

Daily Journal

www.dailyjournal.com

THURSDAY, AUGUST 14, 2025

PART I: PROCESS ERRORS

Common mistakes in family law matters: Pitfalls practitioners and courts should avoid

Family law cases are often costly, complex and emotionally charged, and common procedural mistakes – from faulty proof of service to improper disclosures – can delay justice, undermine fairness and even result in void orders that could have been avoided with proper training and preparation.

By Patti C. Ratekin

Family law matters can be very costly; when mistakes are made, those costs can be even higher. Cases involving divorce, child custody and property division are often complex and emotionally charged. They require careful adherence to procedural and statutory requirements.

But despite the best intentions of courts, attorneys and self-represented litigants, mistakes are often made. These simple errors can compromise the integrity of proceedings, delay justice and even result in invalid, unenforceable and – most tragically – void orders.

Over the course of my family law career, including while serving as a commissioner, I saw the same mistakes being made over and over again, often with significant consequences for the parties. These errors could – and should – have been avoided with proper training and preparation.

In a series of columns, I will share with you errors I regularly witnessed in family law practice. My goal is to improve awareness and accuracy in family law adjudication and settlement. This column will focus on commonly made procedural missteps.

Proceeding without proof of service

It is a fundamental misstep to try to move forward with hearings or rulings without valid proof of service. Family law proceedings require proper notice to all parties; without notice, due process is compromised and any resulting orders may be subject to challenge or reversal.

Proof of service lets the court know that the other party was properly



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served with legal papers. It documents what papers were served, where they were served and who served them. In divorce, child custody and support cases, proof of service establishes that the other party is aware of the legal proceedings and that the court has jurisdiction.

In *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, the appellate court held that a judgment entered without proper service of process is void as a matter of law. Due process, the court said, requires notice and an opportunity to be heard before a party can be deprived of property. Because Gorham had not been properly served and had no actual notice of the lawsuit until after judgment was entered, the default judgment had to be vacated. Sadly,

the custodial parent – or, more precisely, the County acting on behalf of the custodial parent – was deprived of the default child support judgment that had previously been entered against Gorham.

Under Rule 5.66 of the Rules of Court, parties must file with the court a completed form showing that the other party received a petition or complaint or a response to a petition or complaint. And it must be the correct form: FL-115 *or other form including the FL-330 for service of summons, FL-335 for service by mail, DV-200 for personal service in domestic violence cases, or POS-050/EFS-050 for electronic service. When utilizing service by way of a Notice and Acknowledgment of Receipt, FL-117, it is man-

datory that it be attached to an FL-115.

Incomplete or incorrect information, service by a party, an underage server, service by a felon, the wrong type of service for the document, or forgetting to deliver the completed form to the court – all of these can have devastating effects for the party and invalidate the whole effort. Without service, the court lacks jurisdiction over the party being served, due process is denied that party and the case should not move forward. If the court fails to notice defects with proof of service and allows the case to proceed, serious problems can arise. A client may be denied a benefit they believed they had obtained by virtue of having legal representation.

Mishandling joinder procedures
When third parties will be affected by a family proceeding, they must be officially joined as parties by the court. Until this happens, the claimant cannot be served.

Family cases often implicate interests outside the family unit. These might include individuals who have physical custody of minor children, persons who claim custody or visitation rights, others who assert claims against marital property, or retirement plans and other financial holdings of the parties.

Under Rules of Court 5.24, the court issues a joinder order and directs that a summons (form FL-375) be issued. The claimant – who is served with a copy of the Notice of Motion and Declaration for Joinder (form FL-371) with the pleading attached, the order of joinder and the summons – has 30 days to file a response.

A common mistake in a joinder, other than one involving a retirement plan, is that the person seeking joinder may fail to file the pleading related to the third party's interest, such as claims to custody or property rights – in essence, a civil complaint.

Improper bifurcation without Preliminary Declarations of Disclosure

Another common error is bifurcating marital status – granting divorce – prematurely, before a Preliminary Declaration of Disclosure (PDD) has been served or the written agreement to delay service under Family Code Section 2337 has been filed with the court.

The point of disclosure in family law matters is to make sure that spouses are aware of everything each owns and owes, separately and together, so that assets and debts can be divided equitably. Disclosure also gives parties the financial information they need to make decisions about child and spousal support and attorney fees.

