. In *Mitchim v. Mitchim* an Arizona judgment for back alimony was rendered against a Texas resident. In discussing the exercise of extraterritorial jurisdiction by the Arizona trial court, the Texas Supreme Court indicated that personal jurisdiction could be obtained on the basis of extraterritorial service of process upon a nonresident if: (1) a statute of the state ordering support authorizes extraterritorial service; and (2) sufficient contacts between the defendant and the forum exist to satisfy "traditional notions of fair play and substantial justice." 

When under the law of the rendering jurisdiction, alimony payments do not become vested when they become due and the rendering court has continuing authority to reduce or extinguish the arrearage, the alimony decree is not entitled to full faith and credit until the past due installments are reduced to judgment. Once a money judgment has been obtained, however, the judgment is entitled to full faith and credit. When under

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247. Fox v. Fox, 559 S.W.2d 407, 410 (Tex. Civ. App.—Austin 1977, no writ): "In the absence of in personam jurisdiction, however, a court may not enter an order binding on both parties regarding such matters as division of property outside the state, alimony, and other decrees involving personal obligations."
248. 518 S.W.2d 362 (Tex. 1975).
249. 518 S.W.2d 362 (Tex. 1975).

We recognize that judgments for future payments of alimony and judgments otherwise subject to modification have "no constitutional claim to a more con-
the law of the jurisdiction that rendered the alimony decree, past due alimony installments become vested and are not subject to retroactive modification, the arrearage need not be reduced to a money judgment in the sister state that rendered the divorce decree before the alimony decree is entitled to full faith and credit in Texas. In this connection several commentators have expressed the view that the burden of proving the finality of the foreign judgment is upon the claimant. This conclusion is based primarily on the reasoning of the Texas appellate court in Ogg v. Ogg, which held that the presumption that the foreign law is the same as Texas law does not help a claimant who seeks to enforce a foreign alimony judgment because Texas does not permit a judgment for permanent alimony. Rule 184a of the Texas Rules of Civil Procedure should make it a relatively easy matter to bring the law of a sister state to the attention of the trial court.

B. Application to Child Support Orders

As in the case of foreign decrees providing for the periodic payment of alimony in installments, the standard set forth in International Shoe and subsequent United States Supreme Court opinions concerning the exercise of extraterritorial jurisdiction must be satisfied before a state has judicial jurisdiction to make a child support order imposing a personal obligation upon a nonresident. As in the case of alimony decrees, decrees of sister states for periodic child support payments are entitled to full faith and credit when under the law of the rendering state, the right to each installment becomes absolute and vested as it falls due. On the other hand, if each installment remains subject to modification under the law of the sister


253. Sampson, supra note 103, at 175; Comment, supra note 250, at 84: In addition it appears that Texas courts place the burden of pleading and proving the finality of the foreign judgment upon the party so asserting, which is contrary to the general notion that every reasonable implication should be against the power of a foreign court to modify or revoke a judgment for alimony in arrears. (footnote omitted; citing Sistare v. Sistare, 218 U.S. 1 (1910); Quinn v. Quinn, 216 S.W.2d 1001 (Tex. Civ. App.—Fort Worth 1948, writ ref’d n.r.e.); Ogg v. Ogg, 165 S.W. 912 (Tex. Civ. App.—San Antonio 1914, no writ); see Milner v. Schaefer, 211 S.W.2d 600, 602-03 (Tex. Civ. App.—San Antonio 1948, writ ref’d).


256. See Schwartz v. Vecchiotti, 529 S.W.2d 603, 606-07 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.).


state, it is not entitled to full faith and credit until the arrearage is reduced to a money judgment in the sister state. Some courts have held in connection with an appeal of a common law action to enforce the judgment that the claimant must prove that the past due support payments are vested and not subject to modification under the law of the sister state. This holding is apparently based upon the reasoning that unless the applicable foreign law is shown to differ from Texas law, the presumption will be made that the law of the sister state is the same as Texas law, which at the time did not authorize a money judgment for delinquent child support payments. Since Texas law now authorizes a court to render judgment against a defaulting party in favor of any party entitled to receive child support payments, the basis for holding that the burden rests upon the claimant appears to have been eliminated. In fact, one court of civil appeals stated: "Even if the trial court failed to consider the law of Colorado regarding finality of judgments for arrearages in child support, the result is unchanged. The presumption that the law of Colorado is the same as that of Texas would apply . . . and these Colorado judgments are considered final under Texas law."  

C. Application to Custody Decrees  

1. United States Supreme Court Decisions  

The application of the full faith and credit clause to child custody decrees has been questioned for many years. A series of United States Supreme Court opinions on the subject have demonstrated that the need for national uniformity may be outweighed by the interest of the state where the child resides and enforcement of the sister state decree is attempted. In *New York v. Halvey* the Supreme Court considered whether a forum state had the authority to modify a sister state custody  

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261. Brazeal v. Renner, 493 S.W.2d 541, 543 (Tex. Civ. App.—Dallas 1973, no writ): A closely analogous case is Ogg v. Ogg, 165 S.W. 912 (Tex. Civ. App.—San Antonio 1914, no writ), in which a suit was brought to enforce a New York alimony judgment. The court held that the judgment was not entitled to full faith and credit under *Sistare* because plaintiff had failed to plead and prove that the matured installments were not subject to modification under the law of New York, and further held that the judgment could not be aided by applying Texas law because Texas does not permit judgments for permanent alimony. The same rule would prevent enforcement of a money judgment for child support not permitted by Texas law unless it is shown to be a final judgment entitled to full faith and credit.  
262. Tex. Fam. Code Ann. § 14.09(c) (Vernon 1975); see also id. § 14.08(c)(2) (Vernon Supp. 1982-1983) ("an order providing for the support of a child may be modified only as to obligations accruing subsequent to the motion to modify").  
decree without offending the full faith and credit clause. Mrs. Halvey had left her husband in New York and had taken their child to Florida. She obtained a Florida ex parte divorce, which purported to give her custody of the child. On the day before the Florida court awarded permanent custody of the child to Mrs. Halvey, Mr. Halvey snatched the child and returned to New York. Mrs. Halvey then sought to recover the child through a New York habeas corpus proceeding. After a hearing, the New York court ordered that custody of the child remain with the mother, but also ordered that the father have visitation rights, including the right to keep the child with him during stated vacation periods each year. The court further required that the mother post a surety bond conditioned on the delivery of the child to the father for the periods when he had the right to keep the child with him. The Supreme Court concluded that the New York proceeding did not offend the full faith and credit clause:

So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. . . . The general rule is that this command requires the judgment of a sister State to be given full, not partial, credit in the State of the forum. . . . But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered. . . . Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not cognizable in the State where the judgment was rendered . . . it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.265

Consequently, the New York court was not bound to enforce automatically the Florida decree without imposing modifications because the Florida court had the power to modify it at all times, not merely under the theory of changed circumstances, but also upon proof of facts that were not presented or considered at the former hearing.266

Of more interest in the present day context is a statement by the Supreme Court that was not necessary to its decision in *Halvey*:

The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, e.g., whether Florida at the time of the original decree had jurisdiction over the child, the father having removed him from the State after the proceedings started but before the decree was entered; whether in absence of personal service the Florida decree of custody had any binding effect on the husband; whether the power of New York to modify the custody decree was greater than Florida's power; whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires. On all these problems we reserve decision.267

265. *Id.* at 614-15 (citations omitted).
266. *Id.* at 612-13.
267. *Id.* at 615-16.
Subsequently, in the much criticized case of *May v. Anderson*, the Supreme Court gave conflicting responses to several of the questions it had reserved in *Halvey* for future determination. The issue presented in *May* was whether an Ohio court was required to give full faith and credit to a Wisconsin decree awarding custody of minor children to their father. Although Wisconsin had been the matrimonial domicile before the petition for divorce was filed, the wife had taken the children to Ohio and established residence in that state. She was served with process in Ohio pursuant to a Wisconsin nonresident notice statute, which was intended for use in divorce actions but which made no mention of its availability in a child custody proceeding. The Wisconsin court granted the divorce and awarded custody to the father. The father subsequently sought to enforce the decree in Ohio under an Ohio habeas corpus procedure designed to secure summary enforcement of valid court orders concerning the right to possession of children without opening the door for the modification of a prior custody award on a showing of changed circumstances. The Ohio trial and appellate courts concluded that the full faith and credit clause compelled enforcement of the Wisconsin custody decree.

The Supreme Court held that the forum was not required to give the Wisconsin custody decree full faith and credit. Four opinions were written by members of the court, however. Justice Burton, writing for four members of the Court, stated that the Wisconsin decree was not entitled to full faith and credit because it was rendered without jurisdiction over the person of the nonresident mother:

Separated as our issue is from that of the future interests of the children, we have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody.

In the instant case, we recognize that a mother’s right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.

Justice Burton also rejected an argument made on behalf of the father that the children were technically domiciled in Wisconsin and held that: “We find it unnecessary to determine the children’s legal domicile because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their

268. See generally Hazard, *supra* note 139.
269. 345 U.S. 528 (1953).
270. The opinion does not discuss why the nonresident mother was not subject to jurisdiction. Wisconsin was the matrimonial domicile. Although she was served in Ohio, the mother’s absence from Wisconsin had been for a short period (approximately one month) when the Wisconsin proceeding was instituted. *Id.* at 530.
271. *Id.* at 533-34.
mother of her personal right to their immediate possession." Unfortunately, Justice Burton's opinion says little about how the issue of personal jurisdiction should be analyzed. Although the due process clause is not mentioned in the Burton opinion, the opinion could be read as authority for the proposition that a decree adjudicating custody must be based on personal service in the forum state or the equivalent minimum contacts on the part of a nonresident parent.

Justice Frankfurter agreed with the members subscribing to Justice Burton's plurality opinion that Ohio need not have given full faith and credit to the Wisconsin decree. Justice Frankfurter did not conclude, however, that personal jurisdiction is required before one state may give full faith and credit to a foreign decree. In fact, the concurring opinion also indicates that for Ohio to respect the Wisconsin decree would not offend the due process clause. In addition, Justice Frankfurter suggested that child custody awards are not entitled to full faith and credit when the local interest of the forum outweighs the "interest of national unity that underlies the Full Faith and Credit Clause."

