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Bay Area Law Associates

Frequently Asked Questions:
Divorce California Style

Randall L. Hornibrook, Esq.

The decision to file for divorce is rarely an easy one. If there are minor children in the marriage it is even more difficult to make that decision.

While a divorce may be the best path forward, it is important to enter it with your eyes open, understanding both the process and the consequences (intended and unintended). One of your lawyer's jobs is to inform you of what to expect – not to talk you out of divorce but to mentally and emotionally prepare you as much as possible for what you (and your children, if any) will face.

If you choose to proceed without a lawyer, you need to be aware of how the system works (and doesn't work) and some of the pitfalls you may encounter. Most divorcing people ("parties") get lots of advice and "facts" from well-meaning friends, but you will probably find that since each case is different their help can actually cause more problems than they solve. Divorce (or dissolution) law is complex and subtle, and even reading the statutes in the Family Code cannot prepare you for how the Court will decide your case.

There are few certainties in divorce, other than life will change and that you will not end up with everything you want or think you should get.

Life Will Change – Significantly

Unless you are one of the rare people who has great wealth, your standard of living will diminish in divorce. Income that supported a specific lifestyle will probably not be sufficient to maintain that lifestyle for two households. Spending patterns will need to change, and financial planning for not only the present but the future will be necessary.

Often divorcing parties start off with a sizable chunk of money, from the sale of a home or distribution of stocks, savings or retirement assets. These funds can quickly disappear if they are used to artificially supplement a former lifestyle, leaving the person with no resources and no financial plan.

If you have been a non-working spouse, or have only worked part-time (perhaps because you have been a caregiver for children) you will probably need to make efforts to become self-sufficient financially. While every case is different, a traditional homemaker cannot count on spousal support (what is often referred to as alimony) forever, even after a long-term marriage (a marriage lasting over 10 years). There has been a shift in how judges view support, as well as the law governing support, and there is now a statutory presumption that the supported person will make efforts to become self-sufficient. What used to be called "permanent support" is now generally referred to as "post judgment support" because it is considered "rehabilitative"; the support is to be used to allow the supported person time and financial freedom to gain an education, update skills, and gain employment.

You will also find that your parenting becomes more of a challenge. Even if your spouse was

not that active in the kids' lives, you generally had someone who could cover you as occasionally needed whether it was to go to the store or gym or just have a few minutes to yourself. Even if you rarely needed help, knowing that it was there was a relief. With divorce, even an illusion of possible assistance is gone, and you may feel additional stress and responsibility.

Co-Parenting Minor Children will be a Challenge

One of the hardest things for divorced parents to do is work together to raise children in the face of the strong emotions that generally accompany divorce (anger, betrayal, pain, incomprehension). Perhaps the biggest adjustments divorcing people have to come to terms with is that the person you were married to will become a stranger; divorce brings out a side of your former partner that often transforms them into someone you don't recognize. You will no longer be able to assume you know how they will react no matter how long you were together. You will not be able to count on them acting rationally, or consider the welfare of the children first.

One truth remains in almost any divorce with children – while you may no longer be your ex's spouse, they will always be a parent to your children. How you manage that relationship will influence so much in your kids' (and your own) lives – from attending parent-teacher conferences to supporting the kids in sports and activities to dancing at their wedding. There are resources available to assist you with co-parenting after divorce, but each relationship is unique. You may have great difficulty even being in the same room as your ex, or they may be so angry that they refuse to talk to you about the kids.

Judges tend to lecture parents in contentious divorces with something like, "You are the adults. You need to set aside your feelings for the welfare of the children." This is, of course, easier said than done.

However, the goal is worth it. If you cannot work out some form of cooperative parenting you stand to lose a great deal of the joy your kids can bring, as well as miss out on significant events in their life.

Settlement Outside Court is Almost Always Best

The last thing many divorcing parties expect to do is work things out with their spouse. The anger, pain, sense of betrayal and a whole variety of other emotions may make the thought of sitting down and deciding who gets the silverware and who gets the sofa an impossible task.

It may seem so much easier to just let a judge decide. After all, your position is the righteous one, you were the wronged party, you deserve to "win." And the judge will certainly recognize this. Right?

Wrong.

Even with the best lawyer and the best facts and the best evidence, you will probably not be completely satisfied with the result of a trial where you ask the judge to decide things. And the cost of such a trial will be great; even a short one or two day trial might cost $40,000 or more for preparation,

expert witnesses, depositions, and attorney preparation and trial time. Another cost not to be underestimated is the pressure and stress you will endure both leading up to the trial, during and after.

