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THE *FORUM NON CONVENIENS* DEFENSE IN FAMILY LAW LITIGATION

By Gregory W. Herring, CFLS

California's family law policies and remedies can be attractive to out-of-state parties. For instance, spousal support remains generally robust here, whereas it is limited – sometimes draconically so -- in other jurisdictions. Domestic monthly child support awards can reach tens of thousands of dollars -- especially in "extraordinary high earner" cases -- while firm caps are imposed elsewhere. Our community property principles might prove more generous in certain cases than under the "equitable distribution" laws in 41 other states.

As a result, "foreign" litigants not-uncommonly seek California courts. Assuming the existence of personal and subject matter jurisdiction, do California's under-funded and over-burdened family courts ***always*** have to handle the litigation when a party travels here?

Forum shopping for opportunities toward more lucrative litigation awards has long been rejected at the **national** level. The United States Supreme Court case, *Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501, 510, upheld the dismissal of a New York lawsuit that had been mounted on arguments that New York awards were likely better than those of another competing state's.

In **California**, Code of Civil Procedure section 410.30 subdivision (a) codifies the common law doctrine of ***forum non conveniens*** ("*FNC*"): "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." (Code Civ. Proc. § 410.30, subd. (a).) A "defendant," by the last day of her time to plead, may file and serve a motion to stay or dismiss an action on the ground of *FNC*. (*Id*., § 418.10, subd. (a)(2).) Failing to timely do so waives the defense. (*Id*., § 418.10, subd. (e)(3).) An order granting a motion to stay or dismiss on the ground of *FNC* is immediately appealable. (*Id*., § 904.1 subdiv. (a)(3).)

In *Stangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744, the California Supreme Court explained that *FNC* "… is an equitable doctrine invoking the discretionary power of a court to decline the

exercise of jurisdiction (to stay or dismiss) it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." (*Stangvik v. Shiley, Inc*., supra., at 751.)

> "There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned. … [T]he injustices and burdens on local courts and taxpayers … which can follow from an unchecked
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> and unregulated importation of transitory causes of action for trial in this state … require that our courts, acting on equitable principles …, exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere."
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> (*Ibid*., (citing the first published California case to apply *FNC*, *Price v. Atchison, T. & S. F. Ry. Co.* (1954) 42 Cal.2d 577).)

"In determining whether to grant a motion based on *FNC*, a court must first determine whether the alternate forum is a 'suitable' place for trial." (*Ibid*.) "A forum is suitable if there is jurisdiction and no statute of limitations bar to the action. It is sufficient that the action can be brought, although not necessarily won, in the suitable alternative forum." (*Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1464.)

A defendant bears the burden of proof of establishing an *FNC* defense. This means that she must provide the trial court with sufficient evidence to enable it to carry out its weighing and balancing analysis. (*NFL v. Fireman's Fund Ins. Co*. (2013) 216 CA4th 902, 926-927, 933, FTN. No. 15.)

The *Stangvik* Court outlined an approach including an analysis of **"private" and "public" interest factors** after which a California court might determine that another state could provide a proper alternative forum. (*Stangvik v. Shiley Inc.*, supra, at 751.)

Private interest factors relate to where the trial and enforcement of any judgment will be the most expeditious and least expensive. They include:

- Accessing sources of proof (residence of parties, witnesses, location of physical evidence).
- Travel costs for witnesses.
- The availability of compulsory process concerning unwilling witnesses.

(Ibid.; *Morris v. AGFA Corp.*, supra., at 1463-1464.)

Public interest factors include:

- Avoiding overburdening local courts with congested calendars.
- Protecting the interests of potential finders of fact so that they are not called upon to decide cases in which the local community has little concern.
- Balancing the competing interests of California and the alternate jurisdiction.

(Stangvik v. Shiley Inc., supra, at 751.)

The foregoing laws and principles are incorporated into family law practice through Family Code section 210: " … [T]he rules of practice and procedure applicable to civil actions

generally, … apply to, and constitute the rules of practice and procedure in, proceedings under [the Family Code]." (Fam. Code § 210.)

Henderson v. Superior Court (1978) 77 Cal.App.3d 583 concerned a ***Marvin*** action (breach of a non-marital cohabitation contract) brought by a plaintiff who traveled to California before filing against her Florida resident partner. The defendant asserted *FNC*. The Court of Appeal upheld its application, rejecting the practice of forum shopping against nonresidents:

> "California has a distinct public interest in not attracting to its borders and drawing into its court system controversies arising out of … affairs carried on and concluded by nonresidents outside the state. … If a newly-arrived claimant in California could initiate [a *Marvin*] action against a nonresident … based on prior nonmarital cohabitation outside California, then California's courts would be thrown wide open to the grossest form of forum shopping, for which the only equipment needed would be a tenuous claim to some California connection, a serviceable carpetbag, and a one-way ticket from New York, London, Paris, or Cannes."
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> (*Id.*, at 593-595.)

California's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), as codified in Family Code sections 3400 *et seq.,* expressly includes *FNC* considerations. Family Code section 3427 provides that a California family court may decline to exercise its jurisdiction at any time if it finds that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. (Fam. Code § 3427.)

Our state's version of the Uniform Interstate Family Support Act ("UIFSA"), as codified in Family Code sections 5700.101 *et seq.,* reflects *FNC* concerns. It asserts strict requirements before California courts can modify out-of-state support obligations. UIFSA, as adopted in California, was in pertinent part meant to ensure that "only one valid support order may be effective at any one time." (*In re Marriage of Amezquita* (2002) 101 Cal.App.4th 1415, 1420 (citations omitted)).

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On the other hand, the California Supreme Court, in *Whealton v. Whealton* (1967) 67 Cal. 2d 656, held that California courts may freely entertain an annulment action against a non-domiciliary spouse based on the mutual consent of the parties. It stated, "the interests of the … state of domicile of either party do not preclude a court that has personal jurisdiction over both parties from entertaining an annulment action." (*Whealton v. Whealton*, supra., at p. 664.) That case, though, concerned a relatively narrow fact pattern (the "wife" lived in Maryland, but accepted California jurisdiction) and is an outlier compared to the general rule.[1]

FNC defenses are thus available when a party travels to California and litigates family law disputes. With today's increasingly mobile population, initial consideration of *FNC* is more important than ever, and should fall under a family law attorney's duty of care.

This article is in part based on legal research by Herring Law Group attorneys, Ruston Imming, CFLS and Morgan Nix. Greg Herring is also a CFLS and is the principal of HLG, a family law firm serving the 805 with offices in Santa Barbara and in Ventura County. He is a Fellow of the Southern California Chapter of the American Academy of Matrimonial Lawyers, and of the International Academy of Family Lawyers. His prior articles and blog entries are at www.theherringlawgroup.com.

[1] See also *Millar v. Millar* (1917) 175 Cal. 797, 809, holding that statutory residence requirements for divorce do not apply to annulment.