SUPREME COURT OF NEW JERSEY
DOCKET NO. A-93-04 (57,182)

GAYATRI SHAH,

Plaintiff - Respondent,

-v-

MAYANK SHAH,

Defendant - Appellant

Civil Action

Sat Below:
Hon. Howard H. Kestin, P.J.A.D.
Hon. Edwin R. Alley, J.A.D.
Hon. Joseph A. Falcone, J.A.D.

BRIEF AND APPENDIX OF AMICUS CURIAE LEGAL SERVICES OF NEW JERSEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Page

Cases

Statutes

INTRODUCTION

This case focuses the Court's attention on the question of the extent of the State's authority to protect domestic violence victims who have fled to New Jersey seeking refuge. Specifically, this case involves the issue of whether New Jersey courts have jurisdiction over a defendant who is alleged to have committed acts of domestic violence in another state and who had no prior connections with the State of New Jersey.

The Appellate Division appropriately held that New Jersey has inherent authority to protect residents of New Jersey from future acts of domestic violence, even without personal jurisdiction. That court made a distinction between prohibitory relief, such as restraints against domestic violence, and relief that mandates obligations upon the defendant, such as payment of financial support. The long-established status exception to personal jurisdiction supports the decision of the Appellate Division. Moreover, New Jersey may exercise personal jurisdiction over a nonresident defendant who commits purposeful acts, even in another state, that have consequences in New Jersey. Legal Services of New Jersey believes that the Appellate Division decision should be

affirmed and the plaintiff granted a final restraining order hearing in New Jersey.

LEGAL ARGUMENTS

POINT I

THE CASE LAW AND PUBLIC POLICY OF NEW JERSEY SUPPORT RESTRAINING ORDER PROTECTIONS FOR VICTIMS WHO HAVE FLED FROM DOMESTIC VIOLENCE IN OTHER STATES

New Jersey courts have had several opportunities to address jurisdiction in the context of domestic violence matters. This Court, in State v. Reyes, 172 N.J. 154 (N.J. 2002), considered the question of subject matter and personal jurisdiction over a defendant who prior to committing acts of domestic violence outside the State of New Jersey did not have minimal contacts with New Jersey. The Court concluded that the plain language of the Prevention of Domestic Violence Act of 1991, N.J.S.A. 2C:25-17 to 33 (hereinafter, the "the Act" or "PDVA") authorizes the courts of New Jersey to protect victims of domestic violence seeking shelter in New Jersey, even when the acts of domestic violence occur in another state. While the court based personal jurisdiction over the defendant upon his pursuing the plaintiff into New Jersey and further harassing her, the court explicitly states that

its "holding today would not change even in the absence of defendant's harassing conduct in New Jersey." Id., at 166.

The analysis included review of the prior legal interpretations of legislative history and intent in enacting the PDVA, especially as it pertains to victims who have fled to New Jersey seeking refuge. Reyes, at 160.

> The Legislature enacted the Domestic Violence Act to assure victims of domestic violence the maximum protection from abuse the law can provide. Because it is remedial in nature, the Legislature directed that the Act be liberally construed to achieve its salutary purposes.

Id., at 160 (citations omitted). In light of the Legislatures vision of a broad scope of protection for domestic violence victims, it incorporated a provision for expansive statutory jurisdiction. A plaintiff has the choice to apply for relief under the Act in the "court having jurisdiction over the place where the alleged act of domestic violence occurred, where the defendant resides, or where the plaintiff resides or is sheltered." Id., at 160-61.

This Court also reviewed the public policy considerations of providing restraining orders to domestic violence victims who have sought shelter in New Jersey from domestic violence that occurred outside the State. The

decision details the extent of the domestic violence crisis.

> Domestic violence is a serious problem in our society. Each year, three to four million women from all socio-economic classes, races, and religions, are battered by husbands, partners, and boyfriends. The Act and its legislative history confirm that New Jersey has a strong policy against domestic violence. Although New Jersey is in the forefront of states that have sought to curb domestic violence, New Jersey police reported 77,680 incidents of domestic violence in 2000 alone.
>
> Domestic violence rarely consists of an isolated event and often occurs both within and outside the home. It is a pattern of abusive and controlling behavior injurious to its victims. Indeed, most female homicide victims are assaulted and killed in their own homes at the hands of male intimates.

Id., at 163 (citations omitted). This Court acknowledged, in Reyes, that in the face of such "stark realities," domestic violence victims act reasonably in leaving their homes and even fleeing their home states to escape their batterers. Id., at 164. The Court also recognized that victims of domestic violence who leave their abusers must contend with enduring and often escalated risk of physical injury and death. Id.

> [O]nce they have left their homes domestic violence victims are not out of danger and often must seek further shelter from abuse. Domestic violence victims who leave their abusers are justified in their continued fear because of the many cases of victims who are assaulted or killed by former partners. Often victims are at greatest risk when they leave their abuser

> because the violence may escalate as the abuser attempts to prevent the victim's escape. Many victims of domestic violence are afraid to leave their partners because of the response that their leaving might provoke in the abuser.
>
> Once a domestic violence victim has successfully escaped, the victim faces the continued risk of stalking and further abuse. This Court has recognized the numerous case histories replete with instances in which a battered wife left her husband only to have him pursue her and subject her to an even more brutal attack. Indeed, abused women are at the highest risk of being killed by their batterers during the time following separation.

Id., 163-64 (citations omitted).

In J.N. v. D.S., 300 N.J. Super. 647 (Ch. Div. 1996), a Chancery Division held that the New Jersey Prevention of Domestic Violence Act of 1991, N.J.S.A. 2C:25-17 to 33, provides the court with subject matter jurisdiction over alleged acts of domestic violence by a New Jersey resident against a New Jersey resident, that occurred when the parties were attending college in another state. The court recognized that a domestic violence complaint may not be dismissed simply because the victim has fled from "the residence to avoid further incidents of domestic violence." J.N., at 651. The court noted that the Act does not expressly limit application thereof to acts of domestic violence that occur within the borders of the State of New Jersey. Id., at 650-51. The court further recognized the hardship and enhanced level of risk that would be imposed

upon a victim who has fled to New Jersey after an incident of domestic violence if New Jersey did not exercise jurisdiction.

> Were the court to deny jurisdiction in this case, the victim who seeks shelter in this state would be unprotected, unable to use the procedures established in this state which permit law enforcement officers and the courts to respond, promptly and effectively to domestic violence cases. The victim would have to wait, in fear, for the alleged abuser to commit an additional act of domestic violence, this time in New Jersey, before having recourse to the law and to the courts of this state.

Id., at 651.

Another Chancery Division court, in Sperling v. Teplitsky, 294 N.J. Super. 312 (Ch. Div. 1996), relied upon similar reasoning and lack of statutory language to the contrary to find that the court had subject matter jurisdiction over acts of domestic violence that occurred in New York City between two residents of the same New Jersey county. Id (the court denied subject matter on the unrelated issue of lack of requisite type of interpersonal relationship between the parties).

The issue of jurisdiction over a defendant who committed acts of domestic violence in another state was again addressed by the Appellate Division in A.R. v. M.R. 351 N.J. Super. 512 (App. Div. 2002). That court followed the reasoning of Reyes and found personal jurisdiction over

the defendant who it deemed to have pursued the plaintiff by making telephone calls to New Jersey with the expressed purpose of locating the plaintiff. Id., at 519.[1]

POINT II

PERSONAL JURISDICTION IS NOT NECESSARY FOR PROHIBITORY RELIEF IN DOMESTIC VIOLENCE FINAL RESTRAINING ORDERS IN ACCORD WITH THE STATUS EXCEPTION TO PERSONAL JURISDICTION

Normally subject matter and personal jurisdiction are both required for a court to enter a judgment in a civil matter. See, Pennoyer v. Neff, 95 U.S. 714, 734 (1878). Subject matter jurisdiction requires that the nature of the case is within the realm of cases that the statute covers. Subject matter jurisdiction within the PDVA requires that the complaint contain allegations that: (1) the parties currently or previously have one of the enumerated types of interpersonal relationships; (2) that one of the enumerated criminal activities was committed; and (3) that the

[1] In the present case, the defendant's briefs repeatedly cite the dicta in A.R., "[h]ad defendant only threatened in Mississippi to pursue the victim wherever she might go, we might have been obliged to find a lack of jurisdiction," as dispositive of the facts before the court. A.R., at 519. This assertion stretches the meaning of the language in the decision. The plain language states that the court "might" be compelled to make a different finding. The court does not and can not speculate on what decision would be appropriate under alternative facts, that is, had the defendant not pursued the plaintiff. That court's acknowledgement that its holding may not apply directly to a case in which the defendant did not pursue a victim into New Jersey, does not dictate a contrary result in the present case. The court merely acknowledged that such a scenario might require a distinct legal analysis.

plaintiff either resides or is sheltered in New Jersey. There is no suggestion in the present matter that the complaint fails to make any of these necessary allegations. As mentioned above, the courts, in J.N., Sperling, and Reyes, specifically held that the PDVA authorizes New Jersey courts to protect domestic violence victims who have fled to New Jersey, even when the alleged acts of domestic violence occurred beyond the borders of this State. The primary issue raised by the defendant is whether New Jersey may exercise jurisdiction over him, which is a question of personal jurisdiction rather than subject matter jurisdiction.

Personal jurisdiction refers to the Due Process requirement that an out of state defendant have at least minimum contacts with the forum state. International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945). Purposeful acts by the defendant toward the forum state, such that the defendant should reasonably anticipate "being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 440 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501 (1980). However, as far back as 1878, the United States Supreme Court recognized an exception to the need for personal jurisdiction for issues that are entirely within the realm

of a state's control of its inhabitants and solely concerning the status of such residents. Pennoyer v. Neff, 95 U.S. 714, 734, 24 (1878)

> [W]e do not mean to assert, by any thing we have said [regarding personal jurisdiction], that a State may not authorize proceedings to determine the *Status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involve authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. Pennoyer v. Neff, 95 U.S. 714, 734 (1878)

Subsequently, courts have noted that dissolution of a marriage falls within the status exception, but economic determinations within a divorce matter do not. In re Adoption of J.L.H., 737 P.2d 915 (Okla. 1987)**(1a)**[2]. A divorce plaintiff may not seek alimony or equitable distribution without the state having personal jurisdiction over the defendant. Id.

In addition to the example of the status exception in divorce actions acknowledged in Pennoyer, New Jersey has applied the status exception to other types of family-

[2] Citations to the Appendix of amicus are identified by the Appendix page number followed by the letter "a".

related cases. New Jersey courts, like the courts in the majority of states, have repeatedly acknowledged that child custody matters do not require personal jurisdiction over the non-custodial parent, so long as there is actual notice and an opportunity to be heard. See, Genoe v. Genoe, 205 N.J. Super. 6, 15 (App. Div. 1985), Matsumoto v. Matsumoto, 335 N.J. Super. 174 (App. Div. 2000); Schuyler v. Ashcraft, 293 N.J. Super. 261, (App. Div. 1996), certif. denied, 147 N.J. 578 (1997); Shaffer v. Heitner, 433 U.S. 186, 208, 97 S.Ct. 2569, 2581, 53 L.Ed.2d 683 (1977). However, child support matters do not fall within the status exception to personal jurisdiction. Kulko v. Super. Ct., 436 U.S. 84; 98 S. Ct. 1690; 56 L. Ed. 2d 132 (1978).

More recently, the Appellate Division held that the status exception to personal jurisdiction applies to termination of parental rights matters. Div. of Youth & Family Servs. v. M.Y.J.P., 360 N.J. Super. 426, certif. denied, 177 N.J. 575 (2003)(subjecting a parent in Haiti "to the jurisdictional sway of this State under the status exception, notwithstanding that she, herself, has never been present here"). The New Jersey Appellate Division noted that other state courts are divided on whether minimum contacts between the defendant parent and the forum state are required. Id., at 457. However, the majority of

states that have addressed the application of the status exception have agreed with the conclusion of New Jersey. Id.

Other states have afforded restraining or protective orders to plaintiffs based solely upon the alleged actions of a nonresident defendant that occurred outside the forum state. Two of the most notable are the cases from Illinois, the home state of the defendant in the present matter, and from Iowa.

The Illinois Appellate Court reviewed the entry of a protective order and provisions pertaining to child custody pursuant to that State's Domestic Violence Act. In re Marriage of Los, 299 Ill. App. 3d 357, 593 N.E.2d 126 (App. Ct. 1992)(8a). The defendant made several challenges, including that of the court lacking personal jurisdiction over him to enter the order of protection. Id. The Illinois Appellate Division noted that jurisdiction under their Domestic Violence Act follows the principals of jurisdiction of child custody, including the status exception, which regard personal jurisdiction as irrelevant. In re Marriage of Los, at 362 - 63. The court denied the merits of the defendant's personal jurisdiction challenge, but reversed the entry of the order for lack of proper notice and an opportunity to be heard. Id.

In 2001, the Supreme Court of Iowa explicitly applied the status exception to a domestic-abuse protective order. Bartsch v. Bartsch, 636 N.W.2d 3, 2001 Iowa Sup. LEXIS 207 (Iowa 2001)(14a). In that case, a protective order was entered in Iowa against a Colorado resident, whom the Iowa courts found did not have minimum contacts with the state of Iowa, and therefore was not under the personal jurisdiction of the Iowa courts. Id., at 5-6. The Supreme Court of Iowa framed the application of the status exception to domestic abuse or domestic violence matters in terms of adjudicating a protected status[3] for victims of domestic violence and as an addition to the historical application to domestic relations matters, including divorce, child custody and termination of parental rights.

> [W]e affirm the legal conclusion by the district court that , under these circumstances, personal jurisdiction over a nonresident is not required for a court to enter an order preserving the protected status afforded Iowa residents under [Iowa statute]. The district court's ruling does not purport to grant affirmative relief against the defendant; it merely preserves the protected

[3] Like termination of parental rights cases, domestic violence cases revolve around the assessment of risk of future harm, rather than prior harm, which is the issue in most civil matters. (J.N. v. D.S., at 652 (courts will grant a restraining order if "there is a showing that restraints are necessary to protect the life, health or well - being of a victim"). This distinction supports the assertion of a state's powers of protection regardless of personal jurisdiction over the defendant, as the resident plaintiff's future in the forum state is the ultimate question. Any facts about predicate incidents that occurred outside the forum state are relevant only as factors in the assessment of risk of future harm.

> status accorded to the plaintiff by [Iowa statute]. (citation omitted)

Id., at 6. The court turned to the 1942 United States Supreme Court case, Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942), which discusses jurisdiction in terms of the rights of states to exercise sovereign powers over the "commanding problems in the field of domestic relations," including the "[p]rotection of offspring, . . . and the enforcement of marital responsibilities." Williams, supra, at 317 U.S. 298-99, 63 S. Ct. 213, 87 L. Ed. 286. "Generally, a family relationship is among those matters in which the forum state has such a strong interest that its courts may reasonably make an adjudication affecting that relationship even though one of the parties to the relationship may have had no personal contacts with the forum state," see, Bartsch, at 8-9 (quoting In re S.A.V., 837 S.W.2d 80, 84 (Tex. 1992)(22a)). The Iowa Supreme Court noted that the State's interest in providing protection of victims of domestic violence is of a higher order than most domestic relations matters.

> The greater and more immediate risk of harm from domestic violence, as opposed to the considerable interest in preventing bigamous marriages and in protecting the offspring in marriages from being illegitimate in dissolution proceedings, make application of the status exception to protective

> orders even more compelling than in dissolution actions. (citation omitted) Indeed, the State's interest in protecting victims of domestic abuse is equal to, if not greater than, its interest in actions determining child custody or terminating parental rights because it involves the safety of the protected parties. If the State can make adjudications without personal jurisdiction over a nonresident parent in custody determinations in which it has a strong state interest, it also has that right in domestic-abuse protection actions in which it has an even stronger interest.

Bartsch, supra, 636 N.W.2d at 9.

Like the Supreme Court of Iowa, the New Jersey courts have repeatedly and consistently held the interest of this State in providing protection to victims of domestic violence to be of the highest order. See, Sperling v. Teplitsky, supra, and State v. Hoffman, 149 N.J. 564, 584 (1997). Therefore, the trial court, in the case at bar, should be permitted to apply the status exception to personal jurisdiction in this and other domestic violence cases.

POINT III

NEW JERSEY HAS PERSONAL JURISDICTION OVER THE DEFENDANT BASED UPON THE CONSEQUENCES, IN NEW JERSEY, OF THE DEFENDANT'S PURPOSEFUL ACTS

Notwithstanding the fact that personal jurisdiction is not necessary for the entry of restraints against domestic violence, exercise of personal jurisdiction is important in domestic violence cases, because only with personal

jurisdiction over the nonresident defendant may a state provide monetary relief to the domestic violence victim, and thereby reduce the risks of poverty and homelessness which plague domestic violence victims. In re S.A.V., supra. In the present case, the plaintiff seeks financial support from her husband, the defendant.

The Appellate Division made the assumption that the plaintiff's lack of affirmative factual allegations specifically about the defendant's minimum contacts with the State of New Jersey constitutes an admission that the defendant lacks sufficient contacts with the State to confer personal jurisdiction over him. Shah v. Shah, 373 N.J. Super. 47, 51 (App. Div. 2002).

However, the Appellate Division did not consider that the facts alleged within the complaint, if proven, might provide sufficient contacts by the defendant with the State to confer personal jurisdiction. The plaintiff certainly made allegations about incidents of domestic violence by the defendant against the plaintiff and the plaintiff's resulting fear of the defendant. Such facts, if proven, constitute minimal contacts with the State of New Jersey.

In the present case, the alleged predicate act of domestic violence against the plaintiff occurred in Illinois. However, there are clearly consequences within

the state of New Jersey. The plaintiff has sought the protections of the court in New Jersey because she is in fear. She must live her life, in New Jersey, with a constant eye toward protecting herself from the defendant pursuing her to New Jersey and following through on his threats or otherwise continuing the pattern of domestic violence against her. The plaintiff has had to relocate as the direct result of the defendant's conduct toward her. She has had to live in a transitional, effectively homeless, situation as the result of fleeing the domestic violence. She has lost the financial security that she and her husband had enjoyed as a couple based upon the defendant's occupation as a doctor. (Da37)[4]

Additionally, the defendant retained the plaintiff's immigration and employment documents that would have permitted her to work in New Jersey. (Da37-39). The defendant's actions further contributed to the plaintiff's economic hardship and dependence upon a New Jersey family for shelter and financial support.

While the plaintiff may not have become financially dependent upon the State of New Jersey for public

[4] Citations to the Appendix to Petition for Certification (Amended) of the defendant are identified by the prefix "Da" and the page number (to be consistent with the citations in documents previously filed in this matter).

assistance, she clearly became financially dependent upon the New Jersey family that took her in. The defendant has thereby caused financial hardship to that family in New Jersey, which took on the responsibility of providing housing and food for the plaintiff, which was a legal marital obligation of the defendant.

New Jersey courts have looked to traditional notions of minimal contacts to find personal jurisdiction over nonresident defendants whose conduct outside the state has consequences within New Jersey. Matsumoto v. Matsumoto, 335 N.J. Super. 174 (App. Div. 2000). In that case, the defendant who challenged New Jersey's personal jurisdiction over her, had taken part in a scheme to deprive her daughter-in-law, the custodial parent, of custody of the child. Id. The court found that the challenging defendant's tortiously interfering with custody had negative consequences to the custodial parent in New Jersey and conferred personal jurisdiction over that defendant. Id.

> Thus "an intentional act calculated to create an actionable event in a forum state will give that state jurisdiction over the actor." [Waste Management, Inc. v. Admiral Ins. Co., 138 N.J. 106, 119-20 (1994), cert. denied, 513 U.S. 1183, 115 S. Ct. 1175, 130 L. Ed. 2d 1128 (1995)] "A single isolated act may be sufficient to exercise jurisdiction over a non-resident defendant if the

> cause of action is related to its contacts with the forum state." Interlotto, Inc. v. National Lottery Admin., 298 N.J. Super. 127, 136 (App. Div.), certif. denied, 151 N.J. 78 (1997) Such acts include intentional tortious actions conducted outside the jurisdiction, aimed at a person or entity within the jurisdiction with the knowledge of the potentially devastating impact of the acts.

Matsumoto, supra, 335 N.J. Super. at 230. The Matsumoto court noted examples of this basis for assuming personal jurisdiction from the United States Supreme Court and courts in several states:

> Calder v. Jones, 465 U.S. 783, 789-90, 104 S. Ct. 1482, 1487, 79 L. Ed. 2d 804, 812 (1984) (jurisdiction in California over Florida newspaper persons for libel in article written and edited in Florida but published in newspaper circulated in California). See also D & D Fuller CATV Construction, Inc. v. Pace, 780 P.2d 520, 524-26 (Colo. 1989) (actions of nonresident grandparents in conspiring with ex-husband to remove minor from lawful custody of mother found to be tortious act causing injury in Colorado and falling within long-arm statute); Larson v. Dunn, 460 N.W.2d 39, 43-44 (Minn. 1990) (personal jurisdiction could be asserted where grandparents assisted in abduction of grandchild while residing in Minnesota and where tortious conduct continued after moving to California by depriving father of custody); Chiosie v. Chiosie, 104 A.D.2d 962, 480 N.Y.S.2d 756, 757 (App. Div. 1984) (tortious acts of co-conspirators in New York to remove children from father's custody were sufficient to establish personal jurisdiction even though appellant was domiciliary of New Jersey and had never entered New York); Fungaroli v. Fungaroli, 51 N.C. App. 363, 367-68, 276 S.E.2d 521, 524 (N.C. 1981) (trial court's denial of grandfather's motion to dismiss for lack of personal jurisdiction upheld on appeal where presented

with competent evidence of participation in removal of child from mother's custody). But see Inselberg v. Inselberg, 56 Cal. App. 3d 484, 490-91, 128 Cal. Rptr. 578, 582 (1976)(personal jurisdiction lacking where aunt and uncle enticed niece to leave custody of father through phone calls from Michigan to California because effect of actions was not exceptional and never invoked benefits and protections of state).

Id.

The Minnesota Court of Appeals, in Hughs ex rel. Praul v. Cole, 572 N.W.2d 747 (Minn. App. 1997)(35a), upheld its personal jurisdiction over a nonresident defendant in a request for an order of protection by a mother on behalf of her child, whom she alleged had been physically abused during an out of state visit with his father, the defendant. The court noted that "the standard for determining whether a tort is committed in Minnesota is whether damage from the alleged tortious conduct results in Minnesota. . . . [E]motional distress in Minnesota, caused by acts outside of the state, is sufficient." Id., at 750 (citations omitted). That court held that sufficient consequences occurred within Minnesota from the out of state abuse, including emotional and physical suffering of the child, and threats of the child to run away if required to return to the home of the defendant, to consider the defendant's out of state acts to have caused injury within the forum state. Id.

The Appellate Division, in New Jersey, has determined that in the realm of domestic relations, a plaintiff uprooting herself and moving to another state based upon the promise of a defendant may constitute sufficient effects within the forum state to establish minimum contacts. Sharp v. Sharp, 336 N.J. Super. 492 (App. Div. 1992). If the disruptions to the personal life of a plaintiff from being lured to move to another state by promises constitute minimum contacts sufficient to confer personal jurisdiction over the out of state defendant, then surely that same level of life disruption occurs from being caused to move to another state by threat of violence, which must also constitute minimum contacts and confer personal jurisdiction.

The United State Supreme Court, in Kulko v. Super. Ct., 436 U.S. 84; 98 S. Ct. 1690; 56 L. Ed. 2d 132 (1978), clarified that personal jurisdiction in child support matters may not be conferred by the other party's unilateral decision to move to another state. Id., at 436 U.S. at 93, 98 S. Ct. at 1698; 56 L. Ed. 2d at 142. However, courts have held that fleeing from domestic violence is not a unilateral choice of the fleeing victim.

> By abusing and harassing [the plaintiff], effectively forcing his wife to [flee to] Colorado where she and the defendant's child

> became dependent upon public assistance, the defendant caused important consequences in Colorado and thereby created a substantial connection between himself and Colorado . . . Accordingly, it is not [the plaintiff's] unilateral action which is causing the defendant to be haled before a Colorado court, but the defendant's own conduct, which created a substantial connection between himself and Colorado and necessitated the involvement of the courts.

Malwitz v. Parr, 99 P.3d 56, 63 - 64(Colo. 2004)(41a). A Virginia appellate court addressed the issue of the defendant's connections to the forum state when a domestic violence victim flees to a state that might be unexpected to the defendant, even if reasonable. Franklin v. Commonwealth, Dept. of Social Servs., 27 Va. App. 136, 497 S.E.2d 881 (Va. App. 1998)(50a). That court, with reasoning similar to that in Malwitz, recognized personal jurisdiction over an out of state defendant who committed acts of domestic violence against his wife, threatened her life, and ordered her and their children to leave the marital home in Africa. Id.

> Since husband never specifically directed wife to move to Virginia, he argues that Virginia courts failed to obtain jurisdiction over him . . . We disagree. . . . They had to go somewhere.
> ***
> Husband's contention that unless he directed wife to this Commonwealth, Virginia courts may not exercise personal jurisdiction in support matters, is overly restrictive. If widely adopted, such a construction would leave spouses similarly situated without a forum in which to

> request child and spousal support. It is the legal and moral duty of a spouse to support his or her family consistent with his or her financial ability. (citation omitted). To allow husband to escape his support obligations merely because he failed to dictate the specific destination when he ordered his family to leave the marital home would frustrate the purpose of the legislature.

Id., at 144-46.

POINT IV

NEW JERSEY SHOULD NOT DECLINE TO EXERCISE JURISDICTION BASED UPON FORUM NON CONVENIENS

While the defendant may not wish to travel from Illinois to New Jersey, that alone is insufficient to create forum non conveniens. Bartsch, supra, at 17. In New Jersey, a defendant's claim of forum non conveniens is rarely successful, because the "plaintiff's choice of forum ordinarily will not be disturbed except upon a clear showing of real hardship or for some other compelling reason. The choice of forum must be demonstrably inappropriate." Kreuzer v. Kreuzer, 230 N.J. Super. 182 (App. Div. 1989); See also, Civic Southern Factors v. Bonat, 65 N.J. 329 (1974).

The presumption in favor the of plaintiff's choice of forum is particularly important in domestic violence matters. A history of domestic violence between the parties adds to the inconvenience of defendant's home as

the forum for the litigation. If the plaintiff travels to the defendant's home state, where she may have no family and require lodging in a temporary setting, she is substantially more vulnerable to future acts of domestic violence than if the matter is litigated in New Jersey, where the plaintiff has found some level safe haven, even if temporary.

Plaintiffs who flee their home in fear of their abuser are also foregoing, at least temporarily, the financial support of the abuser and their home. This leaves the victim in a financially precarious situation and unable afford travel and lodging expenses necessary to return to the state she fled in order to litigate. In the present case, the plaintiff testified that defendant has told her in the past that he, as a doctor, earned $150,000.00 annually. (Da37). On the other hand, the plaintiff has been unable to work due to the defendant retaining her employment and immigration documents. (Da37-Da39). Therefore, the defendant has much more financial capacity to litigate a matter in New Jersey, than the plaintiff has to litigate in Illinois.

The New Jersey Legislature recently acknowledged the role of domestic violence in forum considerations, when it enacted the Uniform Child Custody Jurisdiction and

Enforcement Act, (hereinafter "UCCJEA"), L. 2004, c. 147, codified as N.J.S.A. 2A:34-53 to 95, enacted September 14, 2004, effective as of December 12, 2004. The UCCJEA modified the former jurisdiction statute, the Uniform Child Custody Jurisdiction Act, to require consideration of specific factors, including the relative wealth of the parties and any history of domestic violence in the relationship, in determining whether a forum is so inconvenient for a defendant that the state should decline to exercise jurisdiction. N.J.S.A. 2A:34-71. The legislature thereby acknowledged the hardship faced by a domestic violence victim in litigating outside of her state and especially in the home state of her abuser. Illinois, the home state of the defendant in the present matter, has also adopted the UCCJEA including the consideration of domestic violence and relative wealth as factors in inconvenient forum claims. 750 ILCS 36/207 (56a).

