CARLTON FIELDS

Family Law: Corporate and Trust Challenges to Service of Process and Jurisdiction

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The president of a corporation, manager of a limited liability company, trustee of a family trust, or principal of another business entity receives a summons in a Florida divorce case. One spouse contends the other's control, ownership of an interest in, or history of substantial business with the entity being sued requires its joinder as a party. The suing spouse may contend joinder is necessary for the court to transfer or sell real property or other assets from the entity to the spouse. A spouse who sues a trust may contend the trust must be joined because the spouse claims a direct or equitable interest in the trust or may attack the other spouse's creation or use of a trust or entity as an attempt to manipulate the distribution of property in the divorce. *See, e.g., Schneider v. Schneider*, 864 So. 2d 1193, 1997 (Fla. 4th DCA 2004) (improper for husband to place marital funds in an irrevocable trust as a "stratagem" to manipulate equitable distribution). The spouse may further contend that failing to join a trust and beneficiaries may invite later lawsuits and motions by them to intervene in proceedings or otherwise collaterally challenge decisions of the family court regarding trust assets. *See Crescenze v. Bothe*, 4 So. 3d 31, 32 (Fla. 2d DCA 2009). How may the business entity or trust get out of the family law case? This article discusses challenges to service of process and jurisdiction that may be available to secure dismissal. **Due Process: Service of Process and Personal Jurisdiction Over An Entity** For a family law judge in Florida to adjudicate a spouse's claims over a corporate entity or trust, the spouse must satisfy due process requirements. First, **service of process** over the entity or trust must be sufficient. Second, there must be a basis for **personal jurisdiction** over the entity. *See Borden v. East-European Ins. Co.*, 921 So. 2d 587, 591 (Fla. 2006) and *Scott-Lubin v. Lubin*, 49 So. 3d 838, 840 n. 1 (Fla. 4th DCA 2010). Service of process and personal jurisdiction are two distinct but related elements of due process protections. *See Ulloa v. CMI, Inc.*, 133 So. 3d 914, 919 (Fla. 2013) (discussing difference between service of process, personal jurisdiction, and subpoena power). Both valid service of process and a basis for personal jurisdiction are necessary before an entity can be compelled to answer a claim brought in a Florida family law case. *Service of process* Service of process is the means of notifying a party of a legal claim. When

accomplished, service enables a court to exercise jurisdiction and proceed to judgment. **Caution:** If the entity seeks affirmative relief, it may waive otherwise valid challenges to the Florida court's exercise of jurisdiction. **Service of Process: Can It Be Challenged?** As a threshold matter, the entity sued in a family law lawsuit may consider challenging the sufficiency of service of process. Proper service of the family law papers on the entity is required before the Florida court can acquire personal jurisdiction over the entity as a party in a family law action. *See* Fla. Rules of Civ. P. 1.080(a) and 1.180. *See also Thompson v. State/Dept. Revenue*, 867 So. 2d 603, 605 (Fla. 1st DCA 2004) (the court lacks jurisdiction without proper service of process, and the burden of proof of proper service is upon the person who seeks to invoke the court's jurisdiction). Entry of an order adjudicating rights of a party not properly served is reversible error. *See Varveris v. Alberto M. Carbonell, P.A.*, 773 So. 2d 1275, 1276 (Fla. 3d DCA 2000) (judgment debtor's wife was not properly brought before the court to set aside allegedly fraudulent transfers). A summons, properly issued and served, is the method by which a court acquires jurisdiction over an entity. *See Seymour v. Panchita Inv., Inc.*, 28 So. 3d 194, 196 (Fla. 3d DCA 2010). Defects in the summons may make service void. *Id.* at 196 (attempt to serve corporation with summons naming person individually was void to effect good service on the corporation of which he was registered agent.) An entity, through sufficient affidavits, may challenge service and obtain a hearing to present evidence on the effectiveness of services. *See Panama City Gen. P'ship v. Godfrey Panama City Inv., LLC,* 109 So. 3d 291, 293 (Fla. 1st DCA 2013) (affidavits supported partnership's assertion that managing partner identified in process server's affidavit as having been served moved from his home to assisted living nursing facility two days before alleged service). A party who attempts to serve a foreign corporation not qualified to do business in Florida must show that the requirements for service have been met *and* that process has been served upon a person qualified to accept such process. Courts strictly construe statutory requirements and require strict compliance with them for effective service. *See Grange Insurance v. Walton Transport*, 2014 WL 1917987 *3, Case No. 3:13-cv-977-J-34MCR (M.D. Fla. May 13, 2014); *Estela v. Cavalcanti*, 76 So. 3d 1054, 1055 (Fla. 3d DCA 2011); *Mecca Multimedia, Inc. v. Kurzbard*, 954 So. 2d 1179, 1181 (Fla. 3d DCA 2007); *S.T.R. Indus., Inc. v. Hidalgo Corp.*, 832 So. 2d 262, 263 (Fla. 3d DCA 2002). Failure to comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters articles 2-6, November 15, 1965, 20 U.S.T. 361 (Hague Convention), may invalidate service of process. *See SDS-IC v. Florida Concentrates International, LLC*, 157 So. 3d 389 (Fla. 2d DCA 2015) (service of process quashed because it did not comply with Florida law or China's Central Authority under the Hague Convention). But note Article 10(a) of the Hague Convention permits service of process by mail. *See Portalp International SAS v. Zuloaga*, 40 Fla. L. Weekly D2791b (Fla. 2d DCA December 18, 2015). A corporation cannot make it impossible for a plaintiff to comply strictly with the statutory requirements by listing a private mailbox or "virtual office," where no directors, officers, corporate employees, or registered agent can be found and evade service by feigning compliance with the requirement of maintaining a registered agent under section 48.091, Florida Statutes. The party seeking service may serve such corporation under section 48.081(3)(b) at another physical address for the corporation, its officers, directors, or registered agent discoverable through public records, under the general service of process statute

