In the

Supreme Court of the United States

EZRA KULKO,
Appellant,

v.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO (SHARON KULKO HORN), REAL PARTY IN INTEREST,

Appellees

NO. 77-293

Washington,D.C.
March 29, 1978

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v.	:	No. 77-293
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Washington, D. C.

Wednesday, March 29, 1978

The above-entitled matter came on for argument at 11:15 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LAWRENCE H. STOTTER, ESQ., Stern, Stotter & O'Brien, 465 California Street, Suite 400, San Francisco, California 94104; on behalf of the Appellant

SUZIE S. THORN, ESQ., San Francisco, California 90807; on behalf of Appellee, Sharon Kulko Horn

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-293, Julko v. Superior Court of California.

Mr. Stotter, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE H. STOTTER, ESQ.,

ON BEHALF OF THE APPELLANT

MR. STOTTER: Mr. Chief Justice, and may it please the Court:

This case arises in an action for child support in the State of California as a consequence of the departure of two children from the custody of their father and the home that they had enjoyed all of their lives in the State of New York.

The matter comes before you as a final judgment of the Supreme Court of California under California rules which permit us to bifurcate issues of jurisdiction and challenge those up through the courts which is done by a write of mandate and was done in this case.

We submit that this Court has jurisdiction by virtue of the nature of the California statute which is involved in this particular case. In particular, this particular statute states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

In the legislative judicial counsel comments, the

legislature adopted the statement that the sufficiency of such contact is a matter of constitutional law on which the Supreme Court of the United States has the final voice. So as a consequence of this particular action before you, there is almost a coexistence between the construction of the statute and its application.

I might submit to the Court that I think there is a question with respect to the omnibus type of statute in terms of it being an improper delegation of the legislative duty to the courts or possibly even vagueness, but that has not been the approach raised by the appellant in this case. The approach in this particular case is how this statute is applied as being unconstitutional under the 14th Amendment.

We also submit that the issue of mootness raised by the appellee is not appropriate in this case because in fact in each case at each level, this was raised solely on special appearance to challenge the jurisdiction of the court. The trial court so found at each level that this was an issue of special appearance; even after the proceedings the trial court found that we had appeared only by special appearance. And I might add that in the Titus case cited by us, the specific act of advising the court after it had already denied a motion to quash that the matter was going up on appeal and did not have jurisdiction, was found by the Appellate Court to not constitute an appearance at that time.

Lastly, Your Honors, we submit that the issue of mootness is inappropriate in a situation or in a society in which there has generally been an attitude of expanding jurisdiction and which --

QUESTION: Mr. Stotter, could I interrupt you here at this point?

MR. STOTTER: Certainly, Justice Blackmun.

QUESTION: Anywhere or at any time was ever any attack made on the decree, the Haitian decree of divorce in this case?

MR. STOTTER: No, sir, and that was the decree in which the appellee moved to be established in California in the initial action filed in California.

QUESTION: Do you think it is invulnerable to attack at this late date?

MR. STOTTER: I do, sir.

QUESTION: You do?

MR. STOTTER: Yes, sir.

QUESTION: It recites on its face that both parties are domiciled and resident other than in Haiti?

MR. STOTTER: I think, Justice Blackmun, that there is enough authority both in New York and in California that these parties would be estopped to take a position inconsistent with their joint acts in going to Haiti and therefore I certainly would not have advised that by my client and I would

imagine the other side would take the same position.

QUESTION: Have both paries remarried?

MR. STOTTER: Yes, sir.

QUESTION: The doctor, too?

MR. STOTTER: Yes, sir.

Lastly, as I was saying, it would seem to me that many of the commentators seem to suggest that to test issues of jurisdiction, we should not be engaged in a type of wager at law in which we act at our peril in trying to test out jurisdiction.

Certainly the attempt here in no case was there ever an attempt by the appellant to deal with the merits.

QUESTION: I thought your argument basically is that California law allows special appearances without waiver --

MR. STOTTER: Yes, sir.

QUESTION: -- and that is what the procedure was that you followed here.

MR. STOTTER: Precisely.

QUESTION: Well, isn't that the complete answer?

MR. STOTTER: I think so. Now, in this particular case, the appellant, Ezra Kulko, differs materially from the type of parties which have generally been before this Court in state court jurisdiction cases relating to non-residence.

We have here an average citizen, a family man, engaged in common family interactions. He is not a corporation, he is

not involved in doing business or acts for economic benefits such as generally all the cases that have been involved in this matter in the past have been involved.

This is the type of individual that strikes all across the breadth of this country's activities, from the penthouse to the ghetto there are people engaging in the split of their family and entering into marital settlement agreements of the type engaged in this particular case. And I submit that the activities of this particular party or both of these parties are acts that are going on by thousands of citizens across the country monthly, if not weekly.

Second, Dr. Kulko in this case is both a resident and a domiciliary of the State of New York. He was born, educated, married, established his home there. For all intents and purposes, with a few exceptions, he has never left the state. He is not the typical father who has departed from the domicile state in order to escape his obligations. He has remained in the state of the marital domicile.

In this particular case, on the contrary, it is the appellee, the wife who has departed from the domicile state, who has attained in essence, to use what some of the commentators talk about as the migratory or suitcase divorce with the consent of the husband. And in addition, it should be borne in mind that each of the two children at two year intervals also departed from the State of New York and from the

residence of the father by their own choice.

