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LONG-ARM JURISDICTION FOR CHILD SUPPORT: CONSTITUTIONAL CONSIDERATIONS

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In 1979 the North Carolina General Assembly enacted a new law affecting the district courts' power to subject out-of-state parties to suit in North Carolina.[1] Chapter 542 (Senate Bill 616) authorizes courts to subject out-of-state parties to suit in North Carolina for paternity and child support whenever the party has participated in an act of sexual intercourse in the state that may have resulted in the conception of an illegitimate child. A decision by the United States Supreme Court in May 1978, Kulko v. California Superior Court,[2] casts some doubt on the constitutionality of this expansion of state court jurisdiction. This memorandum will examine the Kulko decision in some detail and then evaluate the new statute in light of the legal principles set forth in Kulko.

Kulko v. California Superior Court

In Kulko, a mother, resident in California, sued in a California superior court to increase her former husband's child-support obligations. Her ex-husband, a resident of New York for fifteen years, appeared specially and moved to quash service of the summons on the ground that he lacked sufficient contact with California to be required to defend a lawsuit there. The trial court denied his motion, and both the California Court of Appeals and the California Supreme Court sustained the trial court's decision. The United States Supreme Court reversed the California Supreme Court and held that California's exercise of jurisdiction over the husband violated the due process clause of the Fourteenth Amendment.

Because the decision in Kulko was based on the unfairness of requiring the husband to defend in California, it is important to review exactly what his

1. N.C. Sess. Laws 1979, Ch. 542 (to be codified as N.C. Gen Stat. § 49-17).
2. 436 U.S. 84 (1978).

contacts with the state had been. Ezra Kulko had been in California for a three-day stopover in 1959 and a 24-hour stopover in 1960 while serving in the military. He married Sharon Kulko during the 1959 visit. When the couple separated after living in New York for eleven years, Sharon moved to California. Kulko kept his two children in New York during the school year and sent them to visit their mother in the summer. In 1973 Kulko agreed to allow his daughter to move to California to live with her mother. In 1976 his son also moved to California, but without Kulko's approval. For at least six years, Kulko sent his former wife $3,000 yearly in child support.

When presented with these facts, the California Court of Appeals decided that by consenting to his children's living in California, Kulko had "caused an effect in the state" that justified the California court's assumption of jurisdiction over him.[3] The California Supreme Court agreed and added that jurisdiction was reasonable because Kulko had "purposely availed himself of the benefits and protections of the laws of California" by sending his daughter to live there permanently.[4]

The United States Supreme Court disagreed. Mr. Justice Marshall's opinion for the Court methodically reviewed Ezra Kulko's contacts with California and concluded that California was not a "fair forum" in which to require Kulko, "who derives no personal or commercial benefit from his child's presence in California and who lacks any other relevant contact with the State, either to defend a child-support suit or to suffer liability by default."[5]

The critical aspect of the Kulko opinion is its insistence on framing the issue principally in terms of fairness to the defendant. Lawyers for the plaintiff asked the Supreme Court to consider California's interests in seeing that resident children were adequately supported. The Court agreed that "California has substantial interests in protecting resident children and in facilitating child-support actions on behalf of those children" but then added: "But these interests simply do not make California a 'fair forum'. . . ."[6]

The controlling constitutional principle is drawn from International Shoe v. Washington: The defendant must have certain "minimum contacts" with the state so that subjecting him to suit does not offend "traditional notions of fair play and substantial justice."[7] The interests of the forum state and of the plaintiff are relevant, but "an essential criterion on all cases is whether the 'quality and nature of the defendant's activity is such that it is reasonable and fair to require him to conduct his defense in that State.'"[8] Neither a state's interest in bringing a defendant into its courts nor a plaintiff's interest in pursuing litigation at home justifies jurisdiction if the defendant's contacts with the state are inadequate.

How much contact is enough? Perhaps the best guidelines can be obtained by noting what the Court said was not enough: Kulko's two short visits to California were not enough grounds for assertion of jurisdiction. His marriage in California was not enough. His agreement to allow his children

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3. 133 Cal. Rptr. 627, 628 (1976).
4. 19 Cal. 3d 514, 524, 564 P.2d 353, 358 (1977).
5. 436 U.S. at 100.
6. Id.
7. 326 U.S. 310, 316 (1945).
8. Kulko v. California Superior Court, 436 U.S. 84, 92 (1978).

to live in California and his mailing of support payments to California were not enough. The Court was not willing to rely on tenuous connections with the forum state. The opinion looked for an act by which the defendant had "purposefully availed himself of the privilege of conducting activities within the forum State" and concluded that Ezra Kulko's acts were not of that nature.

