Divorce Jurisdiction after the 1977 Amendment to the Illinois Long Arm Statute: Extending a Legal Doctrine or Creating a Legal Hallucination?

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INTRODUCTION

In 1965, Illinois became the second state to broaden the scope of its long arm statute to encompass divorce jurisdiction. Under that amendment, an individual filing for divorce in Illinois could obtain in personam jurisdiction over an absent spouse, if the defendant either maintained a marital domicile in Illinois at the time the cause of action arose, or committed an act within the state which created the cause of action. To clarify and broaden the scope of this provision, the 1977 Illinois Marriage and Dissolution of Marriage Act again amended the long arm statute. The Act deleted both the

1. ILL. REV. STAT. ch. 110, § 17(1) (1975), provides:
   (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
   (a) The transaction of any business within this State;
   (b) The commission of a tortious act within this State;
   (c) The ownership, use or possession of any real estate situated in this State;
   (d) Contracting to insure any person, property or risk located within this State at the time of contracting;
   (e) With respect to actions of divorce and separate maintenance, the maintenance in this State of a matrimonial domicile at the time the cause of action arose or the commission in this State of any act giving rise to the cause of action.


3. The term “long arm statute” refers to a statute enabling the courts of a particular state to obtain in personam jurisdiction over non-resident defendants when they are beyond the state’s borders. The assertion of jurisdiction is usually predicated on the commission of certain acts within the state, or the maintenance of certain relations within the state. See generally M. GREEN, BASIC CIVIL PROCEDURE 30-36 (1972); Reese & Galston, Doing an Act or Causing Consequences as a Bases of Judicial Jurisdiction, 44 IOWA L. REV. 249 (1959).

4. “Divorce jurisdiction” is used to refer to a state’s power to adjudicate marital relationships and the incidental obligations which arise from those relationships.

5. “Absent spouse” is used to describe a marital partner who has abandoned the state where his co-partner resides, with the intention to remain outside of that state.


7. Pub. Act 80-923, 1977 Ill. Legis. Serv. 1640 (West) (to be codified as ILL. REV. STAT. ch. 40, §§ 101-802). The long arm amendment is contained in § 904 of the Act. Section 904 is
language referring to the commission of an act giving rise to the cause of action and the domicile clause's time limitation. Thus, in Illinois, the only substantive, statutory prerequisite to assertion of jurisdiction over an absent, non-resident defendant in an action for divorce is the maintenance, at any time, of a marital domicile within the state.

This article will examine the problems in interpreting and applying the amended provision. After establishing a framework for constitutional analysis, this article will then measure the Illinois statute against the approaches taken by other states. Finally, alternatives to the present language will be suggested.

BACKGROUND

Proper analysis of the application of the concept of long-arm jurisdiction in marital relationship adjudication requires an overview of the general topic of divorce jurisdiction. The power of a state to adjudicate matters concerning an individual's marital relationship is not predicated solely upon its in personam jurisdiction over the relevant parties. The common notion has been that, in determining whether to dissolve a marriage, the state exercises jurisdiction not over the parties themselves, but over the intangible marital status.

The United States Supreme Court, in the landmark decision of Williams v. North Carolina, endorsed this characterization. Mrs. Williams had filed for divorce, but could not legally compel her currently § 17(1)(e) of the Civil Practice Act, ILL. REV. STAT. ch. 110, § 17(1)(e) (1976). As amended, it provides:

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(e) With respect to actions of divorce and separate maintenance, the maintenance in this State of a matrimonial domicile.

While this concept is most clearly identified with Williams v. North Carolina, 317 U.S. 287 (1942) (Williams I), judicial recognition of the notion can be traced to Haddock v. Haddock, 201 U.S. 562, 624-25 (1906), which was overruled by Williams I.

Divorce actions were traditionally characterized as in rem because the court was taking jurisdiction over a status. This approach was specifically repudiated by the Supreme Court in Haddock v. Haddock, 201 U.S. 562 (1906). Although Haddock was expressly overruled in Williams v. North Carolina, 317 U.S. 287 (1942) (Williams I), Justice Douglas, writing for the majority, approved the use of the term "status" to classify such actions. Id. at 298, 304.