Now, in addition, we have here recognition that at the time of the filing of Mrs. Horn's complaint, the father was the legal custodian of both of these two children by virtue of a marital settlement agreement which, if Your Honors please, was negotiated, prepared, executed and carried out in the State of New York by Mrs. Horn's attorney, Dr. Horn not being represented by choice, and which Mrs. Horn flew from California to New York in order to execute and complete the negotiations of that particular agreement.

QUESTION: You are getting me a little bit confused. Where was the decree entered?

MR. STOTTER: The decree was entered in Haiti, Your Honor, after --

QUESTION: Not in New York?

MR. STOTTER: If I said decree, then I stand corrected.

QUESTION: You seem to be arguing the New York -- domicile --

MR. STOTTER: I think New York --

QUESTION: -- when both parties consented to the divorce in another place.

MR. STOTTER: I think the facts, Mr. Chief Justice, of the New York domicile is important in this case but not for the traditional reasons that there was a decree entered in New York, that simply because of facts and circumstances relating

to the parties and their agreement as negotiated in New York, there is a great deal of importance to the ties that New York would give to its contracts and certainly to its negotiated marital settlement agreements.

It is significant, I submit, that it was Mrs. Kulko who departed from New York to obtain the decree and subsequently was married in the State of California, under circumstances which, based on her residence in California, she could have at the time obtained the typical type of nonfault divorce for dissolution allowed by California, but she chose instead to come east and go through the arrangements at that particular time. So she had the option at that time of getting jurisdiction in the State of California --

QUESTION: But she preferred to have this marriage settlement, didn't she?

MR. STOTTER: I'm sorry, Your Honor.

QUESTION: She preferred to have the marriage settlement, didn't she?

MR. STOTTER: That's correct, she preferred to have the arrangements that could be made at that time in New York.

QUESTION: Now at that time -- what time are we talking about, Mr. Stotter?

MR. STOTTER: We are talking about the time of the marital settlement agreement and the Haitian decree, which took place only a matter of days separating --

QUESTION: Even while living in New York, as domiciliaries of New York as husband and wife?

MR. STOTTER: That's correct, at all times.

QUESTION: Up to the time of the Haitian decree at least?

MR. STOTTER: Up to the time of the separation --

QUESTION: They went to Haiti or somebody went to Haiti and got a divorce, and I suppose the jurisdictional support for that divorce was somebody's domicile in Haiti, but in any event they had been living in New York and after the divorce in Haiti, the husband, your client, returned to New York where he has lived ever since --

MR. STOTTER: Yes, Mr. Justice Stewart

QUESTION: -- except for military duty?

MR. STOTTER: It ran this way: The parties and the family always lived in New York.

QUESTION: Right.

MR. STOTTER: The wife departed from the family, leaving the father and the children in the State of New York.

QUESTION: Before or after the divorce?

MR. STOTTER: Before.

QUESTION: Before the divorce.

MR. STOTTER: And she went to California. They then entered into a marital settlement agreement, all of which took place in New York, all aspects of it.

QUESTION: She personally or did her lawyer --

MR. STOTTER: She personally -- her lawyer negotiated and she personally came from California to New York to execute the agreement and left from New York, she did, to go to Haiti with consent of the --

QUESTION: She obtained the decree in Haiti?

MR. STOTTER: She obtained the decree in Haiti and then she returned to California and the father returned to the family home where the children were, which he had never departed.

QUESTION: He returned from where?

MR. STOTTER: I'm sorry, the father never left, he continued to live there.

QUESTION: He continued to reside in New York?

MR. STOTTER: That's correct.

QUESTION: At that time also with the children?

MR. STOTTER: That's correct.

QUESTION: But the issue we have to decide is whether Dr. Kulko did anything in California that subjected him to in personam jurisdiction in the United States, isn't that right?

MR. STOTTER: Yes, sir.

QUESTION: When are you going to get to that?

MR. STOTTER: I will in a moment, sir. I think that the Court should recognize that one of the major issues involved here is whether the contacts required to establish

personal jurisdiction under International Shoe should be of a more substantial type or nature in domestic or family law proceedings than those existing in other cases. And I submit to Your Honors that this is made particularly clear by the restatement of section 37.

In the restatement, Your Honors, section 37, which deals with the question of doing an act having effect elsewhere, they talk about three times, intent, foreseeability and no intent. When one reads all of the statements made by the Commissioners, in intent we are talking about the shooting of a missile or a bullet; in foreseeability, we are talking about loaning your car to be driven by somebody else across state lines, or putting explosives that might have an effect. None of these types of circumstances were clearly contemplated by the Commissioners when they adopted this particular type of criteria.

Significantly, in the caveat to this restatement, they talk about defamation possibly being an exception that should be handled differently with more substantial types of matters, raising in essence questions of free speech. And I submit to Your Honors that in this particular case, the question of invasion of privacy, the decision of the rights of the family to decide where their children should live is significantly appropriate.

QUESTION: You are here attacking the judgments of

California, and I think it would be very helpful to us, it certainly would be to me if you would tell me what it is that is wrong about California's assertion of jurisdiction based upon their contact with the children and the wife?

MR. STOTTER: Well, if Your Honor please, California had two lower court cases both of which rejected the concept that these type of acts were essentially the type of acts that were contemplated by this type of a criteria. It is our contention that Dr. Kulko really passively went along with the daughter who decided that she wanted to come to California, and we submit if Your Honors look that in the pleadings here, paragraph 10 of the original complaint filed in here makes a specific allegation that the father threatens to remove the children from the State of California and asks for a restraining order. At that particular time, when the original pleading was filed, the trial court issued a restraining order against the removal of both of those children, so that we submit that the suggestions made by the California Supreme Court that this was a voluntary act or a consent by the father to send his children into the State of California is untrue.

