Comment,
TACTICAL STRATEGIES FOR JOINDER OF THIRD PARTIES AND JOINDER OF CLAIMS IN DIVORCE ACTIONS

I. Introduction

The divorce rate in America remains high.[1] So is the number of issues (and parties) that couples now seek to join in divorce actions. "Joinder" is defined as "the uniting of parties or claims in a single lawsuit."[2] Since interspousal tort immunity is a thing of the past,[3] couples today often seek to join civil actions with their divorce proceeding—from contract claims[4] to intentional torts like assault and battery.[5] Joinder of third parties has also become increasingly necessary in divorce actions where a third party possesses or claims an interest in property that a party to the divorce seeks to gain or receive as an award of support.[6]

As any attorney knows, preparing to file a claim takes patience, thorough research, and an understanding of current jurisdictional law. Although a wife may *want* to sue her spouse for intentional infliction of emotional distress during the marriage,[7] or a son *hopes* to avoid being joined as a party during his parents' dissolution,[8] jurisdictions are split in their approaches to permitting, requiring, or forbidding the joinder of claims and parties with dissolutions.[9] Before allowing joinder of either parties or claims, courts should consider the "judicial efficiency, procedural

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1 *See Divorce Rate (Most Recent) By Country*, NATIONMASTER.COM, *available at* http://www.nationmaster.com/graph/peo_div_rat-people-divorce-rate (2011). The current divorce rate in the United States is nearly 50 percent, the highest rate amongst countries world-wide. *Id.*

2 BLACK'S LAW DICTIONARY (9th ed. 2009).

3 *See generally* Barbara Glesner Fines, *Joinder of Tort Claims in Divorce Actions*, 12 J. AM. ACAD. MATRIM. LAW. 285, 287-89 (1994); *see also* Kristyn J. Krohse, Note, *No Longer Following the Rule of Thumb – What to do With Domestic Torts and Divorce Claims*, 1997 U. ILL. L. REV. 923, 925-28.

4 *See*, *e.g.*, Ashby v. Ashby, 227 P.3d 246 (Utah 2010).

5 *See*, *e.g.*, Toles v. Toles, III, 45 S.W.3d 252 (Tex. Ct. App. 2001).

6 24 AM. JUR. 2d *Divorce & Separation* § 206 (2010).

7 *See*, *e.g.*, Boblitt v. Boblitt, 118 Cal. Rptr. 3d 788 (Cal. Ct. App. 2010).

8 *See* Bond v. Bond, 161 S.W.3d 859 (Mo. Ct. App. 2005).

9 *See* discussion *infra* Parts II & III.

rationality, and potential for confusion and prejudice that may result[.]"[10] Part II of this article will address the various reasons parties to a dissolution may seek to join other *claims* with their divorce causes of action, while Part III will address the reasons third *parties* are joined with dissolutions. Each part will analyze the different approaches jurisdictions use when handling these situations, as well as highlight tactical considerations and some jurisdictionally mandated requirements that parties and attorneys must think about before seeking to join a party or a claim with a dissolution.

II. Joinder of Claims in Dissolution Cases

The purpose of a tort claim is to redress a legal wrong through damages while the purpose of a divorce claim is to sever the marital relationship between the parties.[11] Divorce actions and tort claims are drastically different causes of action and it should therefore, according to one commentator, be up to the parties involved whether or not to join the causes of action.[12] "Individuals who are married to each other should have the same rights, protections, and legal recourse that strangers would have."[13]

Joinder of a tort claim with a dissolution proceeding presents several advantages and disadvantages. As one critic notes:

> [w]hen the courts allow the claims to be joined, the parties are able to save money. When the claims can be joined, the party filing will incur fewer court costs and will need only work with one attorney. If joinder is prohibited and the parties want to pursue both claims, the parties are forced to pay for both proceedings. This may very well involve hiring two different attorneys, which would also raise the cost of the transaction . . . when joinder is prohibited, given the costs of bringing

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10 *See* Krohse, *supra* note 3, at 935 (internal citations omitted).

11 Glesner Fines, *supra* note 3, at 296.

12 Valencia Bilyeu, *Survey: Joining Interspousal Personal Injury Tort Claims With Divorce Actions*, 30 IDAHO L. REV. 859, 868 (1994). However, some courts mandate that the causes of action remain separated or, conversely, mandate that they be joined – regardless of the parties' wishes. *See infra* text at notes 25-55.

13 *Id.* at 859.

> two separate suits, parties may be deterred from bringing the tort suit at all.[14]

Parties considering joining claims must also weigh the likelihood that by joining their tort claim with the divorce, they will lose their right to jury trial in the tort action.[15]

A. *A Spectrum of Claim Joinder Issues*

Most states have considered the issue of joining torts with divorce actions; however, there is not a general consensus among jurisdictions as to how to treat such joinder.[16] It is important to research the state in which you will be filing to determine the court's opinion on joining claims with a dissolution.[17] Overall, states have adopted three basic approaches in deciding if other claims can be joined with a dissolution: mandating joinder of all claims by a broad application of issue preclusion (res judicata), prohibiting joinder of claims all together, or allowing but not mandating joinder.[18]

"Permissive" joinder *entitles* an injured spouse *to decide* whether to join the tort with the divorce action.[19] "Mandatory" joinder, on the other hand, *requires* an injured spouse to join

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14 Krohse, *supra* note 3, at 956.

