

*In re the marriage of,*

Jane Doe,

Petitioner,

Case No. 11-FA-XXXXXX

and,

John Doe,

Respondent.

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**Petitioner's Brief in Opposition to Motion to Dismiss**

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**Background**

The respondent has filed a motion to dismiss this action on the grounds that there is pending a previously filed divorce action in Mexico. As will be set forth in more detail below, the court must deny the motion for the following reasons: (1) the parties have been residents of the United States for forty-one years, and they have been domiciled in the City of Milwaukee, Milwaukee County, Wisconsin for approximately twenty years and, therefore, under Sec. 767.055, Stats., any Mexican judgment of divorce is of no effect in Wisconsin; (2) upon information and belief based upon the petitioner's review of the alleged Mexican petition for divorce, it appears to be nothing more than a sworn statement made before a notary public, it does not appear to be an authentic summons and petition for divorce, it contains material mis-statements of fact concerning the residence of the parties and their assets and, therefore, the petitioner holds the respondent to his burden of proving that a legitimate action for divorce is currently pending in Mexico; at the very least, the Milwaukee County Circuit Court has

*in rem* jurisdiction because the respondent has been served, and the petition alleges that the parties own three parcels of real estate in Milwaukee County, and most of the marital estate is located in Milwaukee.

## **Allegations of Fact**

**Now comes** the above-named petitioner, Jane Doe, by her attorney, Jeffrey W. Jensen, and hereby alleges and shows to the court as follows:

1. The petitioner, Jane Doe, along with her husband, John Doe, have been continuous residents of the United States for approximately forty-one years. For the first twenty-one years, the couple resided in California. For the past twenty years, the couple has been domiciled in the City of Milwaukee, Milwaukee County, Wisconsin. On approximately a yearly basis, the couple has traveled to Mexico for short periods to visit relatives.

2. The petitioner, Jane Doe, has examined the purported petition for divorce that was filed in Mexico. In the opinion of the petitioner, the document does not appear to be a legitimate petition for divorce. The document contains material mis-statements of fact concerning the domicile of the parties, it does not summon the respondent to respond to the petition nor to appear in court, it does not identify the judge before whom the petition is allegedly pending, and-- in the opinion of the petitioner-- it appears to be a statement written by John Doe which was then signed before a notary public. Therefore, the petitioner holds John Doe to his proof that a legitimate divorce action is currently pending in Mexico.

3. The parties own three parcels of real estate in Milwaukee County, State of Wisconsin; and the vast majority of the marital property is located in Milwaukee County. Therefore, even if it is determined that the court lacks competence to determine the status of the parties' marriage, the court retains *in rem* jurisdiction to make orders concerning the property of the parties.

## **Legal Discussion**

**I. The court must deny the respondent's motion to dismiss because the parties were domiciled in this state at the time the Mexican divorce was filed, the petition does not appear to be authentic, and the property of the parties is located in Milwaukee.**

The respondent's motion alleges that Sec. 767.041(2), Stats., mandates that this action be dismissed. That section provides, “ (2) **Actions in courts of foreign countries.** Any court of this state may recognize a judgment in any action affecting the family involving Wisconsin domiciliaries, except an action relating to child custody, by a court of competent jurisdiction in a foreign country, in accordance with the principles of international comity.”

Firstly, the statute provides that the court “may” recognize a *judgment*<sup>1</sup> from a foreign country. Generally speaking, the use of the word “may” in a statute indicates that the statute is directory rather than mandatory, unless there is some reason to believe that the legislature intended the statute to be mandatory. *Worachek v. Stephenson Town School Dist.*, 270 Wis. 116, 122 (Wis. 1955). Here, it is apparent that the legislature intended the statute to be directory because the last phrase is, “in accordance with the principles of international comity.” In other words, if principles of international comity demand it, the courts in Wisconsin should recognize the foreign judgment. The statute does not provide, as the respondent suggests, that the existence of a previously filed divorce case in a foreign country deprives the Milwaukee County Circuit Court of jurisdiction (assuming that the other jurisdictional requirements are met).

Here, the respondent's motion makes no effort to address the issue of whether or not “principles of international comity” require this court to defer its jurisdiction to the court in Mexico. This is probably because, as is set forth below, there are no such principles present in this case.

Curiously absent from the respondent's brief is a citation to Sec. 767.055, Stats., which provides:

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<sup>1</sup>The petitioner could also quibble about the fact that, even under the respondent's allegations in his motion to dismiss, there is no *judgment* in Mexico. There is only an action pending. Therefore, the real issue of jurisdiction is whether Milwaukee County or Mexico is the appropriate forum to litigate the issues.

(1) **Effect of foreign divorce by state domiciliary.** A divorce obtained in another jurisdiction *is of no force or effect in this state if the court in the other jurisdiction lacks subject matter jurisdiction to hear the case because both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced.*

(2) **Proof.** Proof that a person obtaining a divorce in another jurisdiction was domiciled in this state within 12 months prior to the commencement of the divorce proceeding and resumed residence in this state within 18 months after the date of the person's departure from this state, or that at all times after the person's departure from this state and until the person's return the person maintained a place of residence within this state, is prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

(emphasis provided). The Supreme Court has explained that this statute was created to thwart the very gimmick that the respondent has attempted to pull off in this case.

The unequivocal declaration of legislative policy in sec. 247.21, Stats., [renumber to 767.04] is that no judgment of divorce is of effect in this state when a person domiciled in this state goes into another country for the purpose of obtaining a divorce for a cause which occurred in Wisconsin or for a cause which is not a ground for divorce under the laws of this state.

*In re Estate of Steffke*, 65 Wis. 2d 199, 204-205 (Wis. 1974).

For these reasons, the court must deny the respondent's motion to dismiss.

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 2011

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