What we are involved with is a situation where --

QUESTION: But didn't the father pay for the air fare?

MR. STOTTER: Yes, sir.

QUESTION: Isn't that consent?

MR. STOTTER: Not in the traditional situation, Your

Honor. Let me put it this way: We have here a considerate concerned father who was attempting to work out in the family interaction what would be the best solution for the children. Now, on the other side, if we replace a father who is obstinate, who would not pay anything, who would not cooperate, I think this Court would therefore say that the non-cooperative litigant type father would have done no acts and therefore not be subject to jurisdiction. But the father who is facing reality and who says, when the daughter says I want to live with my mother, okay, if that is your choice, I think you are wrong but I will buy you a ticket and I wish you well, the court in California was saying that is a type of act conferring jurisdiction.

QUESTION: The mother in this case sought first an in personam money judgment against your client, did she not?

MR. STOTTER: There is no proceedings relative to any action filed by the mother at any time claiming in the State of New York or anywhere else, claiming that the father was indebted to her for some act or acts.

QUESTION: Well, what did the mother seek in her action in the Superior Court of California?

MR. STOTTER: The mother sought only to establish the Haitian decree and to establish child support prospectively. This was not an action --

QUESTION: Didn't she have to increase her interests?

MR. STOTTER: Yes.

QUESTION: Well, that is a little different from what you just said.

QUESTION: Well, that is an in personam money judgment.

MR. STOTTER: That's correct, she was asking for an in personam money judgment in the future.

QUESTION: Also custody of the children?

MR. STOTTER: And also custody of the children, which we did not contest, so the issue comes before the Court solely on her right to seek through California courts a larger sum of money.

QUESTION: Well, the real question is did the California court have personal jurisdiction over your client, that is the case?

MR. STOTTER: That's right.

QUESTION: That's the issue.

MR. STOTTER: That's the very bottom issue.

QUESTION: But the answer to that question may turn on whether simply an adjustment of custody was sought and whether an in personam money judgment was sought, may it not? I mean they differ.

MR. STOTTER: It does differ. Traditionally the courts have viewed questions of custody as relating solely to issues of status, and they have viewed questions of money judgment as

being a type of in personam jurisdiction of a type which in Vanderbilt this Court ruled would not apply as far as alimony is concerned.

QUESTION: Well, page 7 of the appendix, which contains the complaint, paragraph 4 of the complaint clearly asks for money, the court to award money to the plaintiff against the defendant, doesn't it?

MR. STOTTER: Yes, sir.

QUESTION: And the question is did the court have jurisdiction. That is the question we have.

MR. STOTTER: Yes.

QUESTION: I mean as a matter of constitutional law, could the court assert jurisdiction over your client.

MR. STOTTER: And the position of the appellant is no, because the appellant has absolutely no contact with the State of California --

QUESTION: Exactly.

MR. STOTTER: -- in any respect, has never entered California in any circumstance, was not doing business, did not do an intentional act of the type which this Court has found applies in the economics sphere in other types of cases. We are involved in this particular case with the interaction between families and which we submit would have a very counter effect when families are left with the decision that by being cooperative, they would thereby be conferring jurisdiction. We

jsut don't feel that that measures up to the standards which this Court has submitted in the past.

I might add that another aspect of this relates to the question of the foreseeability type circumstances which Justice Stevens mentioned in the Shaffer case, in which he equates fair notice to include fair warning, and I submit that as a general rule parents deciding that allowing their children who have asked to go with another parent do not thereby have knowledge or are aware of the fact that they are conferring jurisdiction in court 3,000 miles away to decide how much money they may have to pay in the future.

I also submit to the Court the question that ordinarily one thinks in terms of the state's right to protect the children that are within its domicile. In this particular case, there is no determination that the amount of money awarded in New York might not already have been sufficient, and that really would be a question of just how well the children should live.

Under those particular circumstances, it is not a decision that these children were somehow going to be thrown into poverty. We have the Uniform Reciprocal Support Act and the right of a mother to, as she did at the time of the marital settlement agreement, to come back to New York in the first instance, have New York settle her particular running problems.

In this particular case, she judiciously chose to

avoid New York, presumably because she felt that she would not be treated well in New York because essentially she had abandoned New York.

QUESTION: Except, Mr. Stotter, I suggest that what she did or didn't do is not relevant to the question we have to decide. We have to decide whether he did, as the California Supreme Court held, is suffice to subject him in personam jurisdiction in California. Do you quarrel with the tests that the California Supreme Court laid down? Did he purposely avail himself of the benefits and protections of California laws or anticipate that he would derive an economic benefit or a result of his act outside of California? Do you quarrel with that test?

MR. STOTTER: Yes, sir.

QUESTION: Oh, I see.

MR. STOTTER: I don't quarrel with the test. I quarrel with the fact that --

QUESTION: With its application?

MR. STOTTER: That's correct.

QUESTION: And as I understand it, the way they applied it was, it said that probably no parental act more fully invokes the benefits and protections of California law than that by which a parent permits his minor child to live in California. We start with a premise of a non-resident parent who allows his minor child or children to reside in California,

has by that act purposely availed himself of the benefits and protections of the laws of California. Do you quarrel with that?

MR. STOTTER: Not as a fact. It seems to me that the Court does have a concern relative to the choice of law, a question of protecting children that are --

QUESTION: As I understand it, what the court did was then go on to say what he did in letting his daughter come and buying her the airline ticket, and those other facts, they established that he had committed an act in New York which had the effect of allowing his children to reside in California and that thus he had purposely availed himself of the benefits and protections of the laws of California and therefore under the test, which you say you don't quarrel with, that that established a basis for in personam jurisdiction.