15 *See* Glesner Fines, *supra* note 3, at 298. Thus, in jurisdictions where joinder is permissible, "joinder accomplishes minimal efficiencies when tort actions must be separated to preserve the jury right." *Id.* However, "voluntary addition of [sic] tort claims to a divorce action waives the right to a jury trial[.]" *Id.* at 306.

16 Bilyeu, *supra* note 12, at 864.

17 Illinois, for example, has simply stated that its law requires resolution of all issues "ancillary" to a dissolution, as well as the dissolution itself, in a single proceeding for "reasons of certainty, financial security, and judicial economy." *In re* Marriage of Mardjetko, 861 N.E.2d 354, 355 (Ill. App. Ct. 2007) (internal citations omitted).

18 Glesner Fines, *supra* note 3, at 291. *See also* San Pedro v. San Pedro, 910 So.2d 426, 428 (Fla. Dist. Ct. App. 2005) (holding that interspousal tort claims *may* be brought in the dissolution proceeding or can be brought as a separate action); Sullivan v. Sullivan, 105 P.3d 963, 966 (Utah Ct. App. 2004) (stating that trial courts have broad discretion in determining the outcome of joinder of claims; however in this case, joinder was necessary due to facts specific to UCCJEA rules).

19 Bilyeu, *supra* note 12, at 867 (emphasis added). The same is true of "permissive" joinder of third parties to divorce actions.

their tort claim with the dissolution.[20] Because divorces are equitable causes of action and tort claims are legal actions, most courts have held that creating mandatory joinders would cause divorces to be extremely complex and unduly long.[21] Other courts, conversely, argue that permissive joinders would encourage "surprise and unfair divorce agreements."[22] Courts must decide how to accommodate a litigant's right to a jury trial for the tort claim, how to handle contingency fees, and how efficient or burdensome the case will become if the two claims are joined.[23] Commentators on claim joinder often suggest that under the general principles of res judicata, a tort claim between spouses should be joined with a divorce proceeding because "both actions arise out of the same 'transaction.'"[24] It is vital for the success of the second claim for attorneys to not only consider the jurisdiction's attitude to joinder of claims with a dissolution, but also to judge strategic considerations regarding the specific claims.

1. *Tactical Considerations for Claim Joinder*

There are various strategies to argue successfully for joinder of an additional claim in a dissolution proceeding. Many jurisdictions that permit joinder of claims do so under the assumption that allowing such joinder will prevent multiple additional claims in the future. Courts also tend to allow joinder when the facts of the case are such that combining the claims is not barred by res judicata or issue preclusion. Some courts, though, have decided to take a hard stance and hold that joinder of claims with a dissolution is banned for public policy reasons. In these jurisdictions, it is likely most efficient to simply file separate causes of action in the appropriate courts.

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20 *See id.* at 867 (emphasis added). The same is true of "mandatory" joinder of third parties to divorce actions. "Mandatory" joinder is typically governed by each state's individual procedural joinder statute. *See infra* discussion in text at notes 68-70.

21 *See* Bilyeu, *supra* note 12, at 866 (citing Stuart v. Stuart, 421 N.W.2d 505, 508 (Wis. 1988)).

22 *Id.* at 867 (citing Nash v. Overholser, 757 P.2d 1180, 1185 (Idaho 1988) (Huntley, J., concurring)).

23 Krohse, *supra* note 3, at 935.

24 Glesner Fines, *supra* note 3, at 286.

a. *Avoid Multiplicity of Claims*

Courts do not like seeing the same parties repeatedly in additional cases if that can be prevented. Thus, courts often allow interspousal claims to be joined within the dissolution proceeding to prevent subsequent causes of action at a later date. Courts refer to such reasoning as the "entire controversy doctrine" or simply state that they want to avoid "multiplicity of claims."[25] The entire controversy doctrine encompasses virtually all claims, causes of action, and defenses relating to a controversy and requires that all parties to the suit assert all claims at one time.[26] While some courts want to reserve the additional claims for a later time or a different court, others desire the opposite effect and want to essentially "get it over with" while they have all of the parties together.[27] It would be a waste of time to file the claims jointly if your jurisdiction has mandated that the claims remain separate, and could potentially be futile to keep them separate if your jurisdiction allows joinder (unless done so for strategic reasons).

