



FAMILY LAW

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WHAT EVERY LAWYER SHOULD KNOW ABOUT FAMILY LAW
By Lesa Christenson, CFLS

I. OVERVIEW OF THE SAN DIEGO FAMILY LAW COURT.

The Family Law Court is a branch of the Superior Court of San Diego County. Following are its locations:

<p><u>Downtown</u> Pre-July 2017: 1551-1555 Sixth Avenue San Diego, CA 92101</p> <p>Madge Bradley Building 1409 Fourth Avenue San Diego, CA 92101</p> <p>Central Courthouse 220 West Broadway San Diego, CA 92101 Depts. 41 through 45 (DCSS cases and overflow)</p> <p>As of July 2017: New Central Courthouse 1100 Union Street San Diego, CA 92101</p>	<p><u>North County</u> 325 South Melrose Drive Vista, CA 92083</p> <p><u>East County</u> 250 Main Street El Cajon, CA 92021</p> <p><u>South Bay</u> 500 Third Avenue Chula Vista, CA 91910</p>
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Department of Child Support Services (DCSS) cases:

A party seeking a child support order, or enforcement of an existing child support order, can obtain free services from the Department of Child Support Services (DCSS). If that occurs, the Family Law Court is divested of jurisdiction over the issue of child support. All future hearings on support will be heard with DCSS involvement until the DCSS file is closed; the Family Court can still hear other issues (see below).

II. ISSUES IN FAMILY COURT.

The Family Law Court has exclusive jurisdiction over dissolution of marriage, legal separation, and paternity actions, including all of the issues that are dealt with in such actions.

The main issues in a dissolution of marriage action are:

- A. Termination of marital status (six months from service of Summons and Petition for Dissolution at the earliest)
- B. Child custody and visitation (latter now called "child sharing")
- C. Child support
- D. Spousal support
- E. Property and debt characterization (community vs. separate), valuation and division
- F. Attorney's fees

III. STAGES OF THE MARITAL DISSOLUTION ACTION.

A. Filing Initial Pleadings (Petition and Response).

These documents commence the case and frame the issues to be addressed by the Court in the dissolution action.

A Family Law Summons is issued at the time the Petition is filed. The back of the Summons contains the very important "ATROs" (Automatic Temporary Restraining Orders), which enjoin the parties from doing any of the following during the

dissolution action *without the consent of the other party or Court order*:

1. Taking the children out of California.
2. Cancelling, borrowing against or changing beneficiaries of any insurance (health, life, auto, disability, etc.).
3. Transferring, disposing of, encumbering or concealing any real or personal property, whether separate or community, except in the ordinary course of business, for the necessities of life or to retain an attorney.
4. Funding a newly created revocable trust.

The purpose of the ATROs is to maintain the status quo which existed at the date of separation until the issues can be sorted out and resolved.

The ATROs go into effect against the Petitioner when the Petition is filed, and against the Respondent when the Summons and Petition is served upon him.¹

B. Optional: File Request for Order ("RFO").

An RFO is a Family Law motion which requests interim orders from the Court on disputed issues (custody, support, exclusive use of the marital residence/cars, payment of certain debts and expenses (mortgage, property taxes), attorney's fees, etc.). Hearings on RFOs are set out about eight weeks.

The parties sometimes work out such matters on their own or through counsel and an RFO is not necessary. In such case, a written Stipulation and Order should be prepared and filed reflecting the parties' agreements.

If custody or child sharing issues are in dispute, the parties will be sent to Family Court Services ("FCS"), which is a free mediation service at the Family Law Courthouse. The mediation appointment will be scheduled to occur before the RFO hearing.

¹ Pronouns are intended to apply to both genders throughout this letter.

After mediation at FCS, the mediator will prepare a written report containing any custody and child sharing agreements reached by the parties, as well as recommendations on custody and child sharing if the parties cannot agree. The FCS report is sent to the Court and parties/counsel, and is given great weight at the RFO hearing. Hence, preparing clients for FCS mediation is critical.

During FCS mediation, the mediator may ask to set up a subsequent appointment to meet with the parties' children. The mediator also may make collateral contacts (teachers, doctors, therapists, etc.) if appropriate.

Orders obtained at RFO hearings are considered "temporary" or "interim" (aka *pendente lite*, while the action is pending).

At the RFO hearing, evidence is presented by written declarations and exhibits submitted to the Court in advance, and sometimes by live testimony of the parties and/or witnesses.

Children are not allowed to submit declarations, or to appear in Court; however, if they are 14 they may be allowed to testify as to their living preferences. Otherwise, their input is obtained by the FCS mediator through direct interviews or collateral contacts with their teacher, therapist, physician, etc. In rare cases, minor's counsel is appointed.

