VENUE, STANDING AND JURISDICTION

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State Bar of Texas
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CHAPTER 3

CURRICULUM VITAE

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Family Law Practice Manual Revision Committee, State Bar of Texas (2006-2009)
Family Law Council of the Family Law Section of the State Bar of Texas 2006 to present
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PUBLICATIONS

"Mediation: When is it Really Over?" (with Gary L. Nickelson) 2002 Advanced Family Law Course

"Characterization and Tracing on a Budget" (with Gary L. Nickelson) 2003 Marriage Dissolution Institute

"Family Law for Fun and Profit" (with Gary L. Nickelson) 2003 Advanced Family Law Course

"Dealing with the "Not So Right" Client" 2004 Marriage Dissolution Institute

"The ABCs of Trying the Simple or Complex Case" (with Gary L. Nickelson) 2005 Marriage Dissolution Institute

"Evidence" 2005 Marriage Dissolution Institute

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"If You Can't Get It Before the Factfinder, You Can't Win" - Effective and Practical Application of the rules of Evidence 2006 Advance Family Law Course

"Summary Judgments" 2007 Marriage Dissolution Institute

"Possession Orders, Including Special Circumstances" (with G. Thomas Vick, Jr.) 2007 Advance Family Law Course

"Evidence & Discovery" 2008 Marriage Dissolution Institute

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SPEAKER AND LECTURER

Speaker at Family Law Essentials Seminar, presented by the Family Law Section, September 2003, Lubbock, TX

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Course Director, Family Law Essentials for $2000 or Free, presented by the Pro Bono Committee of the Family Law Section, April 2007, Mineral Wells, TX

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Speaker, Family Law Essentials for $2000 or Free, presented by the Pro Bono Committee of the Family Law Section, October 2007, Laredo, TX

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Speaker at 2008 Advanced Family Law Course, August 2008, San Antonio, TX

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Moderator of a panel at the 9th Annual Family Law On The Front Lines, June 2009, San Antonio, TX, "When You Play, You May Pay! Paternity Fraud – The Newest Form of Birth Control"

Speaker, 2009 Advanced Family Law Course, August 2009, Dallas, TX

Course Director, Pro Bono Family Law Seminar, presented by the Family Law Section, October 2009, Eagle Pass, TX

Speaker, Parent-Child Relationships: Critical Thinking for Critical Issues, January, 2010, Austin, TX

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INTRODUCTION

The first portion of the paper will address property aspects, especially when you are faced with competing jurisdictions. The second portion will address SAPCR issues. Hopefully you'll find at least one area that will be of assistance.

PROPERTY ISSUES

I. WHY DOES IT MATTER WHETHER TEXAS OR A SISTER STATE HAS PROPER JURISDICTION?

In today's mobile society, it is unlikely that individuals will live there lives in one location. With technology advances and job transfers, it is more common for families to reside in several different states or several different countries during a marriage. The laws applying to a dissolution of such marriage generally only depend on the state where the couple is residing at the time of the divorce.

The following are only a few examples as to why examining whether a case should be tried in Texas or another sister state is crucial to consider prior to filing a cause of action:

A. Alimony
B. Equitable Division Laws
C. Method of Dividing Retirement
D. Other Marital Property Laws
E. Right to Trial by Jury
F. Laws and Procedures Respecting Interim Orders
G. Comparative Venue Within the States
H. Convenience and Expense

Most of these issues will be discussed in the paper but the bottom line is do not always assume that a divorce action in Texas is most advantageous for your client. Explore all of the possibilities before you file that Original Petition or Answer.

II. COMPETING JURISDICTIONS – FILING FOR A DIVORCE

A. Did you Know?

1. Did you know that the residency requirements for a divorce in Rhode Island is one year?
2. Did you know that the residency requirements for a divorce in Florida is six months and that it can be filed in the county in which either spouse resides?
3. Did you know that Johnson County, Kansas has developed a guideline regarding maintenance based on the number of years of marriage and the difference in earning capacity of the spouses?
4. Did you know that Nevada is the hardest state in the country in which to pierce the corporate veil?
5. Did you know that Utah has a ninety (90) day "residency requirement" and that they are a liberal alimony state?

Interestingly enough, this information can be discovered by doing a quick google search on the internet. If you have a case that may involve other jurisdictions, do a quick search on the internet to find out basic information. I DO NOT recommend that you totally rely on such information, but it may give you a start and point you in the right direction.

If there is a possibility a divorce may be filed in another state, find a lawyer in that state to talk to. A great way to find lawyers in another state that practice family law is through the American Academy of Matrimonial Lawyers (AAML). Check out their website at www.aaml.org to find attorneys in different states. Or, contact a local attorney that is a member of the AAML and ask them if they know of an attorney in the locale of interest or can help you make the initial contact.

B. Requirement of Domicile

In Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942) the U.S. Supreme Court decided that an ex parte decree of divorce granted by the state of one spouse's domicile must be recognized throughout the nation according to the Full Faith and Credit Clause of the U.S. Constitution. The following paragraphs reflect the reasoning of the Court:

> *. . .[D]ivorce decrees are more than in personam judgments. They involve the marital status of the parties. Domicile creates a relationship to the state which is adequate for numerous exercises of state power. [citations omitted]. Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus 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. [317 U.S. at pp. 298-299; 63 S.Ct. at p. 213]

Under the circumstances of this case, a man would have two wives; a wife two husbands. The reality of a sentence to prison proves that there is no mere play on words. Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other. [317 U.S. at pp. 299-300; 63 S.Ct. at pp. 213-214]

Certainly if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not but bring "considerable disaster to innocent persons" and "bastardized children hitherto supposed to be the offspring of lawful marriage" (Mr. Justice Holmes dissenting in Haddock v. Haddock, supra, 201 U.S. at p. 628, 26 S.Ct. at p. 525), or else encourage collusive divorces. Beale, Constitutional Protection of Decrees for Divorce, 19 Harv. L. Rev. 586, 596. These intensely practical considerations emphasize for us the essential function of the full faith and credit clause in substituting a command for the former principles of comity. [317 U.S. at p. 301; 63 S.Ct. at p. 214]

In a second opinion ("Williams II") in Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945) the United States Supreme Court held that while the state of a spouse's domicile has the power to grant a divorce which would be entitled to full faith and credit in the other states, the issue of whether either spouse was, in fact, domiciled in the particular state of divorce is open for re-examination in the other states. The court reasoned as follows:

The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State. As to the truth or existence of a fact, like that of domicile upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority to ascertain the truth or existence of that crucial fact. [325 U.S. at p. 230; 65 S.Ct. at p. 1095]

What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached. The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rest heavily upon the assailant. But simply because the Nevada court found that it had power to award a divorce decree cannot, we have seen, foreclose re-examination by another State. Otherwise, as we pointed out long ago, a court's record would establish its power and the power would proved be by the record. Such circular reasoning would give one State a control over all the other states which the Full Faith and Credit Clause certainly did not confer. [325 U.S. at pp. 233-234; 65 S.Ct. at pp. 1096-1097]

C. Is Domicile the Only Basis for Jurisdiction?

In "Williams II" Justice Frankfurter asserted, "Under our system of law, judicial power to grant a divorce--jurisdiction, strictly speaking--is founded on domicile." Williams v. North Carolina, [325 U.S. at p. 229; 65 S.Ct. at p. 1094]

Query: Is a divorce granted on a basis of other than domicile (for example, on the basis of both parties' being present at the time of the proceeding or on the basis of their residing in the state for a certain period of time despite being domiciled elsewhere) an invalid divorce according to the U.S. Constitution? Note that Justice Goodrich in Alton v. Alton, 207 F.2d 667 (1953) felt that such a divorce would be invalid in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

Therein, Justice Goodrich stated, "We think that adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens. . . [I]f the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere. [207 F.2d at pp. 676-677]

It must be noted that this issue became moot in the particular case before it was decided by the Supreme Court. Alton v. Alton, 347 U.S. 610, 74 S.Ct. 736 (1954).

Although the issue was later brought to the U.S. Supreme Court in Granville-Smith v. Granville-Smith, 349 U.S. 1, 75 S.Ct. 553 (1955), the constitutional issue was not reached due to the Court's decision that the Virgin Island's Divorce Act was passed in violation of the legislature's powers granted under the Islands' Organic Act.

Over the years some justices have expressed the view the domicile is not the fundamental basis of jurisdiction for divorce. See Justice Rutledge's dissent in "Williams II" suggesting that one year of residence could be adopted as the jurisdictional requirement for divorce and Justice Murphy's opinion in "Williams II" that a state may grant divorces on bases other than domicile.

D. Residency Requirements

States have traditionally required not only that one of the litigants in an action for divorce be a domicile of that state but also that such litigant have resided there for a certain length of time.

For a period of time an issue existed as to whether a state could constitutionally deny a domiciliary a divorce solely on the basis of residency there for an insufficient period of time.

Finally, in Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) the Court upheld a one-year residence requirement as being justified and constitutional due to the interests of the state in avoiding becoming a divorce mill and in having full faith and credit afforded to its divorce decrees.

E. Divisible Divorce

In terms of jurisdiction, the courts hold that they have 'partial jurisdiction', i.e. a court will only enter orders pertaining to issues for which it has authority. In order to effect a complete divorce, the court must have both personal and subject matter jurisdiction.

> *"Where the trial court in a divorce proceeding has no personal jurisdiction over the respondent, the trial court has the jurisdiction to grant the divorce, but not to determine the managing conservatorship of children or to divide property outside the State of Texas."*
> Dawson-Austin v. Austin 968 S.W.2d 319, 324 (Tex. 1998) (quoting Comisky v. Comisky 597 S.W.2d 6,8 (Tex. Civ. App. - Beaumont 1980, no writ).

Another court with the authority to do so, must complete the divorce process. A valid judgment for child support may be rendered only by a court having jurisdiction over the person of the obligor. In the Interest of S.A.V. 837 S.W.2d 80, 83 (Tex. 1992).

Considering the mobile nature of today's society it may well be that in order to complete the divorce and accomplish all of the necessary relief, actions may be need to be maintained in multiple jurisdictions.

F. Tactical Considerations

1. May a Divorce Action Properly Be Maintained in the Nonresident's State of Domicile?

It should be noted that numerous states have a one-year residency requirement which would not permit the filing of an action for divorce for a considerable period of time after the filing of the Texas divorce action.

Because of the possibility of the Texas resident's obtaining the divorce and subsequently disposing of marital assets awarded to him or her in the Texas divorce before a sister state could acquire jurisdiction to act at all, the better course of action for the client might be an appearance in the Texas divorce action despite the absence of Texas personal jurisdiction of the client, but for the client's making a general appearance.

2. Would the Nonresident's State of Domicile Have Personal Jurisdiction of the Texas Petitioner in an Action for Divorce Filed in the nonresident's State of Domicile?

Although a divorce in the nonresident's state of domicile might be preferable (for reasons hereinabove stated such as alimony laws, matrimonial property laws, a divorce court more likely to favor the client's equitable positions, etc.), all of this may be worthless to the client if the nonresident client's state of domicile would not have personal jurisdiction of the Texas resident in a divorce action filed in that state.

For reasons stated regarding the need for Texas personal jurisdiction, the nonresident's state of domicile similarly would need personal jurisdiction of the Texas resident for purposes such as being able to personally obligate the Texas resident's making alimony payments, being able to bind the Texas resident to orders for payment of debts, and being able to bind the Texas resident to orders for transfers of property located outside of the sister state's borders.

Do not forget that when assessing the initial course of action, all issues as to jurisdiction should be looked at from the standpoint of both a divorce action brought in Texas and of a divorce action brought in the nonresident's state of domicile.

3. What Property, If Any, Does the Sister State Consider it Can Divide in the Absence of Personal Jurisdiction?

Of course, as noted above, most other states consider that they may divide at least real property within their own borders in an action for divorce regardless of personal jurisdiction. Many still contend

they may also divide personal property with a "situs" within their own borders.

Unless the client wishes to pay for an effort to attempt to apply the U.S. Constitution in the sister state's courts to achieve the same result as in Dawson-Austin v. Austin, supra, this consideration must be given in the particular case.

4. Although the Sister State May Order Alimony Payments, Is the Nonresident Spouse Likely to Be Awarded Alimony?

Those of us not practicing in a "true alimony" state frequently forget that the sister states do not order alimony in all cases and in fact seem to be ordering alimony payments less and less every year.

Likewise, many sister states distinguish between "permanent alimony" wherein a spouse may be eligible to receive alimony until death or remarriage and "temporary alimony" (or "supportive alimony") wherein a spouse may be eligible to receive alimony for only a few number of years for limited purposes such as allowing the spouse to finish a college degree, to raise minor children until they are all in elementary school, etc.

Factors such as duration of the marriage, the parties' relative wage earning abilities, the parties' educations, the parties' comparative health situations, and other factors are matters which need to be fully considered in determining how much alimony, if any, the nonresident spouse is likely to receive in the nonresident spouse's state of domicile.

5. Exactly Where Are the Marital Assets Located?

Not only must an immediate consideration be given to the location of the marital real properties, but the "situs" of items of personal property must likewise be determined.

These factors may weigh greatly in determining which state (or whether perhaps both of them) would have the practical ability to make orders disposing of the ownership of such property in a manner entitled to Full Faith and Credit in the other states.

6. If Texas Does Not Have Personal Jurisdiction of the Nonresident Client, Should the Client File a Special Appearance or Not Appear at All in the Texas Proceeding?

The reader will remember that in civil law litigation procedure, the answer to this question is usually determined by the answer to the question, "Does the nonresident have a meritorious defense?"

Although there is not likely to be any successful defense to the action for dissolution of the marriage, the client may indeed have a position in equity, or based upon reimbursement principles, or otherwise as to why a general appearance in the Texas divorce action would likely produce a favorable result without the necessity of subsequent litigation in the sister state.

Of course, if the nonresident makes a special appearance and loses the jurisdictional contest, such nonresident may still defend on the merits. Martinez v. Valencia, 824 S.W.2d 719 (Tex.App. – El Paso 1992, no writ).

After filing a Special Appearance, the nonresident will be bound by the Texas determination on the jurisdictional issues according to principles of Full Faith and Credit. See Williams v. North Carolina ("Williams II"), supra.

On the other hand, if the nonresident takes no action regarding the Texas divorce, such nonresident may risk a Texas divorce court's award of all Texas real property and Texas-located personal property to the Texas resident. Despite this, the issue of whether Texas had personal jurisdiction could subsequently be contested in either the nonresident's state of domicile or in the state where marital assets were otherwise located outside of Texas.

Of course, if no marital assets are located in the state of Texas (without considering any parent-child issues), the better course of action under most circumstances would be not to file the Special Appearance or appear in the Texas proceeding at all.

7. Why Filing a Texas Special Appearance Now and Then Later Deciding to Waive it May Not Be the Best Plan of Action

Unlike a jury demand which once filed may be withdrawn only with the consent of both parties, a special appearance may be unilaterally waived (among other ways) by the simple filing of an instrument designated "Respondent's General Appearance".

Why then not file the Special Appearance now and later determine if the client should perhaps make a general appearance?

Of course, if time is of the essence (such as would be the case if Answer Day has passed and the sixtieth day after divorce is at hand), this may be the only possible way of proceeding.

However, if time permits, the prudent practitioner should make a complete determination as to whether his or her client should contest Texas's personal jurisdiction and file accordingly.

As the reader is well aware, principles of comity should cause a sister state to abate a divorce proceeding pending the conclusion of another state's previously filed divorce action -- or at least until the state having the previously filed divorce action has made a judicial determination of the jurisdictional issues.

There is a very good possibility that the Petitioner's Texas attorney will not have investigated whether his or her Texas client's interests would be better served by a Texas divorce or a divorce in the

nonresident spouse's state of domicile. However, in response to a Special Appearance, such attorney will probably get on the phone to a family law attorney in the sister state and become so educated.

If the Texas attorney then determines his or her client's interest indeed would be better served by a divorce in the nonresident spouse's state of domicile, the attorneys may nonsuit the Texas divorce (prior or subsequent to presenting an order sustaining the Special Appearance) and have an action filed in the spouse's state of domicile before a new action could be filed by the former respondent in Texas.

8. If the Nonresident Client's Interests Are Better Served by Contesting Texas Personal Jurisdiction, in Addition to Filing the Special Appearance in Texas Also Immediately and Fully Pursue an Action for Divorce in the Client's State of Domicile

If the nonresident client's interests are better served by contesting Texas personal jurisdiction, in addition to filing the special appearance in Texas also immediately cause an action for divorce to be filed in the client's state of domicile, serve the Texas resident and proceed towards a finalizing of the divorce action there until/unless the client's actions there are stopped.

The pendency of such an action, particularly if coupled with a determination by the Court in the sister state that it has subject matter jurisdiction, that it has personal jurisdiction of the Texas resident under its long-arm statute and that it has an interest in the divorce issues will go a long way toward defeating the contentions in favor of Texas's long-arm personal jurisdiction as found in Phillips v. Phillips, 826 S.W.2d 746 (Tex.App. – Houston [14th Dist.] 1992, no writ).

III. COMPETING JURISDICTIONS IN A DIVORCE ACTION – PROPERTY DIVISION

A. Other Community Property States' Case Law

1. Bonuses

a. In re Marriage of Griswold, 112 Wn.App. 333, 48 P.3d 1018 (2002) review denied 148 Wn.2d 1023 (2003). Both parties to this marital dissolution action appealed the superior court's distribution of property. The primary issues involved the court's characterization of an employment bonus. The court of appeals affirmed the trial court.

Helen J. Griswold and Michael T. Griswold were married in 1983. Mr. Griswold earned a bachelor's degree in accounting and a master's degree in business administration after the parties married. Ms. Griswold worked throughout the marriage. By the 1990s, she was operating a small business, from which she earned about $12,000 per year. Mr. Griswold began working for Washington Water Power Company as a financial analyst in 1989. In the years 1992 to 1996, Mr. Griswold's wages, including bonuses, ranged from about $42,000 to about $62,000. In 1997, he began working as an energy trader with Avista Energy, with an annual salary of $75,000. He became the senior power trader in 1998, and his earnings increased to $219,000, consisting of $120,000 in salary and the rest in bonuses.