Justices Jackson and Reed dissented. They concluded that Justice Burton's plurality opinion prohibited Ohio from giving full faith and credit to the Wisconsin decree. They found analogies to property right cases entirely unpersuasive because they concluded that custody determinations should be viewed, not with the idea of adjudicating parental rights to the children, but with the idea of the children's welfare. Finally, the dissenters' view of Justice Frankfurter's concurrence was extremely critical: "The interpretive concurrence, if it be a true interpretation, seems to reduce the law of custody to a rule of seize-and-run."

Justice Minton also dissented. Two subsequent United States Supreme Court opinions provide little additional guidance. In *Kovacs v. Brewer* the Supreme Court held, following *Halvey*, that a North Carolina court had the authority to modify a New York custody decree, which was modifiable by a New York court on the basis of changed circumstances. The Supreme Court in *Ford v.*

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272. *Id.* at 534. The footnote that accompanies this conclusion indicates that when a parent removes a minor child from the child's domicile for the purpose of evading process or escaping jurisdiction, other considerations might require a different analysis. *Id.* at 534 n.8.

273. "For Ohio to give respect to the Wisconsin decree would not offend the Due Process Clause. Ohio is no more precluded from doing so than a court of Ontario or Manitoba would be, were the mother to bring the children into one of these provinces." *Id.* at 535-36.

274. *Id.* at 536. Justice Frankfurter's subsequent dissenting opinion in *Kovacs v. Brewer*, 356 U.S. 604, 609-16 (1958), indicates that the full faith and credit clause does not require deference to foreign custody decrees even when both parents are before the court that originally rendered the decree.

275. 345 U.S. at 540 (Jackson & Reed, JJ., dissenting).

276. *Id.* at 542.

277. *Id.*


279. In his dissent Justice Frankfurter questioned the applicability of the full faith and credit clause to the entire issue:

In short, both the underlying purpose of the Full Faith and Credit Clause and the nature of the decrees militate strongly against a constitutionally enforced
Ford again failed to resolve the questions reserved in the latter part of the Halvey opinion for future discussion.

As the review of the foregoing cases indicates, the United States Supreme Court has steadfastly avoided resolving the issue of the proper interpretation of the full faith and credit clause or the application of the due process clause to custody disputes. Beyond the holdings that the full faith and credit clause does not preclude modification of a foreign state's custody decree based on grounds for modification permissible in that state, the picture remains hazy. The questions posed in the latter portion of the Halvey opinion have not been answered. A minority of jurisdictions have concluded that full faith and credit need not be given to custody decrees. This confusing situation has contributed substantially to the enactment of federal and state legislation.

2. Development of the Texas Jurisdictional Test in Custody Litigation

Prior to May v. Anderson Texas viewed a custody determination as a status determination that did not require personal jurisdiction because it was an in rem proceeding. Moreover, despite the fact that Justice Burton's plurality opinion in May did not represent the view of a majority of the court, May was accepted for a time as authoritative in Texas.

In Perry v. Ponder the court analyzed Justice Burton's plurality opinion from May as not imposing a requirement that a nonresident either be personally served in Texas or be subject to the minimum contacts doctrine.
The court of civil appeals made several observations concerning the May plurality opinion:

(1) *May* did not involve a case in which the child and one parent resided in the state in which the custody decree was rendered. . . .

(2) Since the *Burton* opinion did not represent the view of a majority of the court, the decision must be taken as authoritative only on the narrow ground stated by Mr. Justice Frankfurter in his concurring opinion. . . . His view was that the Court was deciding only that the full faith and credit clause did not require the Ohio court to accept the Wisconsin disposition of custody, without precluding the Ohio court from recognizing that disposition as a matter of comity under the local law of Ohio.

(3) The *Burton* opinion in *May* must be interpreted in the light of subsequent expressions in *Shaffer v. Heitner* and *Stanley v. Illinois*. . . 285

(4) The *Burton* opinion in *May* rests solely on the rights of parents and does not consider the welfare of the children, which is the primary consideration in the selection of a forum for custody adjudication, according to the overwhelming consensus of legal scholars.286

After rejecting the interpretation of *May* that personal jurisdiction in the minimum contacts sense is prerequisite to the exercise of jurisdiction to make a child custody determination binding upon a nonresident,287 the Dallas court of civil appeals concluded that:

[D]ue process permits adjudication of the custody of a child residing in the forum state without a showing of “minimum contacts” on the part of the nonresident parent, and we also hold that if the [notice?] requirements of due process and applicable procedural rules are met, a Texas court has “personal jurisdiction” over the nonresident . . . to adjudicate the custody issue, even though it may not have such jurisdiction to render a personal judgment enforcing or imposing affirmative duties on the nonresident. We hold further that without such personal jurisdiction the court has no power to make a binding cus-

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285. *Perry v. Ponder*, 604 S.W.2d 306, 320-21 (Tex. Civ. App.—Dallas 1980, no writ) (emphasis omitted). *Shaffer’s* somewhat overstated point that all assertions of jurisdiction must be in accordance with the fairness standards of *International Shoe* is accompanied by footnote 30, which provides: We do not suggest that jurisdictional doctrines other than those discussed in the text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness.” *Shaffer v. Heitner*, 433 U.S. 186 n.30 (1977). This footnote has been interpreted as justifying the exercise of custody jurisdiction as an exception to the minimum contacts requirement of *International Shoe*. Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C.D. L. Rev. 229, 239-41 (1979).

286. 604 S.W.2d at 321 (emphasis omitted).

287. Some cases hold that personal jurisdiction is not necessary because subject matter jurisdiction is good enough to make the decree valid in Texas. *Compare Thornlow v. Thornlow*, 576 S.W.2d 697 (Tex. Civ. App.—Corpus Christi 1979, writ dism’d w.o.j.), *cert. denied*, 445 U.S. 949 (1980), with *Hilt v. Kirkpatrick*, 538 S.W.2d 849, 851-52 (Tex. Civ. App.—Waco 1976, no writ): Without minimum contacts, adjudication may proceed on the basis of subject matter jurisdiction, and while the resulting decree is good in Texas, it may not be recognized outside of Texas.
In this connection the test to be applied is "whether the child and the mother have been in Texas long enough to give this state a sovereign's interest in and responsibility for the child's welfare and to provide access to sufficient evidence to make an informed decision concerning the child's best interests." 289

3. Texas Pre-Family Code Response to Sister State Custody Decrees

Prior to the passage of the current provisions of title 2 of the Texas Family Code, Texas courts had concluded that child custody decrees of sister states having jurisdiction to render the decrees were entitled to full faith and credit. 290 In Bukovich v. Bukovich 291 an Indiana child custody decree modified the Indiana court's prior order by changing the custody of the child from the mother to the father. Before the decree could be executed, the mother and child left Indiana and moved to Texas. The father brought a habeas corpus proceeding to obtain possession of the child. In response, the mother filed a cross-action for custody, alleging a change of circumstances since the date of the Indiana modification decree. The case was tried to a jury, which found that a change of circumstances had in fact occurred, and the trial court awarded custody to the mother. Although the court of civil appeals affirmed the judgment of the trial court, 292 the Texas Supreme Court concluded that the evidence presented by the mother was insufficient to support the jury verdict. Thus, the high court ordered the trial court to issue a warrant to the sheriff to bring the child before the trial judge so that the child could be placed in the father's custody.

Several distinct but related principles are set forth in the supreme court's opinion concerning the relationship of full faith and credit principles to child custody determinations made by sister states. First, Texas courts will give full faith and credit to a child custody decree of a sister state and will not order a change of custody in the absence of proof of a subsequent material change of conditions. 294 Secondly, at the time of its rendition, a custody judgment is res judicata of the question of the best interests of the child. 295 Thirdly, a material change of conditions affecting the welfare of the child must be demonstrated before a change of custody is war-

288. 604 S.W.2d at 313-14.
289. Id. at 318.
290. Meucci v. Meucci, 457 S.W.2d 48, 49 (Tex. 1970); Bukovich v. Bukovich, 399 S.W.2d 528, 529 (Tex. 1966); Goldsmith v. Salkey, 131 Tex. 139, 145, 112 S.W.2d 165, 168 (1938).
291. 399 S.W.2d 528 (Tex. 1966).
293. "The evidence offered by her was, in substance, that she would have an opportunity for employment in a bank in Oak Lawn, Illinois, and that she would be a guest in the home of responsible friends until arrangements could be made for her own living quarters." 399 S.W.2d at 529-30.
294. Id. at 529; see also Short v. Short, 163 Tex. 287, 290-91, 354 S.W.2d 933, 935-36 (1962).
295. 399 S.W.2d at 529; see also Ogletree v. Crates, 363 S.W.2d 431, 434 (Tex. 1963);
In substance, Bukovich stands for the practical proposition that Texas will not be a haven for child snatchers. As a result of the principle that custody could be redetermined if the noncustodial parent could prove a material change of circumstances affecting the child's welfare, however, attempts to relitigate child custody determinations made by sister states continued.

In Meucci v. Meucci an Illinois court found the mother guilty of adultery and unfit to have care and custody of her four children. The court awarded custody to the father. Prior to the conclusion of the Illinois divorce proceeding and in violation of the Illinois court's temporary custody orders, the mother moved to Texas with the children. One month after the conclusion of the Illinois divorce proceeding, the father filed an application for a writ of habeas corpus in Texas. The mother brought a cross-action for change of custody. The trial court gave custody to the mother, despite the fact that her pleading failed to allege a material change of circumstances following the date of the Illinois judgment. The court based its decision on testimony that the mother had appeared emotionally and mentally stable since moving to Texas. After the court of civil appeals affirmed, the Texas Supreme Court reversed without hearing arguments. The court simply held that the decision of the court of civil appeals was in conflict with the supreme court's opinion in Bukovich.