"Hence, the decrees in this case, like other divorce decrees, are more than in personam judgments." Williams v. North Carolina, 317 U.S. 287, 298 (1942) (Williams I).

husband's appearance in court.\textsuperscript{12} The Court held that since jurisdiction is exercised over the status,\textsuperscript{13} it is unnecessary that both parties appear for a court to modify that status.\textsuperscript{14} Thus, to justify ex parte divorce jurisdiction, the appearing party need only establish the requisite relationship between the marital status and the forum state—bona fide\textsuperscript{15} domicile within the jurisdiction.\textsuperscript{16} The other requirements for a valid decree are adequate notice to the defendant and an opportunity for him to be heard.\textsuperscript{17} Thus \textit{Williams} permits ex parte divorces without in personam jurisdiction over an absent spouse.\textsuperscript{18}

\textbf{The Need for Long Arm Jurisdiction}

\textit{In Marital Proceedings}

\textit{Williams} does not resolve all jurisdictional issues in marital litigation, for numerous rights and obligations\textsuperscript{19} accompany the marital

\begin{itemize}
\item \textsuperscript{12} Both spouses were residents of North Carolina. Mrs. Williams went to Nevada to obtain a divorce, serving process upon Mr. Williams in North Carolina. Mr. Williams was not amenable to the service, as Nevada had no applicable long arm statute. Consequently, he refused to appear and answer in Nevada.
\item \textsuperscript{13} The only question addressed by the Supreme Court was the state's power to dissolve the marital status.
\item \textsuperscript{14} "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 298, 299 (emphasis added). The paramount rationale of \textit{Williams v. North Carolina} is that the primary restraint on the state's power derives from the doctrine of federalism, and not from due process. See Granville-Smith v. Granville-Smith, 349 U.S. 1, 16 (1954) (Clark, J., dissenting); Rheinstein, \textit{Constitutional Bases of Jurisdiction}, 22 U. Chi. L. Rev. 775, 779-80 (1955). \textit{But see Alton} v. Alton, 207 F.2d 667 (3d Cir. 1953), where divorce jurisdiction was invalidated on due process grounds. The decision in \textit{Alton} is, however, somewhat unclear and difficult to rationalize with prior law. Both parties were present at the proceeding, and the basic issue was whether they were in fact bona fide domiciliaries of the jurisdiction. Since both parties appeared, the only "person" who would have been deprived of anything by a finding of invalid domicile was the state in which the parties were domiciliaries. Thus, if one state improperly adjudicates the rights of parties which should be determined by another state, the problem is actually one of federalism, relating to the state's power and its territorial limits. See \textit{Pennoyer v. Neff}, 95 U.S. 714, 734 (1877).
\item \textsuperscript{15} In \textit{Williams v. North Carolina}, 325 U.S. 226 (1945) (Williams II), the holding in \textit{Williams I} was qualified in that the first state's finding as to the bona fide nature of the domicile could be questioned by the state to which an application for full faith and credit had been made.
\item \textsuperscript{17} \textit{Id. at 299}. Although the opinion refers to Milliken v. Meyer, 311 U.S. 457 (1940), \textit{rehearing denied}, 312 U.S. 712 (1940), which required a minimum of service by publication, it is likely that Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) which requires a form of notice most likely to afford actual notice, is now applicable.
\item \textsuperscript{18} Personal jurisdiction cannot be questioned if the divorce is not ex parte, since both parties are present and submit to the jurisdiction of the court.
\item \textsuperscript{19} These rights and obligations include the right to be man and wife under the law, child custody, property rights and the right to support.
\end{itemize}
relationship. The Supreme Court held\(^{20}\) in *Estin v. Estin*\(^{21}\) that since these privileges are considerably more personal than the *shared* marital status, the *Williams* jurisdictional standard provides an insufficient basis for adjudicating those rights.\(^{22}\) Moreover, property aspects\(^{23}\) of the marital relationship involve the fourteenth amendment due process clause as the predominant limitation on a court's exercise of jurisdiction.\(^{24}\) Since most divorce litigation concerns not only dissolution of the marital status, but, perhaps more importantly, adjudication of property rights,\(^{25}\) in personam jurisdiction over an absent spouse is required to determine property interests.\(^{26}\) Thus, in absent spouse marital litigation, full resolution of all the issues requires statutory long arm service to acquire personal jurisdiction over the absent party.

Additionally, long arm jurisdiction serves a practical purpose. In many instances, because a dependent spouse is financially unable to file suit in a foreign jurisdiction, the remedies available to that party are substantially limited.\(^{27}\) In any event, the abandoned indi-

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20. *Estin v. Estin*, 334 U.S. 541 (1948), could be read to view the problem alternatively as one of conflict of law. The conflicts approach would apply the law of the absent party's domiciliary state rendering the ex parte decree binding to the extent mandated by that law. *Id.* at 544. The theory is poorly developed in the opinion, and would appear to be repudiated completely by language in *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), which speaks of in personam jurisdiction as a prerequisite to any adjudication. *Id.* at 418. Nonetheless, the Supreme Court has subsequently denied certiorari to a case decided under the conflict of law rationale. *See* *Nowell v. Nowell*, 157 Conn. 470, 254 A.2d 889, *cert. denied*, 396 U.S. 844 (1969).

