EXTRATERRITORIAL JURISDICTION TO AWARD ALIMONY

Mizner v. Mizner, — Nev. —, 439 P.2d 679, *cert. denied*, 393 U.S. 847 (1968).

The Mizners lived in California from the time of their marriage in 1947 until their separation in 1965. The husband then moved to Nevada and in 1966 commenced divorce proceedings. Before any decree was entered in that suit, his wife commenced divorce and support proceedings in California with personal service of process on Mr. Mizner at his home in Reno, Nevada. By California statute,[1] such service of process gives the court in personam jurisdiction over a nonresident if he was a domiciliary[2] when the cause of action arose. The husband made no appearance in the California action. The wife was awarded an interlocutory judgment of divorce,[3] certain California

1. CAL. CIV. PRO. CODE § 412 (Deering Supp. 1969) provides for service by publication if the person resides out of state. Section 413 says that, when publication is appropriate, personal service of a copy of the summons and complaint is equivalent to publication. And Section 417 provides:

> Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State (a) at the time of the commencement of the action, or (b) at the time the cause of action arose, or (c) at the time of service.

2. The California court has interpreted "resident" in CAL. CIV. PRO. CODE § 417 (Deering 1959) to mean "domicilliary." Owens v. Superior Court, 52 Cal. 2d 822, 345 P.2d 921 (1959); Hartford v. Superior Court, 47 Cal. 2d 447, 304 P.2d 1 (1956); Smith v. Smith, 45 Cal. 2d 235, 288 P.2d 497 (1955).

3. "[I]nterlocutory decree [of divorce] does not sever the marital bonds. It is merely a declaration that one of the spouses has at that time established a right to a final decree . . . ." Olson v. Superior Court, 175 Cal. 250, 252, 165 P. 706, 707 (1917). "The interlocutory decree does not forbid a remarriage; it simply refrains from dissolving the existing one." Hirschfeld v. Hirschfeld, 165 Cal. App. 2d 474, 475, 332 P.2d 397, 398 (1958). "The marital relationship is severable from the property rights which it creates; and final settlement of the relationship should not be dependent upon final settlement of corollary property interests." Hull v. Superior Court, 54 Cal. 2d 139, 147, 352 P.2d 161, 165, 5 Cal. Rptr. 1, 6 (1960). For the effect of interlocutory decrees of divorce on property settlements, see Note, *Interlocutory Decrees of Divorce*, 56 COLUM. L. REV. 228, 236-42 (1956).

A final decree of divorce may be entered one year after service of process in the original suit upon motion of either party or by the court on its own motion. CAL. CIV. CODE § 132 (Deering Supp. 1969). A final decree of divorce may be denied if the parties are no longer entitled to dissolution of the marriage because of condonation, O'Connell v. Superior Court, 74 Cal. App. 350, 240 P. 294 (1925), or reconciliation, Olson v. Superior Court, 170 Cal. 250, 165 P. 706 (1917), or if the parties were not entitled to the dissolution of the

property, and alimony by the California court. She then appeared in the husband's divorce proceeding in Nevada and moved for partial summary judgment asserting that that part of the California decree granting alimony was a final judgment rendered with in personam jurisdiction and hence entitled to full faith and credit in the Nevada proceeding. Her motion was granted. On appeal the Nevada Supreme Court held that the California court had acquired in personam jurisdiction over the husband and that the alimony decree was entitled to full faith and credit.[4]

To determine whether a forum court can obtain in personam jurisdiction over an absent non-domiciliary by extraterritorial personal service of process, the Nevada court fashioned the following test: (1) the forum state must have a statute authorizing extraterritorial service of process; and (2) the defendant must have certain minimum contacts with the forum state which are relevant to the cause of action.

In compliance with the Nevada Court's test, service of process in the wife's California proceeding had been made pursuant to statutes[5] which were applicable in divorce and alimony actions. Sections 412 and 413 of the Civil Procedure Code provide for service of process by publication if the defendant can not be located within the state. In conjunction with service by publication, Section 417 provides that if the person is personally served with a copy of the summons and complaint *and* he was a domiciliary when the cause of action arose, in personam jurisdiction over the person is acquired. Hence, Section 417 is crucial to secure in personam jurisdiction over a husband who commits acts giving rise to a cause of action for divorce and alimony while he is domiciled in the forum state. If he should later desert the wife, she can assert that he was a domiciliary when the cause of action arose.

Illinois and Kansas are two other states that have similarly extended personal jurisdiction to solve the problem of support for the deserted wife. The Illinois statute provides that "[w]ith respect to actions of divorce and separate maintenance, the maintenance in the State of a matrimonial domicile at the time the cause of action arose or the commission in this State of any act giving rise to the cause of action" will

---

marriage in the first instance, Carp v. Superior Court, 76 Cal. App. 481, 245 P. 459 (1926), or, in the court's discretion, if the marriage has been dissolved by the death of one or both parties; Gloyd v. Superior Court, 44 Cal. App. 39, 185 P. 995 (1919).

