Extending Minimum Contacts to Alimony: Mizner v. Mizner

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COMMENT

EXTENDING “MINIMUM CONTACTS” TO ALIMONY:
MIZNER v. MIZNER

In 1877 the United States Supreme Court decided Pennoyer v. Neff, which held that a court must have “power” over a defendant in order to subject him to in personam jurisdiction. This doctrine has proved too inherently inflexible to deal adequately with the enormous number of interstate transactions in modern America. To meet this problem, numerous exceptions to Pennoyer have been established. One jurisdictional theory which has been employed to this end is the doctrine of “minimum contacts.” The essence of this doctrine is that a state may assume in personam jurisdiction over a defendant if he has “certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”

1 95 U.S. 714 (1877).
2 Pennoyer lays down two propositions: “[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.” Id. at 722. “[N]o State can exercise direct jurisdiction and authority over persons or property without its territory.” Id.
3 “[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent.” McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957).
4 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 27(1) (Proposed Official Draft, Part I, 1967) states that: “A state has power to exercise judicial jurisdiction over an individual on one or more of the following bases:
(a) presence;
(b) domicil;
(c) residence;
(d) nationality or citizenship;
(e) consent;
(f) appearance in an action;
(g) doing business in the state;
(h) an act done in the state;
(i) causing an effect in the state by an act done elsewhere;
(j) ownership, use or possession of a thing in the state;
(k) other relationships to the state which make the exercise of judicial jurisdiction reasonable.”
The philosophy underlying this section is that “[a] state has power to exercise judicial jurisdiction over a person if the person’s relationship to the state is such as to make the exercise of such jurisdiction reasonable.” Id. § 24(1).
plied by the United States Supreme Court to foreign corporations in cases involving state taxation,\(^6\) contracts\(^7\) and probate.\(^8\) Other courts have extended it to cover tort cases as well.\(^9\)

Is a further extension of “minimum contacts,” to include alimony and related areas in domestic relations feasible? This is the question to which this comment is addressed. Such an inquiry requires the consideration of two independent problems: statutory authority and constitutional power. Although both will be dealt with, primary emphasis will be placed on the latter. The “springboard” for this analysis is *Mizner v. Mizner*,\(^10\) in which the Nevada Supreme Court did apply the “minimum contacts” concept in an action to enforce a California alimony judgment.

### Alimony: The Status Quo

After “decades of confusion,”\(^11\) the effect of divorce decrees acquired *ex parte* was finally determined in two United States Supreme Court decisions, both entitled *Williams v. North Carolina*:\(^12\) Full faith and credit must be accorded an *ex parte* divorce granted by any state in which one spouse was, in fact, domiciled.\(^13\)

However, the rule of the two *Williams* cases has not been extended by the Court to alimony. In both *Estin v. Estin*\(^15\) and *Vanderbilt v. Vanderbilt*,\(^16\) state courts had awarded the plaintiff a decree of absolute divorce, with no provision for alimony.\(^17\) In each case a New York court refused to accord full faith and credit to the sister state’s denial of alimony.\(^18\) Relying on the *Williams* cases, the United

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\(^8\) Hanson v. Denckla, 357 U.S. 235 (1958).
\(^12\) 317 U.S. 287 (1942) [known as Williams v. North Carolina(I)]; 325 U.S. 226 (1945) [known as Williams v. North Carolina(II)].
\(^13\) The requirement that one spouse be a *bona fide* domiciliary of the state in which the divorce was obtained was established in *Williams v. North Carolina*(I), 325 U.S. 226 (1945). This point was not litigated in *Williams v. North Carolina* (I), 317 U.S. 287 (1942).
\(^15\) 334 U.S. 541 (1947).
\(^16\) 354 U.S. 416 (1956).
\(^17\) *See id. at 416-17; 334 U.S. 541, 543 (1947).*
\(^18\) *Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 135 N.E.2d 553, 153 N.Y.S.2d 1*
States Supreme Court found each divorce entitled to full faith and credit. The respective denials of alimony, however, were held to have been properly refused full faith and credit. This apparent contradiction, known as "divisible divorce," was explained in Estin as being necessary to accommodate important conflicting interests of law and policy.

Thus, with regard to alimony, there has been no advance beyond Pennoyer. An alimony judgment is in personam. As such, the court must have "power" over the defendant in order to have jurisdiction to grant the award. However, the Court has not decided any case in which the state of the marital domicile, with the requisite statutory authority, attempted to assert extraterritorial jurisdiction over an out-of-state defendant.

Mizner v. Mizner

Mizner involved precisely that situation. Mr. and Mrs. Mizner maintained their marital domicile in California from April, 1947 until March, 1965, when they separated, Mr. Mizner moving to Nevada. Mrs. Mizner filed suit in California for divorce and alimony. Pursuant to the California "long-arm statute," personal service of summons was made upon the defendant at his residence in Reno, Nevada. He did not appear. Mrs. Mizner was awarded an interlocutory decree of divorce and a judgment for $300 per month alimony.


