NORTH CAROLINA LAW REVIEW

Volume 64 | Number 4 Article 4

4-1-1986

Miller v. Kite: Should Domestic Disputes Require the Maximum of Minimum Contacts

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NOTES

Miller v. Kite: Should Domestic Disputes Require the Maximum of Minimum Contacts?

As early as 1799 a North Carolina district court judge asserted the State's commitment to a restrictive application of in personam jurisdiction over nonresident defendants. In declaring invalid a 1784 legislative act holding "wicked and ill disposed persons, resident in the neighboring states" liable in North Carolina for their acts of counterfeiting North Carolina bills of credit,[1] Judge Taylor remarked: "The States are to be considered, with respect to each other, as independent sovereignties, possessing powers completely adequate to their own government, in the exercise of which they are limited only by the nature and objects of government, by their respective constitutions, and by that of the United States."[2] For close to two hundred years the attempt to balance respect for state sovereignty with the need to reach those "ill disposed" nonresidents who injure residents has been debated in federal and state courts and legislatures.[3]

In *Miller v. Kite*[4] the North Carolina Supreme Court reexamined the balance between state sovereignty and a state's right to protect its residents, this time in the context of a domestic relations dispute. The court concluded that a North Carolina court may not exercise jurisdiction over a nonresident father in an action for increased child support when the father's only contacts with the State are his monthly child support payments mailed to a state resident and his occasional trips to the State to visit his child. By confining itself to a strict minimum contacts analysis developed primarily from tort and contract cases, the court failed to consider the special character of family relationships and the public policy arguments in favor of sustaining jurisdiction.

This Note examines the analytical framework North Carolina courts use to determine whether the State may exercise personal jurisdiction over a nonresi-

1. State v. Knight, 1 N.C. (Tay.) 144 (1799) (quoting Act of the 1784 North Carolina General Assembly, 1st Sess., ch. 25, reproduced in 1 PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 355 (J. Iredell & F. Martin ed. New Bern, N.C. 1804)).

2. *Id.* at 144.

3. *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1064-1073 (1969 & Supp. 1985) (noting transition in jurisdictional principles from territorial basis to due process basis and considering future trends of personal jurisdiction); Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L. REV. 429 (1981) (criticizing defendant-oriented approaches to personal jurisdiction and arguing for a more balanced analysis); Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147 (tracing the development of jurisdictional principles through changes in the Nation's physical setting, economic needs, and judicial resources); Kurland, *The Supreme Court, The Due Process Clause and In Personam Jurisdiction of State Courts from* Pennoyer *to* Denckla: *A Review*, 25 U. CHI. L. REV. 569 (1958) (discussing the decline of federalism as an issue in personal jurisdiction questions); Note, *Jurisdiction Over Non-residents Doing Business Within a State*, 32 HARV. L. REV. 871 (1919) (discussing problems of state jurisdiction over businesses when physical presence or consent are the grounds for jurisdiction).

4. 313 N.C. 474, 329 S.E.2d 663 (1985).

dent defendant and how that framework is applied in domestic relations cases. It concludes that the liberal exercise of personal jurisdiction over a nonresident defendant in a domestic relations case does not violate the defendant's right to due process. Finally, this Note endorses an expansive approach to the minimum contacts question in domestic relations cases and addresses the policy considerations in support of such an approach.

Barbara and Dennis Kite were married in Illinois in 1967 and had a child there in 1968.[5] The Kites separated in 1971 and, pursuant to a separation agreement, plaintiff wife took custody of the child. Defendant agreed to pay three hundred dollars per month for child support. Shortly after plaintiff and defendant divorced in 1972, plaintiff and the child moved to North Carolina, where they resided until 1982.[6] Defendant remained in Illinois until 1977; he later lived in Texas and California. Defendant mailed monthly support checks to plaintiff at her North Carolina address and made several visits to his daughter between 1973 and 1981.[7]

In 1982 plaintiff filed an action for increased child support in Buncombe County District Court in North Carolina. When the action was filed, defendant was domiciled in California, but was a resident of Tokyo, Japan, where he was an officer with Bank of America.[8] After conducting a hearing at which defendant was not present, the trial court entered an order modifying the child support agreement and ordered defendant to pay eight hundred dollars per month in child support.[9] Defendant then appeared specially to move that the order be set aside as void due to lack of personal jurisdiction. In support of his motion defendant filed affidavits showing that his only contacts with North Carolina were the mailing of monthly support checks and his occasional visits. The trial court found that it could properly exercise jurisdiction over defendant and denied the motion.[10]

The North Carolina Court of Appeals affirmed the trial court's decision, noting that defendant's contacts included his daughter's nine-year residence in the State, his support payments sent to plaintiff in North Carolina, his visits to the State, his formal agreement that the child would reside with the mother, and his own benefits from the North Carolina laws that protected his child.[11] The court concluded that "[u]nder the circumstances there is nothing unfair about

5. *Id.* at 475, 329 S.E.2d at 664.

6. *Id.*

7. *Id.* at 475-76, 329 S.E.2d at 664.

8. *Id.*

9. *Id.* at 476, 329 S.E.2d at 664. In his findings of fact, Judge Israel indicated that the increased support was based on a demonstrated change in the child's needs and on evidence of defendant's increased ability to pay. The judge noted that at the time of the divorce, defendant was earning a salary of $950 per month and receiving $300 per month in dividend and interest income. The evidence showed that at the time of the hearing he was earning in excess of $50,000 per year. Record at 11-12, Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984), *rev'd*, 313 N.C. 474, 329 S.E.2d 663 (1985).

