



Best of ListServ

Q: *For those jurisdictional afficianados . . .*

Scenario:

H lives in state A. W lives in state B. W has been in state B with minor child for over 6 months. W & child previously lived in state A with H for slightly less than 6 months. Prior to this W lived in state C with minor child. H files for divorce in state A and personally serves W in state B. An order regarding one particular visitation comes out of an expedited hearing held in state A. W subsequently wishes to raise the issue that state A does not have jurisdiction over the child to make custody/visitation orders. There is no action pending in state B.

Can W file in state B, serve H in state A and bifurcate the divorce action? Must W now submit this issue to jurisdiction of state A? If there is no action pending in state B, can W still claim that state A still has no jurisdiction over the child? If the order from the court in state A deals with only one specific visitation but not custody, can W successfully claim that state A has no jurisdiction to make custody orders regarding the child?

A: Although these questions don't have a lot to do with the jurisdictional aspect, they are of some import: (1) how long has it been since H filed the divorce and wife answered? (2) why hasn't wife filed in state B?

Regarding the jurisdictional issues:

1. personal jurisdiction. Since Wife, Husband and child all lived in state A and (presumably) Husband hasn't moved from state A since that time, State A has personal jurisdiction over Wife for determination of issues such as property division, divorce and spousal and child support. The personal jurisdiction over wife continues until H has left the last state in which all the parties lived. Personal jurisdiction can be waived. In other words, if wife makes an appearance of any kind and does not object that one state does not have personal jurisdiction, then that objection is lost.

2. child custody jurisdiction. Child custody jurisdiction is subject matter jurisdiction that cannot be lost by an appearance of the party who later decides to challenge that jurisdiction. Child custody jurisdiction can be raised by a party or the court (on its own initiative) even at the appellate level and even if it has never been raised before (although some state courts have improperly determined that continued actions by both parties mistakenly believing that one state had child custody jurisdiction could be read as a waiver -- those cases are an aberration and should not be viewed as good precedent).

Child custody jurisdiction is strictly construed. Thus, if the child lives in state B for 6 months and 1 day, then **only** state B has child custody jurisdiction. It doesn't matter if the child had been in state A for 5 years, if the child has **now** been in state B for that 6 month period of time.

Appearance in any kind of hearing (whether in person or by phone, whether objecting to child custody jurisdiction or not) does not waive the child custody jurisdiction objection. It can be raised at any time.

I suggest that wife file an action in state B. The UCCJEA requires that when there is already an action on file regarding child custody, the new filing must reference that other action and it **is** stayed until the judges in both state communicate and give both parties an adequate opportunity to bring relevant law to the court's attention.

Q: *So what, in your opinion, is the best way to force the subject matter jurisdiction issue to a ruling, so it is not lingering out there in limbo?*

A: Mom should file an answer in State A objecting to child-custody jurisdiction, pointing out that she and the child have lived in state B for more than 6 months, even though she and the child and father previously lived in state A. In addition, mom should file a motion to [vacate] the temporary child custody (visitation) order, pointing out that the court did not have child custody jurisdiction and that any such jurisdiction resides in state B.

Mom should also file a child-custody action in State B, indicating that she has lived in that state for more than 6 months until the date on which the action in state A was filed, indicate that there is currently an action pending in state A to which objection has been made, and detail in both the answer and new action the dates and places lived so that both judges have the same information in front of them.