C. Prepare Declaration of Disclosure ("DOD") Documents.

The DOD documents are the Income and Expense Declaration and the Schedule of Assets and Debts, plus supporting documentation.

California law requires FULL DISCLOSURE between the parties of all information re finances, assets and debts. In fact, spouses owe one another fiduciary duties - the same fiduciary duties owed by business partners to each other - both during the marriage and after separation. Spouses even have the right to request an accounting from one another. The fiduciary duties are extinguished only when all of the property has been divided pursuant to the Judgment of Dissolution.

One of the purposes of the DOD documents is to ascertain the community estate and each party's separate estate, if any. This includes:

1. Listing all property and debts

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2. Characterizing same as either separate property or community property
 3. Valuing the property (appraisals usually necessary)
 4. Providing supporting proof/documentation of the above (e.g., deed to the house, mortgage statement, bank account statements, credit card statements, etc.)

Full disclosure is imperative. When a party fails to fully disclose, he runs the risk of having the entire Judgment of Dissolution set aside at a later time because of his failure to comply with the disclosure statutes. Sanctions also may be ordered for failing to properly disclose.

D. Optional: Discovery.

All forms of civil discovery are available in Family Law actions. The extent of discovery necessary depends in part upon the parties' compliance with the disclosure statutes. If disclosure of information and documents is broad, little or no discovery may be needed.

E. Negotiate a Settlement.

Once the community and separate estates are determined, the parties/attorneys try to negotiate a settlement of the property rights and other case issues (custody and child sharing, etc.). This can be done informally by sending settlement offer letters back and forth; at a Mandatory Settlement Conference scheduled by the Court; or at private mediation.

Seasoned Family Law attorneys (usually Certified Specialists) volunteer their time to the Court to act as Mandatory Settlement Conference judges.

The community estate generally will be divided so that each spouse receives an approximately equal share, and each party's separate estate will be confirmed to the party who owns it.

All other issues in the case need to be addressed in the settlement negotiations as well. If "temporary" orders have been obtained at an RFO hearing during the pendency of the action, parties often agree to have them included in the Judgment and Marital Settlement Agreement.

Orders on the following issues are modifiable post-Judgment: custody and child sharing, and child support. Spousal support is modifiable unless clearly made non-modifiable in the MSA. Attorney's fees are also available post-Judgment.

F. If Case Settles - Preparation of Marital Settlement Agreement and Judgment of Dissolution.

The Marital Settlement Agreement ("MSA") and Judgment packet documents are prepared by one of the attorneys and circulated for comment, revision and signature. The Judgment and MSA are then submitted to the Court for entry. It takes between two and six months for the Court to process Judgments.

G. If Case Does NOT Settle - Go to Trial.

The parties must attend a Mandatory Settlement Conference before the Court will set a trial date. There is no right to a jury in Family Law cases.

H. Post-Judgment Matters.

After the Judgment is processed, entered and filed, the parties may wish to return to Court to modify the orders in the Judgment, usually with respect to custody and child sharing and support orders. Property and debt division orders are not modifiable.

To obtain a modification, a new RFO is filed. A change of circumstances is generally required to obtain modification. If custody or child sharing is sought to be modified, the parties must return to FCS mediation for another session (unless their previous session was in the last 12 months).

IV. COMMON QUESTIONS.

Q. What is the significance of the date of separation?

A. The date of separation is the day when one spouse tells the other the marriage is over and then acts in accordance with that statement. (Resumption of the marital relationship "cancels" the date of separation.) You do not need a Judgment or order telling you that you're "separated" in order to be separated. Whether you are "separated" is a question of fact. There needs to be some factual manifestation of one party's intent. The best example would be one party announcing "I want a divorce," and moving out.

The date of separation is basically the date the community ceases to grow as a result of the parties' personal services or efforts. Everything earned after the date of separation is the property of the party earning it, and every debt incurred after that date is the debt of the party incurring it. If a party earned money prior to separation but did not get paid until after separation, those earnings are still community property.

The period RIGHT AFTER THE DATE OF SEPARATION is critical to custody and child sharing issues. The Court often feels that maintaining the "status quo" is in the best interest of the minor children of divorce, who need as much stability and consistency in their lives as they can get during this difficult time. If the children spend most of their time with one parent between the date of separation and the date of the RFO hearing, the Court may maintain this status quo and order the children to continue spending most of their time with that one parent. This is one reason it's critical for a person to meet with an attorney prior to separating.

Q. As a Dad, I'm entitled to 50/50 custody, right?

A. Sorry. The Court will make custody and child sharing orders based on the best interest of the children, and California believes this is achieved through "frequent and continuing contact" between the children and each parent. The actual custody arrangement eventually ordered by the Court depends on many factors, and the Court has WIDE discretion in this area.