21. *Estin v. Estin*, 334 U.S. 541, 545 (1948); *see also* *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418-19 (1954) (affirming a holding that in ex parte divorces in which property rights are adjudicated, in personam jurisdiction over the absent defendant is required).


23. The property rights typically involved are the right to financial support and marital property rights, such as community property, dower, and forced share. *See* *Estin v. Estin*, 334 U.S. 541, 548 (1948). The same rationale has been applied to classify child custody rights as "property" rights, thus requiring in personam jurisdiction over the absent spouse. *See* *May v. Anderson*, 345 U.S. 528, 533 (1953).

24. Due process is implicated by the presence of a jeopardized property right of the absent spouse. It is not clear what effect is to be given to non-vested, contingent property interests which are incidental to the marital relationship. A prime example is inchoate dower. For a case holding that an inchoate dower claim does not deserve extended protection, *see* *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965).


26. This concept has long been recognized in Illinois, *see*, e.g., *Gleiser v. Gleiser*, 402 Ill. 343, 344, 83 N.E.2d 693, 694 (1949); *Kelley v. Kelley*, 317 Ill. 104, 107, 147 N.E. 659, 661 (1925); *Proctor v. Proctor*, 215 Ill. 275, 276, 74 N.E. 145, 145 (1905), and in other states, *see*, e.g., *Jennings v. Jennings*, 251 Ala. 73, 36 So.2d 236 (1948); *Baldwin v. Baldwin*, 28 Cal. 2d 406, 412, 170 P.2d 670, 676 (1946).

27. Without jurisdiction over the absent spouse, the alternative remedy was to attach
individual should not be forced to pursue his or her spouse to enforce rights arising from the marriage. Thus a long arm statute affords an opportunity for a remedy within the forum of marital domicile. This analysis clearly shows the necessity of a divorce provision in a long arm statute. A proper provision must be within the constitutional parameters for long arm jurisdiction in general.

**Federalism and Due Process**

Two constitutional doctrines—federalism and due process—restrain a state's jurisdictional power over individuals who are neither residents of, nor served with process within, the state. Thus, a valid state long arm statute must comport with the requirements of both doctrines. The first concept, federalism, represents a compromise whereby independent states reserve their sovereign integrity under the Constitution, while combining for the purpose of forming an ongoing union of central government. The state cannot exert its power beyond its borders, unless the defendant has established a connection with the state in some manner, such as residency. As society has become more transitory, the notion of sovereign state power has been diluted extensively. It is no longer necessary for a state to find a non-resident physically within its borders.
to invoke in personam jurisdiction. The basic requirement of federalism is the existence of a nexus between an absent individual and a state, which renders adjudication in that state at least as appropriate as adjudication in the state where the defendant can be found. Thus, federalism demands at a minimum, that the absent, non-resident party have some relationship with the state.

Such a requisite relationship is similar to, but conceptually distinct from, the “minimum contacts” necessary to satisfy the second constitutional constraint, due process of law. The threshold requirement is that minimum contacts exist, for without them, due process is violated by requiring a defendant to appear and defend himself in a distant, inconvenient and unjustified forum. Due process also carries with it the procedural requirements of adequate notice and opportunity to be heard, but such aspects are easily satisfied once it is determined that the court has the power to issue such notice.

Thus, the due process minimum contacts analysis is more complex than the minimal relationship inquiry of federalism. This analysis emphasizes the “traditional notions of fair play and substantial justice.” That determination requires balancing such factors as the nature and extent of the defendant’s contacts with the state, the competing interests of the parties in having claims litigated in a particular forum, and the interest of the state in providing the plaintiff with an effective means of redress. If these factors

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37. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); see also Shaffer v. Heitner, 97 S. Ct. 2569, 2584-85 (1977) (“We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.”) (footnote omitted). Shaffer limited in rem attachments to cases where the suit bore the “minimum contacts” relationship to the defendant’s ownership of the property.
41. Mullan v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950). State statutes typically provide for service of process beyond the state’s borders. Such service is given the same force and effect as service within the state, provided the necessary relationship exists between the state and the person served, e.g., residence or other submission to the jurisdiction of the state. See Ill. Rev. Stat. ch. 110, § 16(1) (1975).
46. See McGee v. International Life Ins. Co., 355 U.S. 220, 222-24 (1957); see also Nelson
weigh too harshly against the asserted jurisdiction, the state has no power to determine the claim. Long arm statutes typically meet this due process requirement by making the exercise of jurisdiction dependent upon the defendant’s commission of certain acts within the state.