MR. STOTTER: Well, Justice Brennan, the question of the purposeful nature I guess is the factual question which under this particular statute is submitted to this particular Court and --

QUESTION: You want us to decide the factual question?

MR. STOTTER: No, sir. It seems to me that it is inappropriate to do so and as a consequence it seems that to place the father in a position where he must act at his peril in making the type of act which one would presume that any concerned father would make, when confronted with a decision

by a young child that says I want to go with my mother. Now, having this being the state of the marital domicile, under all circumstances this particular father had two choices, either was to litigate, denying the request of the child and enter into litigation in New York, or force litigation in New York, or cooperate in terms of allowing the child to go live with the mother, and I submit that that is not the type of purposeful activity for obtaining the privileges and benefits in the State of California which this Court has generally treated in the past.

QUESTION: Of course, the Supreme Court distinguished between the daughter and the son, saying that the father had done nothing in New York which had the effect of committing the son to California in the same way that he had done with the daughter.

MR. STOTTER: That's correct.

QUESTION: Therefore they refused to accept or say there was no jurisdiction as to the increased support for the son, but only as to the daughter, isn't that correct?

MR. STOTTER: No, Mr. Justice Brennan, they made a decision to the effect that while they recognized there was no contact, since they already had contact with the daughter, and since they felt the jurisdiction of the father was established by virtue of his single act of buying that ticket, they therefore said we therefore will also apply it to the son as well.

QUESTION: They finally wind up, "We deem it fair and reasonable to subject him to the personal jurisdiction for the support of both children, where he has committed acts with respect to one child, which confers personal jurisdiction, and has consented to the permanent residence of the other child."

MR. STOTTER: Because, as they say --

QUESTION: You're right, the judgment is finally entere for support for both.

MR. STOTTER: And they basically say that he consented to the son because he didn't commence an immediate action, even though at the time he was under a restraining order from the State of California against him removing those children.

QUESTION: Mr. Stotter, the airline ticket, was it round-trip?

MR. STOTTER: No, sir, it was a one-way ticket.

QUESTION: One way?

MR. STOTTER: That's correct.

QUESTION: Well, how did he expect the child to get back?

MR. STOTTER: He had hoped that the child would recognize that life with the mother would not be as idyllic as she thought it would be and that by giving her an opportunity for her day in California, so to speak, she would see

that life in California was not as good as life in New York.

QUESTION: The answer to my question is how would the child get back, walk?

MR. STOTTER: I think the child was simply to call the father and say in much the same way, I would like to come back to New York, and a ticket instantly would have been available.

QUESTION: Mr. Stotter, earlier you mentioned there might be a difference between jurisdiction to award a money judgment and jurisdiction to determine custody. Paragraph 3 of the complaint asks just for modification of the decree to award permanent custody to the wife. Paragraph 4 is the one that asks for money. Do you concede that there is jurisdiction to grant the relief provided in paragraph 3?

MR. STOTTER: Yes, we have conceded that for purposes of the proceedings that we brought. We at the trial court level raised questions that the Uniform Child Custody Jurisdiction Act certainly as to Darwin would not apply. On the other hand, it was the advice of counsel, myself in this case, that a decision of a child certainly of this age would be very persuasive on a court and therefore that the issue of jurisdiction should not be challenged on that issue. So the question of custody was not raised and I think there is no issue here relative to the custody question.

QUESTION: But that didn't involve a matter of

personal jurisdiction?

MR. STOTTER: That's correct. I think custody is a type of status which can be handled --

QUESTION: But the relief prayed for in that paragraph would result in a modification of the decree, of the settlement agreement between the parties, wouldn't it?

MR. STOTTER: That's correct, and relief as to terms of custody might well be granted without getting into money judgments at all.

QUESTION: It almost would follow inevitably under this settlement, as I understand it, that there would be some increase in the support money because the support under the agreement was calculated on the basis of temporary time with the wife. Wasn't that correct?

MR. STOTTER: I think there was no question about the fact that both California and New York as a choice of law issue would have recognized that these children were entitled to support. The issue is can California make a determination as to what the father should pay as distinguished from her going back to New York and the marital domicile, which has generally been very highly respected in family law proceedings and which great importance has always been stressed in order to determine what the amount of child support should be.

QUESTION: Well, can a California court constitutionally order your client to pay money, that is the point,

based upon his relationships with the state, and so there is no conflict with the facts, as I understand it.

MR. STOTTER: Mr. Justice Stewart, I think that is correct and the answer that we contend is no, on the basis of a single act which is of the type of act done in this particular case and not of the type of acts done in the typical economic type of cases.

Thank you.

MR. CHIEF JUSTICE BURGER: Ms. Thorn.

ORAL ARGUMENT OF SUZIE S. THORN, ESQ.,

ON BEHALF OF THE APPELLEES

MS. THORN: Mr. Chief Justice, and may it please the Court:

I would like to begin by making three corrections which I believe are relevant to the facts. Dr. Kulko was served in person and not by mail, as suggested in some of the briefs --

QUESTION: What difference does it make, no one is challenging the decree now, are they?

MS. THORN: That's correct. Secondly, a very relevant fact is --

QUESTION: He was served in this litigation?

MS. THORN: Yes, in New York.

QUESTION: In New York?

MS. THORN: In New York, yes.

QUESTION: Okay.

MS. THORN: Secondly, the daughter, Ilsa, was eleven and a half years old at the time that she asked to live with her mother and her father participated with her in that change of custody, therefore, to suggest that it was a unilateral act does not seem appropriate.