4. Mizner v. Mizner, —— Nev. ——, 439 P.2d 679, *cert. denied*, 393 U.S. 847 (1968).

5. See note 1 *supra*.

subject the absent person to in personam jurisdiction.[6] The Illinois statute provides the same result as in *Mizner*, but it does recognize the peculiar situation of divorce by providing for it in a separate subsection and explicitly requiring the marital domicile to be in Illinois. In contrast, the Kansas statute is broader and relies on the marital relationship and the plaintiff's continued residence in the state in order to grant an in personam judgment against an absent spouse. Specifically it provides for in personam jurisdiction over a person "living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations arising for alimony . . . if the other party to the marital relationship continues to reside in the state."[7] Under such a statute with jurisdiction depending on "living in the marital relationship within the state" and the plaintiff continuing to reside in the state, the problems of divisible divorce may be eliminated.[8] Essential to the doctrine of divisible divorce is the fact that the divorce ordering state does not have in personam jurisdiction over the absent spouse and hence can not affect her support rights.[9] With the Kansas statute, if the wife can show that she is a Kansas domiciliary entitled to a divorce, she will probably also be able to acquire in personam jurisdiction over the absent husband and a valid support decree.

Similar to the far reaching Kansas provision is the New York case of *Venizelos v. Venizelos*[10] in which the parties were married in New York and maintained their marital domicile there for nine years until the husband returned to his native Greece. The wife then brought a separation action and the husband was personally served with process in Greece. While the court disposed of the husband's objection to jurisdiction on grounds of waiver, it also said,

> Whether defendant was a domiciliary of New York or not at the time of commencement of this action, it is our opinion that his

6. ILL. ANN. STAT. ch. 110, § 17(1)(e) (Smith-Hurd 1968). *See also* Friedman, *Extension of the Illinois Long Arm Statute: Divorce and Separate Maintenance*, 16 DE PAUL L. REV. 45 (1966).

7. KAN. STAT. ANN. § 60-308(b)(6) (1964).

8. *See* Fowks & Harvey, *The New Kansas Code of Civil Procedure*, 36 F.R.D. 51, 61 (1965).

9. *See generally* Krauskopf, *Divisible Divorce and Rights to Support, Property and Custody*, 24 OHIO ST. L.J. 346 (1963); Note, *Divisible Divorce*, 76 HARV. L. REV. 1233 (1963).

10. 30 App. Div. 2d 856, 293 N.Y.S.2d 20 (1968).

> contacts with this State and the interests of New York in the litigation are sufficient to subject him, under the appropriate statutes, to the jurisdiction of our courts in an action for separation.[11]

Under this analysis there seems to be no reason to base jurisdiction on domicile in marital related causes of action. The state in which the cause of action arises is always able to award satisfactory relief if the offending spouse departs.

In *Loeb v. Loeb*[12] the wife was a New York domiciliary but the parties were married in Connecticut. After the husband obtained a Nevada *ex parte* divorce the wife became a New York domiciliary and sued for a support order. She claimed that the prior Nevada decree, obtained without jurisdiction over her, could not affect her support rights under New York law. But the New York Court held that its law[13] applied only to "New York wives" and that she had to establish "domicile" in New York prior to the Nevada decree. The court then retreated somewhat from use of domicile to narrow the protection afforded by its support law saying that "it seems abundantly clear that plaintiff had no contact with New York at any time during the period of their marriage. . . ."[14] This statement by the Court of Appeals seems to lend support to the *Venizelos* court's opinion that domicile is not the controlling jurisdictional concept in these matters. Indeed, the court seems to recognize that the interests of the forum state that need to be protected in the domestic relations area are often defeated by the concept of domicile.

To say that the forum state would most likely be the domicile of the departing spouse as well as the marital domicile begs the question of what *should* be a proper basis for jurisdiction. In a situation in which domicile is an inadequate concept to deal with absent spouses, the solution cannot be phrased in its useless rubric. Indeed the *Restatement (Second) of Conflicts*[15] approves extension of jurisdiction over absent spouses and does not hamstring itself by then relying on a finding of domicile as the necessary nexus to the forum state. The *Restatement* would sanction in personam jurisdiction over any person who

---

11. *Id.* at —, 293 N.Y.S.2d at 21.

12. 4 N.Y.2d 542, 152 N.E.2d 36, 176 N.Y.S.2d 590 (1958), *cert. denied,* 359 U.S. 913 (1959)

13. N.Y. DOM. REL. § 236 (McKinney Supp. 1968).

14. Loeb v. Loeb, 4 N.Y.2d 542, 549, 152 N.E.2d 36, 39, 176 N.Y.S.2d 590, 594 (1958), *cert. denied,* 359 U.S. 913 (1959).

