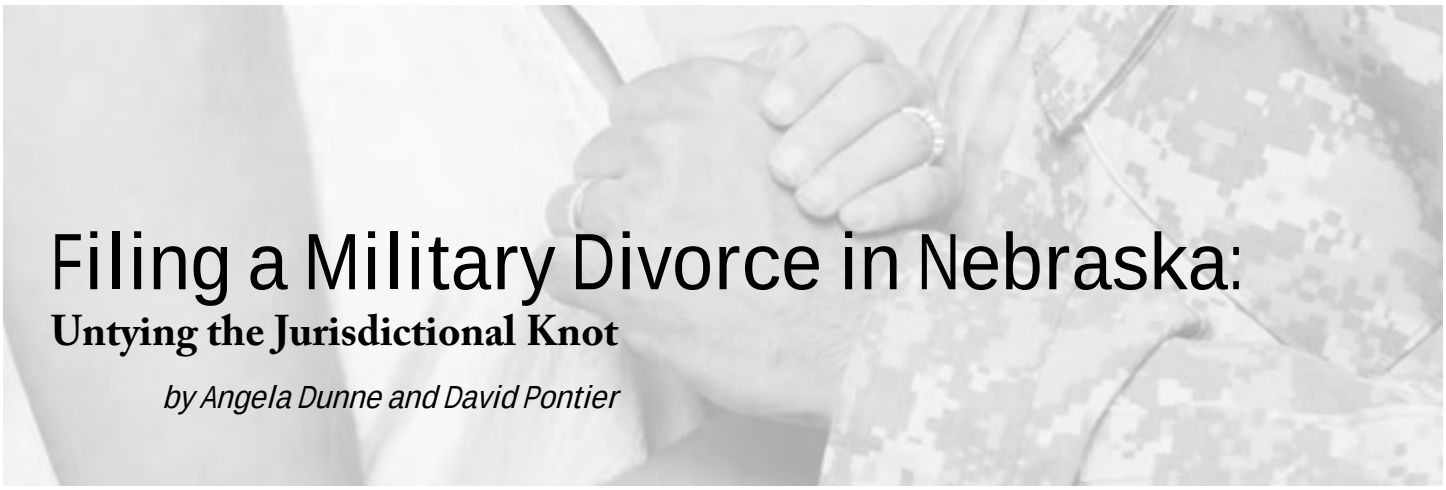

Filing a Military Divorce in Nebraska:

Untying the Jurisdictional Knot

by Angela Dunne and David Pontier

Attorney: How long have you been stationed in Nebraska?

Servicemember: Over a year.

Attorney: Great, let's file.

Military divorces are complex. From the division of service benefits to the application of federal and state laws exclusive to servicemembers, military divorces encompass legal and practical issues absent from civilian divorces. While practitioners in this area often answer questions about TRICARE, the 10/10 rule, and sometimes even adultery under the Manual of Court Martial, inevitably one of the first military divorce questions that any Nebraska attorney will have to answer is where to file. And that answer may not be as straightforward as you think.

Federal and state laws unique to servicemembers complicate determining the correct jurisdictional forum for a military divorce, and the consequences of improperly filing a military divorce cannot be understated. No attorney wants to explain to a client a few years down the road that her divorce decree is void.

The focus of this article is to examine Nebraska's subject matter jurisdiction over military divorces, to discuss jurisdictional issues in filing a military divorce in Nebraska, and to review common filing scenarios with suggestions for practitioners.

Nebraska's Subject Matter Jurisdiction Over Military Divorces: § 42-349

Nebraska's subject matter jurisdiction over a divorce is codified in § 42-349.[1] Like all other states, Nebraska's subject matter jurisdiction over a divorce, including a military divorce, is tethered to at least one spouse's "residency" within the state.[2] Nebraska's subject matter jurisdiction statute reads:

> No action for dissolution of marriage may be brought unless at least one of the parties has had actual residence in this state with a bona fide intention of making this state his or her permanent

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> home for at least one year prior to the filing of the complaint, or unless the marriage was solemnized in this state and either party has resided in this state from the time of marriage to filing the complaint. Persons serving in the armed forces of the United States who have been continuously stationed at any military base or installation in this state for one year or, if the marriage was solemnized in this state, have resided in this state from the time of marriage to the filing of the complaint shall for the purposes of sections 42-347 to 42-381 be deemed residents of this state.[3]

Accordingly, for any divorce to be filed in Nebraska, two requirements must be met in at least one spouse: (1) actual residency in Nebraska, and (2) a bona fide intention of making Nebraska his or her permanent home.[4] Both requirements must have been true for at least one year prior to filing the divorce or meet certain exceptions.[5]

If this two-prong requirement conjures bad memories of studying domicile for the bar exam, pat yourself on the back because the Nebraska Supreme Court has confirmed that domicile is precisely what is required by § 42-349.[6]

Under the second sentence of § 42-349, the Nebraska Legislature enacted a residency presumption for servicemembers continuously stationed in Nebraska for at least one year prior to filing.[7] But here, the devil lies in the details.