The Utah Supreme Court decided a case in 2010 ordering that spousal contract claims must be joined with a dissolution proceeding or such claims will be waived.[28] In *Ashby*, the wife joined a claim for breach of a student support contract when she filed for divorce.[29] The trial court initially bifurcated the issues; but on appeal the Supreme Court held that not only is that type of contract claim enforceable between spouses, the issues were correctly joined in the initial dissolution filing.[30] The court based its decision on two reasons.[31] First, the court reasoned that the district judge who presides over the dissolution has the best understanding of the relationship of the spouses and is therefore in the best position to make a determination on the enforceability of a student support contract claim.[32] Second, the court held that joining the claims together in the divorce action best served pub-

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25 *See* Oliver v. Ambrose, 705 A.2d 742, 747 (N.J. 1998).

26 *Id.* at 747 (internal citations omitted).

27 *See* Herndon v. Herndon, 139 S.W.3d 822, 824 n.4 (Ky. 2004).

28 Ashby v. Ashby, 227 P.3d 246, 248 (Utah 2010).

29 *Id.*

30 *Id.* at 249, 254.

31 *Id.* at 254.

32 *Id.*

lic policy because it would be "imprudent to empower a district court to grant an alimony award only to have that award later frustrated by a legal determination of contract rights in another action."[33]

In a New York case involving proper venue of dissolution proceedings, the court held that "[w]here common questions or law or fact exist, a motion to consolidate . . . should be granted absent a showing or prejudice to a substantial right by the party opposing the motion."[34] Similarly, the Supreme Court of Rhode Island has held that the bifurcating of spousal issues from the dissolution should be the exception, not the rule.[35]

b. *Barred by Res Judicata*

Some jurisdictions have a requirement or an expectation that the plaintiff raise his or her tort causes of actions against a spouse in the dissolution proceeding.[36] The argument is that once a divorce decree is issued, the subsequent tort claims are barred by the doctrine of res judicata (claim preclusion) or collateral estoppel (issue preclusion).[37] Although this sounds vaguely like the above argument concerning avoiding multiple claims in the future, courts have allowed or banned joinder of claims by reasoning under both doctrines and the strategies employed when deciding whether or not to join claims could potentially make or break its case.

Res judicata prevents the parties of one action from re-litigating in an additional lawsuit any causes of action that were, or could have been, litigated in the first action.[38] If the jurisdiction where the dissolution is being litigated does not permit joinder of

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33 *Id.* at 254-55.

34 Moor v. Moor, 39 A.D.3d 507, 507 (N.Y. App. Div. 2007) (internal citations omitted). Although this case does not involve joinder of different causes of action (the husband wanted to consolidate two divorce proceedings that were taking place in different counties), it is still important to note the court's reasoning for allowing the consolidation of the cases.

35 Koutroumanos v. Tzeremes, 865 A.2d 1091, 1094 n.2 (R.I. 2005).

36 Nechama Masliansky, 6-67 FAMILY LAW & PRACTICE § 67.16[f] (Matthew Bender & Co, Inc.) (2010).

37 *Id.*

38 *Id.* at [f][i].

claims, then the divorce decree cannot have "preclusive effect" on the tort claims the parties have against each other.[39]

Collateral estoppel, on the other hand, does not allow for relitigation in a second cause of action of issues that were "fully and fairly litigated" between the same parties to the first action.[40] This argument is only sound if the prior judgment was a final judgment and if the second issue was actually decided in the initial action.[41] At least one court has additionally held that when tort claims are tried within a divorce action, courts cannot permit double recovery of damages.[42]

In a recent California decision, the Court of Appeals addressed the idea of issue preclusion in divorce cases.[43] The wife in this case filed causes of action against her then ex-husband for domestic violence, assault, battery, breach of fiduciary obligations, and negligent and intentional infliction of emotional distress – three years after the dissolution had been ordered.[44] The husband argued that the wife's claims were barred by issue preclusion in that they could have, and should have, been tried in the divorce.[45] The court, however, disagreed by holding that the causes of action involved different rights and therefore were not precluded from being brought at a later date.[46] The court added that, in California at least, a tort action claiming damages cannot be joined with a dissolution.[47]

B. *Jurisdictions that Bar Claim Joinder*

Like California,[48] several other jurisdictions do not permit joinder of claims with dissolutions, no matter what arguments are presented advocating for such joinder. Colorado, for example,

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39 *Id.*

40 *Id.*

41 6-67 FAMILY LAW & PRACTICE, *supra* note 35, at [f][ii].

42 Toles v. Toles, 45 S.W.3d 252, 264 (Tex. App. 2001) (citing Twyman v. Twyman, 855 S.W.2d 619, 625 (Tex. 1993)).

43 *See* Boblitt v. Boblitt, 118 Cal. Rptr. 3d 788 (Cal. Ct. App. 2010).

44 *Id.* at 791.

45 *Id.* at 792.

46 *Id.* at 796.

47 *Id.* at 797.