10. *Miller*, 313 N.C. at 476, 329 S.E.2d at 665.

11. Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984), *rev'd*, 313 N.C. 474, 329 S.E.2d 663 (1985).

adjudicating this child's needs from the defendant in our courts."[12]

The North Carolina Supreme Court reversed, ruling for the first time since 1979 on a domestic case in which the sole issue was personal jurisdiction. In concluding that defendant's contacts were insufficient to justify in personam jurisdiction, the court relied on the United States Supreme Court's minimum contacts analysis in *Kulko v. Superior Court*,[13] also a suit for increased child support by a mother against a nonresident father. Further, the *Miller* court concluded that allowing the exercise of visitation rights to serve as a basis for jurisdiction would have a detrimental effect on parental visitation.[14]

The "minimum contacts" standard applied in *Miller* was first articulated by the United States Supreme Court in *International Shoe Co. v. Washington*.[15] This standard has since become the test by which courts determine whether the due process rights of a nonresident defendant would be violated by a state's exercise of personal jurisdiction.[16] The Court stated that to comply with due process requirements, a defendant must have sufficient minimum contacts with the forum state such that the "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[17]

In *International Shoe* the Supreme Court sought to balance a state's need to redress the grievances of its citizens with an individual's need to be free from the unreasonable burden of defending in any forum in which a plaintiff might chose to bring an action.[18] The factors the Court considered relevant in the balancing process included the following: whether it would be inconvenient for the defendant to come to the forum, whether the defendant's activities in the state had been continuous and systematic, whether those activities in the state gave rise to the action, and the quality and nature of the activities.[19]

Since *International Shoe*, the Court has suggested certain guidelines that a court should use in determining whether minimum contacts are present. One of

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12. *Id.* at 682, 318 S.E.2d at 104.

13. 436 U.S. 84 (1978).

14. *Miller*, 313 N.C. at 478-80, 329 S.E.2d at 666-67.

15. 326 U.S. 310 (1945). *International Shoe* expanded the concept of jurisdiction from the old territorial standard articulated in Pennoyer v. Neff, 95 U.S. 714 (1877) (state had jurisdiction only over those within its borders), *overruled by* Shaffer v. Heitner, 443 U.S. 186 (1977), to the new standard of "minimum contacts" with the forum state. *International Shoe* was predicated on the growing impact of interstate commercial transactions and the need to protect the state's residents in those transactions. Accordingly, if a defendant had contacts with a state indicating an attempt to derive benefits from the state (especially economic benefits), the defendant was thought to have submitted to the state's jurisdiction. Those contacts would "make it reasonable and just, according to our traditional conception of fair play and substantial justice" for the state to exercise jurisdiction over the defendant. *International Shoe*, 326 U.S. at 320.

16. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (minimum contacts requirement satisfied by the contract which was the subject of the suit); *cf.* Chadbourn, Inc. v. Katz, 285 N.C. 700, 703-04, 208 S.E.2d 676, 678-79 (1974) (noting that recent United States Supreme Court cases beginning with *International Shoe* indicate a modern trend toward jurisdiction based on relationship between forum and subject matter of litigation).

17. *International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

18. *Id.* at 317.

19. *Id.* at 317-19.

the earliest guidelines was set out in *Hanson v. Denckla*[20] in which the Court indicated that the defendant's contacts must include some purposeful activity through which the defendant takes advantage of the protections and benefits of the forum state's laws. In *World-Wide Volkswagen Corp. v. Woodson*[21] the Court emphasized an additional inquiry: whether the defendant could foresee that he or she would be required to defend a suit in a particular forum. Two other relevant considerations that have been articulated by the Court are whether the defendant could foresee that his or her actions would "cause an effect" in the state[22] and whether the relationship between the defendant, the forum, and the type of litigation giving rise to the jurisdiction question is strong enough to give the forum an interest in resolving the litigation.[23]

Although the Supreme Court has articulated numerous criteria by which a court may measure the sufficiency of a defendant's contacts with a particular state, it is important to recognize that most courts use the phrase "minimum contacts" as a shorthand reference to the underlying principle of fairness.[24] The real concern is whether it is fair for a party to be required to defend an action in a particular forum.[25] If a defendant has sufficient contacts with the state, exercising jurisdiction is fair. If the defendant's contacts with the state are too tenuous, an exercise of jurisdiction is unjust.

In applying the Supreme Court's criteria for the exercise of in personam jurisdiction to the facts of *Miller*, Justice Mitchell indicated that the North Carolina courts have established a two-step analysis to determine whether in personam jurisdiction over a nonresident is warranted.[26] First, personal jurisdiction over the defendant must be authorized by statute.[27] Second, the exercise of that jurisdiction must not violate the defendant's due process

20. 357 U.S. 235, 253 (1958) (Delaware trustee not subject to Florida jurisdiction simply because the appointees and beneficiaries of trust were domiciled there).

21. 444 U.S. 286, 297-98 (1980) (because defendants could not reasonably anticipate being haled into Oklahoma court, jurisdiction was denied in products liability suit against New York automobile dealer and its wholesaler who did no business in Oklahoma).

22. Calder v. Jones, 465 U.S. 783 (1984) (California jurisdiction upheld in libel suit because defendant's intentional conduct in Florida was calculated to cause injury in California).