The Textual Flaw of § 42-349 for a Military Divorce: Residence vs. Domicile

The Nebraska Supreme Court expressly recognized in *Ashley v. Ashley* that the crux of a state's authority to exercise subject matter jurisdiction over a divorce is founded upon domicile.[8] Accordingly, *Ashley* and its progeny interpret § 42-349 to require at least one spouse to be domiciled in Nebraska for Nebraska to obtain subject matter jurisdiction over a divorce.[9] Following *Ashley*, the Nebraska Supreme Court in *Rector v. Rector* later read § 42-349 to include a rebuttable presumption in favor of domicile whenever a spouse proves actual residence within Nebraska for the year immediately preceding filing.[10]

The textual flaw of § 42-349 is that while *residency* is presumed under § 42-349 for servicemembers stationed in Nebraska, *domicile* is not. Remember that § 42-349 deems servicemembers ". . . residents of [Nebraska] . . . [,]" not domiciliaries. This is an important legal distinction, as residence refers to the location where an individual actually lives, while domicile refers to the last location where an individual was physically present with the intention to remain indefinitely.[11] And this distinction brings *Rector*'s domiciliary presumption into conflict with other Nebraska common law domicile rules for servicemembers.

For example, the Nebraska Supreme Court in *Means v. Means* held that "[t]he residence or *domicile* of a person in the military or naval service of his country is in no way affected by such service."[12] *Means*' military domicile rule was upheld in *Willie v. Willie*, which found that a major in the United States Army who entered the service in Nebraska in 1940 but who hadn't actually resided in Nebraska for over 16 years at the time of filing for divorce was still a domiciliary of Nebraska.[13]

If the Nebraska Legislature intended to supersede *Means* and *Willie* via § 42-349 (which was enacted after these cases), then the Legislature missed the mark. By using the term resident instead of domiciliary, *Means* and *Willie* are presumably still good law, meaning that a servicemember's domicile is unchanged after entering the service.

However, *Means* and *Willie* likely can only be read to create a rebuttable presumption of domicile for servicemembers, because the United States Supreme Court has made clear that irrebuttable presumptions of domicile are unconstitutional.[14] Accordingly, if someday the Nebraska Supreme Court construes "resident" under the second sentence of § 42-349 to actually mean "domiciliary" (effectively overruling *Means* and *Willie*), then such a holding, like *Rector*'s reading of the first sentence of § 42-349, would almost certainly have to find that the second sentence of § 42-349 merely creates a rebuttable presumption of domicile for servicemembers or else run afoul of the Constitution.[15]

Thus, the key takeaway here for attorneys is that regardless of whether a servicemember has been stationed in Nebraska for one year immediately prior to filing for divorce, the filing attorney must still determine whether the servicemember or his or her spouse was domiciled in Nebraska for the preceding year. As discussed below, this requirement may be fatal.

Proving Domicile for Servicemembers and Spouses

Nebraska law defines domicile as "a person's physical presence accompanied by the present intention to remain indefinitely at a location or site or by the present intention to make a location or site the person's permanent or fixed home."[16] The latter element of this test—individual intent—is often the center of domicile disputes. While neither the Nebraska Legislature nor the Nebraska Supreme Court has prescribed an exhaustive list of factors for courts to consider when determining domiciliary intent, Nebraska courts often weigh the following universal factors, which include examining the situs of an individual's:

- Current residence;
- Voter registration;
- Voting practices;

- Real property;
- Personal property;
- Financial accounts;
- Personal and professional memberships;
- Religious practices;
- Employment or education;
- Owned businesses;
- Driver's license;
- Preparation of a will;
- Automobile registration; and
- Tax payments.[17]

While proving these factors is not unique to military divorces, unique proof of these factors often exists for military divorces. For example, servicemembers usually sign a State of Legal Residence Certificate ("DD Form 2058"), in which servicemembers expressly declare their domicile.[18] The same is true for servicemembers who sign a State Income Tax Exemption Test Certificate ("DD Form 2058-1"),[19] or a Native American State Income Tax Withholding Exemption Certificate ("DD Form 2058-2").[20] These certificates are typically the most direct and persuasive documentary evidence to prove a servicemembers' domiciliary intent.