The defendant's claim of forum non conveniens must fail for the additional reason that he makes no claim of an appropriate alternative forum. The doctrine of forum non conveniens only comes into play when there is another available forum that will assume jurisdiction for the litigation. Civic Southern Factors, at 333. "The purpose of the doctrine [of forum non conveniens] is to prevent

harassment and injustice to a defendant, but it may not be used to embarrass or destroy a claimant's opportunity to be heard." Kreuzer, at 186. In the present case, the Plaintiff no longer resides in Illinois. As mentioned in Point I, New Jersey has a substantial interest in protecting its residence from domestic violence. However, Illinois does not have such an interest in protecting individuals who no longer reside in that state.

As is mentioned in Point II, the Illinois courts have applied the status exception to personal jurisdiction in domestic abuse matters. In re the Marriage of Los, supra. Consequently, the defendant should have no expectation that the court of Illinois will exercise jurisdiction.

Finally, a determination on the equitable doctrine forum non conveniens is firmly within the discretion of the trial judge and should not be overturned on appeal without "a showing of clear abuse of that discretion." Kreuzer, at 186. There is no such showing by the defendant in the present case.

CONCLUSION

For all the reasons discussed in this brief, amicus urges this Court to affirm the decision below, denying defendant's interlocutory appeal, and permitting the plaintiff to proceed to a final restraining order hearing

under the PDVA. The status exception to personal jurisdiction in family-related matters, which dates back to at least 1878, firmly supports the Appellate Division decision in providing prohibitory relief in domestic violence matters. Additionally, the alleged actions of the defendant and the consequences of those actions within the State of New Jersey confer personal jurisdiction over the defendant, permitting adjudication of the prohibitory all of the relief sought. Finally, the defendant's claim of forum non conveniens is without merit.

LEXSEE 737 P.2D 915

In the Matter of the ADOPTION OF J.L.H., Jr., and J.P.H., Minors, D.K.H., Appellant, v. J.L.H. and B.A.H., Appellees

No. 63,524

Supreme Court of Oklahoma

1987 OK 25; 737 P.2d 915; 1987 Okla. LEXIS 169

April 14, 1987, Filed

PRIOR HISTORY: [1]**

Certiorari to the Court of Appeals, Oklahoma City Divisions. A natural mother, who is a noncustodial parent and a nonresident of the State, appeals from the order of the District Court, Grady County, Oteka L. Alford, Judge, which declared two minor children eligible for adoption without her consent. The Court of Appeals reversed and certiorari was granted on petition brought by the natural father and stepmother. THE OPINION OF THE COURT OF APPEALS' IS VACATED; THE TRIAL COURT'S ORDER IS REVERSED WITH DIRECTIONS.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, a father and a stepmother, sought review of the judgment from the Court of Appeals, Oklahoma City Divisions (Oklahoma), which reversed the trial court's judgment that the two minor children were eligible for adoption without appellee mother's consent pursuant to *Okla. Stat. tit. 10, § 60.6(3)(b)* (1981).

OVERVIEW: The father and the stepmother sought a judicial determination of his children's eligibility for adoption without the consent of their mother based on her allegedly willful failure to provide support for a full year. The trial court found in favor of the father and the stepmother. The appellate court reversed. The court vacated. The court reversed. The children were bona fide residents of Oklahoma. Their residence was free from legal cloud. The court held that the trial court had subject-matter cognizance to affect their personal status. For the year preceding the filing of the adoption proceeding, the mother's income was far below the level of bare subsistence. She still managed to send gifts to all the children of the father's household. The court held that the proof did not disclose her modest gifts were incommensurate with her ability to discharge the support requirements. The court found that the record did not meet the high standard of evidentiary support required for the judicial declaration sought by the father and the stepmother.

OUTCOME: The court vacated the appellate court's judgment. The court reversed the trial court's judgment with directions.

LexisNexis(R) Headnotes

Family Law > Adoption > Procedures
[HN1] Proceedings for adoption must be brought in the district court, or any specially created court having jurisdiction in the county where the petitioners reside. *Okla. Stat. tit. 10, § 60.4* (1981).

Family Law > Adoption > Procedures
[HN2] Any child present within Oklahoma at the time the petition for adoption is filed, irrespective of place of birth or place of residence, may be adopted. *Okla. Stat. tit. 10, § 60.2* (1981).

Family Law > Adoption > Procedures
[HN3] Proceedings by a person seeking to adopt a child shall be had in the county of the residence of such person if such person is a resident of the state. If such person is a nonresident of the state such proceedings shall be had in the county in which the child to be adopted resides. *Kan. Stat. Ann. § 59-2203.*

Family Law > Child Support > Obligations
Family Law > Adoption > Consent
Family Law > Adoption > Procedures
[HN4] A legitimate child cannot be adopted without the consent of its parents, if living except that consent is not necessary from a father or mother: 3. Who, for a period of twelve (12) months next preceding the filing of a petition for adoption of a child, has willfully failed, refused or neglected to contribute to the support of such child: a. in a substantial compliance with a support provision contained in a decree of divorce, or orders of modification subsequent thereto, or b. according to such parent's financial ability to contribute to such child's support if no provision for support is provided in a decree of divorce or an order of modification subsequent thereto. *Okla. Stat. tit. 10, § 60.6* (1981).

Family Law > Adoption > Consent
Family Law > Adoption > Procedures
[HN5] Both natural parents must consent to their child's adoption by another person. *Okla. Stat. tit. 10, § § 60.5(1)* and *60.6* (1981). A child may be declared eligible for adoption without the consent of a parent who is judicially found to have willfully failed to support it. *Okla. Stat. tit. 10, § 60.6* (1981).The determination that an adoption may be effective without a parent's consent must be made in an ancillary proceeding anterior to the decree of adoption. In a proceeding for declaration of the child's eligibility to be adopted without a parent's consent, the burden is cast on the adoption petitioner to show by clear and convincing evidence that the natural parent, whose consent is to be deemed unnecessary, has failed to meet the obligation for support.

Family Law > Delinquency & Dependency > Wards of Court
[HN6] Oklahoma jurisprudence has long viewed a child as a ward of the state.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
Civil Procedure > Venue > Individual Defendants
[HN7] The status of a child vis-a-vis its parents is a proper subject for the exercise of cognizance by the courts of the child's domicile.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN8] A nondomiciliary, who has no minimum contacts to the state for the occurrence or transaction in suit, may not be sued in this state for an in personam judgment. Before the emergence of the minimum contacts doctrine, the U.S. Supreme Court allowed a state to exercise judicial jurisdiction over personal status when only one of the parties sharing the status was a bona fide domiciliary of the forum state. The later-announced minimum contacts gauge of state in personam jurisdiction neither enlarged, nor abridged the existing norms of state cognizance over personam status. The Williams analysis clearly authorizes a state to exercise cognizance over the personal status of a nondomiciliary party if the sub judice status has a sufficient relationship to the state.

Civil Procedure > Pleading & Practice > Service of Process
[HN9] A state may not exercise judicial jurisdiction over the status of a person unless a reasonable method is employed to give him notice of the action and unless he is afforded a reasonable opportunity to be heard.

COUNSEL:

Randy Witzke, Esq., Messrs. Huckaby, Fleming, Frailey, Chaffin & Darrah for the Appellant.

Richard E. Koenig, Esq., Messrs. Ferguson, Horn & Lawson for the Appellee.

JUDGES:

Opala, J. Doolin, C.J., and Hodges, Kauger and Summers, JJ., concur; Simms and Wilson, JJ., concur in judgment; Hargrave, V.C.J., and Lavender, J., dissent.

OPINIONBY:

OPALA

OPINION:

[*917] The issues for disposition on certiorari are: [1] Is Oklahoma a constitutionally sanctioned forum state for the exercise of judicial cognizance to declare minor children -- bona fide residents of this state -- eligible for adoption by their domiciliary father and stepmother without the consent of the noncustodial **[**2]** natural mother, a nonresident who claims to have had no minimum contacts with Oklahoma? and [2] Does the record, when measured by the fundamental law's clear-and-convincing-evidence test, establish the children's eligibility for a consentless adoption grounded on the mother's willful failure to support them? We answer the first question in the affirmative and the second in the negative.

Two children were born to D.K.H. [mother] and J.L.H. [father] before their 1979 Kansas divorce. The decree gave their custody to the mother and specifically required the father to pay child support. Later the decree was modified to place custody with the father but no

monetary obligation was imposed upon the mother. In short, she remained free of any court-decreed support responsibility. The father subsequently remarried and moved his family to Oklahoma.

In March of 1984 the father (joined by B.A.H., the stepmother) sought a judicial determination of his children's eligibility for adoption without the consent of their natural mother. This claim for relief was grounded on the natural mother's allegedly willful failure to provide child support -- within the meaning of *10 O.S. 1981 § 60.6(3)* [**3] n1 -- for a full year last preceding the filing of the adoption case.

n1 See footnote 5 *infra* for the pertinent text of § 60.6(3)(b).

The mother *appeared specially* and objected to the trial court's in personam and subject-matter jurisdiction but her challenge met with an adverse ruling. After hearing testimony the trial court found that, because the mother had willfully and intentionally neglected to contribute to the children's support, they became eligible for adoption without her consent by force of § 60.6(3)(b).

The Court of Appeals reversed that decision and held that the trial court (a) was without in personam jurisdiction of the natural mother because she did not have minimum contacts with Oklahoma as required by the federal fundamental law's doctrine of *International Shoe v. State of Washington* n2 and (b) lacked authority to proceed with the adoption without the natural mother's consent. The father and stepmother now seek our review by certiorari.

n2 *326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* [1945]; see also footnote 11 *infra*.

[**4]

I

THE JURISDICTION OF THE TRIAL COURT

The father, stepmother and the two minor children are domiciliaries of Grady County, Oklahoma, the forensic situs of the adoption case. Under the applicable legal norms of the forum state, *10 O.S. 1981 § 60.4*, n3 venue was properly laid and the trial court did have subject-matter jurisdiction to entertain the proceeding under review. n4 *10 O.S. 1981 § 60.2*.

n3 The terms of *10 O.S. 1981 § 60.4* provide:

> [HN1] "Proceedings for adoption must be brought in the district court, or any specially created court having jurisdiction in the county where the petitioners reside."

It is undenied that the adoption petitioners are bona fide residents of Grady County.

n4 The terms of *10 O.S. 1981 § 60.2* provide:

> [HN2] "Any child present within this state at the time the petition for adoption is filed, irrespective of place of birth or place of residence, may be adopted."

If we were to look to Kansas law for guidance to the proper forum state and to the applicable venue, the governing statute of this state, K.S. 59-2203, provides in pertinent part that

> "* * * * [HN3] proceedings by a person seeking to adopt a child shall be had *in the county of the residence of such person if such person is a resident of the state. If such person is a nonresident of the state such proceedings shall be had in the county in which the child to be adopted resides . . . .*" [Emphasis supplied.]

Even under the law of the natural mother's domicile venue in this proceeding was rightly laid in Grady County and the trial court had subject-matter jurisdiction over the adoption claim.

[**5]

[*918] The quest for a consentless adoption was rested on the provisions of § 60.6(3). n5 If their claim were to be considered as governed by the cited section of our adoption law, the petitioners were required to establish by clear and convincing proof that the natural mother willfully had failed to contribute to the children's support for the prescribed period of twelve months next preceding the filing of the adoption case. Whether the noncustodial parent whose consent was deemed unnecessary discharged her support duty presented an issue ancillary to the pending adoption. n6

n5 The *currently effective* version of *10 O.S. 1981 § 60.6* was enacted in the 1986 session (Okl.Sess.L. 1986, Ch. 263 § 6, operative July 1, 1986). The terms of *the then-effective* text of *10 O.S. 1981 § 60.6* provided in pertinent part:

> [HN4] "A legitimate child cannot be adopted without the consent of its parents, if living . . . . except that consent is not necessary from a father or mother:
>
> 3. Who, for a period of twelve (12) months next preceding the filing of a petition for adoption of a child, has willfully failed, refused or neglected to contribute to the support of such child:
>
> a. in a substantial compliance with a support provision contained in a decree of divorce, ... or orders of modification subsequent thereto, ... or
>
> b. according to such parent's financial ability to contribute to such child's support if no provision for support is provided in a decree of divorce or an order of modification subsequent thereto; * * * *"

[6]**

n6 [HN5] Both natural parents must consent to their child's adoption by another person. *10 O.S. 1981 § § 60.5(1)* and *60.6*. A child may be declared eligible for adoption without the consent of a parent who is judicially found to have willfully failed to support it. *10 O.S. 1981 § 60.6*. The determination that an adoption may be effective without a parent's consent must be made in an ancillary proceeding anterior to the decree of adoption. In a proceeding for declaration of the child's eligibility to be adopted without a parent's consent, the burden is cast on the adoption petitioner to show by "clear and convincing evidence" that the natural parent, whose consent is to be deemed unnecessary, has failed to meet the obligation for support. *Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599* [1982] and *Darren Todd H., Okl., 615 P.2d 287, 290* [1980].

The mother relied upon *International Shoe v. State of Washington* to defeat Oklahoma's cognizance. n7 She contended that subjecting her to the jurisdiction of an Oklahoma forum would offend the constitutional fair play component **[**7]** of the Due Process Clause in the XIVth Amendment.

n7 See footnote 2 *supra*.

Our jurisdictional inquiry would indeed be misdirected if it were focused on the trial court's in personam cognizance of the natural mother. The issue critical to our determination of cognizance is whether Oklahoma affords a constitutionally sanctioned forum to entertain the proffered quest to change the underage children's parental *status* vis-a-vis their nonresident and noncustodial mother. n8 The "bona fide domiciliary" analysis of *Williams v. State of North Carolina* n9 yields a jurisdictional doctrine that is here determinative of Oklahoma's forensic authority to affect the family bond between the resident children and their nonresident natural parent. According to *Williams*, judicial cognizance over *personal status* -- be it one created by matrimony or by natural parentage n10 -- may be validly exercised by a court of the state in which *only* one party to the **[*919]** status is a bona fide domiciliary while **[**8]** the other party, whose bond is sought to be adversely affected by the litigation, is a resident of a foreign jurisdiction. n11 The teaching of *Williams* has never been questioned by the subsequent emergence of the so-called minimum contacts doctrine. n12 That doctrine was fashioned to gauge the standards of due process for the exercise of jurisdiction to render an in personam judgment against one not served within the state -- a form of forensic cognizance that is not implicated in this case because here *no* personal judgment is sought against the Kansas mother. n13

n8 [HN6] Oklahoma jurisprudence has long viewed a child as a ward of the state. *Allison v. Bryan, 21 Okl. 557, 97 P. 282, 286* [1908]. The teaching of *Allison* was followed in *Ex Parte Walters, 92 Okl.Cr. 1, 221 P.2d 659, 667* [1950]. [HN7] The status of a child *vis-a-vis* its parents is a proper subject for the exercise of cognizance by the courts of the child's domicile. See *Deason v. Jones, 7 Cal. App. 2d 482, 45 P.2d 1025, 1026* [1935] and *Rizo v. Burruel, 23 Ariz. 137, 202 P. 234* [1921]; see also *Restatement (Second) of Conflict of Laws § 78*. The text of § 78 is:

> "A state has power to exercise judicial jurisdiction to grant an adoption if
>
> (a) it is the state of domicil of either the adopted child or the adoptive parent, and
>
> (b) the adoptive parent and either the adopted child or the person having legal custody of the child are subject to its personal jurisdiction."

[9]**

n9 *317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279* [1942].

n10 While *Williams v. State of North Carolina, supra* note 9, concerns itself with judicial cognizance over the termination of marital status, its reasoning clearly applies to the legal severance of a bond between a child and its parent as well. *Adoption, like divorce, involves a change of status. Rizo v. Burruel, supra* note 8 at 237; see e.g., *A. v. M., 74 N.J. Super. 104, 180 A.2d 541, 548* [N.J. Super. 1962] and 1 Beale, Treatise on the Conflict of Laws, 469 [1935].

n11 Oklahoma has long been in faithful compliance with the federal doctrine that [HN8] a nondomiciliary, who has *no* minimum contacts to the state for the occurrence or transaction in suit, may not be sued in this state for an in personam judgment. See *B.K. Sweeney Co. v. Colorado Interstate Gas Co., Okl., 429 P.2d 759* [1967]. Before the emergence of the minimum contacts doctrine, in *Williams v. State of North Carolina, supra* note 9, the U.S. Supreme Court allowed a state to exercise judicial jurisdiction over *personal status* when only one of the parties sharing the status was a bona fide domiciliary of the forum state. The later-announced minimum contacts gauge of state in personam jurisdiction neither enlarged, nor abridged the existing norms of state cognizance over *personam status.* The *Williams* analysis clearly authorizes a state to exercise cognizance over the personal status of a nondomiciliary party if the *sub judice* status has a sufficient relationship to the state. See also *Restatement (Second) of Judgments § 7, infra* note 13.

Although *Shaffer v. Heitner, 433 U.S. 186, 207, 97 S. Ct. 2569, 2581, 53 L. Ed. 2d 683* [1977], articulates the parameters for the exercise of judicial jurisdiction over property *(in rem),* it explicitly refrains from ruling on the fairness of *in rem* standards in cases brought to adjudicate the personal status of an individual. In *Shaffer at 433 U.S. 208, 97 S. Ct. at 2582,* the Court said: "It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard." In footnote 30 of the opinion, *433 U.S. at 208, 97 S. Ct. at 2582,* the Court further elucidated: ". . . . We do not suggest that jurisdictional doctrines other than those discussed in [the] text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness." **[**10]**

n12 See *Sherrer v. Sherrer, 334 U.S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429* [1948]; *Coe v. Coe, 334 U.S. 378, 68 S. Ct. 1094, 92 L. Ed. 1451* [1948] and *Kreiger v. Kreiger, 334 U.S. 555, 68 S. Ct. 1221, 92 L. Ed. 1572* [1948].

n13 The case *sub judice* can be readily distinguished from *Kulko v. Superior Court, 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132* [1978]. In *Kulko* the forum state was attempting to hale the defendant-father from his home in New York into a distant California court for modification of his child support obligation -- a classical form of court-imposed obligation that requires in personam jurisdiction of the defendant. In the present case no money judgment is sought against the natural mother; instead, Oklahoma's cognizance is invoked to settle the status of her minor children who are bona fide domiciliaries of the forum state. See *Restatement (Second) of Judgments § 7.* The text of § 7 is:

> "A state may exercise jurisdiction to establish or terminate a status if the status has a sufficient relationship to the state. Relationships sufficient to support exercises of such jurisdiction in matters of family status are stated in *Restatement, Second, Conflict of Laws § § 70-79.*"

In sum, *Kulko* is distinguishable because it deals with jurisdiction to enforce liability arising from status rather than with determination of status.

[**11]

A quest for a consentless adoption must, of course, always conform to the procedural requirements of due process. Because the natural mother had ample notice of the Oklahoma proceeding and was afforded sufficient opportunity to appear and defend against the attempted judicial extinguishment of her consent power, the minimum standards of fundamental fairness in the Due Process Clause were adequately met. In short, due process was not offended by the procedure used to hale her into the Oklahoma forum. n14

n14 *Armstrong v. Manzo, 380 U.S. 545, 550, 85 S. Ct. 1187, 1190, 14 L. Ed. 2d 62* [1965] and *Stubbs v. Hammond, 257 Iowa 1071, 135 N.W.2d 540, 543* [Iowa 1965]. See also *Restatement (Second) of Conflicts of Laws § 69*. The text of § 69 is:

> [HN9] "A state may not exercise judicial jurisdiction over the status of a person unless a reasonable method is employed to give him notice of the action and unless he is afforded a reasonable opportunity to be heard."

We hold that, inasmuch as the children [**12] to be adopted are bona fide residents of this state and their *residence status* is free from legal cloud, the trial court was not without subject-matter cognizance to [*920] affect their personal status vis-a-vis the nondomiciliary natural parent. n15

n15 Our view would not be the same if the father had brought the children to Oklahoma illegally or under a legal cloud. If that were so, the children could not be considered bona fide residents of Oklahoma and hence would not be within the ambit of the *Williams* doctrine.

II

THE FATHER'S (AND STEPMOTHER'S) PROOF TO ESTABLISH THE NATURAL MOTHER'S ALLEGEDLY WILLFUL NONSUPPORT FAILS TO MEET THE FUNDAMENTAL LAW'S CLEAR-AND-CONVINCING-EVIDENCE STANDARD

Assuming without deciding that the norms of Oklahoma law are applicable here to measure the legal support obligation owed by this nonresident and noncustodial parent, the issue before us is whether the proof adduced to establish that the natural mother had willfully failed to support the children [**13] according to her financial ability is sufficient to show the children eligible for a consentless adoption. We hold that the record fails to meet the requisite clear-and-convincing-evidence standard.

Oklahoma law requires a noncustodial parent to support his child according to the terms of a court order n16 or, absent such provisions, in a manner commensurate with one's financial ability. n17 An unadjudicated, status-based duty of support may be discharged in non-monetary form if the contribution made is used or usable for the child's necessary living expenses such as food, clothing, medical care or insurance. Failure to provide the required support for the year last preceding the filing of the case may result in a judicial declaration that the child is eligible for a consentless adoption. n18

n16 *10 O.S. 1981 § 60.6(3)(a)*, *supra* note 5, and *Matter of Adoption of C.M.G., Okl., 656 P.2d 262* [1982].

n17 *10 O.S. 1981 § 60.6(3)(b)*, supra note 5, and *Matter of Adoption of C.M.G., supra* note 16.

n18 *Matter of Adoption of C.M.G., supra* note 16.

[**14]

A parent who is financially unable to provide for the support of his child and who has not voluntarily placed himself in a disabling position to avoid legal responsibility is not within the class of persons whose power to consent is judicially extinguishable. Excusable disability factors were found to be present in *Matter of Adoption of V.A.J.* n19 There, the respondent-father, a prisoner serving a life sentence, was earning a monthly salary of $25. His support contributions consisted of non-monetary gifts. We held that he did not willfully place himself under disability to avoid meeting his support obligation.

n19 *Okl., 660 P.2d 139* [1983].

For a part of the critical period -- the year next preceding the filing of the adoption proceeding -- the mother in this case was a public charge upon the State of Kansas. Her income for that year was far below the level

of bare subsistence. Yet during the time her financial outlook was the bleakest, she managed to send gifts to all the children in the custodial father's **[**15]** household -- her own as well as those of the second wife. One can hardly say that the mother placed herself in an impoverished and disabled condition to avoid meeting her support obligation. n20 In short, the proof does not disclose that her modest gifts were incommensurate with her ability to discharge the Oklahoma-imposed support requirements. We hence find that the record does not meet the law's high standard of evidentiary support required for the judicial declaration sought here by the father and stepmother. n21

n20 *See Matter of Adoption of V.A.J., supra* note 19.

n21 *Santosky v. Kramer, supra* note 6, and *Matter of Adoption of Darren Todd H., supra* note 6.

Because we have determined that under the applicable legal norms the mother's bond to the children was not severable without her consent, we need not decide here whether the law of the mother's domicile -- where the divorce was granted and **[*921]** the custody of the children was later reposed in the father -- ought to provide the **[**16]** gauge for measuring her support duty. This choice-of-law question, which bears here some unmistakable Full-Faith-and-Credit overtones, must accordingly be saved for another day. n22

n22 The mother contended below that, because she was a Kansas resident, the outer limit of her support duty is to be measured by the law of that state. She asserted that Oklahoma cannot impair the terms of the Kansas decree nor may it require her, as a nonresident and noncustodial parent, to conform to Oklahoma's support norms. Because the divorce decree was rendered in Kansas and that state conferred upon her the status of a noncustodial parent, she took the position that Kansas had the most significant relation to her conduct. See *Yarborough v. Yarborough, 290 U.S. 202, 54 S. Ct. 181, 78 L. Ed. 269, 90 ALR 924* [1933]. In *Yarborough,* where a child sought severance of the father's bond, the Court held that the character and extent of the father's support obligation and the status of the minor vis-a-vis the father were both to be governed by the law of the father's domicile.

[17]**

On certiorari previously granted, the Court of Appeals' opinion is vacated and the trial court's order is reversed with directions to declare the children ineligible for adoption without their natural mother's consent.

Doolin, C.J., and Hodges, Kauger and Summers, JJ., concur;

Simms and Wilson, JJ., concur in judgment;

Hargrave, V.C.J., and Lavender, J., dissent.

CONCURBY:

SIMMS

CONCUR:

SIMMS, J., CONCURRING IN JUDGMENT ONLY:

I join in the Court's judgment; however I cannot concur in that portion of the majority opinion which holds that Oklahoma's exercise of in personam jurisdiction over this nonresident mother is justified and constitutionally permissible. The Court of Appeals decision was correct and should be affirmed.

This is not an action brought by the state to protect the safety and well-being of a child in danger within our boundaries. Different issues would be present if it were.

The mother did not have sufficient minimum contacts with Oklahoma to support requiring her to defend this attack on her parental rights in this private interparental litigation under *10 O.S. 1981 § 60.6.*

Under these circumstances, the exercise of personal jurisdiction in the absence of minimum **[**18]** contacts offends traditional notions of fair play and substantial justice. See: *International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); Kulko v. California Supreme Court, 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978); Yery v. Yery, Okl., 629 P.2d 357 (1981); Perdue v. Saied, Okl., 566 P.2d 1168 (1977); Dunn v. Dunn, Okl.App., 550 P.2d 1369 (1976).*

I cannot agree with the majority that *Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L.Ed 279 (1942)* is even applicable here, let alone controlling.

It seems clear to me that correct resolution of the choice-of-law issues here would require holding that Kansas law must govern. Kansas is clearly the state with the most significant relationship to the parties.

I do agree with the majority that under Oklahoma law, the evidence here was plainly insufficient to support severance of this maternal bond.

LEXSEE 593 N.E.2D 126

In re MARRIAGE OF CATHERINE L. LOS, Petitioner-Appellee, and SIMON G. LOS, Respondent-Appellant.

No. 2-91-0910

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

229 Ill. App. 3d 357; 593 N.E.2d 126; 1992 Ill. App. LEXIS 773; 170 Ill. Dec. 584

March 3, 1992, Submitted
May 19, 1992, Filed

SUBSEQUENT HISTORY: [*1]**

Released for Publication June 24, 1992.

PRIOR HISTORY:

Appeal from the Circuit Court of Du Page County. No. 91-MR-171. Honorable Michael R. Galasso, Judge, Presiding.

DISPOSITION:

Reversed and remanded with directions.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent father appealed the Circuit Court of Du Page County's order of protection that restricted his visitation rights with his children for two years.

OVERVIEW: Before the father and petitioner mother's divorce was final, the mother and the children moved from Delaware to Illinois. The mother was awarded primary custody of the children, and the father was awarded liberal visitation. The mother filed a motion to domesticate the judgment in Illinois, and the father filed a motion for reargument. When the father picked up the children for court ordered visitation, the mother claimed that the children were abducted. The Illinois court granted full custody to the mother and prohibited the father from removing the children from the state. On appeal, the father claimed that the trial court lacked jurisdiction, abused its discretion in issuing the protection order, and violated his due process rights. The court held that (1) the trial court had jurisdiction because jurisdiction is irrelevant under Ill. Rev. Stat. ch. 40, para. 2140(a)(1) (1989). (2) The trial court violated the father's due process rights when it terminated his parental rights without proper notice and a hearing. And (3) the emergency order of protection was improperly granted because exigent circumstances did not exist.