21 As it was christened by the Court: "The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony." Estin v. Estin, 334 U.S. 541, 549 (emphasis added).

22 The Court explained that changes in marital status, such as divorce, should be given full faith and credit whenever possible to avoid bigamous marriages and illegitimate children. There being no such considerations involved with respect to alimony, it should be fully litigated. Id. at 546-47.


24 May v. Anderson, 345 U.S. 528 (1952) (a child custody case), cited as controlling by Justice Batjer, dissenting in Mizner v. Mizner, — Nev. —, —, 439 P.2d 679, 684 (1968), is not on point. The forum state in May was the state of the marital domicile. However, it attempted to assert personal jurisdiction over the nonresident defendant without statutory authority. May v. Anderson, supra at 530-31. Therefore, the constitutional question was not reached. See text accompanying notes 42-43, and note 43 infra.

25 In Vanderbilt v. Vanderbilt, 354 U.S. 416 (1956) and Estin v. Estin, 334 U.S. 541 (1947), the forum state was not the state of the marital domicile. See text accompanying notes 118-119 infra.

26 See text accompanying notes 44-46 infra.

Mrs. Mizner brought suit in Nevada to enforce the California alimony judgment, asserting that it was entitled to full faith and credit in the Nevada court. Her motion for summary judgment as to that issue was granted28 and the husband appealed. His attack was directed solely at the validity of that part of the original decree which awarded alimony. He contended that the assumption of jurisdiction by the California court was a denial of due process in violation of the 14th amendment.29

In a 3-2 decision, the Nevada Supreme Court held that the lower court decision granting Mrs. Mizner summary judgment had been correct;30 i.e., that the California judgment was entitled to full faith and credit in Nevada. The opinion relied upon the cases delineating the “minimum contacts” concept of personal jurisdiction over out-of-state defendants: International Shoe Co. v. Washington,31 Travelers Health Ass'n v. Virginia,32 Perkins v. Benguet Consol. Mining Co.,33 McGee v. International Life Ins. Co.,34 and Hanson v. Denckla.35

The court recognized that none of the cited cases involved a personal judgment for alimony,36 but noted that the doctrine of “minimum contacts” is “peculiarly suited to matrimonial support cases.”37 It observed that the resulting extension of in personam jurisdiction would help to solve some of the hardships arising from family separation.38 Particularly, it would rend the shield of “migratory divorce” used by spouses to avoid their financial responsibilities.39 The deep interest of the state in preventing the impoverishment of its citizens would thereby be effectuated.40

Chief Justice Thompson, writing for the court in Mizner, concluded that in personam jurisdiction may be acquired over a nonresident defendant in an alimony action by extraterritorial personal service of process if:

(1) a statute of the support-ordering state has authorized the acquisition of such jurisdiction in that manner, and

(2) there exist sufficient contacts between the defendant and the forum relevant to the cause of action to satisfy “traditional notions of fair play and substantial justice.”41

29 Id.
30 Id. at —, 439 P.2d at 681.
31 326 U.S. 310 (1945).
33 342 U.S. 437 (1952).
34 355 U.S. 220 (1957).
37 Id.
38 Id.
39 Id.
40 Id. at —, 439 P.2d at 681.
41 Id.
Thus, *Mizner* represents a step beyond the *status quo* in alimony. It transcends the "power" doctrine of *Pennoyer* by applying the more flexible standard of "minimum contacts."

**Statutory Authority**

The first question presented by *Mizner* is: Does the court of the support-ordering state have the statutory authority to decide the case? The answer turns on legislative action. If the "long-arm statute" of the forum state encompasses extraterritorial service in actions for alimony there is the requisite "statutory authority." Without it, the court lacks competence, and any judgment it renders is void. The existence of statutory authority is therefore a condition precedent to the consideration of the constitutional question.

In *Mizner*, the state whose statutory authority was involved was California, whose "long-arm statute" consists of Code of Civil Procedure sections 412, 413 and 417. Section 412 provides that "[w]here the person on whom service is made resides out of the state [and] . . . a cause of action exists against the defendant . . . [t]he court, or judge, may make an order that the service be made by publication of the summons." Section 413 says that "[w]hen publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication. . . ." And section 417 provides that "[w]here 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 . . . (b) at the time that the cause of action arose." (Emphasis added).