Further, Dr. Kulko was represented by an attorney at the time of the New York settlement agreement.

I would like to address myself first to the question of jurisdiction of this Court with regard to this matter. Throughout the entire proceedings through the California Supreme Court, there was no attack made on the California statute either on its face or as applied. We therefore submit that appeal is not applicable here.

QUESTION: But we can still treat it as certiorari, can't we?

MS. THORN: That's correct, Your Honor.

The defendant moves to quash the summons on the ground that the court lacked personal jurisdiction because he was a non-resident, without sufficient contacts in California to satisfy due process requirements.

Furthermore, the circumstances of this case are most unusual, as are outlined in the brief for the appellee. They are unlikely to occur again and do not raise issues of national importance.

I would like to address myself secondly to the issue of mootness.

QUESTION: You don't suggest there isn't a federal question then, it is just one on which it isn't a proper appeal and we should deny certiorari?

MS. THORN: Yes, Your Honor.

QUESTION: Is that what you are suggesting?

MS. THORN: I am suggesting --

QUESTION: But are you also saying it is not a substantial federal question?

MS. THORN: I am suggesting that it is not a substantial federal question, Your Honor, because of the unique happenstance of the facts in the situation.

QUESTION: Well, I would think Justice White's question and the Chief Justice's question pose two quite different inquiries. One is whether it is the kind of case that would recur frequently that this Court would want to exercise discretionary jurisdiction, and the other is whether there is any federal, substantial federal claim here at all, even though the case is a real sport. Is your answer to both of those questions no or both yes or --

MS. THORN: I think my answer to one would be no. Would you repeat the second one, Justice Rehnquist?

QUESTION: Well, I can conceive of a case where there might be a very substantial constitutional claim in the sense

that a party litigant has had a constitutional right violated, and yet nonetheless one would way this is a set of facts that is never going to recur, and this Court only takes 150 cases a year and we simply wouldn't grant certiorari in a case like that. But if it were an appeal as a right, we would probably not feel free to say there is no substantial federal question.

MS. THORN: I would answer yes to the second question.

QUESTION: You say that there really isn't any really doubtful federal question in the case, even though it were to recur time and again, it should be resolved in favor of state jurisdiction?

MS. THORN: I am saying, Your Honor, that this is a unique set of facts that doesn't justify the Court in assuming jurisdiction.

QUESTION: Now, let me ask you about that. Suppose the settlement agreement here had given the custody to the parents and at the time the woman was residing in California, which she was.

MS. THORN: Yes, she was.

QUESTION: So there was an agreement, essential agreement that would be embodied in the decree that the wife would have custody.

MS. THORN: Correct.

QUESTION: So by consent under this agreement, the little girl or the children would be residing with the ex-wife

in California and there is an agreed upon amount for support, and then the wife sues in California to increase support and serves the husband in New York. Jurisdiction?

MS. THORN: I think that raises a different case.

QUESTION: Well, why is it different if the husband has in advance agreed to take advantage of California law?

MS. THORN: I would say that --

QUESTION: All I am bringing it up for is I would think it would occur time and time again, this question.

MS. THORN: I would answer that by saying in this case we have a substantial change in the status of the children after the making of the agreement.

QUESTION: Well, that may be so, but what has that got to do with jurisdiction?

MS. THORN: I think it has to do with the reasonableness of the contacts which led the California Supreme Court to feel that the exercise of jurisdiction was reasonable in this case.

QUESTION: Do you think the California Supreme Court either in retired Justice Sullivan's opinion to the court or in Justice Richardson's dissenting opinion, that the members of the court felt that they were dealing with a constitutional issue, a federal constitutional issue?

MS. THORN: I think they felt they were dealing with the application of the Code of Civil Procedure for --

QUESTION: Justice Richardson, in his dissenting opinion, begins by saying, "In my view, it is unreasonable to subject petitioner to the jurisdiction of the California courts, under the circumstances in this case," and then he goes on with the facts and so on, and he never is explicit in saying that in his view it is unconstitutional.

MS. THORN: That's correct.

QUESTION: Nor indeed does Justice Sullivan's opinion deal with the question as though it were a constitutional question.

MS. THORN: That is correct.

QUESTION: Was it presented to that court as a constitutional question?

MS. THORN: No, it was not, Justice Stewart.

QUESTION: It was not?

MS. THORN: It was not presented as a constitutional question. It was presented as to whether or not this particular case fell into the statute called California Code of Civil Procedure, 1410.10.

QUESTION: It was presented to us in the jurisdictional statement as a constitutional question, whether California's construction of your Civil Practice Act extend in personam jurisdiction over the non-resident appellant violates the Due Process Clause of the 14th Amendment. That was never presented to the California Supreme Court?

MS. THORN: That is our position, Justice --

QUESTION: Well, that is a matter of fact --

MS. THORN: Yes.

QUESTION: -- not a matter of somebody's position?

MS. THORN: That is a matter of fact, Justice Stewart. It was not presented that way to the California Supreme Court.

QUESTION: Ms. Thorn, doesn't the California Supreme Court expressly say that the limits of the statute are defined by the Constitution --

QUESTION: Where is that?

QUESTION: On page v of the jurisdictional statement, it points out that the "court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States," and later that the case that the statute has construed "manifests an intent that the courts of California utilize all such bases, limited only by constitutional considerations."

MS. THORN: That is correct.

QUESTION: Didn't the court necessarily decide a constitutional question when it decided over jurisdiction?

MS. THORN: I think it was inferring that decision was limited by constitutional perimeters, that it was not really construing the Constitution in this particular situation.