This same qualified deference has also been afforded to ex parte modification decrees rendered by sister states in order to change custody from a nonresident legal custodian to a parent who continues to live in the decree state. Deference to modification decrees under these circumstances is based on the reasoning that a proceeding for modification of a custody award is permissible as a continuation of the original proceeding in which the award was made with respect to a party over whom the court had jurisdiction in the original proceeding. Deference is given even though the court would not have had jurisdiction under the facts existing at the time of the modification but for the existence of the original decree. Not sur-


296. 399 S.W.2d at 530: "The facts here shown do not make the exceptional case which is prerequisite to an exercise of jurisdiction by the courts of Texas to the extent of a new and independent determination of child custody rights." See also Knowles v. Grimes, 437 S.W.2d 816, 817 (Tex. 1969) ("As a matter of public policy, there should be a high degree of stability in the home and surroundings of a young child, and, in the absence of materially changed conditions, the disturbing influence of re-litigation should be discouraged."); Mumma v. Aguirre, 364 S.W.2d 220, 221-23 (Tex. 1963).

297. 457 S.W.2d 48 (Tex. 1970).


299. The supreme court's summary reversal evidences its apparent annoyance with the proceedings conducted in the lower courts; the per curiam opinion concludes with the sentence that "no motion for rehearing may be filed in the cause," 457 S.W.2d at 49. But see Hollis v. Hollis, 508 S.W.2d 179, 181 (Tex. Civ. App.—Amarillo 1974, no writ).

prisingly, these cases have been subjected to criticism.\(^{301}\)

**PART C. LEGISLATIVE RESPONSES TO THE PROBLEMS OF THE “INTERSTATE CHILD”: UCCJA, PKPA, AND THE TEXAS FAMILY CODE**

**I. THE UNIFORM CHILD CUSTODY JURISDICTION ACT**

**A. The Purpose of the UCCJA**

The somewhat deferential attitude accorded original and modification decrees of sister states apparently was not practiced uniformly in other states. The chaos and confusion concerning the application of the due process clause (*International Shoe*’s personal jurisdiction standards) and the full faith and credit clause contributed to hometown decisions in favor of resident ex-spouses, punitive custody modifications when a legal custodian moved to a new state, and child snatching. The hope of the drafters of the UCCJA was that these legal and practical problems could be resolved by uniform legislation. As a result of the enactment of the Parental Kidnapping Prevention Act of 1980, a basic understanding of the UCCJA and its interpretive problems will frequently be prerequisite to the proper handling of custody disputes involving the interstate child.

**B. Jurisdictional Provisions**

**1. The Basic Provision**

Section 3 of the UCCJA is its basic jurisdictional provision. Under that section a court that has the competence to decide child custody matters has jurisdiction to make a child custody determination under any one of the following circumstances:\(^{302}\)

1. The state in which the court is located is the “home state” of the child, i.e., generally the state in which the child, immediately preceding the commencement of the proceeding, lived with its parents, a parent, or a person acting as a parent for at least six consecutive months.

2. The state in which the court is located had been the child’s home state within six months before the commencement of the proceeding, and a parent or person acting as a parent continues to reside in the state.

3. The court’s exercise of jurisdiction is in the best interest of the child because (a) the child and its parents or at least one contestant have a significant connection with the state; and (b) substantial evidence is available

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\(^{301}\) See Sampson, *supra* note 103, at 228:
Each apparently failed to perceive the distinction between an original adjudication and a subsequent modification adverse to an absent, nonresident, legal custodian granted in a wholly ex parte proceeding. While efforts to prevent hometown decisions may be laudable, they serve no good purpose if the deference shown foreign decrees is excessive and is given without analysis of the factual context in which the modification occurred.

within the state concerning the child's present or future care, protection, training, and personal relationships.

(4) The child is physically present in the state and (a) has been abandoned; or (b) an emergency situation involving mistreatment or abuse has arisen.

(5) No other court has jurisdiction or a court of another state has declined to exercise it on the ground that the forum state is a more appropriate forum to determine the custody of the child and the assumption of jurisdiction by the court in the forum state is in the best interest of the child.

Under the basic provision two sister states may have concurrent jurisdiction.

2. Continuing Jurisdiction

While section 3 is the basic jurisdictional provision, section 14 must be consulted when a person seeks to modify a conservatorship determination made by a court of a sister state. Section 14 provides:

If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

In other words, before a modification decree may be rendered, the court of the state in which the modification proceeding is instituted must have jurisdiction under one of the alternative provisions set forth in section 3 of the UCCJA. In addition, it must appear to the court asserting jurisdiction that the court that rendered the decree sought to be modified does not still have jurisdiction under jurisdictional prerequisites substantially in accordance with those set forth in section 3 of the UCCJA or that the court that rendered the decree has declined to assume jurisdiction to modify its decree.

The following two examples illustrate the interrelationship of sections 3 and 14 of the UCCJA. Assume that both Montana and Oregon are UCCJA jurisdictions. A husband and wife marry in Montana, have a child, and subsequently separate. If the wife takes the child to Oregon, and they continue to reside in Oregon for a period in excess of six months, Oregon will have jurisdiction under section 3 to make a child custody determination. Oregon's jurisdiction would be based upon the home-state jurisdictional provision. Montana's jurisdiction would be based upon the portion of section 3 that permits a court to exercise jurisdiction if the child and at least one contestant have a significant connection with the state and substantial evidence is available within the state concerning the child's present or future well-being.

303. Id. § 14, 9 U.L.A. at 153-54.
304. UCCJA provisions designed to resolve concurrent jurisdiction problems are set
Once a child custody determination has been made, section 14 of the UCCJA must also be consulted. If, for example, a custody determination had been made in Montana awarding the mother custody of the child, and the father subsequently abducts the child and takes it to Oregon where he resides with the child for a period in excess of six months, Oregon would be required to defer to the continuing jurisdiction of Montana pursuant to section 14 of the UCCJA, even though Oregon would be the new home state of the child. The only exception would be if it appeared to Oregon that the Montana court did not continue to have significant connection/substantial evidence jurisdiction or the Montana court declined to assume its jurisdiction to modify its own prior decree.

Several distinct points of view have been expressed concerning the proper interpretation of sections 3 and 14 of the UCCJA with respect to continuing jurisdiction. The late Professor Bodenheimer expressed the following view:

Exclusive continuing jurisdiction is not affected by the child’s residence in another state for six months or more. Although the new state becomes the child’s home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. Only when the child and all parties have moved away is deference to another state’s continuing jurisdiction no longer required.305

Recent cases from several UCCJA states have either qualified or rejected the Bodenheimer view. The pattern is hardly uniform, however. In re Marriage of Leonard306 involved a situation in which the child’s mother was given custody by virtue of a 1974 Georgia divorce decree. In 1978 the child journeyed to California to visit her father. She stayed in California with her father through the 1978-1979 school year. At the end of the school year her father filed in California to modify custody. In concluding that the California court had jurisdiction to modify the Georgia decree, the California appellate court specifically rejected Professor Bodenheimer’s theory that the original-decree-state’s jurisdiction over modification of conservatorship continues exclusively until both parents leave the original state. Although the California appellate court did not conclude that Georgia ceased to have significant connection/substantial evidence jurisdiction,
as the literal language of UCCJA section 14 seems to require, it found that California's significant connections tipped the scales in favor of California. In substance, the court concluded that substantial evidence supported the trial court's determination that California met both the home state test and the significant connection test under the UCCJA and that California was not, therefore, required to defer to the jurisdiction of Georgia for modification of the prior Georgia decree.307

Section 14 was similarly interpreted by a New York court in Leslie v. Constance F.308 In that case a New York court concluded that a California custody decree could be modified by a New York court although the legal custodian continued to reside in California after the child had resided in New York for about one year. In determining that California no longer had jurisdiction, the New York court held that even though California arguably met the significant connection test, it no longer had jurisdiction because it was not the home state and did not meet the evidence-availability test of UCCJA section 3(a)(2). The court reasoned that this section is premised upon the primacy of the child's best interests and that it grants jurisdiction to the forum possessing optimum access to relevant evidence concerning the child and the family.309 The method for ascertaining whether or not substantial evidence concerning a child's present and future well-being exists in a particular jurisdiction is not fully explained in Constance. It contains, however, a strong suggestion that once a new home state is established, the significant connection/substantial evidence connection with the old home state ordinarily will be eliminated because the evidence concerning the child's present or future well-being in the old home state will be overbalanced and eliminated by substantial evidence concerning the child's present or future well-being in the new home state. This

307. Id. at 460-66, 175 Cal. Rptr. at 913-16. Unlike two earlier California decisions (Palm v. Superior Court, 97 Cal. App. 3d 456, 158 Cal. Rptr. 786 (1979); Allison v. Superior Court, 99 Cal. App. 3d 993, 160 Cal. Rptr. 309 (1979)), which do not appear to understand the interpretive problem or the Bodenheimer position concerning the proper interpretation of § 14 of the UCCJA, the court recognized and rejected the Bodenheimer view in the following terms:

The late Professor Brigette M. Bodenheimer, reporter for the special Committee which drafted the Act, maintained that the Act clearly and properly contemplates continuing and exclusive jurisdiction in the original decree state unless the child and both parents have moved from that state or the original decree state has declined jurisdiction. She bases her interpretation on the "unambiguous" language of UCCJA § 14 (Civ. Code, § 5163) supplemented by UCCJA § 8(b) (Civ. Code, § 5157, subd. (a)), the so-called "clean hands doctrine." . . . She asserts that "[E]xclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more."

. . . We do not agree that UCCJA § 14 (Civ. Code, § 5163, subd. (1)) unambiguously affirms continuing and exclusive jurisdiction to modify in the decree state as long as one parent continues to reside there and the state has not declined jurisdiction. The Commissioner's Note to section 14 indicates only a "preference" for the decree state.


309. 441 N.Y.S.2d at 918-19; see also Kioukis v. Kioukis, 440 A.2d 894, 897 (Conn. 1981) ("The first state's exclusive jurisdiction does not continue indefinitely. At some point the child's connections with the first state become too tenuous. . . .").
result may also be justified by focusing on the language of section 3(a)(2) concerning the best interests of the child.