There seems to have been no dispute that the defendant, Mr. Mizner, resided out of the state, that a cause of action existed against him, that he was personally served in Nevada, and that he was a *domiciliary* of California at the time the cause of action arose. Since "resident," as used in California Code of Civil Procedure section 417, has been judicially determined to mean "domiciliary,"

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42 *RESTATEMENT OF JUDGMENTS* § 7, comment a (1942).
43 "There are two parts to the question whether a foreign corporation can be subject to suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented . . . If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise whether such attempt violates the due process clause." Pulson v. American Rolling Mill Co., 170 F.2d 193, 194 (1st Cir. 1948) (Goodrich, J).
44 *CAL. CODE CIV. PROC.* § 412.
45 *CAL. CODE CIV. PROC.* § 413.
46 *CAL. CODE CIV. PROC.* § 417.
there were no grounds on which to argue that the California court lacked the statutory authority to decide the case.

**Constitutional Power**

The second question presented by Mizner is: Does the court of the support-ordering state have the constitutional power to decide the case? In order to ascertain if the doctrine of "minimum contacts" may, consistently with due process, be applied to alimony, three essential questions must be answered. First, are the contacts in Mizner, as judged by the standards presented in *International Shoe et al.*, sufficient to be considered "minimum contacts?" Second, have the cases been limited so as to preclude the application of the "minimum contacts" test in alimony proceedings? Third, do these proceedings present jurisdictional problems so unusual that jurisdictional standards unique to them are necessary?

**Minimum Contacts**

The United States Supreme Court has decided five cases dealing with "minimum contacts." At issue in each was whether the subjection of a nonresident defendant to personal jurisdiction by the forum state was a denial of due process. In none of the five has the Court spelled out a precise test for the "minimum contacts" concept. An analysis of these cases, however, reveals an adequate set of general guidelines.

Before the "minimum contacts" test can even be applied, the defendant must conduct some activities within the forum state. To be amenable to suit there, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws." This is in the nature of a condition precedent.

The determination of the existence (or nonexistence) of "mini-

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51 In *International Shoe*, the Court asserts that the due process clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations." Id.


"Minimum contacts" is the process by which a court decides if the defendant has carried on sufficient activities within the state to be sued there. This process is not mechanistic. Instead, it is flexible, being, in truth, aimed at attaining "fair play and substantial justice." In the five cases, the Court considered the following factors to be of importance in determining whether sufficient contacts existed (listed according to importance, in the author's opinion):

1. Whether the activities of the defendant within the state were systematic and continuous.
2. The state's interest in protecting its citizens with respect to the type of action involved.
3. Whether the cause of action sued upon is related to the activities carried on within the state.
4. The nature and quality of the defendant's act(s) when (a) the activities were continuous but the cause of action was unrelated to them; or (b) there was one, or only an occasional act within the state.
5. The convenience of trying the case in the forum state.
6. The inconvenience to the defendant of defending the action away from home.
7. The expense and trouble to the plaintiff of going to the defendant's state to sue.
8. The problems involved in the plaintiff's adopting a different, though available, method of pursuing his remedy.

Thus, in applying the "minimum contacts" concept to the facts of the case, the court in Mizner was faced with seeking answers to two jurisdictional questions. First, did the defendant do "some act" within the forum state which is the condition precedent for the application of the "minimum contacts" test? This must be answered in the affirmative. Mr. Mizner established a domicile in California and

55 Id.
56 Id. at 316.
maintained it for some eight years. Second, as judged by the criteria enumerated above, were the defendant's activities within the forum state sufficient to be considered "minimum contacts?" This question can be answered by considering the factual contacts in Mizner within the guidelines presented by the standards previously given. Analysis shows several factors in favor of upholding California's assumption of jurisdiction over the out-of-state defendant, and only one opposed to it.

The defendant's activities within the state were both continuous and systematic, thus meeting the most important criteria for finding sufficient "minimum contacts." The primary meaning of domicile is "home," as that term is understood by a layman. It cannot be doubted, as a general proposition, that the activities resulting from the maintenance of a permanent home are continuous and systematic, although there are situations in which a person will have very few contacts with the state of his marital domicile. However, Mizner did not present such a situation.

The maintenance of the marital domicile in California also gave that state a strong interest in the proceedings. In cases such as Mizner, the potential impoverishment of the plaintiff is often at stake. A state has a clear interest in protecting its citizens against such an occurrence. Also, it seems clear that the cause of action for alimony arose out of activities within the state, since alimony is considered compensation for the loss resulting from the defendant's breach of the obligations of the marital relationship.

Further, California was

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69 See note 80 infra.
70 There is nothing in the Mizner cases to indicate that the defendant had had substantial activities in any state other than California. Further, in Mizner v. Mizner, No. 101,297 (Super. Ct. Cal., filed Dec. 6, 1966), it was found that among the community property assets in California were a parcel of improved real property, household furniture, furnishings, appliances and effects, and a bank account. These assets substantiate the fact that the Mizners maintained a "home" in California.
the most convenient place to try the case, since the corroborating witness, required by law in California for alimony to be granted, and Mrs. Mizner were both living in California at the time of the suit.