QUESTION: Would you listen to this for just a moment: "The holding accords" -- talking about the lower court's

holding -- "accords with established due process principles." I am quoting from page of your motion to affirm. So you recognized it, didn't you? Didn't you recognize due process?

MS. THORN: I think it would be fair to say that, Justice Marshall.

QUESTION: In fact, analysis of the California court is whether International Shoe or Hanson v. Denckla require a different result, and those are federal cases.

MS. THORN: That's correct, Justice Stevens.

I would like to move to the issue of mootness, if I may.

QUESTION: Before you go to that, since we have got you interrupted anyway, let me sure I understand your position. Suppose we have two different cases, one the case we actually have and the second case in which the settlement agreement itself said the children shall be given to the mother, be in the custody of the mother, who shall reside in California, and that is all it said, and then had agreed upon amounts. And then thereafter the mother brought suit to increase the support allowance. Would that be a stronger or a weaker case for jurisdiction in California under your view?

MS. THORN: Well, it would be weaker in the sense that there would have been less acts by the father causing in effect --

QUESTION: But there would have been a clear consent

to the children being there, unambiguous and all of that, and he paid the tickets?

MS. THORN: It would be strong in the sense that the contract was to be performed there in many instances.

QUESTION: Well, actually the children's presence would certainly be the effect of his having made and signed that agreement in New York, wouldn't it?

MS. THORN: That's correct.

QUESTION: How would the issue be any different than the one we have now?

MS. THORN: Well, only that the contract that we have in the instant case was to be performed partly in California, because he was to pay support there when the children were in her custody.

QUESTION: Well, partly or not, if you are for the Supeme Court's test of whether or not he committed the children to the benefits of California laws, under the agreement he did, didn't he?

MS. THORN: That's correct.

QUESTION: Well, is the constitutional issue any different?

MS. THORN: No, the constitutional issue would not be different.

QUESTION: You haven't claimed though that California would have jurisdiction though, would you, if custody was

litigated in the divorce court and custody was awarded to the mother?

MS. THORN: I think that would depend as to whether it was understood in that custody litigation that the mother lived in California --

QUESTION: Well, everybody knew she lived in California and the father was ordered to pay and mail to California $300 a month for child support.

MS. THORN: I think there is some distinction, Justice White, because --

QUESTION: Well, do you suppose the California court would think that set of facts satisfied the California test, of something done outside by the defendant?

MS. THORN: Well, I think --

QUESTION: He resisted the custody decree?

MS. THORN: Well, I think that would be different, Justice Brennan, but I think if it is an agreement entered into --

QUESTION: Well, it is an agreement made with --

MS. THORN: A contract.

QUESTION: Let me give you another one. The mother now moves to Oregon and wants more money, files suit in Oregon and the father has never said a thing about Oregon, is there jurisdiction in Oregon for it?

MS. THORN: I think that it begins at that point,

Justice White, to get weaker because there are not the contacts with Oregon that we have with California.

QUESTION: Well, did not the California Supreme Court face the rather long-arm jurisdiction here on the proposition that he in effect sent the children and submitted them to the custody of the State of California and all its protections?

MS. THORN: That is correct, Mr. Chief Justice.

QUESTION: So that wouldn't apply, he has never done that with respect to Oregon.

MS. THORN: That's right, so Oregon would be distinct.

QUESTION: They wouldn't have any jurisdiction over him.

MS. THORN: I do not believe that jurisdiction would be the same. But this was not a unilateral act, sending a child of eleven and a half to California with a one-way ticket plus all of her clothing is not a unilateral act on behalf of the child. It is a deliberate act in which the father participated and helped.

QUESTION: Ms. Thorn, I still am not sure you answered my question. I don't know if you did or not. Would the case, the alternative case where it is in the settlement agreement, be stronger or weaker?

MS. THORN: Where the custody is being --

QUESTION: Where there is a settlement agreement between the husband and the wife to provide that the children

shall reside in California with the mother.

MS. THORN: And that he will pay support --

QUESTION: And he will pay support.

MS. THORN: -- to them in California?

QUESTION: Yes.

MS. THORN: I think it would be stronger.

QUESTION: Stronger for jurisdiction in California?

MS. THORN: For jurisdiction.

QUESTION: I see.

MS. THORN: But I think we have the intervening force here of active acts on the part of the father which resulted in these children being residents of the state and needing to be supported in California.

QUESTION: Ms. Thorn, let me ask you a question about the active acts. Let's assume, for example, that the husband had not paid the air fare of the daughter to California, what acts would you then rely upon?

MS. THORN: Had not paid her air fare, had not sent her with her clothing?

QUESTION: Well, the facts are clear, I take it, that the daughter asked to go back to her mother or to go to her mother in California.

MS. THORN: Yes. The other acts would be with respect to the boy, the father called the Social Service Agency in San Francisco, and that is in the record, and requested that that

Social Service Agency investigate --

QUESTION: Because he had run away, hadn't she? Hadn't he run away from the father?

MS. THORN: No, he had left but he had told the father that he was going.

QUESTION: The Supreme Court said that as to the boy, what the father did would not subject the father to in personam jurisdiction.

MS. THORN: They said that --

QUESTION: They finally brought him in on the increase support order, but had there only been the boy apparently there would have been no in personam jurisdiction sustained.

MS. THORN: That is correct under the opinion. However, I was pointing out some acts that he did take with regard to the boy. He had the Social Service Agency investigate the home and make a report to him. He then wrote a letter to the mother, which is part of the record, saying we must renegotiate our bargain because it is no longer applicable to the circumstances as they have developed.