The parties separated on November 2, 1998. Ms. Griswold filed this action, and the court conducted a trial in October and December 2000. The court entered a decree of dissolution and other related documents in January 2001. In its initial findings of fact and conclusions of law, the court awarded each party all of his or her separate property and half of the community property. On reconsideration, the court awarded to Ms. Griswold $138,000 of Mr. Griswold's separate property. Both parties appeal the court's distribution of the marital property.

The court considered the trial court's characterization of an employment bonus Mr. Griswold received in 1999. Pursuant to an incentive plan that Avista Energy implemented in 1998, Mr. Griswold received a bonus of $980,772 in March 1999, just a few months after the parties separated. This amount was comprised of several elements: (1) $32,358 was based on the company's total performance during 1998; (2) $35,035 was called "holdback and discretionary," which was a reserved amount to be paid out at year's end based on nonquantitative employee criteria; (3) $5,372 was called a "Q4 bonus," which was an amount awarded to traders involved in long-term contracts; (4) $848,006 was called the "super trader award" or "special trader award," which was based on the value of an individual trader's "book"; [FN1] (5) $60,000 was to mitigate Mr. Griswold's concerns about being shorted by the bonus plan and to give him an incentive to remain at Avista Energy. To be eligible for a bonus under Avista Energy's plan, a trader was required to remain employed at the time the bonus is paid.

> FN1. A trader's "book" is the sum of his or her contracts to sell or buy electricity as a commodity.

Mr. Griswold's bonus thus was based primarily on the value of his book. Because electricity prices fluctuated dramatically,[FN2] the resulting value of his book also fluctuated dramatically. Mr. Griswold testified that the base figure for the "super trader award" increased by $620,000 from November 2, 1998, when the Griswolds separated, to the end of the 1998 calendar year, when the bonus amounts were calculated. He testified that he completed 1,200 to 1,500 trades during that two-month period. One of those was the so-called "Enron sale" of electricity that he had purchased in October 1998, yielding a profit of $4.2 million.

> FN2. For example, when trial started on October 11, 2000, electricity traded at $75 per megawatt hour. By December 6, 2000, electricity was selling for $1,400 per megawatt hour.

In characterizing the Griswolds' property, the trial court held that the bonus would be calculated on a pro rata basis from January 1, 1998, through November 2, 1998 (the date of separation). The court thus concluded that 84 percent of the bonus was community property and 16 percent was Mr. Griswold's separate property. The court awarded to Mr. Griswold all of his separate portion of the bonus and half of his community portion.

Both parties are appealing the court's characterization of the bonus. In a dissolution action, the court must make a "just and equitable" distribution of the marital property. A trial court has broad discretion in distributing the marital property, and its decision will be reversed only if there is a manifest abuse of discretion. All of the parties' property, both community and separate, is before the court for distribution. Factors to be considered are: (1) the nature and extent of the community property; (2) the nature and extent of the separate property; (3) the duration of the marriage; and (4) the economic circumstances of the parties. In applying these factors, the court first must characterize the marital property as either separate or community.

Assets acquired during a marriage are presumed to be community property. In re Marriage of Short, 125 Wn.2d 865, 870, 890 P.2d 12 (1995). This presumption may be rebutted by showing the assets were acquired as separate property. Id. Spouses' earnings and accumulations during a permanent separation are considered separate property. Id. at 871, 890 P.2d 12.

In the Short case, the Washington Supreme Court addressed the question whether employee stock options, which were unvested during the spouses' marriage but became vested during their separation, should be characterized as separate or community. The court applied the so-called "time rule": To determine how unvested employee stock options are characterized under RCW 26.16, a trial court must first ascertain whether the stock options were granted to compensate the employee for past, present, or future employment services. This involves a specific fact-finding inquiry in every case to evaluate the circumstances surrounding the grant of the employee stock options. Unvested employee stock options granted during marriage for present employment services, assuming the parties were not "living separate and apart" under RCW 26.16.140 when the stock options were granted, are acquired when granted. Unvested employee stock options granted for future employment services are acquired over time as the stock options vest. See In re Binge's Estate, 5 Wn.2d 446, 484, 105 P.2d 689 (1940). Short, 125 Wn.2d at 873, 890 P.2d 12.[FN3]

> FN3. Mr. Griswold cites In re Marriage of Hurd, 69 Wash.App. 38, 848 P.2d 185, review denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993), for the proposition that an unvested right is not subject to characterization as community property. However, Hurd merely held that a vested and matured pension right must be valued at the time of the dissolution, rather than some future date. Id. at 46, 848 P.2d 185. This holding does not mean, as Mr. Griswold contends, that unvested rights cannot be considered community property. Even if it did, the Supreme Court made it clear in Short that unvested rights may be characterized as community property.

Mr. Griswold contends the bonus is his separate property because he received it after the separation. He presents essentially two arguments for why the time rule should not apply here. First, he contends his book had no inherent value because of the market volatility and the need for discretionary decisions by the trader. But the fluctuating value of property and the continued need for discretionary decisions do not render the property *valueless*. As even Mr. Griswold recognizes, the book had a specific, though fluctuating, value on specific dates.

Second, Mr. Griswold contends the bonus had no value when the parties separated (or even, presumably, at the end of the calendar year) because his receipt depended on satisfaction of the requirement that he remain employed at the time the bonus was paid. But the unvested stock options in Short, to which the court applied the "time rule," also were contingent on continued employment. Short, 125 Wn.2d at 871, 890 P.2d 12; see also In re Marriage of Stachofsky, 90 Wn.App. 135, 145, 951 P.2d 346, review denied, 136 Wn.2d 1010, 966 P.2d 904 (1998). This requirement alone does not preclude application of the "time rule."

The "time rule" requires a trial court to determine, as a matter of fact, whether the benefit is conferred for past, present, or future services. Short, 125 Wn.2d at 873, 890 P.2d 12. Here, the court impliedly found Mr. Griswold's bonus was compensation for his services during 1998, and this finding is supported by substantial evidence.[FN4]

> FN4. Mr. Griswold also contends the $35,035 "holdback and discretionary" portion of the bonus and the $60,000 mitigation and incentive payment were not

> payments for services during 1998. However, the holdback portion was based on amounts reserved from earnings during 1998 and thus was payment for specific employee qualities during that year. And while the $60,000 payment was partly an incentive for him to remain employed at Avista Energy, the same could be said of *any* bonus. Substantial evidence supports the trial court's finding that the entire bonus was compensation for Mr. Griswold's services during 1998.

Mr. Griswold likens the bonus to severance pay, which "carries with it no contractual right to a payment that arises after a certain number of years of employment and which will definitely be paid in the future." In Re Marriage of Bishop, 46 Wn.App. 198, 201, 729 P.2d 647 (1986). In Bishop, the court held that severance pay received after the marriage was the separate property of the receiving spouse, recognizing that "[i]t is something of value over and above the community's contribution, and cannot truly be considered as having been onerously traded by the community." Id. at 203, 729 P.2d 647. Here, by contrast, the trial court impliedly found that Mr. Griswold's bonus was compensation for his services in 1998. His services thus were "onerously traded" by the community during the period when the community existed. Bishop's reasoning does not apply.

Mr. Griswold's arguments have no merit. Ms. Griswold, too, objects to the court's application of the "time rule." Contending the value of Mr. Griswold's book changed daily based on market factors alone, she argues the evidence was insufficient to show that his efforts after separation on November 2, 1998, contributed to the amount of the 1998 bonus. See In re Marriage of Sedlock, 69 Wn.App. 484, 508, 849 P.2d 1243, review denied, 122 Wn.2d 1014, 863 P.2d 73 (1993) (increase in value attributable to market forces does not change character of property). She argues that Mr. Griswold had the ability to prove the value of the post separation trades, but he failed to do so. This argument fails to recognize the complexity of the business in which Mr. Griswold was engaged. For example, the "Enron trade" involved a purchase *before* separation and a sale *after* separation. RP at 512. Assigning the value of the entire transaction to pre- or post separation efforts would both complicate the analysis and ignore the circumstances.

Based on Mr. Griswold's testimony that he engaged in 1,200 to 1,500 trades from November 2, 1998 through the end of the calendar year, the trial court properly found the bonus was a result of Mr. Griswold's efforts both before and after separation.

The court did not err in characterizing Mr. Griswold's bonus as partly community and partly separate property.

2. Employment Contract

a. In re Marriage of Duncan (2001) 90 Cal.App.4th 617. Carol C. and William H. Duncan, Jr. were married in February 1989 and separated in September 1994. During their marriage, Carol and William acquired the majority of shares in Duncan-Hurst Capital Management, Inc. (Duncan-Hurst), an investment advisory business managed and operated by William. In a bifurcated proceeding, the court found Duncan-Hurst was community property and applied the exception of Family Code section 2552, subdivision (b) to value the business as of the date of separation. Carol appeals this order, contending the court should have valued Duncan-Hurst as of the date of trial, using an apportionment formula. The court affirmed the lower court's judgment.

For present valuation purposes, an employment contract is the separate property of the employee spouse only if such a contract has actually been negotiated as part of the sale of the business. "However, it is inappropriate when awarding the property to one spouse to reduce the value of the business by the speculative value of a hypothetical [employment] agreement." (In re Marriage of Czapar (1991) 232 Cal.App.3d 1308, 1314, 285 Cal.Rptr. 479). An employment contract negotiated in conjunction with the sale of a business is simply a means of protecting the value of the business goodwill. Until such a contract has actually been negotiated in light of the needs of the buyer and seller, it is too speculative to consider as part of the business's valuation. (Id. at p. 1315, 285 Cal.Rptr. 479). The court may not consider speculative factors when valuing community assets. Ibid. See also In re Marriage of Fonstein (1976) 17 Cal.3d 738, 749, fn. 5, 131 Cal.Rptr. 873, 552 P.2d 1169 [court may not consider tax consequences of an order dividing community asset unless tax liability is immediate and specific and will arise in connection with division of the community property]; In re Marriage of Stratton (1975) 46 Cal.App.3d 173, 175-176, 119 Cal.Rptr. 924 [value of community property home should not be reduced by costs of sale when court has awarded home to one party and there is no evidence that party intends to or is required to sell it].)

Although Gursey valued Duncan-Hurst based on a hypothetical sale that included a long-term employment contract, the fact remains that Duncan-Hurst was not being sold and Husband had no employment contract. Regardless of the certainty that a long-term employment contract would be required upon the sale of Duncan-Hurst, the court was not required to speculate on or consider such a consequence in the absence of proof a sale did occur during the marriage or will occur in connection with the division of the community property. (See Weinberg v. Weinberg (1967) 67 Cal.2d 557, 566, 63 Cal.Rptr.

13, 432 P.2d 709; In re: Marriage of Fonstein, supra, 17 Cal.3d at p. 749, fn 5, 131 Cal.Rptr. 873, 552 P.2d 1169).

The hypothetical probability Husband would be required to sign a long-term employment contract *if* Duncan-Hurst were sold was not a valuation factor the court was required to apply to achieve an equal division of existing community property. (In re Marriage of Davies (1983) 143 Cal.App.3d 851, 858, 192 Cal.Rptr. 212.) Because Wife should not be charged with the speculative cost of a speculative sale, there is no adjustment in value to be made against her share of the community property. (In re Marriage of Fonstein, supra, 17 Cal.3d at p. 750, 131 Cal.Rptr. 873, 552 P.2d 1169; In re Marriage of Stratton, supra, 46 Cal.App.3d at pp 175-176, 119 Cal.Rptr. 924.

Moreover, the likelihood of Husband's selling Duncan-Hurst and entering into a long-term employment contract will depend on a number of variables, most of which are within his control. Consideration of these variables results in a speculative approximation of the value of Husband's ongoing efforts. If, for example, Husband sold Duncan-Hurst because he was retiring or had become incapacitated, there would be no employment contract. Thus, establishing a value for a future long-term employment contract, separate from the value of the business itself, is entirely too speculative. (In re Marriage of Czapar, supra, 232 Cal.App.3d at p. 1315, 285 Cal.Rptr. 479).

"[O]nce having made [an] equal division [of community property], the court is not required to speculate about what either or both of the spouses may possibly do with his or her equal share and therefore to engraft on the division further adjustments reflecting situations based on theory rather than fact." (In re Marriage of Fonstein, supra, 17 Cal.3d at p. 749, 131 Cal.Rptr. 873, 552 P.2d 1169.)

The true value of a future employment contract can only be determined with reference to Husband's circumstances at the time the business is sold. Thus, the court properly refused to introduce the speculative value of an employment contract into the process of determining the current fair economic value of a community property asset for equal division purposes. (See In re Marriage of Lopez (1974) 38 Cal.App.3d 93, 109, 113 Cal.Rptr. 58.)

b. Garfein v. Garfein (1971) 16 Cal.App.3d 155. This is an appeal by the husband from an interlocutory decree of divorce. The decree granted a divorce to each party, found that there was no community property not previously divided by mutual arrangement, and made other orders hereinafter discussed. The husband's attack is directed solely to the provisions dealing with community property and community debts. For the reasons set forth below, the court of appeals affirmed the decree.

The husband is, and during the marriage was, a motion picture director; the wife is, and was, a motion picture actress. During the marriage, the husband was active in procuring employment for the wife, including assisting in negotiating a 'play or pay' contract for her with Paramount Pictures, under which she appeared in, and was paid for her appearance in, the motion picture 'Harlow.' The contract entitled Paramount to the services of the wife for six additional pictures, at the rate of one picture each twelve months,[FN1] commencing in May of 1966, and obligated Paramount to pay to her compensation (whether or not she was called to work) at the following rate:

Year	1	until 5/66	$200,000
	2	until 5/67	$200,000
	3	until 5/68	$300,000
	4	until 5/69	$300,000
	5	until 5/70	$300,000
	6	until 5/71	$300,000

FN1. Under the contract, plaintiff was obligated to appear in one picture a year, with a payment spread over ten calendar weeks; Paramount, at its option, could require her to appear in a maximum of two pictures each year, with her compensation being thereby accelerated. Since she was never called on to make any picture after 'Harlow' the exact details of the arrangements are not material on this appeal.

For reasons known to it, Paramount did not call on the wife to appear in any pictures after 'Harlow' was completed. Litigation took place, resulting in a judgment declaring the obligation of Paramount to comply with the 'pay' clauses of the agreement; thereafter, payments have been made as above provided.[FN2] The litigation cost the marital community in excess of $126,000 for attorney fees and costs.

FN2. The trial and judgment were in 1969; both parties assume that the 1970 payment has been made and that the 1971 payment will be made as provided in the contract.

The husband contended in the trial court, and contends here: (a) that there existed a 'marital partnership' between him and his wife, whereby all of their property and property rights became partnership property; (b) that, at the time of separation (June 30,

1967) they had entered into an oral property settlement agreement, whereby the payments for the first two years of the six-year period were to be used to pay community debts, the balance (if any) to be equally divided, and the payments for the final four years were to be divided 60 per cent to the wife and 40 per cent to the husband; (c) that, if the first two contentions were not sustained, the entire payments under the Paramount contract were community property to be dealt with as such.

The trial court made fact findings adverse to the husband on the first two contentions, and held as a matter of law that the payments received by the wife after the separation were her own separate property. The court of appeals could not say that the trial court erred in its factual findings. There was substantial evidence negating the alleged 'marital partnership' and substantial evidence that the alleged oral separation agreement not only was merely tentative and subject to being reduced to writing, but that it had been unfairly secured by the husband from a distraught and unadvised wife, and entered into by her under a mistake as to the applicable law.

The judgment against Paramount was not one which, itself, called for the payment of any fixed sum; it established the validity and enforceability of that contract according to its terms. Those terms, so far as herein material, required the wife to hold herself available for service in one picture[FN3] each twelve-month period; without the consent of Paramount she could not accept other potentially conflicting engagements, business or social.[FN4]

The court of appeals concluded that the trial court correctly held that the payments falling due after the date of separation (June 30, 1967)- i.e., the final $1,200,000-were the separate property of the wife. Section 169 of the Civil Code (as it read at the time of trial)[FN5] was as follows: "The earnings and accumulations of the wife, while she is living separate from husband, are the separate property of the wife."

FN3. See footnote number 1, Supra.

FN4. Under the contract, plaintiff could perform for another producer, provided she gave Paramount notice of her intent; in that event, Paramount was required either to consent or to schedule her for its own picture at the time or times involved.

FN5. The provision is now found in section 5118 of the Civil Code. Since the statutory provision is unchanged the court did not reach the issue of the applicability of the 1969 legislation to property reduced to possession after January 1, 1970.

The husband argues that the several payments were not "earnings" because the wife was entitled to them even though she did not "work" i.e., appear in any motion pictures. But appearance in a picture was only one alternative of her obligations to her employer under the contract. Under a "play or pay" contract, the employer secures: (1) an option on the performer's services; and (2) the assurance that a performer will not, without its consent, create competition for other pictures of the employer by performing for some other producer. "They also serve who only sit and wait."

The court of appeals held that the wife "earned" her agreed compensation by refraining from performing for anyone except the employer during the period of the contract, unless with the employer's consent.[FN6] Since the payments made after June 1967, were "earned" after that date, they were separate property.[FN7]

FN6. The effect of the contract, obviously, was to limit plaintiff in bargaining with other producers and subjected her to losing the opportunity to appear in pictures for other producers, which she might regard as important to her career or her bank account. It is immaterial, in determining the status of the contract, that Paramount, in fact, did not restrict plaintiff's activities; the potential limitation still existed.

FN7. The duty to pay, where no picture was made, did not accrue until the final day of each twelve-month period, since the wife was required to hold herself available for the full period. The compensation, thus, was not "earned" until that last day.