23. Keeton v. Hustler Magazine, 465 U.S. 770 (1984) (jurisdiction in libel suit based on distribution of libelous material in forum state and plaintiff's injury from it there).

24. *See, e.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 441, 176 N.E.2d 761, 766 (1961) ("[P]rocedural rules must be designed and appraised in the light of what is fair and just to both sides in the dispute."); *see also* Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970) (focusing on courts' confusion in analyzing jurisdictional questions and suggesting that because the majority of cases falls within the "fair play standard," the time-consuming minimum contacts analysis should be reserved for those cases that are truly questionable).

25. The *International Shoe* court stated:

> [D]ue process requires only that in order to subject a defendant 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."

International Shoe, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

26. *Miller*, 313 N.C. at 476, 329 S.E.2d at 665.

27. *See, e.g.*, Dillon v. Numismatic Funding Corp., 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977).

rights.[28] The court has examined the due process step of the analysis by focusing on two questions: (1) whether the defendant received actual notice of the action,[29] and (2) whether the defendant engaged in purposeful activity in North Carolina sufficient to justify the exercise of personal jurisdiction.[30]

The question of statutory authorization is a threshold inquiry; if there is no authorization, the analysis goes no further. Similarly, the forum state's reasonable assurance of actual notice to the defendant is a threshold inquiry. Once the court has satisfied itself that these requirements are met, it must undertake the more subjective "purposeful activity" inquiry.

In the first step of its analysis, the court must examine the North Carolina long-arm statute, which enumerates those circumstances in which a court may exercise personal jurisdiction over a nonresident defendant.[31] North Carolina courts and federal courts construing North Carolina law have repeatedly held that the long-arm statute is to be construed as liberally as possible within the limits of due process.[32] Those limits are the focus of the second step of the analysis: Has the defendant had adequate notice and does the defendant have sufficient contacts with the state to justify the exercise of personal jurisdiction?

The question whether a defendant's contacts with a state are sufficient to subject the defendant to personal jurisdiction is fact-specific and involves a balancing process. Thus, minimum contacts questions are examined on a case-by-case basis, and few bright line rules have emerged.[33]

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28. *Id.*

29. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 138, 231 S.E.2d 39, 41 (1977) (citing Goldman v. Parkland, 277 N.C. 223, 229, 176 S.E.2d 784, 788 (1970)). Notice is achieved by service of process. A judgment is invalid if the defendant received no notice and therefore had no chance to be heard. Coble v. Coble, 229 N.C. 81, 84, 47 S.E.2d 798, 800 (1948).

30. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 138, 231 S.E.2d 39, 41 (1977) (citing Goldman v. Parkland, 277 N.C. 223, 229, 176 S.E.2d 784, 788 (1970)).

31. N.C. GEN. STAT. § 1-75.4 (1983). The statute specifies that a court may exercise personal jurisdiction over a defendant who:

1. is a person present within the state, a resident of the state, or is engaged in substantial activity within the state;
2. causes an injury by an act or omission within the state;
3. causes an injury within the state by a foreign act or omission;
4. offers local goods or participates in local services or contracts;
5. possesses or controls local property;
6. is an officer or director of a domestic corporation;
7. is under an obligation of security instrument within the state;
8. is a party to an insurance contract and plaintiff was a resident of the state when the claim arose or when the event out of which the claim arose occurred within the state;
9. is subject to state taxes;
10. is in a marital relationship with a resident of the state.

Statutes of this kind often are called long-arm statutes because they reach beyond the state's territorial borders. 4 C. WRIGHT & A. MILLER, *supra* note 3, § 1068, at 243 (1969).

32. Modern Globe, Inc. v. Spellman, 45 N.C. App. 615, 623, 263 S.E.2d 859, 862, *cert. denied*, 300 N.C. 373, 267 S.E.2d 677 (1980); Munchak Corp. v. Riko Enter., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973). This liberal interpretation was carried to its logical limit in a trademark infringement suit in which the court held that "the prevailing law in North Carolina presumes the existence of in personam jurisdiction." Southern Case, Inc. v. Management Recruiters, Int'l, 544 F. Supp. 403, 405 (E.D.N.C. 1982).

33. The question whether minimum contacts exist "cannot be answered by applying a mechani-

Although the primary focus in a minimum contacts analysis is the defendant and his or her purposeful activity, *International Shoe* and its progeny require a balancing of interests of all parties involved—those of the state and the plaintiff as well as those of the defendant.[34] Courts have delineated factors to be considered in the balancing process under North Carolina law, including the quantity and quality of the contacts,[35] the connection between the cause of action and the contacts,[36] the forum state's interest in protecting its residents,[37] convenience of the forum,[38] and fairness to both the plaintiff and the defendant.[39] Understandably, such determinations turn on specific facts; even minor variations in the facts presented are likely to produce differing results.

The traditional factors used to decide jurisdictional questions are derived primarily from tort and contract law.[40] The "purposeful activity" analysis used in tort and contract decisions frequently focuses on the defendant's attempts to derive economic benefit through contacts with the state.[41] The parties to such actions typically are involved in arms-length relationships with one another, and the factors that bear on the decision whether to allow personal jurisdiction reflect this perspective. In *Vishay Intertechnology v. Delta International Corp.*,[42] for example, the United States Court of Appeals for the Fourth Circuit applied

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cal formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances." Farmer v. Ferris, 260 N.C. 619, 625, 133 S.E.2d 492, 497 (1963).

34. *See supra* notes 19-23 and accompanying text.