(section 48.031). *See Diaz v. Winn-Dixie Stores, Inc.*, 2015 WL 136404 at *3, No. 14-cv-21045 (S.D. Fla. January 9, 2015) (setting aside clerk's default where attempted service on corporation took place at local store, rather than corporation's principal place of business, meaning where the corporation's high level officers direct, control, and coordinate the corporation's activities); *Natures Way Marine, LLC v. Everclear of Ohio, Ltd.,* No. 12-0316-CG-M (S.D. Ala. January 18, 2013) (applying Florida law); *TID Services, Inc. v. Dass*, 65 So. 3d 1 (Fla. 2d DCA 2010) (reversing order denying motion to vacate for lack of jurisdiction a default judgment, where summons was left at UPS store where defendant maintained a private mailbox). Improper service of process on a person not among those persons authorized to be served may be quashed. *See Seymour v. Panchita Inv., Inc.*, 28 So. 3d 194, 198 (Fla. 3d DCA 2010) (affirming order vacating final judgment after default because attempted service on a corporate officer in his individual capacity was void); *S.T.R. Industries, Inc.*, 832 So. 2d at 264 (quashing service of process on a foreign corporation not qualified to do business in Florida because a party failed to meet its burden of proof to show a diligent search for superior officers or the necessity for substitute service and where the process server's affidavit failed to indicate that the foreign corporation's business agent was served absent superior officers); *Lisa, S.A. v. Gutierrez*, 806 So. 2d 557, 559 (Fla. 3rd DCA 2002) (affirming order quashing service on a receptionist or on a law clerk); *Washington Capital Corp. v. Milandco, Ltd., Inc.*, 665 So. 2d 375, 376 (Fla. 4th DCA 1996) (quashing service on a secretary/receptionist of a foreign corporation not in strict compliance with section 48.081, Florida Statutes). *Compare with Kalb v. Sail Condominium Ass'n, Inc.*, 112 So. 3d 674, 675 (Fla. 3d DCA 2013) (judgment against a corporation qualified to do business in Florida was not void where service had been validly accomplished on an employee of the condo association's registered agent, as permitted by amended section 48.081(3)(a), Florida Statutes). An affidavit of service merely alleging service of process statute has been complied with may not be enough to meet the burden of establishing proper service. *See Diaz v. Winn-Dixie Stores, Inc.*, 2015 WL 136404 at *3, No. 14-cv-21045 (S.D. Fla. January 9, 2015) (bare allegation of failing to keep a sign posted designating the name of the registered agent on whom process may be served is insufficient to justify service on a corporation's employee or employee of its registered agent, pursuant to section 48.081(3)(a), Florida Statutes); *Johnston v. Halliday*, 516 So. 2d 84, 85 (Fla. 3d DCA 1987)(a return of service merely stating that substituted service was effected on the defendant's son who was "of suitable age and discretion" was insufficient absent facts establishing that the process server complied with the requirements for substituted service); *York Communications, Inc. v. Furst Group, Inc.*, 724 So. 2d 678, 679 (Fla. 4th DCA 1999) (a process server's statement that service was made on John Doe corporate employee, without including a statement supporting the necessity for substituted service, was "patently tainted" where the process server alleged neither that he first attempted to serve the registered agent nor that the agent was absent); *Kemmerer v. Klass Associates, Inc.*, 108 So. 3d 672, 675 (Fla. 2d DCA 2013) (quashing service because plaintiff failed to submit competing evidence for the trial court to contradict defendant's affidavit regarding her usual place of abode). *Cf. Panama City Gen. P'ship v. Godfrey Panama City Inv., LLC*, 109 So. 3d 291, 293 (Fla. 1st DCA 2013) (partnership's mere denial of validity of service insufficient, but its later motion for reconsideration with attached affidavits from managing partner and son, plus a moving