The sole factor which tended to mitigate against California assuming personal jurisdiction over the nonresident defendant was the inconvenience to him in having to defend the action away from his home. This may not be very important when the defendant is a corporation, but might be accorded substantial weight when an individual is involved. But even assuming this factor would receive substantial weight, it should not be sufficient, by itself, to outweigh the factors in favor of California's assumption of jurisdiction.

It should be noted that the analytical turning point in Mizner is that the defendant had maintained his marital domicile in the forum state. Because his contacts with that state were those of a marital domiciliary, analysis showed that four important factors of the "minimum contacts" test balanced in favor of California's assuming jurisdiction. It seems safe to assume that Mizner represents a fairly typical case; that a marital domiciliary generally will have approximately the same contacts with his domicile as did the defendant in Mizner. Therefore, whenever one state is both the marital domicile and the forum, analysis almost always will demonstrate sufficient "minimum contacts" to allow the assumption of jurisdiction by that state. There might be exceptions, but they would be unusual.

73 In both McGee and Travelers Health it was the presence of the necessary witness in the forum state which made it the most convenient state in which to try the case. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 649 (1950).


75 The corroborating witness in Mizner was the couple's married daughter, Gwenn Lee McGrew. At the time of the divorce action, Mrs. McGrew was living at 202 Hazel Drive, Pleasant Hills, California. Mrs. Mizner was living with her. Letter from James R. Holmstrom to the Hastings Law Journal, Sept. 10, 1968, on file in Hastings Law Library.

76 In the author's opinion, the other factors set out in the five Supreme Court cases are not relevant to the case at hand.

77 In McGee v. International Life Ins. Co., 355 U.S. 220, 224 (1945), the inconvenience to a Texas corporation in defending a suit in California was cursorily brushed aside, despite the fact that it had had no contacts with the state save the single contract upon which suit was brought.


79 See note 116 infra.

80 Domicile is defined as physical presence in a state with an intent to make a home there, "for the time at least." Restatement (Second) of Conflict of Laws §§ 15, 16, 18 (Proposed Official Draft, pt. I, 1967). Once domicile is acquired, it is retained until a new one is established. Id. § 18. A couple might thus be away from the marital domicile indefinitely and still
Corporations Only?

It does not appear that the concept of "minimum contacts" has in any way been directly limited to preclude its application to alimony. However, the five United States Supreme Court cases have in common the significant fact that the party over whom extraterritorial in personam jurisdiction was sought was a corporation.81 Thus, a question which must be answered is: Is the concept of "minimum contacts" limited, by implication, to corporate defendants?

Of the three basic policy statements in International Shoe, one remain domiciliaries, provided that they do not intend to make a home in any other place. An extreme example is that a person who travels about in a mobile home does not, during his travels, acquire a new domicile. Id. § 16, comment c.

A more normal example might run as follows: H and W have their marital domicile in state A. They travel extensively, having little contact with state A. Eventually they part; H going to state B, W to state C. W, brings suit in state A for divorce and alimony. It is submitted that state A could not enter a personal judgment for alimony against H. The establishment of the marital domicile in state A would be sufficient to allow the "minimum contacts" test to be applied. However, the defendant's activities in state A could not be considered "continuous and systematic." Also, state A would have no interest in the outcome of the proceedings since W has ceased to be a citizen of that state. Further, depending upon the particular facts, it is probable that the cause of action would not have arisen out of the activities within the state, and that the necessary corroborating witness would not live there.

This submission is given some support by Owens v. Superior Court, 52 Cal. 2d 822, 829, 345 P.2d 921, 924 (1959) (Traynor, C.J.) (dictum). "If, for example, neither the plaintiff nor the defendant were presently domiciled here and the cause of action arose out of the defendant's activities elsewhere, the fact standing alone that the defendant was domiciled here at the time the cause of action arose might be too tenuous a basis for asserting jurisdiction over him."

Compare the author's preceding hypothetical situation with the following: H and W have their marital domicile in state A where they spend all of their time. They separate; H going to state B, W to state C. W brings an action for divorce in state A. The "minimum contacts test would clearly be applicable. Also, the defendant's actions would be considered "continuous and systematic". However, since W has ceased to be a citizen of state A, "state interest" would not favor that state's assuming jurisdiction. But, if the cause of action arose out of the activities within the state, state A probably would be able to assume in personam jurisdiction over H. The existence of sufficient "minimum contacts" has never been doubted when the activities of the corporation there [in the forum state] have not only been continuous and systematic, but also give rise to the liabilities sued on . . . ." International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

81 The corporations were, with the exception of Hanson v. Denckla, those named in the case name, i.e., the International Shoe Co., the Travelers Health Ass'n (an unincorporated association), the Benguet Consol. Mining Co., and the International Life Ins. Co. In Hanson, the corporation involved was the Wilmington Trust Co.
refers only to "corporation," and the second to "defendant," and the third at one point to "corporation," and at another to "an individual or corporate defendant." Thus, the case is not decisive in determining if "minimum contacts" applies to defendants who are individuals. However, in McGee, Mr. Justice Black, writing for a unanimous court, gave an overview of the cases from Pennoyer through International Shoe:

Since Pennoyer v. Neff, 95 U.S. 714, this court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. . . .

