

Race to the courthouse — unnecessary

In dissolution actions, the first filing or service of process does not control venue selection



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With couples' increasing mobility and the often great disparities in substantive and procedural law of different venues, the decision of where to file a dissolution action can mean the difference in millions of dollars and months of litigation. ("Dissolution" here refers to both a "divorce" proceeding involving the dissolution of a marriage as well as the dissolution of a domestic partnership.) Given the high stakes involved, it may come as a comfort to learn that the court should not apply a rigid rule of "gotcha" for determining where such a case should proceed. Unfortunately, there is a misperception among lawyers that the first party to file and serve a petition for divorce "wins" and thereby controls the venue. This is far from the truth.

Consider the following example: The parties are registered domestic partners in California, a community property state. One partner moves to Colorado, an equitable property state that divides the marital estate based on a variety of factors including each party's contribution to the wealth

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of the estate. In Colorado, the court has wide discretion in equitably dividing the estate. For example, if one partner earned all the wealth in the partnership, this could result in the "earning partner" being awarded up to 60 percent of the marital estate. In contrast, under California law there is an equal, not equitable, division of community property and the parties would share the community property equally. Assume the

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partner establishes residency in Colorado and then both parties file separate petitions for dissolution, one in California, the other in Colorado. The Colorado partner files and serves the petition first. Assuming both states have jurisdiction over both parties, which petition should proceed? Should it matter that the majority of their partnership was conducted in California, or that the majority of their wealth created there? Should it matter who was able to serve the petition first? Does the location of assets and witnesses impact the analysis?

Under the myth of "first filed" or "first served," none of these factors matter. However, under California law, the court must conduct a review of both private and public factors before determining whether California is the proper venue for the dissolution action.

Under cases involving civil litigation

and prior family law precedent, there was a strong preference for the "first served" petition to control the venue. A rigid bright-line test utilized by some older cases has created the myth that the "first filed" or "first served" petition governs the venue in a dissolution action. This theory was articulated as early as 1950 and later reaffirmed in the 1988 family law case of *Marriage of Hanley*, 199 Cal.App.3d 1109.

Superficially, these cases appeared to hold that venue is determined by where process is served first, regardless of which action was filed first or other public policy considerations. Similarly, civil cases held that the right to the forum of petitioner's choice is entitled to great weight if the jurisdictional requirements are otherwise satisfied. *Ford Motor Co. v. Insurance Co. of No. America*, 35 Cal.App.4th 604 (1995) ("Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"). This case law and anecdotal evidence of the advantage of "serving first" has created a myth that these tactics should govern the venue for a divorce or dissolution proceeding. This is not the case, however.

FIRST FILED DOCTRINE HAS BEEN ERODED

In 2002, the California Supreme Court ruled that the "first filed" doctrine is not a rigid doctrine to be applied mechanically. In the context of a case involving the enforcement of a noncompetition clause, the Supreme Court had an opportunity to review the "first filed doctrine." The court noted:

"The first filed rule in California means that when two courts of the same sovereignty have concurrent jurisdiction, the first to assume jurisdiction over a particular subject matter of a particular controversy takes it exclusively, and the second court

should not thereafter assert control over that subject matter. The first filed rule was never meant to apply where the two courts involved are not courts of the same sovereignty. Restraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore requires that such action be taken only with care and great restraint.”

Advanced Bionics Corp. v. Medtronic Inc., 29 Cal.4th 697 (2002) (internal citations omitted).

The concurring opinion went even further in its direction:

“The crucial determination is whether the suit was filed in another state for the purpose of *evading* the important policies of the forum state. Such a purpose may be inferred, for example, if neither party has ties to the sister state in which a parallel suit has been initiated. Courts have found that a party’s connection to the foreign jurisdiction minimizes the possibility that such a suit was filed for purposes of evading the forum state’s law.” *Id.*, concurring opinion, J. Moreno.

Thus, the Supreme Court’s decision in this case opened the way to a more nuanced analysis rather than the bright line “first filed” or “first served” rule.

NEW DEVELOPMENTS

Recent family law cases have focused on a more practical test, including a review of the underlying facts of the case and policy implications of the application of different laws. Fundamentally, a California court can choose to stay or dismiss an action when it

determines that “in the interest of substantial justice” it should be adjudicated elsewhere. Cal. Code Civ. Pro. §410.30. This can be accomplished by bringing a motion based on inconvenient forum. Cal. Code Civ. Pro. §410.309(a). In disregarding the “first filed” or “first served rule” — if the competing state can be proven to be an appropriate alternate forum — the court must then balance the private and public interest factors to determine in which forum the action should proceed. *Stangvik v. Shiley, Inc.*, 54 Cal.3d 744 (1991).

The *forum non conveniens* analysis proves that the “first filed/first served” myth is not the law in California. In a case subsequent to *Marriage of Hanley*, the “first served” case cited above, the court reviewed the following factors to determine the appropriate venue:

- Private interest factors: “those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses.”

- Public interest factors: “includ[ing] avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation.”

Marriage of Taschen, 134 Cal.App.4th

681 (2005).

The question of which petition was served first was not a factor in the analysis. In *Marriage of Taschen*, the court went so far as to grant petitioner’s motion to change venue to Germany after she had initially filed in California. Petitioner had first filed in California, but requested the transfer based on the following facts: Both parties were German nationals domiciled in Germany, the parties’ business was headquartered in Germany, various necessary witnesses and documents are located in Germany, and some of the documents are written in German. The court found “there is no obvious reason why California taxpayers should bear the burden and expense of this litigation” while acknowledging “the record also contains countervailing evidence and argument.”

Because decisions regarding the appropriate forum are “within the trial court’s discretion” they are accorded “substantial deference” on appeal. *Stangvik v. Shiley Inc.* Accordingly, parties should carefully consider both the private and public interest factors before determining where to file. This analysis should include a review of the relevant facts, availability of documents, witnesses and property, and competing legal theories. If it appears that one party is seeking a jurisdiction to avoid the public policy of another forum, this should also be taken into consideration. In cases where more than one state or country may have jurisdiction over the parties, if the parties are not careful in choosing the proper venue, they may be faced with an expensive, fact-based motion to dismiss or stay their action.