15. RESTATEMENT (SECOND) OF CONFLICTS § 24, comment b (Proposed Official Draft, 1967).

had "relationships to the state which make the exercise of judicial jurisdiction reasonable."[16]

The Supreme Court and commentators have given much attention to the proper basis for exercising jurisdiction. Based on an analysis of the Court's decisions on in personam jurisdiction,[17] the due process requirement that long arm jurisdiction not offend "traditional notions of fair play and substantial justice" has been said to be a two level requirement of fairness.[18] First there must be a meaningful connection between the person and the forum state. Secondly, the person's contact with the forum state must relate to the suit, and the forum state must have an interest in the suit as well as be a convenient forum for the litigation. The commentators[19] have emphasized reasonableness, convenience, legitimate state interests, reasonable contacts, and the nature of the controversy in determining a basis for jurisdiction. The decision in *Mizner* comports well with these considerations because of the concurrence of two facts in the forum state: (1) the cause of action arose from facts that established substantive contacts with the forum; and (2) the forum state was the matrimonial domicile.[20]

Even if a statute authorizes extraterritorial service of process, the statute must still comply with due process requirements. The usual test of the reasonableness of such a statute is phrased in the "minimum contacts" language of *International Shoe Co. v. Washington.*[21] The majority of the Nevada Supreme Court deferred to the California court

16. *Id.* at § 27(1)(k).

17. *See* Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Mining Co., 341 U.S. 437 (1952); Travelers Health Ass'n v. Virginia, 339 U.S. 310 (1950); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

18. *See* Note, *Extraterritorial Jurisdiction: The Substantive Due Process Requirement,* 13 KAN. L. REV. 554, 561-62 (1965).

19. *See* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens,* 65 YALE L.J. 289 (1956); Friedman, *supra* note 6; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121 (1966); note 15 *supra.*

20. Matrimonial domicile has been variously defined as "the common domicile of both spouses," R. LEFLAR, AMERICAN CONFLICTS LAW § 11 at 22 (1968), "where the couple lived as husband and wife," Krauskopf *supra* note 9 at 353, "the place of their abode with intention of continuance," *In re* Estate of Smidt, 162 Misc. 596, 599, 295 N.Y.S. 227, 230 (Sur. Ct. 1937), and "the last state in which the couple lived as man [sic] and wife," Note, *Divisible Divorce,* 76 HARV. L. REV. 1233 n.6 (1963).

21. 326 U.S. 310 (1945). "[D]ue process requires only that in order to be subject to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316.

for its interpretation of the constitutionality of Section 417. In *Owens v. Superior Court*[22] Justice Traynor, speaking for the court, said, "The rationale of the International Shoe case is not limited to foreign corporations, and both its language and the cases sustaining jurisdiction over non-resident motorists make clear that the minimum contacts test for jurisdiction applies to individuals as well as foreign corporations."[23] In *Soule v. Soule*,[24] the California District Court of Appeal followed the *Owens* decision on the constitutionality of Section 417 and applied it in a case much like *Mizner*. In *Soule* the parties were domiciled in California before the husband deserted to Montana. The wife, pursuant to Section 417, obtained a judgment of alimony against the absent spouse. The California court held that the extension of in personam jurisdiction was valid. Justice Collins, dissenting in *Mizner*, said that *Soule* was not in point because the wife did not try to enforce her award outside of California.[25] Such a case, the dissent argues, would clearly prevent the full faith and credit issue which could only be authoritatively determined by the United States Supreme Court. He argues that the Nevada Court is not bound by California's own determination of its jurisdiction and distinguishes cases in which jurisdiction is extended in order to reach non-resident tortfeasors. In such cases, the liability once determined is not subject to modification as is true of support decrees. Justice Collins declared that that distinction gives rise to a "different substantive due process jurisdictional requirement."[26]

The other dissent in *Mizner*, in addition to questioning the validity of subjecting the absent spouse to jurisdiction for future modifications of a support decree, argues that the minimum contacts doctrine is not applicable to the domestic relations area. As support for this proposition, Justice Batjer relies on the child custody cases of *New York ex rel. Halvey v. Halvey*[27] and *May v. Anderson*.[28] But it seems clear that child custody cases present different interests than those present in the *Mizner* and *Venizelos* cases. Mr. Mizner had actual notice of the California proceeding, and it can be presumed that he chose to forego an appearance to protect his rights. In child custody cases there is at least this

22. 52 Cal. 2d 822, 345 P.2d 921 (1959).
23. *Id.* at 831, 345, P.2d at 924-25.
24. 193 Cal. App. 2d 443, 14 Cal. Rptr. 417 (1961), *cert. denied*, 368 U.S. 985 (1962).
25. Mizner v. Mizner, — Nev. —, —, 439 P.2d 679, 682 (1968) (dissenting opinion).
26. *Id.* at 683.
27. 330 U.S. 610 (1947).
28. 345 U.S. 528 (1953).

personal interest of the absent spouse present plus the special state interest in protecting the welfare of its minor children.

The *Mizner* case presents solutions to two problems which have arisen in the area of domestic relations due to outdated concepts of jurisdiction. New long arm statutes can effectively provide an alternative to divisible divorce in order to obtain support for an absent spouse. If states would adopt long arm provisions similar to the Kansas statute, "divisible divorce" may become the epitaph of a period of transition in in personam jurisdiction from domicile to reasonableness.