

SOME PROBLEMS WITH RULE 120a

by

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Rule 120a of the Texas Rules of Civil Procedure explains the procedure a party must follow to make a special appearance. The rule states that if a court sustains a special appearance, the court should enter an "appropriate order."² Presumably, this phrase means that the case should be dismissed for want of jurisdiction. If the court overrules a special appearance, the objecting party may then appear generally without waiving that party's right to complain on appeal that the special appearance should have been granted.³

Other than stating that a special appearance may be made to any severable claim in a lawsuit,⁴ Rule 120a does not say what the court should do or what the parties' rights are when the court sustains a special appearance in part but also overrules it in part. These issues are important to the family law practitioner when a court has status jurisdiction over the petitioner but lacks in personam jurisdiction over the respondent.

Jurisdiction to Adjudicate Status

The jurisdiction of a court to determine a person's marital status rests upon the doctrine of "divisible divorce." A "divisible divorce" takes place when a state exercises its jurisdiction over a resident's status to divorce that person from his nonresident spouse. The divorce decree will be valid even though the divorce court had no personal jurisdiction over the nonresident spouse.⁵

A court's status jurisdiction extends to questions of conservatorship and visitation. A court may rule on these questions without possessing in personam jurisdiction over a nonresident respondent so long as there is a significant connection between the forum and the child.⁶ In contrast, a court must have personal jurisdiction over a nonresident respondent to order the payment of child support⁷ or to divide out-of-state property.⁸ Historically, a court could divide the property located within the forum state by exercising the court's in rem jurisdiction.⁹

Texas courts have applied the doctrine of "divisible divorce" to divorce Texas residents from their nonresident spouses. For example, in *Dosamantes v. Dosamantes*,¹⁰ the Texarkana Court of Appeals affirmed the petitioner's divorce from a Mexican national because the Texas court had jurisdiction to adjudicate the marital status of Texas citizens. But Texas courts have been careful to divide only the parties' property which was located within Texas. For example, in *Fox v. Fox*,¹¹ the Austin Court of Appeals affirmed the petitioner's divorce from an out-of-state spouse but reversed the trial court's attempt to divide the parties' out-of-state property. The trial court had no jurisdiction to divide out-of-state property because the court had no personal jurisdiction over the nonresident respondent. The trial court's power to divide the parties' in-state property was based upon the court's in rem jurisdiction.

These cases antedated *Shaffer v. Heitner*.¹² *Shaffer* effectively abolished in rem jurisdiction. In *Shaffer*, the United States Supreme Court held that due process requires an exercise of jurisdiction in rem to meet the "minimum contacts" test previously required only for in personam jurisdiction. But *Shaffer* did acknowledge that adjudications of status nevertheless may be made by a state without personal jurisdiction over all the parties.¹³

The Texas Supreme Court recently has expanded upon *Shaffer*. In *In re S.A.V.*,¹⁴ the court stated:

Unlike adjudications of child support and visitation expense, custody determinations are status adjudications not dependent upon personal jurisdiction over the parents.¹⁵

Thus, *Shaffer* had no effect on the adjudication of conservatorship and visitation issues because these issues had not previously required in personam jurisdiction. But the court reiterated that a court must have in personam jurisdiction over a party to impose a personal obligation on him.¹⁶

Shaffer's effect on property issues has been subtle and not widely recognized. In the pre-*Shaffer* case *Fox v. Fox*,¹⁷ the Austin Court of Appeals correctly stated that in rem jurisdiction permitted a Texas Court to divide even personal property so long as it was located within the State of Texas.¹⁸ After all, in rem jurisdiction is premised upon the power of the state over property located within the state *because* it is located within the state.¹⁹ But by subjecting the exercise of in rem jurisdiction to the "minimum contacts" test, *Shaffer* implicitly overruled the proposition that a state may adjudicate the rights of persons to property located within that state despite lacking personal jurisdiction over all the parties. Nevertheless, even post-*Shaffer* Texas cases have mechanically cited *Fox* for the proposition that a Texas court can divide community property in a divorce case merely because the property is located within Texas.²⁰ In only one recent case has it been acknowledged that a Texas court might not have jurisdiction to divide community property located within Texas absent personal jurisdiction over the respondent.²¹

According to *Shaffer*, in rem jurisdiction in its classic formulation no longer exists. Thus, as a practical matter, a Texas court must have personal jurisdiction over a nonresident to divide property located within *and* outside the State of Texas and to impose personal obligations, such as

child support, on a nonresident respondent.²² In personam jurisdiction is not necessary, however, to divorce a Texas resident from a nonresident or to rule on issues such as conservatorship and visitation.