Under the Illinois long arm statute, the act providing divorce jurisdiction is the maintenance of a marital domicile within the state. Originally, section 17(1)(e) of the Illinois Civil Practice Act contained the requirement that domicile exist in Illinois at the time the cause of action for divorce arose. However, the few cases that interpreted this provision were inconsistent and fraught with misinterpretations. To clarify the disparity, the 1977 amendment deleted the phrase italicized above. Although well-intentioned, this simplification fails in its primary purpose of clarifying the statute; indeed, it may even add to the confusion in this area. Furthermore, it may exceed the constitutional limitations on long arm jurisdiction.

v. Miller, 11 Ill. 2d 378, 384, 143 N.E.2d 673, 676 (1957).
49. The Illinois long arm statute is typical. Section 17(1) conditions long arm jurisdiction upon the doing of certain enumerated acts by any person within the state, or his personal representative, whether or not a citizen of the state. ILL. REV. STAT. ch. 110, § 17(1) (1975). The “acts” most commonly used are the transaction of any business within the state, the commission of a tortious act within the state, the ownership, use or possession of any real property within the state, and the contracting to insure any persons, property or risks located within the state.
50. Prior to 1977, this subsection of the statute included the commission within the state of any act giving rise to the divorce action. See note 1 supra. This clause could easily foster interpretive problems, both in no-fault divorce states, and in fault states with grounds such as repeated mental cruelty. The fact that most states have now adopted no-fault divorce statutes is one explanation for the conspicuous absence of such a clause in other long arm statutes with provisions for divorce jurisdiction. See, e.g., I.D.A.Y. Code § 5-514(e) (Supp. 1977); Okla. Stat. Ann. tit. 12 § 1701.03(a)(7) (West Supp. 1977-1978); Wis. Stat. Ann. § 247.057 (West Supp. 1977-1978). The 1977 amendment deleted this provision. See note 7 supra.
51. ILL. REV. STAT. ch. 110, § 17(1)(e) (1975). For text, see note 1 supra.
53. See Lefkovitz v. Lefkovitz, 341 So. 2d 253 (Fla. App. 1976) (holding no domicile maintained in Illinois when cause of action arose, where husband left the state to relocate his business and continued to support his family in Illinois and make payments on house located there); Nickas v. Nickas, 113 N.H. 261, 306 A.2d 51 (1973) (holding domicile maintained in Illinois where husband, New Hampshire resident, lived with his wife in Illinois for only three weeks before abandoning her and returning to New Hampshire).
54. ILL. ANN. STAT. ch. 110, § 17(1)(e) (Smith-Hurd Supp. 1977). For the full text see note 7 supra.
PROBLEMS CREATED BY THE 1977 AMENDMENT TO THE ILLINOIS LONG ARM STATUTE

Interpretational

Utilization of domicile as a basis of jurisdiction under the Illinois long arm statute promotes needless confusion. Due to its abstract nature and its similarity to the related concept of residence, domicile has been inconsistently interpreted and applied by the courts. Although their basic elements are similar, i.e., physical presence at a site and an intention to remain indefinitely, domicile and residence are commonly held to embody different concepts. Domicile denotes more than the intention to remain in one place in that it usually refers to an intention to make a place one's permanent and primary "home," the center of daily activities and relationships.

Unfortunately, this logical construct has been clouded by case law. Courts, seeking to reach a desired end, have often tailored the definition of domicile to conform to the character of the perceived inquiry. This judicial tampering has resulted in holdings that an individual simultaneously has more than one domicile and more than one residence, all at different locations. Further, in Illinois, residence and domicile have often been viewed by the courts as indistinguishable, but at other times have been held to be different concepts. Consequently, it is often difficult to make a precise de-

58. See Hughes v. Ill. Public Aid Comm., 2 Ill. 2d 374, 380, 118 N.E.2d 14, 17-18 (1954). Thus, one may have more than a single residence, yet maintain a single domicile, as the intention necessary for domicile is of a more permanent nature.
59. Id; see also Stilwell v. Continental Ill. Bank and Trust Co. of Chicago, 31 Ill. 2d 546, 202 N.E.2d 477 (1964); H. CLARK, LAW OF DOMESTIC RELATIONS 144-47 (1968).
60. See, e.g., In re Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932); Dorrance v. Thayer-Martin, 115 N.J. Eq. 268, 170 A. 601 (1934), cert. denied, 298 U.S. 678 (1935). This complex estate administration determined that a decedent's domicile could be located in numerous sites at given times, depending on the present intent of the decedent at those times.
61. See Berlingieri v. Berlingieri, 372 Ill. 60, 22 N.E.2d 675 (1939); see also A. EHRENZWEIG, CONFLICT OF LAWS 240-44 (1962).
62. See Texas v. Florida, 306 U.S. 398, 424-28 (1938) (holding that the limitation on finding that an individual has more than one domicile is only a theoretical fiction; in practice that fiction may be ignored).
termination as to when and where an individual maintains a domicile.