company's receipt and letter from director of retirement community to which managing partner moved, established prima facie case to challenge service, entitling the partnership to an evidentiary hearing); *Robles-Martinez v. Diaz, Reus & Targ, LLP*, 88 So. 3d 177, 181 (Fla. 3d DCA 2011) (returns of service were regular on their face and contained all information required to show plaintiff complied with the statute, plus corroborating testimony, entitled plaintiff to the presumption that valid service was effectuated, and affidavits defendants offered that failed to challenge the facial regularity of the return of service failed to overcome by clear and convincing evidence the presumption). **Checklist for challenges to service of process:**

- Was process (summons and the papers being served) properly issued and sufficient under Florida law?
- Was service of process validly accomplished?
- Was the hierarchy for service of process followed, if required?
  - Was service made on the registered agent?
  - Was service made on the president, vice president, the cashier, treasurer, secretary, general manager, any director, any officer, or business agent residing in the state?
  - Can service be made at an address discoverable in the public records on an employee at the corporation's principal place of business or employee of the registered agent, because the foreign corporation failed to comply with the requirements regarding a registered agent?
- Was the proper party served? This can be tricky in corporate families.

Caution: If the entity seeks affirmative relief, it may waive otherwise valid challenges to the Florida court's exercise of jurisdiction, such as based on defective service of process. **Family Law Pleadings: Must Allege Basis for Personal Jurisdiction Over the Entity** If process was sufficient and service valid, is there a basis for subject matter jurisdiction for the family law party to proceed against the entity? A court has no jurisdiction over foreign entity named when the petition fails to allege the entity has minimum contacts with Florida or is subject to long arm jurisdiction. *See Fishman, Inc. v. Fishman*, 657 So. 2d 44, 45-46 (Fla. 4th DCA 1995) (if a petitioner fails to plead a legally sufficient basis for long-arm jurisdiction, the respondent "need not come forward with affidavits to prove a negative — that is, that there is no jurisdiction."); *Rollet v. de Bizemont*, 159 So. 3d 351, 355 (Fla. 3d DCA 2015) (directing dismissal of a divorcing French wife's complaint that failed to allege sufficient long-arm jurisdictional facts against a nonresident foreign entity and her nonresident husband, whom she alleged fraudulently or under undue influence assigned a contract to buy a South Beach condo without her consent and to divest her of her property rights). *See also Morgan v. Morgan,* 679 So.2d 342, 346 (Fla. 2d DCA 1996) (mother's unsworn pleading alleging nonresident father failed to provide child support to children in Florida was deficient because she failed to allege a proper basis for jurisdiction under the Long Arm Statute). A spouse's claims that an entity must be brought in

because of either spouse's marital contributions of marital funds or effort do not constitute allegations sufficient to bring the entity within the jurisdictional reach of the circuit court in which the Florida divorce action is pending. *See Fishman*, 657 So. 2d at 46; *Manus v. Manus*, 193 So. 2d 236, 237-38 (Fla. 4th DCA 1966) (affirming order quashing service of process on the president of a foreign corporation, while he was in Florida en route to the Bahamas, where it was not shown a wife's alleged cause of action arose out of an obligation or cause connected with the corporation's activities in Florida, but was merely based on the husband's majority ownership of stock in the corporation and alleged threats to remove his assets from the state and country). Operating a business in Florida, owning real property in Florida, committing a tortious act in Florida, breaching a contract in Florida, or engaging in substantial business activity in Florida may give rise to long arm jurisdiction. Section 48.193, Florida Statutes. For example, jurisdiction was extended to a foreign corporation in a marriage dissolution case because the suing spouse alleged that marital assets were unlawfully removed from the state or improperly encumbered within the state by the foreign corporation – the predicate for jurisdiction was the alleged commission of a tortious act within the state of Florida. *See Lee B. Stern & Co., Ltd. v. Green*, 398 So. 2d 918, 919 (Fla. 3d DCA 1981).

Checklist for challenges to personal jurisdiction:

- Is there a proper basis to proceed against the entity in Florida state court?
  - Corporations: look to the state of incorporation and principal place of business.
  - Partnerships/LLCs: look to the residence of the partners/members.
  - Trusts: look to the situs of the trust.
- What is the conduct or asset at issue in the family law proceeding?
- What does the party allege the entity allegedly did to bring it into the family law action?
- Does the alleged basis for the cause of action arise out of the entity's conduct in or directed to Florida?
- How have corporate formalities been observed?
- Has the spouse controlled and operated the entity and its assets and debts and, if so, how?
- Issues can be tricky where declaratory or injunctive relief or sequestration of assets is sought.