Servicemembers also declare a "Home of Record" when joining the service, which is used to determine travel and transportation allowances. A servicemember's Home of Record should not be mistaken for a declaration of domicile, but it may help to evidence a servicemembers' original domicile upon joining the service.[21]

It is also important to note that the Servicemembers Civil Relief Act and the Military Spouses Residency Relief Act expressly allow servicemembers and their spouses to retain and use the domicile of the servicemember upon entering service for taxation situs and voting rights.[22] And state laws allow for servicemembers and spouses to retain their state driver's licenses and vehicle registrations if absent from the state for service related reasons.[23] Accordingly, these types of records can be among the most persuasive in evidencing either an intent to maintain an original domicile or an intent to establish a new domicile—say upon beholding

the vibrant views of the Missouri River while flying into Offutt Air Force Base.

Ramifications of Improperly Filing a Military Divorce: Void Decree

Absent from the list of errors that can be remedied in a divorce is the lack of subject matter jurisdiction. When a Nebraska court grants a divorce without proper subject matter jurisdiction, the resulting decree is void.[24]

> Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. A judgment entered by a court which lacks subject matter jurisdiction is void. It is a longstanding rule in Nebraska that such a void judgment may be attacked at any time in any proceeding.[25]

While collaterally attacking a Nebraska divorce decree lacking subject matter jurisdiction in Nebraska may have limits, the ability to directly attack a Nebraska divorce decree within two years of its entry is unquestionable, and this ability arguably extends indefinitely if undertaken with the proper procedure.[26]

Furthermore, a void Nebraska decree may be challenged collaterally in another state, irrespective of any Nebraska state law limitations on challenging a void decree, if the contesting spouse was not properly served nor had the opportunity to contest the Nebraska decree.[27] This scenario is often labelled an *ex-parte* divorce, and collateral challenges to an *ex-parte* divorce often take the form a subsequently filed divorce in the state with proper subject matter jurisdiction.[28]

Other Filing Considerations for a Military Divorce: The UCCJEA and Forum Non Conveniens

When the issue of child custody arises in a military divorce, it is important to remember that the foundation for Nebraska's jurisdiction over child custody is separate from Nebraska's jurisdiction over a divorce.

For a Nebraska court to determine child custody issues incident to a military divorce, the Nebraska court must also have subject matter jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).[29] Unlike a divorce, domicile is not the requisite finding for child custody jurisdiction under the UCCJEA, rather the residence of the child controls.[30] Under the UCCJEA, Nebraska obtains initial jurisdiction over the custody of a child when that child has resided in Nebraska for at least six months preceding the commencement of a custody action.[31] There are exceptions and further complexities to determining jurisdiction under the UCCJEA that go beyond the scope of this article, but be aware that it is not uncommon for Nebraska to be the proper jurisdictional forum for a military divorce, while being an improper jurisdictional forum to determine child custody (or vice versa).

Another doctrine that practitioners should understand when representing clients in a military divorce is the doctrine of forum non conveniens. Because it is not unusual for servicemembers and their spouses to maintain separate domiciles, it is possible that a divorce may be properly filed in either spouse's state of domicile, assuming personal jurisdiction is proper in the filing state.[32] The first divorce filed will gain jurisdictional priority.[33] Yet, the state with jurisdictional priority may not be the state best suited or most appropriate to litigate a military divorce. For example, said state may lack jurisdiction under the UCCJEA to determine child custody issues, therefore necessitating a multistate, bifurcated divorce. In such circumstances, attorneys can file a second-in-time divorce proceeding in the more appropriate state, and motion the first-in-time state court for a dismissal of the initial action based on a finding of forum non conveniens.[34]

Common Military Divorce Scenarios and Suggestions

Finally, here are a few common scenarios for military divorces with filing suggestions:

1. Foreign Domiciliary Servicemember and Foreign Domiciliary Spouse Stationed in Nebraska: Servicemember has been stationed in Nebraska for over a year, and her spouse has lived in Nebraska with her for over a year. Both spouses maintain a foreign state domicile, which is evidenced by their taxes, voting records, and driver's licenses.

Filing Suggestions: Regardless of whether the spouses agree, their divorce cannot be filed in Nebraska and instead must be filed in their state of domicile.