48 *See* Boblitt v. Boblitt, 118 Cal. Rptr. 3d 788, 797 (explaining that "[g]iven finite family law jurisdiction, a tort action claiming damages cannot be joined or pleaded in a dissolution proceeding.") (internal citations omitted).

has consistently held that separate causes of actions must be filed for an interspousal tort claim and a divorce proceeding.[49] On at least four separate occasions, the courts repeatedly emphasized that a divorce action and tort claims must remain in different proceedings due to the equitable nature of a divorce proceeding and the procedural requirements for a tort claim.[50] In *Simmons*, the court additionally explained that "sound policy considerations preclude *either* permissive or compulsory joinder of interspousal tort claims, or non-related contract claims, with dissolution of marriage proceedings."[51]

The Wyoming Supreme Court has likewise mandated that tort claims between husband and wife remain separate causes of action for public policy and civil procedural reasons.[52] In *McCulloh v. Drake*, the court explained that while divorce actions are more equitable in nature, tort claims often require a trial by jury so for the benefit of the parties and "administration of justice," the proceedings should remain separate.[53] The court further referenced the negative aspects associated with combining the claims into one action by saying that joining a tort claim with a dissolution proceeding could "unduly lengthen the period of time before a spouse could obtain a divorce and result in such adverse consequences as delayed child custody and support determinations."[54] Oregon simply holds that a divorce court does not have the authority to award damages for injuries received by one spouse at the hand of the other and interspousal tort claims must be bifurcated.[55]

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49 *See* Wilson v. Prentiss, 140 P.3d 288 (Colo. App. 2006); *In re* Marriage of Ludwig, 122 P.3d 1056 (Colo. App. 2005); *In re* Marriage of Lewis, 66 P.3d 204 (Colo. App. 2003); Simmons v. Simmons, 773 P.2d 602 (Colo. App. 1988).

50 *See, e.g.*, Simmons v. Simmons, 773 P.2d at 604.

51 *Id.* at 605 (emphasis added).

52 *See* McCulloh v. Drake, 24 P.3d 1162 (Wyo. 2001).

53 *Id.* at 1170.

54 *Id.* (internal citations omitted).

55 *See* Gaber v. Gaber, 32 P.3d 921, 923, n.1 (Or. Ct. App. 2001) (citing In re Marriage of Koch & Koch, 648 P.2d 406 (Or. Ct. App. 1982)).

III. Joinder of Third Parties in Dissolution Cases

Issues implicated in a divorce may impact persons other than the husband and wife and their children.[56] Parents of the parties, corporations intertwined with the litigants, and various other third parties involved with the marital assets may be affected by the divorce.[57] Recognizing the effect that the divorce can have on these other people, courts may allow the outsiders to be joined as parties to the divorce settlement. If the third party is not joined by either party to the divorce, the third party himself has the right to intervene to protect his interests.[58] However, third parties should not be allowed to join to advance their own "parochial" interests.[59] Thus, courts have consistently held that it is acceptable for additional parties to be joined in a divorce action, but the interests they seek to protect must be substantially related (or at least not too remote) to the disputes of the divorce.[60]

Joinder of a third party in a dissolution case most frequently becomes an issue when the third party is an owner of all or part of the marital property.[61] A third party may be added, for example, to clarify who owns what property,[62] to determine if there was fraudulent transfer of the marital property[63] or to avoid multiple claims that may arise in the future from a distribution of

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56 Gregg A. Greenstein, *Joinder of Third Parties in Divorce Cases*, 26 COLO. LAW. 75, 75 (May 1997). At least one jurisdiction clarifies that children are *not* parties to their parents' divorce and have no right to have representation in the dissolution proceedings. *See* Rowe v. Rowe, 218 P.3d 887, 890 (Okla. 2009).

57 *See* Greenstein, *supra* note 48, at 75.

58 1-2 FAMILY LAW & PRACTICE § 2.06[3] (Matthew Bender & Co, Inc.) (2011).

59 Hendrick v. Hendrick, 765 N.W.2d 865, 871 (Wis. Ct. App. 2009) (holding that a putative father should not be allowed to intervene in divorce action in order to dispute paternity results being admitted into evidence).

60 *See generally* Frank D. Wagner, Annotation, *Propriety of Consideration of, and Disposition as to, Third Persons' Property Claims in Divorce Litigation*, 63 A.L.R.3D 373, § 2 (1975); *see also* Brett R. Turner, *Division of Third-Party Property in Divorce Cases*, 18 J. AM. ACAD. MATRIM. LAW. 375, 426 (2003).

61 3-37 FAMILY LAW & PRACTICE § 37.02 (Matthew Bender & Co, Inc.) (2011).

62 *See*, *e.g.*, Bond v. Bond, 161 S.W.3d 859 (Mo. Ct. App. 2005).

63 *See*, *e.g.*, Roberts v. Roberts, 173 S.E.2d 675 (Ga. 1970).

property.[64] Some courts have even held that it would be improper to decide division of marital property without the mandatory joinder of a third party.[65] Various courts have addressed these issues and have ruled differently according to facts specific to each case.