B. Equitable Distribution States' Case Law

1. Retention Bonus

a. Linton v. Linton, 2005 WL 3077140 (Mich.App., 2005) (unpublished opinion). Defendant's contention concerns the severance package that she anticipated receiving from her employer. Defendant testified that her employer would be closing the facility where she worked within the year, but that she did not know the exact date on which her employer planned to cease operations. In exchange for a retention bonus, defendant agreed to continue working until her employer's final day of business. Defendant testified that upon losing her job, she would receive a severance package consisting of two parts: severance pay based on the number of years she had worked, and the retention bonus for remaining with her employer until it terminated its operations.

Defendant argued that the trial court erred in its valuation of her severance package. The appeallate court disagreed. Defendant testified that she did not know the exact value of her severance package, but she believed that the severance pay portion would be based on the number of years she had worked and a percentage of her annual salary. Based on this formula, plaintiff testified that he believed the severance pay portion would be about $32,000. Plaintiff also testified that he believed the retention bonus would be about $8,000. On the basis of this testimony, the trial court found that the two portions of the severance package had a combined total of $40,000. The appellate court found the trial court did not clearly err in assessing this value. Defendant further argued that even if the trial court properly assessed the value, it erred in including the entire severance package in the marital estate. The appellate court agreed. The testimony indicated that the severance pay portion had been earned entirely during the marriage, based entirely on defendant's past service to her employer; however, the retention bonus would not accrue until defendant completed her final period of employment. The trial court included both portions in the marital estate. The court granted the full $40,000 severance package to defendant, but offset that amount by awarding plaintiff $40,000 in cash from the balance of his IRA. The appellate court has held that severance compensation earned entirely during the marriage is a marital asset subject to equitable division on divorce. McNamara v. Horner, 249 Mich.App. 177, 187-188; 642 N.W.2d 385 (2002). Because defendant's $32,000 severance pay had already been earned during the marriage, the trial court did not err by including it in the marital estate. But, unlike the severance pay, defendant had not yet earned the retention bonus, so it was not accumulated during the marriage. Id. By including defendant's $8,000 retention bonus in the marital estate, the trial court erred so the appellate court remanded for exclusion of defendant's $8,000 retention bonus from the marital estate. On remand, the trial court shall reduce the value of plaintiff's $40,000 cash setoff to $32,000 and equitably divide the $8,000 difference. [FN1]

> FN1. Defendant allegedly learned after the judgment was entered in this case that she would not be losing her job and would not receive any severance or retention pay. Defendant filed a post-judgment motion to reopen the divorce and amend the judgment, but provided no documentary evidence in support of the motion. The trial court denied defendant's motion. Defendant's motion asserted that her circumstances with respect to the once-anticipated severance package had changed; however, defendant presented no evidence to substantiate this claim. Because defendant presented no affidavit or other documentary evidence to corroborate her assertion, the trial court did not abuse its discretion in denying defendant's motion.

b. Robertson v. Robertson, 381 N.J.Super. 199 (App.Div.2005). On appeal, the husband challenges the equitable distribution of stock options awarded to him as a signing and retention bonus by his present employer on September 17, 2001--three days before the complaint for divorce was filed. The appellate court addressed the issue of the equitable distribution of stock options given in connection with the husband's employment with USA Interactive, which commenced on September 17, 2001, three days before the complaint for divorce was filed.

The Family Part judge ordered that the wife be awarded a one-half interest in any stock options granted to the husband before the filing of the complaint. The options at issue, granted at the start of the employment, contained a provision that they would vest in one-fourth increments each year over the next four years on the anniversary date of employment. On appeal, the husband contends that the wife should have no interest in these options, which were given after separation had occurred and within a week before the divorce complaint was filed, and which vested, at the earliest, twelve months later. [FN2] The wife concedes that the husband's stock options "were given to him as an incentive for him to accept the position at USA Interactive." However, she contends that he would not have qualified for the job but for her support during the marriage. She also urges that a bright-line rule be employed to determine whether these options are exempt from distribution, and contends that since they were granted before the complaint for divorce was filed, she is entitled to share in them. She also argues that the husband waived his right to claim immunity, since he did not present that argument at trial, but instead argued that the options lacked value.

> FN2. The husband asserts that at the time of trial, a portion of the options had vested, but they were not profitable.

The appellate court disagreed with the wife's position. The husband consistently maintained, not only that his vested options lacked value, but also that the stock options did not constitute a marital asset.

The appellate court also declined to impose a bright-line rule to a consideration of the distribution of the options as an asset of the marriage. In Painter v. Painter, 65 N.J. 196, 218, 320 A.2d 484 (1974), the Supreme Court stated "that for purposes of determining what property will be eligible for distribution the period of acquisition should be deemed to terminate the day the [divorce] complaint is filed." Although the

Court appeared thus to set forth a bright-line rule in its decision, the court observed further: "We are under no illusion that what we have said above will provide certain and ready answers to all questions which may arise as to whether particular property is eligible for distribution. We have sought only to implement the legislative intent, as we discern it, by setting forth what we believe should be the general governing rules. Individual problems must be solved, as they arise, within the context of particular cases."

c. Marcell v. Marcell, 842 So.2d 945 (Fla.App. 1st Dist., 2003). The former husband appeals a final judgment of dissolution of marriage, insofar as it treated his United States Air Force reenlistment bonus as a marital asset and distributed the parties' marital assets. The appellate court approved the trial court's designation of the reenlistment bonus, including installments not yet paid, as a marital asset, but reversed the lower court's distribution of marital assets, with directions that any duplication be eliminated.

Before filing his petition for dissolution of marriage, the former husband reenlisted in the Air Force for another five years, and so became eligible to receive a bonus under the Aviator Continuation Pay Program. See 37 U.S.C. §301b(a) (2003) (authorizing a retention bonus for aviation officers who agree to extend active duty for at least a year). He chose to receive half of the bonus in a lump sum, and the remainder in yearly installments for five years. Even though he had not received all the installments as of the date on which marital assets were valued, the trial judge awarded half of the entire bonus to the former wife.

The trial court did not err in ruling that the former husband's reenlistment bonus is a marital asset. Although the bonus can be forfeited, see 37 U.S.C. § 301b(g) (2003), entitlement to the bonus vested upon reenlistment, which occurred before the petition for dissolution was filed. See 37 U.S.C. § 301b(e) (2003); United States v. Larionoff, 431 U.S. 864, 877, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); Ford v. United States, 33 Fed. Cl. 560, 564 (1995) (noting that the Air Force insisted that, under 37 U.S.C. § 308, "the service members' entitlement to bonuses vested at the time ... they had obligated themselves to re-enlist"); Di Clemente v. Di Clemente, No. 531597, 1995 WL 404954, at 4 (Conn.Super.Ct. June 26, 1995) (unpublished opinion) (distributing a reenlistment bonus payable after the action for dissolution of marriage was filed, 40% to the wife and 60% to the husband).

The former husband contends that awarding the former wife any part of the bonus he had not already received violates federal law. But the decree does not purport to require the Air Force to make payments directly to the former wife. As an accommodation to the former husband, the trial court allowed him to make partial distribution of the bonus in annual installments within ten days of each date an annual bonus payment was due, rather than reducing future bonus payments to present value and requiring immediate payment. The court of appeals approved the trial court's treatment of the resigning bonus in this regard.

d. Lineberger v. Lineberger, 303 S.C. 248, 399 S.E.2d 786 (App.1990). The husband was an executive with Fluor-Daniel and he received a performance bonus and a retention bonus at the end of each year in unspecific amounts. In January of 1989, he received $27,500 performance bonus and $7,259 as a retention bonus. Husband claimed his bonuses are separate property because he did not physically receive them until after the date of filing of the legal action. The appellate court disagreed. Marital property is property "acquired by the parties during the marriage". (S.C.Code Ann. § 20-7-473 (1976, as amended)). The court had previously held that pensions and other benefits are clearly marital property because they are compensation for services performed during the marriage although not received until a later time. Noll v. Noll, 297 S.C. 190, 375 S.E.2d 338 (Ct..App. 1988); Martin v. Martin, 296 S.C. 436, 373 S.E.2d 706 (Ct.App. 1988).

2. Signing Bonus

a. Purdy v. Purdy, 2003 WL 23095483 (Ohio App. 12 Dist., 2003) (unpublished opinion). In this assignment of error, appellant argues that the domestic court "committed a computational error that erroneously benefited" appellee. Appellant argues that the marital portion of the signing bonus to be divided was clearly $12,666, not $12,999 as the magistrate found. After reviewing the magistrate's decision, it is clear that the magistrate made a minor mathematical error. The magistrate determined that the total amount of the signing bonus was $19,000, paid in three equal installments of $6,333.33. The magistrate determined that two of the installments were marital assets to be divided. However, the court credited appellant with $12,999.99, rather than $12,666.66, the sum of the two installments. Therefore, appellant was mistakenly credited with an additional $333.33.

This appeal was based on the math error but the importance of this case is that it is clear the bonus was apportioned and divided.

b. Trotman v. Trotman, 2005 WL 3742212 (N.J.Super.A.D., 2006) (unpublished opinion). I have included this case because of the mutation, if you will, of the Husband's compensation package.

Husband's/Plaintiff's income in 1997 was $172,771, made up of a base salary of $120,000, a

$10,000 signing bonus and other performance incentives. In 1997 when plaintiff joined Summit, he was given 1500 shares of restricted stock as part of his sign-on bonus, which increased to 2250 shares as a result of a stock split. The stock vested in equal shares over a five-year period, and he had to still be employed at Summit to exercise his options.

In 1998, plaintiff was promoted to senior vice president and his income was $193,787. In January 1998, plaintiff was granted 2400 non-qualified stock options which were exercisable on January 23, 1999. In 1998, he was also issued another 500 shares of restricted stock which also vested over a five-year period, at the rate of 100 shares per year.

In January 1999, plaintiff was granted 1500 shares of stock and 1150 performance stocks. In addition plaintiff was issued 9000 stock options, which he could exercise on January 22, 2000. In 1999, he was promoted to executive vice president, earned $243,267 and took a $20,000 IRA distribution. As of October 1, 2000, all of the stocks vested when Summit Bank merged with Fleet Bank.

Plaintiff contended that "since the value of [the stock options] are going to be based upon future action" i.e., "are the result[ant] of activities in the future that relate to me making money for the bank," defendant was not entitled to share in the grant of 9000 shares, although he conceded that she was entitled to share in the earlier grant of 2400 shares.

Plaintiff's wages in 2000 were $435,504. However, he contended that $205,000 of that income was a result of the restricted stock vesting on an accelerated basis due to the merger of Summit and Fleet Banks.

Plaintiff contends that the judge erred in setting the complaint date as the termination date for inclusion of assets in equitable distribution, including the stock and stock options that he acquired after April 1, 1997. Plaintiff further argues that even if the complaint date were the proper date for inclusion of assets, that the stock and stock options should not have been included in equitable distribution because they were compensation for performance that occurred after the complaint was filed.

Plaintiff contends that the date of termination of the marriage for equitable distribution purposes should have been April 1, 1997, when he moved to New Jersey. He alleges that was the date the parties separated and the date the marriage irretrievably failed. This contention was vigorously disputed by defendant. The court, however, made credibility determinations in deciding the issue of date of separation. The judge stated:

> [P]laintiff went to great lengths to attempt to establish April 1997 as the parties' date of separation for equitable distribution and support purposes. However, his own witness, Larry Sheffield, testified he had dinner with plaintiff and defendant in New Jersey a few weeks after plaintiff started working at Summit. Moreover, the court finds more credible on this point the testimony of defendant, supported by the testimony of Reverend Cole and her mother, that it was the intention of the parties to move in connection with the Summit job. Plaintiff acknowledged receiving a relocation package from Summit for "duplicate housing" pending such a move. Defendant and her mother testified to house-hunting efforts in the Princeton and New Hope/Yardley area. Revered Cole testified to seeing plaintiff at church functions through the spring and summer of 1997, prior to the reverend's departure for Delaware in October/November 1997.

In finding that the termination date was the date of the complaint, the judge concluded:

> As set forth above ··· the court finds defendant's testimony as to the events leading to the "termination date" more credible than plaintiff's testimony on this issue. The court considers plaintiff's testimony as part of his effort to limit defendant's entitlements to his assets and earnings to the greatest extent possible. New Jersey courts have consistently regarded the "date-of-complaint" as the termination of the marriage for purposes of determining what property is eligible for equitable distribution. Painter v. Painter, 65 N.J. 196, 217-218 (1974). The physical separation of the parties without a form of separation agreement in place "is an insufficient indication that a marriage is effectively at an end." Brandenburg v. Brandenburg, 83 N.J. 198, 207 (1980) (emphasis added). Not even a "partial distribution" of marital assets at the time of alleged separation suffices to establish an earlier date; an "agreed distribution" must involved [sic] "a large part of [the] marital assets." Di Giacomo v. Di Giacomo, 80 N.J. 155, 159 (1979).

Here, there was no distribution of assets attendant upon plaintiff's relocation to NJ to start his Summit job. While he testified that he "told" defendant his move was tantamount to ending the marriage, such evidence, even if credible, is insufficient, as a matter of law, to establish April 1997 as the termination date for this marriage. "In the absence of a qualifying separation

agreement, the date a complaint is filed will fix the termination date of a marriage for equitable distribution." Brandenburg, supra [sic] 83 N.J. at 209.

In effectuating an equitable distribution, a judge engages in a "three-step proceeding." Rothman v. Rothman, 65 N.J. 219, 232 (1974). First, the judge decides "what specific property of each spouse is eligible for distribution." Ibid. Second, the judge determines "its value for purposes of [equitable] distribution." Ibid. Third, the judge determines "how such allocation can most equitably be made." Id.

The judge here correctly determined that the period of acquisition of property eligible for equitable distribution terminates the day the complaint is filed. See Painter v. Painter, 65 N.J. 196, 218 (1974). This rule was reaffirmed in Brandenburg v. Brandenburg, 83 N.J. 198 (1980), in which the Supreme Court stated that "[i]n the absence of a qualifying separation agreement, the date a complaint is filed will fix the termination date of a marriage for purposes of equitable distribution." Id. at 209. The Court added that "[i]f the parties have entered into a written separation agreement accompanied by actual physical separation, the date of the agreement will terminate the period of acquisition of distributable assets." Ibid. The Court continued: "In Smith v. Smith, 72 N.J. 350 (1977) we reaffirmed the premise of Painter that 'the precise date on which the enterprise collapses-on which the marriage irretrievably breaks down-is generally impossible or extremely difficult to determine." Id. at 205 (quoting Smith, supra, 72 N.J. at 361).

The parties here had no separation agreement. The precise date on which the marriage irretrievably broke down was not capable of precise determination. The appellate court was convinced therefore that the trial court correctly determined that the date the complaint was filed was determinative of which assets were includable for equitable distribution purposes. Therefore, plaintiff's argument that all of his stocks and stock options were exempt from equitable distribution was without merit.

Plaintiff contended that even if the complaint date were used, the judge still erred in distributing the stocks and options because the plan under which he was granted them "clearly indicated that future performance was necessary to enjoy the right of ownership." The appellate court disagreed. The "Incentive Stock and Option Plan," Section 1(a) states: Summit Bancorp ··· desires to afford certain *key employees* ··· who are responsible for the continued growth of the Company an opportunity to acquire a proprietary interest in the Company, and thus to create in such key employees an increased interest in and a greater concern for the welfare of the Company and its shareholders. The Company also seeks to retain the services of persons holding key positions with the Company ··· while motivating those persons, as key employees and shareholders, to achieve individual and corporate performance standards. Section 1(b) states that the common stock and options were "offered as a matter of separate inducement and are not in lieu of any salary or other compensation for the services of any key employee." Section 4(a) states: "Only full-time salaried key employees of the Company ··· who are in a position to contribute significantly to the Company's continued growth and development and to its long term financial success are eligible…"

Plaintiff claims that he owned only 3800 of the 7800 shares of restricted stock as of the complaint date; the rest had not yet vested and were contingent on his future employment and performance. Plaintiff also asserts that the judge erred in including in equitable distribution 9000 stock options that plaintiff was granted on January 22, 1999, but were not exercisable until January 22, 2000.

In Pascale v. Pascale, 140 N.J. 583, 610 (1995), the Supreme Court set forth a clear basis for determining the issue. In Pascale, the wife argued that stock-option grants awarded to her ten days after she filed for divorce were not subject to equitable distribution. Id. at 607 She argued that 1800 of the options were awarded in recognition of past performance and that another 4000 options were awarded in recognition of a job promotion that imposed increased responsibility on her in the future. Ibid. The Court posited the issue as "whether the nature of the asset is one that is the result of efforts put forth 'during the marriage' by the spouses jointly, making it subject to equitable distribution." Id. at 609. The party seeking exclusion of the asset bears the burden of establishing immunity of any particular asset. Ibid.

The Court stated, "stock options awarded after the marriage has terminated but obtained as a result of efforts expended during the marriage should be subject to equitable distribution." Id. at 610. The Court concluded that both grants, the 1800 and 4000 options, were includable in equitable distribution. Ibid. Although the 4000 shares were in recognition of the wife's promotion, "that promotion came about as a result of the excellent service that she had provided to the company during her marriage." Ibid. Her husband's contributions to the home contributed to her success and "increased her worth for that promotion." Ibid. The other shares were in recognition of past performance and thus also includable. Id. at 608. The Court stated that "stock options are a form of deferred compensation for efforts expended during the marriage," and as such, "equity demands that the options be recognized as marital assets, and thus be subject to equitable distribution." Id. at 611.

The court in Pascale, analogized the stock options there to pension benefits, in which the pension benefits

were the result of direct or indirect efforts expended by one or both parties to the marriage but its enjoyment was delayed. Ibid. Just as pension benefits that were awarded after the marriage, but obtained as a result of the efforts expended during the marriage were distributable, so were stock options. Ibid.