2. Foreign Domiciliary Servicemember and Foreign Domiciliary Spouse Stationed in Nebraska with Children: Same facts as #1 above, except said spouses share minor children who live with them in Nebraska.

Filing Suggestions: If the minor children have resided with the spouses in Nebraska for six months or longer, then the divorce and custody actions must be bifurcated into separate proceedings in separate states. The custody action must be filed in Nebraska under the UCCJEA, and regardless of whether the spouses agree, their divorce cannot be filed in Nebraska and instead must be filed in their state of domicile.

3. Foreign Domiciliary Servicemember and Nebraska Domiciliary Spouse: Same facts as #1 above except spouse is a domiciliary of Nebraska as evidenced by his taxes, voting records, and driver's license.

Filing Suggestions: Filing for divorce in Nebraska is proper. Even though the servicemember is not a domiciliary of Nebraska, the spouse's domicile will grant Nebraska proper subject matter jurisdiction. It is likely that the servicemember will have maintained sufficient contacts with Nebraska by residing in Nebraska, and thus Nebraska should have proper personal jurisdiction over the servicemember.

Filing for divorce in the servicemember's foreign state of domicile is also proper, and the first-in-time filed divorce will receive jurisdictional priority. Whether a divorce in the foreign state would be considered an ex-parte divorce depends on whether the Nebraska spouse has maintained sufficient contacts with said foreign state for personal service of the spouse to be constitutional.

Under either filing approach, the spouses may consent to personal jurisdiction even if either lacks sufficient contacts with the filing state to be properly served.

Conclusion

It goes without saying that the time, expense, and conflict that an improperly filed divorce entails for servicemembers and their spouses is an unfortunate outcome that is preventable. While it is tempting for practitioners to question only the length of time that servicemembers and their spouses have been stationed in Nebraska, practitioners must dig further to determine domiciles, which—in spite of the surface language of § 42-349 and the Servicemembers Civil Relief Act—dictate proper subject matter jurisdiction. Failing to do so could well result in a knot that remains uncomfortably tied.

Endnotes

1 *See* NEB. REV. STAT. § 42-349 (Reissue 2016).

2 *See id.*

3 *Id.*

4 *See id.*

5 *See id.* Each state differs on the minimum length of "residency" required to file. For example, South Dakota has no minimum-length residency requirement. *See* S.D. CODIFIED LAWS § 25-4-30 (2020).

6 *See Ashley v. Ashley*, 191 Neb. 824, 217 N.W.2d 926 (1974); *Rector v. Rector*, 224 Neb. 800, 401 N.W.2d 167 (1987); *Huffman v. Huffman*, 232 Neb. 742, 744 N.W.2d 899 (1989); *Rozsnyai v. Svacek*, 272 Neb. 567, 723 N.W.2d 329 (2006); *Catlett v. Catlett*, 23 Neb. App. 136, 869 N.W.2d 368 (2015); *Metzler v. Metzler*, 25 Neb. App. 757, 913 N.W.2d 733 (2018).

7 *See* NEB. REV. STAT. § 42-349.

8 *See Ashley*, 191 Neb. at 826, 217 N.W.2d 926 (1974) (*citing Williams v. North Carolina*, 325 U.S. 226 (1945)).

9 *See Rector*, 224 Neb. at 801, 401 N.W.2d at 168 ("In [*Ashley*] this court recognized jurisdiction depends on domicile . . . [.]").

10 *See id.*

11 *See State v. Jensen*, 269 Neb. 213, 218, 691 N.W.2d 139, 144 (2005) ("A person may have two places of residence, but only one

of them may be his domicile."). *See also* JAMES W. MOORE ET. AL., MOORE'S FEDERAL PRACTICE ¶ 102.34[8] (3d ed. 2010) (noting that residence alone is insufficient to establish domicile).

[12] *Means v. Means*, 145 Neb. 441, 444, 17 N.W.2d 1, 3 (1945) (emphasis added).

[13] *Willie v. Willie*, 167 Neb. 449, 93 N.W.2d 501 (1958). *Means* and *Willie* are in unison with national authorities with respect to the preservation of a servicemember's domicile upon entering military service. "A member of the armed forces who is ordered to a station to which he must go and live in quarters assigned to him will usually not acquire a domicil[e] there though he lives in the assigned quarters with his family." PETER HAY, PATRICK J. BORCHERS & RICHARD FREER, CONFLICT OF LAWS: PRIVATE INTERNATIONAL LAW CASES AND MATERIALS 37 (15th ed. 2017) (quoting Restatement (Second) Conflict of Laws § 17c (Am. Law Inst. 1988)).