A. *A Spectrum of Party Joinder Issues*

In most jurisdictions, if the property is clearly owned jointly by either or both of the spouses in conjunction with the third party, then the third party can easily join in the dissolution action.[66] "The purpose of this rule is to allow individuals to join whose interests need to be protected."[67] If, however, the property is titled solely in the third party's name, joinder may be more difficult.[68] Typically, property cannot be divided by a divorce court unless it is owned by the spouses (as marital property); but property owned solely by a third party is not marital property and therefore cannot by divided in a dissolution proceeding.[69] It is the duty of the court to determine which marital property is actually owned by the parties.[70]

When property that is alleged to be marital property is owned in whole or in part by a third party, the divorce court may nevertheless have jurisdiction to determine if the property is in fact marital property and in doing so may join as parties other persons with an interest in the property.[71] If the third party is not interpleaded by either party to the initial dissolution, he or she may intervene to establish a property right.[72]

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64 *See* Wagner, *supra* note 60, at § 3[b].

65 *See*, *e.g.*, *In re* Marriage of Ward, 659 S.W.2d 605 (Mo. Ct. App. 1983).

66 3-37 FAMILY LAW & PRACTICE, *supra* note 61, at [6].

67 24 AM. JUR. 2D *Divorce & Separation* § 206 (2010).

68 3-37 FAMILY LAW & PRACTICE, *supra* note 53, at [6].

69 *Id.* (citing Walton v. Walton, 769 S.W.2d 162 (Mo. Ct. App. 1989); Addington v. Addington, 522 So. 2d 897 (Fla. Dist. Ct. App. 1988)).

70 *See Bond* 161 S.W.3d 859 (Mo. Ct. App. 2005).

71 3-37 FAMILY LAW & PRACTICE, *supra* note 61, at [6] (citing Van Buskirk v. Van Buskirk, 590 A.2d 4 (Pa. 1991); *In re* Sexton, 380 S.E.2d 832 (S.C. 1989)).

72 1-2 FAMILY LAW & PRACTICE, *supra* note 58, at [3].

B. *Tactical Considerations for Third Party Joinder*

Joinder of a third party in a dissolution cause of action requires research of the jurisdiction in which you are filing to determine if joinder will even be permissible. Courts tend to favor certain approaches to joinder of a third party in a dissolution proceeding. Many jurisdictions that permit third party joinders do so under the assumption that allowing such joinder will prevent multiple additional claims in the future.[73] Courts also tend to allow joinder when there is evidence of fraudulent transfer of part or all of the marital property.[74] In these circumstances, courts either allow or require the third party to be added as a party to the dissolution to determine ownership of the property. Other courts take the hard stance that proper disposition of the property cannot be had without the addition of a third party.

1. *Avoid Multiplicity of Claims*

Just as courts use this reasoning to permit joinder of tort claims with divorce claims, so too do courts like this logic when deciding to allow joinder of third parties in dissolutions. The Missouri Court of Appeals has held that "[j]oinder of all the interested parties allows for finality of the judgment and alleviates any due process concerns when the judgment affects property subject to a claim of ownership by an outsider."[75] The rationale, the court argued, rests on the inability of the divorce court to make an equitable distribution of the marital property if all potential claims "are not simultaneously adjudicated and the consequent multiplicity of suits or circuity of actions if third parties are left subsequently to litigate their claims with the divorced spouses."[76]

In *Bond v. Bond*, the wife sought to have a company joined as a third party to her divorce.[77] The company had two shareholders, the adult children of the couple, who argued, like the

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73 *See infra* discussion in text at notes 75-80.

74 *See infra* discussion in text at notes 81-100.

75 *Bond*, 161 S.W.3d at 860.

76 *Id.* For additional cases that have permitted joinder of parties in divorce actions under similar reasoning, *see* Spencer v. Spencer, 60 Cal. Rptr. 747 (Cal. Ct. App. 1967); Baker v. Baker, 128 N.E.2d 616 (Ill. App. Ct. 1955); Wharff v. Wharff, 56 N.W.2d 1 (Iowa 1953).

77 *Bond*, 161 S.W.3d at 860.

husband, that the company was therefore not marital property available for distribution because it was not owned by either party to the divorce.[78] The trial court allowed, and the court of appeals affirmed, the company and the children to be joined in the divorce and found that the company was in fact marital property.[79] In so holding, the court noted that when all parties are necessarily joined in a dissolution action, the court has the authority to set aside any corporate causes of action and establish the true ownership of the company in a single action.[80]

2. *Demonstrate a Party's Fraudulent Transfer of Property*

Jurisdictions that do not commonly allow joinder of third parties in divorce actions often view fraudulent transfer of property or assets to a third party as an "exception" to this rule.[81] "When fraud is alleged, third parties can be joined in the divorce action only if they have conspired with one spouse to defraud the other spouse of a property interest."[82] Courts often will look "to the beneficial, not just the legal ownership" of the property[83] and third parties may then be joined, either by the husband, wife, or by the third party himself, to demonstrate who actually has ownership of the property that is allegedly marital property.[84]

For example, in a recent decision by the California Court of Appeals, the court held in underlying causes of actions that independent shareholders should be joined as parties when they owned property that was fraudulently concealed and conveyed during a dissolution proceeding.[85] Initially the wife alleged that her husband secretly owned part of a trademarked company and

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78 *Id.* at 860-61.