An attempt to ascertain the locus of a marital domicile presents additional complications. The common law approach dictates that the husband's domicile is also that of the wife. Despite some sentiment for change, this is still the basic rule in Illinois and other jurisdictions.

Strict application of the rule leads to hardship and confusion when a husband establishes a new domicile in a foreign jurisdiction after separating from his wife: a subsequent proceeding by the wife in which jurisdiction is based on marital domicile must be brought in the foreign jurisdiction. The earliest judicial attempt to alleviate this problem was the determination of domicile on the basis of fault; marital domicile followed a departing husband only if he left "without fault." This scheme created more problems than it solved, and the United States Supreme Court eventually invalidated the approach.

Subsequently, some courts view a husband's departure, without first having obtained a divorce, as temporary and without effect upon the situs of the marital domicile. Other jurisdictions, including Illinois, suggest that the common law rule does not apply after separation. The married woman may then acquire her own domicile. If she remains at the last domicile shared with her husband, that situs may be designated the "surviving" marital domicile. However, this analysis creates problems similar to those of the invalidated "fault" approach, in that determination of domicile may depend on matters going to the substance of the litigation. Also, it

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65. Cooper v. Beers, 143 Ill. 25, 33 N.E. 61 (1892).
66. See Restatement (Second) of Conflict of Laws § 77, Comment c (1971) (defining marital domicile as the place where the spouses were domiciled when they last lived together). Of course, if the Equal Rights Amendment to the Constitution were to be enacted, it would invalidate the common law distinction.
68. See, e.g., In re Estate of Daniels, 53 Wis. 2d 611, 193 N.W.2d 847 (1972).
72. See Bateman v. Bateman, 337 Ill. 11, 85 N.E.2d 196 (1949).
73. See Restatement (Second) of Conflict of Laws § 77 Comment c (1971).
74. See text accompanying notes 79 and 80 supra. The problem was that in order to establish jurisdiction, the court had to determine matters that were the substance of the litigation.
is equally appropriate to hold that the marital domicile ceases to exist upon separation.

Therefore, the basic problem is the confusion generated by the use of a concept as vague as marital domicile as a foundation for a jurisdictional statute, particularly a statute that becomes relevant only upon separation or divorce. The foregoing interpretations of marital domicile are not definitive and can not be relied upon to produce consistent and just results. Indeed, as the situation stands, much depends upon the particular tribunal determining the matter and its perception of the state's policies.75

There are primarily two ways in which the interpretational difficulties of section 17(1)(e) could be corrected. First, the term "marital domicile" could be deleted and a new concept substituted in its place. This approach has been followed in many other states having statutes similar to Illinois'.76 The Illinois legislature, however adopted a second method by eliminating the language concerning maintenance of a marital domicile "at the time the cause of action arose."77 This solution raises serious questions regarding whether and to what extent simple maintenance of a marital domicile satisfies the dual constitutional requirements for long arm jurisdiction.

75. For example, in Nickas v. Nickas, 113 N.H. 261, 306 A.2d 51 (1973), the defendant husband, a New Hampshire resident, had come to Illinois to marry an Illinois resident. After living together for three weeks in Illinois he deserted his wife and returned to New Hampshire. After serving process upon her husband under § 17(1)(e), the wife secured a default divorce and property settlement decree. Without hesitation, the New Hampshire Supreme Court held that the decree was entitled to full faith and credit since the marital domicile existed in Illinois at the time the cause of action arose.

In contrast, in Lefkovitz v. Lefkovitz, 341 So. 2d 253 (Fla. App. 1976), the parties were married in Illinois in 1966 and lived there until 1971, during which time they had three children. Late in 1971, Mr. Lefkovitz departed to Florida to open a business, planning to have his family join him there at a later date. During the next two years, Mr. Lefkovitz periodically returned to Illinois to live with Mrs. Lefkovitz and continued the mortgage payments on the house. However, in November of 1973, Mr. Lefkovitz decided never to return to his home in Illinois, and his wife subsequently learned he had been living with another woman in Florida. Mrs. Lefkovitz instituted Illinois divorce proceedings, basing jurisdiction over her husband on § 17(1)(e) and obtained a decree in her favor.