Plaintiff claims that the options were awarded for future efforts and thus were not includable in equitable distribution. Similarly, he contends that because the options vested over a period of five years and he had to remain employed to obtain the options, he did not obtain the options until after the marriage was over. While it is true that plaintiff had to remain employed to receive the options, the language of the stock option plan fairly implies that the options were awarded based on past performance of both the individual and the company as well as to give employees an incentive to keep performing. Plaintiff presented no expert testimony to the contrary. Plaintiff had the burden to establish that the property should be excluded. He failed to do so.

Lastly, defendant contends that the recent decision of the appellate court in Robertson v. Robertson, 381 N.J.Super. 199 (App.Div. 2005) supports his position that the trial court erred by including his stock options in equitable distribution. However, the facts in Robertson are distinguishable from the facts here. In Robertson, stock options were given in connection with the husband's employment with USA Interactive, which commenced on September 17, 2001, three days before the complaint for divorce was filed. The Family Part judge ordered that the wife be awarded a one-half interest in any stock options granted to the husband before the filing of the complaint. The options at issue, granted at the start of the employment, contained a provision that they would vest in one-fourth increments each year over the next four years on the anniversary date of employment.

On appeal, the husband contended that the wife should have no interest in these options, which were given after separation had occurred and within a week before the divorce complaint was filed, and which vested, at the earliest, twelve months later. The wife conceded that the husband's stock options "were given to him as an incentive for him to accept the position at USA Interactive." However, she contended that he would not have qualified for the job but for her support during the marriage. [Id. at 203 (footnote omitted).]

The wife contended that since they were granted before the complaint for divorce was filed, she was entitled to share in them.

The court of appeals disagreed and critical to its decision was its "consideration of a principal purpose of equitable distribution: namely, to recognize and provide compensation for the contribution of each party to the joint marital enterprise, whether as a homemaker ··· or salary-earner." Id. at 204. In distinguishing Pascale from the facts in Robertson, the court of appeals noted that "[a]t the time that the parties separated [on July 31, 2001], the husband was working at a company known as Double Click. Dissatisfied with his position at Double Click, the husband had started a search for different employment in May or June 2001. However, he did not commence his new employment with USA Interactive until September 17, 2001." Id. at 205. "Stock options were issued to the husband immediately upon his employment with USA Interactive." Ibid. Therefore the conclusion was inescapable that they were offered as an inducement to commence employment, not as a recognition for past performance with the company, as in Pascale. There was no evidence that the vesting of those options over a subsequent period of four years was designed for any purpose other than as a means to insure the husband's continued employment with the company. As such, the options in no fashion represented compensation attributable to the couple's joint marital endeavors.

As a consequence, the court of appeals found Robertson had met his burden of establishing the immunity of the USA Interactive stock options from equitable distribution. In this case, however, based on the precise language expressed by section 1(a) of the Summit Bank "Incentive Stock and Option plan," the court was satisfied that plaintiff was granted the stocks and stock options by Summit for efforts he put forth during the marriage, which afforded him the status of a "certain key employee ··· responsible for the continued growth of the company" and thus entitled to "an opportunity to acquire a proprietary interest in the Company" and not as, in Robertson, an incentive to accept new employment with the company.

The court of appeals was convinced that the court's determination that the stock options that were granted prior to the filing of the complaint were assets includable in equitable distribution was based on substantial credible evidence and that the court properly applied the governing law to the court's factual findings.

3. Employment Incentive Agreement/Plan

a. Hamza v. Hamza, 247 A.D.2d 444, 668 N.Y.S.2d 677 (1998). Proceeds to become due under husband's employment incentive agreement were subject to equal division upon divorce, where evidence was presented at trial of wife's substantial contributions as spouse, homemaker, and parent throughout marriage, all of which allowed husband to continue his career.

The Supreme Court erred when it failed to distribute the proceeds which are to become due under the husband's employment incentive agreement with Barr Laboratories, Inc. equally between the parties, since there was ample testimony presented at trial regarding the wife's substantial contributions as

spouse, homemaker, and parent throughout the marriage, all of which allowed the husband to continue his career (see, Repka v. Repka, 186 A.D.2d 119, 588 N.Y.S.2d 39; Poretsky v. Poretsky, 176 A.D.2d 713, 714, 574 N.Y.S.2d 796; Bisca v. Bisca, 108 A.D.2d 773, 485 N.Y.S.2d 302) Further, since the agreement did not require that the proceeds be used for the higher education of the parties' children, the court should not have given the husband one-third of the proceeds to be used as he saw fit, while requiring that the other two-thirds be used exclusively for the higher education of the parties' children.

b. Eisenberger v. Eisenberger, 1996 WL 666734 (Va.App., 1996) (unpublished opinion). All property including that portion of pensions, profit-sharing or deferred compensation or retirement plans of whatever nature, acquired by either spouse during the marriage, and before the last separation of the parties, if at such time or thereafter at least one of the parties intends that the separation be permanent, is presumed to be marital property in the absence of satisfactory evidence that it is separate property.

Here, appellant argues that the management incentive plan award made to him in February 1994, which appellant opted to defer, was improperly categorized as marital property, because it was awarded after his separation from appellee. The pertinent question before the court of appeals was whether appellant "acquired" the award made in 1994, at that time, or previously. Crestar's Management Incentive Compensation Plan states that "[a]n employee is eligible for consideration for an incentive award for a Year if he meets the eligibility standards established by his employer for such Year." Assuming the employee meets the criterion in the given year, the employee's supervisor may recommend the employee for an award for a given year by submitting the employee's "performance ratings and recommendations to the committee or its designee on or before February 15 of the following Year."

Despite appellant's arguments to the contrary, the plan provisions make clear that the award to appellant in February of 1994 was made in view of his performance during 1993. That the specific amount of the award was not known, and that the plan committee reserved the right to ultimately make or not make an award, does not negate the fact that any award eventually made was made for the work of the appellant in calendar year 1993, during the period of the appellant's marriage. Consequently, the court did not err in classifying the award made in February 1994 as marital property.

4. Employment Contract

a. Byington v. Byington, 224 Mich.App. 103, 568 N.W.2d 141 (1997). Compensation package earned by husband from his employer before entry of judgment of divorce was marital property, notwithstanding fact that package was earned after husband had moved to another state and had filed for divorce, and fact that it was based on contract that husband negotiated after filing for divorce.

With respect to the case, the parties do not dispute that the asset in question, defendant's compensation package, was earned before the entry of the judgment of divorce. Because this asset was earned by a spouse before the entry of a judgment of divorce, it is marital property and is properly considered part of the marital estate. The circuit court erred in concluding otherwise.

In defense of the trial court, it is true that this Court had suggested previously that events other than death or the entry of a divorce judgment may be sufficient to render property earned subsequently by a spouse the separate property of that spouse. In Wilson v. Wilson, 179 Mich.App. 519, 446 N.W.2d 496 (1989), the parties to a divorce action disputed whether the defendant's settlement in a personal injury action was properly considered part of the marital estate. The injury occurred in 1983 and the parties were divorced in 1987. The trial court reasoned that because the parties had had no romantic relationship since 1980 and because the parties had otherwise failed to satisfy their respective obligations since 1980 in what appears to have been a very "traditional" marriage,[FN1] the settlement was not a marital asset. The higher court had reversed, stating that the "acts seen by the trial court as ending the marriage are insufficient to end a marriage and to end the rights included within that marriage without some external public manifestation of intent by the parties, such as moving out or filing a complaint for divorce." Id. pp. 523-524, 446 N.W.2d 496.

> FN1. The precise words of the Court, in summarizing the holding of the trial court, were that "plaintiff had stopped cooking and otherwise caring for defendant because he stopped giving her money." Wilson, supra, p. 522, 446 N.W.2d 496.

The obvious implication of the Wilson decision is that an "external public manifestation" of the intent to divorce could, at least in some circumstances, be sufficient to create a separate estate with respect to assets subsequently earned. In fact, the Wilson Court intimated that the marital estate effectively ended when the parties in that case took up separate residences in 1987.[FN2] Id., p. 524, 446 N.W.2d 496.

> FN2. The decision is somewhat ambiguous in this respect. The opinion reads that the marriage "did not end in 1980, but in 1987." Id., p. 524, 446 N.W.2d 496. However, in

> 1987, the parties both began living apart *and* were legally divorced. Despite this ambiguity, we infer from the predicate reasoning in the opinion that the event of crucial significance was not the entry of the judgment of divorce but the public manifestation of the intent to divorce, which, in Wilson, was the establishment of separate domiciles.

b. Lewis v. Lewis, 785 P.2d 550 (Alaska 1990). Husband began working for Petro Star Refining Co. in October of 1984. Shortly thereafter, he signed an employment agreement with Petro Star. This agreement provided for a salary of $112,000 per year and approximately $20,000 per year in taxable benefits. The employment agreement had a term of three years at the time of trial. There is no dispute that the employment agreement was entered into during the parties' marriage.

Wife argues that Husband's employment contract is marital property and therefore its value should be divided between them in the same fashion that the court distributes other marital property. Wife based this argument on the fact that Husband's employment contract began during the marriage.

The trial court determined that earnings made by either party subsequent to the termination of the marriage are separate property. This is consistent with the fundamental principal that post-separation earnings are severable from marital property. See Schanck v. Schanck, 717 P.2d 1, 3 (Alaska 1986) (declining to specify when, as a matter of law, post-separation earnings become severable from marital property).

Wife cites no authority from this or any other jurisdiction which recognizes employment contracts as marital property subject to division upon divorce. While it is possible that an employment contract may have a deferred earning component which should be recognized as marital property, there is no indication that Husband's contract contained such a feature. The court of appeals concluded that the trial court did not abuse its discretion on this issue and therefore affirmed the trial court's determination.

c. McMurtray v. McMurtray, 275 Ark. 303, 629 S.W.2d 285 (1982). In divorce action, chancellor's findings that parties' property settlement following first divorce was abrogated by intention and actions of parties when they remarried, and that husband's corporate account, which was result of incentive employment contract, was marital property subject to equal division following parties' second divorce were not clearly erroneous despite wife's previous relinquishment of any rights she had to any “stock” in company in exchange for equity in their home. Ark.Stats. § 34-1214(B)(5).

Where husband terminated his employment in July, 1980, during parties' marriage and preceding second divorce, and where at that time his employment agreement was modified and he was paid immediately 25 percent of his corporate fund for preceding fiscal year, with understanding that upon completion of audit for fiscal year 1980 he would be paid balance within one year, husband's interest in company stock was vested and fully distributable to him as of July, 1980, and therefore constituted marital property subject to equal division on date of parties' divorce in January, 1981.

Where all property, including husband's corporate fund that resulted from incentive employment contract was marital property and subject to equal division, and where chancellor held that upon sale of any item of property net proceeds were to be divided equally and that all debts were joint debts of marriage with each party receiving credit for any payment thereof, fair interpretation of chancellor's findings required that wife share equally in income tax indebtedness on corporate fund. Ark.Stats. § 34-1214.

Appellant argued that the chancellor erred in holding that a nonfunded account, which appellant owned in a corporation, had vested and was marital property subject to equal division. Ark.Stat.Ann. §34-1214 (Supp.1981) (Act 705 of 1979).

Appellant was employed in 1973 by a corporation which was partly owned by appellee's father. In 1977, during the parties' first marriage of 15 years, the company gave him an incentive contract by the terms of which appellant would own the equivalent of 5% of the book value of the corporation's common stock at the end of each fiscal year. The stock was nontransferable. The account was distributable or payable to appellant or his estate upon his death, resignation, or termination of employment. His employer retained the option to make a distribution in a lump sum or pay 25% initially and the balance, without interest, within one year or purchase an annuity.

The appellant argues his contractual right in the nonfunded account was acquired in 1977 as his sole and separate property, remained his property after his 1978 divorce and continued to be his separate property upon the parties' remarriage in 1979 notwithstanding their 1978 property settlement agreement by which appellee relinquished her interest in the stock. In other words, appellant asserts that the stock he owned in the corporation was not marital property since it was acquired before and not during their second marriage.

Section 34-1214(B)(5) provides: For the purpose of this statute “marital property” means all property acquired by either spouse subsequent to the marriage except: The increase in value of property acquired prior to the marriage.

In a property settlement at the time of their first divorce, the appellee relinquished any rights she had to

any "stock" in the company in exchange for the equity in their home. The court of appeals previously said that a property settlement survives a reconciliation unless the court can find an intention or express agreement that it shall not survive. Arnold v. Arnold, 261 Ark. 734, 553 S.W.2d 251 (1977). Here, the trial court held it was the party's intentions to abrogate the property settlement when they remarried. He found that the property each possessed as a result of their first divorce was brought back into the second marriage and used as joint property with "intent to make it a family." It is undisputed that upon remarriage, after nine months, the appellee took $10,000, the balance of the $13,000 equity in their home which she had received pursuant to the property settlement, and used it as a down payment on another home for themselves. The property was titled in their joint names. Both signed a note and mortgage to Wife's mother for additional funds to purchase the new home. The appellant placed his paycheck into a joint account, and appellee wrote checks to pay their expenses. They filed a 1979 joint income tax return.

Here, the court of appeals could not say the chancellor's finding is clearly erroneous that the settlement was abrogated by the intention and actions of the parties and that the corporate account was marital property subject to equal division.

In the alternative, the appellant argues the benefits he would receive under the incentive agreement with his employer were "retirement benefits" which should not be considered marital property inasmuch as the value of the benefits or balance due on the account is speculative, citing Paulsen v. Paulsen, 269 Ark. 523, 601 S.W.2d 873, 875 (1980); Knopf v. Knopf, 264 Ark. 946, 576 S.W.2d 193 (1979); Lowrey v. Lowrey, 260 Ark. 128, 538 S.W.2d 36 (1976); Fenney v. Fenney, 259 Ark. 858, 537 S.W.2d 367 (1976). These cases are inapplicable. Here, appellant terminated his employment in July, 1980, during the parties' marriage or preceding the second divorce. At that time his employment agreement was modified whereby appellant would be paid immediately, as of August 15, 1980, 25% of his corporate fund for the preceding fiscal year, which ended September 30, 1979.

According to appellant, his corporate fund on that date was worth about $82,000 ($22,000 in 1977, $40,000 in 1978). He was paid about $20,500 with the understanding that upon completion of the audit for the fiscal year 1980, he would be paid the reflected balance, without interest, within one year or by July, 1981. The chancellor correctly held that his interest in the company stock was vested and fully distributable to him as of July, 1980, and, therefore, marital property subject to equal division on the date of their divorce in January, 1981. Bachman v. Bachman, 274 Ark. 23, 621 S.W.2d 701 (1981).

5. Guaranteed Payments

a. Harbour v. Harbour, 227 A.D.2d 882, 643 N.Y.S.2d 969 (1996). In valuing husband's partnership interest in engineering firm, trial court properly included amount of salary continuation plan; although husband was not yet 55 years old as of valuation date, he had reached age 55 by time of trial, and husband's expert testified that salary continuation plan was essentially an unfunded pension plan which, in turn, plainly qualified as marital property subject to valuation and distribution.

Trial court's valuation of husband's partnership interest in engineering firm should not have included "guaranteed payments on account of capital"; including payments as component of both husband's annual compensation and his partnership interest was illogical and improper.

As for the salary continuation plan, the partnership agreement dictates that a partner or principal leaving the firm due to death, disability or retirement is entitled to 40% of his or her average guaranteed payment or salary, provided he or she has reached age 55 and has been a partner or principal for at least 10 years. While it is true that defendant was not 55 years old as of the December 31, 1992 valuation date, two important points must be observed.

First, defendant's expert testified that the salary continuation plan essentially was an unfunded pension plan which, in turn, plainly qualifies as marital property subject to valuation and distribution (See Burns v. Burns, 84 N.Y.2d 369, 376-377, 618 N.Y.S.2d 761, 643 N.E.2d 80). Additionally, inasmuch as defendant had reached age 55 by the time of trial, Supreme Court would have been remiss had it elected to simply ignore the fact that defendant indeed was eligible to participate in the plan at that point in time. In short, economic reality requires that the salary continuation plan be included as a component of defendant's interest in CHA. As to value, defendant's expert testified that the after-tax present value of this plan was $73,485 and, again, the court of appeals saw no reason to disturb Supreme Court's decision to credit this testimony.

The court of appeals agreed that that the Supreme Court's valuation of defendant's partnership interest should not have included the "guaranteed payments on account of capital". The partnership agreement, defendant's tax returns and the testimony of the respective experts all indicate that defendant's total annual compensation has two components-a guaranteed payment on account of services and a guaranteed payment on account of capital. Such payments are made on a monthly basis in accordance with the terms of the partnership agreement, with the amount apparently determined on an annual basis by the firm's executive committee. Defendant's expert testified that defendant always received a guaranteed

payment on account of services and, with the exception of one year, received a guaranteed payment on account of capital.

In determining the value of these payments for purposes of equitable distribution, plaintiff's expert averaged the guaranteed payments on account of capital received by defendant during the relevant time period and projected those payments over a 16-year period,[FN2] resulting in a pre-tax present value of $1.7 million as of December 31, 1992. Defendant's expert assigned no value to these payments, contending instead that such payments were not relevant in determining the overall value of defendant's partnership interest. Defendant's expert is correct.

> FN2. Defendant was 54 years old at the time of trial, and plaintiff's expert estimated that defendant would not retire until age 70.

First, the guaranteed payments defendant received each month based upon his capital contribution, which plaintiff characterizes as a return on investment and defendant likens to interest payments, in no way enhances defendant's interest in the capital itself. In other words, although defendant received additional compensation each month based upon his capital contribution, the payments themselves do not increase defendant's capital interest in the firm. Additionally the record, including the testimony given by plaintiff's expert, plainly revealed that defendant was entitled to receive guaranteed payments on account of capital only as long as he remains a member of the firm and, as such, there was no basis for projecting these payments over a period of years until the date of defendant's anticipated retirement. Moreover, inasmuch as these payments unquestionably contribute to defendant's overall compensation on a monthly basis, common sense dictates that defendant should be "charged" with such payments only once. Thus, permitting the guaranteed payments on account of capital to be included as a component of both defendant's annual compensation and his partnership interest was illogical and improper. Accordingly, defendant's partnership interest in CHA was deemed to be $703,485, representing the after-tax value of defendant's capital account, capital note and salary continuation plan.