Depending on several factors, it is possible that after trial the judge may actually order you to pay some or all of your *spouse's* legal fees! A big factor in that decision by the judge is how they view your efforts to settle before trial – did you try to settle or were you unreasonable?

You can settle at any point prior to (or even during) a trial. When you settle, you retain control; in a trial you hand over everything you and your lawyer have put together to make your case and trust the judge to decide for you. You take yourself out of the equation, and you cannot control the outcome at all. You cannot say to the judge after she rules, "No, I don't like that part. No deal."

When you negotiate a settlement, you can work towards obtaining the things you care for most, bargaining with things the other party cares for most. You can make choices – to give up a little more here to get something you want there. You can decide to pay more spousal support for a shorter period of time rather than less support for a longer period of time. You can give up a motorcycle your husband loves and you could care less about or insist you get it, then give in when you get something else you want. Anything is possible in settlement discussions.

Judges love out-of-court settlements. The most common thing you will hear judges say to parties in court (after "Where are your disclosures?"; see below) is "You are adults. You need to set aside your feelings to work this out." This is especially true when it comes to children from the marriage, but it is also important in distributing everything acquired during the marriage.

The courts have very limited resources. There are few judges and courtrooms, few hours in the day for judges to hear matters. The system would come to a crashing halt if all divorces required judges to make all the decisions. Instead, the vast majority of divorces are settled outside court, with agreements between the parties which the judge then approves and signs as orders.

Settlement outside court will generally a) cost you far less than going to trial; b) get you more of what you really care about; c) allow you to avoid what you really don't want to happen; and d) keep you involved until the very end with the power to say yes or no.

Rarely does a settlement get a party everything they want, but rarely do people emerge from divorces totally happy about the outcome. When you can set aside your emotions and deal at arm's length with the other party to settle issues and allow each of you to move on with your lives you will usually be happier (and have fewer lawyer bills) than if you fight it out to the bitter end and ask a judge to make all the decisions for you.

You don't have to work things out with your spouse on your own. Sometimes spouses can accomplish much, through talking (face-to-face or on the phone), or via text or email. Sometimes it is best to talk through lawyers. Sometimes it helps to have a mediator work with you – a professional who is impartial and not representing either party but who tries to work with both spouses to arrive at a settlement both can live with.

802 B Street, San Rafael, CA 94901 ● T & F 844.LAW.BALA www.BALA-LAW.com

The Divorce Process

One of the first things most divorcing clients ask their attorney is "How much will this cost?" The second question is usually, "How long with this take?"

The answer to both is "It depends." While that is not the definitive answer most seek, it is unfortunately the most honest answer.

Self-help divorce books often estimate that using a lawyer in a divorce will cost on average about $15,000 to $20,000 (assuming no trial). Those are very scary numbers. Depending on the circumstances of your divorce they may be very high or low. As discussed above, if the case goes to trial these costs zoom skyward.

If you and your spouse can work together amicably (even if you hate each other's guts) and settle your custody, support and property issues (the big three in a divorce), you may not even need an attorney. You may want to work with a mediator (generally an experienced family law lawyer who helps you agree on issues and produces the paperwork needed to memorialize and finalize your divorce) at a much lower cost than separate attorneys representing each party. You can also use a mediator if you are represented, if you have stalled in negotiations; a good mediator can often help even the most stubborn parties come to grips with reality and settle.

If you have conflicts with your spouse and cannot work together to settle things, you probably need an attorney. If you have a lot of property or young children are involved, you probably should consider hiring an attorney even if you believe things will go smoothly. An attorney can save you money and heartache in the long run, and repeated returns to court.

The divorce process has a basic framework that includes the following steps:

1. The filing of the Petition for divorce (FL-100) and Summons (FL-110); the person filing will be known as the Petitioner. Together, you and your (soon to be ex-) spouse are known as the parties).
    a. If there are children, filing a basic UCCJEA declaration (FL-105) about the children (their names, when and where they were born, where they have lived)
    b. The Petition and Summons must be personally served (given to) the Respondent by someone other than the Petitioner; once you have served the Summons and Petition, personally, you can serve papers on the other party (Petitioner or Respondent) by mail (but the person actually mailing the papers must not be a party, i.e., *you*, to the divorce).
    c. You will always file a paper known as a "proof of service" with everything you file and serve on the other party.
    d. You also serve a blank copy of the Response (FL-120)
    e. If the Petition and Summons cannot be personally served (if the Respondent's location is not known, for example), there are alternate forms of service such as publication or (in Marin) posting that can be used after reasonable effort has been expended towards personal service. You must be able to show that you have made significant efforts to locate and serve the other party personally before the judge will allow you to do an alternative form of service. This is basic fairness; the judge does not want you to be able

to "secretly" divorce someone without them having a chance to have their say in the outcome in matters of support, custody and property.