More about Personal Jurisdiction: Two-Part Test or "Alter Ego" Theory? A spouse attempting to bring in a corporate entity or trust must meet the requirements under Florida's two-part test for establishing personal jurisdiction over the entity or trust, under Florida's long arm statute. In the alternative, a spouse may assert personal jurisdiction is established because the entity is merely the "alter ego" of the other spouse. Personal jurisdiction refers to whether the actions of an individual or business entity as set forth in the applicable statutes permit the court to exercise jurisdiction in a lawsuit brought against the individual or business entity in this state. *See Borden v. East-European*

Ins. Co., 921 So. 2d 587, 591 (Fla. 2006). *See generally* section 48.193, Florida Statutes; *White v. Pepsico, Inc.*, 568 So. 2d 886, 888 (Fla.1990); *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla.1989) (to subject a defendant to personal jurisdiction, "due process requires that the defendant have certain minimum contacts with the forum"). **First prong: Specific Jurisdiction or General Jurisdiction** Long arm jurisdiction over a foreign corporation or entity may be either ***specific*** *See* sections 48.193(1)(a)-(h), Florida Statutes (where the defendant either "personally or through an agent does any of the acts enumerated in those subsections") *or* ***general*** see section 48.193(2), Florida Statutes (where the defendant is "engaged in substantial and not isolated activity"). *See Marina Dodge, Inc. v. Quinn*, 134 So. 3d 1103 (Fla. 4th DCA 2014) (good analysis of specific and general jurisdiction, resulting in reversal of order denying motion to dismiss personal injury suit for lack of personal jurisdiction); *Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011) (considering the role the Internet plays in a specific and general jurisdiction analysis); *Magwitch, LLC v. Pusser's West Indies Limited*, __41 Fla. L. Weekly D2077a_ (Fla. 2d DCA September 7, 2016) (Internet sales to Florida were insufficient in themselves to establish general jurisdiction). *See also Travelocity.com v. Pier 35 Events, Inc.*, 2014 WL 2999208 at *7-8, No. 13-81240-CIV-HURLEY (S.D. Fla. July 3, 2014) (discussion of specific and general jurisdiction and effect of a contractual waiver of the requirements for personal jurisdiction); *Northwestern Aircraft Capital Corp. v. Stewart*, 842 So. 2d 190, 193 (Fla. 5th DCA 2003); *Christus St. Joseph's Health Sys. v. Witt Biomedical Corp.*, 805 So. 2d 1050, 1053-54 (Fla. 5th DCA 2002); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (determining the extent of a state's judicial power over persons outside its borders under the *International Shoe* standard can be undertaken through two different approaches—by finding specific jurisdiction based on conduct connected to the suit, or by finding general jurisdiction). If an entity's contacts with Florida are also the basis for the suit, those contacts may establish specific jurisdiction. *See* section 48.193(1)(a)-(h), Florida Statutes; *Marina Dodge, Inc. v. Quinn*, 134 So. 3d 1103, 1108 (Fla. 4th DCA 2014) (affidavits revealed very few contacts between the state of Florida and the defendant which had engaged in isolated transactions with Florida companies, mostly over the Internet without having targeted Florida for business); *Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, 255-56 (Fla. 4th DCA 2011) (applying traditional minimum contacts analysis, whether or not the Internet is involved); *Canale v. Rubin*, 20 So. 3d 463, 467 (Fla. 2d DCA 2009). In determining specific jurisdiction, courts consider (1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in Florida; (2) whether the claims arise out of those activities directed at Florida; and (3) whether the defendant's contacts with Florida are such that the defendant should reasonably anticipate being brought into court in Florida. *See Corporacion Aero Angeles, S.A. v. Fernandez*, 69 So.3d 295, 299 (Fla. 4th DCA 2011). On the other hand, if an entity's contacts with Florida are not also the basis for the claims, jurisdiction must arise from the entity's general, more persistent, but unrelated contacts with Florida. Fla. Stat. §48.193(2).) **Specific jurisdiction** Florida law provides that an entity that personally or through an agent does certain acts submits itself to the jurisdiction of the courts of Florida for any action arising

from the acts. Fla. Stat. §§48.193(1)(a) 1-9. These acts include:

- Operating, conducting, engaging in, or carrying on a business or business venture in Florida (48.193(1)(a)1);
- Having an office or agency in Florida (48.193(1)(a)1);
- Committing a tortious act in Florida (48.193(1)(a)2);
- Maintaining a matrimonial domicile in Florida (48.193(1)(a)5);
- Causing injury to persons or property within Florida arising out of an act or omission by the entity outside this state, if, at or about the time of the injury, either:

(a) The entity was engaged in solicitation or service activities within Florida (48.193(1)(a)6.a); or (b) Products, materials, or things processed, serviced, or manufactured by the entity anywhere were used or consumed within Florida in the ordinary course of commerce, trade, or use (48.193(1)(a)6.b).