35. Parris v. Garner Commercial Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29 (1979) (Defendant insurance company was subject to North Carolina jurisdiction when its contacts included a listing in North Carolina telephone directories, a toll-free number to call from North Carolina, general agents who handled defendant's insurance listed in various North Carolina cities, and a letter to plaintiff's counsel in North Carolina regarding renewal of term life insurance.), *disc. rev. denied*, 297 N.C. 455, 256 S.E.2d 808 (1979).

36. Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977) (solicitation, advertising, and negotiations on a contract constituted attempts to enter North Carolina textile machinery market and were related to the causes of action in negligence, misrepresentation, and unfair and deceptive practices).

37. Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062 (4th Cir. 1982) (North Carolina's interests in the case included that plaintiff was a North Carolina resident, that plaintiff sought relief under the North Carolina unfair trade practices legislation, and that the action centered on goods which would have been manufactured within the State).

38. Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980) (although convenience of forum was a consideration, mere ownership of property in the state that was unconnected with the controversy did not support jurisdiction).

39. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977) (jurisdiction upheld in suit for breach of employment contract when defendant's contacts were solicitations of orders to buy coins from North Carolina citizens, $50,000 worth of business in 147 transactions, and sending a representative to appraise a collection).

40. The landmark Supreme Court decisions, *see supra* notes 15-23 and accompanying text, were contract, tort, and business cases, as were all the North Carolina and federal decisions cited *supra* notes 35-39. The notable exception to this pattern is Kulko v. Superior Court, 436 U.S. 84 (1978), the only domestic relations case involving a personal jurisdiction issue the Supreme Court has heard. *Kulko* is discussed at length *infra* at notes 53-66 and accompanying text.

41. *See* Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640 (1979) (jurisdiction in tort action upheld because defendant had contact with the state when he sold his wire art within its borders, although the sale was unrelated to the cause of action); Forman & Zuckerman, P.A. v. Schupak, 31 N.C. App. 62, 228 S.E.2d 503 (1976) (jurisdiction over nonresident attorneys established in contract action because defendants had sought out plaintiffs, had supervised plaintiffs' work, and had visited the state to attend a hearing related to the case for which they had hired plaintiffs), *disc. rev. denied*, 292 N.C. 264, 233 S.E.2d 391, *appeal dismissed*, 434 U.S. 804 (1977).

42. 696 F.2d 1062 (4th Cir. 1982).

North Carolina law to uphold jurisdiction over a nonresident defendant on the basis of three letters and five telephone calls to North Carolina.[43] The court concluded that those contacts were related to the causes of action—including unfair business practices, tortious interference with contract, and slander—and that the contacts were part of defendant's efforts to derive economic benefit through its contacts with the State.[44]

On the other hand, the North Carolina Supreme Court found no jurisdiction over a New York resident in a suit on a promissory note executed in favor of a North Carolina resident. Defendant had signed the note for his brother and thus derived "no attending commercial benefits to himself enforceable in the courts of North Carolina."[45] Because the relationship between the signor and the debtor was not at arms-length, the court was unwilling to find the "purposeful activity" that normally would be present in signing a promissory note.

Although most minimum contacts decisions have arisen in the context of tort and contract disputes, North Carolina courts have used the same analytical framework in domestic relations cases involving nonresidents. Because an alimony or child support order is a personal judgment against the debtor, due process restrictions apply,[46] and a court must have proper jurisdiction to enter a valid order against a defendant.[47] Statutory authorization for such jurisdiction usually exists. The North Carolina courts have held, for example, that the long-arm statute permits the assertion of personal jurisdiction in an action against a nonresident spouse for support on the grounds of abandonment[48] as well as in an action for arrearages in support payments.[49]

In *Moore v. Wilson*[50] plaintiff mother brought an action against the nonresident father for child support. Defendant moved to dismiss for lack of jurisdiction.[51] The court of appeals held that because defendant had signed an acknowledgment of paternity and a voluntary agreement to support the child in North Carolina, he had "engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum."[52]

In *Miller* the supreme court applied the North Carolina framework for minimum contacts analysis. Finding it unnecessary to address the statutory au-

43. *Id.* at 1068.

44. *Id.* at 1069.

45. United Buying Group, Inc. v. Coleman, 296 N.C. 510, 517, 251 S.E.2d 610, 615 (1979).

46. "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

47. Southern v. Southern, 43 N.C. App. 159, 258 S.E.2d 422 (1979) (court refused to enforce decree from English court requiring husband to pay alimony and child support arrearages when there was no showing that the English court had jurisdiction over the husband).

48. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976) (abandonment of resident plaintiff constituted an "injury to person or property" under N.C. GEN. STAT. § 1-75.4(3) (1983) and was statutory grounds for personal jurisdiction).

49. Moore v. Wilson, 62 N.C. App. 746, 303 S.E.2d 564 (1983).

50. 62 N.C. App. 746, 303 S.E.2d 564 (1983).

51. *Id.* at 746, 303 S.E.2d at 564.

52. *Id.* at 748, 303 S.E.2d at 565 (findings of fact included that defendant had been convicted of criminal nonsupport in North Carolina, had been held in contempt of that criminal order, and finally had complied with the order and had made payments for six years).

thority aspect of the two-step analysis, the court focused on whether an exercise of jurisdiction would violate defendant's due process rights. After examining the factors of the minimum contacts balance in light of the United States Supreme Court decision in *Kulko v. Superior Court*,[53] the *Miller* court concluded that defendant lacked sufficient contacts to justify jurisdiction.