OUTCOME: Judgment was reversed, and the case was remanded.

LexisNexis(R) Headnotes

Family Law > Child Custody > Jurisdiction
[HN1] See Ill. Rev. Stat. ch. 40, para. 2312-8 (1989).

Family Law > Child Custody > Jurisdiction
[HN2] Section 4 of the Custody Act, Ill. Rev. Stat. ch. 40, para. 2103.04 (1989), states that circuit courts have jurisdiction to modify a child custody judgment if, among other reasons: this state is the home state of the child at the time of commencement of the proceedings, or had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state. Ill. Rev. Stat. ch. 40, para. 2104(a)(1) (1989). Section 3.04 of the Custody Act defines home state as the state in which the child immediately preceding the time involved lived with a parent, for at least 6 consecutive months. Ill. Rev. Stat. ch. 40, para. 2103.04 (1989).

Family Law > Child Custody > Jurisdiction
[HN3] Section 15 of the Custody Act, Ill. Rev. Stat. ch. 40, para. 2115 (1989), provides that an Illinois court may modify a child custody judgment of another state if that state no longer has jurisdiction or the Illinois court has jurisdiction. Ill. Rev. Stat. ch. 40, para. 2115 (1989). Under the Custody Act, personal jurisdiction is not necessary for a circuit court to modify the judgment as long as the jurisdictional requirements of § 4 of the Custody Act are met. If subject matter jurisdiction exists, a court could dismiss the petition for modification if another state is a more convenient forum.

Family Law > Child Custody > Jurisdiction
[HN4] For a plenary order of protection to issue, the petitioner must establish jurisdiction under § 208 of the Domestic Violence Act, Ill. Rev. Stat. ch. 40, para. 2312-19 (1989). Section 208 of the Domestic Violence Act specifically states that personal jurisdiction is determined by the Custody Act. Thus, the same jurisdictional requirements for a custody order modification under the Custody Act apply to a plenary order of protection.

Constitutional Law > Procedural Due Process > Scope of Protection
[HN5] The Due Process Clause of the Fourteenth Amendment limits the power of Illinois courts to modify out-of-state dissolution judgments affecting the rights of nonresident respondents lacking minimum contacts with the state.

Family Law > Child Custody > Jurisdiction
[HN6] See *28 U.S.C.S. § 1738A*(d).

Family Law > Child Custody > Jurisdiction
[HN7] See *28 U.S.C.S. § 1738A* (d).

Constitutional Law > Procedural Due Process > Scope of Protection
[HN8] See Ill. Rev. Stat. ch. 40, para. 2106(b)(3), (c) (1989).

COUNSEL:

APPELLANT ATTORNEY: None Available.

APPELLEE ATTORNEYS: Botti, Marinaccio, DeSalvo & Tameling, Ltd., Attorneys at Law, Eva W. Tameling, Botti, Marinaccio, DeSalvo & Tameling, Ltd., 720 Enterprise Drive, Oak Brook, IL 60521, (312) 573-8585.

JUDGES: INGLIS, UNVERZAGT, NICKELS

OPINIONBY: INGLIS

OPINION: [*358]

[127]** PRESIDING JUSTICE INGLIS delivered the opinion of the court:

Respondent, Simon G. Los, appeals after the circuit court of Du Page County issued a plenary order of protection that restricted his visitation rights for a two-year period. Simon, a resident of Delaware, **[*359]** contends that the Illinois trial court lacked personal jurisdiction to enter the order of protection sought by petitioner, Catherine L. Los. He alternatively contends that the trial court abused its discretion in issuing the protective order. We reverse and remand.

The parties were divorced in August 1989. At that time, Simon and Catherine had two sons, Benjamin and Morgan. Before the final divorce decree, Catherine and the children moved to Chicago to **[***2]** live with her parents. On October 13, 1989, the family court of Delaware awarded primary custody to Catherine in Illinois. Simon was awarded visitation for July and August of each year, from December 26 through January 1 of each year, "from Tuesday through Sunday during the weeks [sic] following the childrens' [sic] spring vacation from school," alternate Thanksgivings, and three weekends a year in October, February and June.

The visitation schedule remained unmodified until March 1991. On March 15, Catherine filed a petition to domesticate the Delaware judgment for dissolution of marriage pursuant to section 511(c) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (Ill. Rev. Stat. 1989, ch. 40, par. 511(c)). Simon, pro se, filed an answer, appearing "specifically and not generally" to contest jurisdiction. Between the time of Catherine's petition and Simon's answer, the Delaware Supreme Court ordered that Simon's pending motion to amend visitation would be treated as a properly filed petition to amend provided that Simon paid the required filing fee. The record reflects that Simon did not follow through with the petition to amend visitation in the **[***3]** Delaware courts.

On May 9, 1991, Judge Michael Galasso of the eighteenth judicial circuit, Du Page County, received a letter from Judge Jay Conner of the Delaware family court. Judge Conner informed Judge Galasso that the parties had no issues of custody or support pending in the family court. Judge Conner also acknowledged that Simon failed to pay the filing fee to retain his motion for modification of visitation. Simon wrote a letter to Judge Galasso on May 29, 1991, to inform him that the order of the Delaware Supreme Court was being appealed to the United States Supreme Court.

Catherine replied to Simon's answer on June 12, 1991. Her affidavit stated that visitation should be

modified because Simon was behind on child support payments, he was unemployed and Catherine did not know his address, and that the children were not properly cared for when visiting Simon. The same day, the Du Page County **[**128]** circuit court domesticated the Delaware judgment. Simon filed a motion for reargument.

[*360] According to Judge Conner's order in the Delaware family court, Catherine wrote Simon on June 22 claiming that a hearing to modify custody was scheduled for July 9, and Catherine did not want **[***4]** to permit Simon's summer visitation prior to the hearing. However, the record reflects that Catherine's petition to modify the judgment for dissolution of marriage was not filed until July 1. On July 1, Simon traveled to Illinois to bring his children to Delaware for the court-approved July and August visitation. Simon picked them up at day-care in the morning and returned to Delaware. In response, Catherine filed a petition for order of protection claiming the children had been "abducted." Catherine also filed a petition for a rule to show cause and for attorney fees. According to the record, Catherine also filed the petition to modify the dissolution judgment. The court issued an emergency order of protection for the return of the Los children to Illinois. The order was to expire on July 18.

Simon was sent notice on July 1 that the hearing on the petitions for a rule to show cause, attorney fees and for modification of the judgment would be held on July 9. Catherine also petitioned the Delaware family court to find Simon in contempt for violating the emergency order of protection. Simon claims that he became aware of the protection order several days after returning to Delaware. **[***5]**

On July 8, both Simon and Catherine appeared in the Delaware family court. The Delaware court ordered that Simon had a legal right to visitation pursuant to the dissolution judgment. The court also expressed concerns about whether Illinois courts had subject matter jurisdiction and personal jurisdiction over Simon to modify visitation rights. The court ordered that Simon return to Illinois with the children on July 18 for a weekend visit with Catherine. That date coincided with the hearing in Illinois on July 18 for extension of the protection order.

Meanwhile, the hearing on Catherine's various petitions was scheduled for July 9. Simon failed to appear, and the court ordered that the rule to show cause be issued for Simon's failure to pay child support of $ 131.54 per week. The court also ordered that the hearing on Catherine's petition to modify the judgment and on the contempt order be set for July 18, the same time as the hearing on the extension of the protection order. Simon filed a memorandum on July 16, again disputing the court's jurisdiction to issue the protection order and to domesticate the Delaware judgment and requested that all pleadings by Catherine in the Illinois **[***6]** courts be dismissed.

On July 18, the trial court issued a plenary order of protection giving full legal custody of the children to Catherine until a hearing **[*361]** on July 15, 1993. Simon was prohibited from removing the children from the State of Illinois and was allowed visitation if supervised by Catherine or another person selected by her. Simon filed a timely notice of appeal.

Simon contends that the trial court lacked jurisdiction to issue the plenary order of protection under Illinois's Uniform Child Custody Jurisdiction Act (Custody Act) (Ill. Rev. Stat. 1989, ch. 40, par. 2101 et seq.) and under Federal law, specifically the Parental Kidnapping Prevention Act (Kidnapping Act) *(28 U.S.C. § 1738A* et seq. (1990)). Alternatively, Simon contends that the trial court abused its discretion in issuing the plenary order of protection. Catherine contends that the trial court had personal jurisdiction over Simon to enter the protection order and that Simon is estopped from arguing jurisdiction because he failed to appear at the hearing to present his argument.

We note that arguments I and II in Catherine's brief, which claim that Simon is estopped from arguing **[***7]** jurisdiction, are not adequately briefed. There are no references to case citations or to the record. We deem these arguments waived by Catherine. *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc. (1987), 118 Ill. 2d 389, 400-01.*

[129]** Section 208 of the Domestic Violence Act of 1986 states:

"[HN1] In child custody proceedings, the court's personal jurisdiction is determined by this State's Uniform Child Custody Jurisdiction Act, as now or hereafter amended. Otherwise, the courts of this State have jurisdiction to bind (i) State residents and (ii) non-residents having minimum contacts with this State, to the extent permitted by the long-arm statute, Section 2-209 of the Code of Civil Procedure, as now or hereafter amended." Ill. Rev. Stat. 1989, ch. 40, par. 2312-8.

[HN2] Section 4 of the Custody Act states that the circuit courts have jurisdiction to modify a child custody judgment if, among other reasons:

"1. This State

(i) is the home state of the child at the time of commencement of the proceedings, or

(ii) had been the child's home state within 6 months before commencement of the proceeding and the child is

absent from this State because of [***8] his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State." Ill. Rev. Stat. 1989, ch. 40, par. 2104(a)(1).

[*362] Section 3.04 of the Custody Act defines "home state" as:

"The state in which the child immediately preceding the time involved lived with * * * [a] parent, for at least 6 consecutive months." Ill. Rev. Stat. 1989, ch. 40, par. 2103.04.

[HN3] Section 15 of the Custody Act provides that an Illinois court may modify a child custody judgment of another State if that State no longer has jurisdiction or the Illinois court has jurisdiction. (Ill. Rev. Stat. 1989, ch. 40, par. 2115; *In re Marriage of Bueche (1990), 193 Ill. App. 3d 594, 598* (emphasis in original).) Under the Custody Act, personal jurisdiction is not necessary for a circuit court to modify the judgment as long as the jurisdictional requirements of section 4 of the Custody Act are met. (*Bueche, 193 Ill. App. 3d at 599.)* If subject matter jurisdiction exists, a court could dismiss the petition for modification if another State is a more convenient forum. *Bueche, 193 Ill. App. 3d at 599;* [***9] Ill. Rev. Stat. 1989, ch. 40, par. 2108(a).

Even though the Bueche case concerned a petition to modify a custody order, its discussion of the jurisdictional principles is applicable here. [HN4] For a plenary order of protection to issue, the petitioner must establish jurisdiction under section 208 of the Domestic Violence Act (Ill. Rev. Stat. 1989, ch. 40, par. 2312-19). Section 208 of the Domestic Violence Act specifically states that personal jurisdiction is determined by the Custody Act. Thus, the same jurisdictional requirements for a custody order modification under the Custody Act apply to the plenary order of protection appealed from by Simon.

We hold that the circuit court of Du Page County had jurisdiction not only to register the Delaware judgment in Illinois but also to issue a plenary order of protection and to accept the other underlying pleadings in this case. The Bueche case cannot be any clearer that personal jurisdiction is an irrelevant issue under the Custody Act. However, we do recognize that an argument can be made that the Custody Act jurisdictional requirements infringe upon substantive due process rights.

This court has previously found that [HN5] the due process [***10] clause of the fourteenth amendment limits the power of Illinois courts to modify out-of-State dissolution judgments affecting the rights of nonresident respondents lacking minimum contacts with the State. (See *Coons v. Wilder (1981), 93 Ill. App. 3d 127, 130.)* The fact that Simon's ex-wife lives with her children in Illinois does not necessarily mean that he has purposely availed himself to be subject to the Illinois courts' jurisdiction over him. (*Wiles v. Morita Iron Works Co. (1988), 125 Ill. 2d 144, 151* ("Jurisdiction will only be proper where the contacts proximately [*363] result from actions by the defendant himself that create [**130] a 'substantial connection' with the forum State" (emphasis in original).) Moreover, Professors Richman and Reynolds suggest in their treatise, Understanding Conflicts of Law, that minimum contacts may be necessary in custody cases:

"The extension in *Shaffer v. Heitner [(1977), 433 U.S. 186, 53 L. Ed. 2d 683, 97 S.Ct. 2569]* of the minimum contacts requirement to in rem actions suggests that custody decrees rendered without [***11] jurisdiction over all concerned may present serious constitutional concerns. * * *

Some have argued that status adjudications, or at least those involving children, will escape testing under the Shaffer standard; * * *. Nevertheless, it is possible that the minimum contacts standard will be applied to custody cases." W. Richman & W. Reynolds, Understanding Conflicts of Laws 340 (1984).

Although we acknowledge that the substantive due process argument has some merit, we choose to follow the established precedent. We leave the question of personal jurisdiction under the Custody Act for the legislature to ponder.

Simon also argues that Illinois does not have jurisdiction because Delaware did not, and could not, relinquish jurisdiction pursuant to the Kidnapping Act. Simon cites section 1738A(d), which states:

"[HN6] The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant." *(28 U.S.C. § 1738A* [***12] (d) (1990).)

However, the relevant section of the Kidnapping Act in this situation is subsection f:

[HN7] "(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such

jurisdiction to modify such determination." *28 U.S.C. § 1738*(f) (1990).

Section 15 of the Custody Act is phrased similarly, except that the requirements of subsections (1) and (2) are disjunctive, not conjunctive. Ill. Rev. Stat. 1989, ch. 40, pars. 2115(a)(1), (a)(2). [*364]

The circuit court of Du Page County had jurisdiction to make a child custody determination in this case as there was jurisdiction under Illinois law, specifically the Custody Act, and Illinois was the children's home State. *(28 U.S.C. § § 1738A*(c)(1), (c)(2)(A)(i) (1990).) We also find that the requirement under subsection (f)(2) of the Kidnapping Act was met. The letter from Judge Conner in the Delaware family court to Judge Galasso of the eighteenth judicial circuit, Du Page County, showed that the Delaware [***13] court was no longer exercising jurisdiction to modify the dissolution judgment. Therefore, the Kidnapping Act does not require a different result.

Although Simon did not raise the issue in his brief, we also consider sua sponte whether the Illinois court was the most convenient forum under the Custody Act. (Ill. Rev. Stat. 1989, ch. 40, par. 2108.) After reviewing the factors under section 8, we hold that the Illinois court was the most convenient forum. Illinois was the children's home State, was the place containing substantial evidence concerning the children's care, and the purposes of the Custody Act would not be contravened if Illinois exercised jurisdiction. In short, Illinois was the court which could most capably act in the children's best interests. *In re Marriage of Doehner (1991), 215 Ill. App. 3d 570, 572-73.*

Simon's second contention is that the trial court abused its discretion in issuing the plenary order of protection. Simon argues that the emergency order of protection was improperly granted because "exigent circumstances" did not exist to issue the order without prior notice to him, citing *Sanders v. Shephard (1989), 185 Ill. App. 3d 719.* [***14] [**131] Simon also argues that his procedural due process rights were violated when his parental rights were terminated without proper notice and a hearing.

We agree that Simon's procedural due process rights were violated here. Section 6 of the Custody Act governs the notice requirements in this situation. It states:

[HN8] "(b) Notice in all custody proceedings required for the exercise of jurisdiction over a person outside this State shall be given in a manner best calculated to give actual notice and shall be either:

* * *

3. by any form of mail addressed to the person to be served and requesting a receipt; * * *

* * * [*365]

(c) Notice under this Section shall be served, mailed or delivered at least 10 days before any hearing in this State. (Emphasis added.) (Ill. Rev. Stat. 1989, ch. 40, pars. 2106(b)(3), (c).)

As Simon points out, he was not timely notified of the July 9 hearing on the petition to show cause and for attorney fees and the petition to modify the judgment. He received notice after July 1. On July 9, the trial court ordered that the hearing on Catherine's petition to modify would be held on July 18. Simon also did not receive timely notice of this hearing pursuant [***15] to the requirements of section 6(c) of the Custody Act. We agree with Catherine that Simon was properly notified of her petition to domesticate the Delaware judgment.

Finally, although Simon received timely notice of the emergency order of protection on July 8, 10 days before the July 18 hearing to extend the order, we find that the order was not based on a showing of "exigent circumstances. The emergency order of protection was based on a false accusation by Catherine that Simon had "abducted" the children. Simon had custody in July and August pursuant to a valid Delaware judgment that was unmodified at the time his visitation began. Further, Catherine's petition for the emergency protection order was not supported by an affidavit demonstrating that exigent circumstances existed justifying the entry of the order without prior notice to Simon. (*Sanders, 185 Ill. App. 3d at 727.)* The record reflects that the attachments to Catherine's petition for the emergency protection order were her petitions for a rule to show cause and attorney fees and her petition to modify the judgment. We found no affidavit attached to these documents.

We vacate the plenary [***16] order of protection, the issuance of which was based on the emergency order for protection and Catherine's other petitions, all of which violated Simon's procedural due process rights for lack of proper notice. We remand this cause with directions that the trial court schedule a hearing on Catherine's petitions for a rule to show cause and attorney fees and for modification of the judgment for dissolution of marriage.

We do not appreciate the way in which the judicial system was manipulated in this situation. Catherine should have petitioned for modification of the judgment at a time when her children's visitation with their father would not be disrupted. Instead, she created an inconvenient and frustrating situation for Simon by seeking an emergency order of protection and modification of the judgment at the exact time that his

visitation was to begin. The court system would best serve the community if these adolescent tactics were avoided. [*366]

For the foregoing reasons, the order of the circuit court of Du Page County is reversed, and the cause is remanded with directions.

Reversed and remanded with directions.

UNVERZAGT and NICKELS, JJ., concur.

LEXSEE 636 N.W.2D 3

TARA E. BARTSCH, Appellee, vs. NATHAN R. BARTSCH, Appellant.

No. 67 / 00-0068

SUPREME COURT OF IOWA

636 N.W.2d 3; 2001 Iowa Sup. LEXIS 207

November 15, 2001, Filed

PRIOR HISTORY: [**1] Appeal from the Iowa District Court for Jones County, Douglas S. Russell and Thomas L. Koehler, Judges. Appeal by nonresident defendant in domestic-abuse case raises issues of personal jurisdiction and forum non conveniens.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: In a domestic-abuse case, appellant nonresident husband challenged the order Iowa District Court for Jones County entering a protective order, and denying his motion to dismiss based on forum non conveniens.

OVERVIEW: The nonresident husband challenged the district court's exercise of jurisdiction as contrary to Iowa case law regarding the necessity of a finding of both subject matter jurisdiction and personal jurisdiction in order to exercise jurisdiction over the case. The supreme court determined that the district court's finding of insufficient contacts for personal jurisdiction was supported by substantial evidence; however, the supreme court affirmed the legal conclusion by the district court that personal jurisdiction over the nonresident husband was not required for it to enter an order preserving the protected status afforded Iowa residents under Iowa Code ch. 236 (1999). The nonresident husband also contended that the district court erred in refusing to dismiss the action on forum non conveniens grounds. The supreme court held that a foreign jurisdiction would not have had a significant interest in protecting a family that did not even live there, so the district court was well within its discretion in refusing to dismiss the case on forum non conveniens grounds.

OUTCOME: The supreme court affirmed the order.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Motions to Dismiss
Civil Procedure > Appeals > Standards of Review > Standards Generally
[HN1] A supreme court's scope of review on a motion to dismiss is well established. The trial court's findings of fact have the effect of a jury verdict and are subject to challenge only if not supported by substantial evidence in the record; the supreme court is not bound, however, by the trial court's application of legal principles or its conclusions of law.

Family Law > Family Protection & Welfare > Cohabitants & Spouses
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN2] Personal jurisdiction over a nonresident defendant is not required for a court to enter an order preserving the protected status afforded Iowa residents under Iowa Code ch. 236 (1999).

Family Law > Divorce, Dissolution & Spousal Support > Jurisdiction
Family Law > Child Custody > Jurisdiction
[HN3] Personal jurisdiction over a nonresident spouse is not necessary to dissolve a marriage because it is a status determination. Traditionally, child custody determinations have also been exempt from the personal jurisdiction requirement. The original drafters of the Uniform Child Custody Jurisdiction Act stated that

custody determinations were status exceptions and exempt from the personal jurisdiction requirement.

Family Law > Divorce, Dissolution & Spousal Support > Jurisdiction
[HN4] Marriage-dissolution actions, insofar as they affect the status of marriages, do not require personal jurisdiction of the defendant.

Family Law > Family Protection & Welfare > Cohabitants & Spouses
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN5] Iowa Code ch. 236 (1999) clearly creates a status of "protection." Chapter 236 is protective rather than punitive.

Family Law > Family Protection & Welfare > Cohabitants & Spouses
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN6] The Minnesota Supreme Court has found no due process problems in a statute allowing ex parte restraining orders in domestic-abuse cases, relying on: (1) a state's strong interest in preventing abuse; (2) the necessity for prompt action; and (3) the protection provided by judicial scrutiny.

Family Law > Family Protection & Welfare > Cohabitants & Spouses
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN7] The greater and more immediate risk of harm from domestic violence, as opposed to the considerable interest in preventing bigamous marriages and in protecting the offspring in marriages from being illegitimate in dissolution proceedings, makes application of the status exception to protective orders even more compelling than in dissolution actions. Indeed, the State's interest in protecting victims of domestic abuse is equal to, if not greater than, its interest in actions determining child custody or terminating parental rights because it involves the safety of the protected parties. If the State can make adjudications without personal jurisdiction over a nonresident parent in custody determinations in which it has a strong state interest, it also has that right in domestic-abuse protection actions in which it has an even stronger interest.

Family Law > Family Protection & Welfare > Cohabitants & Spouses
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN8] Due process requires, in status determinations as well as others, reasonable attempts to notify the defendant and a reasonable opportunity to defend.

Civil Procedure > Venue > Forum Non Conveniens
[HN9] Forum non conveniens is a facet of venue under which a court can decline to proceed with an action, although venue and jurisdiction are proper. Application of the doctrine presupposes at least two forums in which jurisdiction and venue are proper. The decision as to which forum should hear the case lies in the sound discretion of the trial court. The mere desire of a party to have a case tried in his or her state of residence is insufficient; nor is it a sufficient ground that the claim arose elsewhere.

COUNSEL: Janette S. Voss of Remley, Willems, McQuillen & Voss, Anamosa, for appellant.

Anne E.H. Hoskins of Fishel and Hoskins, Marion, for appellee.

JUDGES: LARSON, Justice. All justices concur except Carter, J., Lavorato, C.J., and Ternus, J., who dissent.

OPINIONBY: LARSON

OPINION: [*5]

LARSON, Justice.

Nathan Bartsch, a nonresident of Iowa, appeared specially in an Iowa domestic-abuse case under Iowa Code chapter 236 (1999) to challenge the court's personal jurisdiction over him. The court agreed it did not have personal jurisdiction but concluded that, for purposes of entering a protective order under chapter 236, personal jurisdiction was not required. The court also denied Nathan's motion to dismiss based on forum non conveniens. We agree and therefore affirm.

I. *Facts and Prior Proceedings.*

Tara Bartsch filed an application for a protective order against Nathan Bartsch in Jones County District Court in November 1999. Tara was a resident of Iowa, and **[**2]** Nathan was apparently a resident of Colorado. (He has asserted residency in both Utah and Colorado.) They were married but separated. Their daughter, Morgan, was less than a year old when Tara moved to Iowa to live with her parents in October 1999. While both Nathan and Tara had early ties to Iowa, they moved to Utah in 1994 and lived there until December 1997, when they moved to Texas. Approximately a year later, they moved back to Utah and continued to live there until October 1999, when Tara moved to Iowa. She lived in Iowa at the time she filed her application for a

protective order on November 12, 1999. The court entered a temporary protective order on that date. *See Iowa Code § 236.4.* By that time, Nathan says he had moved to Colorado, where he was served with notice of Tara's application for a protective order. He immediately challenged the order by a motion to dismiss. The court denied his motion.

II. *Standard of Review.*

[HN1] Our scope of review on a motion to dismiss is well established.

> "The trial court's findings of fact have the effect of a jury verdict and are subject to challenge only if not supported by substantial evidence **[**3]** in the record; we are not bound, however, by the trial court's application of legal principles or its conclusions of law."

Percival v. Bankers Trust Co., 450 N.W.2d 860, 861 (Iowa 1990) (quoting *State ex rel. Miller v. Internal Energy Mgmt. Corp., 324 N.W.2d 707, 709-10 (Iowa 1982)).*

III. *Personal Jurisdiction.*

The district court found that the defendant did *not* have sufficient minimum contacts for personal jurisdiction, but personal jurisdiction was not required. The defendant challenges the district court's exercise of jurisdiction as "contrary to Iowa case law regarding the necessity of a finding **[*6]** of both subject matter jurisdiction and personal jurisdiction in order to exercise jurisdiction over the case." The plaintiff seems to concede the need for personal jurisdiction but contends it is "inconceivable" that defendant lacks sufficient minimum contacts.

We believe the district court's finding of insufficient contacts for personal jurisdiction is supported by substantial evidence, and we reject Tara's argument to the contrary. While both parties were born in Iowa, lived here most of their lives, and were married here, **[**4]** they moved to Utah in 1994 immediately after their marriage, and Nathan currently lives in Colorado. Despite the fact Nathan maintained substantial ties to Iowa prior to 1994, he has had virtually no ties to Iowa since that time, except that his wife and child now live here.

Nevertheless, we affirm the legal conclusion by the district court that, under these circumstances, [HN2] personal jurisdiction over a nonresident defendant is not required for a court to enter an order preserving the protected status afforded Iowa residents under chapter 236. *See State v. Vincik, 436 N.W.2d 350, 354 (Iowa 1989)* (court's ruling "will be upheld if sustainable on any grounds appearing in the record"). The district court's ruling does not purport to grant affirmative relief against the defendant; it merely preserves the protected status accorded to the plaintiff by chapter 236.

In other situations it is clear personal jurisdiction is not necessary to satisfy the demands of the Due Process Clause. For example,

> the Supreme Court has held that [HN3] personal jurisdiction over a nonresident spouse is not necessary to dissolve a marriage because it is a status determination. Traditionally, **[**5]** child custody determinations have also been exempt from the personal jurisdiction requirement. The original drafters of the [Uniform Child Custody Jurisdiction Act] stated that custody determinations were status exceptions and exempt from the personal jurisdiction requirement.

Anthony A. Dorland, Case Note, Hughs ex rel. Praul v. Cole, 572 N.W.2d 747 (Minn. Ct. App. 1997), 25 Wm. Mitchell L. Rev. 965, 988-89 (1999) (citations omitted). As early as *Pennoyer v. Neff*, the Supreme Court recognized that not all exercises of a state's subject matter jurisdiction require personal jurisdiction of a defendant. The Court stated:

> The jurisdiction which every State possesses, to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution **[**6]** may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile

> in such case, . . . the injured citizen would be without redress.

Pennoyer v. Neff, 95 U.S. 714, 734-35, 24 L. Ed. 565, 573 (1877).

This concept is reflected in the Restatement of Conflict of Laws, which recognizes that an adjudication of status does not require personal jurisdiction. The Restatement illustrates the point:

> [*7] A leaves his home in State X and goes to State Y, where he becomes domiciled and there obtains an *ex parte* divorce from B, his wife. Assuming that the requirements of proper notice and of opportunity to be heard have been met, this divorce is valid and must be recognized in X under full faith and credit even though B was not personally subject to the jurisdiction of the Y court and at all times retained her domicile in X.