The Court seemed to apply a tougher test in Kulko than it had applied in a number of previous opinions dealing with state court jurisdiction. In attempting to explain this insistence on more contact with the forum state, it distinguished prior cases by noting that Ezra Kulko had not caused physical injury to either property or persons and that the suit against him did not arise from commercial transactions.[9] The precedents that had authorized states to subject nonresidents to suit on the basis of fleeting contacts had involved either physical injury to residents or commercial disputes. Implicit in the Kulko opinion was a warning that state court jurisdiction over defendants in routine domestic disputes will be closely examined.

Lower Court Decisions Since Kulko

Since the decision in Kulko, several lower courts--both state and federal--have handled jurisdictional challenges by nonresidents in child-support actions.[10] Most of these decisions were easy because the defendant had either innumerable contacts with the forum state or none at all. In Pope v. Pope, for example, the North Carolina Court of Appeals upheld a default judgment entered in North Carolina against an ex-husband who resided in Florida.[11] The defendant in Pope had been a resident of North Carolina until 1967, had been married and divorced here, and had entered into a separation agreement here. Given these significant contacts with the state, the Court of Appeals easily found that the defendant had "purposefully [availed] himself of the privilege of conducting activities within the forum state. . . ."[12]

The opposite extreme is illustrated by Boyer v. Boyer.[13] In that case the Supreme Court of Illinois held that Illinois could not subject a Georgia resident to its jurisdiction when he had lived all his life in Georgia, had married and divorced there, and had never been in the state of Illinois.

The California Court of Appeals had a closer case to decide in Barlett v. Superior Court.[14] Because the defendant in Barlett had had a few contacts with the forum, the court was forced to decide just how stringent the Kulko standard was. In Barlett, a county in California sought welfare reimbursement from a Florida resident. After Florida refused to accept a Uniform Reciprocal Enforcement of Support Act petition, the county successfully sued in a California court. The defendant was a Navy man who had twice visited a California resident in California in 1976. Both visits lasted a week. When the woman became pregnant, he paid her medical bill for treatment in California.

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9. Id. at 96-97.
10. Swafford v. Avakian, 581 F.2d 1224 (5th Cir. 1978); Boyer v. Boyer, 73 Ill. 2d 331, 383 N.E.2d 223 (Supreme Ct. Illinois 1978); Pope v. Pope, 38 N.C. App. 328 (1978); In re Marriage of Lontos, 152 Cal. Reptr. 271, 89 Cal. App. 3d 61 (1978); Barlett v. Superior Ct., 150 Cal. Rptr. 25, 86 Cal. App. 3d 72 (1978).
11. 38 N.C. App. 328 (1978).
12. Id. at 331.
13. 73 Ill. 2d 331, 383 N.E.2d 223 (Supreme Ct. Illinois 1978).
14. 86 Cal. App. 3d 72, 150 Cal. Rptr. 25 (1978).

The California Court of Appeals reversed the lower court and held that California did not have grounds to assert personal jurisdiction over the defendant. The court stressed that the defendant's recent visits to the state were primarily made to conduct Navy business and were "unrelated to his personal association with [the plaintiff]."[15] The court seems to read Kulko to require that the defendant's contacts with the forum be made for the purpose of visiting the child's mother. Under such a reading, jurisdiction could never be asserted over a defendant who impregnated a woman while he was on a journey through the state.

Chapter 542

On May 9, 1979, the General Assembly enacted Chapter 542, which authorizes an extension of long-arm jurisdiction in actions to adjudicate paternity and child support. The new law provides that an act of sexual intercourse within North Carolina is "sufficient minimum contact with this forum" to subject participants to the jurisdiction of North Carolina courts for actions brought under Article 3 of G.S. Chapter 49 ("Civil Actions Regarding Illegitimate Children"). Under Article 3, civil actions to establish paternity and the right to support may be brought by the child, his mother, father, personal representative, or the county director of social services.[16] These actions must be brought within three years of the child's birth or within three years after the father's last support payment.[17]

The preface to the act clearly states the legislation's goal. In 1977 almost 17 per cent of all births in North Carolina were illegitimate. Many of these children become dependent on welfare for their support. The biological parents of the children are frequently neither residents of North Carolina nor present in the state when the need for support arises. The act's proponents thought that "persons responsible for the birth and support of these children should be obligated to return to this State for purposes of adjudicating the parentage of children, the risk of whose conception they previously assumed by engaging in sexual intercourse in this State."[18]

The act's primary effect is to shift the burden of litigating in a distant forum away from the plaintiff and onto the defendant. Without the act, these actions for the support of illegitimate children could still be pursued, but only in the defendant's home state. When the defendant resides a considerable distance from North Carolina, the act's reallocation of the burdens of litigation is worth a lot to the plaintiff.