79 *Id.* at 861.

80 *Id.* at 862.

81 *See*, *e.g.*, Smela v. Smela, 367 N.W.2d 426 (Mich. Ct. App. 1985); Dean v. Dean, 275 N.W.2d 902 (Wis. 1979); 10 MICH. PL. & PR. § 70:31 (2nd ed.) (2011).

82 Estes v. Titus, 751 N.W.2d 493, 498 (Mich. 2008) (internal citations omitted).

83 3-37 FAMILY LAW & PRACTICE, *supra* note 61, at [6].

84 "A spouse in a dissolution proceeding can be a 'creditor' authorized to sue to undo a fraudulent transfer." Haubenschild v. Haubenschild, No. A08-0097, 2009 WL 66377, at *6 (Minn. Ct. App. Jan. 13, 2009).

85 *In re* Marriage of Bohbot, No. B214035, 2010 WL 4108439 (Cal. Ct. App. Oct. 20, 2010).

moved to have both the company and its single shareholder joined as parties to her dissolution, arguing that they controlled assets that were community property.[86] The court allowed the joinder and the parties reached a stipulated dissolution.[87] Years later, the wife sought to have the property division of the dissolution set aside due to the husband's fraudulent acts of misrepresenting his ownership in additional companies.[88] The trial court dismissed her request but the appellate court reversed, holding that the husband should have disclosed ownership of the company before adequate property distribution could be made.[89] The wife again sought joinder, this time of a different shareholder, to concretize her allegations that the shareholder had fraudulently concealed community property during the dissolution.[90] The court again found that the shareholder was a necessary party to the litigation to determine ownership of the company and its trademark assets.[91]

The Connecticut Court of Appeals similarly held that a transferee of an alleged fraudulent conveyance of property could be joined as a party in a dissolution.[92] The court limited its holding to the facts of this case where the property was allegedly transferred to the transferee by the husband to deny the wife her rights to the property.[93] Here, the court held, the transferee had not disclaimed ownership of the property and any disposition of the property in the dissolution would affect the interests of the transferee, which therefore required his joinder as a party.[94] The court additionally concluded that by allowing joinder of the third party, the court could avoid multiple claims in the future and afford the parties complete relief in a single proceeding.[95]

Other jurisdictions hold that third party property claims still must remain a separate action, even when fraudulent transfer is

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86 *Id.* at *1.

87 *Id.*

88 *Id.* at *2.

89 *Id.*

90 *In re* Marriage of Bohbot, 2010 WL 4108439 at *3.

91 *Id.*

92 Gaudio v. Gaudio, 580 A.2d 1212, 1217 (Conn. App. Ct. 1990).

93 *Id.*

94 *Id.*

95 *Id.*; *see also supra* discussion of joinder of third parties to avoid multiplicity of future claims in text at notes 75-80.

alleged.[96] For example, in *Howard v. Howard*, the trial court ordered that the "marital property" be divided equally, including the property that the husband had fraudulently transferred to his business partners prior to the divorce proceedings.[97] The Maine Supreme Court remanded the case to allow the business partners and any other interested parties in the property to join in a *separate* action that may result from the divorce litigation.[98] The court explained that joinder of a third party in a dissolution is only permitted with causes of actions that could be brought independently in family court.[99] In this instance, the court found that the third party owners of part of the "marital property" did not have a cause of action that could be maintained separately in the Family Division and therefore were not allowed to join as parties to the actual divorce.[100]

3. *Property Disposition Would be Improper Without Joinder*

Some jurisdictions go so far as to say that a third party is not only a proper party to the proceeding, but is a necessary party that must be joined.[101] The Federal Rules of Civil Procedure mandate that a person is required to be joined as a party to a cause of action if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.[102]

Most states and the District of Columbia have some variation of statutes worded nearly identically to that of the federal

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96 *See generally* Howard v. Howard, 2 A.3d 318 (Me. 2010).
97 *Id.* at 320.
98 *Id.* at 322.
99 *Id.* at 323.
100 *Id.*
101 Wagner, *supra* note 60, at § 8.
102 FED. R. CIV. P. 19(a)(1) (2011).

rules for civil actions.[103] However, seven states including Connecticut, Florida, Georgia, Illinois, New Hampshire, Pennsylvania, and Rhode Island, have adopted statutes that provide other alternatives for adding third parties to civil cases and do not follow the federal method.[104] A misjoinder of parties, however, is not by itself a sound basis for dismissal of a divorce action.[105]

Typically in divorce actions, third parties are required to be joined when distribution of marital property includes property owned by the third party.[106] For example, the Appellate Court