Restatement (Second) of Conflict of Laws § 71 cmt. a, illus. 1, at 219 (1971). Thus, [HN4] marriage-dissolution actions, insofar as they affect the [**7] *status* of marriages, do not require personal jurisdiction of the defendant.

> Domicile creates a relationship to the state which is adequate for numerous exercises of state power. Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. *Protection of offspring*, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institutions of marriage can alter within its own borders the marriage status of the spouse domiciled there, *even though the other spouse is absent*. There is no constitutional barrier if the form and nature of the substituted service meet the requirements of due process.

Williams v. North Carolina, 317 U.S. 287, 298-99, 63 S. Ct. 207, 213, 87 L. Ed. 279, 286 (1942) (emphasis added) (citations omitted). [HN5] Iowa Code chapter 236 clearly creates a status of "protection" under [**8] the reasoning of *Williams*. In fact, we have said "chapter 236 is protective rather than punitive." *Christenson v. Christenson, 472 N.W.2d 279, 280 (Iowa 1991).*

The recognition in *Williams* that the "protection of offspring" is a state concern overriding the need for personal jurisdiction underlies the general rule that a state may make custody adjudications without personal jurisdiction of the defendant. *See* Unif. Child Custody Jurisdiction Act § 12 cmt. (1999) ("There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions, are proceedings in rem or proceedings affecting status." (citation omitted)); *In re Marriage of Torres, 62 Cal. App. 4th 1367, 73 Cal. Rptr. 2d 344, 352 (Cal. Ct. App. 1998); In re Paternity of Robinaugh, 616 N.E.2d 409, 411 (Ind. Ct. App. 1993)* ("Custody proceedings are adjudications of status, and as such are an exception to the minimum contacts requirements normally associated with discussions of personal jurisdiction."); *Hudson v. Hudson, 35 Wn. App. 822, 670 P.2d 287, 293 (Wash. Ct. App. 1983);* [**9] *see also Iowa Code § 598B.201(3)* (Supp. 1999) ("Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.").

The court in *Perry v. Ponder, 604 S.W.2d 306 (Tex. Civ. App. 1980),* explains the rationale of our ruling today:

> [A] family relationship may be among those matters concerning which the forum state may have such an interest that its courts may reasonably make an adjudication affecting that relationship, even though one of the parties to the relationship may have had no personal contacts with the forum state.
>
> The reasonableness of such an adjudication is well recognized in divorce cases, in which the status of marriage may be adjudicated at the domicile of [*8] one party without establishing any contacts by the nonresident spouse with the state of the forum. *See Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).* Custody of children is a status or relationship in which the state has an interest no less than in a marriage. . . . For these reasons, custody of children has been recognized

> traditionally [**10] as a status which may be determined at the domicile of the child.

Perry, 604 S.W.2d at 314-15.

At least one state has applied, by statute, the jurisdictional provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) (which, as we have already discussed, does not require personal jurisdiction of a defendant) to domestic-abuse cases. *See In re Marriage of Los, 229 Ill. App. 3d 357, 593 N.E.2d 126, 129, 170 Ill. Dec. 584 (Ill. App. Ct. 1992); see also Iowa Code § 598B.102(4)* (Supp. 1999) (new Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) applies specifically to domestic-abuse protection orders). [HN6] The Minnesota Supreme Court has found no due process problems in a statute allowing ex parte restraining orders in domestic-abuse cases, relying on (1) a state's strong interest in preventing abuse, (2) the necessity for prompt action, and (3) the protection provided by judicial scrutiny. *See Baker v. Baker, 494 N.W.2d 282, 288 (Minn. 1992).*

The Oklahoma Supreme Court applied the status rationale of *Williams* in a case involving state court jurisdiction to decide the issue [**11] of a nonconsensual stepparent adoption in *In re Adoption of J.L.H., 737 P.2d 915 (Okla. 1987).* In that case, the children's natural father and stepmother petitioned in Oklahoma for the nonconsensual adoption of the father's children on the ground their mother, a nonresident of Oklahoma, had willfully failed to pay child support. Two issues were raised on appeal: whether the district court had jurisdiction and whether the plaintiffs had proved their claim of willful nonpayment. *J.L.H., 737 P.2d at 917-20.* The Oklahoma court concluded the district court had jurisdiction of the case, but rejected the petition on its merits. *737 P.2d at 918-21.*

The Oklahoma court rejected the nonresident's argument that the minimum contacts requirement of *International Shoe v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945),* prevented the court's exercise of jurisdiction:

> The so-called minimum contacts doctrine . . . was fashioned to gauge the standards of due process for the exercise of jurisdiction to render an in personam judgment against one not served within the state--a form of forensic cognizance that is not implicated [**12] in this case because here *no* personal judgment is sought against the Kansas mother.

J.L.H., 737 P.2d at 919 (footnote omitted); *see also In re Marriage of Kimura, 471 N.W.2d 869, 875 (Iowa 1991)* (divisible divorce doctrine recognizes when court does not have personal jurisdiction over absent spouse it still has "jurisdiction to grant a divorce to one domiciled in the state but no jurisdiction to adjudicate the incidents of the marriage, for example, alimony and property division").

A Texas court explained the distinction between adjudications affecting family relationships and those requiring personal jurisdiction:

> Unlike adjudications of child support and visitation expense, custody determinations are status adjudications not dependent upon personal jurisdiction over the parents. *Generally, a family relationship is among those matters in which the forum state has such a strong interest that its courts may reasonably make an adjudication affecting that relationship* [*9] *even though one of the parties to the relationship may have had no personal contacts with the forum state.*

In re S.A.V., 837 S.W.2d 80, 84 (Tex. 1992) [**13] (emphasis added) (citations omitted).

[HN7] The greater and more immediate risk of harm from domestic violence, as opposed to the "'considerable interest in preventing bigamous marriages and in protecting the offspring in marriages from being [illegitimate]'" in dissolution proceedings, *see Kimura, 471 N.W.2d at 875* (quoting *Estin v. Estin, 334 U.S. 541, 546, 68 S. Ct. 1213, 1217, 92 L. Ed. 1561, 1567 (1948)),* makes application of the status exception to protective orders even more compelling than in dissolution actions. Indeed, the State's interest in protecting victims of domestic abuse is equal to, if not greater than, its interest in actions determining child custody or terminating parental rights because it involves the safety of the protected parties. If the State can make adjudications without personal jurisdiction over a nonresident parent in custody determinations in which it has a strong state interest, it also has that right in domestic-abuse protection actions in which it has an even stronger interest.

The interstate nature of many abusive relationships, and the concomitant need for protection extending beyond the borders of a particular [**14] state was

discussed by us, under analogous facts, in *State v. Bellows, 596 N.W.2d 509 (Iowa 1999).* "Future violence ought to be constrained in any state in which the victim is located." *Bellows, 596 N.W.2d at 513.* Our domestic-abuse statute evidences a special solicitude for potential abuse victims. It allows a petition to be filed without payment of costs, *Iowa Code § 236.3(7)*; forms are provided for pro se filing, *Iowa Code § 236.3A(2)*; and the county attorney may assist the plaintiff in all stages of the proceeding, *Iowa Code § 236.3B.*

It is true that [HN8] due process requires, in status determinations as well as others, reasonable attempts to notify the defendant and a reasonable opportunity to defend. The Oklahoma court in *J.L.H.* acknowledged that "[a] quest for a consentless adoption must, of course, always conform to the procedural requirements of due process." Nevertheless,

> the natural mother had ample notice of the Oklahoma proceeding and was afforded sufficient opportunity to appear and defend against the attempted judicial extinguishments of her consent **[**15]** power, the minimum standards of fundamental fairness in the Due Process Clause were adequately met. In short, due process was not offended by the procedure used to hale her into the Oklahoma forum.

J.L.H., 737 P.2d at 919; see also Hudson, 670 P.2d at 293. These requirements were satisfied in this case. Nathan was served notice in his home state, and he appeared at the hearing through counsel to challenge the court's jurisdiction.

The protected status established by our statute is sufficient to justify the district court in exercising jurisdiction. However, this defendant suggests that the plaintiff should be required to go to the state of Utah (where, apparently, neither of the parties now resides), get a protective order, then transfer it to Iowa. *See Iowa Code § 236.19* (registration of foreign protective orders). This would be a cumbersome and time-consuming procedure that is not required by the Constitution and is not even consistent with common sense. A court in a state where none of the parties resided would be unlikely to become involved in view of the doctrine of forum non conveniens and issues of subject **[**16]** matter jurisdiction. **[*10]**

The order here does not attempt to impose a personal judgment against the defendant. *See J.L.H., 737 P.2d at 919 n.13* ("*Kulko [v. Superior Court of California, 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978),* is distinguishable [from a case in which no money judgment is sought] because it deals with jurisdiction to enforce liability arising from status rather than with determination of status."). The district court merely ordered the defendant to "stay away from the protected party" and not assault or communicate with her, in furtherance of the State's strong interest in protecting Iowa residents from domestic abuse. If a court may constitutionally make orders affecting marriage, custody, and parental rights without personal jurisdiction of a defendant, it certainly should be able to do what the court did here--enter an order protecting a resident Iowa family from abuse.

IV. *Forum Non Conveniens.*

Nathan contends the district court erred in refusing to dismiss Tara's action on forum non conveniens grounds. We first discussed this doctrine in detail in *Silversmith v. Kenosha Auto Transport, 301 N.W.2d 725 (Iowa 1981).* **[**17]** [HN9] "Forum non conveniens is a facet of venue under which a court can decline to proceed with an action, although venue and jurisdiction are proper." *Silversmith, 301 N.W.2d at 726.* Application of the doctrine presupposes at least two forums in which jurisdiction and venue are proper. *Douglas Mach. & Engraving Co. v. Hyflow Blanking Press Corp., 229 N.W.2d 784, 791 (Iowa 1975).* The decision as to which forum should hear the case lies in the sound discretion of the trial court. *Silversmith, 301 N.W.2d at 728; Restatement (Second) of Conflict of Laws § 84* cmt. b, at 251 (1971).

The mere desire of a party to have a case tried in his or her state of residence is insufficient; nor is it a sufficient ground that the claim arose elsewhere. *Silversmith, 301 N.W.2d at 727.* With respect to residence, Nathan's status is unclear. Part of his brief states he is a resident of Utah, for forum non conveniens purposes, but he also states he was a resident of Colorado at the time Tara filed her application. Apparently, the only nonparty witness to the event is Tara's mother, who lives in Iowa. Nathan argues that "most, if not all, of **[**18]** the evidence regarding the allegations contained in Tara's application was most easily accessible in the state of Utah, where the parties had resided [at the pertinent time]." However, Tara and her mother both live in Iowa, and if he has moved to Colorado, as he has stated, a Utah venue for the case would be inconvenient for him as well. Further, for the reasons discussed in Division III, Iowa has a significant interest in protecting its residents under chapter 236. A foreign jurisdiction--whether Utah or Colorado--would not have a significant interest in protecting a family that does not even live there. We believe the district court was well within its

discretion in refusing to dismiss the case on forum non conveniens grounds.

V. *Other Issues*.

Nathan complains that the court erred in refusing to vacate its temporary order for child custody and visitation issues, and both parties request an award of appellate attorney fees. We reject the first of these claims because it is moot; the court entered its permanent order, which did not purport to deal with issues of child support or visitation, and at the point the permanent order was entered, the temporary order became ineffective. **[**19]** Any request for attorney fees shall be filed in the district court and ruled on after procedendo has issued.

AFFIRMED.

[*11] All justices concur except Carter, J., Lavorato, C.J., and Ternus, J., who dissent.

DISSENTBY: CARTER

DISSENT:

CARTER, Justice (dissenting).

I dissent.

The majority of the court now permits the Iowa courts to adjudicate substantial rights of persons over which they have no in personam jurisdiction in domestic-abuse actions brought under Iowa Code chapter 236. The court concedes, as did the district court, that defendant, Nathan Bartsch, did not have sufficient contacts with the State of Iowa to establish jurisdiction over his person. The court nevertheless proceeds to adjudicate Nathan's substantial rights on the mistaken assumption that a domestic-abuse order under chapter 236 is a status determination. I strongly disagree with that conclusion.

More than 100 years ago in *Pennoyer v. Neff, 95 U.S. 714, 722, 24 L. Ed. 565, 568 (1868),* the court suggested that cases involving personal status of a plaintiff such as divorce actions could be adjudicated in the plaintiff's state of domicile even though personal jurisdiction of the defendant **[**20]** could not be acquired by the courts of that state. The adjudications thus permitted were those "affecting the personal status of the plaintiff." *Pennoyer, 95 U.S. at 733, 24 L. Ed. at 572.* That principle was ratified in *Williams v. North Carolina, 317 U.S. 287, 299, 63 S. Ct. 207, 213-14, 87 L. Ed. 279, 286 (1942).*

In those instances where status adjudications take place without personal jurisdiction over an affected party, the adjudication must be limited to a declaration of status. It may not also award related affirmative relief. *Kulko v. Superior Ct., 436 U.S. 84, 100-01, 98 S. Ct. 1690, 1701, 56 L. Ed. 2d 132, 146-47 (1978)* (notwithstanding state's substantial interest in protecting resident children, jurisdiction with which defendant lacked minimum contacts is not a "'fair forum' in which to require [father] either to defend a child support suit or suffer liability by default." The Restatement (Second) of Judgments recognizes that

> jurisdiction to establish or terminate a status should be distinguished from jurisdiction to determine the existence of a status as an incidental question in litigation whose primary objective **[**21]** is resolution of some other controversy. . . . It should also be distinguished from jurisdiction to enforce liability arising from a status, for example, liability for child support.

Restatement (Second) of Judgments § 7 cmt. a (1982) (citing *Kulko*).

What Tara Bartsch sought from an Iowa court was not a declaration of her status, but rather a grant of injunctive relief against a party beyond the jurisdiction of the Iowa court. Nor did the district court attempt to adjudicate her status in any manner. Consequently, the essential predicate for the majority's holding is missing. Moreover, even if an adjudication of status had been involved, the court had no jurisdiction to grant collateral relief against Nathan. The majority apparently believes that the unavailability of collateral relief against foreign domiciliaries in status adjudications only extends to money judgments. That is not correct. The court in *Kulko* described the protection much more broadly:

> The Due Process Clause of the Fourteenth Amendment operates as *a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants*.

Kulko, 436 U.S. at 91, 98 S. Ct. at 1696, 56 L. Ed. 2d at 140 **[**22]** (emphasis added). The "rights or interests" of Nathan that have been adversely affected by the district court's judgment are substantial. There **[*12]** has been a direct invasion of his liberty interest. In addition, there are collateral consequences of a lasting nature. *See 18 U.S.C. § 922*(g)(8) (possession of a firearm precluded).

Although, as the majority notes, the state clearly has an important interest in fostering protection against domestic abuse, its power to do so does not extend to

granting protective orders against persons lacking the requisite minimum contacts with the forum state. The need to establish such minimum contacts stands as "a prerequisite to [the State's] exercise of power over [foreign domiciliaries]." *Hanson v. Denckla, 357 U.S. 235, 251, 78 S. Ct. 1228, 1238, 2 L. Ed. 2d 1283, 1296 (1958).*

I would reverse the judgment of the district court.

Lavorato, C.J., and Ternus, J., join this dissent. 11/20/2001 11/25/2001

LEXSEE 837 S.W.2D 80

IN THE INTEREST OF S.A.V. AND K.E.V., MINOR CHILDREN

No. D-0599

SUPREME COURT OF TEXAS

837 S.W.2d 80; 1992 Tex. LEXIS 96; 35 Tex. Sup. J. 1028

July 1, 1992, DELIVERED

PRIOR HISTORY: [1]**

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner mother sought review of the judgment of the Court of Appeals for the Seventh District (Texas) that found that the trial court could exercise jurisdiction over respondent father to modify child support and visitation expense but that the trial court's order modifying custody or visitation was improper under the Parental Kidnapping Prevention Act of 1980, *28 U.S.C.S. 1738A* (1990).

OVERVIEW: Petitioner mother and respondent father were divorced in Minnesota and their divorce decree provided for child custody, support, and visitation. Subsequently, petitioner and her children moved to Texas. Petitioner sought to modify the divorce decree in Texas. The court affirmed in part and reversed in part the judgment of the court of appeals. The court held that the trial court had personal jurisdiction over respondent because respondent had purposefully established minimum contacts with Texas as a result of his repeated trips to Texas to visit the children and his searching for work in Texas. The court recognized that the burden on respondent of adjudicating the matters in Texas was not an extremely heavy one and that Texas had a vital interest in protecting the rights of children within its borders and providing for their support. The court held that the Parental Kidnapping Prevention Act of 1980, *28 U.S.C.S. § 1738A* (1990) did not prevent the trial court from modifying custody and visitation because the Minnesota court declined to exercise its jurisdiction over custody and visitation matters.

OUTCOME: The court reversed in part the judgment of the court of appeals. The trial court could modify custody and visitation because the Minnesota court declined to exercise jurisdiction over custody and visitation matters. The court affirmed in part the judgment of the court of appeals because the trial court had jurisdiction over respondent to modify the Minnesota decree as it related to child support, visitation expense, custody, and visitation.

LexisNexis(R) Headnotes

Family Law > Child Custody > Visitation
Family Law > Child Support > Jurisdiction
[HN1] Claims for child support and visitation expenses are like claims for debt in that they seek a personal judgment establishing a direct obligation to pay money. Therefore, a valid judgment for child support or visitation expenses may be rendered only by a court having jurisdiction over the person of the defendant.

Family Law > Child Custody > Jurisdiction
[HN2] A "custody determination" means a court decision providing for the custody of a child, including visitation rights. Tex. Fam. Code Ann. § 11.52 (1986). Unlike adjudications of child support and visitation expense, custody determinations are status adjudications not dependent upon personal jurisdiction over the parents.

Family Law > Child Custody > Visitation
Family Law > Child Custody > Jurisdiction
[HN3] Due process permits adjudication of the custody and visitation of a child residing in the forum state

without a showing of "minimum contacts" on the part of the nonresident parent.

Family Law > Child Custody > Jurisdiction
[HN4] To acquire jurisdiction over custody issues, no connection between the nonresident parent and the state is required. Instead, jurisdiction can he established by demonstrating that Texas has become the child's "home state." Tex. Fam. Code Ann. § 11.53. Texas will become the child's home state when the child has resided there for six months or since birth if the child is younger than six months. Tex. Fam. Code Ann. § 11.52(5). Alternatively, a Texas court may assert jurisdiction to modify custody when the best interests of the child will be served because the child and at least one contesting parent have a significant connection with Texas and substantial evidence concerning the child's care exists in Texas. Tex. Fam. Code Ann. § 11.53(a)(2).

Family Law > Child Custody > Jurisdiction
[HN5] If the requirements of the Texas Family Code are satisfied, the state's interest in determining custody has been demonstrated. That is, the state has acquired a sovereign's interest in and responsibility for the child's welfare. In such a situation, the state's interest in the child's welfare outweighs the nonresident parent's interest in avoiding the burden and inconvenience of defending the suit in Texas. Therefore, due process does not require that a connection exist between the nonresident parent and this state. In adjudications of custody, once these jurisdictional provisions have been satisfied, the court can properly exercise jurisdiction over the nonresident. Satisfaction of these provisions confers "personal jurisdiction" over the nonresident as well as subject matter jurisdiction over the case.

Family Law > Child Custody > Jurisdiction
[HN6] A challenge to the court's personal jurisdiction is properly raised in a special appearance. *Tex. R. Civ. P. 120a.*

Family Law > Child Support > Jurisdiction
[HN7] For a court to properly exercise jurisdiction in suits seeking to impose a personal obligation to pay money, such as child support modification proceedings, two conditions must be met. First, the long-arm statute must authorize the exercise of jurisdiction. Second, the exercise of jurisdiction must be consistent with federal and state constitutional guarantees of due process.

Family Law > Child Support > Jurisdiction
[HN8] Tex. Fam. Code Ann. § 11.051 (1986) provides the Texas courts with personal jurisdiction over nonresident parents with regard to child support. Tex. Fam. Code Ann. § 11.051(4)(1986) requires only "any basis" consistent with due process.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
[HN9] Under the federal constitutional test of due process, the plaintiff must initially show that the defendant has established "minimum contacts" with the forum state. The plaintiff must then show that the assertion of jurisdiction comports with fair play and substantial justice. The fair play analysis is separate and distinct from the minimum contacts issue. The nonresident must have purposely established minimum contacts with Texas. This means that there must be a "substantial connection" between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed toward Texas. When specific jurisdiction is asserted, the cause of action must arise out of or relate to the defendant's contacts with Texas. When general jurisdiction is alleged, there must be continuous and systematic contacts between the nonresident defendant and Texas. General jurisdiction requires a showing of substantial activities by the nonresident defendant in Texas.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
[HN10] The assertion of personal jurisdiction must comport with fair play and substantial justice. In this inquiry, it is incumbent upon the defendant to present a compelling case that the presence of some consideration would render judgment unreasonable. The following factors, when appropriate, should be considered: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. Once minimum contacts have been established, however, the exercise of jurisdiction will rarely fail to comport with fair play.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
[HN11] In analyzing minimum contacts, it is not the number of the contacts with the forum state that is important. Rather, the quality and nature of the nonresident defendant's contacts are important.

Family Law > Child Custody > Parental Kidnapping Prevention Act
[HN12] The Parental Kidnapping Prevention Act of 1980 requires every state to give full faith and credit to child

custody determinations of other states. *28 U.S.C.S. § 1738A*(a).

Family Law > Child Custody > Parental Kidnapping Prevention Act
[HN13] See *28 U.S.C.S. § 1738A*(f).

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JUDGES: Cook, Gonzalez, Hecht, Phillips, Cornyn

OPINIONBY: EUGENE A. COOK

OPINION:

[*82] OPINION

This case involves complex jurisdictional issues arising from a Texas trial court's modification of a Minnesota divorce decree. We must decide whether the Texas court could exercise jurisdiction to modify the decree with respect to four areas: child support, visitation expense, custody, and actual visitation arrangements. The court of appeals determined that the Texas court could exercise jurisdiction to modify child support and visitation expense but that the Texas **[**2]** court could not exercise jurisdiction to modify custody or visitation. *798 S.W.2d 293.* Because we hold that the trial court could exercise jurisdiction over all these issues, we affirm in part and reverse in part the judgment of the court of appeals.

I. FACTS AND PROCEDURAL HISTORY

The mother and the father, both physicians, were married on June 7, 1980 in Minnesota. They continued to reside in Minnesota throughout their marriage. The mother and the father entered a stipulated divorce decree in 1986. The decree contained specific provisions relating to the two minor children of the marriage. The decree provided for joint custody of the children with the mother having physical custody. The decree also provided for visitation. In addition, the decree set out each parent's child support obligation. Each parent was obligated to pay child support when the children resided with the other parent for more than one week.

The mother moved to Amarillo in the spring of 1987. The children joined her there in August 1987. The father has continued to reside in Minnesota since the divorce.

On October 22, 1987, the Minnesota court modified its divorce decree. The court implemented a provision **[**3]** in the original decree which provided that the mother's child support obligation would be increased if her annual income reached $ 60,000. In addition, the Minnesota court held that the parties could deduct their visitation expenses from their child support obligation. This modification was made to allow for the visitation expenses the father incurred when traveling to Amarillo to see the children.

On January 19, 1989, the mother brought the instant action in Texas to modify the Minnesota court's October 1987 order. The mother asked the trial court to terminate the offset for visitation expenses. Additionally, she asked that she not be required to pay any child support to the father and that the court modify the joint conservatorship of the children.

The next day the father filed a motion to modify the same decree in a Minnesota court. The father asked that the mother **[*83]** be ordered to pay additional child support and that the offset for visitation expenses be maintained.

Simultaneous modification proceedings in Texas and Minnesota resulted.

In order to object to the Texas trial court's exercise of jurisdiction, the father entered a special appearance pursuant to *Rule* **[**4]** *120a of the Texas Rules of Civil Procedure.* The father's challenge to the Texas court's jurisdiction took two forms. First, the father objected to the trial court's exercise of subject matter jurisdiction to modify custody. Second, the father objected to the trial court's exercise of personal jurisdiction over him to modify his child support obligation. The trial court denied his special appearance and determined that it had subject matter jurisdiction over the case and personal jurisdiction over the father.

Before the Texas court reached the merits of the case, the Minnesota court issued an order modifying the Minnesota decree. The Minnesota order modified the parties' child support obligations and terminated the offset of visitation expenses. The Minnesota order did not alter custody or visitation.

After the Minnesota court had rendered its order, the Texas trial court issued an order modifying the Minnesota decree. The Texas court's order mirrored the

Minnesota order with respect to child support and visitation expenses. However, the Texas order dissolved the joint conservatorship and appointed the mother as sole managing conservator. The order also narrowed and specified [**5] the father's visitation rights. The father appealed the Texas court's order modifying the Minnesota decree arguing that the trial court did not have subject matter jurisdiction over the case or personal jurisdiction over him. Additionally, the father challenged the merits of the trial court's modification of visitation and custody.

On April 5, 1989, while the case was pending before the Texas court of appeals, the Minnesota trial court entered a separate order that unconditionally asserted jurisdiction over child support issues. The order also conditionally asserted continuing jurisdiction over the custody issues involved in this case. The Minnesota trial court's assertion of jurisdiction over custody was expressly conditioned on an appellate court ruling. On December 24, 1990, the Minnesota court of appeals issued an opinion affirming the April 5th order of the Minnesota trial court.

In the appeal of the Texas order, the court of appeals determined that, by raising the issue of subject matter jurisdiction in his special appearance, the father made a general appearance before the trial court. Therefore, the court held that the father had subjected himself to the personal jurisdiction [**6] of the Texas court. As a result, the court of appeals determined that the trial court's modification of the father's support obligation and offset of visitation expenses was proper. The court determined, however, that the Texas court's modification of the Minnesota order as it related to custody and actual visitation arrangements was improper under the Parental Kidnapping Prevention Act of 1980 (PKPA), *28 U.S.C.A. 1738A* (West Supp. 1990).

II. DUE PROCESS REQUIREMENTS

We begin our examination of the issues presented in this case by examining the distinct due process requirements necessary for the proper exercise of jurisdiction over child support, visitation expense, child custody, and visitation.

A. Child Support and Visitation Expense

[HN1] Claims for child support and visitation expenses are like claims for debt in that they seek a personal judgment establishing a direct obligation to pay money. *See Creavin v. Moloney, 773 S.W.2d 698, 703* (Tex.App.--Corpus Christi 1989, writ denied); *Perry v. Ponder, 604 S.W.2d 306, 312-13* (Tex.Civ.App.--Dallas 1980, no writ). Therefore, a valid judgment for child support or visitation expenses may be rendered only by a court having jurisdiction [**7] over the person of the defendant. *See Kulko v. Superior Court of California, 436 U.S. 84, 91, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978).*

[*84] B. Custody and Visitation

[HN2] A "custody determination" means a court decision providing for the custody of a child, including visitation rights. TEX. FAM. CODE ANN. § 11.52 (Vernon 1986). Unlike adjudications of child support and visitation expense, custody determinations are status adjudications not dependent upon personal jurisdiction over the parents. *See Creavin, 773 S.W.2d at 703; Perry, 604 S.W.2d at 313; see also Shaffer v. Heitner, 433 U.S. 186, 208, 53 L. Ed. 2d 683, 97 S. Ct. 2569 n.30 (1977).*

Generally, a family relationship is among those matters in which the forum state has such a strong interest that its courts may reasonably make an adjudication affecting that relationship even though one of the parties to the relationship may have had no personal contacts with the forum state. *See Creavin, 773 S.W.2d at 703; Perry, 604 S.W.2d at 313.* Consequently, [HN3] due process permits adjudication of the custody and visitation of a child residing in the forum state without a showing of "minimum contacts" [**8] on the part of the nonresident parent. *See Creavin, 773 S.W.2d at 703; Perry, 604 S.W.2d at 313.*

The Texas legislature recognized the state's strong interest in determining the custody of children by adopting the Uniform Child Custody Jurisdiction Act (UCCJA). TEX. FAM. CODE ANN. § 11.51 *et seq.* (Vernon Supp. 1992). [HN4] To acquire jurisdiction over custody issues, no connection between the nonresident parent and the state is required. Instead, jurisdiction can he established by demonstrating that Texas has become the child's "home state." *Id.* at § 11.53. Texas will become the child's home state when the child has resided here for six months, or since birth if the child is younger than six months. *Id.* at § 11.52(5). Alternatively, a Texas court may assert jurisdiction to modify custody when the best interests of the child will be served because the child id at least one contesting parent have a significant connection with Texas and substantial evidence concerning the child's care exists in Texas. *Id.* at § 11.53(a)(2).