QUESTION: Are you saying writing a letter was activity in California? He was in New York when he wrote the letter?

MS. THORN: Yes.

QUESTION: And you say writing a letter to somebody in California is activity in California of a kind that will

submit you to the jurisdiction of a California court to order you to pay money?

MS. THORN: Certainly not standing alone, but I believe it was a recognition by him that he had by his activity done acts in California and that he realized he had to change their agreement.

QUESTION: We will resume there at 1:00 o'clock.

[Whereupon, at 12:00 o'clock noon, the Court recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Ms. Thorn, you may proceed.

MS. THORN: I would like to raise next the case of McGee v. International Life and point out that in that case the Court found that one contact with the State of California was sufficient in the case of an insured under a life insurance contract.

QUESTION: Ms. Thorn, I think you were before lunch going to start -- you started to address when we interrupted you your point as to the fact that the husband in this case waived his claim by making a general appearance. Were you going to do that?

MS. THORN: Yes, I was going to address --

QUESTION: Do it whenever you wish during the course of your argument, but I would be interested in what you have to say.

MS. THORN: With regard to the issue of mootness, the California Supreme Court opinion was fild on May 26, 1977 and became final on June 25th. Appellant did not move for stay of the filing of the Supreme Court of California opinion and thus allowed the Superior Court for the City and County of San Francisco to reacquire jurisdiction. We followed with a motion for various matters, including support and for a determination of the very substantial arrearage that Dr. Kulko was in in terms of support payments even under the agreement.

The appellant here filed a written response labeled "A Special Appearance," and I believe all of the documents relevant to this have been lodged with the Court, but in his response he requested pending appeal that Mrs. Horn's motion be "denied without prejudice contained or stayed." Appellant's attorney also spoke to the judge by telephone and wrote a letter to the judge on September 8, 1977, which letter is shown in our brief at page 10.

We contend that appellant's activities before the Superior Court for the City and County of San Francisco, State of California, constituted more than a special appearance and constituted a general appearance, waiving his rights to pursue jurisdiction further.

QUESTION: Ms. Thorn, I think it was some forty or fifty years ago that this Court decided a case in which it said that if one could pay a judgment rendered against him by the highest court of a state and not superseded and then was pursuing appeal here, without the case becoming moot -- do you see much difference between that situation and the situation you have just referred to?

MS. THORN: Well, here they are raising jurisdictional issue and making a special appearance only -- and there was a request for a continuance, which has been held many times to constitute a general appearance. I don't know that payment of a judgment constitutes a general appearance in the same sense

as a request for a continuance.

QUESTION: Did you urge this in the state court?

MS. THORN: This happened after the state court opinion became final, Justice White.

QUESTION: Did you raise it in the motion to dismiss in this Court?

MS. THORN: I do not believe it was urged, Justice Marshall.

QUESTION: The other thing is, what law determines, California law or federal law?

MS. THORN: As to whether or not the issue is moot?

QUESTION: Yes.

MS. THORN: I'm not sure I know the answer to that question, Justice Marshall.

QUESTION: Well, you raised it.

MS. THORN: It would be our opinion --

QUESTION: If it is moot in California, it is moot here, isn't it?

MS. THORN: I would think so, Mr. Chief Justice. Under California law, it is clearly moot under the cases which say that or request for a continuance is a general appearance.

QUESTION: But wouldn't there be a federal element in this Court's decision as to whether the petitioner or appellant is free to pursue his remedy by way of appeal here and nonetheless protect what he conceives to be his pending

interests in a state trial court while we have the appeal before us?

MS. THORN: I think that he had the right to protect, as Your Honor suggests. He could have done that, however, by moving to stay the filing of the Supreme Court of California opinion so that it did not become final, thereby putting jurisdiction back in the Superior Court. He did not do that.

QUESTION: You are really asking us to determine what constitutes a general appearance or, more accurately, whether the things that you are talking about constitute a general appearance under California law. How are we competent to do that?

MS. THORN: Well, I am asking that you recognize that in asking for a form of affirmative relief from the California Superior Court, that appellant made a general appearance causing the matter to become moot at this level.

I would like to make a few more points on the merits, and in that connection I would like to return to the McGee case where the Court found that one contact with the California insured was sufficient because California had shown a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.

The case also mentioned that there would be some inconvenience to the Texas insurer from having to defend in California, but that this did not constitute a denial of due

process.

I would suggest to the Court that the state has a manifest interest in protecting the welfare of the children who reside there.

QUESTION: May I get back to this general appearance business. I gather you concede that everything happened that happened before the coming down of the California Supreme Court opinion, save the failure to move to stay the coming down of that opinion, everything that he did before that in no wise prejudiced the special appearance he had been making through the Superior Court?

MS. THORN: Prior to the rendering of the California Supreme Court opinion --

QUESTION: So your reliance in the argument that what he did constituted a general appearance, everything occurred after the coming down of that opinion, right?

MS. THORN: That is correct.

QUESTION: And apparently in order to preserve his opportunity to come to this Court, is that it?

MS. THORN: That is correct.

QUESTION: And that is the opinion that is before us?

MS. THORN: Excuse me, I didn't hear.

QUESTION: That is the opinion that is before us, is the Supreme Court's judgment and opinion?

MS. THORN: Yes, but I believe that the documents

with regard to the proceedings in the San Francisco Superior Court subsequent to the rendering of the Supreme Court opinion of the State of California have been lodged with the Court in the --

QUESTION: And the sort of netrual tone makes it moot before?