In a three paragraph opinion, the Florida Court of Appeals held that no marital domicile had been maintained in Illinois by Mr. Lefkovitz at the time the cause of action arose, since no cause of action arose until Mrs. Lefkovitz discovered the adultery in 1973, and since Mr. Lefkovitz had ceased to maintain a marital domicile in Illinois upon his decision never to return there. This narrow reading of the 1965 Illinois statute, is due at least in part to the lack of a concrete definition for the term "marital domicile." For a critique of the majority opinion see Lefkovitz v. Lefkovitz, 341 So. 2d. 253, 254 (Fla. App. 1976) (Smith, J., dissenting).

76. See notes 101 through 117 and accompanying text infra.

77. See notes 1 and 7 supra; see also Ill. ANN. STAT. ch. 110, § 17(1)(e) (Smith-Hurd Supp. 1977).
Domicile, like residence, is a traditional basis for jurisdiction over absent parties, so long as that fact exists at the time jurisdiction is asserted. The 1965 long arm statute permitted the exercise of jurisdiction over an absent spouse on the condition that the marital domicile had been maintained in Illinois at time the cause of action arose. However, the 1977 amendment, in effect, establishes that a sufficient basis for in personam jurisdiction exists if a marital domicile was ever maintained in Illinois.

The use of a hypothetical situation will facilitate the analysis of the issue raised by the amendment. Husband and Wife marry in the state of Virginia, live there for six years, and have two children. After residing in a number of states, the family moves to Chicago, Illinois, where they rent an apartment and live for approximately one year. Pursuant to a permanent employment transfer, the family moves to Gary, Indiana, intending to live there indefinitely. After three years, Husband deserts his family and returns to Virginia. One year later, Wife and the children return to Chicago, Illinois, where Wife signs a one year lease and enrolls her children in the public schools. Wife secures an Illinois divorce and property settlement decree after serving process upon Husband in Virginia pursuant to the amended section 17(1)(e). Thereupon, Wife seeks full faith and credit for the Illinois judgment in Virginia.

Assuming section 17(1)(e) is valid in its present form, there is little Husband can do to attack the Illinois decree. He cannot object to the retroactive application of the long arm statute, for such an application offends neither the United States Constitution, nor the law of Illinois. The argument that the provision was meant to apply only to those maintaining a domicile in Illinois when the

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79. ILL. REV. STAT. ch. 110, § 17(1)(e) (1975). For the text of the statute see note 1 supra.
80. ILL. ANN. STAT. ch. 110, § 17(1)(e) (Smith-Hurd Supp. 1977). For the text of the statute see note 7 supra.
82. The law applicable in the State of Illinois is that there is no vested right in any particular remedy or method of procedure, and that, while generally statutes will not be construed to give them a retroactive operation unless it clearly appears that such was the legislative intent, never the less, when a change of law merely affects the remedy or law of procedure, all rights of action will be enforceable under the new procedure without regard to whether they accrued before or after such change of law and without regard to whether the suit has been instituted or not, unless there is a saving clause as to existing litigation. Ogdon v. Gianakos, 415 Ill. 591, 597, 114 N.E.2d 686, 690 (1953); accord, Nelson v. Miller, 11 Ill. 2d 378, 382, 143 N.E.2d 673, 676 (1957).
cause of action for divorce arose also fails for this construction reads in the exact language eliminated by the amendment. Thus, Illinois law resurrects the home husband thought he had abandoned in Illinois, since no express language in the long arm statute prevents its application to the hypothetical situation. Thus, this result would be constitutionally invalid, for it clearly fails to satisfy due process and probably cannot even meet the less demanding standard for federalism.

The lack of any meaningful relationship between the defendant and the forum state, would render adjudication in the forum less appropriate than would be adjudication in another state, where a significant relationship might exist. This conflict between forum states is based on federalism. Due process, on the other hand, enters into the conflict between the defendant and a forum state, assuring the defendant that he need not be forced to litigate in a distant, inconvenient and inappropriate forum. The due process constraint requires an even stricter standard than does federalism, i.e., a qualitative analysis of the relationship or "contacts" between the defendant and the forum state. As the satisfaction of these requirements would thus ensure that the minimal requisite relationship standard of federalism was present, the following analysis will be in terms of what changes would be necessary to satisfy due process.