Justice Mitchell indicated that *Kulko* mandated the finding of no jurisdiction in *Miller*. Both *Kulko* and *Miller* involved actions for child support brought against nonresident defendants. In *Kulko* the father, a New York resident with custody of his children, agreed to let the children live with their mother in California. The California Superior Court held that it could properly exercise jurisdiction over the defendant father in a suit for custody and increased child support, reasoning that "by consenting to his children's living in California, appellant had 'caused an effect in th[e] state' warranting the exercise of jurisdiction over him."[54] The United States Supreme Court reversed, holding that the father's acquiescence in the children's desire to live with their mother did not establish the minimum contacts required for personal jurisdiction.[55]

Although the *Miller* court concluded that it was compelled by *Kulko* to find that defendant's contacts were insufficient to support an exercise of personal jurisdiction,[56] a close examination of the facts could reasonably dictate a different result. Arguably, the facts in *Miller* were too dissimilar to those of *Kulko* to compel the court's finding.[57]

The North Carolina Supreme Court found that in *Miller*, as in *Kulko*, defendant had not engaged in any purposeful activity by which he had availed himself of the protections and benefits of North Carolina law.[58] In *Kulko*, however, a noncustodial parent brought suit in the state of her residence. The children had lived in that state on a temporary basis and with only the "acquiescence" of the father, in whose custody the children remained.[59] This situation differs from the more common fact pattern found in *Miller*, in which the custodial parent brought suit in the domicile of herself and the child. Although the court observed that the child's presence in North Carolina was due solely to plaintiff's decision to live there,[60] it should be noted that defendant had signed a formal agreement providing that the child would reside with plaintiff.[61] The father in *Miller* had done much more than acquiesce; he had given legal approval of the child's residence with the mother when he gave up his custody rights. If not quite purposeful activity, defendant's behavior in *Miller* was at least more purposeful than the mere acquiescence of defendant in *Kulko*.

53. 436 U.S. 84 (1978).

54. *Id.* at 88-89 (quoting Kulko v. Superior Court, 133 Cal. Rptr. 627, 628 (1976), *aff'd*, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977), *rev'd*, 436 U.S. 84 (1978)).

55. *Id.* at 101.

56. *Miller*, 313 N.C. at 478, 329 S.E.2d at 666.

57. *See Miller*, 69 N.C. App. at 682-83, 318 S.E.2d at 104.

58. *Miller*, 313 N.C. at 480-81, 329 S.E.2d at 667.

59. *Kulko*, 436 U.S. at 88.

60. *Miller*, 313 N.C. at 479, 329 S.E.2d at 666.

61. *Id.* at 475, 329 S.E.2d at 664.

In addition to declaring that defendant had not engaged in purposeful activity in North Carolina, the *Miller* court concluded that under *Kulko* the quantity and quality of defendant's contacts were insufficient to establish personal jurisdiction.[62] Specifically, the court indicated that defendant's occasional visits to the State to see his child could not serve as the basis for establishing jurisdiction. Quoting from *Kulko*, the court noted, " 'To hold such temporary visits to a State a basis for the assertion of in personam jurisdiction over unrelated actions arising in the future would make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment.' "[63] Although recognizing that the father's visits to California in *Kulko* were generally "fewer and more distant in time from the litigation"[64] than were the visits in *Miller*,[65] the court stated that "[t]he visits by this defendant to North Carolina . . . were no less temporary than those in *Kulko* and were *so unrelated to this action* that he could not have reasonably anticipated being subject to suit here."[66] It is difficult to imagine, however, what kinds of contacts would be more related to an action for child support than visits to and payments for the child whose support is in controversy. Furthermore, regular visits to one's child are less temporary and more purposeful than the military stopovers that occurred in *Kulko*.[67]

In a broad sense, defendant's contacts with North Carolina in *Miller* were not only the trips made to the State to visit his child. The nature of his relationship with his daughter could be considered a form of contact. In examining the quality and quantity of contacts a defendant has with a state, courts have long recognized that a single contractual agreement may be sufficient contact with the forum state if that agreement is the subject of the controversy and if it has a sufficient nexus to the forum.[68] In essence, it is the relationship established by contract that justifies the exercise of personal jurisdiction. The parent-child relationship, although not entered into voluntarily by both parties, is as deserving of protection as the relationship between contracting parties. The nonresident parent's interest in state laws protecting his or her parental rights in the parent-child relationship is as strong as the nonresident contracting party's interest in state laws protecting rights established by contract.

The *Miller* court also stated that although North Carolina may have been the most convenient forum in which to bring the action, convenience alone is not a sufficient basis for asserting personal jurisdiction over the defendant.[69] A further review of *Kulko*, however, clearly shows that the *Kulko* Court did consider

62. *Id.* at 479, 329 S.E.2d at 667.

63. *Id.* at 479-80, 329 S.E.2d at 667 (quoting *Kulko*, 436 U.S. at 93).

64. *Id.* at 480, 329 S.E.2d at 667.

65. The visits to California by Mr. Kulko to which the *Miller* court alluded consisted of a 3-day military stopover in 1959 and a 24-hour stopover in 1960—two visits 16 years prior to the lawsuit and before children were born to the Kulkos. *Kulko*, 436 U.S. at 93.

66. *Miller*, 313 N.C. at 480, 329 S.E.2d at 667 (emphasis added).

67. *See supra* note 65 and accompanying text.

68. *See, e.g.*, Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1985); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974); Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977).