- Breaching a contract in Florida by failing to perform acts required by the contract to be performed in Florida (48.193(1)(a)7). *See also Olson v. Robbie*, 141 So. 3d 636 (Fla. 4th DCA 2014) (the contract itself must *require* performance in Florida to invoke long arm jurisdiction under section 48.193(1)(a) 7 (formerly 48.193(1)(g)).

The absence of sufficient jurisdictional facts alleged by the suing party against an entity gives grounds for dismissal for lack of jurisdiction. *See Rollet v. de Bizemont*, 159 So. 3d 351, 355 (Fla. 3d DCA 2015*)* (reversing denial of nonresident husband's motion to dismiss for lack of personal jurisdiction); *Reynolds American, Inc. v. Gero*, 56 So. 3d 117, 119-20 (Fla. 3d DCA 2011) (reversing denial of nonresident parent and subsidiary's motion to dismiss because there were insufficient jurisdictional facts existing to confer personal jurisdiction over them under Florida's long arm statute); *Marina Dodge, Inc. v. Quinn*, 134 So. 3d 1103 (Fla. 4th DCA 2014) (reversing denial of motion to dismiss, where contacts were random, attenuated, minimal, or de minimus, but were not "minimum.") **General jurisdiction** Florida courts have jurisdiction over a foreign entity when it is engaged in "substantial and not isolated activity" within Florida, whether such activity is wholly interstate, intrastate, or otherwise, and whether or not the claim arises from that activity. The term "substantial and not isolated" has been construed by Florida courts as meaning "continuous and systematic general business contact" with Florida. *Caiazzo,* 73 So. 3d at 250. S*ee also Olson v. Robbie*, 141 So. 3d 636 (Fla. 4th DCA 2014); *Vos, B.V. v. Payen*, 15 So. 3d 734, 736 (Fla. 3d DCA 2009); *Gadea v. Star Cruises, Ltd.*, 949 So. 2d 1143, 1145 (Fla. 3d DCA 2007). The "continuous and systematic" standard for establishing general personal jurisdiction is more demanding than the standard for establishing specific personal jurisdiction. *See Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414; Daimler AG v. Bauman, 134 S. Ct. 746, 761, 187 L. Ed. 2d 624 (2014) (the corporation's affiliations with the state must be so continuous and systematic as to render it "essentially at home in the forum state.") (internal citations omitted); *Carmouche v. Tamborlee*

Mgmt., Inc., 789 F.3d 1201, 1205 (11th Cir. 2015) ("A foreign corporation cannot be subject to general jurisdiction in a forum unless the corporation's activities in the forum closely approximate the activities that ordinarily characterize a corporation's place of incorporation or principal place of business."); *Biloki v. Majestic Greeting Card Co., Inc.*, 33 So.3d 815, 820 (Fla. 4th DCA 2010) (general personal jurisdiction may lie when a nonresident defendant's activities are extensive and pervasive, with a significant portion of the defendant's business operations or revenue derived from established commercial relationships in the state); *Canale v. Rubin*, 20 So. 3d 463, 467 (Fla. 2d DCA 2009) ("General jurisdiction requires far more wide-ranging contacts with the forum state than specific jurisdiction, and it is thus more difficult to establish.") If a plaintiff fails to meet the due process test for specific jurisdiction, the test for general jurisdiction will rarely be met. *Marina Dodge, Inc. v. Quinn*, 134 So. 3d 1103 (Fla. 4th DCA 2014). Showing continuous and systematic contacts is more demanding than what must be shown to establish specific jurisdiction because section 48.193(2), Florida Statutes requires no connection between a petitioner's claim and the foreign defendant's Florida activities. *Vos, B.V. v. Payen*, 15 So. 3d 734, 736 (Fla. 3d DCA 2009). By itself, ownership of property cannot subject a nonresident defendant to jurisdiction of the courts, unless the cause of action asserted arises out of such ownership. *See* Fla. Stat. §48.193(1)(c); *Nichols v. Paulucci*, 652 So. 2d 389, 393 n. 5 (Fla. 5th DCA 1995); *Forrest v. Forrest*, 839 So. 2d 839, 841 (Fla. 4th DCA 2003) (Singapore, not Florida, was where the parties lived together as husband and wife, and husband's mere ownership of property in Florida that was not the subject of the petition for dissolution was insufficient to subject husband to jurisdiction). Likewise, an out-of-state party's contract with a Florida resident alone cannot establish minimum contacts. *See SDM Corp. v. Kevco Fin. Corp.*, 540 So.2d 931, 932 (Fla. 2d DCA 1989). The sons of Miami Dolphins' founder and owner, the late Joe Robbie, who sued their sister, a co-trustee and shareholder under a shareholders' agreement, faced these principles in *Olson v. Robbie*, 141 So. 3d 636, 640-41 (Fla. 4th DCA 2014). The court reversed the trial court's denial of the Minnesota sister's motion to dismiss for lack of personal jurisdiction in Florida. The place where the parties' shareholder agreement required performance, and not the familial relationship between the parties, determined if Florida had jurisdiction over the nonresident sister. Her handful of visits to see friends in Florida, filing of annual reports, and status as co-trustee of a Florida trust until its termination were insufficient for general jurisdiction. Whether an entity targeted a Florida resident through website activity at Florida or operated an active or passive website may be considered as part of determining minimum contacts and due process. *See Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, 255-56 (Fla. 4th DCA 2011). *See also Magwitch, LLC v. Pusser's West Indies Limited*, 41 Fla. Law Weekly _D20077a (Fla. 2d DCA September 7, 2016) (Internet sales to Florida were insufficient in themselves to establish general personal jurisdiction); *Internet Solutions Corp. v. Marshall*, 39 So.3d 1201, 1207 (Fla. 2010) (addressing the narrow question of the Internet activity that will fall under the tortious acts section of the long arm statute, concluded that posting allegedly defamatory web statements about a Florida resident directed to potential readers within Florida and accessing of such statements in Florida were sufficient facts to constitute committing a tortious act within Florida); *Carmel & Co v. Silverfish, LLC*, 2013 WL 1177857, No. 1:12-cv-21328-KMM (S.D. Fla. March 21, 2013) (entity