Application of Kulko to Chapter 542

Is the new law constitutional when evaluated according to the standards used in Kulko? It is useful to hypothesize a set of difficult circumstances under which Chapter 542 might be invoked.

Suppose a California serviceman traveling through North Carolina spends an evening with a Florida woman who is visiting her sister in North

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15. Id. at 27.
16. N.C. Gen. Stat. §49-16.
17. Id. at § 49-14.
18. N.C. Sess. Laws 1979, Ch. 542.

Carolina. Both parties are in the state for only a day and have no contact with the state other than this single visit. A child conceived by them during this visit comes to live with its North Carolina aunt. Soon the child becomes a recipient of public welfare payments. State child-support enforcement agents institute suit against the putative father in a North Carolina district court using the new law to justify long-arm jurisdiction.

The Kulko decision suggests that assuming jurisdiction over the nonresident father would probably violate the due process clause of the Fourteenth Amendment. Compared with Ezra Kulko, this hypothetical defendant has had far less contact with the forum state. It is difficult to claim that a serviceman traveling through the state has "purposely availed himself of the benefits and protections" of the laws of North Carolina by engaging in so personal an act as sexual intercourse. Although North Carolina has an obvious interest in providing child support for minor children residing in the state, the state's interests, according to Kulko, are not controlling for jurisdictional purposes.

Two distinctions can be drawn, however, between the facts of Kulko and the facts of the hypothetical situation posed. First, an argument can be made that the defendant who conceives and runs has acted wrongfully, that he has committed an irresponsible act in the state that unfairly burdens residents. A parent who refuses to provide adequate support for his illegitimate child is guilty of a misdemeanor under N.C. Gen. Stat. § 49-2.

An analogy might be drawn to long-arm jurisdiction over nonresident motorists. If a California resident on vacation has an automobile accident while driving through North Carolina, he becomes subject to suit here in any action arising out of the accident even though he has no other contact with North Carolina. The United States Supreme Court upheld this kind of long-arm motorist statute in Hess v. Pawloski as a means to "require a nonresident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for claimant a convenient method by which he may sue to enforce his rights."[19] It can be argued that conceiving a child who will require eighteen years of financial support is as consequential an activity as driving a motor vehicle and should subject participants to similar legal consequences.

Despite the appeal of treating absconding parents on the same basis as negligent drivers, it is probably not wise to rely on this analogy to support Chapter 542. Hess v. Pawloski was decided in 1927, and it relies heavily on the physical injury that automobiles can inflict. In the Kulko decision, the Supreme Court distinguished Hess as involving a defendant who had "visited physical injury on either property or persons."[20] Clearly the Court does not view the financial burdens of child support in the same light as the aftermath of physical injury.

The second distinction between Kulko and the hypothetical situation is the existence in North Carolina law of a particular statutory authorization for jurisdiction (Chapter 542). California asserted jurisdiction over Ezra Kulko pursuant to its broad authority to exercise all jurisdiction not inconsistent with due process.[21] Thus Kulko had little reason to suspect that his

19. 274 U.S. 352, 356 (1927).
20. 436 U.S. 84, 96-97 (1978).
21. Cal. Civ. Proc. Code Ann. § 410.10.

brief activity in California might result in his being subjected to suit there. In its opinion in this case, the Supreme Court noted this absence of a special statute as a factor to be weighed.[22] Presumably a North Carolina district court assuming jurisdiction pursuant to Chapter 542 would be in a slightly more favorable posture.

Summary

A North Carolina district court judge asked to assume jurisdiction over a nonresident defendant in an action for child support will need to proceed with caution. New Chapter 542, which authorizes jurisdiction solely on the basis of a single act of intercourse within the state, is probably unconstitutional in light of the recent United States Supreme Court decision in Kulko v. California Superior Court. Although the state has a substantial interest in litigating paternity and child support in the local courts, the defendant's right to be sued in a "fair forum" must be respected.

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22. 436 U.S. at 98. The Court noted: "And California has not attempted to assert any particularized interest in trying such cases in its courts by, e.g., enacting a special jurisdictional statute."