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.

Although dictum, this statement appears decisive on the issue, since its very terms, specifically envisage reaching nonresident defendants who are individuals. While the greater part of the litigation has involved nonresident corporations, on the strength of McGee "minimum contacts" is applicable to individuals as well. This rationale has been accepted by several appellate court decisions, including Calagaz v. Calhoon and Owens v. Superior Court.

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82 "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly said to be undue." International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (emphasis added).

83 "Due 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.'" Id. at 316 (emphasis added).

84 "It is evident that the criteria by which we mark the boundary line between those activities which justify the submission of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend rather upon the quality and nature to the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." Id. at 319 (emphasis added).


86 Id. at 222 (dictum) (emphasis added).

87 E.g., Schutt v. Commercial Travelers Mut. Accident Ass'n, 229 F.2d 158, 159 (2d Cir. 1956) (dictum) (Medina, J.).

88 309 F.2d 248 (5th Cir. 1962). The court was required to "decide if the 'minimum contacts' test enunciated in International Shoe Co. v. Washington . . . applies to natural persons as well as to corporations." Id. at 254. It con-
Thus, the fact that the defendant in *Mizner* was an individual, rather than a corporation, does not render the "minimum contacts" concept less applicable to him. It should be applied to individuals whenever "fair play and substantial justice" so dictate.  

**Continuing Jurisdiction**

With respect to finality, alimony judgments are distinct from judgments entered in tort or contract actions. In the latter, there is a final judgment which ends the case. In the former, however, the trial court retains continuing jurisdiction to modify the amount of the award. Thus, the defendant conceivably faces a lifetime of litigation. This distinction Justice Collins, dissenting in *Mizner*, finds sufficient to require a "different substantive due process requirement."

Whether such a conclusion is warranted may be ascertained by examining the protections afforded the interests of a nonappearing defendant. The steps leading from the bringing of the original action concluded that the "broad language of the opinion [in *International Shoe*] indicates that it does." *Id.*. The opinion went on to say that "it would seem that the same considerations of fairness and the nature of the defendant's activities in the state which are utilized in determining jurisdiction over corporations would be equally applicable when the defendant is a natural person." *Id.* at 225.

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89 52 Cal. 2d 822, 345 P.2d 921 (1959). Chief Justice Traynor, writing for the California Supreme Court, stated that "[t]he rationale of the *International Shoe* case is not limited to foreign corporations, and both its language and the cases sustaining jurisdiction over nonresident motorists make clear that the minimum contacts test for jurisdiction applies to individuals as well as to foreign corporations." *Id.* at 831, 345 P.2d at 924-25.

90 *But cf.*, Ehrenzweig, *Pennaoyer Is Dead—Long Live Pennoyer*, 30 Rocky Mt. L. Rev. 285, 292 (1958) where it is suggested that the fact that a corporation necessarily will have transacted business within the forum, while an individual's contacts may be of a more varied nature, necessitates different approaches for the two with regard to "minimum contacts." Professor Ehrenzweig concludes that "absent individuals not transacting business in the state will have to remain exempt from jurisdiction with specific exceptions to be established from case to case." *Id.*


93 In his dissenting opinion in *Mizner*, Justice Collins also suggests that the defendant's estate might be bound after his death. *Mizner v. Mizner*, — Nev. —, 439 P.2d 679, 683 (1968). In view of the provision in California Civil Code section 139 that "[e]xcept as otherwise agreed by the parties in writing, the obligation of any party . . . shall terminate upon the death of the obligor," this suggestion must be regarded as unfounded.

to a modification are three in number: (1) a divorce is granted, (2) an alimony judgment is awarded with the divorce, (3) the alimony judgment is modified as to amount. As will be seen, the rights of a nonappearing defendant are afforded some protection at each juncture. Although the discussion which follows refers only to California, similar protections exist in other states. 95

Alimony is awarded in conjunction with a decree of divorce. 96 Since the plaintiff spouse must offer proof of the facts alleged in order to obtain the divorce, 97 the defendant is given some modicum of protection. This, however, tends to be illusory in that courts generally grant divorces summarily. 98

However, in the determination of the amount of the alimony award, the interests of the nonappearing spouse receive substantial actual protection. The plaintiff spouse is entitled to alimony sufficient to supply her needs, 99 or, if possible, to maintain her normal standard of living. 100 However, the uppermost limit of the award is the defendant's ability to pay. 101 These elements must be alleged and proved by the plaintiff. 102 An award which improperly balances these elements amounts to an abuse of discretion. 103 These limitations give the nonappearing defendant considerable protection against an unreasonable initial award.