purposefully availed itself of Florida forum through website sales and advertising to Florida consumers, and such availing related to cause of action for trademark infringement). **Second prong: Constitutional Due Process Principles** After the first determination regarding a basis for long arm jurisdiction is made, the second inquiry a court must make involves constitutional analysis controlled by United States Supreme Court precedent interpreting the Due Process Clause. This second inquiry requires a party to establish that the entity has sufficient minimum contacts with the state to meet the federal requirements of fair play and substantial justice. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). Contacts must be enough for the entity to reasonably anticipate being brought into court in Florida to defend the claims brought against it. *Id.* at 475-76. *Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, 255-56 (Fla. 4th DCA 2011) (defendant could reasonably anticipate being sued in Florida based on the extent of its website business originating in Florida, and posting on its website of allegedly defamatory statements targeted into Florida at a competitor's business headquartered in Florida, to damage the competitor's reputation). The nonresident must have "fair warning" a particular activity may subject the nonresident to Florida jurisdiction. *See Madara v. Hall*, 916 F.2d 1510, 1516 (11th Cir. 1990). If a spouse successfully alleges sufficient jurisdictional facts to bring the entity into the case under the Long Arm Statute, exercise of jurisdiction over the entity in Florida must still follow due process principles. The test for "minimum contacts" depends on whether the entity's "conduct and connection" with Florida are such that the entity should reasonably anticipate being haled into court" in Florida. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297(1980). The paramount question is, "Has the entity purposefully established minimum contacts in Florida to anticipate being haled into the family court in Florida?" **Alter Ego Basis for Jurisdiction** The two-step process for establishing long arm jurisdiction does not apply when a spouse is traveling under a different theory for jurisdiction: the alter ego theory. As an alternative, limited basis for jurisdiction, Florida courts have recognized an "alter ego theory" that permits a nonresident shareholder of a resident corporation to be subjected to long arm jurisdiction, when the claimant alleges that basis and evidence establishes the nonresident entity has operated as the mere instrumentality (or "alter ego") of the resident shareholder or entity and the other party engaged in improper conduct in the formation of the entity. *See Bellairs v. Mohrmann*, 716 So. 2d 320, 323 (Fla. 2d DCA 1998); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1120-21 (Fla.1984). To support jurisdiction under an alter ego theory, the suing spouse must allege facts sufficient to "pierce the corporate veil" of the entity. *See WH Smith, PLC v. Benages & Associates, Inc.*, 51 So. 3d 577, 582-83 (Fla. 3d DCA 2010) (reversing denial of motion to dismiss because the plaintiff failed to establish personal jurisdiction under the alter ego theory)*; Woods v. Jorgensen*, 522 So. 2d 935, 937 (Fla. 1st DCA 1988). *See also Hobbs v. Don Mealey Chevrolet, Inc.*, 642 So. 2d 1149, 1155 (Fla. 5th DCA 1994); *Qualley v. International Air Serv. Co.*, 595 So. 2d 194, 196 (Fla. 3d DCA 1992). The veil may be pierced if a party can prove both that the entity is a "mere instrumentality" or alter ego of the other party and that the other party engaged in "improper conduct" in the formation or use of the entity. *See Noah Technologies, Inc. v. Rice*, 2014 WL 6473664 at *6, No. 2:14-cv-325-FtM-29DNF (M.D. Fla. November 18, 2014); *Bellairs v. Mohrmann*, 716 So. 2d 320, 323 (Fla. 2d DCA 1998); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1120-21 (Fla.1984). In the divorce context, an entity may