[HN5] If the requirements of the Family Code are satisfied, the state's interest in determining custody has been demonstrated. That is, the [**9] state has acquired a sovereign's interest in and responsibility for the child's welfare. In such a situation, the state's interest in the child's welfare outweighs the nonresident parent's interest in avoiding the burden and inconvenience of defending the suit in Texas. Therefore, due process does not require that a connection exist between the nonresident parent and this state. In adjudications of custody, once these jurisdictional provisions have been

satisfied, the court can properly exercise jurisdiction over the nonresident. Satisfaction of these provisions confers "personal jurisdiction" over the nonresident as well as subject matter jurisdiction over the case. *See Creavin, 773 S.W.2d at 703; Perry, 604 S.W.2d at 313-14.*

III. JURISDICTION OVER CHILD SUPPORT AND VISITATION EXPENSE

Because custody adjudications do not require minimum contacts with the forum state, disputes involving both custody and child support create a unique jurisdictional problem for courts. A custody adjudication may be made by a court that has no jurisdiction to render a personal judgment for support against a nonresident parent. This difficulty, however, is inherent in our system of **[**10]** jurisdiction as a result of the separate due process requirements for adjudications of custody and adjudications of child support. With this inherent difficulty in mind, we must now attempt to reach a result that is both fair to the parties and in the best interest of the children.

A. No Waiver of Special Exception

In determining whether the father waived his special appearance, the distinct jurisdictional requirements for adjudications of custody are relevant. The mother sought to have the Texas court modify both custody and child support. In his special appearance, the father challenged the trial court's subject matter jurisdiction to adjudicate custody as well as the court's **[*85]** personal jurisdiction over the father. The court of appeals determined that, by raising the issue of subject matter jurisdiction in his special appearance, the father made a general appearance before the trial court. We disagree.

By challenging the court's subject matter jurisdiction over custody, the father challenged the satisfaction of the jurisdictional statute. As discussed earlier, in adjudications of custody, satisfaction of the jurisdictional statute confers "personal jurisdiction" over **[**11]** the nonresident. As a result, [HN6] the father's challenge to the court's subject matter jurisdiction over custody issues served as a challenge to the court's "personal jurisdiction" over the father. This type of challenge is properly raised in a special appearance. *See TEX. R. CIV. P. 120a.* Therefore, we hold that the father did not waive his right to complain of the trial court's lack of personal jurisdiction over him by challenging the court's subject matter jurisdiction over custody issues. n1

n1 We do not reach the broader question of whether raising subject matter jurisdiction in a typical suit that seeks to impose a personal obligation constitutes a general appearance. *See Goodwine v. Superior Court of Los Angeles, 63 Cal. 2d 481, 407 P.2d 1, 47 Cal. Rptr. 201 (Cal. 1965); see also* Annotation, *Objection Before Judgment to Jurisdiction of Court Over Subject Matter as Constituting General Appearance, 25 A.L.R.2d 833 (1952).*

B. Minimum Contacts Analysis

Because the father properly preserved **[**12]** his right to challenge the trial court's exercise of personal jurisdiction over him, we must determine whether that exercise of jurisdiction was proper. [HN7] For a Texas court to properly exercise jurisdiction in suits seeking to impose a personal obligation to pay money, such as child support modification proceedings, two conditions must be met. First, a Texas long-arm statute must authorize the exercise of jurisdiction. Second, the exercise of jurisdiction must be consistent with federal and state constitutional guarantees of due process. *Schlobohm v. Shapiro, 784 S.W.2d 355, 356 (Tex. 1990).*

[HN8] Section 11.051 of the Family Code provides the Texas courts with personal jurisdiction over nonresident parents with regard to child support. Subsection 4 of that provision requires only "any basis" consistent with due process. TEX. FAM. CODE ANN. § 11.051(4) (Vernon 1986).

[HN9] Under the federal constitutional test of due process, the plaintiff must initially show that the defendant has established "minimum contacts" with the fotum state. *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945).* The plaintiff must then show that the assertion of jurisdiction **[**13]** comports with fair play and substantial justice. *Id.* The fair play analysis is separate and distinct from the minimum contacts issue. *See generally Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).* The jurisdictional formula Texas courts are to use to ensure compliance with federal constitutional requirements of due process was recently clarified by this Court in *Guardian Royal Exchange Assurance v. English China Clays, 815 S.W.2d 223 (Tex. 1991).* First, the nonresident must have purposely established minimum contacts with Texas. *Id. at 230.* This means that there must be a "substantial connection" between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed toward Texas. *Id.* When specific jurisdiction is asserted, the cause of action must arise out of or relate to the defendant's contacts with Texas. *Id.* When general jurisdiction is alleged, there must be continuous and systematic contacts between the nonresident defendant and Texas. General **[**14]**

jurisdiction requires a showing of substantial activities by the nonresident defendant in Texas. *Id.*

Second, [HN10] the assertion of personal jurisdiction must comport with fair play and substantial justice. *Id. at 231.* In this inquiry, it is incumbent upon the defendant to present "a compelling case that the presence of some consideration would render judgment unreasonable." *Id.* (quoting *Burger King, 471 U.S. at 477).* The following factors, when appropriate, should be considered: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.* Once minimum contacts have been established, however, the exercise of jurisdiction will rarely fail to comport with fair play and substantial justice. *Id.; see* **[*86]** *Burger King, 471 U.S. at 477-78; Schlobohm, 784 S.W.2d at 358.*

The mother argues that the trial court's exercise of personal **[**15]** jurisdiction over the father was proper under the federal and state guidelines. She argues that the father's trips to visit the children establish the necessary minimum contacts. In addition, the mother relies on the fact that the father sought employment in Amarillo to argue that the father's contacts with Texas were continuing, systematic and related to his relationship with the children.

With the federal and state guidelines in mind, we hold that the Texas trial court's exercise of jurisdiction did not violate the father's right to due process.

First, the father purposefully established minimum contacts with Texas. There was a substantial connection between the father and Texas arising from his repeated visits to Texas. Although it is unclear exactly how often the father came to Texas, the record reflects that he visited Amarillo so often between September 1987 and January 1989, that there were many months in which he was able to virtually eliminate his entire child support payment ($ 1800 per month) through his visitation expense offset.

[HN11] In analyzing minimum contacts, we recognize that it is not the number of the contacts with the forum state that is important. Rather, the **[**16]** quality and nature of the nonresident defendant's contacts are important. *Guardian Royal, 815 S.W.2d at 230 n.11.* The record reflects that during his numerous trips to Texas, the father visited the children and sought employment in Amarillo. At the special apace hearing, the father testified that on one trip to Amarillo he spent four hours with doctors at the Amarillo Diagnostic Clinic. During that visit, he inquired into the opportunities available at the clinic and expressed an interest in any openings that might arise. The father testified that, during a subsequent trip to Amarillo, he spent two hours making the rounds with another doctor at the clinic. This testimony indicates that the father's contacts with Texas included a continuing job search as well as visits with the children. Based on these facts, we find that the father purposefully established minimum contacts with Texas.

Two Texas cases have held that there were no minimum contacts between the nonresident parent and Texas even though the parent had paid visits to Texas. *See Cunningham v. Cunningham, 719 S.W.2d 224, 228* (Tex.App.--Dallas 1986, writ dism'd); *Ford v. Durham, 624 S.W.2d 737, 740* (Tex.App.--Fort **[**17]** Worth 1981, writ dism'd). n2 Although these cases appear to conflict with our decision today, they are distinguishable from the instant case.

> n2 Other Texas courts held that visits to the children in Texas may establish minimum contacts with Texas. *See Crockett v. Crockett, 589 S.W.2d 759, 762* (Tex. Civ. App.--Dallas 1979, writ ref'd n.r.e.); *Bergdoll v. Whitley, 598 S.W.2d 932, 935* (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.).
>
> Courts from other jurisdictions also hold that trips to visit the children can establish minimum contacts with the forum state. *See McCarthy v. McCarthy, 146 Wis. 2d 510, 431 N.W.2d 706 (Wis.Ct.App. 1988); Duehring v. Vasquez, 490 So.2d 667 (La.Ct.App. 1986).* Because the father conducted a continuing job search while he was in Texas, we do not reach the question whether visits to the children alone can establish minimum contacts.

In *Cunningham,* the nonresident parent's only recent contact with the state was one unsuccessful attempt to visit the child in **[**18]** Texas. *Cunningham, 719 S.W.2d at 225.* The court held that this contact and the mother's unilateral removal of the child **[*87]** to Texas without the father's approval did not establish any basis meeting the requirements process. *Id. at 228.* The facts of the present case are distinguishable from those of *Cunningham.* The father has made numerous trips to Texas to visit the children. Additionally, the father sought employment during his visits to Texas.

In *Ford,* the nonresident parent came to Texas several times to visit the child and came to Texas at least twelve times to conduct business. *Ford, 624 S.W.2d at*

740. The court found that the father's trips to Texas to visit the child were insufficient to subject him to the jurisdiction of the Texas trial court. *Id.* The court further found that the business trips did not give rise to a cause of action regarding the parent-child relationship so as to subject him to the jurisdiction of the Texas courts. In this case, it appears that the father paid more visits to Texas than the nonresident parent in *Ford.* Additionally, *Ford* was decided before the Texas "due process formula" had been modified to allow **[**19]** for general jurisdiction. *See Schlobohm, 784 S.W.2d at 358.* Therefore, the court in *Ford* did not include the nonresident's business contacts as part of the due process analysis. In this case, the father's trips, when taken as a whole, are sufficient to establish minimum contacts with Texas.

Second, the Texas court's assertion of personal jurisdiction comports with far play and substantial justice. The burden on the father of adjudicating the suit in Texas is not an extremely heavy one. Although there are many miles between Texas and Minnesota, modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he has minimum contacts. *See generally McGee v. International Life Insurance Co., 355 U.S. 220, 223, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957).* Moreover, the father's repeated trips to Texas indicate that traveling to this state does not present an undue hardship on him. Additionally, Texas has asserted its particularized interest in adjudicating child support by enacting a special jurisdictional statute. *See* TEX. FAM. CODE ANN. (11.051 (Vernon 1986); *see also Kulko, 436 U.S. at 98.* Finally, Texas **[**20]** has a vital interest in protecting the rights of children within its borders and providing for their support. For these reasons, we hold that the Texas court's exercise of jurisdiction comports with fair play and substantial justice.

IV. JURISDICTION OVER CUSTODY AND VISITATION

The UCCJA creates a system of concurrent jurisdiction in custody determinations. That is, two states may have subject matter jurisdiction to modify custody of the same children. This is true in the instant case. Because the children lived in Texas for a period in excess of six months before the proceedings in question, Texas is their "home state" under the Texas UCCJA and has acquired subject matter jurisdiction over the children's status. TEX. FAM. CODE ANN. § § 11.52(5), 11.53. Minnesota also had subject matter jurisdiction over the original custody determination made in the 1986 divorce decree and continues to have jurisdiction concerning the custody of the children. *MINN. STAT. ANN. § 518A.03* (West 1990). Therefore, Texas and Minnesota have concurrent jurisdiction over the same child custody question.

In order to prevent jurisdictional conflicts and competition over child custody, the United States **[**21]** Congress passed the Parental Kidnapping Prevention Act of 1980 (PKPA), *28 U.S.C.A. § 1738A* (West Supp. 1990). [HN12] The PKPA requires every state to give full faith and credit to child custody determinations of other states. *28 U.S.C.A. § 1738A*(a). However, the PXPA provides that:

[HN13]

A court of a State may modify a determination of the custody of the same child made by a court of another State, if

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

[*88] *28 U.S.C.A. § 1738A*(f). In case of any conflict, the PKPA takes precedence over state law.

The court of appeals rejected the mother's argument that the Minnesota court declined to exercise its jurisdiction. The mother bases her argument on the April 5, order rendered by the Minnesota trial court while this case was pending before the Texas court of appeals. The Minnesota order states:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over all dissolution matters, including child support and visitation expenses.

2. This Court has continuing **[**22]** jurisdiction over child custody and visitation based on the children's best interests pursuant to Minnesota's version of the Uniform Child Custody Jurisdiction Act.

3. Minnesota is not an inconvenient forum.

4. This Court will decline to exercise its jurisdiction over child custody and visitation if Texas insists on exercising jurisdiction pursuant to an appellate court decision.

IT IS HEREBY ORDERED:

1. [The father's] motion for this Court to exercise jurisdiction is granted with respect to child support and visitation expenses and partially granted with respect to child custody and visitation.

2. [The mother's] motion for this Court to decline jurisdiction is granted with respect to child custody and

visitation issues if an appellate court rules this Court should not be exercising jurisdiction.

3. The [father] shall provide the Texas Court of Appeals and District Court with a copy of this Order and Memorandum.

The court of appeals determined that, although the Minnesota court appeared to decline jurisdiction in paragraph 4 of the above conclusions of law and paragraph 2 of the decree, when considered as a whole, the order did not decline [**23] jurisdiction within the meaning of the PKPA. Instead, the court of appeals concluded, those recitations were only a "praiseworthy attempt" by that Minnesota court to shorten the "period of uncertainty" by deferring to the Texas court of appeals' decision. *798 S.W.2d at 297.* We disagree.

In its order, the Minnesota court recognizes that it has jurisdiction over all dissolution matters, i.e., child support, visitation expenses, child custody and visitation. The order, however, *asserts* jurisdiction only over child support and visitation expenses, those matters for which "minimum contacts" are required. The Minnesota court declines to exercise its subject matter jurisdiction over custody and visitation.

Our view is supported by the Minnesota court of appeals' opinion in the appeal of the April 1990 order. That opinion was issued following the Texas court of appeals' disposition of the case. The Minnesota court of appeals affirmed the Minnesota trial court's order and held that, if no appeal was taken from the Texas court of appeals' judgment, or this Court upheld the court of appeals, Minnesota would exercise jurisdiction over custody and visitation issues to assure that a "jurisdictional [**24] vacuum" would not occur. The Minnesota court went on to hold that if this Court affirmed the Texas trial court's exercise of jurisdiction over child custody ad visitation, Minnesota "will *continue to decline* to exercise the jurisdiction it has over these issues." (emphasis added). In interpreting the actions of the Minnesota trial court, we respect the determination made by the Minnesota court of appeals that the trial court had declined to exercise jurisdiction over custody ad visitation.

This case presents the difficulties inherent in the resolution of all interstate custody disputes. The cooperation of the Minnesota court of appeals has allowed us to resolve the jurisdictional questions with careful regard for the rights of the parties and the hest interests of the children.

Because we determine that Minnesota has declined to exercise its jurisdiction over custody and visitation matters, the Texas court's exercise of jurisdiction over custody and visitation was proper under the PKPA.

[*89] V. CONCLUSION

For the above reasons we affirm in part and reverse in part the judgment of the court of appeals. We hold that the trial court could exercise jurisdiction to modify [**25] the Minnesota decree as it related to child support, visitation expense, custody and visitation. The court of appeals determined that the trial court could not properly exercise jurisdiction over visitation and custody and, therefore, did not address the merits of the trial court's order modifying these aspects of the Minnesota decree. Because the father properly challenged the trial court's modification of visitation and custody, we remand this cause to the court of appeals so that it may address the merits of the father's challenges to the modification order.

Eugene A. Cook,
Justice

Dissenting Opinion by Justice Gonzalez.

Concurring and Dissenting Opinion by Justice Hecht joined by Chief Justice Phillips and Justice Cornyn.

OPINION DELIVERED: July 1, 1992.

CONCURBY: NATHAN L. HECHT (In Part); PHILLIPS (In Part); CORNYN (In Part)

DISSENTBY: RAUL A. GONZALEZ; NATHAN L. HECHT (In Part); PHILLIPS (In Part); CORNYN (In Part)

DISSENT:

JUSTICE HECHT, joined by CHIEF JUSTICE PHILLIPS and JUSTICE CORNYN, concurring in part and dissenting in part.

I agree with the Court that the district court properly exercised its jurisdiction to modify the provisions of the parties' Minnesota [**26] divorce decree concerning custody and visitation. I do not agree, however -- although it is a close question -- that the district court had personal jurisdiction over the father, who still resides in Minnesota, to modify the provisions of the decree relating to support and payment of visitation expense. I therefore respectfully dissent from Parts III.B and V of the Court's opinion but concur in the remainder of it. I would reverse the judgment of the court of appeals in its entirety and remand the case to that court for consideration of other points raised by the father.

The father's only contacts with Texas were his visits to his children in Amarillo and his inquiries on some of those visits concerning employment there. For a Texas

court to exercise specific personal jurisdiction over the father, the mother's cause of action must arise out of or relate to his contacts with Texas. *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, 815 S.W.2d 223, 227 (Tex. 1991); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 413-414, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984).* While the mother's action to modify the father's support obligation does not arise out of **[**27]** his visits to the children here, the action and the visits are not completely unrelated. The relationship between them, however, is not sufficient for specific personal jurisdiction over the father. If it were, Texas would have jurisdiction over the father if he visited his children here but not if they went to Minnesota for visits. To avoid being compelled to come to Texas to litigate, the father would be encouraged to insist upon visitation in Minnesota, despite any inconvenience of that journey to the mother and the children. He might even be discouraged from visiting his children as frequently or at all. I share the concern expressed in Part II of JUSTICE GONZALEZ' dissent that a parent should not be forced to chase between not visiting his or her children and submitting to the jurisdiction of their home state. This concern has led most courts to refuse to hold that visits to one's children alone constitute sufficient minimum contacts for the exercise of personal jurisdiction. *Compare Cunningham v. Cunningham, 719 S.W.2d 224, 228* (Tex. App.--Dallas 1986, writ dism'd w.o.j.) (attempting to visit child on one occasion); *Ford v. Durham, 624 S.W.2d 737, 740* (Tex. Civ. App.--Fort **[**28]** Worth 1981, writ dism'd w.o.j.) (per curiam) (visiting child on several occasions, taking child to football game, and returning child after summer visitation); *Minkoff v. Abrams, 539 So. 2d 306, 308 (Ala. Civ. App. 1988)* (visiting children for four days and picking up children on three other occasions); *St. Hilaire v. St. Hilaire, 581 A.2d 752, 756 (Conn. Super. Ct. 1990)* (attending children's school, recreational and sports activities and transporting children in and out of state when exercising right to visitation); *Miller v. Kite 313 N.C. 474, 329 S.E.2d 663, 667 (N.C. 1985)* (visiting child approximately six times); *Buck v. Heavner, 93 N.C. App. 142, 377 S.E.2d 75, 79 (N.C. Ct. App. 1989)* (making trips for visitation); *In the Matter* **[*90]** *of the Marriage of Van Acker, 97 Ore. App. 343, 775 P.2d 921, 922 (Or. Ct. App. 1989)* (taking children to a picnic at a relative's house on one occasion while exercising visitation rights); *with Wells v. Wells, 533 So. 2d 606, 608 (Ala. Civ. App. 1987)* (stayed at ex-wife's house when came to visit the children); *Duehring v. Vasquez, 490 So. 2d 667, 673 (La. Ct. App. 1986)* (entered the state four times **[**29]** to visit with his child); *McCarthy v. McCarthy, 146 Wis. 2d 510, 431 N.W.2d 706, 708 (Wis. Ct. App. 1988)* (visited children during two holiday periods and during one unanticipated trip). n1

n1 The Court cites *Crockett v. Crockett, 589 S.W.2d 759, 762* (Tex. Civ. App.--Dallas 1979, writ ref'd n.r.e.) for the proposition that "visits to the children in Texas may establish minimum contacts with Texas"; however, visitation was only one of seven contacts with the state that the court considered in *Crockett.* The court held that all seven of those contacts taken together were sufficient minimum contacts to establish personal jurisdiction.

The Court does not hold that visitation alone constitutes minimum contacts for the exercise of personal jurisdiction. *Ante,* at n.2. The additional contact which the Court does find to be sufficient is the father's "continuing job search" in Texas. *Id.* This additional contact, by itself and apart from visitation, is also not sufficient enough for **[**30]** jurisdiction. I doubt whether the Court would hold in any other context that the father's two casual inquiries concerning employment in Amarillo were the substantial, continuous and systematic activity necessary for general personal jurisdiction. *Guardian Royal, 815 S.W.2d at 228; Helicopteros, 466 U.S. at 414-416.* The assertion of jurisdiction in this case appears to be based upon the father's visitation combined with his employment inquiries. I would not hold these combined contacts sufficient.

Moreover, I disagree with the Court that the district court's exercise of personal jurisdiction over the father comports with fair play and substantial justice. The Court holds that the inconvenience to the father in having to litigate in Texas is outweighed by Texas' interest in assuring that he provides adequate support for his children. The same issue has been addressed in very similar circumstances by the United States Supreme Court in *Kulko v. Superior Court of California, 436 U.S. 84, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978),* which the Court cites but does not follow. In that case, Ezra and Sharon Kulko, both residents of New York, were married in California while Ezra **[**31]** was on a brief layover on his way to Korea for military duty. When he completed that duty, Ezra returned to New York, where he and his wife lived continuously for several years, and where their two children were born and raised. The Kulkos eventually divorced, and Sharon moved to California. Sometime later both children joined her, but Ezra remained in New York. Sharon sued Ezra in California to increase the amount of his child support. The California Supreme Court upheld personal jurisdiction over Ezra. The United States Supreme Court

reversed. In considering the issue of fairness to Ezra, the Court considered the same factors which are present in this case. Concerning the burden on Ezra, the Court held that "basic considerations of fairness point decisively in favor of [New York] as the proper forum for adjudication of this case, whatever the merits of [Sharon's] underlying claim. It is [Ezra] who has remained in the State of the marital domicile, whereas it is [Sharon] who has moved across the continent." *Id. at 97.* Concerning California's interest in providing for the support of children living within its borders, the Court held that that interest was already fully **[**32]** served by the Revised Uniform Reciprocal Enforcement of Support Act, which allowed Sharon to file suit in California and have it adjudicated in New York without either she or Ezra being required to leave their respective places of residence. The burden on a Minnesota father in having to litigate in Texas is similar to the burden on a New York father in having to litigate in California. The Revised Uniform Reciprocal Enforcement of Support Act, adopted in California, has also been adopted in Texas. *TEX. FAM. CODE § § 21.01*-21.43. The factors in determining whether the exercise of personal jurisdiction comports with fair play and substantial **[*91]** justice are essentially the same in this case as in *Kulko.* I would reach the same result. The Court does not explain why it does not.

I would hold that the father did not have sufficient contacts with Texas for our courts to exercise personal jurisdiction over him. I would also hold that that exercise is not fundamentally fair or just. I would therefore conclude, as JUSTICE GONZALEZ does, that the district court's exercise of personal jurisdiction over the father to modify his support obligation violated his right to due process under **[**33]** the Fourteenth Amendment to the United States Constitution.

The district court's exercise of jurisdiction over the father appears to be of little significance in this case. The district court modified the father's support obligation in the Minnesota decree in the same way that the Minnesota court had already modified that obligation. Thus, the father's obligation is now the same under both the Texas judgment and the Minnesota judgment. Since the father resides in Minnesota, and there is no suggestion that he has any property in Texas, it seems that the mother would most likely enforce the Minnesota judgment, if necessary, rather than the Texas judgment. Thus, the Court has gone out of its way to exercise jurisdiction over a nonresident when it appears to be unnecessary. For this additional reason I respectfully dissent.

Nathan L. Hecht, Justice

July 1, 1992

DISSENTING OPINION

Raul A. Gonzalez

This case turns on two questions. First, did Minnesota decline to exercise jurisdiction over the dispute? And second, did sufficient minimum contacts exist for the Texas court to exercise personal jurisdiction over an out-of-state parent who merely visited our state to **[**34]** see his children? The answer to both questions must be "yes" in order for today's opinion to stand. Conflicting language from the Minnesota courts' decisions clouds the answer to the first question. The trial court conditionally declined to exercise jurisdiction, but the appellate court characterized that action as a declination. Nothing, however, obscures the answer to the second question. Federal constitutional requirements of due process should lead us to no other conclusion but that the assertion of personal jurisdiction over the visiting parent by Texas is unreasonable.

The states of Minnesota and Texas have concurrent jurisdiction over the custody, support and visitation of the children. After a hearing, a Minnesota trial court concluded that it was a convenient forum to resolve the dispute between the parties. n1 The Minnesota trial court recognized the potential for conflicting orders in this case and wisely decided to **defer** exercising jurisdiction over these issues to ascertain whether Texas would **insist** on exercising its own jurisdiction over this case. A Texas intermediate court of appeals reviewed this matter and, in my opinion, correctly concluded that Minnesota **[**35]** **had deferred** rather than declined jurisdiction within the meaning of the Parental Kidnapping Prevention Act, *28 U.S.C. § 1738A. 798 S.W.2d at 297.* Our Court disagrees and holds that Minnesota declined jurisdiction. More egregiously, our Court implies that any parent who comes to Texas to visit his or her children and consults the "want ads" or stops by the Employment Office while on one of these visitation trips has engaged in sufficient "minimum contacts" to become subject to the personal jurisdiction of Texas courts. All of this gives new meaning to the phrase: "Don't mess with Texas!" I dissent.

n1 The following factors show that the parties have substantial contacts in Minnesota: (1) the parties were married in Minnesota; (2) they lived in Minnesota until their divorce; (3) the children of the marriage were born in Minnesota; (4) the children have relatives in Minnesota; (5) the father lives in Minnesota; and (6) his family and friends who would testify on his behalf live in Minnesota. The parties **stipulated** that Minnesota would retain jurisdiction over all issues dealing with custody,

visitation and support as long as one of the parents resided in Minnesota.

[**36]

I. CUSTODY AND VISITATION

The Court acknowledges that Minnesota has subject matter jurisdiction over these [*92] same issues and does not dispute the finding by the Minnesota trial court that these issues could be conveniently resolved in Minnesota. Nonetheless, our Court holds that Texas courts have jurisdiction over the child custody and visitation issues in this case under the Texas Uniform Child Custody Jurisdiction Act (UCCJA), Tex. Fam. Code § 11.51 et seq. (1992), and the Parental Kidnapping Prevention Act of 1980 (PKPA), *28 U.S.C. § 1738A.* S.W.2d at . While I agree that Texas courts have jurisdiction over these issues under the UCCJA, I disagree with our Court's interpretation and application of the Parental Kidnapping Prevention Act.

The PKPA provides that:

A court of a State may modify a determination of the custody of the same child made by a court of another State, if --

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, **or it has declined to exercise such jurisdiction** to modify such determination.