Having determined that Supreme Court overvalued defendant's partnership interest in CHA by $1.7 million, it becomes rather apparent that the parties' assets had to be redistributed, and the court remitted the matter to Supreme Court for that purpose on the existing record.

b. Christensen v. Christensen, 107 N.C.App. 431, 420 S.E.2d 469 (N.C.App. Sep 15, 1992). Trial court's adoption of expert's valuation of marital asset consisting of limited partnership did not result in double recovery to husband on ground that wife's management contract was included as capital asset of partnership and payments wife received as manager after separation were treated as dividend, and thus, as marital asset, where there was no evidence that any management fee paid to wife subsequent to date of separation was incorporated into expert's valuation of marital asset.

Defendant next contends that since the trial court adopted the valuations of Dr. Lee, plaintiff received a double recovery, because defendant's management salary was included in the marital estate twice, directly and indirectly as a capital asset of CDC Management Corporation. Defendant submits that Dr. Lee's conclusion that the payments she received with regard to CDC Management constituted a dividend guaranteed for forty years rather than a salary resulted in the trial court's classification of defendant's post-separation earnings as a marital asset. The court then credited plaintiff's share of the marital estate with one-half of defendant's salary from the date of separation until the summer of 1988, which amounted to $45,000. The court also ordered that, pending sale of the club and the management contract, plaintiff and defendant would each receive fifty percent (50%) per year of the $36,000 management fee effective from the date of the Equitable Distribution trial. Additionally, defendant asserts that the court attributed defendant's post-separation salary as the sole component of the value of CDC Management based on Dr. Lee's testimony, since CDC Management's value was based on defendant's receipt of $36,000 annually for a six year period spanning from the date of separation until July 1991. Thus, defendant argued that because of its reliance on Dr. Lee's appraisals, the trial court included her management salary both in the marital estate and as part of the CDC Management valuation.

The trial court clearly included the management contract in the marital estate, as was stated in Finding of Fact No. 19: The Court finds that Defendant has received to the exclusion of Plaintiff total payments of $90,000.00 in regard to the parties' marital asset in CDC Management Corporation (which has the management contract in regard to MetroSport athletic club) from the date of the parties' separation until the summer of 1988, and that Plaintiff is entitled to a credit of one-half of this marital asset in the amount of $45,000.00. The Court found that these payments were made pursuant to the parties' contractual right to receive $36,000.00 per year, and which amount did not constitute salary to Defendant.

Thereafter the court ordered that: "Pending sale of the club and the management contract, the parties will receive the following percentage of their $36,000.00 annual management fee: Plaintiff to receive fifty percent (50%) per year, and Defendant to receive fifty

percent (50%) per year effective from the date of the Equitable Distribution Trial."

The court of appeals could not conclude that this distribution grants plaintiff a double recovery since they found no evidence that the management fees subsequent to the date of separation were incorporated into Dr. Lee's valuation of CDC Management. Finding of Fact 12(g) stated that the net fair market value of CDC Management was determined by Dr. Lee as of the date of the parties' separation. Although the court found this marital asset included the management contract with CDC Associates, there is no evidence that any future payments pursuant to the contract were considered when ascertaining CDC Management's value. Payments under the contract after the date of separation were considered by the court separately and, after determining they did not constitute a salary to defendant, were then included in the marital estate.

6. Incentive Bonus

a. Dunham v. Dunham, 1006 WY 1, 125 P.3d 1015 (Wyo.2006). Trial court did not abuse its discretion in concluding that ex-husband's income in form of "deferred compensation" he received from his former employer after terminating his employment was merely an expectancy, and, as such, could not be divided as an item of marital property, in divorce action; ex-husband testified that he received "incentive bonuses" from former employer for several years after terminating his employment, and that he had no right or guarantee to future payments.

Wife challenged the district court's treatment of Husband's "Whiting Petroleum income." Husband testified that he worked for Whiting Petroleum in Arkansas from 1990 until 1999. After leaving Whiting Petroleum and moving to Wyoming, he began to receive "deferred compensation" from Whiting and had received such compensation each year through 2004. Husband further testified that he was neither guaranteed to receive this money from Whiting Petroleum, nor did he have a right to receive it in the future. Based on this evidence, the district court stated the following in its amended decision letter:

> "WHITING PETROLEUM INCOME: Plaintiff testified: he received "incentive bonuses" from this source for several years after terminating employment with the company; AND that he had no right or guarantee to future payments. Therefore the Court finds this is not an item of property that can be divided, but is evidence of [Husband's] prior years' income."

Wife apparently contends that this money is either akin to an oil production royalty or it is a current right to future compensation based on Husband's previous employment. Under either of these theories, Wife argues, the "Whiting Petroleum income" should have been included in the district court's property division. The district court, however, found that this money was never guaranteed to be paid in the future; therefore, the Whiting Petroleum income could not be divided as marital property and would, instead, be treated as income for the years it was received (i.e., 2000 through 2004).

In support of her position, Wife referred the court only to 24 Am.Jur.2d Divorce and Separation §515 (1998) for the proposition that "[c]hoses in action, rights, and other interests, the benefits of which may be receivable now and in the future, may constitute intangible personal property which are marital assets subject to equitable distribution." Wife, however, ignored the remainder of §515 which draws a distinction between current rights to future assets, and mere expectancies. *Id.* The court of appeals had said, "[w]ith respect to future property, we think the rule must be that, when a court divides property incidental to the granting of a divorce, the court is limited by the amount of property in its hands for division and a mere expectancy is not subject to division." Storm v. Storm, 470 P.2d 367, 370 (Wyo. 1970). Referring specifically to the court's previous discussion in Storm, §515 clarified that "[a]n expectancy is a future interest which cannot be distributed in a divorce proceeding since it may never come into being." 24 Am.Jur.2d, supra §515; see also Kane v. Kane, 577 P.2d 172, 175 (Wyo. 1978).

There was evidence in the instant case that could have supported Wife's characterization of the Whiting Petroleum income; however, there was also evidence which could have led to the conclusion that this money was merely an expectancy and, therefore, could not be divided by the district court. As is plain from the district court's amended decision letter, the district court weighed this evidence and made a finding of fact that the income was not guaranteed in the future. Based on this finding, the court found that the district court correctly determined that this money could not be divided as an item of marital property. The district court did not abuse its discretion in making this finding of fact or applying the law. Therefore, the decision was affirmed.

IV. COMPETING JURISDICTIONS - DIVORCE ACTIONS INVOLVING CHILDREN OR SUITS AFFECTING THE PARENT CHILD RELATIONSHIP

It must be noted that although establishing Title 1 Texas jurisdiction over a nonresident respondent for purposes of a suit for divorce, annulment, or to declare a marriage void also results in the establishment of Title 5 jurisdiction over the nonresident respondent for the purposes of the suit affecting the parent-child

relationship, the reverse is not so. See Texas Family Code §6.305 and §102.011.

Texas Family Code §6.305 provides:

> *(a) If the petitioner in a suit for dissolution of a marriage is a residence or a domiciliary of this state at the time the suit for dissolution is filed, the court may exercise personal jurisdiction over the respondent or over the respondent's personal representative although the respondent is not a resident of this state if:*
>
> *(1) this state is the last marital residence of the petitioner and the respondent and the suit is filed before the second anniversary of the date on which marital residence ended; or*
> *(2) there is any basis consistent with the constitution of this state and the United States for the exercise of the personal jurisdiction.*
>
> ***(b) A court acquiring jurisdiction under this section also acquires jurisdiction over the respondent in a suit affecting the parent-child relationship.***

Texas Family Code §102.011 provides the basis for acquiring jurisdiction over a nonresident in a suit affecting the parent-child relationship under Title 5 of the Texas Family Code. Establishing Title 5 jurisdiction over a nonresident respondent for purposes of a suit affecting the parent-child relationship does not establish jurisdiction over the nonresident respondent for purposes of a suit for divorce, annulment, or to declare a marriage void.

Accordingly, in an action for divorce, personal jurisdiction over the nonresident respondent regarding non-child issues will not be found in Texas Family Code §102.011, but instead ONLY in Texas Family Code §6.305.

V. COMPETING JURISDICTIONS - PRENUPTIAL AGREEMENTS AND POSTNUPTIAL AGREEMENTS

A. Prenuptial Agreements

The most obvious and, at this point, most common application of choice of law provisions in Texas divorce law is in the context of a prenuptial agreement. The Texas Family Code specifically identifies "the choice of law governing the construction of the agreement" as a category which the parties may contract with respect to in entering into a premarital agreement. See Texas Family Code §4.003(a)(7). Thus, so long as the prenuptial agreement itself is valid and enforceable, a choice of law provision contracted for as part of the agreement would be enforceable.

Providing for a choice of law provision in a prenuptial agreement would seem to be particularly appropriate in circumstances where the parties could conceivably meet the residency requirements in more than one state at any given time. In addition, a choice of law provision would be quite useful if a temporary relocation is planned or anticipated, or if the parties wish to restrict the forum-shopping ability of the other party.

On the other hand, certain aspects of a choice of law election in a prenuptial agreement could be problematic, or at least better addressed. If a person wishes to lock in a marital property right provided for in a particular jurisdiction, it would seem to be more efficient to specifically spell out that particular right in the prenuptial agreement, thereby eliminating the possibility that a sweeping restructuring of the marital property laws in that state would significantly thwart the purpose of the prenuptial agreement.

Additionally, a choice of law clause still leaves one subject to the whims of the legislature, which can sometimes pass marital property laws that were not initially contemplated. A prenuptial agreement drawn up ten years ago might elect for a choice of law provision specifying that Texas law will be used; however, such a prenuptial agreement would end up applying economic contribution rules in determining the community and separate estates, a provision which can have far-reaching implications which could not have been anticipated when the agreement was first drawn up.

B. Postnuptial Agreements

Texas law in regards to postnuptial agreements is not as clear as it is regarding prenuptial agreements, and as a result, there appears that there may be some question about the efficacy of a postnuptial agreement involving a choice of law clause. Unlike prenuptial agreements, postnuptial agreements do not have a statutory provision sanctioning a choice of law clause; instead, an agreement between spouses is authorized in the Family Code to provide for the partition or exchange of community assets, and to allow future community income to be characterized as the separate property of a spouse. See Texas Family Code §4.102-4.103. Separate property can be converted to community, but only if the specific property to be converted is identified in the written agreement converting the property. See Texas Family Code §4.203(a)(1)(C).

This would appear to potentially raise a conflict. Parties are generally free to contract the right to a choice of law clause; however, a married couple that enters into a postnuptial choice of law clause which would result in property which, in Texas, would be

separate, instead being treated as community, could be nullified under §4.203. On the other hand, if the contract was entered into post-marriage, but before moving to Texas, it could be argued that the contract should control, since there could be no separate or community property under Texas law until the parties were domiciled in Texas, and since the postnuptial agreement included a choice of law clause which would overrule Texas law, there could not be a conversion from separate to community property, since there was no separate property (under Texas law) to begin with.

Additionally, a choice of law clause in a postnuptial agreement which results in one party essentially being stripped of a significant, and already accumulated, community interest risks being nullified as well. A case from the Fort Worth Court of Appeals has stated that a postnuptial partition "contemplates a division of property among the parties, not a complete forfeiture or assignment. Absent a specific reference to a partition or language indicating that such a division was intended, Texas courts have refused to uphold transactions between spouses as partitions." Byrnes v. Byrnes, 19 S.W.3d 556, 559 (Tex. App. – Fort Worth 2000, no pet.). Thus, if a postnuptial agreement invokes a choice of law clause which results in one spouse being essentially divested of all the community property which had been accumulated, it seems unlikely that the choice of law clause would be enforced, absent a specific clause in the postnuptial agreement specifying that that divestiture was intended in the agreement.

VI. COMPETING JURISDICTIONS - AGREEMENTS INCIDENT TO DIVORCE

An Agreement Incident to Divorce ("AID") is a contractual agreement entered contemporaneously with a divorce decree, which can provide for the division of assets and liabilities of the marital estates, and which can be enforced as a contract. Texas Family Code §7.006 provides:

> *(a) To promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse. The agreement may be revised or repudiated before rendition of the divorce or annulment unless the agreement is binding under another rule of law.*

Oftentimes, an AID will provide a choice of law provision, which dictates what state's law will be used in enforcing the AID. An AID is interpreted under the rules of contract law. See Buys v. Buys, 924 S.W.2d 369, 372 (Tex. 1996). Since a choice of law provision is generally enforceable if included in a contract, if a choice of law provision is present in an AID, the Court interpreting the AID would most likely need to apply the laws of the jurisdiction invoked by the choice of law clause, absent a contractual defense to the choice of law provision.

In the absence of a choice of law provision, the issue may be a little more complicated. A Texas court, for example, that is asked to enforce an AID from another jurisdiction may have to do a separate choice of law analysis in determining what law to use. In such a situation, given the Buys rule requiring an AID to be interpreted as a contract, the Texas trial court would need to apply the same "most significant relationship test" that would be applied to any other contract in determining whether to use Texas marital property law, or the marital property laws of another state.

VII. COMPETING JURISDICTIONS - CONVENANT MARRIAGES

A recent trend in matrimonial law nationwide has been the push for so-called "covenant marriages". Covenant marriages are not offered as an option in the state of Texas and are currently only offered in Louisiana, Arizona and Arkansas. A covenant marriage provides for a more binding form of marriage, generally eliminating the more common "no fault" divorce option if the parties seek a divorce. The idea is to make the parties commit to a stronger marital bond, and make it more difficult for them to seek divorce.

Although covenant marriages are not offered as an option in the state of Texas, it is certainly not uncommon for either Texas residents to marry elsewhere, or for residents who married in another state to relocate to Texas. Moreover, given the close proximity of the states offering covenant marriages, it can be expected that Texas courts will likely begin to see parties filing for divorce, who entered into a covenant marriage. That raises the question of whether the restrictions in granting a divorce in a covenant marriage are enforceable in Texas.

The restrictions in a covenant marriage would seem to fall under the category of a prenuptial agreement under Texas law. Since a prenuptial agreement can encompass any matter "not in violation of public policy or a statute imposing a criminal penalty", Texas Family Code §4.003(a)(8), then the covenant marriage restrictions would appear to be enforceable unless the court determines that there is a public policy interest in allowing parties the ability to easily exit a marital relationship.

The question of public policy can definitely be a difficult one, should one party raise such a defense against the dissolution of the marriage. The very existence of a "no fault" provision in the Texas Family

Code §6.001, suggests that Texas public policy is in favor of granting a divorce without regard to fault. Courts have suggested that allowing a no-fault divorce may be required under the public policy of the state, as elucidated by the legislature. See Waite v. Waite, 64 S.W.3d 217, 221 (Tex. App. – Houston [14th Dist.] 2001, pet. denied); Baxla v. Baxla, 522 S.W.2d 736, 738 (Tex. App. – Dallas 1975, no writ), overruled on other grounds, Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977).

On the other hand, it could be colorably argued that public policy also endorses the right of the individual to freely contract rights connected to marriage. In fact, public policy might support the notion that marriage should be encouraged, not discouraged, and thus a contractual provision that requires a heightened level of proof in order for a divorce to be granted could be entirely consistent with public policy.

At the end of the day, it seems most likely that a covenant marriage clause that is freely entered into would be upheld, and a Texas court would be able to deny relief to a party seeking a divorce based on the covenant marriage provisions. Nevertheless, it is an area that is open to interpretation, and something that will likely be dealt with by the Courts of Appeals in the years to come.

VIII. APPLYING THE LAWS OF ANOTHER STATE OR COUNTRY

When you have a situation where you need for the court to apply the law of another state or possibly of a foreign country refer to Texas Rules of Evidence 202 and 203:

A. TRE 202: Determination of Law of Other States

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon a timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceedings. The court's determination shall be subject to review as a ruling on a question of law.

Daugherty v. Souther P.T. Co. 772 S.W.2d 81, 83 (Tex. 1989) found that the failure to plead sister state law does not preclude a court from judicially noticing that law. Texas Rules of Evidence 202 requires the moving party to furnish sufficient information to the trail court for it to determine the foreign law's applicability to the case and to furnish all parties any notice that the court finds necessary.

B. TRE 203 Determination of the Laws of Foreign Countries

A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trail such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's Determination shall be subject to review as a ruling on a question of law.

Reading & Bates Construction Co. v. Baker Energy Resources 976 S.W. 702,707 (Tex. App. - Houston [1st Dist] 1998, pet den'd) applied Rule 203 and set forth the procedural mechanism for raising an issue concerning the law of a foreign country, for giving notice to the other parties, and for furnishing materials concerning the foreign law.

IX. PRO HAC VICE

There are circumstances where out-of-state non-resident counsel may desire to participate personally in a Texas proceeding and in that event they can apply for Pro Hac Vice authority to appear and actively participate in the proceedings. In that event they must associate a Texas attorney. If you are brought in to such a situation as the Texas lawyer you will need to assist out of state counsel in obtaining permission to participate in the Texas proceeding. The following rules outline how that is accomplished.

Likewise, there may be circumstances where you feel it important to appear in an out-of-state proceeding. The Pro Hac Vice admission rules are uniform and promulgated by the American Bar Association. Your first step in gaining the right of

participation in an out-of-state proceeding, or one that is on going in multiple states, will be to find and associate yourself with counsel in the locale where the foreign proceeding is or will be filed.

You might be inclined to say to yourself, I do not even want to take cases in the next county, why would I want to go to another state? It should not be just for the challenge. It should be based upon the need to see that the client has the best representation available under the circumstances. Your case may have issues of the application of sister state law or other such matters that make dual counsel with expertise in single state jurisdictions essential to address multi state issues.

Do not be reluctant to contact a fellow practitioner who has been down this road for direction. Most who have been will bend over backwards to guide you in the right direction.