In some situations other courts have placed more importance upon the preference in favor of the state that rendered the initial decree. In *In re Custody of Ross*[^310] a Montana couple with a young child separated. After the separation and while the child was temporarily in the father's custody, the father, his girlfriend, and the child moved to Oregon. The mother obtained a Montana divorce and was awarded custody of the child. Since she did not know the whereabouts of the child until approximately eighteen months after the Montana custody decree, she did not seek enforcement of the Montana decree in Oregon until that time. When enforcement was sought, the father requested the Oregon court to assume jurisdiction and to hold a full hearing to determine custody of the child. After this hearing the trial court concluded that Oregon had jurisdiction, denied the mother's petition for enforcement of the Montana decree, and awarded custody of the child to the father. The court of appeals affirmed[^311].

The Oregon Supreme Court reversed. On the basis of its interpretation of UCCJA section 14 as adopted in Montana and Oregon, the Oregon Supreme Court concluded that both the significant connection and substantial evidence requirements for continuing jurisdiction in Montana were fulfilled because the child's mother continued to live and work in Montana and "the relationship between mother and child [was] itself a significant one."[^312] Moreover, the child's older sister continued to reside in the family home with the mother, and other friends and neighbors continued to live nearby in Montana. With respect to the substantial evidence criterion, the Oregon court concluded that since the child had lived in Montana from birth until it was abducted and taken to Oregon, substantial evidence concerning the child's well-being existed in Montana. Moreover, evidence existed in Montana concerning the child's father and mother. The Oregon Supreme Court stated:

In the case of an abducted child whose whereabouts is concealed, where "substantial evidence" of a child's present or future welfare for purposes of the jurisdiction section [UCCJA § 3] still exists in the decree state as well as in the forum state for the reasons set forth above, the decree state continues to have jurisdiction under the Act for a reasonable time following the abduction.[^313]

The question arises whether the same result would have been reached by the Oregon Supreme Court if the child had not been abducted from Montana. While no doubt exists that this factor strongly influenced the Oregon

[^312]: 630 P.2d at 361.
[^313]: *Id.* at 363-64. In a footnote, the Oregon Supreme Court quoted a passage from a Bodenheimer law review article that suggests jurisdiction would not continue in the old home state for more than "an outer limit of 3 or 4 years." *Id.* at 364 n.22 (quoting Bodenheimer, *Progress, supra* note 305, at 989).
Supreme Court, how the abduction factor is related to the significant connection/substantial evidence analysis or section 14 of the UCCJA is unclear. Finally, although there is substantial debate concerning a decree state's continuing jurisdiction as long as one contestant continues to reside in that state, when all parties have moved away from the decree state, the decree state no longer has jurisdiction under UCCJA section 3 and, therefore UCCJA section 14 is no impediment to the modification of the decree by a court of a state having jurisdiction to make a child custody determination. The concept of continuing jurisdiction in the interstate context is embodied in the provisions of the UCCJA. Unfortunately, under current judicial interpretations of the UCCJA, the extent to which jurisdiction continues varies depending upon the UCCJA jurisdiction whose interpretation of the supposedly uniform law is being consulted.

3. Rejection of the Personal Jurisdiction Approach

A significant aspect of the UCCJA is its treatment of the confusion generated by the United States Supreme Court's opinions concerning the application of the due process clause and the full faith and credit clause to child custody determinations. The drafters of the UCCJA rejected the personal jurisdiction approach to child custody determinations, which was apparently adopted by Justice Burton's plurality opinion in May v. Anderson. Section 12 of the UCCJA provides that:

[a] custody decree rendered by a court of this State which had jurisdiction under section 3 binds all parties who have been served in this State or notified in accordance with section 5 or who have submitted

314. 630 P.2d at 364 n.23:
This holding is consistent with the results in recent decisions in similar cases by courts of several other jurisdictions. See Both v. Superior Court, In and For County of Mohave, 121 Ariz. 381, 590 P.2d 920 (1979); Kraft v. District Court, 197 Colo. 10, 593 P.2d 321 (1979); Matter of Potter, 10 Ohio Op. 3d 214, 377 N.E.2d 536 (1978). These cases essentially hold that in "seize-and-run" cases, where there exists a valid custody decree and the "wronged" parent continues to reside in the state of the decree from which the child was removed, jurisdiction under the Act will exist presently for purposes of § 14(a) of the Act . . . and a petition for modification may not be entertained in another state.

315. Section 8(a) of the UCCJA provides: "If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances." 9 U.L.A. at 142. Section 8(b) of the UCCJA provides:

Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

Id. 316. See Bodenheimer, Interstate Custody, supra note 305, at 215; see also UCCJA § 14, 9 U.L.A. commissioner's note at 154.
317. 345 U.S. 528 (1953); see supra notes 269-72.
Based on a traditional theory that custody determinations, as distinguished from support actions, are proceedings affecting status or proceedings in rem, there is no requirement for personal jurisdiction in the International Shoe\textsuperscript{319} sense under the UCCJA. Section 5\textsuperscript{320} of the UCCJA provides that notice is to be given in a manner reasonably calculated to give actual notice, for example: (1) personal delivery outside the state in the same manner as prescribed for service within the state; (2) in the manner prescribed by the law of the place where service is to be effectuated; (3) by mail, requesting a receipt, addressed to the person to be served; or (4) as directed by the court.

4. Concurrent Jurisdiction Problems: Tie-Breakers

While the UCCJA has not eliminated the existence of concurrent jurisdiction, it does contain several provisions that address the problem. Section 6\textsuperscript{321} of the UCCJA provides that a court shall not exercise jurisdiction if at the time of filing in that court, a proceeding concerning the same child is already pending in a court of another state exercising jurisdiction substantially in conformity with the UCCJA. This result occurs unless the proceeding is stayed by the court of the other state because "this State" is a more appropriate forum or for some other reason. Moreover, if a court determines from the pleadings\textsuperscript{322} a child custody registry established in the state,\textsuperscript{323} or otherwise that there is a simultaneous proceeding pending elsewhere, it is supposed to communicate with the other court to determine which court is the more appropriate forum.\textsuperscript{324}

Section 7(a) of the UCCJA provides that:

[a] court which has jurisdiction under this Act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.\textsuperscript{325}

The following factors should be considered in making this jurisdictional determination: (1) "if another state is or recently was the child's home state;" (2) "if another state has a closer connection with the child and his family or with the child and one or more of the contestants;" (3) "if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;" (4) "if the parties have agreed on another forum which is no less

\begin{itemize}
  \item 318. 9 U.L.A. at 149.
  \item 319. 326 U.S. 310 (1945); see UCCJA § 12, 9 U.L.A. comment at 149-50.
  \item 320. 9 U.L.A. at 131; see also UCCJA § 4, 9 U.L.A. at 129.
  \item 321. 9 U.L.A. at 134.
  \item 322. See UCCJA § 9, 9 U.L.A. at 145-46.
  \item 323. See id. § 16, 9 U.L.A. at 160.
  \item 324. Id. § 6(b), 9 U.L.A. at 134; see also id. §§ 19-22, 9 U.L.A. at 162-67.
  \item 325. Id. § 7(a), 9 U.L.A. at 137.
\end{itemize}
appropriate;” and (5) “if the exercise of jurisdiction by a court of this state would contravene any of the purposes [of the UCCJA].”

Another basis for a court to decline to exercise its jurisdiction is set forth in UCCJA section 8. Under this section a court may decline to exercise its jurisdiction to make an initial decree when a child has been wrongfully taken from another state. Moreover, unless the best interest of the child requires it, a court is prohibited from exercising its jurisdiction to modify a custody decree of another state if the petitioner has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit. In addition, when a court dismisses a petition under section 8 of the UCCJA, it may charge the petitioner with necessary travel and other expenses, including attorneys’ fees, incurred by other parties or their witnesses.

C. Enforcement and Modification of Sister State Decrees

Under the UCCJA

Procedures and standards for the enforcement of sister state child custody decrees are set forth in the UCCJA. Section 13 provides:

The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act . . . so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

Concerning recognition and enforcement of child custody decrees made by sister states, section 13 must be read in conjunction with section 14 because the latter section controls the question of when a foreign state may modify a sister state’s initial or modification decree that is entitled to recognition and enforcement. Section 14(a) of the UCCJA prohibits modification unless: “(1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.” The following hypotheticals illustrate the interaction of UCCJA sections 13 and 14.

(1) Assume that a married couple living in Alabama obtains an Alabama divorce and that the wife is made legal custodian of the couple’s child. The wife thereafter moves with the child to California. If the husband, who continues to reside in Alabama, goes back to court and obtains

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326. Id. § 7(c), 9 U.L.A. at 137-38.
327. Id. § 8(a), 9 U.L.A. at 142.
328. Id. § 8(b), 9 U.L.A. at 142.
329. Id. § 8(c), 9 U.L.A. at 142.
330. Id. § 13, 9 U.L.A. at 151. Additionally, UCCJA § 15(a) provides: “A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State,” 9 U.L.A. at 158.
331. Id. § 14(a), 9 U.L.A. at 153-54.
a change of custody after the wife and the child have been gone five months from Alabama, must California recognize and enforce the decree? Since Alabama constituted the child’s home state before the child and the wife moved to California, they have not been gone six months before the commencement of the Alabama modification proceeding, and the husband continues to reside in Alabama, the Alabama court has jurisdiction under UCCJA section 3(a)(1) to render the modification decree. Although the Alabama court could decline to exercise its jurisdiction by concluding that it is an inconvenient forum pursuant to UCCJA section 7, UCCJA section 3 confers jurisdiction upon the Alabama court to make the modification decree. Consequently, pursuant to section 13 of the UCCJA, recognition and enforcement is required.

(2) If under the same facts as the preceding hypothetical, the child and mother have been gone one year from Alabama when the Alabama modification decree is made, must California recognize and enforce that decree? Again, under section 13 the issue is whether Alabama “had assumed jurisdiction under statutory provisions substantially in accordance with this Act.” Despite the fact that Alabama no longer constitutes the home state of the child and that Alabama has ceased being the home state of the child more than six months before the commencement of the Alabama modification proceeding, since Alabama could still have jurisdiction to make a modification decree pursuant to UCCJA section 3(a)(2) (significant connection/substantial evidence jurisdiction), recognition and enforcement might still be required.