28 U.S.C. § 1738A(f) (emphasis [**37] added). The Court concludes that Minnesota declined jurisdiction; therefore, Texas may properly exercise jurisdiction to modify the child custody and visitation rights. S.W.2d at . Because Minnesota did not unconditionally decline to exercise jurisdiction over these issues, I disagree.

The Minnesota trial court entered an "Order **Retaining** Jurisdiction." It stated in its conclusions of law that:

1. This Court has jurisdiction over all dissolution matters, including child support and visitation expenses.

2. This Court has **continuing jurisdiction** over child custody and visitation based on the children's best interests pursuant to Minnesota's version of the Uniform Child Custody Jurisdiction Act.

* * * *

4. This Court will decline to exercise its jurisdiction over child custody and visitiation **if** Texas insists on exercising jurisdiction pursuant to an appellate court decision. n2

(emphasis added).

n2 In the Minnesota trial court's memorandum of facts accompanying the order retaining jurisdiction, the trial judge noted that "Minnesota a formal action rejecting jurisdiction by the state with continuing jurisdiction before Minnesota will modify that state's custody decree or order." The findings state that "this Court will not exercise its jurisdiction over child custody and visitation rights if Texas continues to exercise jurisdiction pursuant to an appellate court decision. . . . Until that time, however, this Court **will continue** to exercise its jurisdiction." (emphasis added).

[**38]

In an unpublished opinion, the Minnesota court of appeals stated that, "we affirm with the understanding that the [Minnesota] trial court will ascertain the ultimate resolution of custody and visitation issues in Texas. If no further appeal is sought [in Texas] within the time permitted, or if, upon appeal, the Texas Supreme Court upholds the Texas Court of Appeals, Minnesota **shall exercise jurisdiction** of custody and visitation issues to assure that a jurisdictional vacuum does not occur." (emphasis added).

By the terms of the PKPA, the necessary predicate for Texas to exercise jurisdiction over this suit is for the Minnesota court to unconditionally **decline** to exercise jurisdiction. In my opinion, the Texas court of appeals correctly determined that the recitations in the Minnesota trial court were "a praiseworthy attempt by that court to shorten the present period of uncertainty by deferring to our decision as to the legal ramifications in this case." *798 S.W.2d at 297.* Because the Minnesota court did not decline to exercise jurisdiction over the child support, custody, visitation, and visitation expense issues, Texas does not have jurisdiction over these issues. [**39]

II. SUPPORT AND VISITATION

I agree with our Court that "a valid judgment for child support or visitation expenses may be rendered only by a court having jurisdiction over the person of the defendant." S.W.2d at . Therefore, in order [*93] for a Texas court to render a binding judgment on the child support and/or visitation expense issues, minimum contacts must exist. This Court determined that minimum contacts were present because the father made "numerous trips" to Texas to visit his children and "sought employment in Amarillo." S.W.2d at . The

Court is impressed that the father spent four hours with doctors in the Amarillo Diagnostic Clinic and made an inquiry about job openings. The Court also places significance on the fact that the father "spent two hours making the rounds with another doctor at the clinic." S.W.2d at . n3 In my opinion, these are insufficient contacts to confer personal jurisdiction to Texas courts over the father.

n3 The father testified that he did not "formally even begin an application process for a job . . . [and that] there is no formal effort underway for [seeking] employment [in Amarillo]." He stated that he "merely checked out the possibility of what the quality of the job would be." Furthermore, on the other contact which the court finds significant, the father merely "watched" as he accompanied another doctor making his rounds.

[40]**

In *Mitchim v. Mitchim, 518 S.W.2d 362, 366 (Tex. 1975),* we held that even though a state may exercise jurisdiction over a cause, the assumption of personal jurisdiction over a nonresident defendant must not offend that defendant's due process rights. See *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945).* In *Hanson v. Denckla, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958),* the United States Supreme Court stated that there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws. Minimum contacts with the forum state are required so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe, 326 U.S. at 316.* An essential criterion in 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. *Kulko v. Superior Court of California, 436 U.S. 84, 92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978).*

In Guardian **[**41]** *Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223, 230 (Tex. 1991),* this Court clarified the personal jurisdiction formula to "ensure compliance with federal constitutional requirements of due process." We stated that "general jurisdiction may be asserted when the cause of action does not arise from or relate to the nonresident defendant's purposeful conduct within the forum state but there are **continuous and systematic** contacts between the nonresident defendant and the forum state." *Id. at 228* (citing *Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414-16, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984)).* (emphasis added). Furthermore, when general jurisdiction is alleged, "the minimum contacts analysis is more demanding and requires a showing of **substantial activity** in the forum state." *Id.* (emphasis added). Therefore, in order for Texas to properly exercise personal jurisdiction over the father, he must have "purposefully established minimum contacts" with Texas. *Id.* Additionally, the assertion of personal jurisdiction must "comport with fair play and substantial justice." *Id.* at 231.

It is undisputed that the father's **[**42]** main purpose for coming to Texas was to visit his children. The fact that he made a job inquiry, in my view, does not alter the primary purpose of the visits -- to see his children.

The act of visiting children pursuant to a child visitation agreement should not subject a parent to the jurisdiction of the state in which the custodial parent decides to reside. To find personal jurisdiction in a State merely because the custodial parent was residing there, would discourage parents from entering into reasonable visitation agreements. This result "would discourage voluntary child custody agreements and subject a non-custodial parent to suit in any jurisdiction where the custodial parent chose to reside." *Miller v. Kite, 313 N.C. 474, 329 S.E.2d 663, 666 (N.C. 1985)*(citing *Kulko, 436 U.S. at 93).* **[*94]** Furthermore, "a parent would be faced with the dilemma of visiting the child and subjecting himself to the jurisdiction of the forum state or refraining from such contacts with the child due to the fear of being forced to litigate there." *Miller, 329 S.E.2d at 667.* "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy **[**43]** the requirement of contact with the forum State." *Hanson 357 U.S. at 253 (1958).* n4

n4 Other states have also held that a noncustodial parent's exercise of visitation rights does not subject that parent to in personam jurisdiction. See *Minkoff v. Abrams, 539 So.2d 306 (Ala. Civ. App. 1988)*(court found that minimum contacts did not exist although father traveled to Alabama and remained for four days and thereafter traveled to Alabama three times to bring his children to Georgia pursuant to his visitation rights); *St. Hilaire v. St. Hilaire, 41 Conn. Supp. 429, 581 A.2d 752 (Conn. Super.Ct. 1990)*(fact that father entered Connecticut to pick up and return children during visitation periods along with attending the children's dance recitals, graduations, school and sports activities in Connecticut was insufficient to establish

minimum contacts with the state); *Buck v. Heavner, 93 N.C. App. 142, 377 S.E.2d 75 (N.C. Ct. App. 1989)*(the exercise of personal jurisdiction on the basis of child visitation violated due process because "the fact that a defendant makes trips to North Carolina in order to exercise his visitation rights cannot supply the necessary minimum contacts for the purposes of a child support action"); *Roderick v. Roderick, 776 S.W.2d 533 (Tenn. Ct. App. 1989)*(court held that even if fact that father traveled to Tennessee to exercise visitation rights along with the fact that he was married in Tennessee and once held a Tennessee driver's license were proven, "they do not warrant requiring [the father] to defend himself in Tennessee's courts").

[44]**

In my opinion, Texas cannot properly assert personal jurisdiction over the father, because he did not establish continuous or systematic contacts with Texas in order to meet the minimum contact requirement set forth in Guardian Royal. Furthermore, the exercise of personal jurisdiction fails to meet the second requirement of Guardian Royal because such exercise does not comport with fair play or substantial justice.

CONCLUSION

Because the Minnesota court did not unconditionally decline to exercise its jurisdiction over the suit, but merely deferred the exercise of its jurisdiction pending the resolution of the Texas case, Texas cannot properly assert jurisdiction over the child custody and visitation issues under the PKPA. Furthermore, because the father has not established minimum contacts with Texas, Texas should not assert personal jurisdiction over him. Finally, there is absolutely no reason for Texas to insist on exercising jurisdiction over this case; in the future, some of our sister states may not be as accommodating. In the long run, it is the children who will suffer.

Raul A. Gonzalez
Justice

OPINION DELIVERED: July 1, 1992

LEXSEE 572 N.W.2D 747

In Re the Matter of: Barb Hughs o/b/o Bryan Praul, petitioner, Respondent, vs. Gerald Cole, Appellant.

C6-97-870

COURT OF APPEALS OF MINNESOTA

572 N.W.2d 747; 1997 Minn. App. LEXIS 1358

December 23, 1997, Filed

SUBSEQUENT HISTORY:

Petition for Further Review Denied February 26, 1998, Reported at: *1998 Minn. LEXIS 145.*

PRIOR HISTORY: [**1] Wright County District Court. File No. F2-97-377.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant father, a Pennsylvania resident, sought review of a judgment from the Wright County District Court (Minnesota) that granted the petition of respondent mother, a Minnesota resident, for a domestic abuse order.

OVERVIEW: The father was the legal father of the mother's son. On appeal from the judgment against him, the father contended that the district court erred as a matter of law when it granted the mother's petition for a domestic abuse order. The petition was based on allegations of physical and emotional abuse inflicted upon the boy during summer visitation. The court affirmed the order, finding that the record supported the district court's findings that it had personal jurisdiction over the father by way of Minnesota's long-arm statute and minimum contacts. The boy suffered emotionally and physically in Minnesota even though the father's acts of physical abuse occurred in Pennsylvania. While the father may not have had a plethora of contacts in Minnesota, the facts showed that the contacts, based on a continuing relationship between the father and his son, were significant. Further, the father could have foreseen possible consequences resulting from the abuse; it was foreseeable that the consequences would have arisen in Minnesota; Minnesota had a compelling interest in protecting the welfare of the child; and the inconvenience to the father of trying the case in Minnesota was minimal.

OUTCOME: The court affirmed the order that granted the mother's petition for the domestic abuse order.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] Determining whether personal jurisdiction exists is a question of law, which an appellate court reviews de novo.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
Civil Procedure > State & Federal Interrelationships
[HN2] How far a state's long-arm statute extends is a question of state law, while how the statute is limited by due process is a question of federal law.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN3] Before Minnesota courts can exercise personal jurisdiction over a nonresident, two criteria must be met. First, Minnesota's long-arm statute must be satisfied. Second, "minimum contacts" must exist between the defendant and this state in order to satisfy due process. In close cases, doubt should be resolved in favor of

maintaining jurisdiction. In any case, however, the plaintiff bears the burden of proof.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN4] The long-arm statute is a specific jurisdictional requirement, demanding that every claim in a lawsuit have its own ties to Minnesota.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN5] Minnesota's long-arm statute provides, in part, that a Minnesota court may exercise personal jurisdiction over a nonresident defendant if that defendant commits an act outside of Minnesota causing injury in Minnesota. In order for this statute to apply, it must be shown that the action is based upon a tort committed in Minnesota. For purposes of applying the long-arm statute, the standard for determining whether a tort is committed in Minnesota is whether damage from the alleged tortious conduct results in Minnesota. Emotional distress in Minnesota, caused by acts outside of the state, is sufficient to trigger the long-arm statute.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
[HN6] The Due Process Clause of the United States Constitution requires that a defendant have "minimum contacts" with the foreign state such that maintaining jurisdiction does not offend traditional notions of fair play and substantial justice. Due process is satisfied if it is fair and reasonable to require defense of the action in the State of Minnesota. Minnesota courts examine five factors: (1) the quantity of contacts within the State of Minnesota; (2) the nature and quality of those contacts; (3) the connection between the contacts and the cause of action; (4) the state's interest in providing a forum; and (5) the convenience of the parties. The first three factors are the most important, while the last two are given less consideration.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN7] Personal jurisdiction can be established by a single contact, in which case the nature and quality of the contact becomes "dispositive."

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN8] On review, when the appellate court analyzes the nature and quality of contacts, it must determine whether the nonresident "purposely availed" himself of the benefits and protections of Minnesota law.

Family Law > Family Protection & Welfare > Cohabitants & Spouses
[HN9] The Domestic Abuse Act is the vehicle that allows a person to petition the district court for an order for protection. *Minn. Stat. § 518B.01*, subd. 4 (1996).

Family Law > Family Protection & Welfare > Cohabitants & Spouses
[HN10] Domestic abuse is defined as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.

Family Law > Family Protection & Welfare > Cohabitants & Spouses
[HN11] In order to secure relief under the Domestic Abuse Act, one must either intend present harm, or inflict fear of present harm. When a petition asserts a fear of further acts of violence and is accompanied by a supporting affidavit, the requirements of the Domestic Abuse Act are met.

COUNSEL: Yancy A. Jancsok, Central Minnesota Legal Services, 830 West St. Germain # 309, P.O. Box 1598, St. Cloud, MN 56302 (for Respondent).

Scott Willis Shaw, Mary Elizabeth Smits, Shaw Law Firm, 6066 Shingle Creek Parkway, # 231, Brooklyn Center, MN 55430 (for Appellant).

JUDGES: Considered and decided by Willis, Presiding Judge, Norton, Judge, and Schumacher, Judge.

OPINIONBY: NORTON

OPINION: [*748]

OPINION

NORTON, Judge

Appellant contends the district court erred as a matter of law when it granted respondent's petition for a domestic abuse order. Appellant claims the evidence in the record fails to support an order for protection and, furthermore, the district court lacked personal jurisdiction. The record supports the district court's conclusion that it had personal jurisdiction over appellant. In addition, the evidence was sufficient to issue an order for protection. We [**2] affirm.

FACTS

Appellant Gerald Cole and respondent Barb Hughes met in 1985 when respondent was already pregnant.

They were living together in New Jersey when respondent gave birth to a son. The couple never married. After appellant and respondent separated, appellant petitioned the Superior Court of New Jersey to have himself declared the legal father of the boy, even though he was not the biological father. The court not only adjudged appellant to be the father of the child, it also granted him visitation rights during the months of June, July, and August.

After the court's decision, respondent moved to Ohio and appellant moved to Pennsylvania. From 1989 through 1996, the boy visited appellant every summer for three [*749] months and during some holidays. Respondent and the boy eventually moved to Minnesota on November 28, 1996. Appellant still resides in Pennsylvania.

On February 18, 1997, respondent filed a petition for an order for protection on behalf of the boy. In respondent's affidavit and testimony, she described several occasions when appellant abused the child. Respondent indicated that, on June 26, 1995, the boy and his stepsister were arguing in their bedroom. Appellant [**3] came up to the bedroom and slapped the boy in the face three times. Appellant then proceeded to force the back of the boy's head into the bed. Also in June, appellant punched the boy's leg. Another incident occurred in July 1995. While riding in the car, the boy leaned up in between the two front seats and appellant elbowed him in the stomach, knocking the wind out of him. Allegedly, appellant said, "I hope you can't breathe." Later in July, appellant's mother-in-law backhanded the boy several times, causing his nose to bleed.

More incidents allegedly occurred during the summer of 1996. On June 19, appellant punched the boy in the arm when the boy went to answer the door. Finally, on or about the week of July 5, the boy accidentally rode his skateboard into appellant's car. Appellant proceeded to punch the boy in the back and slap him in the back of the head hard enough to knock the boy forward.

Respondent was aware of the abuse prior to the boy's visiting appellant in the summer of 1996. She testified, however, that she only let the 1996 visit occur because she thought the boy was staying with appellant's parents. Respondent testified that the boy told her about the incidents of [**4] abuse and threatened to run away if he were forced to spend another summer with appellant. Respondent also introduced a letter from a psychologist who interviewed the boy and recommended that he "remain in the care of his mother until more definitive information can be ascertained." Nowhere in the record does appellant rebut the evidence. n1

n1 Both appellant and his wife denied the allegations in written affidavits, except for the incident between the boy and the mother-in-law. Appellant's argument relies heavily on these affidavits. However, the court file does not contain the affidavits or list them as filed. Since the affidavits are not part of the record, we decline to consider them. *See* Minn. R. Civ. App. P. 110.01 (record on appeal consists of papers filed in district court); ***Mitterhauser v. Mitterhauser, 399 N.W.2d 664, 667*** ((Minn. App. 1987) ("an appellate court cannot base its decision on matters outside the record.").

Appellant has never lived in Minnesota, does not own property in Minnesota, [**5] does not transact business in Minnesota, nor has he ever visited Minnesota. As a result, appellant served and filed a motion to dismiss for lack of personal jurisdiction. The district court denied the motion, finding the presence of the minor child in the State of Minnesota provided a sufficient jurisdictional basis. Furthermore, at the hearing on April 7, 1997, the district court found domestic abuse did occur and issued an order for protection on behalf of the child for the duration of one year.

ISSUES

1. Did the district court err as a matter of law when it exercised personal jurisdiction over appellant?

2. Did the district court err as a matter of law in finding a factual basis to issue an order for protection against appellant?

ANALYSIS

[HN1] Determining whether personal jurisdiction exists is a question of law, which this court reviews de novo. ***Welsh v. Takekawa, 529 N.W.2d 471, 473 (Minn. App. 1995).*** [HN2] How far a state's long-arm statute extends is a question of state law, while how the statute is limited by due process is a question of federal law. ***Stanek v. A.P.I., Inc., 474 N.W.2d 829, 832 (Minn. App. 1991)*** (citing ***Now Foods Corp. v.*** [**6] ***Madison Equip. Co., 386 N.W.2d 363, 366 (Minn. App. 1986), review granted and summarily vacated, 395 N.W.2d 926 (Minn. 1986)), review denied*** (Minn. Oct. 31, 1991).

Before the hearing on April 7, 1997, appellant brought a motion to dismiss for lack of personal jurisdiction under Minn. R. Civ. P. [*750] 12.02(B). n2 The district court dismissed appellant's motion, finding that the presence of the minor child in the State of

Minnesota provided a sufficient basis for issuing an order for protection.

> n2 Respondent argues that, prior to challenging the district court's jurisdiction, appellant surrendered to the jurisdiction of the court by submitting written affidavits in response to the allegations in the order for protection. As previously stated, however, the affidavits are not part of the record.

[HN3] Before Minnesota courts can exercise personal jurisdiction over a nonresident, two criteria must be met. First, Minnesota's long-arm statute must be satisfied. ***Sherburne County Soc. Servs. v. Kennedy***, **[**7]** *426 N.W.2d 866, 867 (Minn. 1988);* ***Stanek***, *474 N.W.2d at 832.* Second, "minimum contacts" must exist between the defendant and this state in order to satisfy due process. ***Sherburne County***, *426 N.W.2d at 867.* In close cases, doubt should be resolved in favor of maintaining jurisdiction. ***Valspar Corp. v. Lukken Color Corp.***, *495 N.W.2d 408, 412 (Minn. 1992).* In any case, however, the plaintiff bears the burden of proof. ***Trident Enters. Int'l, Inc. v. Kemp & George, Inc.***, *502 N.W.2d 411, 414 (Minn. App. 1993).*

The legislature designed Minnesota's long-arm statute to extend Minnesota courts' personal jurisdiction as far as due process allows. ***Valspar Corp.***, *495 N.W.2d at 410.* Nevertheless, the court of appeals has interpreted [HN4] the long-arm statute as a specific jurisdictional requirement, demanding that every claim in a lawsuit have its own ties to Minnesota. ***Id.*** [HN5] Minnesota's long-arm statute provides, in relevant part, that "a Minnesota court may exercise personal jurisdiction over a nonresident defendant if that defendant commits an act outside of Minnesota causing injury in Minnesota." ***Trident Enterprises***, *502 N.W.2d* **[**8]** *at 414* (citing *Minn. Stat. § 543.19*, subd. 1(d)).

In order for this statute to apply, it must be shown that the action is based upon a tort committed "in Minnesota." ***Howells v. McKibben***, *281 N.W.2d 154, 156 (Minn. 1979).* For purposes of applying the long-arm statute, the standard for determining whether a tort is committed in Minnesota is whether damage from the alleged tortious conduct results in Minnesota. ***Id.*** According to ***Howells***, emotional distress in Minnesota, caused by acts outside of the state, is sufficient to trigger the long-arm statute. ***Id.*** *at 156-57.*

In this case, the boy suffers emotionally and physically in Minnesota even though appellant's acts of physical abuse occurred in Pennsylvania. Respondent testified that the boy told her about the abuse and threatened to run away if he had to visit appellant for another summer. Furthermore, the psychologist indicated in her report that the boy seemed very "concerned, distraught, and distressed" over the possible upcoming visit to Pennsylvania. Because the boy suffers emotional distress in Minnesota as a result of acts committed in Pennsylvania, the Minnesota long-arm statute authorizes **[**9]** the district court to exercise personal jurisdiction.

Next, the Due Process Clause of the federal Constitution must be satisfied. [HN6] The Due Process Clause of the United States Constitution requires that a defendant have "minimum contacts" with the foreign state such that maintaining jurisdiction does not offend "traditional notions of fair play and substantial justice." ***International Shoe Co. v. Washington***, *326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945)* ***quoted in Sherburne County***, *426 N.W.2d at 868.* In other words, due process is satisfied if it is fair and reasonable to require defense of the action in the State of Minnesota. ***Howells***, *281 N.W.2d at 157.* Minnesota courts examine five factors: (1) the quantity of contacts within the State of Minnesota; (2) the nature and quality of those contacts; (3) the connection between the contacts and the cause of action; (4) the state's interest in providing a forum; and (5) the convenience of the parties. ***Sherburne County***, *426 N.W.2d at 868.* The first three factors are the most important, while the last two are given less consideration. ***Mahoney v. Mahoney***, *433 N.W.2d 115,* **[**10]** *118 (Minn. App. 1988),* ***review denied*** (Minn. Feb. 10, 1989).

[HN7] Personal jurisdiction can be established by a single contact, in which case the nature and quality of the contact becomes "dispositive." **[*751]** ***Sherburne County***, *426 N.W.2d at 868.* [HN8] On review, when this court analyzes the nature and quality of contacts, it must determine "whether the nonresident 'purposely availed' himself of the benefits and protections of Minnesota law." ***Mahoney***, *433 N.W.2d at 118-19* (quoting ***Dent-Air, Inc. v. Beech Mountain Air Serv., Inc.***, *332 N.W.2d 904, 907 (Minn. 1983)).*

For example, the court in ***Howells*** found that the quality and quantity of defendant's contacts with Minnesota were sufficient because a substantial portion of the defendant's relationship with the plaintiff developed in *Minnesota. 281 N.W.2d at 157.* The defendant visited the plaintiff numerous times in Minnesota, and they had sexual relations in Minnesota. ***Id.*** Also, defendant made repeated phone calls to plaintiff's home. ***Id.*** Furthermore, it was reasonable for the defendant to anticipate that his actions could possibly lead to consequences arising in Minnesota. ***Id.*** **[**11]** These facts, taken together, show that the contacts were significant.

In ***Sherburne County***, however, the supreme court held that a putative father's contacts with Minnesota were insufficient to maintain a paternity suit on behalf of the child who resided in *Minnesota. 426 N.W.2d at 870.* According to the facts in ***Sherburne***, conception did not take place in Minnesota, the mother voluntarily traveled to Montana to have relations with the father, the father did not have a continuing relationship with the mother, and the father had no other contacts with Minnesota other than the allegation that he fathered the child of a Minnesota resident. ***Id.*** *at 867.*

While appellant may not have a plethora of contacts in Minnesota, like ***Howells***, the facts show the contacts are significant. The record indicates appellant made repeated telephone calls to respondent's home. Furthermore, appellant may have reasonably assumed that, because the boy was living in Minnesota, it might result in custody or visitation matters being dealt with by the Minnesota courts. More importantly, unlike ***Sherburne***, appellant has a continuing relationship with his son. Finally, **[**12]** what is at issue in this case is not paternity; the issue is domestic abuse of a minor.

Next, this court must consider the relationship between the contacts and the cause of action. In this case, the issue and the contact are directly related. Appellant is challenging an order for protection against him as a result of abuse against his son. Appellant's contact in Minnesota is his son. Appellant could foresee possible consequences resulting from this abuse. Moreover, since the boy lives in Minnesota, it is foreseeable that consequences could arise here.

The fourth element involves the state's interest in providing a forum. "Minnesota has a strong interest in providing a forum for its own residents." ***Howells,*** *281 N.W.2d at 158.* Arguably, this interest is even stronger when the issue involves domestic abuse. In this case, respondent is attempting to protect her son from an abusive father. This state has a vested interest in enabling respondent to do so. ***Lundman v. McKown,*** *530 N.W.2d 807, 818 (Minn. App. 1995)* ("Minnesota has a compelling interest in protecting the welfare of children"), ***review denied*** (Minn. May 31, 1995), ***cert. denied,*** *516 U.S. 1099, 133 L. Ed. 2d 770,* **[**13]** *116 S. Ct. 828 (1996).*

Finally, although appellant argues it would be inconvenient for him to try this case in Minnesota, "this factor is not dispositive when the inconvenience is not extensive." ***Trident Enters.,*** *502 N.W.2d at 416.* Here, the inconvenience is minimal because the issues involve the same facts, witnesses, and documents.

While appellant's only contact with Minnesota is his son, this is enough to satisfy the minimum contacts requirement in this case. As a result, the trial court did not err as a matter of law when it exercised personal jurisdiction over appellant. n3

n3 Appellant also claims that the district court does not have jurisdiction under the Domestic Abuse Act because it lacks jurisdiction over the parties' dissolution action. However, this argument improperly links the Marriage Dissolution Act with the Domestic Abuse Act. The Domestic Abuse Act is complete in itself; therefore, when analyzing it, the court need not refer to other statutes. ***Baker v. Baker,*** *494 N.W.2d 282, 285 (Minn. 1992).*

[14]**

Appellant's final argument is that the evidence in the record is insufficient to **[*752]** support a protective order. [HN9] The Domestic Abuse Act is the vehicle that allows a person to petition the district court for an order for protection. *Minn. Stat. § 518B.01*, subd. 4 (1996). [HN10] Domestic abuse is defined as "physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members." ***Swenson v. Swenson,*** *490 N.W.2d 668, 670 (Minn. App. 1992)* (citing *Minn. Stat. § 518B.01*, subd. 2(a)). [HN11] In order to secure relief under the statute, appellant must either intend present harm, or inflict fear of present harm. ***Andrasko v. Andrasko,*** *443 N.W.2d 228, 230 (Minn. App. 1989).* When a petition asserts a fear of further acts of violence and is accompanied by a supporting affidavit, the requirements of the Domestic Abuse Act are met. ***Baker v. Baker,*** *494 N.W.2d 282, 287 (Minn. 1992).*

Appellant's present intent to harm or inflict fear of harm is satisfied. Just because appellant lives in Pennsylvania does not mean the boy feels safe. During each of the last two summer visits with appellant, the district **[**15]** court found the boy was abused. Allegations of abuse were discussed extensively at the hearing. Furthermore, respondent testified in detail to acts of violence committed by appellant against the boy. It was reasonable for the district court to assume that sending the boy to visit appellant during the summer of 1997 would result in further abuse. As a result, the present intent to harm element under the Domestic Abuse Statute is satisfied.

Next, this court recognizes that the evidence submitted to the district court was minimal, but the evidence was not rebutted. At the hearing, respondent testified appellant elbowed the boy in the stomach, punched him, left bruises on his arms and leg, and forced the back of the boy's head into the bed. Respondent also listed these incidents with particularity in the supporting

affidavit. Furthermore, the psychologist stated in her report that the boy seemed very "concerned, distraught, and distressed" over the possible upcoming visit to Pennsylvania. Finally, respondent testified that the boy told her about the incidents of abuse and threatened to run away if he were forced to visit appellant for another summer.

Appellant, on the other hand, failed [**16] to submit any evidence to rebut these allegations. Appellant failed to deny the allegations on the record. He failed to object to the admittance of the psychologist's report. In addition, he failed to present any witness testimony on his behalf.