To this point, there is little difference between uncontested alm-

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95 See H. CLARK, DOMESTIC RELATIONS § 13.7, at 395-96; § 13.7, at 399-402; § 14.5, at 442-45; § 14.9, at 456 & n.34; § 14.9, at 459-61 (1968). [hereinafter cited as CLARK]. Section 13.7 at 395-96 is concerned with the protections offered the interests of the nonappearing defendant when divorce is granted. Section 13.7 at 399-402 specifically treats corroboration. Section 14.5 at 442-45 deals with the factors involved in determining the amount of the alimony award. Section 14.9 at 456 & n.34 indicates that it is a universal rule that a change of circumstances is required for modification. Section 14.9 at 459-61 treats the factors allowing modification of the award as to increase.

96 CAL. CIV. CODE § 139.

97 "No divorce can be granted upon the default of the defendant or upon the uncorroborated statement, admission, or testimony of the parties . . . but the court must . . . require proof of the facts alleged." CAL. CIV. CODE § 130. In Zwarenstyn v. Zwarenstyn, 347 Mich. 353, 79 N.W.2d 913 (1956), where there was no testimony offered to prove the facts alleged and divorce was nevertheless granted, the case was reversed and remanded on appeal. The Michigan statute, M.C.L. § 522.40 (1948) is (and was in 1956) the same, in substance, as California Civil Code section 130.

98 See CLARK § 13.7 at 395-96. See also H. O'GORMAN, LAWYERS AND MATRIMONIAL CASES 21 (1963).


mony judgments and those awarded in tort or contract actions in which the defendant does not appear. In each the plaintiff has brought an action and received a judgment. It is the possibility of modification that sets the alimony judgment apart. It is in subsequent actions for modification that the defendant's interests are afforded the greatest protection. The essential requisite for modification is a change of circumstances since the original order sufficient to warrant an alteration. Modifications granting an increase generally have been allowed only in two situations: (1) where the obligor’s ability to pay has increased and, (2) where the obligee has incurred significant medical expenses subsequent to the judgment. A further protection to the defendant is that he must be given notice of the proposed modification. Given the limited grounds for modification, the necessity for a showing of a change of circumstances, and the notice given to the obligor, the threat to his interests is not too drastic.

Furthermore, modification is also available to the obligor. A state is required only to give foreign judgments “the same full faith and credit... as they have by law or usage in the courts of such State... from which they are taken.” Therefore, whatever the California courts can do in modifying the decree, the Nevada courts, or those of any other state, can also do. Thus, the obligor may seek modification in the courts of whatever state he is a resident.

Because the trial court retains continuing jurisdiction to modify the original alimony judgment, the argument against applying “minimum contacts” to alimony proceedings has considerable validity. However, as has been pointed out, the threat to the nonappearing defendant’s interests is less formidable than it appears. In the last analysis, a question of basic policy is presented. Are the burdens placed upon the absent spouse sufficiently weighty that “traditional notions of fair play and substantial justice” require that he be able

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105 Whether a particular change of circumstances is “sufficient” rests largely in the discretion of the trial court. Id. at 262, 309 P.2d at 443.
109 CAL. CIV. CODE § 147. This may be a constitutional requirement under the due process clause. See Griffin v. Griffin, 327 U.S. 220, 231 (1945).
113 In fact, these would tend to dictate that the husband would be amenable to suit. Traditionally, a husband has been considered to be under a duty to support his wife. Manby v. Scott, 88 Eng. Rep. 781 (K.B. 1659); 1 BLACKSTONE, COMMENTARIES *442; F. POLLACK & F. MAITLAND, HISTORY OF THE ENG-
to abdicate his responsibilities to his wife and children? It would not seem so.

**State Other Than the Marital Domicile**

Consideration must be given to the possibility that a state other than that of the marital domicile might attempt to assert personal jurisdiction over an out-of-state defendant using the rationale of *Mizner*. Most often, the "minimum contacts" test could not even be employed. In a state other than the marital domicile, the defendant spouse generally would not have conducted the activities which operate as a condition precedent to the application of the test. Even if the test could be employed, for example where the couple had maintained a residence in the forum state, there generally would not be sufficient contacts. This is so because sufficient "minimum contacts" exist by the force of the fact that the forum state is also the state of the marital domicile. It seems that, as a general rule, no state other than that of the marital domicile could constitutionally employ "minimum contacts" to obtain personal jurisdiction over a nonresident defendant to award alimony.