(3) Assume that a married couple resides in Alabama, that they divorce, and that the wife is made legal custodian of their child by an Alabama court. Assume further that she moves to California with the child. If the husband, who continues to reside in Alabama, goes back to court and obtains a change of custody making him the legal custodian after the mother and child have been gone five months, may California modify the Alabama decree? (This hypothetical presents the same facts as the first hypothetical, but the issue is modification.) Assuming that not more than five months have passed at the time the modification is sought, there are several reasons why concluding that California could modify the Alabama decree would be difficult. First, until six months have passed, concluding that California has jurisdiction under section 3 would be difficult, because California has not yet become the new home state of the child, although an argument could be made for significant connection/substantial evidence jurisdiction. Secondly, concluding that the Alabama court “does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act” under UCCJA section 14, would be difficult because Alabama has been the child’s home state within six months before the California modification proceeding was commenced.

(4) If, under the same facts as the third hypothetical, the Alabama modification results from a proceeding instituted more than six months after the legal custodian and the child have moved to California, and the
child and the legal custodian have established a home in California for six months or more, could California modify the Alabama modification decree? California would be the child's new home state. Before California could modify the Alabama decree, however, under the literal language of UCCJA section 14 it would have to be determined that Alabama has lost continuing jurisdiction because it "does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act," that is, because there is no longer any significant connection/substantial evidence jurisdiction. Of course, the same continuing jurisdiction dilemma is again evident. Given the nonuniform interpretations of the UCCJA by the jurisdictions that have enacted it, how long continuing jurisdiction continues is entirely unclear.

D. Comparison of the UCCJA with the Texas Family Code

Texas has not adopted the UCCJA. Moreover, although the pertinent Family Code provisions concerning the exercise of extraterritorial jurisdiction and recognition of foreign decrees are facially similar to the UCCJA's provisions, the Texas legislative scheme is fundamentally at variance with the UCCJA for two important reasons. First, unlike sections 3 and 12 of the UCCJA, under the provisions of the Texas Family Code personal jurisdiction is necessary before a nonresident parent may be bound by a determination of managing conservatorship. Section 11.045 supplements and limits the broad provisions of section 11.051, but section 11.045 is not a jurisdictional grant. The opinion of the Dallas court of civil appeals in Perry v. Ponder, however, narrows the gap between Texas and UCCJA jurisdictions. The court in Perry held that personal jurisdiction does not require minimum contacts in the old International Shoe sense when the child and one of the child's parents have been in Texas long enough to give Texas a "sovereign's interest in and responsibility for the child's welfare and to provide access to sufficient evidence to make an informed decision concerning the child's best interests." By applying the new methods of due process thinking

332. See supra notes 303-16 and accompanying text.
335. For a review of the Texas Family Code and the requirements of due process, see supra Part A.
337. See Perry v. Ponder, 604 S.W.2d 306, 313-23 (Tex. Civ. App.—Dallas 1980, no writ). But see In re M.S.B., 611 S.W.2d 704, 705-06 (Tex. Civ. App.—San Antonio 1980, no writ) (unsound interpretation of both Perry v. Ponder and § 11.045); Sampson, supra note 158, at 30-31 ("I think we do it better in Texas. . . . [B]y statute we take the position that it is unfair to attempt to bind an absent parent to a custody determination unless personal jurisdiction, in the old-fashioned International Shoe sense, is warranted.").
339. Id. at 318.
embodied in Shaffer v. Heitner, Perry makes it abundantly clear that some type of personal jurisdiction is prerequisite to the making of a child custody determination that will be binding upon a nonresident under the Texas Family Code. Perry sensibly rejects the subject matter jurisdiction approach to child custody jurisdictional issues.

The second major difference is that unlike the interpretation given UCCJA section 14 by some courts and commentators, under comparable provisions of the Texas Family Code a Texas trial court may not exercise its continuing jurisdiction to modify a determination of managing conservatorship after the managing conservator and the child have left Texas and have established a new principal residence in another state for more than six months, unless the action was filed and pending before the end of the six-month period.

Consequently, both in terms of initial and continuing jurisdiction, the Texas legislative scheme takes a more restrained view of the propriety of subjecting a nonresident to a binding custody decree than its UCCJA counterparts. More particularly, the Texas Family Code takes a much more restrictive view of the continuing jurisdiction question than some UCCJA jurisdictions.

II. The Parental Kidnapping Prevention Act of 1980

A. Significance of Legislation

Prior to the adoption of the PKPA, the questions concerning the recognition, enforcement, and modification of sister state decrees by Texas courts were controlled by the provisions of title 2 of the Texas Family Code and the due process and full faith and credit requirements of the United States Constitution. Familiarity with the interstices and interpretive problems inherent in the UCCJA was only of marginal importance to the question of whether a Texas court could or should exercise extraterritorial jurisdiction to modify a child custody decree rendered in a sister state. With the passage of the PKPA, the analysis has been federalized. Sister state decrees made consistently with the federal act's provisions must be enforced and not modified unless modification is permitted under the federal act's provisions. Moreover, since the federal act's provisions on the modification issue depend heavily upon the decree state's interpretation of its own continuing jurisdiction, an understanding of how the sister state interprets its version of the UCCJA is extremely relevant to the question of

342. See supra notes 303-16 and accompanying text.
344. See generally Sampson, supra note 158, at 30-31.
345. Id. at 31.
whether a Texas court could or should exercise extraterritorial jurisdiction to modify a child custody decree rendered in a sister state.

**B. Full Faith and Credit Given to Child Custody Determinations**

1. **Mandatory Recognition and Enforcement**

Section 8 of the PKPA provides for the amendment of title 28 of the United States Code by the addition of section 1738A, which is entitled "Full faith and credit given to child custody determinations." As the title suggests, the section is aimed squarely at the plurality opinion and the interpretive concurrence in *May v. Anderson*. Subsection (a) of section 1738A requires the authorities of every state to enforce a child custody determination made by a court of another state when the child custody determination is made consistently with the provisions of section 1738A. Moreover, except as provided in subsection (f) of section 1738A, modification of a sister state decree made consistently with section 1738A's federal situational requirements is also prohibited.

The personal jurisdiction approach taken by Justice Burton's plurality opinion in *May v. Anderson* is not incorporated in section 1738A. Subsection (e) of section 1738A, however, provides that "[b]efore a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants." In addition, reasonable notice and opportunity to be heard must be given to any parent whose parental rights have not been previously terminated and to any person who has physical custody of a child.

2. **Federal Situational Requirements**

Subsection (c) of section 1738A sets the basic ground rules for the determination of whether a child custody determination is consistent with the provisions of section 1738A. A child custody determination made by a state court is consistent only if the situational requirements of the subsection are met and the court "has jurisdiction under the law of such State." The situational requirements are substantially similar to section 3 of the UCCJA. Satisfaction of one of the following conditions is necessary:

(1) The forum state is the home state of the child on the date of the commencement of the proceeding. Home state means the state in which, immediately preceding the time involved, the child lived with its parents, a parent, or a person acting as a parent, for at least six consecutive months.

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347. See supra text accompanying notes 268-77.
348. "[C]ustody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child and includes permanent and temporary orders, and initial orders and modifications . . . ." 28 U.S.C. § 1738A(b)(3) (Supp. IV 1980).
349. Id. § 1738A(e).
350. The term "parent" is not defined to exclude fathers of illegitimate children.
In the case of a child less than six months old, the home state is defined as "the State in which the child lived from birth with any of such persons."\(^{352}\)

2. The forum state had been the child's home state within six months before the commencement of the proceedings, but the child is absent from the state and a contestant (a person, including a parent, who claims a right to custody or visitation of a child) continues to live in the forum state. The reason for the child's absence may be because of its retention or removal by a contestant or for other reasons.\(^{353}\)

3. Assumption of jurisdiction by a court of the forum state is in the best interest of the child because: (a) the child and its parents, or the child and at least one contestant, have a significant connection with the forum state, other than mere physical presence; and (b) "substantial evidence concerning the child's present or future care, protection, training and personal relationships" is available in the forum state. On the other hand, if the child has a home state or had a home state within six months before the commencement of the proceeding and a contestant continues to live there, this alternative is unavailable.\(^{354}\)

4. The child is physically present in the forum state, and the child has been abandoned.\(^{355}\)

5. The child is physically present in the forum state, and immediate protection of the child is necessary because it has been subjected to or threatened with mistreatment or abuse.\(^{356}\)

6. The court of the forum state has continuing jurisdiction under its own law, the initial child custody determination made by the forum state was made consistently with the provisions of section 1738A, and the forum state remains the residence of the child or of any contestant.\(^{357}\)

7. No other state would have jurisdiction because no other state is: (a) the child's home state; (b) the last home state in which a contestant lived and from which the child has not been absent for more than six months; (c) the state with which the child and a contestant have a significant connection; (d) the state where the child has been abandoned or is threatened; or (e) another state has declined to exercise jurisdiction on the ground that the state whose jurisdiction is in issue is the more appropriate forum, and the forum state's assumption of jurisdiction is in the best interest of the child.\(^{358}\) In other words, when none of the other subdivisions of section 1738A(c)(2) solves the jurisdictional question, the decision to adjudicate is based upon the general concept of the child's best interest. Since

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\(^{352}\) Id. § 1738A(b)(4).

\(^{353}\) Id. § 1738A(c)(2)(A). Although the section seemingly is aimed at the child snatcher, it is broad enough to include other factual contexts.

\(^{354}\) Id. § 1738A(c)(2)(B). Consequently, unlike UCCJA § 3, significant connection/substantial evidence jurisdiction is not available as an alternative to home state or old home state jurisdiction.

\(^{355}\) Id. § 1738A(c)(2)(C)(i).

\(^{356}\) Id. § 1738A(c)(2)(C)(ii).