Since appellant failed to rebut the minimal evidence presented, the district court was justified in finding abuse. Therefore, the district court did not err in issuing an order for protection.

DECISION

The record supports the district court's findings that it had personal jurisdiction over appellant by way of Minnesota's long-arm statute and minimum contacts. Furthermore, the record contains sufficient evidence to support a claim of domestic abuse and issuance of an order for protection.

Affirmed.

LEXSEE 99 P.3D 56

In Re the Marriage of: Petitioner: SUSAN A. MALWITZ, and Respondent: REGINALD D. PARR. And concerning: PUEBLO COUNTY CHILD SUPPORT ENFORCEMENT UNIT.

Case No. 03SC439

SUPREME COURT OF COLORADO

99 P.3d 56; 2004 Colo. LEXIS 762

October 4, 2004, Decided

PRIOR HISTORY: [1]** Certiorari to the Colorado Court of Appeals. Court of Appeals Case No. 02CA0056. *In re Marriage of Malwitz, 81 P.3d 1076, 2003 Colo. App. LEXIS 701 (Colo. Ct. App., 2003)*

DISPOSITION: Reversed and remanded with instructions.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner mother appealed the Colorado Court of Appeals ruling that the trial court lacked personal jurisdiction over respondent, her nonresident husband, in an action for dissolution of marriage and child support.

OVERVIEW: The husband was abusive to the mother and her child from a previous marriage (while they lived in Texas). She fled with her daughter to her father's home in Colorado, where she gave birth to his child. She argued the husband's acts caused her to move to Colorado, where she gave birth to his child. Therefore, she contended, the trial court properly exercised personal jurisdiction over the husband pursuant to the longarm provision of Colorado's Uniform Interstate Family Support Act (UIFSA), *Colo. Rev. Stat. § 14-5-201(5)* (2003). The husband was subject to the personal jurisdiction of the trial court. First, the trial court had statutory authority. UIFSA, the long arm statute, extended personal jurisdiction over a nonresident in § 14-5-201(5) because the child resided in Colorado as a result of the acts or directives of the individual. The husband engaged in a course of conduct designed to terrorize the mother and her family, essentially forcing the mother to seek safety in Colorado. These acts caused the mother, her daughter, and, ultimately, the husband's child to reside in Colorado within the meaning of the long-arm provision of UIFSA.

OUTCOME: The decision of the court of appeals was reversed and the case was remanded to the court of appeals with instructions to remand to the trial court for proceedings consistent with this opinion.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction

[HN1] Whether a court may exercise personal jurisdiction over a nonresident defendant is a question of law, which is reviewed de novo. Specifically, in order to determine whether a Colorado court may properly exercise jurisdiction over a party, courts look to whether the court has both statutory and constitutional authority to do so. After determining whether the requirements of the long-arm statute have been met, the court must separately determine whether a defendant has the requisite minimum contacts to satisfy due process.

Family Law > Child Support > Jurisdiction
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction

[HN2] Colorado's Uniform Interstate Family Support Act (UIFSA) was enacted in order to be used as a procedural mechanism for the establishment, modification, and enforcement of child and spousal support. Adopted as the long-arm provision of UIFSA, *Colo. Rev. Stat. § 14-5-201(5)* provides that in a proceeding to establish,

enforce, or modify a child support order or to determine parentage, a Colorado court may exercise personal jurisdiction over a nonresident if the child resides in Colorado as a result of the acts or directives of the individual.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN3] In order for the exercise of personal jurisdiction over a nonresident defendant to withstand constitutional scrutiny, that defendant must have purposefully established "minimum contacts" in the forum State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN4] In assessing a defendant's contacts for long arm jurisdiction, courts consider whether the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. In some circumstances, even a single act may subject a defendant to jurisdiction, where that act creates a substantial connection between the defendant and the forum state. Where personal jurisdiction is asserted based on a single contact or transaction, the following three-prong test has been established to determine whether the requisite minimum contacts are present: First, the defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state. Second, the cause of action must arise from the consequences in the forum state of the defendant's activities. Finally, the activities of the defendant or the consequences of those activities must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Personal Jurisdiction
[HN5] Even where a plaintiff has made a showing of minimum contacts between the defendant and the forum state, courts must further ensure that the assertion of personal jurisdiction would comport with fair play and substantial justice. In resolving that issue, courts consider: the burden on the defendant of litigating in a foreign jurisdiction; the plaintiff's interest in obtaining convenient and effective relief; the interest of the forum state in adjudicating disputes and vindicating the rights of its citizens; the interstate judicial system's interest in the efficient resolution of controversies; and the shared interest of the several states in furthering fundamental social policies. Indeed, where these considerations are strongest, courts may find that jurisdiction is reasonable upon a lesser showing of minimum contacts than would otherwise be required. These principles are not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present.

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JUDGES: JUSTICE RICE delivered the Opinion of the Court. JUSTICE COATS dissents, JUSTICE MARTINEZ and JUSTICE BENDER join in the dissent.

OPINIONBY: RICE

OPINION:

[*58] EN BANC

JUSTICE RICE delivered the Opinion of the Court.

JUSTICE COATS dissents, JUSTICE MARTINEZ and JUSTICE BENDER join in the dissent.

Susan Malwitz appeals a ruling by the court of appeals reversing the trial court's finding that it had personal jurisdiction over her nonresident husband, Reginald Parr (the "Defendant"), in an action for dissolution of marriage and child support. *In re the Marriage of Malwitz, 81 P.3d 1076 (Colo. App. 2003).* Because we conclude that the trial court possessed both statutory and constitutional authority to exercise jurisdiction over the Defendant, we reverse the court of appeals and remand for further proceedings consistent with this opinion.

I. Facts and Proceedings Below

In April 2000, Malwitz petitioned the Pueblo **[**4]** County District Court for dissolution of marriage, seeking orders regarding parental responsibilities, child support, maintenance, and division of property and debts. After being personally served in Texas, the Defendant filed a motion to dismiss for lack of personal jurisdiction. At the trial court's hearing on the personal jurisdiction issue, Malwitz and her father testified regarding the Defendant's history of abuse and harassment, as well as her knowledge of the Defendant's prior conviction for "terroristic threats against one of his ex's and attempted kidnapping against his other daughter."

Malwitz and her father testified to the following course of events. Malwitz and the Defendant were married in Texas, by operation of common law, in

November 1997. Throughout the course of their marriage, the Defendant, whom Malwitz knew to be involved in a gang, abused Malwitz both mentally and physically. For example, in March 1998, when Malwitz attempted to leave the Defendant, he had a friend step on Malwitz's head while the Defendant kicked Malwitz in the face. A few months later, when Malwitz confronted the Defendant with her suspicions that he was sexually abusing her daughter from a **[**5]** previous relationship, the Defendant threatened to kill Malwitz if she turned him in. Despite these threats, Malwitz left the Defendant that night and reported both the death threats and child sexual abuse to the police. n1

> n1 Malwitz's suspicion regarding the sexual abuse stemmed from complaints made by the child, as well as the concerns of the child's doctor. However, the police declined to investigate the allegation of abuse of Malwitz's daughter because Malwitz had not personally witnessed the abuse. Three months later, Malwitz reported the abuse to the Texas child protective services agency, which investigated the claim but never made any formal charge against the Defendant.

Malwitz, who was pregnant with the Defendant's child when she left him in September 1998, initially moved into a friend's trailer, where the Defendant continued to harass her. First, Malwitz witnessed the Defendant in the driveway of the trailer court watching both Malwitz and her daughter. Shortly thereafter, a friend of the Defendant **[**6]** discovered where Malwitz worked and, within the following three days, tires on Malwitz's car were flattened on two occasions while the car was parked at her workplace. In December 1998, when Malwitz reported these incidents to the police, they advised her to move into a woman's shelter. After Malwitz moved into the shelter, the Defendant and a friend were seen carrying firearms and attempting to break into Malwitz's former home in the trailer court. Additionally, during this period of estrangement, the Defendant twice made "harassing" phone calls to Malwitz's father, who resided in Colorado. In January 1999, fearing for her life, Malwitz fled with her daughter to her father's home in Colorado, where, a few months later, she gave birth to the Defendant's child.

For purposes of determining personal jurisdiction, all factual disputes are resolved in the plaintiff's favor, taking into **[*59]** consideration the "allegations set forth in the complaint as well as from evidence introduced in any hearing conducted on the matter." *Keefe v. Kirshenbaum & Kirschenbaum, P.C., 40 P.3d 1267, 1272 (Colo. 2002)*. Thus, in reviewing the trial court's decision to exercise personal jurisdiction **[**7]** over the Defendant, we accept the trial court's factual findings regarding the Defendant's abuse of Malwitz. Here, the only evidence before the trial court consisted of Malwitz's complaint and testimony from Malwitz and her father at the hearing below. Based on that evidence, the trial court expressly found that the Defendant "perpetrated domestic violence against [Malwitz]."

Based on its factual findings, the trial court concluded that it had jurisdiction over the Defendant pursuant to section *14-5-201(5), 5 C.R.S.* (2003), because the Defendant's "acts or directives" had caused Malwitz, pregnant with their child, to flee Texas and because the Defendant was aware that Malwitz's only family ties were in Colorado and therefore should have foreseen that Malwitz would flee to Colorado. The Defendant appealed, and the court of appeals reversed, finding that the trial court abused its discretion in exercising jurisdiction over the Defendant. *In re the Marriage of Malwitz, 81 P.3d at 1079.*

We granted certiorari to address whether the trial court had jurisdiction to order child support under section *14-5-201(5)* based on the Defendant's acts of domestic violence, which caused **[**8]** Malwitz to flee to Colorado where the child was born and now resides with Malwitz. Accepting the trial court's factual findings regarding the Defendant's abuse and harassment of Malwitz, we find that the Defendant's actions were sufficient to constitute "acts or directives" that caused Malwitz to flee Texas for Colorado within the meaning of section *145201(5)*. We further find that, under these circumstances, the exercise of personal jurisdiction over the Defendant is consistent with due process. We therefore hold that the trial court had personal jurisdiction over the Defendant for purposes of entering a child support order.

II. Analysis

[HN1] Whether a court may exercise personal jurisdiction over a nonresident defendant is a question of law, which we review de novo. See *In re the Parental Responsibilities of H.Z.G., 77 P.3d 848, 851 (Colo. App. 2003)*. Specifically, in order to determine whether a Colorado court may properly exercise jurisdiction over a party, we look to whether the court has both statutory and constitutional authority to do so. *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 290, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980)* (noting that "the **[**9]** proper approach was to test jurisdiction against both statutory and constitutional standards"); *Archangel Diamond Corp. v. Arkhangelskgeoldobycha, 94 P.3d 1208, 1212 (Colo. App. 2004)* ("After determining whether the requirements of the long-arm statute have

been met, the court must separately determine whether a defendant has the requisite minimum contacts to satisfy due process."). Thus, we must determine first whether the Defendant's abuse and harassment of Malwitz caused her and the child to reside in Colorado so as to make jurisdiction statutorily appropriate under section 145201(5) and, second, whether exercising personal jurisdiction over the Defendant would be consistent with due process.

A. Jurisdiction Under UIFSA

[HN2] Colorado's Uniform Interstate Family Support Act (UIFSA) was enacted in order "to be used as a procedural mechanism for the establishment, modification, and enforcement of child and spousal support." *McNabb ex rel. Foshee v. McNabb, 31 Kan. App. 2d 398, 65 P.3d 1068, 1074 (Kan. App. 2003).* Adopted as the long-arm provision of *UIFSA, section 145201(5)* provides that, "in a proceeding to establish, enforce, or modify a child support **[**10]** order or to determine parentage," a Colorado court may exercise personal jurisdiction over a nonresident if "the child resides in this state as a result of the acts or directives of the individual." Thus, jurisdiction is appropriate under UIFSA if the Defendant's abuse and harassment of Malwitz constituted "acts or directives" that caused Malwitz to reside in Colorado and, ultimately, **[*60]** to give birth to the Defendant's child in this state.

Other jurisdictions have interpreted the long-arm provision of UIFSA, reaching varying results depending on the particular facts and circumstances of each case. n2 For example, in McNabb, the Kansas Court of Appeals refused to find personal jurisdiction over a nonresident father under UIFSA because it concluded that the child did not reside in Kansas as a result of the acts or directives of the father. In McNabb, the mother claimed that the father drank excessively, had abused her on one occasion a year before the mother and child moved to Kansas, and had dropped the child on one occasion several months before the mother and child moved to Kansas. *65 P.3d at 1070--71.* However, because the one physical incident between the father **[**11]** and mother occurred over a year before the mother fled and the father's drinking "did not cause [the mother] and the child to flee Virginia for Kansas," the court ruled that the father's "acts or directives" did not cause the mother and child to reside in Kansas. *Id. at 1075.* Accordingly, the court concluded that personal jurisdiction was not available under UIFSA. Id.

n2 Our court of appeals addressed the jurisdictional provisions of UIFSA in *In re the Marriage of Zinke. 967 P.2d 210 (Colo. App. 1998).* In Zinke, the court ruled that jurisdiction in Colorado over a nonresident mother was inappropriate because a Montana court had already issued a support order and, therefore, under UIFSA, the Colorado courts were precluded from exercising jurisdiction on the matter. *Id. at 212--13*; see also § *14-5-205(c)*, 5 C.R.S. (2003) ("If a tribunal of another state has issued a child support order pursuant to [UIFSA], or a law substantially similar to that act . . . tribunals of this state shall recognize the continuing, exclusive jurisdiction of the tribunal of the other state."). Thus, although the court inZinke did note that the nonresident mother's only contact with Colorado was in consenting to the child's residing in Colorado, and that this act alone would not satisfy the "acts or directives" language of UIFSA, its resolution of the jurisdictional issue was determined by the existence of a Montana support order. Id. Accordingly, the Zinke opinion provides little guidance on the issue before us today.

[12]**

In *Windsor v. Windsor, 45 Mass. App. Ct. 650, 700 N.E.2d 838 (Mass. App. 1998)*, a Massachusetts appellate court concluded that personal jurisdiction over a nonresident father was inappropriate under UIFSA. There, the mother left the father in Florida in June 1977, gave birth to their son in Massachusetts in September 1977, and filed a complaint for divorce, including a demand for child support, nearly twenty years later, in June 1995. *Windsor, 700 N.E.2d at 839.* In her complaint, the mother alleged that the father had been guilty of "cruel and abusive treatment" during the course of the marriage, but did not offer any specific facts or testimony to support that claim. *Id. at 841.* Thus, finding that "no affidavit, testimony, or authenticated or verified document even intimates, let alone establishes, that the wife and her children were caused 'to flee' from Florida to Massachusetts as a result of any cruel and abusive acts of the husband or any 'directive' he made," the court concluded that personal jurisdiction could not be exercised under UIFSA. *Id. at 842.*

However, in Franklin v. Virginia, a Virginia appellate court held that UIFSA's **[**13]** long-arm provision authorized jurisdiction over a husband who, "after several physical altercations, . . . ordered wife and the children from their home in Africa." *27 Va. App. 136, 497 S.E.2d 881, 885--86 (Va. App. 1998).* In response to the husband's order, the wife and children fled to Virginia, which was the family's home prior to living in Africa, the point of entry for the family's return to the United States, and the location of the husband's employer's field office. *Id. at 886.* The court rejected the

husband's contention that because he did not specifically direct the wife and children to move to Virginia, the Virginia courts could not exercise jurisdiction. Instead, the court noted that "to allow husband to escape his support obligations merely because he failed to dictate the specific destination when he ordered his family to leave the marital home would frustrate the purpose of the legislature in enacting [UIFSA]." Id. Thus, focusing on the affirmative acts of the nonresident father that caused the wife and children to reside in Virginia, rather than the voluntary choices of the mother, the court concluded that personal jurisdiction was appropriate under **[**14]** UIFSA. *Id. at 885--86.* n3 We find that, **[*61]** like the family in Franklin, the pregnant Malwitz and her daughter were effectively forced to flee Texas for Colorado by the affirmative acts of the Defendant. Although the Defendant did not specifically direct Malwitz to leave, his persistent abuse and harassment left Malwitz with little choice but to leave Texas and seek safety near her father's home in Colorado. See Id. (noting that the mother "made no such choice" to leave Africa, but was forced to Virginia because "they had to go somewhere").

> n3 The court in Franklin further ruled that the father's motion for visitation and petition for a rule to show cause, combined with his acts of driving his family out of their home in Africa, satisfied the minimum contacts test for personal jurisdiction. *497 S.E.2d at 886 n.5.*

Malwitz demonstrated to the trial court that she honestly feared for her own safety and the safety of the children, based on the Defendant's actual abuse, threats **[**15]** of abuse, harassment, prior convictions for similar behavior, and involvement in a gang. Although she initially attempted to remain in Texas, first at a friend's house and later in a shelter, the Defendant's menacing behavior caused Malwitz to believe that she and her children would not be safe so long as the Defendant could find them. In fact, when asked why she went to Colorado, Malwitz testified: "Because I had no other alternative. I was afraid that he would hunt me down anywhere in Texas, or his friends. In Colorado, I am a thousand miles away. I am a thousand miles safer." Based on this testimony, the trial court concluded, and we agree, that "it is because of the acts of domestic violence perpetrated against [Malwitz] by [the Defendant] that [Malwitz and her son with the Defendant] presently reside in the State of Colorado."

Moreover, unlike the situations in *McNabb* and *Windsor*, very little time passed between the harassment and Malwitz's decision to move to Colorado. Thus, there is clearly a direct correlation between the Defendant's acts and Malwitz's decision to move to Colorado. Finally, the Defendant was aware that Malwitz's only family connections were in **[**16]** Colorado, and had even initiated contact with Malwitz's father for the purpose of further harassing and intimidating Malwitz and her family. Accordingly, we conclude that the Defendant knew or should have known that his actions would drive Malwitz to her father's home in Colorado.

In sum, the Defendant engaged in a course of conduct designed to terrorize Malwitz and her family, essentially forcing Malwitz to seek safety in Colorado. Given these facts, we conclude that the acts of the Defendant caused Malwitz, her daughter, and, ultimately, the Defendant's child to reside in Colorado within the meaning of the long-arm provision of UIFSA. Thus, the trial court properly exercised personal jurisdiction over the Defendant pursuant to section *14-5-201(5).*

B. Jurisdiction Consistent with Due Process

Having determined that the trial court possessed statutory authority to exercise personal jurisdiction over the Defendant pursuant to section *14-5-201(5)*, we now turn to the issue of whether exercising such jurisdiction was consistent with the guarantees of due process. [HN3] In order for the exercise of personal jurisdiction over a nonresident defendant to withstand constitutional scrutiny, that **[**17]** defendant must have purposefully established "minimum contacts" in the forum State "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)* (quoting *Milliken v. Meyer, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)*); see also *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)*; *Keefe, 40 P.3d at 1270--71.*

[HN4] In assessing a defendant's contacts, we consider whether the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen, 444 U.S. at 297.* In some circumstances, even a single act may subject a defendant to jurisdiction, where that act creates a substantial connection between the defendant and the forum state. See *Burger King, 471 U.S. at 475--76 n.18*; *Keefe, 40 P.3d at 1271.* **[*62]** Where personal jurisdiction is asserted based on a single contact or transaction, we have established the following three-prong test to determine **[**18]** whether the requisite minimum contacts are present:

> First, the defendant must purposefully avail himself of the privilege of acting in

> the forum state or of causing important consequences in that state. Second, the cause of action must arise from the consequences in the forum state of the defendant's activities. Finally, the activities of the defendant or the consequences of those activities must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Van Schaack & Co. v. Dist. Ct., 189 Colo. 145, 147, 538 P.2d 425, 426 (1975) (quoting *State ex rel. White Lumber Sales, Inc. v. Sulmonetti, 252 Ore. 121, 448 P.2d 571, 574 (Or. 1968))* (emphasis added); see also *Panos Inv. Co. v. Dist. Ct., 662 P.2d 180, 181 (Colo. 1983).* n4

> n4 Our previous "single contact" cases have focused on "the transaction of any business within this state" under Colorado's long-arm statute, located at *section 13-1-124(1)(a)*, 5 C.R.S. 2003. See, e.g., *Panos Inv., 662 P.2d at 182--83* (upholding the exercise of jurisdiction over a foreign investment company based upon its issuance of a guarantee for a promissory note payable in Colorado) *; Van Schaak, 189 Colo. at 147, 538 P.2d at 426* (upholding the exercise of jurisdiction over a foreign bank based on its issuance of a letter of credit to a purchaser in Colorado). However, both section 131124 and section 145201(5) were intended to extend the scope of personal jurisdiction of Colorado's courts as broad as constitutionally permissible. See *In re the Marriage of Zinke, 967 P.2d at 212* (noting that the long-arm provision of UIFSA "was intended to be as broad as constitutionally permitted"); *In re the Marriage of Ness, 759 P.2d 844, 845 (Colo. App. 1988)* (stating that section 131124(1) "was adopted by the General Assembly to extend the personal jurisdiction of Colorado's courts to their maximum limits permissible under the United States and Colorado Constitutions"). Thus, we find this single transaction test to be equally appropriate in a case such as the instant one, where the defendant's direct contacts with the state are minimal, but the consequences caused are great.

[19]**

[HN5] Even where a plaintiff has made a showing of minimum contacts between the defendant and the forum state, we must further ensure that the "assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Keefe, 40 P.3d at 1271* (quoting *International Shoe, 326 U.S. at 316*). In resolving that issue, we consider: the burden on the defendant of litigating in a foreign jurisdiction; the plaintiff's interest in obtaining convenient and effective relief; the interest of the forum state in adjudicating disputes and vindicating the rights of its citizens; the interstate judicial system's interest in the efficient resolution of controversies; and the shared interest of the several states in furthering fundamental social policies. See *Worldwide Volkswagen, 444 U.S. at 292.* Indeed, where these considerations are strongest, we may find that jurisdiction is reasonable "upon a lesser showing of minimum contacts than would otherwise be required." *Keefe, 40 P.3d at 1271--72*; see also *Burger King, 471 U.S. at 477.* Finally, we stress that these principles are "not susceptible of mechanical **[**20]** application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present." *Kulko v. Super. Ct., 436 U.S. 84, 92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978).*

Applying the above principles to the instant case, we find that the trial court properly exercised personal jurisdiction over the Defendant because the Defendant did have minimum contacts with the state of Colorado and because the exercise of personal jurisdiction is consistent with the interests of "fair play and substantial justice" under these circumstances.

First, applying the three-prong test set forth above, we conclude that the Defendant established minimum contacts with the state of Colorado based on his abuse and harassment of Malwitz, including his calls to her father in Colorado. The Defendant's purposeful actions caused Malwitz to reside in Colorado, where Malwitz, her daughter, and the Defendant's child are currently receiving public assistance from the state of Colorado, which we deem to be an important consequence. Cf. *In re the Parental Responsibilities of H.Z.G., 77 P.3d at 852* (holding that a father's letter, written to assist a mother **[**21]** and child in receiving assistance in Colorado, **[*63]** caused the creation of a debt in Colorado, which supported jurisdiction under the "transaction of business" test pursuant to section 131124(1)). Second, this action for child support and maintenance clearly arises from the consequences of the Defendant's purposeful activities of abuse and harassment because, but for that conduct, Malwitz would not have fled to Colorado and sought court intervention in order to obtain child support from the Defendant.

Finally, the Defendant's purposeful abuse and harassment, and the consequences it directly caused in Colorado, have created a sufficiently substantial connection between the Defendant and Colorado to make exercise of personal jurisdiction over the Defendant

reasonable. In particular, we find that Malwitz and her child's residence in Colorado, where they are dependent on public assistance to live, is evidence of a substantial connection between the Defendant and Colorado and that this connection makes jurisdiction reasonable because it is the product not of Malwitz's voluntary choice, but of the Defendant's purposeful, affirmative acts. Moreover, the trial court concluded, and we agree, that [**22] the Defendant knew that Malwitz's sole family ties were in Colorado. This knowledge, particularly as evidenced by his phone calls to her father in Colorado during the estrangement period, demonstrates that the Defendant should have foreseen that Malwitz would move to Colorado and, therefore, should have "reasonably anticipated being haled into court" in Colorado. *World-Wide Volkswagen, 444 U.S. at 297*. In sum, we find that by abusing and harassing Malwitz and her family, both through his behavior in Texas and his phone calls to Colorado, the Defendant has established minimum contacts with Colorado sufficient to satisfy the first requirement of due process.

Turning to the second requirement of due process, we further find that the exercise of personal jurisdiction over the Defendant under these circumstances comports with "traditional notions of fair play and substantial justice." *International Shoe, 326 U.S. at 316*. First, to the extent that litigating this action in Colorado, rather than Texas, is inconvenient or burdensome to the Defendant, that burden is greatly outweighed by other interests at stake in this action. Certainly, both Malwitz and [**23] the Defendant's child have a strong interest in obtaining convenient and effective relief in their home state, particularly given their current financial status as dependent upon public assistance. Moreover, given that Malwitz fled Texas out of fear for her own safety, it would impose a substantial and unjust burden on Malwitz to require her to return to that state in order to litigate this action. The financial and emotional burdens on Malwitz, therefore, greatly outweigh the burden on the Defendant. Furthermore, Colorado has a very strong interest in vindicating the rights of its residents and in ensuring that its resident children receive adequate child support. See, e.g., *Kulko, 436 U.S. at 100* (recognizing that states have "substantial interests in protecting resident children and in facilitating child support actions on behalf of those children"). Indeed, all states share a common interest in protecting victims of domestic abuse and providing an effective means of redress for such victims. These considerations, taken together, amply demonstrate the reasonableness of exercising jurisdiction over the Defendant, despite the somewhat limited nature of the Defendant's [**24] direct contacts with Colorado. See *Keefe, 40 P.3d at 1271--72* ("Considerations like the burden on the defendant, the forum state's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief may sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.").

In sum, we conclude that the trial court's exercise of jurisdiction over the Defendant was consistent with the guarantees of due process. By abusing and harassing Malwitz, effectively forcing his wife to Colorado where she and the Defendant's child became dependent on public assistance, the Defendant caused important consequences in Colorado and thereby created a substantial connection between himself and Colorado. n5 Additionally, [*64] the Defendant should have expected Malwitz to flee to Colorado in particular because he knew that Colorado was the only place where she had family ties and, therefore, should have foreseen the possibility of litigation in this forum. Finally, the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice, in [**25] light of the manifest interests of Malwitz and her child, the state of Colorado, and the interstate justice system as a whole.

n5 The court of appeals, in finding that the Defendant did not have minimum contacts with Colorado to satisfy due process, relied heavily on the Supreme Court's Kulko decision. In Kulko, the Supreme Court concluded that a nonresident father's act of allowing his children to move to California to live with their mother, despite a preexisting separation agreement providing that the children would reside with the father in New York, did not satisfy minimum contacts. *436 U.S. at 94*. The court noted that a "father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws." Id. Indeed, the Court observed that the father's single act of acquiescence "is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child support suit in a forum 3,000 miles away," and therefore the father did not reasonably anticipate being haled before a court in California. *Id. at 97--98*. We find that the facts of Kulko are readily distinguishable from the instant case. Unlike the father in *Kulko*, the Defendant did not passively acquiesce to his wife's decision to move to Colorado while she was pregnant with his child, but instead actively drove her to this state through persistent abuse and harassment.

> Accordingly, it is not Malwitz's unilateral action which is causing the Defendant to be haled before a Colorado court, but the Defendant's own conduct, which created a substantial connection between himself and Colorado and necessitated the involvement of our courts. Given these facts, we find the court of appeals' reliance on *Kulko* to be misplaced.

[26]**

III. Conclusion

We hold that the trial court properly exercised jurisdiction over the Defendant pursuant to section *14-5-201(5)*, the longarm provision of UIFSA and that such jurisdiction was consistent with the requirements of due process. We therefore reverse the decision of the court of appeals and remand this case to the court of appeals with instructions to remand to the trial court for proceedings consistent with this opinion.