69. *Miller*, 313 N.C. at 480, 329 S.E.2d at 667.

which state would provide the most convenient and fairest forum.[70] Because New York was the Kulko's marital domicile, because the father had custody there and provided a home for the children there, and because the mother had left the family domicile when she moved to California, a reasonable parent in the father's position would not have expected to travel 3,000 miles to litigate a family question. The fairest and most convenient forum clearly was New York.

North Carolina courts have also identified convenience and fairness of the forum as factors in the balancing process.[71] Convenience to the parties must be examined in light of alternative forums and the location of evidence and witnesses. In *Miller*, because both plaintiff and the child had lived in North Carolina for nine years at the time the child support action was brought, most of their evidence and witnesses would have been in that State. Defendant would have had to bring his evidence from Tokyo regardless of the forum chosen; thus, the burden of defending might not have been significantly greater in North Carolina than in California (defendant's domicile) or Illinois (the marital domicile).

The *Miller* court considered each factor of the balancing process separately.[72] Traditionally, however, these factors are considered together so that competing interests can be balanced. As the court indicated, none of defendant's contacts with North Carolina was sufficient in itself to establish personal jurisdiction.[73] However, defendant's contacts should have been viewed cumulatively in light of competing interests, and all the factors of the minimum contacts analysis should have been considered in the balancing process. The parent-child relationship, the convenience of the North Carolina forum, the relationship of defendant's contacts to the cause of action, and North Carolina's interest in the welfare of children domiciled in the State should have been balanced against the burden of defending in North Carolina, the interest in preserving state sovereignty, and defendant's minimal purposeful activity.

Although a strict minimum contacts analysis focused on purposeful activity could lead to the decision the court reached in *Miller*, such an analysis is inconsistent with North Carolina's stated policy of interpreting the long-arm statute as broadly as possible within the limits of due process.[74] In addition, the *Miller* court failed to consider the policy implications of applying a contract and tort oriented analysis in a domestic relations context.

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70. *Kulko*, 436 U.S. at 97-98.

71. *See, e.g.*, Fireman's Fund Ins. Co. v. Washington, 65 N.C. App. 38, 308 S.E.2d 758 (1983) (personal jurisdiction in declaratory judgment action by insurers over Florida residents involved in an automobile accident in North Carolina was upheld because Florida residents had filed suit in North Carolina regarding the accident), *disc. rev. denied*, 310 N.C. 624, 315 S.E.2d 690 (1984); *see supra* notes 38-39 and accompanying text.

72. The court discussed each factor in a separate paragraph of the opinion; it did not discuss the interplay of the factors. *Miller*, 313 N.C. at 479-481, 329 S.E.2d at 666-67.

73. The court reached a conclusion in each paragraph discussing each factor as to whether the presence or absence of *that* factor would establish jurisdiction. For example, the court said, "The fact that defendant in the instant case visited the child in North Carolina approximately six times between 1973 and 1981 is also insufficient to establish *in personam* jurisdiction over him." *Id.* at 479, 329 S.E.2d at 667. And again, "This fact [that North Carolina may be the most convenient forum] does not confer personal jurisdiction over a non-resident defendant." *Id.* at 480, 329 S.E.2d at 667.

74. *See supra* note 32 and accompanying text.

Several societal trends and related public policy considerations are relevant to the question whether traditional minimum contacts analysis should be used in domestic relations cases. American society has become increasingly transient.[75] When access to transportation was more limited, both parties to a marriage were likely to remain in the same geographic area after a divorce. Therefore, the marital domicile was considered the proper forum for resolving difficulties arising out of that relationship.[76] Today, however, ease of transportation often may lead to the parties' leaving the marital domicile.[77] Because a basic concern in deciding the fairness of the exercise of personal jurisdiction over a defendant is that the burden of defending not be too heavy,[78] it may be appropriate to determine whether the burden of defending would be heavier in the marital domicile or in the plaintiff's new domicile. Moreover, because the plaintiff usually is the dependent spouse, he or she may be the party least able to bear the expense of litigating in a foreign forum. Nevertheless, under traditional minimum contacts analysis, this party may be required to do so.[79] In *Miller*, because both parents had left the marital domicile, the court could have based its decision on whether the burden on defendant to come from Tokyo to defend in North Carolina was greater than it would have been to defend in California or Illinois.

Another consideration in certain domestic relations cases is the special vulnerability of children. As the real party in interest, the child is the one who suffers when the custodial parent cannot afford to sue for child support in a foreign forum.[80] In considering fairness to litigants, the *Miller* court should have weighed the child's limited resources and mobility against the inconvenience to defendant of defending in North Carolina.

A further and perhaps most important consideration in establishing personal jurisdiction in a domestic relations case involving children is the parent-child relationship.[81] Unlike the arms-length relationship in contract or tort

75. Comment, *Securing Personal Jurisdiction Over Nonresidents in Spousal and Child Support Suits: Is California's Long-Arm Too Short?*, 17 SAN DIEGO L. REV. 895, 901-02 (1980) (suggesting a new analysis for California jurisdiction questions in domestic relations cases because policy reasons have left the old analysis too rigid). In World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting), Justice Brennan addressed the relevance of increased commercialism, communication, and ease of transportation to the question of jurisdictional scope, citing statistics indicating that since the decision in *International Shoe* in 1945, the number of passenger miles flown on domestic and international flights had increased from 450 million to 176 billion in 1976. Automobile vehicle miles during the same period increased 500%. Justice Brennan noted that not only did this increase in activity increase contacts with other states, it also made defending in another jurisdiction less burdensome for a nonresident party. *Id.* at 308-09 & n.13

Further statistics document the transient nature of contemporary society. For example, 44.6% of respondents in the 1980 census reported that they lived in different houses in 1980 than the ones they lived in in 1975. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1984, at 16 (1984).