2. The filing of the Response (FL-120); the person filing will be known as the Respondent
    a. Again, if there are children, the Respondent will also file a UCCJEA declaration (FL-105)
    b. The Response can be served on the Petitioner (or their attorney, if they are represented) by mail
    c. If the Respondent fails to file a Response the Court can order a default judgment if service requirements are met
3. Service of preliminary financial disclosures by both parties on each other
    a. Preliminary Declaration of Disclosure (FL-140) – ***not filed with court***; this says that you are serving the actual disclosure documents below on the other party
    b. Income and Expense Declaration (FL-150) – ***not filed with court***; here, the more documentation you can provide about income and expenses the better – payroll check stubs, mortgage statements, bank statements, utility bills, etc., that support what you declare yours income and expenses to be. This declaration, signed by you under oath and penalty of perjury, is an important document to be used to set child and spousal support.
    c. Preliminary Asset and Debt Schedule (FL-142) – ***not filed with court***; this form can be intimidating, but you can reserve answering some areas (such as furniture and personal possessions) until a later time by stating "To be determined", and you can estimate to the best of your knowledge many of the items. Where possible, however, you want exact figures backed up by statements (i.e., bank accounts, retirement funds, stocks, etc.)
        i. Many of the documents needed as support can be found online these days and easily printed out or downloaded as PDF files; if you lack computer skills your bank or broker can assist you or even go to a public library and ask for help
        ii. Your estimate of the value of your home or car is admissible, but there are quick and free options available online (such as kbb.com for car values and Zillow.com for home values) which can help you if you are uncertain
        iii. This form is also signed by you under oath and penalty of perjury, so it is important that any information you fill out is accurate. Many people get in trouble because they attempt to hide bank accounts or assets; be aware that the judge has the power to give the entire amount of an asset that you attempt to hide if it is discovered because it is a breach of fiduciary duty (your duty under the law to fully disclose your assets to your spouse) so honesty is always the best policy.
    d. Declaration of Service of Disclosures (FL-141) – ***FILED with court*** saying you have served the above documents on the other party
    e. The divorce process essentially stops dead until these are served and filed; without the disclosures, support cannot be determined by the court and the divorce cannot be finalized even if both parties agree on everything
    f. IMPORTANT: One thing to remember is that the judge is limited by what is in your file as she/he gets it; "If it isn't in the file, it doesn't exist." If you have a hearing coming up, make sure you file papers several days in advance so the clerk's office has time to get the papers into the file for the judge to review. ***Always take copies of all your papers with you to any court hearings*** just in case some filed papers have not made it

into your file; with cutbacks in funding, it is taking longer and longer for documents you file to be processed and get into your file and to the judge.