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103 *See* ALA. R. CIV. P. 19(a) (1995); ALASKA R. CIV. P. 19(a) (1994); ARIZ. R. CIV. P. 19(a) (1987); ARK. R. CIV. P. 19(a) (1984); CAL. CODE CIV. P. § 389(a) (2009); COLO. R. CIV. P. 19(a) (2010); DEL. R. CIV. P. 19(a) (2011); D.C. SCR-Civil Rule 19(a) (2010); HAW. R. CIV. P. 19(a) (1980); IDAHO R. CIV. P. 19(a)(1) (2004); IND. R. CIV. P. 19(A)(1-2) (2011); IOWA R. CIV. P. 1.234 (2009); KAN. R. CIV. P. 60-219 (2009); KY. R. CIV. P. 19.01 (1978); LA. CODE CIV. PROC. ANN. art. 641 (2011); ME. R. CIV. P. 19 (2010); MD. CODE ANN., CIV. P. – CIR. CT. § 2-211 (2011); MASS. R. CIV. P. 19 (2010); MICH. R. CIV. P. 2.205 (1985); MINN. R. CIV. P. 19.01 (2006); MISS. R. CIV. P. 19(a) (1982); MO. R. CIV. P. 52.04(a) (1999); MONT. CODE ANN. § 25-20-IV-19(a) (2009); NEB. CT. R. § 25-323 (2006); NEV. R. CIV. P. 19(a) (2005); N.J. R. CIV. P. 4:28-1(a) (2011); N.M. DIST. CT. R.C.P. 1-019(A) (2011); N.Y. C.P.L.R. 1001 (McKinney 2011); N.C. GEN. STAT. § 4-19 (2011); N.D. R. CIV. P. 19(a) (2011); OHIO R. CIV. P. 19(A) (1970); OKLA. R. CIV. P. § 12-2019(A) (2010); OR. R. CIV. P. 29(A) (2009); S.C. R. CIV. P. 19(a) (2011); S.D. CODIFIED LAWS § 15-6-19(a) (2011); TENN. R. CIV. P. 19.01 (2011); TEX. R. CIV. P. 39(a) (2010); UTAH R. CIV. P. 19(a) (2010); VT.R.C.P. R. 19(a) (2011); VA. SUP. CT. R. 3:12(a) (2011); WASH. CR 19(a) (2010); W. VA. R. CIV. P. 19(a) (2011); WIS. STAT. § 803.03(1) (2010); WYO. R. CIV. P. 19(a) (2010).

104 *See* CONN. PRAC. BOOK § 9-3 through 9-6 (2011), FLA. R. CIV. P. 1.210 (2010); GA. UNIF. MAGISTRATE CT. 39 (2010); 110 ILL. COMP. STAT. 5/2-404 (2011); N.H. PROB. R. 139 (2011); PA. R. CIV. P. 2227 (1999); R.I. R. Civ. P. 19(a) (2011).

105 Greenstein, *supra* note 56, at 75 (internal citations omitted).

106 *See*, *e.g.*, *In re* Hohenberg, 143 B.R. 480, 489 (Bkrtcy. W.D. Tenn. 1992) (holding that bankruptcy trustee was a necessary party to the dissolution to extent of discovery and litigation concerning the property of the bankruptcy estate); Nicevski v. Nicevski, 909 N.E.2d 446 (Ind. Ct. App. 2009) (stating that because husband's parents were not joined as parties to the dissolution, the court did not have jurisdiction to make decisions regarding marital property owned by the parents); *In re* Marriage of Sammons, 642 N.W.2d 450, 456 (Minn. Ct. App. 2002) (ruling that because mother of husband in dissolution proceeding wasn't joined as a party, she could appeal an order creating a constructive trust on property owned by the mother).

of Connecticut required a stock purchaser be joined in a dissolution proceeding because rights to the property could not rightfully be decided without his involvement.[107] The Connecticut Supreme Court has held that the wife's mother, who held title to land that was being disputed as marital property, was a necessary party to the dissolution in that the trial court could not determine if the property was in fact marital and subject to division without the mother's presence.[108] Likewise a Hawaii Intermediate Court of Appeals affirmed a trial court's finding that it had no jurisdiction to hear or make a decision regarding property owned by a record owner that had not been properly joined in the divorce litigation.[109]

In a case involving a third party who was not joined as a trustee of a trust that was being disputed as marital property, the Texas Appellate Court held that the court did not have jurisdiction to distribute the trust assets without proper joinder.[110] The court explained that although the husband was originally the trustee, the trial court erroneously appointed a new trustee and divided the assets, but failed to join the new trustee in the divorce action.[111] The trust was therefore not before the court and could not be divided between the husband and wife.[112]

Courts have gone the opposite direction as well, holding that parties need not be joined in a divorce proceeding if their rights can otherwise be protected.[113] Third parties seeking to intervene must be mindful of intervening by right or privilege in a timely manner.[114]

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107 Gaudio v. Gaudio, 580 A.2d 1212 (Conn. App. Ct. 1990).

108 *See* Owusu v. Owusu, 2008 WL 590373 (Conn. Super. Ct. Feb. 14, 2008).

109 Rossiter v. Rossiter, 666 P.2d 617, 620 (Haw. Ct. App. 1983).

110 *In re* Aston, 266 S.W.3d 602, 604 (Tex. App. 2008).