The provisions for admitting a non-resident attorney to practice in Texas is governed by Rule XIX of the Texas Board of Examiners Rules which provides as follows:

(a) A reputable attorney, licensed in another state but not in Texas, who resides outside of Texas may seek permission to participate in the proceedings of any particular cause in a Texas court by complying with the requirements of Texas Government Code Section 82.0361 concerning payment of non-resident attorney fee to the Board of Law Examiners as a mandatory initial requirement. Upon completion of this requirement and receipt of an acknowledgment issued by the Board of Law Examiners, the non-resident attorney shall file with the applicable Texas court a written, sworn motion requesting permission to participate in a particular cause.

(1) the office address, telephone number, and, if available, the telecopier number of the non-resident attorney movant;
(2) the name and State Bar card number of an attorney licensed in Texas, with whom the non-resident attorney will be associated in the Texas proceedings, and that attorney's office address, telephone number, and, if available, telecopier number;
(3) a list of all cases and causes, including cause number and caption, in Texas courts in which the non-resident attorney has appeared or sought leave to appear or participate within the past two years;
(4) a list of jurisdictions in which the non-resident attorney is licensed, including federal courts, and a statement that the non-resident attorney is or is not an active member in good standing in each of those jurisdictions;
(5) a statement that the non-resident attorney has or has not been the subject of disciplinary action by the Bar or courts of any jurisdiction in which the attorney is licensed within the preceding five (5) years, and a description of any such disciplinary actions;
(6) a statement that the non-resident attorney has or has not been denied admission to the courts of any State or to any federal court during the preceding five (5) years;
(7) a statement that the non-resident attorney is familiar with the State Bar Act, the State Bar Rules, and the Texas Disciplinary Rules of Professional Conduct governing the conduct of members of the State Bar of Texas, and will at all times abide by and comply with the same so long as such Texas proceeding is pending and said Applicant has not withdrawn as counsel therein.

(b) The motion of the non-resident attorney seeking permission to participate in Texas proceedings shall be accompanied by motion of the resident practicing attorney with whom the non-resident attorney shall be associated in the proceeding of a particular cause, which motion shall contain a statement that the resident attorney finds the Applicant to be a reputable attorney and recommends that the Applicant be granted permission to participate in the particular proceeding before the court.
(c) The motion of the non-resident attorney shall also be accompanied by the proof of payment or proof of indigency acknowledgement issued by the Board of Law Examiners.

…

Rule XIV governs the use of Foreign Legal Consultants. It provides:

§1 General Requirement as to Certification

In its discretion, the Supreme Court may certify to practice in Texas as a legal consultant (a "Foreign Legal Consultant"), without examination, an Applicant who:

(a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(b) for at least three of the five years immediately preceding his or her Application has been a member in good standing of such legal profession and has actively and substantially been engaged in the lawful practice of law of the said foreign country in that country or elsewhere;

(c) possesses the good moral character and general fitness requisite for a member of the Texas Bar;

(d) is at least twenty-six (26) years of age; and

(e) intends to practice as a Foreign Legal Consultant in Texas and to maintain an office in Texas for that purpose.

…

The limited scope of practice of a Foreign Legal Consultant is provided under §3.

SAPCER ISSUES

Now let's turn our attention to SAPCR issues and then we'll deal with what pleadings you may need to file to contest jurisdiction.

I. INTRODUCTION

For the most part, we do not usually encounter complex jurisdictional issues in our daily practices. For the most part, the majority of cases we see in our daily practice jurisdiction and standing are well established. However, as we discussed earlier, with today's increasingly mobile society, the chances of encountering a jurisdictional issue in our practices becomes much more likely. When a potential jurisdictional issue arises, we sometimes feel overwhelmed and compare interpreting the venue statutes, UCCJEA, UIFSA and the long-arm statutes to reading and understanding Greek.

A lot of us hit the panic button as soon as we realize the case we are handling may be controlled by one of the alphabet sections (i.e. UCCJEA or UIFSA). First things first, DON'T PANIC!!! If you will just take the time to read through the statutes and a few of the cases that apply the statutes, the alphabet sections are definitely manageable and occasionally, fun!

II. THE RULES

In order to read the statutes and thus, apply the statutes, you first must know what the rules are, and where to find them. Luckily for us, most are incorporated in the Texas Family Code. Which rules are to be applied depend upon several factors, including: (1) whether the court has personal jurisdiction over the parties; (2) whether the court has subject matter jurisdiction over the case; (3) whether the court has *in rem* jurisdiction over the parties and subject matter; (4) whether there is a divorce action filed in conjunction with the SAPCR; and/or (5) whether the case involves only children and no divorce is pending, (i.e. parties never married, modification, child support, etc.). Establishing all the steps, one step at a time, is crucial in determining whether the court has jurisdiction over the parties and the case, and whether the parties have standing to be before the court in the first place.

A. Standing/Jurisdiction for Divorces and SAPCR's

Certainly, before a court can rule on substantive issues brought before it, the court must have subject matter jurisdiction over the parties and the case. Generally speaking, the court needs personal jurisdiction over the parties as well, although there are some circumstances where personal jurisdiction over both parties is not required. Whether a court must have personal jurisdiction over a party depends upon whether the court is ordering a party to "affirmatively act." This will be discussed in greater detail below.

1. Personal vs. Subject Matter Jurisdiction

The first step in determining whether a court has jurisdiction is understanding the differences between personal, subject matter and *in rem* jurisdiction. A brief primer on each follows.

a. Personal Jurisdiction

A court is not required to have personal jurisdiction over a party to grant a divorce and take certain actions. However, personal jurisdiction is required if a party wants the court to impose personal obligations on the other party, such as division of assets (i.e. ordering a party to transfer or deliver property), payment of child or spousal support, or payment of attorneys fees.

A court acquires personal jurisdiction over a party in one of the following eight ways:

1) party is a resident of Texas;
2) party is served with process in the state of Texas;
3) party waives service of process;
4) party makes a general appearance;

5) party falls under the Texas long-arm statute by being either a resident/domiciliary of Texas or if Texas was the last marital residence of the parties and the proceeding commences within two (2) years of the date that Texas ceased being the marital residence;
6) the exercise of jurisdiction comports with fair play and substantial justice;
7) jurisdiction complies with due process requirements; and/or
8) party has sufficient minimum contacts with Texas to establish jurisdiction.

b. Subject Matter Jurisdiction

In order to exercise jurisdiction, the court must also have subject matter jurisdiction over the case. Subject matter jurisdiction simply means that a particular court has authority to hear a particular type of case (e.g., district courts, family district courts, and county courts at law have subject matter jurisdiction to hear divorces and suits affecting parent-child relationships, where Constitutional county courts and justice of the peace courts do not).

c. *In Rem* Jurisdiction

In rem jurisdiction is the most complex concept of the three. It literally means jurisdiction over the status of a "thing." In order to acquire *in rem* jurisdiction, two requirements must be met: (1) one of the spouses must qualify as a Texas domiciliary, and (2) service of process on a nonresident spouse (if applicable) must be proper. In a SAPCR, *in rem* jurisdiction would encompass the authority of the court to make decisions regarding conservatorship, access and possession, and child support, based upon the children's and the parties' relationship with the state.

2. Is a Divorce Filed?

One of the first inquiries that must be made in a SAPCR when jurisdiction is an issue is whether or not it is filed in conjunction with a divorce. If a divorce is pending along with the SAPCR, but the court does not have personal jurisdiction over the children pursuant to the UCCJEA or other applicable methods, but the Texas court could exercise jurisdiction over the divorce, it is possible that the court could exercise partial jurisdiction over the over the divorce suit and grant the divorce, but must transfer or decline jurisdiction over the other issues of property division and child-related issues to the court of another state where jurisdiction over those issues and parties would be proper. (*See*. Dawson-Austin v. Austin, 968 S.W.2d 319, 324 (Tex.1998). However, as will be discussed in more detail below, the court may decline jurisdiction over all the matters in favor of a more convenient forum, or because the court believes that due process and fair play and substantial justice requires same.

Furthermore, if a party files a SAPCR in one county in Texas, and the other party files a divorce involving the same parties/parents in another county, the SAPCR **must** be transferred to the court that has jurisdiction over the divorce, even if the divorce was filed subsequently to the SAPCR, and even if the SAPCR court case has met the residency requirements under the Texas Family Code. (TFC 6.406)

3. Without Divorce Pending

If the SAPCR is not filed in conjunction with a divorce (i.e. original suit affecting parent-child relationship, modification, etc), then the focus on whether a court may exercise jurisdiction will be on the child's relationship with the state pursuant to the UCCJEA, UIFSA, or, in the case of Texas proceedings, the child's relationship with the county in which the proceeding is filed.

B. Within the State

If both parents reside in Texas at the time the SAPCR is filed, generally speaking, a court may exercise original jurisdiction over a SAPCR if it is the appropriate court with subject matter jurisdiction and is located within the county in which the child resides. (TFC 103.001). The child resides in the county where the child's parents reside or the child's parent resides. (See TFC 103.001 (c)). If the child's parents do not reside in the same county, and if no prior order appointing a managing conservator or guardian exists, then the child resides in the county where the parent having actual care, control, and possession of the child resides. (TFC 103.001 (c)(2)). It is important to remember that the relevant time frame for when a parent has "actual care, control, and possession of the child" is **the day of filing**! In other words, the parent must actually have possession of the child on the day they file their original SAPCR. (In re Narvaiz, 193 S.W.3d 695, 699 (Tex.App-Beaumont 2006, orig. proceeding). Of course this presumes that there is no existing court of continuing jurisdiction.

Again, if a divorce is either pending or filed after a SAPCR is filed, and it involves the same parties/parents, a mandatory joinder of the two causes is required pursuant to TFC §6.406.

C. Interstate Jurisdictional Issues

Jurisdiction becomes tricky in situations where parents reside in different states, the child has lived in different states (or overseas) for less than the required period of time, or the child is an infant who is not old enough to have lived in a particular place for the required period of time. Likewise, if a court of continuing jurisdiction exists in one state, but the child has since relocated, how an order may be enforced or

modified by another court becomes a jurisdictional issue.

As of September 1, 1999, Texas adopted the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA"). The UCCJEA is found in Chapter 152 of the Texas Family Code. Furthermore, Texas previously adopted the Uniform Interstate Family Support Act (hereinafter "UIFSA") in 1995 to help streamline and unify the collection of child support throughout the country. UIFSA is found in Chapter 159 of the Texas Family Code. Both of these acts have very specific requirements regarding how a court obtains jurisdiction over these issues, and how or if courts of other states may exercise jurisdiction over the parties, children and subject matter, and whether same can be transferred.

1. UCCJEA

The UCCJEA provides a uniform road map for both initial and post-SAPCR interstate jurisdiction. Unfortunately, while there may be uniform rules, they may not always be uniformly applied. Nonetheless, the intent and purpose of the UCCJEA is to provide consistency in jurisdiction of child-related cases. The application of the UCCJEA to both initial and modification/enforcement actions will be addressed below.

a. Initial Custody Determination

Under the UCCJEA, Texas may make an initial child custody determination in only four circumstances. These circumstances are the exclusive jurisdictional bases for making a child custody determination by a court of this state.

Initial child custody jurisdiction is addressed in TFC §152.201. Texas may exercise jurisdiction in an original child custody proceeding only if: (1) Texas is the "home state" of the child on the date suit is commenced; (2) another state court does not have jurisdiction OR the state having home state jurisdiction declines jurisdiction in favor of Texas as the more appropriate forum and the child and one or more of the parents has a significant connection with Texas; (3) all courts having jurisdiction under (1) or (2) have declined jurisdiction in favor of Texas being the more appropriate forum; or (4) no court of any other state would have jurisdiction under (1), (2), or (3). (See TFC §152.201).

Home state initial custody jurisdiction– Texas may exercise initial child custody jurisdiction if it is the home state of the child on the date of the commencement of the action, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state. "Home state" is defined by TFC §152.102 (7) as the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with a parent or a person acting as a parent. A period of temporary absence of a parent or a person acting as a parent is part of the period. Priority is given to home state jurisdiction under the UCCJEA. The Texas Supreme Court has addressed this issue in Powell v. Stover, 165 S.W.3d 322, 323 (Tex. 2005), by focusing on where the child "lived" with a parent and finding that using the word "lived" strongly connotes physical presence as opposed to the subjective terms "residence" or "domicile."

Significant connection with Texas– A Texas court may exercise initial custody jurisdiction if it is not the "home state" of the child as defined by the statute, if a court of another state does not have "home state" jurisdiction, OR if that other "home state" has declined jurisdiction on the ground that Texas is a more appropriate forum and the child and the child's parents, or the child and at least one parent or person acting as a parent has a significant connection to Texas *other than physical presence*. (Emphasis added). Since the criteria for exercising initial child custody jurisdiction are listed in order of priority, Texas may only exercise jurisdiction under the 'significant connections' provisions if there is no other home state, or the other home state declined jurisdiction. "Significant connections" is a question for the fact finder.

More appropriate forum– Texas may exercise initial custody jurisdiction if all courts that would meet the criteria of either home state or significant connection jurisdiction have declined jurisdiction in favor of Texas being the more appropriate forum. Only the court(s) that has the priority jurisdiction (i.e. either 'home state' or 'significant connection') has the authority to determine if Texas is the more appropriate forum. Texas does not and therefore, cannot, make that determination. Accordingly, in such a situation, it is up to the party desiring to keep jurisdiction in Texas to obtain rulings/orders from the priority courts showing that they have formally declined jurisdiction, and the basis upon which they so declined. (*See* In re Presley, 166 S.W.3d 866, 868 (Tex.App.– Beaumont 2005, orig. proceeding). If concurrent proceedings have been commenced, the court with the "lesser" priority or the court that is hearing the latter-filed case must stay its proceedings and communicate with the other court to determine whether that court has concluded the issue of jurisdiction. If no concurrent proceedings have been filed, but it appears that another state has priority jurisdiction under the statute, the better practice would be to file a pleading with that other court asking it to decline jurisdiction under the UCCJEA.

In determining whether a state is a more convenient forum (or the originating state is an inconvenient forum), the UCCJEA sets forth factors to consider in making that determination. These relevant factors are enumerated in TFC §152.207(b)(1)-(8), and include: (1) whether domestic violence has occurred and is likely to occur in the future and which state is best able to protect the parties; (2) length of time child has resided inside/outside the state; (3) the distance between the court attempting to exercise jurisdiction and the state that would assume jurisdiction; (4) the relative financial circumstances of the parties;(5) any agreement of the parties as to which state should assume jurisdiction; (6) the nature and location of the evidence required to resolve the pending litigation, including the child's testimony; (7) the ability of the court of each state to decide the issue expeditiously and procedures necessary to present the evidence; and (8) the familiarity of the court of each state with the facts and issues in the pending litigation.

Jurisdiction may also be declined by reason of conduct of one of the parties. This is most likely to occur when a party is seeking to invoke the jurisdiction of a court and has attempted to establish jurisdiction through unjustifiable conduct (e.g. parent hides child out in a state for six months attempting to establish jurisdiction in a state perceived to have laws more favorable to that party, etc.) (*See* TFC §152.208).

No other court has jurisdiction under criteria (1), (2) and (3)– Finally, if no other court in another state would have jurisdiction under home state, significant connections or more appropriate forum principles, then Texas may exercise jurisdiction by default.

b. Jurisdiction to Modify or Enforce Custody

Possibly the most confusion among practitioners that arises in regards to the application of the UCCJEA is whether a state or which state has jurisdiction to modify or enforce a prior custody order. Both will be addressed below.

Enforcement is the easier of the two. All a party need do to enforce a prior order issued by another state is properly register the foreign order in the state in which the enforcement is sought, pursuant to TFC §§152.305 and 152.306 et. seq. This, of course, presumes that the state in which the enforcement is sought has adopted the UCCJEA. Enforcement proceedings under these provisions of the UCCJEA may be expedited, provided that proper notice and citation have been issued.

Modification of foreign orders is a bit more complicated. In order for Texas (or another state that has adopted the UCCJEA) to exercise jurisdiction to modify a prior order of custody from a foreign state, Texas must, at the time the action is filed, have jurisdiction to make an initial determination under either "home state" or "significant connections" jurisdiction, **AND** either (1) the original issuing state determines it no longer has exclusive continuing jurisdiction, or that Texas is a more convenient forum; or, (2) Texas or the originating court determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state. (*See* TFC §152.203). This is the case even if Texas now meets the "home state" definition. Similar to a case within Texas where there is a court of continuing jurisdiction, any new pleadings, including a motion to transfer, must be filed in the originating court for that court to determine. Unlike enforcement actions, a party cannot simply "register" the order in the new state and seek to modify it. They must jump through the jurisdictional hoops outlined in TFC §152.203. However, once Texas acquires jurisdiction from the foreign state under the UCCJEA provisions, it then becomes the court of continuing jurisdiction, and before any future modifications can be sought in another state, they must first be vetted through the jurisdictional process outlined in TFC §152.203.

Notwithstanding the above, a court in a state under the UCCJEA may exercise temporary emergency jurisdiction under TFC §152.204. This is true even if another child custody proceeding has been commenced in another state, but emergency jurisdiction is necessary to protect the child, a sibling or parent from actual or threatened abuse, or if the child has been abandoned. (*See* TFC 152.504). However, if another proceeding had commenced in another state, the courts are required to communicate immediately to resolve the jurisdictional issues pursuant to TFC §152.110, which sets out in detail how the courts should communicate. This section provides for a court in one state to communicate about simultaneous proceedings with the court of the other state, in order to arrange for only one of them to proceed accordingly. The methods of recording such communication also are addressed.

Additionally, it is the intent and purpose of the UCCJEA not to allow temporary emergency jurisdiction ultimately to control the jurisdictional issue so as to prevent forum shopping. Similarly, when simultaneous proceedings are pending, the jurisdictional issue is generally resolved in favor of the action first filed, provided there is no home state. Simultaneous filing conflicts will arise only when there is no home state, no state with continuing, exclusive jurisdiction and there is more than one state that meets the requirements necessary to exercise significant connection jurisdiction. (*See* TFC §152.206).