Conduct within the state that satisfies the minimum contacts standards is the justification for a state's exercise of long arm jurisdiction. Such conduct consists of the performance of certain acts within a state that are sufficiently significant to subject the defendant to the legal authority of that state, for purposes of a cause of action arising from those acts. The conduct most commonly establishing jurisdiction includes doing business or committing a tortious act within the state. There is, however, a substantial difference between these acts and the nature of the conduct on which jurisdiction is based in the hypothetical situation. The "activity"
therein is the maintenance of a marital family unit within the state for a brief portion of the duration of the marriage. The cause of action in question arose after the complete cessation of the conduct within Illinois. In addition, it is difficult at best to find a causal relationship between the defendant's activity within the state, and the subsequent divorce action. The situation differs from an action for injuries sustained as the result of a defendant's tortious conduct, or a suit for breach of contract arising out of a defendant's transaction of business. In these situations, the defendant's conduct involves significant contact with the forum state, since the ensuing cause of action is a direct result of the activity.  

Section 17(1)(e) lacks a limiting factor which, combined with the maintenance of a marital domicile within a given state, validates an assertion of jurisdiction over the party maintaining the domicile. In all of the cases approving long arm jurisdiction based on the maintenance of a marital domicile, such a limiting factor is present. The most common limiting factor is the abandoned family's uninterrupted maintenance of the marital domicile in question, after the separation which created the cause of action and the need for long arm jurisdiction. Another factor is the maintenance of a marital domicile in the state at the time of the conduct responsible for the divorce proceeding. A third limiting factor is that the marital domicile in question be the last shared marital domicile. The common
attribute of these limiting factors is that they insure the existence of a relationship between the defendant and the state sufficient to warrant the latter's exercise of jurisdiction. The maintenance of the marital domicile must be more than an incidental or fortuitous circumstance occurring within the state.

Marital domicile provides a sufficient basis for long arm jurisdiction primarily because of the strong state interest in protecting domiciliaries. In the hypothetical, when the spouses mutually abandoned the Illinois domicile and moved to Indiana, the abandoned state lost the requisite interest, and Indiana, the state of their next permanent domicile, acquired it. Permitting such a long arm-based divorce and property settlement suit in Illinois would contravene the restraints of federalism and due process. Since the current Illinois long arm divorce provision contains no limiting factor, it might be read to permit a suit in Illinois on facts similar to those of the hypothetical situation. The statute therefore contains a potential constitutional infirmity, because no authority exists for such a broad, unlimited assertion of long arm jurisdiction.

ALTERNATIVES

The foregoing analysis compels the conclusion that the amended section 17(1)(e) is deficient in at least two respects. First, the use of the term "marital domicile" creates interpretational difficulties. Second, section 17(1)(e) lacks a limiting factor to ensure compliance with the constitutional standards for minimum contacts. These anomalies are entirely unnecessary, as viable alternatives are available.

Restatement (Second) of Conflict of Laws § 77, Comment c (1971), which provides; "The state of matrimonial domicile, which is the state where the spouses were domiciled when they last lived together as man and wife, should usually at least have jurisdiction to grant support if the plaintiff spouse has continuously remained domiciled there." (emphasis supplied). This factor indirectly requires maintenance of the matrimonial domicile in the state at the time the case of action arose, as the marital relationship and the maintenance of a marital domicile will tend to terminate simultaneously with the conduct giving rise to the cause of action.


94. See notes 30 through 49 and accompanying text supra.

95. The current provision requires only "the maintenance in this State of a marital domicile." ILL. ANN. STAT. ch. 110, § 17(1)(e) (Smith-Hurd Supp. 1977).

96. See cases cited in note 88 supra.

97. See notes 55 through 77 and accompanying text supra.

98. See notes 78 through 96 and accompanying text supra.
One alternative is judicial clarification and limitation of the provision. While some of the problems could be corrected in this manner, there are numerous reasons for the unacceptability of this alternative. Judicial construction would be piecemeal, limited in remedial effect to problems fortuitously raised by aggrieved parties affected by the statute. Also, there is no guarantee that a particular court's interpretation would rectify the uncertainty or that uniformity would result. In fact, an imprecise judicial interpretation would exacerbate the problem. This approach amounts to inefficient repair work, since the statute's inherent inadequacies create the need for the judicial grooming.

The most sensible approach is to amend the language of the statute in a manner effectuating its purpose, while eliminating much of its current ambiguity. Fortunately, the endeavor need not be a blind one; the efforts of other jurisdictions provide an excellent catalogue from which to choose.