76. Comment, *supra* note 75, at 901-02.

77. *Id.* at 902.

78. In *International Shoe*, for example, the Supreme Court observed: "To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process." *International Shoe*, 326 U.S. at 317.

79. Comment, *supra* note 75, at 902.

80. *Id.* at 903-04.

81. *Id.* at 904-05.

cases, the parent-child relationship is personal and continuing. Although the relationship gives rise to legal rights and responsibilities, those rights and responsibilities are not based on the legal structure of a contract in which both sides have equal bargaining power, nor are they based on some arms-length violation of a tort duty owed to an unrelated third party. The parties to the parent-child relationship are not in equal positions; the child is dependent on the parent. Accordingly, when a controversy concerning that parent-child relationship arises, rules that apply to other types of relationships require modification before they may be fairly applied.

The United States Supreme Court has recognized the unique role of the family in society and has concluded that the role "requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children."[82] Providing for a child's welfare clearly is a "special need"; when a controversy arises in that context, it is well within the bounds of reason and fairness to suggest that the sensitivity and flexibility of which the Court has spoken warrant a relaxation of the strict minimum contacts analysis so that personal jurisdiction may be established over a nonresident defendant.

Other policy reasons support an expansive approach to the minimum contacts analysis in domestic relations cases. Although the state's interest in the case is a factor in the traditional minimum contacts test,[83] it is of special significance in a domestic relations case involving children. Foremost is the state's interest in the child's welfare. In North Carolina that interest has been considered so strong that even an agreement between the parents will not deprive the courts of their inherent and statutory power to protect a child's interests and provide for his or her welfare.[84] Furthermore, the state has a more abstract economic and sociological interest in the well-being of the child; generally, children who are taken care of are more likely to grow up to be productive citizens than are children who are not well provided for by their parents.[85]

Related to the state's interest is the power that state courts already have over custody arrangements. Courts are not required to find in personam jurisdiction to adjudicate child custody disputes.[86] Although a child support order is

82. Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion) (affirming right of pregnant minor to obtain abortion without parental or court consent).

83. *See supra* note 37 and accompanying text.

84. Bishop v. Bishop, 245 N.C. 573, 96 S.E.2d 721 (1957) (consent of parties to consent agreement stipulating child support payments did not deprive court of jurisdiction to increase payments).

85. *See* Yarborough v. Yarborough, 290 U.S. 202, 220 (1933) (Stone, J., dissenting). Justice Stone noted that the maintenance and support of children within a state is of particular concern to the government. "Their [the children's] tender years, their inability to provide for themselves, the importance to the state that its future citizens should be clothed, nourished and suitably educated, are considerations which lead all civilized countries to assume some control over the maintenance of minors." *Id.*; *see also* Comment, *supra* note 75, at 906 (noting that the interests of state government are both economic and sociological).

86. A custody order does not require in personam jurisdiction because it imposes no liability or civil obligation on either party. The jurisdiction essential to issue a valid custody order is granted by statute. North Carolina's codification of the Uniform Child Custody Jurisdiction Act generally authorizes jurisdiction if the forum state has been the residence of the child for at least six months, if the child and at least one contestant have a significant connection with the state, if the child is present in the state and emergency protection is required for the child's welfare, or if the forum state

a personal judgment and must be rendered in compliance with due process requirements, the connection between the power to order custody and the power to order support is a close one. In resolving a dispute between a New York couple in *Finlay v. Finlay*,[87] Judge Cardozo said, "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless."[88] Justice Frankfurter quoted *Finlay* to support the proposition that states must be free to do what is best for children when they are responsible for the care of minors within their borders.[89] The protection Judge Cardozo envisioned surely includes ensuring that states can reach those responsible for the children's support.

A recommendation to expand the minimum contacts test in domestic relations cases is not made without caveats. First, states have a recognized interest in preventing forum shopping.[90] In a federal system, the sovereign power of each state to try cases in its courts creates a limitation on the sovereignty of every other state. The reasonableness of exercising jurisdiction over a nonresident defendant "must be assessed 'in the context of our federal system of government.' "[91] Particularly in domestic relations cases, there are likely to be a number of jurisdictions that have some connection to the parties involved. The minimum contacts analysis, however, remains a balancing process; the factors of the expanded analysis should be examined just as the factors in the traditional analysis are examined. If an infringement of state sovereignty is found in either case, a court must refuse to exercise jurisdiction.

A second caveat is based on the existence of mechanisms such as the Uniform Reciprocal Enforcement of Support Act (URESA);[92] this Act may already

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is the most convenient and it appears that no other state could exercise jurisdiction. N.C. GEN. STAT. § 50A-3 (1984); *see also* 3 R. LEE, NORTH CAROLINA FAMILY LAW § 222 (4th ed. 1979) (discussing jurisdiction and procedure in child custody cases).

87. 240 N.Y. 429, 148 N.E. 624 (1925).

88. *Id.* at 431, 148 N.E. at 625.

89. Kovacs v. Brewer, 356 U.S. 604, 612 (1958) (Frankfurter, J., dissenting) (domestic relations case appealed from the North Carolina Supreme Court).