[14] *See Vlandis v. Kline*, 412 U.S. 441 (1973) (holding that the Due Process Clause of the Fourteenth Amendment prohibits states from enacting irrebuttable domiciliary presumptions that deny an individual the opportunity to present evidence to prove whether said individual is a bona fide domiciliary of the state).

[15] *See Vlandis*, 412 U.S. 441.

[16] *Catlett v. Catlett*, 23 Neb. App. 136, 144, 869 N.W.2d 368, 377 (2015) (*citing Huffman v. Huffman*, 232 Neb. 742, 744 N.W.2d 899 (1989)).

[17] *See* 13E CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3612, 536–41 (3d ed. 2009). *See also*, *Vlandis*, 412 U.S. at 448 (noting that the situs of residency, real property, driver's licenses, car registrations, and voter registrations are evidence indicative of a person's domicile). Note that the Nebraska Supreme Court has placed emphasis on the situs of voting and registering to vote. *See State v. Jensen*, 269 Neb. 213, 218–19, 691 N.W.2d 139, 144 (2005) (quoting *In re Estate of Meyers*, 137 Neb. 60, 288 N.W. 35 (1939) ("In doubtful cases particular significance should be attached to the repeated exercise of the right to vote, because this right depends upon citizenship and domicile, and must be generally, if not universally, supported by the oath of the voter.")).

[18] *See* Department of Defense Form 2058 (2018 ed.).

[19] *See* Department of Defense Form 2058-1 (2018 ed.).

[20] *See* Department of Defense Form 2058-2 (2018 ed.).

[21] *See* Department of Defense Form 2058.

[22] *See* 50 U.S.C. §§ 4001, 4025 (2018); 50 U.S.C. § 4027 (2019).

[23] *See, e.g.*, NEB. REV. STAT. § 60-4,121 (Reissue 2010).

[24] *See Catlett v. Catlett*, 23 Neb. App. 136, 143, 869 N.W.2d 368, 377 (2015) (*citing Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996)).

[25] *Kuhlmann*, 251 Neb. at 182, 556 N.W.2d at 19.

[26] *See* NEB. REV. STAT. § 42-346 (Reissue 2016); *Reveiz v El-Kasaby*, 305 Neb. 440, 940 N.W.2d 582 (affirming without opinion a district court order dismissing a declaratory action to void a divorce decree for lack of subject matter jurisdiction based on § 42-346, which prohibits attacking the validity of a divorce decree after two years of its entry). *But see* NEB. REV. STAT. § 25-2001(4) (Reissue 2016) ("A district court may vacate or modify its own judgments or orders after the term at which such judgments or orders were made (a) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order . . . [.]") (emphasis added); *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44, 73 N.W. 269 (1987) (finding judgments lacking jurisdiction may be vacated after term as having been irregularly obtained), rev'd on other grounds, *Bankers Life Ins. Co. v. Robbins*, 55 Neb. 117, 75 N.W.2d 585 (1898). Accordingly, a motion to vacate a decree, as opposed to a collateral action for declaratory relief, may well be permitted to set aside a decree for lack of subject matter jurisdiction after two years from its entry.

[27] *See* Richard A. Williamson, *Divorce Recognition – A Two-Headed Monster: Full Faith and Credit Due Process*, 455 WM & MARY FACULTY PUBLICATIONS 311 (1969) (discussing the commonly held view that *Williams v. North Carolina*, 325 U.S. 226 (1945), and *Sherrer v. Sherrer*, 334 U.S. 343 (1948), are read together to connote that collateral attacks against domicile findings in a divorce decree are contestable in another state only if the attacking spouse was not properly served and did not have the opportunity to contest the domicile findings in the original decree's proceedings).

[28] *See id*.

[29] *See* NEB. REV. STAT. § 43-1238 (Reissue 2016).

[30] *See id*.; NEB. REV. STAT. 43-1227(7) (Reissue 2016).

[31] *See* NEB. REV. STAT. § 43-1238(1).

[32] *See Metzler v. Metzler*, 25 Neb. App. 757, 913 N.W.2d 733 (2018), for an overview of personal jurisdiction considerations for a Nebraska divorce.

[33] *See Charleen J. v. Blake O*, 289 Neb. 454, 855 N.W.2d 587 (2014).

[34] *See* NEB. REV. STAT. § 25-538 (Reissue 2016); *Ameritas Investment Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005).