be so "inextricably intertwined" with a spouse that joinder of the entity is appropriate. *See Hoecker v. Hoecker*, 426 So. 2d 1191, 1192 (Fla. 4th DCA 1983) (error to dismiss corporation from dissolution action in light of husband's testimony, "I'm the company," and evidence of the parties' conduct that demonstrated a blending of marital and business partnerships). The alter ego theory has been extended to allow a trial court to inquire whether a non-profit corporation is the alter ego of a spouse in a dissolution proceeding to achieve equitable distribution. *See Barineau v. Barineau*, 662 So. 2d 1008, 1009 (Fla. 1st DCA 1995) (reversing final summary judgment entered in favor of not-for-profit religious organization and remanding for determination of whether the corporation was engaged in improper conduct involving assets that a court could rightfully consider in equitable distribution). A spouse may invoke the "outsider reverse corporate piercing theory" when a corporation's controlling shareholder has formed or used an entity to defraud creditors by evading liability for pre-existing obligations. Under such circumstances, one spouse may seek to hold the entity liable for the debts of the other spouse who formed or used the entity to hide assets and avoid preexisting personal liability. *See Braswell v. Ryan Investments*, 989 So. 2d 38, 39 (Fla. 3d DCA 2008) (denying reverse veil piercing because taking title to assets in corporate name preceded the former wife's claims and former husband's obligations). The remedy is not available to the spouse who has not alleged and cannot establish that the other spouse used the corporate form to prevent execution on a liability that did not yet exist at the time the entity was used. *Id.* See also *Noah Technologies, Inc. v. Rice*, 2014 WL 6473664 at *6, No. 2:14-cv-325-FtM-29DNF (M.D. Fla. November 18, 2014) (stating court was unaware of any cases applying the "reverse alter ego" theory to pierce corporate veil in jurisdictional contexts). Absent necessary allegations by a spouse in a pleading attempting to bring in an entity on an alter-ego theory, the pleading may be dismissed. *See In re: Big Foot Properties, Inc.*, 2012 WL 6892645, 23 Fla. L. Weekly Fed. B 505 (Bankr. M.D. Fla. 2012). **Checklist for challenges to Alter Ego Allegations:** Has the pleading alleged the alter ego theory as a basis for jurisdiction over the entity?

- What allegations have been made that the corporate veil should be pierced because the spouse is a "mere instrumentality" or alter ego of the entity?
- What dominance or control of the entity has the spouse exerted? Does such dominance or control reflect that the entity has no independent existence?
- What allegations have been made that the spouse engaged in improper conduct in the formation or use of the entity faced with preexisting obligations, such as a device to defraud creditors (including the other spouse) or to defeat equitable distribution of marital assets?
- Where is the entity's principal place of business and what is its market?
- Does the entity own property, have a business agent or conduct business in Florida?
- How have the finances and business operations of the entity been kept independent from the affairs of the spouse who is the owner or control person?

- What separate management, bank accounts, observation of corporate formalities, and other facts support this independence?

- How are decisions made and by whom?

Jurisdiction over Property at Issue When an action between the parties in a divorce case is regarding property within the court's jurisdictional boundaries, it does not matter if the owners or those claiming an interest in the property reside outside Florida. A typical example in a divorce case is an action to partition real property or personal property in which the spouses and another owner, such as a foreign trust or corporation, co-own the property. Under these circumstances, jurisdiction over the property lies in the circuit court of the county in which the property is physically located, regardless of where the foreign corporate entity or trust is principally doing business. *See Ashourian v. Ashourian*, 483 So. 2d 486, 487 (Fla 1st DCA 1986) (corporation dismissed as party because the wife's general allegations against it failed to state cause of action for specific relief). Courts consider stock in a family-owned business a marital asset, subject to equitable distribution, but cannot order the transfer of corporate property or assets without joinder of the entity. *See Austin v. Austin*, 120 So.3d 669, 674 (Fla. 1st DCA 2013) (without joining a corporation, the court may value and distribute corporate stock determined to be a marital asset and may preclude a spouse's disposal of assets over which the spouse exercises exclusive control); *Ehman v. Ehman*, 156 So. 3d 7 (Fla. 2d DCA 2014); *Mathes v. Mathes*, 91 So. 3d 207, 208 (Fla. 2d DCA 2012) (trial court has no power or authority to transfer property of a corporation without joinder of the entity); *Sandstrom v. Sandstrom*, 617 So. 2d 327, 329 (Fla 4th DCA 1993) (the court lacked jurisdiction to order a transfer of a corporation's assets because it was not made a party); *Nichols v. Nichols*, 578 So. 2d 851, 852 (Fla 2d DCA 1991) (an order distributing corporate property in a dissolution of marriage proceeding was reversed because the corporation was not made a party); *Keller v. Keller*, 521 So. 2d 273, 276 (Fla. 5th DCA 1988) (the court had no authority to award wife a Mercedes owned by husband's corporation because the corporation was not joined). The Second District Court of Appeal in December 2016 reaffirmed that assets nonparty LLCs, corporations, partnerships, or trusts own are ordinarily not divisible in equitable distribution. In Nelson v. Nelson, _41 Fla. L. Weekly D2786a_(Fla. 2d DCA December 16, 2016), the court held a California home that a couple transferred during their marriage to an irrevocable trust the ex-husband established for the benefit of the ex-wife and her descendants were not marital assets subject to equitable distribution. The home lost its characters as a marital asset once transferred into the irrevocable trust. Moreover, to reach the assets of an irrevocable trust, all contingent beneficiaries were indispensable parties who would have to be joined, but were not. **Affidavits: Important!** An entity drawn into a family law dispute typically must assemble sworn affidavits supporting challenges it may make to service of process or personal jurisdiction or both. In reviewing a motion to quash service or dismiss, the court likely will derive facts from the affidavits, transcripts, and other records. *See Rollet v. de Bizemont*, 159 So. 3d 351, 355 (Fla. 3d DCA 2015*)* (reversing denial of nonresident husband's motion to dismiss accompanied by his affidavit detailing reasons his wife could not possibly plead sufficient allegations to establish personal jurisdiction over him); *Hamilton v. Hamilton*, 142 So. 3d 969, 972 (Fla. 4th DCA 2014) (a family stock purchase agreement provided for mandatory venue and consent to jurisdiction in