4. Filing of a motion requesting spousal and child support (FL-300; this is the general purpose Request for Order form that will be used for most motions)
    a. Needed if parties cannot agree on custody, timeshare and support
    b. Includes motion for custody and timeshare – the amount of time children spend with each parent and who has legal authority to make decisions regarding the children's healthcare, schooling, etc.
    c. Unless you have filed for and been granted a fee waiver (FW-001, for people on public assistance or with low incomes who cannot afford living expenses and court fees), this motion can cost over $100 to file
    d. A cheaper and easier option is for parents to "stipulate" (agree between themselves) what their spousal and child support will be. This can be done with or without attorneys, or with the assistance of the self-help available at the Court or various free legal services in your county. An agreement for spousal support (what used to be called alimony) is easier, as there are fewer restrictions, but child support is more closely governed by statute and guidelines set in the Family Code to protect the children. A written stipulation that is then signed by the judge as an order is best, allowing the judge to review and approve (and run a guideline calculation on approved software if you have not done so).
5. Response to motion for support (FL-320)
    a. There is no need to respond if you agree to everything in the Request for Order (FL-300), but odds are it would not have been filed if there had been agreement between the parties
    b. There is no court fee to respond to a motion
    c. If you fail to respond the Court can grant the motion by default, ordering everything that was asked for in the request for order
6. Family Court Services (FCS) child custody recommending counseling (if motion for custody filed) may or may not be ordered by the judge prior to a hearing on custody
    a. An experienced Child Custody Recommending Counselor will meet with parents and possibly with children (depending on the age of the children and whether the counselor believes it is appropriate or needed), and attempt to get parties to agree on a custody and visitation plan
    b. This session is ONLY to determine custody and visitation issues; the counselor cannot address financial or property issues
    c. If the parents do not sign an agreement from this session, the counselor will prepare a report for the judge and make recommendations. The report will attempt to impartially relate what each parent said at the session(s), give the counselor's evaluation of what was said (including their impression on the believability of each parent if appropriate), and give specific recommendations for custody and visitation. Judges usually accept the FCS recommendations and turn them into an order in part because the counselor has had more time to learn the facts and interview those involved than the judge can afford to spend. Judges also respect the education, expertise and experience of the FCS counselors, who have gone through this process with hundreds if not thousands of parents
7. Hearing on motion for custody and support

a. The judge will issue a tentative ruling (in Marin County; other Bay Area counties do not have tentative rulings) on the matter the court day before (Friday for a Monday hearing), which will probably include adopting the FCS recommendation or notice that an agreement has been reached on custody and visitation. You can go to the Marin Superior Court Web site and look for Tentative Rulings, Family Law, and the day before after 2 PM of the court day before your scheduled hearing.
b. Either party can object to any part of the tentative ruling, notifying the Court and the other party that they are doing so; if you disagree with the tentative ruling there is a number to call on the web site between 2 PM and 4 PM the day before after you notify the other party (or their attorney) that you will be contesting the tentative ruling in court the following morning
c. If neither party objects, then there is no need for either to appear at the hearing the next day; the tentative ruling will be adopted as written and an order will be written (by the Court or assigned to an attorney) and signed by the judge
d. NOTE: In parentage cases, which are classified as confidential, the tentative ruling will not be available online. Parents will need to call the clerk to obtain a copy; that number is on the web site for Tentative Rulings

8. ***Six months must pass from the date of service of the Petition and Summons on the Respondent and final judgment; this is a minimum time period***, and cases may go on for a much longer period of time if contentious
9. If the parties can agree on everything, they can prepare a written agreement (a Marital Settlement Agreement or MSA) and file the necessary judgment forms with the Court; skip over 10.
10. If the parties cannot settle all issues, the judge will order some form of judicial settlement conference. In Marin County, there is a process known as a Bench/Bar Settlement Conference (B/BSC), where a panel of three experienced family law attorneys (one of whom is acting as a judge pro tem with the authority to put a settlement on the record if one is reached) work with the parties (and their lawyers if they have them) to try to settle the case
    a. A B/BSC is a time-consuming, costly (particularly if you have a lawyer) and exhausting process. It usually takes all day, from 9 AM to 4:30 PM (unless you settle early)
    b. You are forced to stay at the courthouse; you cannot leave for lunch as part of the process, to make you stay and try to wear you down and force you to negotiate as the day wears on and you tire
    c. The three-lawyer panel will work with each side separately, pointing out the weaknesses on their case, explaining from their experience how the case might wind up at trial, what the best case and worst-case scenarios are, and what the party stands to lose. The goal is to show that compromise is probably preferable to the risks of trial.
    d. Preparation for the B/BSC involves drafting a comprehensive brief which is a long document which, if prepared by a lawyer, can costs thousands of dollars.
    e. If the B/BSC fails to result in a settlement, the judge usually sets a trial date the next day
11. If the settlement conference or Bench/Bar fails to result in settlement, a trial may be necessary where the judge reviews all the information and arguments and decides every unsettled issue as part of a decision and order
    a. Trials are very expensive, very time consuming, and take the power of settling away from the parties and give it to the judge; in almost every case it is better to settle than go to trial

b. Trials include opening and closing statements by attorneys, direct and cross examination of witnesses and experts, and exhibits.
c. A trial can take a few hours or go on for days, depending on the issues involved and the amounts at stake.
d. A trial can be on all issues in a divorce (custody, visitation, support and property distribution) or limited in scope to one or more issues
e. Only a small percentage of divorces go to trial; you may read a lot of nonsense online about 5% or 10% but the numbers are much lower. The court system could not handle such a high number of trials;

12. Final judgment papers prepared and filed with the court
    a. Includes agreed-upon or ordered custody and visitation plan for minor children, post-judgment child and spousal support, property division; often all presented in a written document called a Marital Settlement Agreement or MSA which is attached to the Judgment (FL-180) or as orders prepared by the Court
    b. The MSA and final documents can be prepared by the parties if self-represented, their attorneys, or a mediator if one is used
13. The judge signs the Judgment and copies are sent to the parties or their attorneys
14. The divorce is final!