MS. THORN: No, that happened after, Justice Marshall. The proceedings in the Superior Court of San Francisco took place in August of 1977, some four months after the Supreme Court of the state of California rendered its opinion and it had become final.

QUESTION: Ms. Thorn, in your footnote on page 11 of your brief, you end up by saying, "There is no personal appearance as long as the court is not asked to exercise its discretion on the merits." Did your opponent ask the court to exercise jurisdiction on the merits? He asked them not to do that.

MS. THORN: In San Francisco Superior Court he asked them for a continuance.

QUESTION: He asked them not to decide the merits?

MS. THORN: He asked them not to decide the merits, but he asked them for a continuance or a denial of the motion without prejudice, and that is a request for affirmative belief.

QUESTION: Well, it is not a request for a decision on the merits. It is just the opposite. Is there a California case squarely supporting you in this? Your authority seems to

me to be against you.

MS. THORN: I believe we have cited in the brief the applicable cases. I am looking for them.

QUESTION: Footnote 3, page 11, they all seem to be against you.

MS. THORN: Well, those are different kinds of requests. It is clear under California law that a request for a continuance is a request or is a general appearance.

QUESTION: What case -- Zobel v. Zobel, I guess.

MS. THORN: Yes, it is Zobel v. Zobel, at page 13, Justice Stevens.

QUESTION: "...a request for a continuance to plead to the merits" -- but they didn't ask for a continuance to plead to the merits.

MS. THORN: Well, they asked for a denial of the motion without prejudice.

QUESTION: Well, that is not continuance to plead to the merits. He didn't ask for more time to answer, in other words. He maintained his position all along that there was no jurisdiction to decide the merits, whereas the case you cite is one that asks for a continuance so he can file an answer directed at the merits. It is quite different.

MS. THORN: The second case down, Knoff v. City and County, where there was a written motion to continue, which we have here, was foudn --

QUESTION: A party comes in and says I want a continuance in order to file a special appearance, would that be a general appearance?

MS. THORN: A continuance in order to file a special appearance would not be a general appearance under the express terms of the California Code of Civil Procedure, 418.10.

QUESTION: Where would I find that?

MS. THORN: That is in the appendix to our brief, California Code of Civil Procedure, 418.10 is set out in its entirety. But a motion to continue a hearing is a general appearance, and what appellant made here when he came into the San Francisco Superior Court, after the rendition of the California Supreme Court opinion, was a motion to continue the hearing, to deny it without prejudice or to stay it. It was not his request for a continuance to file a special appearance that I am referring to.

QUESTION: But he was not appealing that, and you are not either.

QUESTION: We are suggesting that by that activity at the time --

QUESTION: How did that get into the record? It is after judgment, isn't it?

MS. THORN: I believe that --

QUESTION: Isn't it after judgment?

MS. THORN: That's correct, but appellant requested a

stay from Justice Rehnquist of this Court and he attached portions of the record of the San Francisco Superior Court to his request for a stay, and it is therefore part of the record and before the Court.

I would like to point out one further thing, and that is that appellant could have moved for dismissal of the case on the ground of inconvenient forum, which Code of Civil Procedure 418.10 clearly provides for, and without waiving any special appearance rights he did not choose to do that, therefore --

QUESTION: Let me ask a question. If your client had moved to Hawaii, would you make the same argument?

MS. THORN: The argument about the jurisdiction of the court?

QUESTION: Yes. I just want to move it a little further.

MS. THORN: I don't think so --

QUESTION: Of course, this is all across the country, but --

MS. THORN: Yo- mean she had moved to Hawaii prior to the trial --

QUESTION: Just exactly, instead of California she had kept on going.

MS. THORN: And the agreement had --

QUESTION: Yes, everything else is the same.

MS. THORN: The agreement provided for performance in California and not Hawaii?

QUESTION: I said everything was in Hawaii, she went to Hawaii, the children went to Hawaii, you filed your lawsuit in Hawaii.

MS. THORN: Then I would say that the situation would be the same, Mr. Justice Marshall.

QUESTION: It would be the same in New Jersey, too, wouldn't it?

MS. THORN: Yes, Mr. Chief Justice, it would.

I wanted to point out that California has a special interest in the welfare of the children residing there, more than it has in insurance claimants. They have an interest in the subject matter of the suit.

MR. CHIEF JUSTICE BURGER: Your time is expired, Ms. Thorn.

You have one minute remaining, Mr. Stotter.

ORAL ARGUMENT OF LAWRENCE H. STOTTER, ESQ.,

ON BEHALF OF THE APPELLANT -- REBUTTAL

MR. STOTTER: Briefly, the California Supreme Court specifically found that there was no knowledge by the father of Darwin's departure. Number two, I submit to the Court that in the appendix to the brief, the court specifically finds that only a special appearance was made. Number three, on page 38 of the brief --

QUESTION: The green brief?

MR. STOTTER: The green brief. In the appendix, at page 38, in my motion to -- the writ of mandate, rather, page 38, is specifically set forth the challenges to the constitution, the particular code section in question, and I cite Pennoyer v. Neff, International Shoe, Titus, et cetera, in response to earlier questions. And in conclusion, let me submit that in the search for fair play and substantial justice, in all the cases that cite -- we go back to McDonald v. Mabee, Justice Holmes indicated, in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by pretty close adhesion to fact, under circumstances where this Court has already found mechanical and quantitative evaluations, should not be a determination to say that buying one airplane ticket is sufficient to make this type of connection, it seems to me is going the other way from what this Court has previously said.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

[Whereupon, at 1:16 o'clock p.m., the case in the above-entitled matter was submitted.]

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