There was no common law duty for a father to support his child. However, it has been acknowledged that a father owes his children a certain amount of fair play. See *Yarborough v. Yarborough*, 290 U.S. 202, 220-22 (1933) (Stone, J.) (dissenting opinion). That a father is primarily liable for the support of his children is recognized by statute in California. CAL. CIV. CODE §§ 196, 242. The author submits that the holding in *Mizner* is applicable equally with regard to child support. See text accompanying notes 124-127 infra.

The defendant's actions in *Mizner* were "systematic and continuous" because they were associated with having a home. See text accompanying notes 67-70 supra. The "state interest" factor came into play in *Mizner* because the plaintiff was a domiciliary of the forum state. See text accompanying note 71 supra. The cause of action arose out of the activities within the state because they were those of a domiciliary. See text accompanying note 72 supra. California was the most convenient state in which to try the case because the corroborating witness was there. See text accompanying notes 73-75 supra. In addition, witnesses to activities will generally be found where those activities take place, i.e., where the home is.

A situation in which the general rule might not be applied runs as follows: H and W are domiciled in state A. They have a residence in state B, where they spend a significant amount of time. The couple separates, W moving permanently to state B. She brings an action in state B for divorce and alimony.

The "minimum contacts" test is clearly applicable. However, on its application, the facts present a very close case. H's activities in state B seem more sporadic than "systematic and continuous." However, the "state interest" factor balances in favor of the assumption of jurisdiction in that W has become a citizen of that state. Perhaps this latter factor would be given sufficient
It is on this basis that Mizner may be harmonized with Estin,\textsuperscript{118} which was cited in Hanson\textsuperscript{129} to show that “minimum contacts” has not obliterated all restrictions on the states’ power to assume in personam jurisdiction over nonresident defendants. In Mizner, the forum state was also the state of the marital domicile and the defendant had had all the contacts with the forum incident to having a permanent home there. In Estin\textsuperscript{121} and Vanderbilt,\textsuperscript{122} however, each respective defendant had had no contacts whatsoever with the forum state during the marriage. Reading Mizner together with Estin and Vanderbilt, the result would seem to be that the doctrine of “divisible divorce” would be followed except where the defendant had had sufficient contacts with the forum state to be amenable to suit there. In such cases, both the divorce decree and the alimony judgment would be entitled to full faith and credit.

### Child Support

It would appear that alimony is not the only proceeding in the field of domestic relations to which the rationale of Mizner could be applied. “Minimum contacts” might be used in other in personam domestic relations proceedings,\textsuperscript{123} particularly child support. Analytical weight to carry the case. Then again, perhaps the answer would turn upon consideration of some of the less important factors. A third possibility is that the considerations suggested by Professor Ehrenzweig would dictate that all close cases be decided against upholding the assumption of jurisdiction. See note 90 supra. The author submits only that $W$ would be well advised not to bring her action in state $B$.

\textsuperscript{118} 354 U.S. 541 (1947). In this case, the parties were domiciled in New York. $W$ brought suit in that state and was granted a separation and $\$180 per month permanent alimony. $H$ then went to Nevada and was granted a divorce there. The decree made no provision for alimony. The question presented was whether the Nevada court could cut off $W$’s New York alimony. It was held that it could not, since the Nevada court had obtained no jurisdiction over $W$.

\textsuperscript{119} 354 U.S. 416 (1957). This case presented the same fact situation as in Estin, except that $W$ had not reduced her claim for support to judgment prior to the Nevada divorce. This was found not to be relevant.

\textsuperscript{120} Hanson v. Denckla, 357 U.S. 235, 251 (1958).

\textsuperscript{121} Estin v. Estin, 63 N.Y.S. 476, 477-78 (Sup. Ct. 1946).

\textsuperscript{122} Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 153 N.Y.S.2d 1, 135 N.E.2d 553 (1956).

\textsuperscript{123} Aside from child support, which is discussed in the text accompanying notes 124-127 infra, the other possible in personam proceeding in domestic relations is child custody. However, the jurisdictional basis to award custody is somewhat confused. Clark’s § 11.5. The traditional view is that custody is a status and that therefore only the state where the child is domiciled has jurisdiction. See 3 J. Beale, Conflict of Laws § 144.3 (1935). This has been much criticized. See, e.g., Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Rev. 345 (1953); Stansbury, Custody and Maintenance Law Across State Lines, 10 Law & Contemp. Prob. 819 (1944).

Although not strictly on point, May v. Anderson, 345 U.S. 528 (1953), indi-
ically, child support involves the same factors and jurisdictional problems as alimony. Therefore, it would seem that any fact situation in which there would be sufficient "minimum contacts" for an alimony award, there would also be sufficient "minimum contacts" for child support.

If anything, child support presents a stronger case for application of the "minimum contacts" test than does alimony, for two reasons. First, the unique interest of a state in the maintenance and support of domiciled children might indicate that a state would have a greater interest in providing for their economic well being than for that of a wife. Second, the burden placed upon the defendant due to the trial court's continuing jurisdiction would be lighter with respect to child support. Alimony payments may continue indefinitely, while child support ceases upon the child attaining his majority.