Divorce in a Less-Than-Perfect World

Unfortunately, too often divorcing parties cannot easily agree on all issues. The following are the most common areas for controversy and conflict:

1. Child Custody and Visitation

Child custody refers to the responsibilities that the parents have for their children. Custody is broken down into two categories, legal custody and physical custody.

Custody can be joint (shared equally) or held by one parent.

Legal custody refers to the parents' rights to make decisions on issues like health care and education. Joint custody is common here, unless there are extenuating circumstances which argue that one parent should not have a right to decide for the child (such as alcohol or substance abuse, abandonment, or child abuse). The legislature and courts believe strongly that each parent has the right to be actively involved in decisions in their children's lives absent some strong reasons not to be. With joint legal custody parents must confer with each other (as well as notify each other) about all significant issues facing the child, and must jointly agree on things like which school the child attends. If there is a disagreement about, for example, which church the child attends, the parents may exercise their preference when they have physical custody of the child.

Physical custody can get a little complicated. On its face, physical custody means which parent has the child live with them the majority of the time; the other parent has visitation rights. Often, however, FCS and the Court will dodge this wording and instead say that one parent has "primary physical custody" while either expressly stating that there is joint physical custody or not even mentioning it.

If the parents have joint physical custody, the default is that both parents have the children with them for half the time. There are a variety of ways to accomplish this to spread out the child's time with a parent and fairly allow the parents to have equal weekend and vacation time. You can also have joint physical custody with an unequal timeshare (one parent has the kids more than the other).

More often, one parent has primary physical custody and the other parent has a visitation schedule. This visitation schedule is usually set out in writing ("Father has child Monday, Wednesday and Thursday from pickup after school to 8 PM, and every other weekend from Friday after school to Monday start of school."). Sometimes this schedule is flexible ("Mother has reasonable visitation rights, up to 30% of the week, to be arranged between the parties.").

Ideally, visitation and custody should only be about a parent's desire to maximize their time with their children, but finances often enter the picture. The party who is paying child support may want to maximize their official time with the children to lower their child support amount. A difference between a 25% timeshare (kids are with parent 25% of the month) and a 50% timeshare can be 20% of support per month. This can be thousands of dollars a year.

Unfortunately, the parent paying support often does not recognize that they are supporting their child and instead think of it as supporting the spouse. While there is no dollar-for-dollar accounting, the supporting parent can be relatively certain that absent their support their child would go without or be impacted negatively. The reality is that child support goes to support the child; the amount provided rarely is enough to completely pay for clothing, the child's portion of room and board, activities, entertainment, etc.

When there is a custody and timeshare battle, documentation is often key to prevailing (as it is in most aspects of a divorce). If a parent is trying to gain more time with their kids it helps if they can show a pattern of activities or responsibility for the children, or show that the other parent has not spent time with the children when they had the opportunity. This can be as simple as a diary or calendar showing events and time spent with kids. It can involve signed declarations of grandparents, teachers, coaches or friends which testify to your parenting skills (or your spouse's lack thereof) or time spent with the children.

It is always better to be positive (what you have done) rather than negative (what your spouse has not done). The major exception to this is if there has been any abuse towards you or a child.

Child support is generally determined by state guidelines (and is referred to as "guideline support"). While there are times when the parties agree or the Court orders "non-guideline" support, the guideline set forth in the Family Code is generally followed.

To calculate guideline support, numbers (gross income of each party, a few deductions, timeshare) are plugged in to a computer program (SupporTax or Dissomaster) approved by the state and a support amount is spit out.

One issue that complicates this process is determining the gross income. It is easier if the parties have a paycheck; they are to produce check stubs as part of their disclosures, and that should

definitely determine gross income. But complications arise when there is overtime, bonuses, or one party is self-employed. How is overtime used in the calculations? Are bonuses handled as part of the gross income or is just the base pay used? Is there some additional bonus calculation, where support is based upon one number for base pay and an additional amount from bonuses when they are received? Is the self-employed person's Schedule C income really all that is available, or are many of the deductions for business really personal deductions?