California law requires that a PDD be served on a spouse or domestic partner before divorce can be granted. Bifurcating marital status without a PDD is improper and may render the bifurcation defective.

Entering into stipulations dividing property without service or Waiver of Final Declarations of Disclosure

Family Code Section 2105 provides

that, absent a court order for good cause, before or at the time the parties enter into an agreement for the resolution of property (other than for temporary use) or support issues (other than pendent lite support), each party or their attorneys must serve on the other party a final declaration of disclosure and, unless waived (FL-144), a current income and expense declaration.

Pursuant to Family Code Section 2107(d), with limited exceptions, if a court enters a judgment but the parties have failed to comply with their disclosure requirements, “the court shall set aside the judgment.” However, AB 459, enacted as part of the 2009 Stats, provides that if the complying party voluntarily waives receipt of the noncomplying party's PDD, the court will set the judgment aside only at the request of the complying party – unless the motion to set aside is based on fraud or perjury. The safest practice is to serve or waive the Final Declaration of Disclosure before entering any stipulation dividing property.

Declarations of Disclosure do not have to be filed with the court but proof of service of the document must be. Service can be done personally by mail; service may also be done electronically if both parties are represented by counsel or if there is a stipulation to serve electronically where one party is self-represented.

Settlements without proper disclosures

Parties cannot validly waive PDD, and settlement or trial cannot proceed without either a Final Declaration of Disclosure (FL-141) or a valid waiver (FL-144) on file. Skipping this step undermines transparency and may invalidate agreements.

To effectuate disclosure, parties must complete a Declaration of Disclosure (FL-140), a Schedule of Assets and Debts (FL-142) or a Community Property Declaration (FL-160) and Separate Property Declaration (FL-160), an Income and Expense Declaration (FL-150), a Service of Declaration of Disclosure (FL-141), and, if appropriate, a Stipulation and Waiver of Final Declaration of Disclosure (FL-144) signed by both parties.

If the spouse is participating, by filing a Response, they will also have to complete and serve a PDD and either serve or waive the Final Declaration of Disclosure.

The requirements for service of Declarations of Disclosure can be found on the FL-182 Judgment Checklist. Under Rules of Court 5.405, the court may not require any additional forms or attachments.

Errors in service by posting or publication

Sometimes parties have difficulty locating individuals whom they wish to initially serve, and they will request a court order allowing them to post or publish notice instead of directly serving papers. If the court orders service by posting or publication, it must ensure that the Summons box is correctly checked. Failure to check the correct box may render the service invalid. Posting is only allowed if the party qualifies for a Fee Waiver.

Posting or publishing other documents, including but not limited to Requests for Orders or declarations, is improper under Code of Civil Procedure Section 415.50.

Invalid stipulations to subject matter jurisdiction

Parties commonly believe that they can establish subject matter jurisdiction through mutual agreement. They may even stipulate to this in a document drafted by their attorneys. Any such agreement, however, is void.

Subject matter jurisdiction is a legal requirement established by law – not by agreement – and any attempt to create jurisdiction through stipulation, waiver or estoppel is void.

Entry of judgment of legal separation

When parties enter into a Judgment of Legal Separation and do not check the box for “Reserving Jurisdiction over termination of marital or domestic partnership status,” they must file a new case if they later decide to terminate their marital status. This will require them to file a new petition and also to follow the disclosure requirements in Family Code Section 2104 et. seq.

There are two common ways this mistake plays out:

The parties litigate all issues in the new case. The only issue in the new case should be termination of marital status. Issues related to custody, property or other matters in the judgment of legal separation should have been litigated in the earlier case.

The parties try to call the original proceeding a status judgment, but it cannot actually be a status judgment. Under Family Code Section 2337, status judgment must expressly reserve jurisdiction for later determination of any pending issues. In the new petition, there are no other issues left for determination in the later filed case.

The parties have an absolute right to reserve jurisdiction in a legal separation case in order to terminate their marital status later in the same case. However, they need a mechanism as to how this will occur, such as by stipulation of the parties, by filing a Request for Order, by giving notice by certified mail return receipt requested signed only by the party, or by any other mechanism upon which they can agree.

Conclusion

Procedure in family law cases is complicated, and mistakes are made on a regular basis – by parties, counsel and even judges. Heightened attention to these and other common mistakes in family law proceedings can significantly improve the efficiency, fairness and enforceability of these proceedings.

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