\(^{357}\) Id. § 1738A(c)(2)(E).

\(^{358}\) Id. § 1738A(c)(2)(D).
this concept is presumably the basis for making a child custody determination, the jurisdictional issue and the resolution of the dispute on the merits coalesce.

3. When Modification Is Permissible

Subdivision (f) of section 1738A sets the ground rules for the modification of child custody determinations made by a court of another state. Modification is permissible if the court requested to modify the foreign decree "has jurisdiction to make such a child custody determination," and "the court of the other State no longer has jurisdiction" or has declined to exercise its jurisdiction. 359 Because continuing jurisdiction is allowed to continue as long as the court that rendered the original decree has continuing jurisdiction under its own law when "such state remains the residence of the child or of any contestant," continuing jurisdiction is substantially preferred. This preference exists unless the original court has declined to exercise its continuing jurisdiction or all contestants have moved from the jurisdiction that rendered the initial decree. For example, for litigation problems involving those UCCJA jurisdictions that interpret UCCJA sections 3 and 14 to provide that continuing jurisdiction continues on an exclusive basis as long as one contestant remains there, section 1738A precludes a sister state from modifying the decree in question. The argument could be made that a limitation is imposed on the requirement that full faith and credit be given to a sister state's decree if the child affected by the decree has acquired a new home state; however, when the decree state has a broad view of its continuing jurisdiction, reaching this result under the language of the PKPA is difficult.

4. Simultaneous Proceedings

Subdivision (g) of section 1738A prohibits a court from exercising jurisdiction in any proceeding for a custody determination commenced during the pendency of proceedings in another state "where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination." 360

5. Other Provisions

Section 8 of the PKPA encourages state courts to "afford priority to proceedings for custody determinations." 361 PKPA section 8 also encourages "award to the person entitled to custody or visitation . . . necessary travel expenses, attorneys’ fees, costs of private investigations, witness fees or expenses, and other expenses" when appropriate. The statutory section specifically identifies two situations in which such an award is appropriate. The first situation is when a contestant has, without the consent of the

359. Id. § 1738A(f).
360. Id. § 1738A(g).
361. Id. § 1738A (Congressional Findings and Declaration of Purpose at 683).
person entitled to custody or visitation, wrongfully removed the child from the physical custody of the person entitled to custody or visitation. Similarly, expenses may be awarded to the nonconsenting party when the child is wrongfully retained after a visit or other temporary relinquishment of physical custody.\textsuperscript{362}

Section 9 of the PKPA provides for the use of the federal Parent Locater Service in connection with the enforcement or determination of child custody and in cases of parental kidnaping.\textsuperscript{363} Section 10 contains an express declaration of congressional intent that the Fugitive Felon Act be applied "to cases involving parental kidnaping and interstate or international flight to avoid prosecution under applicable State felony statutes."\textsuperscript{364}

III. ENFORCEMENT OF SISTER STATE CUSTODY AWARDS UNDER THE TEXAS FAMILY CODE

A. Section 14.10: Habeas Corpus

Texas Family Code section 14.10\textsuperscript{365} is the basic enforcement device for compelling compliance with both domestic and foreign child custody awards. If the right to possession of a child is governed by a court order, then in a habeas corpus proceeding involving the right to possession of the child the court must compel the return of the child to the person entitled to possession by virtue of the court order.\textsuperscript{366} The trial court is required to:

[D]isregard any cross action or motion pending for modification of the decree determining managing conservatorship, possession, or support of or access to the child unless it finds that:

(1) the previous order was granted by a court that did not have jurisdiction of the parties; or

(2) the child has not been in the relator's possession and control for at least 6 months immediately preceding the filing of the petition for the writ.\textsuperscript{367}

Moreover, section 14.10 provides that while in the state for the sole purpose of compelling the return of a child through a habeas corpus proceeding, the relator is not amenable to civil process and is not subject to the jurisdiction of any civil court except the court in which the writ is pending and in that court only for the purpose of prosecuting the writ.\textsuperscript{368}

In \textit{Lamphere v. Chrisman}\textsuperscript{369} the Supreme Court of Texas concluded that the legislature, by enacting a substantially similar predecessor version of section 14.10,\textsuperscript{370} intended to change the rule that the right to possession of

\textsuperscript{362} \textit{Id.}

\textsuperscript{363} 42 U.S.C. § 654 (Supp. IV 1980).


\textsuperscript{366} \textit{Id.} § 14.10(a).

\textsuperscript{367} \textit{Id.} § 14.10(b).

\textsuperscript{368} \textit{Id.} § 14.10(d).

\textsuperscript{369} 554 S.W.2d 935 (Tex. 1977).

\textsuperscript{370} In 1977 the legislature modified § 14.10 by revising subdivision b. The version of the section before amendment provided the following:
a child could be readjudicated in a hearing on an application for a writ of habeas corpus. The general practice under the Family Code section was summarized in the following terms:

The general rule now is that the writ should be granted when the relator shows that he or she is entitled to custody of the child by virtue of a valid and subsisting court order. The right to possession may not be relitigated in the habeas corpus hearing; the relator is entitled to an issuance of the writ immediately on a showing of his or her right to custody. . . . Further, mandamus is a proper remedy to compel enforcement of the relator's right to custody. . . . For these purposes, we recognize no differences between valid custody orders of our state and those of sister states beyond the distinctions set forth in the statute.371

Section 14.10(c)372 provides, however, that the court may issue any appropriate temporary order if there is a serious immediate question concerning the child's welfare. The cases clearly indicate that this statutory provision is not a loophole authorizing a trial court to refuse to enforce a custody decree instanter. In Marshall v. Wilson373 Bonita and William Pacheco were divorced in Texas in 1975. Bonita was named managing conservator of their daughter. Subsequently, Bonita remarried and moved with her new husband and the child to Tennessee. On February 22, 1981, William Pacheco drove to Tennessee and convinced Bonita's new husband, Danny Marshall, to surrender the child to him under circumstances apparently amounting to kidnaping. Pacheco immediately brought the child back to Texas. Apparently, immediately thereafter Bonita and two friends came to Texas and tried forcibly to retrieve the child from Pacheco and his new wife at an establishment called Jose's Place. On February 25, 1981, Pacheco commenced a new proceeding to modify the prior order for managing conservatorship. He also sought and obtained a temporary order prohibiting the mother's interference with his possession of the child. Bonita filed a habeas corpus proceeding two days after Pacheco's modification suit was filed. After a hearing, the trial court denied the habeas corpus. Thereafter, Bonita sought a writ of mandamus from the Texas Supreme Court. While determining that the trial court erred in denying the habeas corpus, the supreme court explained the proper approach to be

(b) The court shall disregard any cross action or motion pending for modification of the decree determining managing conservatorship, possession, or support of or access to the child unless it finds that the previous order was granted by a court of another state or nation and that:

(1) the court did not have jurisdiction of the parties; or
(2) the child has been within the state for at least 12 months immediately preceding the filing of the petition for the writ.

371. Lamphere v. Chrisman, 554 S.W.2d 935, 938 (Tex. 1977) (citations omitted); see also Strobel v. Thurman, 565 S.W.2d 238, 239 (Tex. 1978) ("Upon proof of the prior order, absent dire emergency which is not here urged and which under the facts proved does not exist, the grant of the writ should be automatic, immediate and ministerial. The writ [of habeas corpus] should be granted upon proof of the bare legal right to possession. Section 14.10."); Trader v. Dear, 565 S.W.2d 233, 235 (Tex. 1978).
373. 616 S.W.2d 932 (Tex. 1981).
taken in the enforcement of conservatorship decrees pursuant to section 14.10:

The Texas Legislature enacted a simple procedure designed to stop kidnapping such as happened at Dickson, Tennessee; [attempted] child-snatching such as happened at Jose's Place; and the frustration of outstanding orders for managing conservatorship such as the trial court's restraining order has done. The party armed with an order for managing conservatorship is entitled to its enforcement instant. The hearing for the enforcement is not a readjudication of managing conservatorship. . . . What has happened in this case defeats the legislative plan to stop self-help in custody fights. Bonita was entitled to the writ of habeas corpus, and she was by statute made immune from the collateral litigation while prosecuting the writ. 374

In Lamphere v. Chrisman 375 the supreme court had previously concluded that the language of section 14.10 compelling the trial judge to disregard a cross-action did not require the trial court to dismiss the cross-action or motion to modify. Section 14.10 provides that the relator is not amenable to civil process and is not subject to the jurisdiction of any civil court except the court in which the writ is pending and in that court only for the purpose of prosecuting the writ. After prosecution of the writ, the immunity from collateral litigation ends. Thereafter, if jurisdiction over the nonresident exists pursuant to section 11.051's 376 situational requirements, the due process clause of the fourteenth amendment is not offended, and neither section 11.045 377 nor section 11.052 378 precludes the exercise of jurisdiction, the cross-action or motion to modify may be litigated. 379 In many instances, however, the immunity from civil process provided by section 14.10(d) will mean that after the right to possession pursuant to a court order is determined, the respondent must necessarily litigate the modification suit where the nonresident relator and the child reside because the cross-action will be dismissed for want of jurisdiction.

More complex issues are presented by the exceptions provided in section 14.10(b). The following hypothetical cases are designed to illustrate when the trial court need not disregard a cross-action or motion to modify.

(1) Assume that a husband and wife are divorced in Ohio, the wife is made the managing conservator of the child, and the father receives visitation privileges for one week during the December holiday season and for

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375. 554 S.W.2d 935, 939 (Tex. 1977).
377. Id. § 11.045.
378. Id. § 11.052.
379. [A]fter the writ is either issued or denied, the trial court is free to continue with the disposition of any suits or motions for change of custody. The jurisdictional or other questions raised in the change of custody suit may then be considered on appeal from the final judgment in that suit. To the extent that the holding in In re Kamont, 537 S.W.2d 86 (Tex. Civ. App.—1976, writ ref'd n.r.e.) may conflict with our views, it is disapproved.