Florida, but Michigan stepson's affidavit refuted many allegations regarding contacts with Florida, independent of the forum selection clause, that could establish the requisite minimum contacts, and plaintiff stepmother filed no response or affidavits refuting stepson's attestations); *Wendt v. Horowitz*, 822 So. 2d 1252, 1254 (Fla.2002)*; WH Smith, PLC v. Benages & Associates, Inc.*, 51 So. 3d 577, 582-83 (Fla. 3d DCA 2010)*; Marina Dodge, Inc. v. Quinn*, 134 So. 3d 1103 (Fla. 4th DCA 2014) (affidavits before the trial court revealed few contacts between the defendant and the state of Florida). *See also Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla.1989) (setting forth the process for determining factual issues raised by a motion to dismiss for lack of personal jurisdiction); *Bellairs v. Mohrmann*, 716 So. 2d 320, 322 (Fla. 2d DCA 1998) (following the *Venetian Salami* procedure regarding the alter ego theory for establishing jurisdiction); *Extendicare, Inc. v. Estate of McGillen*, 957 So. 2d 58, 63 (Fla. 5th DCA 2007) (relying on defendant's affidavits to refute the jurisdictional allegations in a complaint, and finding that plaintiff failed to meet its burden to offer sworn proof to contradict the jurisdictional allegations in the affidavit to establish a basis for jurisdiction). The requirement of affidavits may be excused if the spouse who has sued the entity fails to plead a basis for jurisdiction, in which case the burden of establishing lack of jurisdiction never shifts to the entity. *Fishman, Inc. v. Fishman*, 657 So. 2d 44, 45 (Fla. 4th DCA 1995). In *Fishman*, the wife joined three out-of-state corporations in her petition for dissolution of marriage. The trial court denied the corporations' motion to dismiss, apparently because they filed no affidavits to support their position they lacked the minimum contacts with Florida to satisfy due process. The appellate court reversed, because the wife failed to plead in the first place a legally sufficient basis for long arm jurisdiction, so the burden never shifted to the corporations to offer sworn affidavits to plead a negative—that there was no jurisdiction. **Declarations: Careful!** Unsworn "declarations" that fail to include the language, "I declare under penalty of perjury" are a legal nullity and have no probative value. *See Intego Software, LLC v. Concept Development, Inc.*, 41 Fla. L. Weekly D1699b (Fla. 1st DCA July 25, 2016) (the right to amend pleadings extends to correcting defects in declarations and affidavits); *Arnold v. Arnold*, 889 So. 2d 215, 216 (Fla. 2d DCA 2004) ("Unsworn statements cannot serve as the basis for a trial court's factual determinations.") Sections 92.50 and 92.525, Florida Statutes set forth how oaths and affidavits are made in Florida, in other states, and in foreign countries. **Be Prepared to Provide Facts for Affidavits Regarding**

- The circumstances surrounding service of process
- Facts to refute incorrect allegations in the spouse's pleading that purport to allege a basis for jurisdiction
- The nature and scope of the entity's business and property
- The extent of agents or contacts in Florida
- Other facts directed to specific personal jurisdiction, general personal jurisdiction or the alter ego theory, if alleged

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