Disregarding both the traditional view and May, courts have adopted a more pragmatic standard. They assume jurisdiction in child custody cases whenever (1) the forum state has significant interest in the outcome of the proceedings and, (2) the decree rendered will be enforceable. Id. § 11.5 at 320-21. With this in mind, the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (Proposed Official Draft, pt. I, 1967) states that:

"A state has power to exercise judicial jurisdiction to determine the custody... of the person of a child...

(a) who is domiciled in the state, or

(b) who is present in the state, or

(c) who is neither domiciled nor present in the state, if the controversy is between two or more persons who are personally subject to the jurisdiction of the state.

Given the confusion present in this area, the author hesitates even to go so far as to call child custody "in personam."

Assume that Mizner had involved child support rather than alimony. It seems clear that precisely the same analytical process would be followed in determining if the contacts of the defendant with the forum state were sufficient to be considered "minimum contacts." The results of the analysis likewise would be the same. The defendant would be found to be amenable to suit in California.

The defendant again would be an individual, and the trial court again would retain continuing jurisdiction to modify the award. CAL. CIV. CODE § 139.

"The maintenance and support of children domiciled within a state... is a subject in which government itself is deemed to have a peculiar interest and concern." Yarborough v. Yarborough, 290 U.S. 202, 220 (1933) (Stone, J.) (dissenting opinion).

"[T]he court may compel the party against whom the decree or judgment is granted to make such suitable allowance for support and maintenance of the other party for his or her life... and also to make suitable allowance for the support, maintenance and education of the children of said marriage during their minority." CAL. CIV. CODE § 139. (Emphasis added).
Conclusion

As was pointed out in Mizner, "strict application of the Pennoyer rule to family support cases has encouraged migratory divorce by offering a shield to a spouse wishing to avoid financial responsibility." This important social problem has, to date, remained unresolved. Mizner, by applying the jurisdictional concept of "minimum contacts" to alimony, offers a solution. By analogy, Mizner also offers a solution when child support rather than alimony is involved. In either situation, a deserted spouse, or child, may acquire a personal judgment without leaving the home state. With this judgment, the obligor may be proceeded against wherever he may be found, without the obligee being required to bring suit in the second state.

This socially desirable result normally may be obtained without violation of due process whenever the forum state is also the state of the marital domicile. Alimony and child support involve certain peculiarities in that the defendant is an individual and the trial court retains continuing jurisdiction to modify the award. However, these peculiarities do not preclude the application of the "minimum contacts" test. A state's interest in seeing that decamped husbands and fathers fulfill their responsibilities to their families must be at least

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129 The result in Mizner might be arrived at by a slightly different line of reasoning. In Milliken v. Meyer, 311 U.S. 457 (1940), it was held that domicile alone is sufficient to bring a defendant who is absent from the state within the reach of the state's personal jurisdiction. The basis for this conclusion is that the "state which accords him [the defendant] privileges and affords protection to him ... by virtue of his domicile may also exact reciprocal duties. ... One such incidence of domicile is amenability to suit within the state even during sojourns without the state." Id. at 463. By analogy to Milliken, it was held that a state could exercise personal jurisdiction over a defendant who had been domiciled in the state at the commencement of the action, but who had subsequently established a domicile in another state. Allen v. Superior Court, 41 Cal. 2d 306, 259 P.2d 905 (1953). It was reasoned that the responsibilities arising out of being a domiciliary do not cease when the domicile is ended. Id. at 312-13, 259 P.2d at 908-09. See Ehrenzweig & Mills, Personal Service Outside the State: Pennoyer v. Neff in California, 41 Calif. L. Rev. 383 (1953); Comment, Jurisdiction and the Nomadic Resident, 5 Hastings L.J. 191 (1954). Both discuss Allen.

The extension of this line of reasoning to Mizner, where the defendant had been a domiciliary of the forum state at the time the cause of action arose, is apparent. The defendant would not free himself from the already existing marital responsibilities merely by establishing a domicile elsewhere.

130 The obligee may make use of the Reciprocal Enforcement of Support Act. This, or its equivalent, is in force in all 50 states, all territories and the District of Columbia. 9C Uniform Laws Ann. 9-10 (Supp. 1967). In California, this codified as Code of Civil Procedure sections 1650-1689. The essence of this procedure is that the obligee brings an action on the judgment in his own state and the case is from thence transferred to, and tried in the state where the obligor can be found. 9C Uniform Laws Ann. 5 (1957) (a more detailed description of the steps involved is given there).
as great as its interest in holding out-of-state corporations to their contractual and tortious obligations. "Traditional notions of fair play and substantial justice" dictate that a state be able to exercise extra-territorial jurisdiction over a nonresident defendant in order to see this interest fulfilled.

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