111 *Id.*

112 *Id.*

113 *See*, *e.g.*, Walters v. Walters, 113 S.W.3d 214, 219 (Mo. App. Ct. 2003) (holding that the husband's mother did not need to be joined as a party to the dissolution in order for the court to divide marital property in which the mother had an interest); Tannen v. Tannen, 3 A.3d 1229, 1244 (N.J. Super. Ct. App. Div. 2010) (finding that trusts were improperly joined as parties in a divorce when any information regarding if income from the trusts could be added to wife's income could be discovered through subpoenas).

114 Wager, *supra* note 60, at §2[b].

In *Tyson v. Tyson*, the Alabama Court of Civil Appeals cited to its rules of civil procedure when making its decision not to require the wife's step-father be joined in a dissolution action.[115] The court held that the absence of the step-father did not preclude the court from granting complete relief to all parties and was therefore not required to be joined, as suggested by the husband.[116] The Indiana Court of Appeals refused to grant joinder of a third party creditor, as requested by the wife, when the creditor did not claim any interest in the parties' marriage or the dissolution and the parties could be afforded relief without the creditor's presence.[117]

Various other limited circumstances may require that one or both of the parties to the dissolution appear through a personal representative, which requires joinder of a third party.[118] Most frequently, this occurs when one of the parties is an incompetent spouse,[119] a minor,[120] or is incarcerated.[121] In states where adultery is still a ground for divorce,[122] "the co-respondent" is allowed to be joined as a party for the limited purposes of protecting his or her reputation.[123]

Certain situations involving the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) may also require a third party to be joined to establish custody rights in a dissolution

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115 Tyson v. Tyson, 21 So.3d 7, 10 (Ala. Civ. App. 2009).

116 *Id.*

117 Gaw v. Gaw, 822 N.E.2d 188, 190-91 (Ind. Ct. App. 2005).

118 *See generally* 1-2 FAMILY LAW & PRACTICE, *supra* note 58.

119 *Id. See also*, *e.g.*, Jackson v. Bowman, 294 S.W.2d 344 (Ark. 1956) (ordering that a guardian be appointed and joined as a party to represent a mentally incompetent wife during her divorce proceeding).

120 1-2 FAMILY LAW & PRACTICE, *supra* note 58, at [1][a][i]. *See also*, *e.g.*, Nims v. Nims, 305 S.W.2d 875 (Mo. Ct. App. 1957) (holding a divorce null and void when a minor was not represented by a guardian ad litem during his divorce proceedings).

121 1-2 FAMILY LAW & PRACTICE, *supra* note 58, at §2.06. *See also*, *e.g.*, Lynk v. LaPorte Sup. Ct. No. 2, 789 F.2d 554 (7th Cir. 1986) (denying husband a divorce because he was incarcerated and unable to appear in person to court proceedings).

122 *E.g.*, New York & Pennsylvania; 1-2 FAMILY LAW & PRACTICE § 2.06.

123 *See*, *e.g.*, Simons v. Simons, 49 N.Y.S.2d 929 (1944).

proceeding.[124] Under the UCCJEA, which all states except Massachusetts have fully enacted,[125] the parties are required to identify other people that the child has lived with, as well as any other individuals having physical custody, or claiming custody or visitation rights.[126] Such parties may then be required to join in the dissolution if necessary to protect their interests of the child.

IV. Conclusion

The decision to prohibit or allow joinder largely reflects the direction that a jurisdiction wants its divorce actions to proceed.[127] Some states have created "unified court systems" whereby they combine all matters that affect families into a single court.[128] Working with social service agencies, these unified courts provide a more "holistic" approach to familial issues by addressing everything from dissolution, to adoption, to issues of domestic violence.[129] These types of court systems openly permit additional causes of action and parties to be joined in dissolution proceedings.

Other jurisdictions choose to keep the court of equity issues, e.g., dissolutions, completely separate and distinct from interspousal tort claims or third party claims, which often require decisions by a jury. Courts throughout the United States remain split among themselves by not holding a common consensus on permitting, requiring or refusing to allow joinder of claims and parties with dissolution proceedings.

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124 1-2 FAMILY LAW & PRACTICE, *supra* note 58, at § 2.06. For an example of a state regulation requiring joinder under the UCCJEA, *see* MO. ANN. STAT. § 452.760 (West 2011).

125 Uniform Law Commission, *Enactment Status Map* and *Legislative Tracking*, *available at* http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (2010).

126 Uniform Law Commission, *Uniform Child Custody Jurisdiction and Enforcement Act* (1997), *available at* http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf (2012).

127 *See* Glesner Fines, *supra* note 3, at 305.

128 Krohse, *supra* note 3, at 954 (citing to Patricia A. Barnes, *It May Take a Village . . .: Or a Specialized Court to Address Family Problems*, 82 A.B.A. J. 22, 22 (1996).

129 Krohse, *supra* note 3, at 954.