Lamphere v. Chrisman, 554 S.W.2d 935, 939 (Tex. 1977).
the summer months. Assume further that the father remarries and moves to Texas. If the father retains possession of the child after the expiration of his summer visitation period, section 14.10 should provide the mother a speedy remedy for securing possession of the child. Any cross-action or motion pending for modification should be disregarded and the mother would be immune from civil process and collateral litigation while prosecuting the writ.

(2) Under the same basic facts as the foregoing hypothetical case, assume that the father retains possession of the child under an agreement with his ex-wife that the child stay in Texas for the school year following the expiration of the summer visitation period. If the father and his new wife wish to keep the child with them for yet another school year, may the mother resort to habeas corpus to enforce the Ohio decree despite the fact that the child has resided in Texas for almost one year? May the father bring a cross-action or prosecute a modification suit filed before the institution of the habeas corpus proceeding? Will a Texas court have jurisdiction to make the father the managing conservator? Finally, even if there is jurisdiction to litigate the custody issue, what standard will the Texas court use to decide the conservatorship issue? Since the child has not been in the mother's "possession and control for at least 6 months immediately preceding the filing of the petition for the writ" of habeas corpus, if the mother sought to compel the return of the child by habeas corpus, the grant of the writ would not be "automatic, immediate, and ministerial."380 Moreover, the expiration of the six-month period provided for in section 14.10(b)(2) would not require that the husband's cross-action or independent modification motion or action be disregarded until the prosecution of the writ of habeas corpus is concluded.381 Section 14.10(b) does not, however, provide explicit guidance concerning the trial judge's discretion to grant the writ of habeas corpus before considering the question of whether modification is appropriate.382 In the context of this hypothetical situation, obtaining jurisdiction over the mother may be difficult because her only contact with Texas was the child's visitation with its father.383 Section 14.10(d) would still be applicable unless the argument could be made that since the trial judge does not have a ministerial duty to disregard the cross-action, the mother could not be "in this state for the sole purpose of compelling the return of a child through a habeas corpus proceeding"384 after the expiration of the section 14.10(b)(2) six-month period. This result would occur because, of necessity, she would also be in Texas to defend the modification proceeding. If she is amenable to process and subject to

381. The husband's filing of a "petition" rather than a motion to modify should not matter. Technically, a motion to modify would be inappropriate unless the court in which the modification of conservatorship is sought constitutes a court of continuing jurisdiction. See TEX. FAM. CODE ANN. § 14.08 (Vernon Supp. 1982-1983).
382. See Gray v. Rankin, 594 S.W.2d 409, 409 (Tex. 1980).
the trial court's jurisdiction on the modification issue, there still is no assurance that the father will prevail. If the standards for modification set forth in section 14.08\textsuperscript{385} are used, then in the average case the father will probably have difficulty prevailing on the merits.

B. Section 14.08: Modification

Section 14.08 imposes a heavy burden on modification motions filed within one year after the issuance date of the order or decree to be modified.\textsuperscript{386} Before a hearing may be obtained, the motion must be supported by an affidavit containing at least one of the following allegations along with supportive facts: (1) the child's present environment may endanger its physical health or significantly impair its emotional development; or (2) the managing conservator is the person seeking the modification or consents to the modification and the modification is in the best interest of the child.\textsuperscript{387} If the court determines that the supportive facts stated in the affidavit are adequate to support an allegation, the court is required to set a hearing.\textsuperscript{388} Unless the court determines that adequate facts support one or both of the allegations, however, the trial court is required to deny the motion to modify and to refuse to schedule a hearing.\textsuperscript{389}

In addition, the standard for modification of conservatorship is stringent. The trial court may modify an order or portion of a decree that designates a managing conservator if the circumstances of the child or the child's managing conservator\textsuperscript{390} have so materially and substantially changed since the entry of the order or decree that the retention of the present managing conservator would be injurious to the child's welfare and the appointment of a new managing conservator would be a positive improvement for the child.\textsuperscript{391} In the ordinary case, satisfying the requirement that the retention of the present managing conservator would be injurious to the child's welfare will be difficult. It is not completely clear, however, that the restrictions imposed upon the modification of a decree set forth in section 14.08 are applicable to proceedings in which modification\textsuperscript{392} of a sister state decree is sought. Possibly, when the sister state law

\textsuperscript{385} Id. § 14.08(c).
\textsuperscript{386} Id. § 14.08(d).
\textsuperscript{387} Id.
\textsuperscript{388} Id. § 14.08(e).
\textsuperscript{389} Id.
\textsuperscript{390} Jones v. Jones, 626 S.W.2d 734 (Tex. 1981).
\textsuperscript{391} TEX. FAM. CODE ANN. § 14.08(c)(1) (Vernon Supp. 1982-1983). A lesser standard is imposed upon a movant who seeks a modification concerning the support of the child, “except that an order providing for the support of a child may be modified only as to obligations accruing subsequent to the motion to modify,” the terms and conditions for access to or possession of a child; or the relative rights, privileges, duties, and powers of conservators; short of a conservatorship modification. These matters may be modified “if the circumstances of the child or a person affected by the order or portion of the decree to be modified have materially and substantially changed since the entry of the order or decree.” Id. § 14.08(c)(2).
\textsuperscript{392} Actually, to speak in terms of the modification of a foreign decree is a misstatement of what occurs. A Texas decree may provide for a different set of rights and responsibilities
permits modification more readily, the law of the sister state that made the order or decree allegedly in need of modification should be applied rather than the relatively stringent standards of section 14.08 of the Texas Family Code. Finally, when enforcement of a sister state decree is sought in Texas and the decree was rendered by a UCCJA state that takes the position that its jurisdiction continues for as long as one contestant remains there, pursuant to the PKPA a Texas court is probably compelled to enforce and not modify the sister state decree unless the sister state declines to exercise its continuing jurisdiction.

C. Impact of the PKPA on Sections 14.08 and 14.10

1. Hypothetical Cases

The two bases for not disregarding “any cross action or motion pending for modification” under Texas Family Code section 14.10 may be superseded by the provisions of the PKPA. The following hypothetical cases illustrate the impact of the PKPA.

(1) Assume that a UCCJA state makes a decree, and the legal custodian moves with the child to Texas and establishes a principal residence in Texas for more than six months. Assume further that under the UCCJA jurisdiction’s interpretation of continuing jurisdiction, the UCCJA state continues to have jurisdiction to modify. Does section 1738A require Texas to enforce the decree and to disregard any motion to modify it? The answer appears to be yes. Section 1738A requires that the appropriate authorities of each state enforce and not modify any child custody determination made consistently with the provisions of section 1738A except as provided in section 1738A(f). Subsection (f) permits modification if: (a) the court of the state in which the modification is sought has jurisdiction to make a child custody determination; and (b) the court of the state that made the decree no longer has jurisdiction or has declined to exercise it.\(^\text{393}\) Before a child custody determination is made consistently with the requirements of section 1738A, the court must have jurisdiction under its own law to make the child custody determination.\(^\text{394}\) In addition, one of the situational requirements of section 1738A must be satisfied. One of the situational requirements, however, is that “the court has continuing jurisdiction pursuant to subsection (d) of this section.”\(^\text{395}\) Subsection (d) provides: “The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1)\(^\text{396}\) of this section continues to be met and such State remains the residence of the child or of any

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\(^{394}\) Id. § 1738A(c)(1).
\(^{395}\) Id. § 1738A(c)(2)(e).
\(^{396}\) Id. § 1738A(c)(1) provides that “such court has jurisdiction under the law of such State.”
contestant. Thus, assuming that the UCCJA state has continuing jurisdiction under its own law, if one contestant remains there the decree must be enforced. Also, the decree must be enforced even though sections 11.052 and 11.053 of the Texas Family Code suggest otherwise. Hence, any cross-action or modification motion would be properly disregarded despite section 14.10's suggestion to the contrary.

(2) Assume that a UCCJA state makes a decree and the mother is made legal custodian. The husband abducts the child and comes to Texas where he resides with the child for one year. When the wife, who continues to reside in the decree state, seeks to enforce the decree by habeas corpus, may the husband assert a cross-action seeking a change of custody pursuant to the second exception set forth in section 14.10(b)? After the enactment of the PKPA, the answer appears to be "no" when the UCCJA state has continuing jurisdiction under its own law. The analysis is the same as in the preceding hypothetical.

(3) Assume the same facts as in the preceding hypothetical except that instead of being abducted, the child was voluntarily delivered to Texas by the legal custodian for an indefinite period while the custodian ran a business in the decree state. May a cross-action be asserted? Again, despite the fact that more than six months has elapsed, section 1738A compels enforcement without modification if the decree state's jurisdiction continues under its own law.

2. Conclusion

In summary, the provisions of section 14.10, which suggest that a cross-action for modification could be considered when "the child has not been in the relator's possession and control for at least 6 months immediately preceding the filing of the petition for the writ" of habeas corpus pursuant to section 14.10, have been displaced by section 1738A when the foreign decree is rendered by a UCCJA jurisdiction which takes the view that its jurisdiction continues. Moreover, enforcement of sister state decrees does not depend upon whether the decrees were made under statutory provisions consistent with the Texas Family Code, but upon whether they were made consistently with the PKPA.

IV. RECOGNITION, ENFORCEMENT, AND MODIFICATION UNDER THE TEXAS FAMILY CODE

Several provisions of title 2 of the Texas Family Code concern the enforcement of sister state orders arising from litigation fitting the definition of a "suit affecting the parent-child relationship." Section 11.053 provides:

397. Id. § 1738A(d).
399. A suit affecting the parent-child relationship is defined in id. § 11.01(5). For the text of this section, see supra note 185.
400. Id. § 11.053.
A court of this state shall recognize and enforce an original or modified final decree granted by a court of another state and entered in litigation that would have been a suit affecting the parent-child relationship in this state unless it is shown that the out-of-state court did not exercise jurisdiction under statutory authority substantially in accordance with the jurisdictional prerequisites of this code.  