What's Wrong with Rule 120a?

Granted the above, what is wrong with Rule 120a? Rule 120a permits a party to make a special appearance when a court has no jurisdiction over his person. If he succeeds, the case should be dismissed; otherwise, the party may appear generally without waiving his right to complain of the jurisdictional ruling on appeal.

But these rules were designed for civil lawsuits, not family law disputes. Rule 120a does not address how a respondent should proceed when the court has granted his special appearance yet unquestionably has jurisdiction to grant a divorce and to decide conservatorship and visitation issues. If a specially appearing respondent appears in a trial limited to these issues, has the respondent waived his special appearance?

The answer to this question is unclear. Presumably, due process of law would permit a party to testify, to introduce documentary evidence, to cross-examine, and to argue to the court. A respondent should be able to take these actions without waiving his special appearance. Otherwise, a party vitally interested in conservatorship and visitation yet not subject to a Texas court's in personam jurisdiction would be forced to choose between his right not to be haled into court in a foreign jurisdiction and his right to participate in a conservatorship and visitation trial. In this situation, a parties' right not to be sued in a foreign jurisdiction would be vitiated.

The Dallas Court of Appeals has most clearly stated the rights such a party *should* have, but its statement of rights falls short of these due process considerations. In *Perry v. Ponder*,²³ the court

held that a non-resident parent must have "notice and opportunity to be heard."²⁴ Yet in the same opinion, the court seems to restrict these rights to submitting a plea to the court's jurisdiction over the case or, alternatively, to arguing forum non conveniens. *Perry* suggests that any other participation by the nonresident in the trial would result in a general appearance.²⁵

To complicate the matter even further - and to cause the family law practitioner even more alarm - Texas jurisprudence is replete with cases stating, for example, that Rule 120a "mandates strict compliance with procedure."²⁶ Moreover, even if a special appearance has been filed, it can be waived by taking actions inconsistent with it.²⁷ Therefore, if the family law practitioner says or does the wrong thing in a case in which the court is exercising only status jurisdiction, the attorney may inadvertently subject his client's person to the jurisdiction of the court. Rule 120a simply does not take this situation into account.

Let's Amend Rule 120a

To avoid this potential jurisdictional trap, Rule 120a should state clearly that a court may exercise jurisdiction over divorce, conservatorship and visitation issues while not taking jurisdiction over the parties' property or other personal obligations such as support. In this situation the nonresident should be permitted to testify, to introduce documentary evidence, to cross-examine and to argue before the court without fear of subjecting himself to the general jurisdiction of the court by exercising his constitutional rights.

An amendment might be added to Rule 120a(4), as follows:

4. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. ***If the court sustains an objection to jurisdiction over the person of a party but retains jurisdiction to adjudicate issues of status, the objecting party may thereafter appear at any trial or***

hearing to contest issues of status without waiving the objection to jurisdiction over the person of that party. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

Rule 120a(1) also states that a special appearance "may be made as to an entire proceeding or as to any severable claim involved therein." Although the tenor of this statement comports with the concept of a "divisible divorce" - that a court may have jurisdiction over some parts of the case but not over other parts of the same case - the language used is confusing. Texas law restricts severing out bits and pieces of divorce cases.²⁸ The word "severable" adds nothing to Rule 120a(1) and serves only to confuse the reader. Therefore, it should be deleted.

Conclusion

To grant a divorcing party complete relief, a court must have jurisdiction over the person of a nonresident spouse. If a court cannot acquire that jurisdiction, the court is restricted to adjudicating issues of status. Status jurisdiction permits the court to divorce the parties and to rule on questions of conservatorship and visitation but not to divide the parties' property or to impose personal obligations upon the nonresident spouse. These issues require personal jurisdiction over the spouse.