2. UIFSA

The Uniform Interstate Family Support Act (hereinafter "UIFSA") is essentially the child support counterpart of the UCCJEA. UIFSA is codified in TFC Chapter 159. In many respects UIFSA is an

easier statute to apply, because once a court obtains jurisdiction of and issues a support order, there are only limited circumstances within which the court of another state may modify that order, although any other state possibly could exercise jurisdiction to enforce the order.

A state court may obtain initial jurisdiction to establish, modify or enforce a support order under UIFSA and may exercise personal jurisdiction over a nonresident respondent under the following circumstances:

(a) the individual is personally served in the state;
(b) the individual submits to the jurisdiction of the state by consent, general appearance, or by filing a responsive pleading that has the effect of waiving any contest to personal jurisdiction (i.e. special appearance, plea to the jurisdiction, etc);
(c) the individual resided in the state with the child the subject of the suit;
(d) the individual resided in the state and provided prenatal expenses or support for the child;
(e) the individual engaged in sexual intercourse in this state and the child may have been the result of that intercourse;
(f) the individual executed the equivalent of an acknowledgment of paternity or registered with the paternity registry; or
(g) any other basis consistent with the Constitutions of the United States or the state seeking to exercise the jurisdiction. [See TFC §159.201].

If initial jurisdiction can be established via one of the above criteria, the state can exercise initial jurisdiction to enter a child support order. Note that in this instance, the court MUST have personal jurisdiction over the Respondent or else the court has no power to order the party to comply with the terms of the order and pay support.

Simultaneous proceedings– A state may also exercise jurisdiction to establish a support order if the petition is filed after a pleading is filed in another state, but only if:

(a) the petition or comparable pleading in this state is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state;
(b) the contesting party timely challenges the exercise of jurisdiction in the other state; and
(c) if relevant, this state is the home state of the child. [See TFC §159.204(a) (1)-(3)].

By the same token, the reverse is true. That is to say, even if the proceeding is first filed in Texas, the Texas court cannot exercise jurisdiction over the case if there exists a subsequently filed proceeding in another state and the Respondent to the Texas action has filed a challenge to the jurisdiction within the time period for filing an answer, or if the other state may be the home state of the child.

Continuing, exclusive jurisdiction– This is perhaps the most important aspect of UIFSA and its greatest difference from the UCCJEA. Essentially, the original issuing tribunal always retains continuing, exclusive jurisdiction over the child support order for so long as at least one party or the child remains in the issuing state, AND, even if no party no longer resides in the state, the issuing court retains jurisdiction unless both parties agree to the contrary. TFC §159.205. In other words, without agreement, or as long as a party remains in the issuing state, even if the child has a new home state, the new home state may not modify a prior support order of another state. Period.

D. Venue

Very similar to the issue of jurisdiction is the establishment of venue and the specific court where a case is properly filed**.** The venue statutes found in the Texas Family Code set forth the requirements for where a suit should be properly filed, both in divorces and SAPCR's. On occasion, the divorce venue statutes and the SAPCR venue statutes can come into conflict with one another. When they do, the "tie" almost always is decided in favor of the court that has jurisdiction over the divorce and ***not*** the court that has jurisdiction over the SAPCR. This is sometimes hard to remember since it seems to contradict the concepts of residency of the child otherwise established in the code and specifically the UCCJEA. However, when all parties reside within Texas, but live in different counties, the fact that a suit was filed first in one county does not necessarily mean it has dominant jurisdiction over a subsequently filed suit involving the same parties and substantially same subject matter. Proper venue will be determined not only by the residency/venue requirements of the Family Code, but also depend upon the type of suit that is actually filed.

1. Divorce Generally

The general residency rule for divorce cases (with or without children) is found in TFC §6.301 which provides:

> "A suit for divorce may not be maintained in this state unless at the time the suit is filed either the petitioner or the respondent has been: (1) a domiciliary of this state for the preceding six-month period; and (2) a

> resident of the county in which the suit is filed for the preceding 90-day period."

Although this venue statute is not itself jurisdictional (i.e. provides authority for the court to exercise control of a case), it is akin to a jurisdictional provision in that it controls a party's right to maintain a suit for divorce and is a mandatory requirement that cannot be waived. (*See* Reynolds v. Reynolds, 86 S.W.3d 272, 276 (Tex.App.–Austin 2002, no pet.).

The key to whether venue is proper, then, is whether the residency requirement had been met *at the time of the filing of the petition*. Having said that, however, at least one court has found that even if residency was not met at the time of the filing, if the requirement was met as of the filing of an amended petition, the amended petition constitutes the filing of a new suit for purposes of establishing proper venue. (See Whiteman v. Whiteman, 682 S.W.2d 357, 358 (Tex.App.–Dallas 1984, no writ.). Thus, a party may be able to remedy a lack of proper venue by filing an amended pleading after the residency requirement has been met. This presumes, of course, that there is not another court that has dominant jurisdiction as a result of another suit being filed in accordance with the statutory venue provisions.

In cases where the Texas spouses have each established residency in different counties, the suit may be filed in either county of residence of the parties. However, the first Petitioner to file a suit has the election of which county in which they will file. (*See* Lutes v. Lutes, 538, S.W.2d 256, 258 (Tex.App.–Houston [14th] 1976, no writ).

If one spouse lives in Texas and the other spouse lives outside of Texas, and if venue is proper in this state, Texas can acquire jurisdiction over the non-resident spouse pursuant to TFC §6.305, which states:

> "(a) If the petitioner in a suit for dissolution of a marriage is a resident or a domiciliary of this state at the time the suit for dissolution is filed, the court may exercise personal jurisdiction over the respondent or over the respondent's personal representative although the respondent is not a resident of this state if:
>
> (1) this state is the last marital residence of the petitioner and the respondent, and the suit is filed before the second anniversary of the date on which marital residence ended; or
> (2) there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.
>
> (b) A court acquiring jurisdiction under this section also acquires jurisdiction over the respondent in a suit affecting the parent-child relationship."

With regard to personal jurisdiction, as stated above, a court may exercise personal jurisdiction over a party if one of the following criteria are met:

> (a) the individual is personally served in the state;
> (b) the individual submits to the jurisdiction of the state by consent, general appearance, or by filing a responsive pleading that has the effect of waiving any contest to personal jurisdiction (i.e. special appearance, plea to the jurisdiction, etc);
> (c) the individual resided in the state with the child the subject of the suit;
> (d) the individual resided in the state and provided prenatal expenses or support for the child;
> (e) the individual engaged in sexual intercourse in this state and the child may have been the result of that intercourse;
> (f) the individual executed the equivalent of an acknowledgment of paternity or registered with the paternity registry; or
> (g) any other basis consistent with the Constitutions of the United States or the state seeking to exercise the jurisdiction. [See TFC §159.201].

However, it is important to remember that the court does not necessarily need personal jurisdiction over a party to grant a divorce or divide the marital estate. Personal jurisdiction over a party is only needed if the court is going to impose an affirmative obligation upon the non-resident. The court must, however, have personal jurisdiction over one of the parties through one of the criteria listed above. Generally speaking, if a party files a lawsuit in a Texas court seeking affirmative relief, they have consented to the jurisdiction of the court by so doing.

Furthermore, both case law and the Family Code acknowledge that a divorce court can exercise partial jurisdiction in a case regarding matters over which it has authority, but then may transfer the remaining issues over which it does not have authority to a court of proper jurisdiction. (*See* TFC §6.308; *see also* Dawson-Austin v. Austin, 968 S.W.2d 319, 324 (Tex. 1998). For example, a court may have authority to grant a divorce (i.e. subject matter and in rem jurisdiction to affect the status of the parties as

married), but not have authority to divide assets or impose an affirmative obligation upon a party and thus transfer that part of the case to a court with proper jurisdiction to rule on those matters. This can often occur in SAPCR cases where a court may have authority under the UCCJEA to render an order for conservatorship and visitation, but does not have personal jurisdiction over the respondent and therefore must transfer the child support issues to a court that may exercise personal jurisdiction over the potential obligor.

2. SAPCR

The provisions for a court to exercise original jurisdiction over a SAPCR are found in Chapter 103 of the Texas Family Code. Specifically, TFC § 103.001 provides:

> (a) Except as otherwise provided by this title, an original suit shall be filed in the county where the child resides, unless:
>
> (1) another court has continuing exclusive jurisdiction under Chapter 155; or
> (2) venue is fixed in a suit for dissolution of a marriage under Subchapter D, Chapter 6.
>
> (b) A suit in which adoption is requested may be filed in the county where the child resides or in the county where the petitioners reside.
> (c) A child resides in the county where the child's parents reside or the child's parent resides, if only one parent is living, except that:
>
> (1) if a guardian of the person has been appointed by order of a county or probate court and a managing conservator has not been appointed, the child resides in the county where the guardian of the person resides;
> (2) if the parents of the child do not reside in the same county and if a managing conservator, custodian, or guardian of the person has not been appointed, the child resides in the county where the parent having actual care, control, and possession of the child resides;
> (3) if the child is in the care and control of an adult other than a parent and a managing conservator, custodian, or guardian of the person has not been appointed, the child resides where the adult having actual care, control, and possession of the child resides;
> (4) if the child is in the actual care, control, and possession of an adult other than a parent and the whereabouts of the parent and the guardian of the person is unknown, the child resides where the adult having actual possession, care, and control of the child resides;
> (5) if the person whose residence would otherwise determine venue has left the child in the care and control of the adult, the child resides where that adult resides;
> (6) if a guardian or custodian of the child has been appointed by order of a court of another state or country, the child resides in the county where the guardian or custodian resides if that person resides in this state; or
> (7) if it appears that the child is not under the actual care, control, and possession of an adult, the child resides where the child is found."

Please do not confuse the criteria for conferring original jurisdiction over a SAPCR with the requirements for a party to have standing to file the suit. These are apples and oranges. For example, even though TFC §103.001 allows a non-parent to file an original suit in a particular county, the statute does not confer standing on that individual to file the suit. The party filing the suit must also have standing to do so under Chapter 102 and other relevant provisions of the Family Code and other Texas statutes.

3. Divorce With SAPCR

The Texas Family Code requires the mandatory joinder of a SAPCR with a divorce proceeding it involves the same parties and children. While a SAPCR involving children of parents who are married to each other can be filed without requiring a divorce action (e.g. parties separated, have not made a final decision regarding divorce, but need orders for child support or visitation), the reverse is not true. If the parties filing for divorce have children, the SAPCR must be included in the divorce.

Likewise, if a SAPCR without a divorce is filed in one county that has jurisdiction over the petitioner and the children, but a divorce involving the same parties is filed in another county that has jurisdiction to hear the divorce, TFC 103.002(b) requires mandatory transfer of the SAPCR to the court presiding over the divorce action.

Furthermore, if a SAPCR is filed in a county of improper venue, and provided there is no other court of continuing, exclusive jurisdiction, upon proper motion of a party, the court must transfer the SAPCR to the county where venue is proper, or dismiss the pending

suit and order it be refiled in the county and court with proper venue.

4. Dominant Jurisdiction

It is possible in some cases for two courts to have proper venue and jurisdiction. For example, a married couple could separate with one of the spouses moving to another county in Texas for over 90 days. Subsequently, both file for divorce in their respective counties? Or, irrespective of the residency requirements, each party files an original suit in the county in which they live. What happens then? Obviously we cannot have two courts entering final orders that involve the same parties and subject matter. In those situations, it must be determined which court has dominant jurisdiction to decide the case.

We start with the general common law rule in Texas that the trial court in which a suit for divorce is first filed acquires dominant jurisdiction to the exclusion of the coordinate courts. [*See* Cleveland vs. Ward, 285 S.W. 1063 (Tex.1926)]. If both courts could have exercised jurisdiction, the subsequent suit filed in another court involving the same parties and controversy must be dismissed. [*See* Brown vs. Brown, 566 S.W.2d 378, 380 (Tex.Civ.App.–Corpus Christi 1978, no writ)].

Superimposed on these common law rules are the various substantive and procedural requirements of the Texas Constitution and the Texas Family Code, discussed above. Thus, determining which court has dominant jurisdiction must be viewed in light of not only the common law rules, but also in conjunction with the venue and jurisdictional requirements of the statutes.

As stated previously, if both courts are essentially equal in their authority to exercise jurisdiction over a case, then the tie goes to the court in which the action was first filed, presuming the cases are identical, both as to the parties and the matter in controversy. However, there are some situations where you have to look beyond which party filed first, even if both courts could exercise jurisdiction over the suits filed in each.

A good example is the Allen case out of the Amarillo Court of Appeals. (*See* Allen v. Allen, 593 S.W.3d 133, (Tex.Civ.App.– Amarillo 1979). In *Allen*, husband and wife separated in December 1978, with wife moving with the children to Lubbock County, and husband staying behind in Floyd County. The parties had lived in Floyd County for many years. In January 1979, wife filed a SAPCR without a divorce, seeking temporary orders, some of which did involve use of property, but she did not seek a divorce, division of property or permanent conservatorship.

Four days after being served with the Lubbock County SAPCR, husband files for divorce in Floyd County, which suit includes a SAPCR regarding the children. He also filed a Motion to Transfer in the Lubbock County case pursuant to what today is TFC §103.002. The Lubbock court denied the transfer. The Floyd County court eventually entered a final decree of divorce disposing of all issues, from which the wife appealed. The court of appeals held that the Lubbock County court's denial of transfer was improper, as Floyd County had dominant jurisdiction, not only because wife did not meet the residency requirements of the Family Code at the time she filed her suit, but also since she failed to seek a divorce in the Lubbock County court, the Floyd County court where a divorce and SAPCR were properly filed became the dominant court of proper jurisdiction and venue pursuant to [now] 103.002. [*It should be noted that the outcome would have been the same even if wife had resided in Lubbock County for over 90 days because she did not seek a divorce–the subsequent Floyd County filing for divorce trumps a previously properly filed SAPCR involving the same parties and subject matter, presuming the divorce was filed in the proper court.]

Thus, in determining which court has dominant jurisdiction when there are concurrently pending cases, be sure not to just automatically rely upon the "first-filed" rule.

5. Transfer of Venue

As stated above, if a case has been filed in a court without proper venue, it must be transferred to the court that has proper venue and jurisdiction. Likewise as discussed above, the proper method for challenging venue is a Motion for Transfer of Venue, if you are seeking to transfer within the state of Texas.

Where you file the Motion for Transfer depends largely on the type of case you are seeking to transfer (i.e. an original suit or a modification). Each of the scenarios will be addressed below.

a. Original Suits

Where to file a Motion for Transfer of an original suit from an improper court to the proper court depends upon whether there is a concurrently pending case in another court. If no other case involving the parties and subject matter is pending, then the Respondent should file the motion to transfer in the improper court in which the original petition was filed. This can also be in conjunction with a Motion to Dismiss and/or a request to order the Petitioner to non-suit and re-file in the appropriate court.

If, however, there are concurrent cases pending (i.e. each spouse filed in a different county), the motion to transfer should be filed in the court ***from which*** the transfer is sought. In such a situation, it is conceivable that not only could you have competing original suits, but also competing motions to transfer in each respective court. In those situations, the preferred practice would be to have an evidentiary hearing to determine the court with dominant jurisdiction.

b. Modifications

If the suit for which a transfer is sought is a modification of a SAPCR order, then a court of continuing, exclusive jurisdiction has already been established. Thus, the Motion to Transfer must be filed in that court, even if it is clear that the transfer is mandatory.

c. Mandatory vs. Discretionary

Transfer of Venue can be either mandatory or discretionary with the court, depending upon the circumstances. The rules differentiating between the two are fairly well known and easy to follow, so they will be addressed only briefly.

If the suit is an original divorce and the petitioner has not met the residency requirement of TFC §6.301, the case must be transferred to a court with proper venue and jurisdiction, if there is one. If concurrent cases have been filed and one of the parties does not meet the requirements of §6.301, the case must be transferred to the other court that has proper jurisdiction and venue, even if it was filed prior to the proceeding in the correct court. Furthermore, in cases where there are concurrently pending cases in separate courts, each of which have proper venue and jurisdiction, upon proper motion, the case must be transferred to the court where the case was first filed.

In modifications and/or enforcements of SAPCRS in Texas cases, a transfer from the court of continuing jurisdiction is required if the child has lived in another county for six months or longer. [See TFC §155.201]. However, in the case of competing motions to modify or enforce, the court is only required to transfer if the court could have transferred the proceeding at the time the first motion or suit was filed. In other words, if a party files a motion to modify/enforce in the court of continuing jurisdiction, and the other party subsequently files a counter-motion to modify/enforce, mandatory transfer is determined by the facts in existence at the time the first motion was filed.

With respect to modifications, the court has the discretion to transfer if the child the subject of the suit lives in another county for less than six months, but transfer is appropriate due to the convenience of the parties, witnesses and in the interest of justice. [See TFC §155.202].

A response to a motion to transfer is not required. However, if a controverting affidavit challenging the basis for the transfer is not filed within the time period for filing same, the court ***shall*** transfer the case without hearing. [See TFC §155.204(c).] Even in clear cut cases, the case cannot be transferred prior to the time afforded to file a controverting affidavit unless the parties agree. The time period for filing a controverting affidavit is the same as the answer date to a petition, i.e. the first Monday after the expiration of 20 days from the time the motion to transfer was served or notice was given.

A motion to transfer under Chapter 155 must be filed within the time period to answer the suit [TFC §155.204(a)], and must be filed at the time the initial pleadings (answer/counterpetition) are filed. The motion to transfer is presumed timely if made within the answer period and/or with the initial pleadings of the Respondent.

If a timely controverting affidavit is filed in response to a timely filed Motion to Transfer, each party is entitled to at least 10 days notice of the hearing on the motion to transfer, which is the only issue allowed to be determined at the hearing. If, after conducting a hearing, the court determines that transfer is proper, the case must be transferred no later than the 21st day after the conclusion of the hearing. [TFC §155.204 (g)].