Justice Coats dissents, Justice Martinez and Justice Bender join in the dissent.

DISSENTBY: COATS

DISSENT: JUSTICE COATS, dissenting.

Although it is important for Social Services to be able to recover child support costs from fathers, even if they are not residents of Colorado, I do not believe that this cause is furthered by making important decisions about an alleged father's past behavior and future responsibilities without having him legitimately before the court. Such a failure in personal jurisdiction is fundamentally unfair and may result in unreliable determinations. Because I believe the majority's jurisdictional analysis cannot be squared with the due process requirements of the federal and state constitutions, I respectfully dissent.

The question **[**27]** whether sufficient contacts exist with a forum state for it to exercise personal jurisdiction over an absentee respondent is admittedly a flexible and highly fact-specific inquiry. *Kulko v. Superior Court, 436 U.S. 84, 92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978)*. It has, in fact, been characterized as "more an art than a science." *Keefe v. Kirshenbaum & Kirschenbaum, P.C., 40 P.3d 1267, 1272 (Colo. 2002)* (citing *Sawtelle v. Farrell, 70 F.3d 1381, 1388 (1st Cir. 1995)*. Nonetheless, due process of law remains a fundamental requirement.

In order to subject himself to the jurisdiction of a particular state, an absentee respondent must, at the very least, have done something to purposefully avail himself of the benefits and protections of that state's laws. *Kulko, 436 U.S. at 94* (citing *Shaffer v. Heitner, 433 U.S. 186, 216, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977))*. Although a single act, not even involving personal presence in the state, may be sufficient to support personal jurisdiction for a specific purpose, it must nevertheless be "such that [the respondent] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. et al. v. Woodson, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980)*. **[**28]** It is this "purposeful availment" requirement that ensures that a respondent **[*65]** will not be haled into a jurisdiction solely as a result of random or fortuitous contacts or the unilateral activity of a third party. *Kirschenbaum, 40 P.3d at 1271*; see also *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)*; *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 n. 17, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984)* (passive activity of a mere customer within a state is insufficient to confer jurisdiction); *Keeton v. Hustler Magazine, 465 U.S. 770, 774, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984)*; *World-Wide Volkswagen Corp., 444 U.S. at 299* (a finding that a product can be transported to and used in a state is too tenuous a connection).

By focusing solely on the effects or "consequences" of the respondent's alleged conduct, quite apart from any "purposeful availment" on his part, the majority shifts the inquiry from one concerning the respondent's intentionality or reasonable anticipation, to one of mere causation. Compare maj. op. at 16, with maj. op. at 14, and *Van Schaack & Co. v. District Court, 189 Colo. 145, 147, 538 P.2d 425, 425 (1975)*. **[**29]** The majority's inquiry is concerned even with causation only in the sense that another free moral agent was motivated by the respondent's abusive conduct to flee to this state in order to get away from him - an act that was clearly against his wishes and directives. As reasonable and as predictable as the mother's choice may have been, it provides no less tenuous a connection between the alleged father and this state than the connection between a car seller and a state through which the buyer drives the car en route to his home. See *World-Wide Volkswagen Corp., 444 U.S. at 299*.

In my view, the phrase "acts or directives," as it appears in the *Uniform Interstate Family Support Act, section 145201(5)*, 5 C.R.S. (2003), can withstand constitutional scrutiny only to the extent that it intends no more than verbal directives and acts in the nature of, or in furtherance of, such directives. Reading these words broadly, as the majority does, to extend the state's jurisdiction to cover virtually anyone who does an act that, in some sense, results in his child's residing in this state violates well-established precepts of fundamental fairness and due process of law and, by contrast **[**30]** with the holding of International Shoe, n1 actually would

"herald the eventual demise of all restrictions on the personal jurisdiction of state courts," *Kulko, 436 U.S. at 101* (citing *Hanson v. Denckla, 357 U.S. 235, 251, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958))*, if allowed to stand.

n1 *International Shoe Co. v. Washington, 326 U.S. 310, 317, 90 L. Ed. 95, 66 S. Ct. 154 (1945).*

The UIFSA is clearly aimed at a burgeoning societal problem and justifiably seeks to extend the personal jurisdiction of a child's home state over a nonresident parent as far as constitutionally permitted. However, as I believe its attempts to distinguish previous applications of the statute make clear, the majority is extending personal jurisdiction well beyond any previous construction. Even the Virginia court, upon which the majority heavily relies, found only that the father's specific orders for his wife and child to leave the marital home in Africa, combined with his motion for visitation and petition for **[**31]** a rule to show cause in the state of the previous family home, to which his wife and child had returned, amounted to sufficient contact. See *Franklin v. Virginia, 497 S.E.2d 881, 887, 27 Va. App. 136 (Va. App. 1998).*

Here, the allegations and testimony of the mother suggest no such directive acts or purposeful contact. The child's mother claimed merely that her less-than-one-year cohabitation with the respondent in Texas amounted to a common-law marriage; that his abusive conduct forced her to flee the marital home; that after leaving the respondent, she discovered that she had very recently become pregnant by him; that several phone calls, made before she even returned to Colorado, evidenced the respondent's awareness that her father lived in Pueblo; and that the respondent's stalking behavior forced her to flee Texas for her father's home in Colorado. The mother delivered the child in this state almost eight months, by her own account, after separating from the respondent. More than a year later, after seeking public assistance, she petitioned for **[*66]** dissolution of the marriage and for child support. n2

n2 In this state, the conception of a child during the course of a marriage creates a presumption of paternity. See *194105(1)(a), 6 C.R.S.* (2003).

[32]**

In the absence of more than a special appearance by respondent's counsel to contest personal jurisdiction, the existence of the marriage, the paternity of the child, and the propriety of the child-support order rested entirely upon the credibility of the mother. Accepting as true all of the mother's allegations, the respondent never attempted to do business in this state; never directed or acquiesced in the child's presence in this state; and never personally set foot inside this state. Inconvenient as they may be, legitimate ways do exist for this state to establish the parentage of the child and have child-support obligations imposed upon the father, without haling the respondent into the courts of this state in the absence of purposefully availing himself of the benefits and protections of its laws. And even if they did not, granting a monetary award against the respondent in absentia would be no less unacceptable.

I would therefore affirm the judgment of the court of appeals.

I am authorized to state that JUSTICE MARTINEZ and JUSTICE BENDER join in this dissent.

LEXSEE 497 S.E.2D 881

CLIFTON A. FRANKLIN v. COMMONWEALTH OF VIRGINIA, DEPARTMENT OF SOCIAL SERVICES, DIVISION OF CHILD SUPPORT ENFORCEMENT ex rel. MARIE CATHERINE FRANKLIN

Record No. 1045-97-4

COURT OF APPEALS OF VIRGINIA

27 Va. App. 136; 497 S.E.2d 881; 1998 Va. App. LEXIS 207

April 14, 1998, Decided

PRIOR HISTORY: [***1] FROM THE CIRCUIT COURT OF ARLINGTON COUNTY. Paul F. Sheridan, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee wife initiated proceedings in Virginia to establish a child support order against appellant husband, who was residing in Africa. The Circuit Court of Arlington County (Virginia) ordered the husband to pay child and spousal support. The husband appealed.

OVERVIEW: The family was living in Africa when the marriage began to deteriorate. With assistance from the husband's employer, the wife moved with the children to Virginia near the employer's offices. The wife received financial assistance from the Commonwealth of Virginia, and the commonwealth assisted her obtaining a support order against the husband. The husband argued that the service of process was insufficient, that the trial court lacked jurisdiction, and that an administrative support order should not have been issued. The wife argued that the husband caused the wife and the children to reside in Virginia. The court concluded that: (1) the children became residents of Virginia; (2) Virginia properly exercised jurisdiction over the husband; (3) by making a request for affirmative relief, the husband entered a general appearance and submitted himself to the authority of the trial court; (4) the husband received notice of the administrative support order and acknowledged its receipt; and (5) the parties had resided in Virginia immediately before moving to Africa.

OUTCOME: The court affirmed the trial court order requiring the husband to pay both child and spousal support.

LexisNexis(R) Headnotes

Family Law > Child Support > Obligations
[HN1] See Va. Code Ann. § 63.1-252.1.

Family Law > Child Support > Jurisdiction
[HN2] See Va. Code Ann. § 20-126(A).

Family Law > Child Support > Jurisdiction
[HN3] See *Va. Code Ann. § 20-88.35(5).*

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Family Law > Child Support
[HN4] In its deliberation concerning a child's welfare, including its determination of jurisdictional and enforcement issues, the trial court must make the child's best interests its primary concern. Trial courts are vested with broad discretion in making the decisions necessary to guard and to foster a child's best interests. A trial court's determination of matters within its discretion is reversible on appeal only for an abuse of that discretion. The appellate court views the evidence in the light most favorable to the party prevailing below, giving it all reasonable inferences fairly deducible therefrom. Where a trial court makes a determination which is adequately

supported by the record, the determination must be affirmed.

Family Law > Child Custody
[HN5] See *Va. Code Ann. § 20-125(2).*

Family Law > Child Support > Jurisdiction
[HN6] *Va. Code Ann. § 20-88.35(2)* provides that courts may exercise personal jurisdiction over an individual for support purposes if the individual submits to the jurisdiction of the commonwealth by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction. An appearance for any other purpose than questioning the jurisdiction of the court is general, although accompanied by the claim that the appearance is only special.

Family Law > Child Support > Jurisdiction
[HN7] In the case of out-of-state obligors and in the absence of a court order, the Division of Child Support Enforcement may establish an administrative support order if the obligor and the obligee maintained a matrimonial domicile within the commonwealth. Va. Code Ann. § 63.1-250.1(G).

COUNSEL: Ted Kavrukov (Kavrukov, Mehrotra & DiJoseph, on briefs), for appellant.

William K. Wetzonis, Special Counsel (Nancy J. Crawford, Regional Special Counsel; Keith H. Warren, Special Counsel; Richard Cullen, Attorney General; William H. Hurd, Deputy Attorney General; Robert J. Cousins, Jr., Senior Assistant Attorney General; Craig M. Burshem, Regional Special Counsel, on brief), for appellee.

JUDGES: Present: Chief Judge Fitzpatrick, Judges Annunziata and Bumgardner. OPINION BY CHIEF JUDGE JOHANNA L. FITZPATRICK.

OPINIONBY: JOHANNA L. FITZPATRICK

OPINION: **[*139]** **[**882]** OPINION BY CHIEF JUDGE JOHANNA L. FITZPATRICK

Clifton A. Franklin (husband) appeals the circuit court's order to pay child and spousal **[**883]** support. Husband argues the trial court erred in: (1) finding that the service of process for the juvenile and domestic relations district court proceedings was sufficient; (2) finding that the trial court and the Division of Child Support Enforcement have jurisdiction over the person of husband; and (3) reversing the administrative hearing officer's finding vacating the Administrative Support Order (ASO). For the following **[***2]** reasons, we affirm the trial court's order. I. Background

Husband and Marie Catherine Franklin (wife) were married in California in 1981. They have two children: Lloyd, born December 14, 1981, and Armelle, born September 15, 1985. Wife testified the parties moved to Virginia in January 1991 and lived here for three months, their last domicile prior to their move overseas. Husband denied ever having resided in Virginia. Husband obtained employment with John Snow, Inc. (JSI), a Boston-based company, and he signed his employment contract at the JSI field office in Arlington, Virginia in the fall of 1990. Husband's job took the family to Africa, where they lived from March 1991 until January 1994.

While the parties lived in Africa, their relationship deteriorated and resulted in several physical altercations. Eventually, husband ordered wife and the children to leave their home. Wife went to the American Embassy for assistance in returning to the United States. JSI, husband's employer, paid travel expenses for the three family members, and they arrived at Dulles Airport in Virginia in January 1994. Wife **[*140]** stayed with the children in a Washington, D.C., hotel for a week and then moved **[***3]** to Arlington, Virginia. They have remained residents of Virginia since that time. After wife and the children returned to Virginia, the parties orally agreed that husband would pay child support, and he did so.

On April 22, 1994, wife applied for assistance from the Division of Child Support Enforcement (DCSE) to establish a child support order against husband. On January 11, 1995, DCSE issued an ASO that required husband to pay $ 1,111 per month in child support and established a debt of $ 2,622 owed to the Commonwealth for the public assistance received by wife. Husband was served with the ASO by certified mail, return receipt, pursuant to Code § 63.1-252.1. n1

> n1 [HN1] "The Commissioner shall initiate proceedings by issuing notice containing the administrative support order which shall become effective unless timely contested. The notice shall be served upon the debtor (i) in accordance with the provisions of § § 8.01-296, 8.01-327 or § 8.01-329 or (ii) by certified mail, return receipt requested, or service may be waived." Code § 63.1-252.1.

[*4]**

Meanwhile, on October 19, 1994, wife appeared before the juvenile and domestic relations (JDR) district court and obtained an ex parte emergency custody order

preventing either parent from removing the children from Virginia. The JDR court scheduled a hearing for the following day, at which time husband, by counsel, entered a special appearance to contest the jurisdiction of the court to enter any orders. Pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA), Code § 20-126, n2 the JDR court assumed jurisdiction to decide custody and issued an emergency order.

> n2 [HN2] "A court of this Commonwealth which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> 1. This Commonwealth (i) is the home state of the child at the time of commencement of the proceeding . . . or
>
> 2. It is in the best interest of the child that a court of this Commonwealth assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this Commonwealth, and (ii) there is available in this Commonwealth substantial evidence concerning the child's present or future care, protection, training, and personal relationships . . . ." Code § 20-126(A).

[*5]**

[*141] On November 16, 1994, wife filed a notice for an additional hearing in the JDR court to determine temporary custody. In her affidavit, wife stated that copies of the notice had been sent by registered mail to the JSI corporate office in Boston, to JSI field offices in Arlington, Virginia, and Bamako, Mali, to husband's work station in Bamako, Mali, and to husband's counsel in Arlington, Virginia. Neither husband nor his counsel appeared to contest custody, and the **[**884]** JDR court granted temporary custody to wife.

On February 8, 1995, husband's counsel filed a "limited appearance" praecipe in the JDR court. In an order entered February 14, 1995, the court, upon husband's oral motion requesting relief, ordered telephone access to and summer visitation with the children. In addition, upon wife's oral motion to join the issues of child and spousal support, the JDR court ordered the parties to submit points and authorities regarding the court's jurisdiction over husband to hear issues other than custody and visitation. The question of jurisdiction was continued to March 8, 1995.

After the March 8, 1995 hearing, the JDR court entered an order on May 10, 1995, which granted custody to wife, **[***6]** granted visitation to husband, and stated "that the parties recognize that all child support issues are currently being handled by DCSE administratively."

Meanwhile, on February 23, 1995, DCSE ordered JSI to withhold child support from husband's earnings. Husband appealed the withholding-from-earnings order to an administrative hearing officer, contending the underlying ASO was invalid for lack of jurisdiction over husband. The ASO's administrative determination itself was never appealed. On June 13, 1995, the hearing officer reversed the ASO, finding that DCSE had "no jurisdiction administratively."

On July 18, 1995, wife appealed the hearing officer's decision to the JDR court and also filed a motion for spousal support. The JDR court notified husband of the appeal pursuant to Code § 63.1-268.1. On July 25, 1995, husband's counsel again entered a praecipe for a special appearance. **[*142]** The appeal was scheduled for August 1, 1995, but was dismissed without prejudice due to wife's failure to appear.

On August 3, 1995, husband filed a petition for a rule to show cause against wife for violations of the JDR court's visitation order of May 10, 1995. Wife agreed that she would not interfere **[***7]** with husband's telephone contact with the children, and husband withdrew his petition.

On December 20, 1995, after a hearing on wife's petition for pendente lite support, the JDR court awarded temporary child support, finding that: (1) husband's "request for visitation . . . coupled with [his] request for a Show Cause Rule on this issue of visitation, constitutes a waiver of [his] objection to this Court's jurisdiction over his person;" (2) "the issue of child support is now ripe for adjudication, the administrative process of the [DCSE] having been exhausted;" and (3) "over [husband's] objection, this court has personal and subject matter jurisdiction." On July 1, 1996, the JDR court awarded spousal support of $ 500 per month for eighteen months and $ 1,230 per month child support. Husband appealed this order to the circuit court on the issue of jurisdiction.

The circuit court heard the case de novo on December 17, 1996. At the hearing, husband testified that he did not demand, suggest, urge, advise, or insist that wife and the children move to Virginia. Husband claimed his only connection with Virginia was that his former employer, JSI, (he had since been terminated) **[***8]** had a branch office in Arlington which arranged the family's travel to Africa in 1990 and forwarded their mail to Africa while they were there. Additionally, husband testified that he never resided, owned property, paid taxes, or obtained a driver's license in Virginia and that he has only been physically present in Virginia three times in the last five years.

The circuit court found that husband caused wife and the children to leave their home in Africa, and, although "he did not direct [wife and the children] to go anywhere," wife's decision to reside in Virginia was "completely logical because it provided the nexus to the employer's office . . . . It provided **[*143]** a conduit for communication, whether or not it was used, between the company, the mother, and the father of these two children." The circuit court found that wife's decision to leave Africa and reside in Virginia with the children was "the result of the acts of the father" and that exercise of personal jurisdiction was proper under *Code § 20-88.35(5)*. n3 Additionally, the circuit **[**885]** court reversed the hearing officer's decision, finding that the ASO was valid under *Code § 20-88.35(5)*. Husband filed a motion for reconsideration **[***9]** which the circuit court denied on May 9, 1997.

n3 [HN3] "In a proceeding to establish, enforce, or modify a support order or to determine parentage, a tribunal of this Commonwealth may exercise personal jurisdiction over a nonresident individual . . . [if the] child resides in this Commonwealth as a result of the acts or directives of the individual." *Code § 20-88.35(5)*.

II. Standard Of Review

[HN4]

"In its deliberation concerning a child's welfare, including its determination of jurisdictional and enforcement issues, the trial court must make the child's best interests its primary concern." *Johnson v. Johnson, 26 Va. App. 135, 144, 493 S.E.2d 668, 672 (1997)*. "Trial courts are vested with broad discretion in making the decisions necessary to guard and to foster a child's best interests." *Farley v. Farley, 9 Va. App. 326, 328, 387 S.E.2d 794, 795 (1990)*. "'A trial court's determination of matters within its discretion is reversible on appeal only for an abuse of that discretion.'" *Commonwealth ex rel. Ewing* **[***10]** *v. Ewing, 22 Va. App. 466, 473, 470 S.E.2d 608, 612 (1996)* (quoting *Farley, 9 Va. App. at 328, 387 S.E.2d at 795)*. "We view the evidence in the light most favorable to the party prevailing below, giving it all reasonable inferences fairly deducible therefrom." *Winfield v. Urquhart, 25 Va. App. 688, 690, 492 S.E.2d 464, 465 (1997)*. "'Where a trial court makes a determination which is adequately supported by the record, the determination must be affirmed.'" *Haase v. Haase, 20 Va. App. 671, 684, 460 S.E.2d 585, 591 (1995)* (citation omitted).

[*144] III. Jurisdiction Over Husband

Husband first argues that service upon him under the Uniform Child Custody Jurisdiction Act (UCCJA) did not give the trial court the authority to enter a support award against him. We agree. The language of the UCCJA is clear: [HN5] "'Custody determination' means a court decision and court orders and decrees providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person." *Code § 20-125(2)*. "This section limits the application of Code § 20-126 to child custody matters only, not child support." **[***11]** *Johns v. Johns, 5 Va. App. 494, 496, 364 S.E.2d 775, 777 (1988)*.

However, this conclusion does not end our inquiry. Although personal jurisdiction under the UCCJA was limited to issues of custody and visitation, the trial court found jurisdiction over husband for support issues under the Uniform Interstate Family Support Act (UIFSA). n4 "In a proceeding to establish . . . a support order . . . a tribunal of this Commonwealth may exercise personal jurisdiction over a nonresident individual . . . [if the] child resides in this Commonwealth as a result of the acts or directives of the individual." *Code § 20-88.35(5)*.

N4 *Code § 20-88.32* et seq.

The scope of *Code § 20-88.35(5)* is an issue of first impression in Virginia. Although the UIFSA has been widely adopted, our sister states also have yet to rule specifically on this provision. Husband contends the plain meaning of this provision confers jurisdiction over an individual who has done an affirmative act, exerted power or influence, or given instructions, **[***12]** orders, or commands to his children and spouse to go and reside in a particular geographical location. Since husband never specifically directed wife to move to Virginia, he argues that Virginia courts failed to obtain jurisdiction over him under *Code § 20-88.35(5)*. We disagree.

[*145] In support of his position, husband cites several cases decided under a similar provision predating the UIFSA in Texas in which courts declined to exercise jurisdiction over fathers of resident children. See *Miles v. Perroncel, 598 So. 2d 662 (La. App. 1992)* (interpreting the Texas statute and declining to exercise jurisdiction over father who failed to object when mother moved child out of state); *Ford v. Durham, 624 S.W.2d 737 (Tex. Civ. App. 1981)* (no jurisdiction over father who acquiesced to mother's move with child); *Bergdoll v. Whitley, 598 S.W.2d 932 (Tex. Civ. App. 1980)* (father's continued court-ordered support payments after ex-wife moved to Texas with children did not confer personal jurisdiction). However, in each of these cases, the

children resided in Texas after their mother chose to move out of state without any urging from their fathers.

In the instant case, wife made no such [***13] choice. After several physical altercations, [**886] husband ordered wife and the children from their home in Africa. They had to go somewhere. Wife sought emergency assistance from the American embassy and husband's employer. As a result of this assistance, she and the children returned to the United States. Wife established a permanent home for herself and the children in Virginia, the family's home immediately prior to their departure for Africa, the point of entry for her return to this country, and the location of husband's employer's field office in charge of distributing his mail. We hold that husband's children became residents of this Commonwealth as a result of his acts, and Virginia properly exercised jurisdiction over his person.

Husband's contention that unless he directed wife to this Commonwealth, Virginia courts may not exercise personal jurisdiction in support matters, is overly restrictive. If widely adopted, such a construction would leave spouses similarly situated without a forum in which to request child and spousal support. "'It is the legal and moral duty of a [spouse] to support his [or her] . . . family consistent with his [or her] financial ability.'" *L.C.S.* [***14] *v. S.A.S., 19 Va. App. 709, 715, 453 S.E.2d 580, 583 (1995)* (citation omitted). To allow husband to [*146] escape his support obligations merely because he failed to dictate the specific destination when he ordered his family to leave the marital home would frustrate the purpose of the legislature in enacting the Uniform Interstate Family Support Act. See *Johns, 5 Va. App. at 495, 364 S.E.2d at 776* ("The purpose of RURESA [the predecessor statute to UIFSA] is to create an economical and expedient means of enforcing support orders for parties located in different states. The act is remedial in nature and should be liberally construed so that its purpose is achieved.").

Additionally, the JDR court found personal jurisdiction on alternative grounds. [HN6] *Code § 20-88.35(2)* provides that courts may exercise personal jurisdiction over an individual for support purposes if "the individual submits to the jurisdiction of this Commonwealth . . . by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction." "An appearance for any other purpose than questioning the jurisdiction of the court . . . is general, although accompanied [***15] by the claim that the appearance is only special." 2A Michie's Jurisprudence of Virginia and West Virginia, Appearances, § 4 (1997). Several states have held that a request for affirmative relief constitutes a general appearance and waives all objections to defects in service, process or personal jurisdiction. See *Weierman v. Wood Landscaping, 259 Ill. App. 3d 300, 630 N.E.2d 1298, 197 Ill. Dec. 174 (Ill. App. 1994)* (pleading to vacate default judgments was general appearance which waived objection to process defects and submitted defendant to jurisdiction); *In re Marriage of Stafeil, 169 Ill. App. 3d 630, 523 N.E.2d 1003, 120 Ill. Dec. 92 (Ill. App. 1988)* (motion to vacate temporary custody order waived special appearance); *Norwood v. Craig, 658 So. 2d 212 (La. App. 1995)* (motion for continuance in child support action submitted father to jurisdiction of court); *Bullard v. Bader, 117 N.C. App. 299, 450 S.E.2d 757 (N.C. App. 1994)* (father's submission of visitation and income information waived his special appearance and his defense of lack of personal jurisdiction).

[*147] In the instant case, husband filed a petition for a rule to show cause on August 3, 1995, at a [***16] time when the issues of custody and support were properly before the JDR court. At the subsequent pendente lite hearing in December 1995, the JDR court found that husband's request for relief waived his special appearance and his jurisdiction defense. We agree and hold that by making a request for affirmative relief, husband entered a general appearance and submitted himself to the authority of the court. n5

> n5 Husband further contends he lacks the minimum contacts with Virginia necessary for the exercise of personal jurisdiction. "'It is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within'" Virginia. *Kulko v. Superior Court, 436 U.S. 84, 94, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978)* (citation omitted). We have held that husband's acts resulted in the children's residence in Virginia. These contacts, combined with husband's motion for visitation and petition for a rule to show cause, each a request for affirmative relief from a Virginia court, satisfy this standard.

[***17]

[**887] IV. Administrative Support Order

Husband also contends the circuit court erred in reversing the hearing officer's determination that the ASO was invalid. He claims DCSE lacked jurisdiction over him and that service under Code § 63.1-252.1 was improper. We disagree. n6

> n6 We note that husband appeals the withholding-from-earnings order on the ground that the underlying ASO is invalid for want of

jurisdiction. The grounds for appeal of a withholding-from-earnings order are limited to a mistake of fact. See Code § 63.1-250.3(B). The proper avenue to contest jurisdiction is to appeal the initial ASO pursuant to Code § 63.1-252.1.

Consequently, we reject husband's formulation and instead address the jurisdictional validity of the ASO directly.

Code § 63.1-252.1 provides:

> In the absence of [a court order for support of a child], the Commissioner may, pursuant to this chapter, proceed against a person whose support debt has accrued or is accruing based upon payment of public assistance [***18] or who [*148] has a responsibility for the support of any dependent child or children and their caretaker.

[HN7] In the case of out-of-state obligors and in the absence of a court order, DCSE "may establish an administrative support order . . . if the obligor and the obligee maintained a matrimonial domicile within the Commonwealth." Code § 63.1-250.1(G). In these circumstances, notice containing the ASO may be served upon the debtor by certified mail, return receipt requested. See Code § § 63.1-250.1(G), -252.1.

Viewing the evidence in the light most favorable to wife, the party prevailing below, the record establishes that the parties lived in Virginia immediately before they departed for Africa. The record further reveals that DCSE served notice of the ASO on husband in Africa by certified mail, return receipt requested, and that husband signed for the letter, acknowledging receipt. Therefore, we hold that DCSE had jurisdiction to issue the ASO, that husband was properly served, and that he had actual notice of the support [***19] order. For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

LEXSTAT 750 ILCS 36/207

*** THIS SECTION IS CURRENT THROUGH PUBLIC ACT 93-1064 ***
*** DECEMBER 31, 2004 ANNOTATION SERVICE ***

CHAPTER 750. FAMILIES
UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT
ARTICLE 2. JURISDICTION

750 ILCS 36/207 (2004)

§ 750 ILCS 36/207. Inconvenient Forum

Sec. 207. Inconvenient Forum. (a) A court of this State which has jurisdiction under this Act to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) the length of time the child has resided outside this State;

(3) the distance between the court in this State and the court in the state that would assume jurisdiction;

(4) the relative financial circumstances of the parties;

(5) any agreement of the parties as to which state should assume jurisdiction;

(6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) the familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this State determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this State may decline to exercise its jurisdiction under this Act if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.