Only two of the states with divorce provisions in their long arm statutes employ the troublesome "marital domicile" language, Idaho and Illinois. Most other states with similar statutes have adopted entirely different language. One alternative is the broad, non-specific approach taken by California and Rhode Island. Those statutes simply provide that courts may exercise jurisdiction on any basis not inconsistent with the state and federal constitutions. This method is poorly suited to Illinois' revisionary needs, as it would completely replace all of the current provisions in the long arm statute. Also, this approach could easily generate much unnecessary litigation, in other areas of Illinois long arm jurisdiction now well settled.

The alternatives adopted by Oklahoma, Florida and Wisconsin are also inadequate for Illinois' purposes. Although conceiva-

99. An example of this is Weinberger v. Weinberger, 43 Ohio App. 2d 129, 334 N.E.2d 514 (1974), where the court limited a provision in a long arm statute to causes of action accruing after the effective date of the statute, even though no such restrictive language appeared in the statute.
100. Cf. Lefkowitz v. Lefkowitz, 341 So. 2d 253 (Fla. App. 1976), which gives an example of the unpredictability of judicial interpretation of such statutory material. See notes 88 through 93 and accompanying text supra.
101. IDAHO CODE § 5-514(e) (Supp. 1977) provides in pertinent part: "(e) The maintenance within this state of matrimonial domicile at the time of the commission of any act giving rise to a cause of action for divorce or separate maintenance."
bly eliminating some of the interpretational problems in the current Illinois provision, each statute contains language creating the potential for new interpretational problems. For example, Oklahoma affords divorce long arm jurisdiction when the defendant maintains "any other relation to this state or to persons or property. . . ." Florida requires only that the defendant maintain a matrimonial domicile in the state "at the time of the commencement of the action, or . . . [that] the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not . . . ." This language is too reminiscent of the former Illinois statute, and may create even greater opportunities for misinterpretation.

Ohio, Indiana, Kansas, and New Mexico approach the problem similarly. The term "domicile" is eliminated, and a limiting factor is provided to ensure that the scope of the statute satisfies the minimum contacts standard. Thus, the Ohio statute provides a basis for jurisdiction if the defendant was "living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state." Ohio has substituted the term "marital relationship" for "marital domicile." Though "marital relationship" is not fully self-explanatory, still it does not carry the excessive common law baggage associated with the term "domicile." Also, the constitutionality of the Ohio statute is virtually assured by requiring the plaintiff's continued residence in the state. First, the maintenance of the


108. Wisconsin makes divorce long arm jurisdiction available when the defendant has lived in marriage with the plaintiff "for not less than 6 consecutive months within the 6 years next preceding the commencement of the actions; . . . ." Wis. STAT. ANN., § 247.057 (West Supp. 1977-1978).


116. As the meaning of this term is fairly self explanatory, it has been infrequently litigated. A case interpreting the Kansas provision, Kan. STAT. ANN. § 60-308(b)(8) (Supp. 1976), limited the term marital relationship to any recognizable marriage contract, excluding agreements to enter into the marital relationship. See Whisenant v. Whisenant, 219 Kan. 387, 548 P.2d 470 (1976).

117. See notes 55 through 77 and accompanying text supra.
marital relationship within the state creates the important state interest in protecting the individuals involved and tips the minimum contacts analysis in favor of valid long arm jurisdiction. Second, the requirement that the other member of the marital relationship continues to reside in the state ensures that Ohio's interest is not subordinated to another jurisdiction. Finally, this provision generally will be operative only if the marital relationship existed in the state when the cause of action arose, without generating the interpretational difficulties created by the use of express language to that effect. Thus, the Ohio provision presents the most satisfactory alternative.

CONCLUSION

The 1977 amendment to Illinois' divorce jurisdiction provision of the long arm statute fails to clarify the statute's inherent ambiguity. Indeed, it may create even greater problems due to the inconsistent interpretation of the term "marital domicile." A preferred alternative would be to amend the language and substitute "marital relationship" for the term "marital domicile." It is further suggested that the provision be limited by the requirement that the spouse bringing suit continues to reside in the state. This approach would effectuate the purpose of protecting the plaintiff spouse, while minimizing the interpretive difficulties and assuring the statute's constitutionality.

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118. See note 75 and accompanying text supra. Since this provision requires that the remaining party plaintiff continues to reside in the state, it is implicit that he or she was already in the state when the activity leading to the cause of action transpired. Thus, this added limitation is effectuated without the use of possibly confusing express language to the same effect.

119. It is further suggested that the language "living in" a marital relationship be replaced with "maintenance of" a marital relationship, to prevent difficulty in situations like that in Lefkovitz v. Lefkovitz, 341 So. 2d 253 (Fla. App. 1976), when a spouse maintains a marital family unit within a state, but is not physically present.