While the statutes and cases appear to be clear that regular overtime and bonuses are to be included in gross pay, some judges have shown an inclination to go along with bonus calculations offered by the software companies. This is an unsettled area of law at this time given the broad discretion of judges.

Even more problematic are people who are self-employed or own a small business. How do you accurately determine their income? Can you depend on tax returns which may not reflect income accurately because of unreported income or personal expenses hidden as business expenses? Businesses that have a certain amount of cash income are always a source of controversy – while the judge will generally understand that cash transactions are often unreported, it will be the burden of the person claiming cash transaction to prove the amount involved. This can be very difficult to prove to a judge's satisfaction.

There are also issues related to a spouse who is unemployed or underemployed. The Court can excuse the unemployment (as in the case of a parent caring for young or special needs children) or the court can assign an "imputed" income – an amount that the person could theoretically be earning. This can be as little as minimum wage (the judge assigning an income equal to full- or part-time minimum wage employment) or can be as high as a professional salary that the person has earned in the past or is qualified to earn. Someone who gave up a $100,000 a year job prior to separation may find that the judge believes they should not have quit that job and should still be earning $100,000, and that pay level will be "imputed" as their actual income for support calculation purposes.

The effort to prove income of the other side is greater than claimed requires document discovery that complicates litigation. Often the other side is reluctant to produce documents, or dribbles them out, or produces only a portion of documents. Sometimes a motion to compel production of documents is required to get the judge to order the other side to produce what you ask for.

You may also be required to produce extensive documentation to prove *your* income or the lack thereof. A party can also be ordered to prove that they are actively looking for work by producing documents showing attempts to find a job.

If there are ongoing problems with timeshare and custody, it may be necessary to go back to court to either enforce an order or request that an order be modified. While it is best to try to work with the other side to resolve such issues outside of court, you may be compelled to seek the judge's help in resolving ongoing issues.

2. Spousal Support

Spousal support (commonly referred to as alimony) is often an area of dispute and legal

maneuvering. The party paying support generally believes it is too high, while the receiving party thinks it is too low.

Theoretically, temporary spousal support (during the duration of the divorce proceeding; also technically called *pendent lite* or "awaiting the litigation" support) is a mathematical certainty. Like child support, spousal support during the divorce proceeding is generally determined by a computer program and has the same issues as child support described above. The fight is generally about the income of the parties.

Where spousal support differs from child support is what used to be called "permanent support" and is now generally referred to as "post-judgment support." The reason for the terminology change is that even for long-term marriages, ongoing support is generally not "permanent" but for a set period of time; the California Legislature has made it clear that they place a value on the supported spouse becoming self-sufficient under most conditions after a reasonable period of time.

Post-judgment spousal support is not calculated using a computer program but is either an amount agreed upon by the parties or by having a judge determine it by evaluating fourteen factors which relate in part to the standard of living during the marriage and other factors. The judge has a great deal of latitude here, but as a rule post-judgment support is less than the temporary guideline spousal support. It should be noted that the courts have long understood that support may not enable the supported party to live at the standard of living enjoyed during the marriage because there is not enough money available to provide that standard for two households; both parties will probably experience a lower standard of living after divorce.

The fourteen factors from the Family Code are:

1. The extent to which each party's earning capacity will maintain the standard of living established during the marriage. *Family Code § 4320(a).*
2. The extent to which the supported party contributed to the supporting party's attainment of an education, training, a career position, or a license. *Family Code § 4320(b).*
3. The supporting party's ability to pay, taking into account his or her earning capacity, earned and unearned income, assets, and standard of living. *Family Code § 4320(c).*
4. Each party's needs, based on the standard of living established during the marriage. *Family Code § 4320(d).*
5. Each party's assets (including separate property) and obligations. *Family Code § 4320(e).*
6. The duration of the marriage. *Family Code § 4320(f).*
7. The supported party's ability to be gainfully employed without interfering with the interests of dependent children in his or her custody. *Family Code § 4320(g).*
8. Each party's age and health. *Family Code § 4320(h).*
9. Documented evidence of any history of domestic violence between the parties, including emotional distress resulting from the violence. *Family Code § 4320(i).*
10. The immediate and specific tax consequences to each party. *Family Code § 4320(j).*
11. The balance of hardships to each party. *Family Code § 4320(k).*
12. The goal that the supported party be self-supporting within a reasonable period of time. *Family Code § 4320(l).*
13. The criminal conviction of an abusive spouse when the court is reducing or eliminating a