E. Procedural Challenges to Jurisdiction

While a motion to transfer is the proper way to challenge venue, there are other procedural forms by which to challenge the court's jurisdiction to hear a case. Previously in this article we discussed the established rules under which a court may or may not exercise personal, subject matter and *in rem* jurisdiction. Now we address how to procedurally challenge a court's jurisdiction if we object to same, or if the facts do not support the exercise of jurisdiction. It is crucial to remember that since these procedural challenges to jurisdiction are in the form of "pleas in avoidance," they MUST be filed ***prior to*** any other responsive pleadings in the case, and any subsequent pleadings must be filed *subject to* the challenges to the court's jurisdiction or they may be waived. (*See* Texas Rules of Civil Procedure 120a). Additionally, it may be prudent to include all possible jurisdictional challenges in one pleading and make each alternative pleading subject to the one before it.

The type of jurisdiction you are challenging determines the procedural vehicle you file to make the challenge. Each type of procedural challenge and how and when it is proper to use that procedural challenge is addressed below.

1. Special Appearance

When challenging the court's exercise of personal jurisdiction over a party, the proper procedural challenge is to file a Special Appearance. In family law cases, this will most likely be in the form of a child support or paternity-related matter. A Special Appearance specifically challenges the court's authority to exercise personal jurisdiction over the Respondent to the suit, and alleges that the court does not have personal jurisdiction over the party. This is important, because without personal jurisdiction, the court cannot impose an order to pay support or

establish parentage that would impose certain duties upon an individual. The Special Appearance must be filed within the time period for filing an answer or other responsive pleadings, and must be filed prior to any other responsive pleadings or it may otherwise be considered a general appearance which waives any objections to the court's jurisdiction. Special appearances, as well as the other jurisdictional challenges, must be verified, and it is generally a good idea to attach an affidavit reciting the facts relied upon to support the challenge. This is particularly true because the court is not necessarily required to conduct an evidentiary hearing on the matter.

Additionally, the rules regarding Special Appearance must be strictly complied with, which requires the motion to be verified. This is different than merely attaching a factual affidavit. The pleading itself must allege specific facts, which if taken as true, sufficiently challenge the court's jurisdiction, and the pleading itself must be sworn to. A supporting affidavit is not sufficient to verify the pleading and comply with TRAP 120a. (*See* Casino Magic Corp. V King, 43 S.W.3d, 14, 18 (Tex.App.–Dallas 2001, pet. denied).

An issue that is often overlooked in Special Appearance litigation is the fact that there is nothing that prohibits the parties conducting discovery to obtain evidence to support their positions. While we all remember our law professors' dire warnings of filing subsequent pleadings or engaging in actions that may waive a special appearance, this does not apply to conducting discovery, so long as the same precautionary steps to protect against waiver are taken. Texas Rule of Civil Procedure 120a specifically allows a party urging a special appearance to conduct discovery without prejudice to the right to prosecute the special appearance. Furthermore, TRCP 120a specifically contemplates ongoing discovery by both the party challenging jurisdiction and the party invoking it, and nothing in the rule limits discovery to matters relating to the special appearance. [*See* *Case v. Grammar*, 31 S.W.3d 304, 311 (Tex.App.–San Antonio 2000, no pet.)]. Thus, in crucial, hotly contested special appearance cases, it may be a good idea to pursue discovery, although the better practice would be to continue to use the "subject to" cautionary language to protect against waiver. Likewise, it may be good practice to cite to Rule 120a in propounding the discovery so as to point out to the court that the rule allows discovery without waiving the special appearance.

2. Plea to the Jurisdiction

When challenging subject matter or in rem jurisdiction, the proper procedure is to file a Plea to the Jurisdiction. Examples of when to file a plea to the jurisdiction include challenging a filing in an improper court in Texas (e.g., filed in a criminal district court instead of family or general jurisdiction court), and/or challenging court's authority to divide property or affect the status of the parties.

In custody related matters, such as one filed in compliance with the UCCJEA, a Plea to the Jurisdiction should be filed which, alleges that the court does not meet the criteria set forth in the UCCJEA to exercise jurisdiction (i.e. not the home state of the child, does not have significant connections sufficient to exercise jurisdiction, etc). The reason a Plea to the Jurisdiction is filed (as opposed to a Special Appearance) is because the court does not need personal jurisdiction over a Respondent to make custody determinations. Since Special Appearances are used only to challenge personal jurisdiction over a party, and since personal jurisdiction over a party is not required in custody related matters, a Special Appearance would not be appropriate. A plea to the jurisdiction is also appropriate in challenging subject matter and *in rem* jurisdiction. Pleas in abatement will most often be used to allege that a court does not have jurisdiction to hear a family law case, does not have *in rem* jurisdiction over a custody related matter, or that there is another court of continuing jurisdiction.

Editor's Note– As a practical tip for UCCJEA and UIFSA cases when a modification or enforcement action has been filed, make sure to determine whether the other party has followed the correct protocol under the UCCJEA and UIFSA, either in registering the prior order in the court from which the Petitioner seeks relief, or in requesting the prior court of continuing, exclusive jurisdiction to decline jurisdiction in favor of the new forum. If they have not done so properly, then a Plea to the Jurisdiction is proper, even if there was a prior order entered by the new court, and even if those prior modified orders were agreed to by the parties. [*See* Moore v. Moore, 2001 WL 1390921, Tex.App.–Dallas 2001– mother did not properly register the Florida order and thus the trial court lacked subject matter jurisdiction to modify or enforce the prior order, even though parties had entered into a prior agreed modified support order in the Texas court which purportedly modified the Florida order. All modifications and prior orders entered by the Texas court were void].

3. Plea in Abatement

A plea in abatement is appropriate to point out to a court that it is unnecessary for the court to hear all the facts and arguments in the case because, no matter what those facts may show, the court cannot grant relief for the reasons set forth in the motion. This is most commonly used when there are simultaneous proceedings filed in different courts and the Respondent alleges that the other court has dominant jurisdiction under one of the provisions of the

UCCJEA or UIFSA, or their are concurrent pleadings pending in two different courts regarding the same parties and subject matter. It is likewise the proper plea to file when there are two cases pending in two Texas courts and the party asserting the plea in abatement wishes the case to be transferred to another court. A plea in abatement must be verified.

4. Request to Decline Jurisdiction under the UCCJEA

Finally, in addition to the above listed challenges, or if a special appearance, plea to the jurisdiction or plea in abatement is not appropriate under the facts of a particular case, a party may still request the court to decline to exercise jurisdiction in UCCJEA cases because another state has home state jurisdiction or significant contacts under UCCJEA, or because the other state may be a more appropriate or convenient forum. This may also be filed as an original pleading with a court of continuing jurisdiction when a party seeks to modify or enforce the issuing court's prior order but wants another state to assume jurisdiction. If a court of continuing jurisdiction exists and the party wants the case heard in another state's court for purposes of modifying or enforcing the prior order, there must be a determination by the issuing court that it either (1) no longer has jurisdiction; or (2) declines to exercise jurisdiction in favor of a more appropriate forum.

III. SPECIFIC DRAFTING PITFALLS

The most common drafting mistakes relate either to confusion over *what* to file, *when* to file it, and *how* to draft it once you have figured the other two out; or just plain sloppiness in drafting the actual pleadings and supporting affidavits. These will be discussed below.

A. What, When, and How to File Jurisdictional/Venue Challenges

We have already discussed above how to determine *what* to file, so we will now address when and how to file the jurisdictional and venue challenges.

B. Due Order of Pleadings

In both general civil and family law cases, the party seeking to challenge jurisdiction must follow a "due order of pleading," that is, a special appearance just be filed before any other pleadings, including an answer or counterpetition. Failure to do so results in the party completely waiving their right to challenge personal jurisdiction. As long as the special appearance is filed first and timely, every other pleading or motion is presumed to be subject to the court's ruling on the special appearance. *(See* Dawson-Austin v. Austin, 968 S.W.2d 319 (Tex.1998).

However, there are a few caveats of which to be aware. Although the "due order of pleadings" rule does not specifically state that other dilatory pleas (e.g. Plea to the Jurisdiction, Motion to Decline Jurisdiction, Plea in Abatement, etc.) must be filed prior to other pleadings, the better practice is to do so. This is especially true if a party cannot really challenge personal jurisdiction through a special appearance, but might otherwise have other jurisdictional challenges against subject matter, *in rem* or UCCJEA jurisdiction. Sometimes courts get confused and equate these other jurisdictional challenges to a special appearance, and may rule that failure to file a Plea to the Jurisdiction/Plea in Abatement prior to another general pleading constitutes a general appearance. If a court so ruled, they would be incorrect, but the party would then have to go to the expense and trouble of an appeal or mandamus to obtain relief. This is likely not a good chance to take.

Thus, the Special Appearance or other dilatory plea should be filed before any other pleading, and each subsequent jurisdictional challenge filed and/or included in the Special Appearance motion should specifically state that it is being filed "*subject to*" the special appearance and other prior pleadings. Although it may be a bit of overkill, the safest practice is to include all the dilatory pleas in the same document, starting with the Special Appearance, and in both title and content state that all of the subsequent pleadings are filed subject to the special appearance. (See attached appendices for specific examples). Additionally, any pleadings filed separately from the special appearance should likewise specifically state that they are being filed subject to and without waiving the special appearance and subject to any other dilatory pleas that were included in the challenge. This would include making sure the clerk's file stamp on the special appearance clearly shows that it was filed prior to subsequent pleadings. This is one are of procedural drafting and practice that one cannot be too careful.

However, the "due order of pleadings" rule does NOT apply to motions to transfer or challenge venue. As such, a party (usually the Respondent) can file his answer or counter-petition prior to filing the Motion to Transfer without waiving the ability to challenge venue at a later time.

A party cannot wait too long, however, because the time limit for filing both dilatory pleas and a special appearance is the date the party's answer is due. So make sure to file before the answer deadline, or else a default judgment could be taken. If that happens, it will almost certainly result in a general appearance if and when a Motion for New Trial is filed to set aside the default judgment. This is because a Special Appearance is a dilatory plea in the form of a *response* to a pending action. A Motion for New Trial is a new pleading seeking affirmative action seeking to

re-open a case that has been concluded. It would not make sense procedurally to file a responsive pleading like a special appearance before filing the request for affirmative relief to re-open the case. Thus it would be impossible not to make a general appearance in the filing of the Motion for New Trial, thus waiving the party's right to file the special appearance.

C. Contents of Pleadings

The contents of the pleadings themselves should set forth the specific jurisdictional challenges being made, and a general statement of the facts that support the challenge (i.e. Respondent is a resident of the state of Utah, has no minimum contacts with Texas, has never resided in Texas, and has not availed himself of this forum, etc.). Each challenge following the special appearance, whether contained in the same document or filed separately, should clearly state that it is being filed *subject to* the special appearance and/or the immediately preceding pleading. It is for this reason that I believe the best practice is to include all dilatory pleas in the same document, starting with the special appearance, so that there is absolutely no question that the special appearance was filed first. The proper order is as follows: Special Appearance, Motion to Dismiss, Plea to the Jurisdiction, Motion to Decline Jurisdiction, and Plea in Abatement.

Extreme care must also be taken in the drafting of other documents that could impact a party's ability to challenge jurisdiction or a court's ability to exercise jurisdiction. In the recent case of In the Interest of K.M.P., 2010 Tex.App. LEXIS 7236 (Tex.App.–Austin, August 31,2010)(Cause No. 03-10-0006), the Austin Court of Appeals held that a 2004 divorce decree that recited that the child's home state was Georgia established that the Texas trial court had no subject matter jurisdiction over the custody and possession orders that Father was attempting to have enforced, and therefore the ***orders were void*** as was the subsequent order modifying access and possession. Apparently the original decree did not specify that Georgia was the "new" home state and/or that Texas was the child's home state for the six months immediately preceding the filing of the petition. The order simply noted that at the time of the divorce Georgia was the child's home state. This allowed the court of appeals to determine that both the original decree and the subsequent modifications were void.

This is not to say that an order cannot be drafted that reflects a new home state for a child for purposes of clarifying where future modifications/enforcements should be filed. There may be good reasons for doing so, namely establishing one of the elements for a subsequent transfer under the UCCJEA. However, the K.M.P. case clearly stands for the idea that if it is the intent of the court or the parties to designate a new home state for a child for subsequent proceedings, the order needs to precisely state that the Texas court had UCCJEA jurisdiction at the time of the rendition of the order, and how it had that jurisdiction (i.e. "The court finds that the child the subject of this suit resided in Texas for at least six months prior to the filing of the Original Petition for Divorce). The order in the K.M.P. case only included the general boilerplate jurisdictional language, which the appellate court apparently found was insufficient.

D. Affidavits

Special appearances must be sworn and have a supporting affidavit setting forth facts which form the basis upon which the challenge is based. The most persuasive affidavits are a combination of chronological data and evidentiary facts that show the affiant's lack of connections with the pending state and the strong connections to the state/forum in which the proceeding should allegedly take place.

E. Briefs

While a brief in support of the special appearance and/or other jurisdictional challenges is not necessary, my experience is that courts find them extremely helpful, as they generally incorporate not only the statutes and case law upon which the party relies, but also the legal arguments and facts upon which the challenge is based. Generally speaking, the special appearance should be a fairly simple procedural pleading setting forth the specific jurisdictional challenge sought, a few supporting facts and the supporting affidavit. The brief is a better forum to set forth the legal theories and arguments in support of the motions

Be mindful, however, if you do prepare a supporting brief, make sure to file it a few minutes (or days!) later than the special appearance, to avoid the argument that filing the brief prior to the special appearance may constitute a general appearance which waives the challenge.

IV. THIRD PARTY STANDING AND BURDENS

Only a brief mention of third party standing and burdens of proof will be addressed because there are many other fine articles and presentations on those issues. It is mentioned here primarily because standing is a jurisdictional issue, and more and more child related cases involve third parties seeking some sort of conservatorship or access.

1. Original Suits for Conservatorship

The general standing statute is TFC §102.003 and sets forth who may file a suit affecting the parent-child relationship. Additionally, in cases of a prospective adoption, a parent or pregnant woman may execute a statement to confer standing upon a prospective adoptive parent. (TFC §102.0035). Furthermore, TFC

§102.004 sets forth additional factors that may confer standing upon a grandparent or relative of the child within the third degree of consanguinity to file an *original* suit if the child's current environment significantly impairs the child's physical health or emotional development, or both parents, the surviving parent or managing conservator consents to the suit. TFC §102.004 also provides that a grandparent or other person deemed to have had substantial past contact with the child may obtain leave to intervene in an existing suit if there is proof that the appointment of a parent as SMC or both parents as JMC's would significantly impair the child's physical health or emotional development.

2. Modifications

A suit to modify a prior order regarding a child may be filed by any party affected by the prior order, or a person or entity, who, at the time of filing, has standing to sue under Chapter 102 (general standing statute). The modification initially must be filed in the court of continuing jurisdiction, even if a mandatory transfer is appropriate.

3. Appeals

Only parties to a ***final*** SAPCR may appeal a final order of the court. This is true even if the party attempting to appeal was previously a party/conservator in temporary orders, but later was not awarded any rights and duties. [*See* In the Interest of M.J.G. and J.M.J.G., Minor Children, 2008 Lexis 971 (Tex.App.–Ft.Worth 2008)-- appellant cannot complain of a judgment on appeal to which he was not a party; *see also* ITIO L.N.E., L.M.E., and L.M.E.,2009 Tex.App. LEXIS 844 (Tex.App.–Dallas, Feb. 6, 2009)–only parties to the prior order may seek appeal or clarification of the order.]

4. 2009 Legislative Changes to Grandparent Access

Also of note are the legislative revisions to the Grandparent Access statutes found at TFC §§153.432–434. **And it appears more are on the way in the 2011 Legislature!!!!** While the standing provisions and burden of proof remain substantially the same, effective September 1, 2009, the grandparent seeking access must include in their original petition/pleading an affidavit that alleges facts, which if taken as true, support a finding that overcomes the presumption that a fit parent acts in the best interest of his/her child, and that denial of possession or access would significantly impair the child's physical welfare or emotional development. The grandparent seeking access must also show that he or she has standing to seek access under the limited situations contemplated by TFC §153.433 (3) (i.e. grandparent is the parent of a parent of the child who is incarcerated, is dead, incompetent or does not otherwise have court-ordered access). The 2009 legislative change further requires the court's order to include findings of fact and conclusions of law consistent with the requirements outlined in TFC §153.433 if access or possession is granted over the objection of the parent or parents. It is important to note that an award of "access" does not necessarily mean "possession." [*See* Spencer v. Vaughn, 2008 Westlaw 615443, (Tex.App.–Austin, March 6, 2008); E.C. v. Graydon, 28 S.W.3d 825, 831 (Tex.App.–Corpus Christi 2000, no pet.); In re Walters, 39 S.W.3d 280, 286 (Tex.App.–Texarkana 2001, no pet.)]

CONCLUSION

Keeping up with the changes in the Texas Family Code and the twists and turns in what we have thought was the law, until the most recent Court of Appeals opinion hits the presses is a chore in and of itself. So, why in the world would you want to clutter your desk, much less your mind with sister jurisdictions rules?

You never know what cards you will be dealt in the way of facts in a case. Sometimes they are not evident until it is time to deal the next round. Good poker players should always stay focused on all of the cards on the table, even those that have not yet been turned. You could be faced with a jurisdictional decision tomorrow morning. Think beyond answer, counter-petition, special appearance or decline representation.

Do your best to determine what options may be available to your potential client. If you are unsure, do not hesitate to pick up the phone and bounce the facts off of a fellow practitioner. Do not hold back a suggestion of pursuit for a relief in an alternate jurisdiction, even if it means you do not get the fee, but do get paid for your time and resources.

Taking the time to see what other jurisdictions are doing with certain issues in contrast to what Texas has or has not done is always insightful. The Supreme Court of the Unites States often looks to the laws of other nations and how their high courts have dealt with an issue at hand.