A nonresident party who is haled into a court that has no jurisdiction over his person is entitled to due process of law with respect to the issues the court will decide. The nonresident party should be able to testify, to introduce documentary evidence, to cross-examine and to argue to the court on issues of divorce, conservatorship and visitation. Due process requires that such a party be permitted to participate in any hearing or trial restricted to these issues without submitting himself to the general jurisdiction of the court.

Rule 120a is unclear on what rights such a nonresident spouse has. Rule 120a should be amended to provide expressly that a party may exercise his constitutional rights to notice and an opportunity to be heard without waiving his constitutional right not to be subjected to the jurisdiction of a foreign state absent jurisdiction over his person.

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2. Tex. R. Civ. P. 120a(4).
3. *Id.*
4. Tex. R. Civ. P. 120a(1).
5. *Williams v. North Carolina*, 317 U.S. 287 (1942), *appeal after retrial*, 325 U.S. 226 (1945) (full faith and credit clause requires recognition of another state's divorce decree even when other state lacked in personam jurisdiction over respondent).
6. *In re S.A.V.*, 35 Tex. S. Ct. J. 1028, 1030 (July 1, 1992). *See* Tex. Fam. Code Ann. § 11.51 *et seq.* (Vernon Supp. 1992) (UCCJA).
7. 35 Tex. S. Ct. J. at 1029-30.
8. A court in one state has no jurisdiction to award, partition or divide property located in another state. Therefore, to divide out-of-state property, a court must order one party to convey the property to the other. *E.g.*, *McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722 (1961).
9. *E.g.*, *Pennington v. Fourth National Bank*, 243 U.S. 269 (1917).
10. 500 S.W.2d 233 (Tex. Civ. App. - Texarkana 1973, writ dism'd w.o.j.).
11. 559 S.W.2d 407 (Tex. Civ. App. - Austin 1977, no writ).
12. 433 U.S. 186 (1977).
13. *Id.* at 208 n.30.
14. 35 Tex. S. Ct. J. 1028 (July 1, 1992).

15. *Id.* at 1030.
16. *Id.* at 1029-30.
17. 559 S.W.2d 407 (Tex. Civ. App. - Austin 1977, no writ).
18. *Id.* at 410.
19. *E.g., Green Oaks Apts., Ltd. v. Cannan*, 696 S.W.2d 415, 418 (Tex. App. - San Antonio, writ denied).
20. *Kramer v. Kramer*, 668 S.W.2d 457, 459 (Tex. App. - El Paso 1984, no writ); *Thornlow v. Thornlow*, 576 S.W.2d 697, 701 (Tex. Civ. App. - Corpus Christi 1979, writ dism'd w.o.j.), *cert. denied*, 445 U.S. 949 (1980).
21. *Hoffman v. Hoffman*, 821 S.W.2d 3, 5 (Tex. App. - Fort Worth 1992, no writ).
22. *Kulko v. Superior Court*, 436 U.S. 84 (1978).
23. 604 S.W.2d 306 (Tex. Civ. App. - Dallas 1980, no writ).
24. *Id.* at 322.
25. *Id.* at 323. *Cf. Simonsen v. Simonsen*, 414 S.W.2d 54 (Tex. Civ. App. - Amarillo 1967, no writ) (court of appeals held nonresident had not waived special appearance as to child custody, support and property division by appearing on issue of divorce, but opinion is unclear whether trial court granted special appearance in the first place).
26. *Villalpando v. De la Garza*, 793 S.W.2d 274, 276 (Tex. App. -Corpus Christi 1990, no writ).
27. *E.g., Seeley v. Seeley*, 690 S.W.2d 626 (Tex. App. - Austin 1985, no writ) (out-of-state respondent waived special appearance by failing to obtain pretrial ruling on it).
28. *E.g., Sanchez v. Sanchez*, 609 S.W.2d 307, 308 (Tex. Civ. App. - El Paso 1980, no writ).