spousal support award under Family Code § 4325. *Family Code § 4320(m).*

14. Any other factors the court deems just and equitable. *Family Code § 4320(n).*

Judges have great discretion in awarding support based upon these factors, and no two judges will rule exactly the same. While judges do their best to be fair and impartial, each will view the facts and circumstances differently, viewed through the lens of their lives and experience. There is no "right" answer for support – when weighing these fourteen factors there is as much art as science, sociology as law. The difference in age of children of even a year may change an award of support, or even the attitude of a party during a hearing toward their spouse. Judges are human – as we want them to be, for it is their humanity that allows us to arrive at justice rather than rote application of statutes. But that justice means applying the facts and law equally to both sides, and often neither side comes away thinking the final award is "fair." Perhaps the best measure of a judge's impartiality is when both sides come away equally dissatisfied with the result.

3. Property Division

Depending on how much "stuff" you have or acquired during the marriage, property division – how you split everything from savings accounts to DVDs to retirement plans to houses – can be a major source of disagreement and legal fighting.

If there are substantial assets, even parties who can agree on most everything else can find that they feel compelled to fight over large amounts of money or property because so much is at stake.

California recognizes two basic forms of property ownership by married people – community property (where the parties own the property together, each having a 50% interest) and separate property (where one person owns the property outright and the partner does not have any interest). Property can also be mixed, having both separate and community elements.

It might appear that separate property is easy to identify; the Family Code defines separate property as all property owned by the person before marriage, all property acquired by the person after marriage by gift, by bequest, devise, or descent (inherited), as well as the rents, issues, and profits from separate property. (Fam. Code §770.)

In the real world, people often argue about the source of property. Was the gift to just one person or to the family? Was a purchase during the marriage a gift or an investment?

People often have strong feelings about what is "theirs" in a marriage. For example, "This is my car; we bought it for me and I always used it. You have your own car." Was that car a gift (and thus the separate property of one person) or a community purchase which one person tended to use more than the other?

Often the major earner in the family believes that everything was bought with "his" or "her" money and is "theirs." This is a false notion attorneys try to educate clients about from the beginning. All money earned with the effort of the spouse during the marriage is community money, belonging equally to both parties. This includes income, retirement, pensions, stocks and stock options, and savings. It is a "sweat of the brow" situation – however, money that is earned from, say, interest on a

savings account owned by one party ***prior*** to marriage is ***not*** community, because the owner is not "sweating" to earn it – it is growing on its own.

Property division relating to house ownership can also be tricky. If the house was purchased during the marriage, solely using funds earned during the marriage, then it is community property no matter how the title is held.

But often people have a house that was either purchased by one person before marriage or there was a down payment made from the separate funds of one spouse used to buy a house during marriage. It is not unusual for one person to enter into the marriage with money from a former house sale or savings from before marriage (their undisputed separate property), which they then use as all or part of a down payment on a house bought during marriage and titled in both spouses names.

Separate property funds do not lose their character if they are used to buy something so long as the course of the funds can be traced back to a separate property sources (such as that savings account owned prior to marriage).

A married person who used separate property funds to either make a down payment or pay down the mortgage principle on what is otherwise a community property house (or other piece of real estate) has a reimbursement right to that amount, ***without interest or growth*** even if the house has significantly appreciated. (Fam. Code §2640.) It is the burden of the party requesting the reimbursement to prove the facts to the judge's satisfaction. If a house is sold as part of the divorce, that reimbursement amount comes first from any profit before the remaining profit is split. If one party is to buy out the interest of the other person, that reimbursement is applied as part of determining the buyout price.

For example, a couple buys a house during marriage. They use as a down payment $50,000 the wife had in savings prior to marriage. If they sell that house and make a $400,000 profit, the wife would get her $50,000 first, then the couple would split $350,000, each getting $175,000. The wife would get $225,000 total while the husband would get $175,000.

If the wife wished to keep the house and buy out the husband's interest, she would have to pay him $175,000. If the husband wished to keep the house and buy out the wife, he would have to pay her $225,000.