The key questions with respect to the interpretation of section 11.053 are: (1) whether it permits modification of an initial or modification decree of a sister state after the sister state's order has been recognized and enforced; and (2) under what circumstances it may be said that the out-of-state court did not exercise jurisdiction under statutory authority substantially in accordance with the jurisdictional prerequisites of the Family Code. A Texas court is required to give full faith and credit to sister state child support decrees that are not modifiable retroactively. Hence, child support awards entitled to full faith and credit obviously cannot be modified retroactively regardless of how section 11.053 is interpreted in other contexts.

A more difficult question is presented when the sister state order concerns the custody of a child. Although the standard for modification of conservatorship may differ among jurisdictions, subsequent modification is generally permissible in the state that made the initial custody determination. Thus, to the extent that full faith and credit principles require recognition and enforcement, modification is not precluded; no state is required to give the award more faith and credit than it would receive where it was rendered. Similarly, the Texas interpretation of the relationship of the full faith and credit clause to child custody litigation has permitted modification of a sister state decree under certain circumstances even though the Texas Supreme Court has concluded that initial and modification decrees of sister states are entitled to full faith and credit. Consequently, section 11.053 does not prohibit the modification of sister state custody determinations that are entitled to recognition and enforcement.

With respect to the second issue, section 11.045 of the Texas Family Code provides that a court has original jurisdiction of a suit affecting the parent-child relationship only if one of the following conditions is met: (1) Texas is the principal residence of the child at the time the proceed-

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401. Section 11.053 bears some resemblance to section 13 of the UCCJA: The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree had not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

402. If the standard for modification of a sister state decree is the one embodied in Tex. Fam. Code Ann. § 14.08 (Vernon Supp. 1982-1983), then in many cases the standard would not be met easily. Whether Texas law would set the standard is unclear.

403. Id. § 11.045.

404. The term “principal residence” is not defined. Section 11.045 was adapted from UCCJA § 3, 9 U.L.A. at 122. Section 3 uses the term “home state,” rather than “principal residence.” A “home state” is defined as:
ing is commenced; (2) Texas was the principal residence of the child at any
time during the six-month period before the proceeding was commenced,
and a parent\textsuperscript{405} or person acting as a parent resides in Texas at the time
the proceeding is commenced; (3) assumption of jurisdiction by a Texas court
is in the best interest of the child because the child and the child's parents
or the child and at least one contestant have a significant connection with
Texas and substantial evidence is available in Texas concerning the child's
present or future care, protection, training, and personal relationships;
(4) assumption of jurisdiction by a Texas court is in the best interest of the
child because the child is physically present in Texas and there is a serious
immediate question concerning the welfare of the child; or assumption of
jurisdiction by a Texas court is in the best interest of the child because it
appears that no other state would have jurisdiction "under prerequisites
substantially in accordance with this section," or another state has declined
to exercise jurisdiction on the ground that Texas is the more appropriate
forum to determine issues concerning the child.

Section 11.045 probably is not a jurisdictional grant authorizing the ex-
ercise of jurisdiction independently of section 11.051\textsuperscript{406} Since the words
"only if" appear before the description of the conditions under which a
Texas court may exercise jurisdiction,\textsuperscript{407} section 11.045 serves as a limita-
tion on the broader language of section 11.051\textsuperscript{408} and, to the extent that
Texas procedural rule 108\textsuperscript{409} is a basis for exercising jurisdiction over non-
residents, a limitation upon the broad language of the last sentence of rule
108. Consequently, to the extent that section 11.051 and rule 108 make
personal jurisdiction prerequisite to the rendition of a judgment binding
upon a nonresident, a sister state decree would not be made under "statu-
tory authority substantially in accordance with the jurisdictional prerequi-
sites of this code" unless the nonresident was subject to personal
jurisdiction.\textsuperscript{410} This approach differs from the one taken by the almost

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\textsuperscript{405} The term "parent" is defined in TEX. FAM. CODE ANN. § 11.01(3) (Vernon 1975);
for the text of the section, see supra note 170.

\textsuperscript{406} One court of civil appeals concluded that the section is a jurisdictional grant. In re
M.S.B., 611 S.W.2d 704 (Tex. Civ. App.—San Antonio 1980, no writ). This decision disre-
gards the literal wording of the section. See also Perry v. Ponder, 604 S.W.2d 306 (Tex. Civ.
App.—Dallas 1980, no writ).

\textsuperscript{407} See UCCJA § 3, 9 U.L.A. at 122.

\textsuperscript{408} TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1982-1983). For a full discussion of
this Family Code long-arm provision, see supra text accompanying notes 159-233.

\textsuperscript{409} TEX. R. CIV. P. 108.

\textsuperscript{410} See supra notes 317-20 and accompanying text. When the sister state order consti-
tutes a child custody determination within the definition of that term contained in the Paren-
tal Kidnaping Prevention Act of 1980, recognition and enforcement may be compelled and
modification prohibited under circumstances insufficient to satisfy § 11.053.
universally enacted Uniform Child Custody Jurisdiction Act.\textsuperscript{411}

A similar limitation on the exercise of jurisdiction is imposed by section 11.052 of the Family Code.\textsuperscript{412} Enacted in 1979, section 11.052 concerns exceptions to the exercise of continuing jurisdiction. It provides that a Texas court may not exercise its continuing jurisdiction to modify "the appointment of a managing conservator if the managing conservator and the child have established and continued to maintain their principal residence in another state for more than six months unless the action was filed and pending before the six-month period . . . ."\textsuperscript{413} Section 11.052(a)(2) contains an exception to the exercise of continuing jurisdiction to modify "any part of a decree if all of the parties and the child have established and continue to maintain their principal residence outside this state."\textsuperscript{414} There is no durational period. The limitations on the exercise of continuing jurisdiction in section 11.052(a) do not affect the power of the court of continuing jurisdiction to enforce or enter a judgment on its decree.\textsuperscript{415} Moreover, the original court retains its continuing jurisdiction to address other possible issues of modification, such as visitation, support, and grandparents' access, as long as one of the parties continues to maintain a principal residence in Texas.\textsuperscript{416}

Under this relatively restrained approach, a Texas court loses its jurisdiction to modify a conservatorship decree after the child and the child's managing conservator move from Texas to another state and establish a new principal residence there for more than six months. The loser of the initial custody litigation is prevented from relitigating the conservatorship issue after the six-month period. This treatment of the continuing jurisdiction question may differ from the approach taken by the almost universally enacted Uniform Child Custody Jurisdiction Act.\textsuperscript{417} Consequently, to the extent that a UCCJA state permits a redetermination of the conservatorship issue after the expiration of a six-month period of the type described in section 11.052 of the Family Code, section 11.053 does not compel its recognition and enforcement in Texas because the redetermination is not "under statutory authority substantially in accordance with the jurisdictional prerequisites of this code."\textsuperscript{418} The Parental Kidnapping Prevention


\textsuperscript{413} Id. § 11.052(a)(1).

\textsuperscript{414} Id. § 11.052(a)(2).

\textsuperscript{415} Id. § 11.052(b).

\textsuperscript{416} See Sampson, supra note 158, at 31. Also, § 11.052 is not an independent jurisdictional grant, and § 11.051 and principles of due process would necessarily place limits on the unrestrained exercise of jurisdiction over a nonresident.

\textsuperscript{417} See Bodenheimer, Interstate Custody, supra note 305, at 215-25 (continuing jurisdiction ends only if all the parties have taken up residence in other states, or if the decree state has declined to exercise its modification jurisdiction); see also Ratner, supra note 305. For a full discussion of the conflict in decisions concerning the proper interpretation of the continuing jurisdiction provisions of the UCCJA among the various states that have enacted it, see supra notes 303-16 and accompanying text.

Act of 1980, however, may compel recognition and enforcement and prohibit modification of conservatorship decrees that would not satisfy section 11.053's requirements.

**PART D. CONCLUSION AND RECOMMENDATIONS**

As a result of the almost universal adoption of the Uniform Child Custody Jurisdiction Act and the passage of the Parental Kidnapping Prevention Act of 1980, for Texas to continue with Family Code provisions that conflict with the provisions of the UCCJA (assuming the latter enactment is properly interpreted) makes no sense. During its next legislative session the Texas Legislature should seriously consider the adoption of the UCCJA and the repeal of sections 11.045, 11.052, and 11.053 of the Texas Family Code. The legislature should amend section 11.051 of the Texas Family Code so as to leave no doubt that a court's jurisdiction to make a child's custody determination by initial or modification decree does not require the same relationship between the defendant and the forum ("minimum contacts") as is required in other suits affecting the parent-child relationship because the relationship between the forum and the litigation problem (the state's interest) is particularly strong in custody cases. Theoretical arguments concerning the constitutionality of the jurisdictional provisions of the UCCJA have very little present-day appeal as a result of the almost universal adoption of the UCCJA, the enactment of the PKPA by Congress, and the continuing interpretation of the fourteenth amendment's due process clause by the United States Supreme Court. When properly interpreted, the jurisdictional provisions of the UCCJA are perfectly compatible with modern due process methodology derived from the Supreme Court's decision in *Shaffer v. Heitner*. Moreover, the Bodenheimer problem concerning exclusive, continuing jurisdiction can be avoided by Texas courts in much the same manner that it has been avoided in other jurisdictions. In this latter respect, the Texas Legislature should resist the temptation to improve upon the technical language of the UCCJA. Legislative tinkering with the provisions of the Uniform Act will only exacerbate the complex problems that already face the interstate child.

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420. In footnote 30 of *Shaffer v. Heitner* the Supreme Court did not revive the in rem wing of *Pennoyer v. Neff*. Justice Guittard correctly reasoned in *Perry v. Ponder* that the references to status in *Shaffer* did not imply that because status is a res, it can be determined in the absence of personal jurisdiction. He therefore rejected the argument that status adjudications are an exception to the personal jurisdiction requirement. Instead, Justice Guittard interpreted *Shaffer's* references to status as recognizing the state's strong interest in adjudications affecting family relationships. *Perry v. Ponder*, 604 S.W.2d 306, 314 (Tex. Civ. App.—Dallas 1980, no writ). Accordingly, the pertinent question in child custody cases is whether the court can exercise personal jurisdiction over a nonresident defendant, not merely whether the court has subject matter jurisdiction.