90. *See, e.g.*, Hamann v. American Motors Co., 131 Mich. App. 605, 609, 345 N.W.2d 699, 701 (1983) (applying doctrine of forum non conveniens).

91. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-94 (1980) (quoting *International Shoe*, 326 U.S. at 317). In *World-Wide Volkswagen*, the Court noted that

> the minimum contacts [test], in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

Id. at 291-92; *see also* Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596, 603 (7th Cir. 1979) (noting that an important factor in the determination of jurisdiction in a commercial contract dispute is " 'the best interests of the international and interstate systems' " (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 comment b (1969))); Note, Burger King v. Rudzewicz: *Flexibility v. Predictability in In Personam Jurisdiction*, 64 N.C.L. Rev. 880, 890-91 (1986) (noting that principles of federalism support a restrictive approach to jurisdiction).

92. N.C. GEN. STAT. §§ 52A-1 to -32 (1984). The Act (or similar legislation) has been enacted in all 50 states to extend the enforcement of support duties. 2 R. LEE, *supra* note 86, § 169, at 337. URESA

> allows an "obligee," any person owed a support duty, to file a petition in his or her home

protect a child's welfare without jurisdictional problems. This avenue of recourse was suggested by both the *Kulko* and *Miller* courts.[93] The limitations of the Act, however, include lengthy time delays, dilatory prosecution of plaintiffs' cases, and a variety of political problems that render the Act ineffectual in handling many child support actions.[94]

A final policy consideration is one noted by the *Miller* court when it expressed the fear of an adverse effect on visitation of children by noncustodial nonresident parents.[95] The court said that if the minimum contacts standard were satisfied by visiting the child in the forum state, a parent could visit a child only at the risk of subjecting himself or herself to the forum state's jurisdiction.[96] The court failed to mention, however, that a nonresident parent is subject to service of process each time he or she visits the child in the state because the state has jurisdiction over natural persons within its borders.[97] Moreover, if the parent-child relationship were to be a sufficient basis for minimum contacts, the parent already would be subject to suit in the forum of the child's residence; the parent, therefore, would incur no added risk by visiting the child.

The policy considerations discussed in this Note do not suggest the need to establish a new standard for the minimum contacts analysis. Rather, they indicate that because the traditional analysis is insensitive to the special character of parent-child relationships, a more expansive approach to personal jurisdiction questions in domestic relations cases would result in fairer and more consistent decisions.[98] The *Miller* court's decision was based on an overly broad reading of *Kulko* and an unduly narrow application of the minimum contacts standard. It is time to recognize that familial contacts are as valid in establishing personal

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state and receive a hearing on its merits in the "responding state" where the "obligor" resides. Court-appointed counsel in the responding state relieves the obligee of both the expense of engaging private counsel and the inconvenience of traveling to a distant forum.

Note, *Interstate Enforcement of Support Obligations Through Long Arm Statutes and URESA*, 18 J. FAM. L. 537, 540 (1979-80).

93. *Kulko*, 436 U.S. at 98-100; *Miller*, 313 N.C. at 480, 329 S.E.2d at 667.

94. *See* Note, *supra* note 92, at 541. Indifferent prosecution for nonresident plaintiffs may result in undue delay and poor preparation. Without a personal appearance, there is little likelihood of sympathy for the destitute plaintiff, and the obligor has a corresponding opportunity to present a persuasive case. Also, administration of the Act by various government agencies may influence the order in which petitions are handled. For example, if the program is administered by a branch of the welfare office, a welfare mother's petition is likely to go through the system before a non-welfare mother's so that if the petition is successful, the agency may have one less person on its rolls. *Id.*

95. *Miller*, 313 N.C. at 480, 329 S.E.2d at 667.

96. *Id.*

97. N.C. GEN. STAT. § 1-75.4(1) (1983) (The courts of this State have jurisdiction over a person "in any action . . . in which a claim is asserted against a party who when service of process is made upon such party [is] a natural person present within this State.").

98. Such an expansion is not altogether new to the North Carolina courts. In Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976), the North Carolina Court of Appeals held that the exercise of jurisdiction over a nonresident defendant who had maintained a marital domicile with plaintiff for nearly two years in North Carolina before abandoning plaintiff and moving to Delaware was warranted. The court cautiously noted: "Though this ruling expands the concept of personal jurisdiction, this expansion is limited by the particular circumstances of this case relative to defendant's acts and contacts within the State in addition to the domicile of the plaintiff-spouse as a jurisdictional basis." *Id.* at 116, 223 S.E.2d at 512.

jurisdiction in domestic controversies as economic contacts are in establishing jurisdiction in business controversies.

For the laws to reach all those "ill disposed neighbors" who assume a responsibility by maintaining family relationships with North Carolina residents, the court should analyze the question of personal jurisdiction by reference to the principle incorporated in the minimum contacts concept—fundamental fairness. If after a practical consideration of the relevant factors—ongoing parent-child relationship, special status of children, policy considerations in an increasingly mobile society, and the more traditional concerns of convenience of the forum, avoidance of an undue burden on the defendant, the state's interest in the matter, and the relationship of the defendant's contacts to the cause of action—it appears fair for a court to exercise jurisdiction over a nonresident defendant, then due process is not violated by an exercise of such jurisdiction. North Carolina's commitment should be to a fair and reasoned analysis encompassing not only the specific contacts of an individual, but how those contacts relate to the cause of action and to the residents of the State; in personam jurisdiction permits nothing less.

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