A house purchased prior to marriage (and even titled in one name only) may still have a community interest component if community funds (money earned during marriage by the effort of the earner) were used to pay down the principle of the mortgage.

In today's Bay Area real estate market, the amounts at issue may be in the hundreds of thousands of dollars, and legal battles may be fierce.

Property disputes also often arise from how to distribute pensions and retirement plans such as 401K accounts. Where these plans have significant value it is best to have a forensic accountant or actuary calculate the interest held by the parties. Often someone has an existing 401K or pension plan prior to marriage; the community would only have an interest for the contributions (and increase

therefrom) made during marriage, with the balance belonging to the earner. Of the community interest, half of the value would go to one party and half to the other.

Property settlements generally involve valuing every piece of property and swapping items to reach a distributed value equal to each party, or amicably agreeing who gets what furniture and knick knacks. For example, one person may get the car worth $10,000, the other person getting the car worth $5,000, the motorcycle worth $2,500 and the boat worth $2,500.

If the parties cannot make this division of property voluntarily the judge will do so, often to the dissatisfaction of both parties.

After Judgment

The Judgment that declares the parties divorced (and able to remarry) does not necessarily end legal battles.

The Court retains jurisdiction over child support until the youngest child is 18 (or 19 and living at home while attending high school). That means that either side can petition the Court for a change in child support if they claim a material change in circumstances. Most often this occurs when one party either gets a new job that pays more or loses a job and is earning less. For example, if the supported party is not working when support is set but later gets a job or moves in with a new partner, the paying party may want to ask the Court to reduce the amount of support because of changed circumstances. The supporting party may also ask the Court to lower or even eliminate child support if the payer loses their job or has a reduction in income.

Parties cannot agree to terminate the jurisdiction of the Court to modify child support for minor children (although they can agree not to collect that support that was ordered, while that money balance continues to accrue and may become payable at some future date).

Spousal support is also subject to modification after Judgment given changed circumstances, but the parties can modify the jurisdiction of the Court by agreement (unlike child support). A settlement agreement may expressly state that spousal support will be set at a certain amount for a specific period of time and that it is "non-modifiable" – i.e., neither party can go to the Court and ask for a change in support due to changed circumstances. The parties can also agree that the Court's jurisdiction (ability to change support) will terminate at a certain date. Thus an agreement can state that support will continue for six years at a given rate, at which time all support will end and the Court's jurisdiction will be terminated. They can even state that the Court's jurisdiction terminates at Judgment – that no matter what happens in the future, neither parte can ever go back to court and ask for spousal support.

Both parties also retain the right to seek a modification of custody and visitation after Judgment; this usually is accompanied by a request for a change in child support, as if the timeshare changes, guideline support would also change. It is not uncommon for a parent to fight for 50/50 visitation for purposes of setting child support during the divorce proceeding, then fail to exercise their visitation privileges once the Judgment is final. That 50% timeshare may drop down to 20% actual time spent with the child, and the parent who takes over the majority of time may want to seek more child support

because of that change in timeshare.

Conclusion

A divorce can be finalized in as little time as six months from the date the Respondent is served (the minimum time by law) or it can drag on for years.

One of the most frequent questions asked by prospective clients is, "How long will this take?" (Usually shortly before or after the question, "How much will this cost?")

There is no way to estimate how long a divorce will take or how much it will cost because the decisions made by both parties will have significant impact on how the matter proceeds. An opposing party who refuses to cooperate outside of Court may require multiple motions, hearings, and even a full-blown trial. Whether the parties exchange all needed information (including bank statements, income information, etc.) or follow agreements will also impact how much time and effort you or your attorney must spend – in and out of court – to properly represent your interests.

The bottom line in any divorce is that you are generally better off when you can work with your former spouse without the need for expensive filings and hearings. You also benefit from cooperative settlement because when you ask the judge to decide an issue you lose all control of the outcome and cannot know how they will decide. When you negotiate with even a difficult former partner you have a measure of control, and can make decisions on what you must have and what you are willing to give up. And you can always say no in a negotiation, but you cannot say no to a judge's order.

Settlement rarely gives you everything you want or think you should get, but there is a great value to settling and moving on with your life. Most people feel that it is worth not getting everything they want just to have the emotionally-exhausting divorce over and be able to start their new life embracing the possibilities, not the past.

802 B Street, San Rafael, CA 94901 ● T & F 844.LAW.BALA www.BALA-LAW.com