Where the children are equally bonded with both parents, and both parents have spent an equal amount of time with them prior to separating, a 50/50 arrangement would usually be found to be in their best interest (barring other factors, such as neglect, abuse, domestic violence, alcohol/drug use, etc.). Where the children have been cared for primarily by a stay-at-home parent, that parent sometimes get more custody. There seems to be a trend toward 50/50 child sharing arrangements.

Q. I'm not sure I want a divorce. Maybe we should start with a legal separation. What's the difference?

A. "Dissolution" and "legal separation" are two separate legal actions. The Court has jurisdiction to address most of the same issues in both actions (i.e., division of property, custody and child sharing, child and spousal support, and attorney's fees). The only difference is that in a dissolution

action, the Court can terminate the parties' marital status; in a legal separation action, it cannot.

A legal separation action can be converted into a dissolution action after six months, but not vice versa.

If a party hasn't lived in California for at least six months, he cannot file a dissolution action here. There is no such residency requirement for a legal separation action. Sometimes people file for legal separation as soon as they move to California, then convert the action into a dissolution action after six months.

To obtain a Judgment of Legal Separation, you must have your spouse's permission. You do not need your spouse's permission to get a divorce.

Q. Why do people file for legal separation instead of dissolution?

A. There are three typical reasons: (1) emotionally, the party feels unready for a divorce; (2) the parties do not want to divorce for religious reasons; and/or (3) one of the parties has an existing health problem and could not get new health insurance if the parties divorced.

Q. I'm a business lawyer. What can I do to help protect my client?

A. BEFORE the client separates from her spouse, advise her to buy an hour or two of a good divorce lawyer's time. Send the client in with a list of questions. Come along to the consultation if you like. The initial consultation is often the most important hour or two your client will spend in planning for her divorce.

If the client has already been served with papers, advise him to see a good divorce lawyer AS SOON AS POSSIBLE. Time is critical.

Why is time so critical? Because of the Court's focus on the "status quo" which existed at date of separation. This is most critical to the issues of custody and child sharing, though it also has an impact on support. If a party voluntarily begins paying a higher than necessary amount of support, she may be setting a bad precedent for the Court hearing down the road.

There also are ways for a business owner to structure his business, and income therefrom, which may help or hurt in the event of a divorce. For example, leaving no money in a company and paying out all profit each year will maximize a client's earnings and her liability for support. Conversely, it is arguable that retained earnings are not "income available for support."

Q. My client would like to save as much money in attorney's fees as possible. How can I help?

A. If the parties are relatively amicable with one another, they should try mediation with a seasoned mediator. Each party should see a good divorce lawyer before heading into mediation however, so that he knows his rights going in. In addition, the client should not agree to anything without first talking to his lawyer.

Clients can save fees generally by following these rules:

1. When the lawyer asks the client to bring in documents, fill out a form, or whatever, the client should do it promptly and completely without having to be asked several times. Law firms bill by time, not project. Each time a lawyer has to get up to speed on a project, only to realize the client hasn't provided requested information, time and fees are spent inefficiently.

2. The client should have a list of questions or issues prepared when she calls to speak with the lawyer. Calling several times or sending numerous emails per day or week is not efficient and wastes money. There is always a bit of time the lawyer must spend getting up to speed on the case before she can intelligently answer questions.

3. The client should be happy he is talking to a staff member or junior lawyer instead of the partner lawyer. My practice group works as a big team. There are many things my staff can do for a client just as well as I can (if not better), but at lower rates. A client shouldn't pay for the big gun when it's not necessary. And clients should not be insulted if the staffers try to help first; they're trying to save the client money. They usually know exactly what I would say as they have worked for me for many years. If not, it takes them just a few moments to ask me.

4. Go to therapy. Divorce is one of the top five most stressful events a person can experience. While I'm happy to listen to a client's problems, I'm not a therapist and pretty expensive to use as one.

Q. My client owns several businesses and receives income from many sources. How much support will he have to pay?

A. Child support is determined by California's "guideline" formula. Family Law attorneys have the guideline support software on their computers, and can calculate support with certain basic information: the respective incomes of the parties, tax filing status, timeshare with the children, mortgage interest and property tax payments, health insurance premium, and certain other information.

Q. I filed for divorce six months ago. Am I divorced now?

A. No, nothing occurs automatically in Family Court. You cannot obtain a Judgment of Dissolution unless, at minimum, you have filed a special proof of service with the Court that you have exchanged your disclosure documents.

Q. I've heard of something called a "bifurcated" divorce. What is that and how can I get one? Do I want one?

A. The Family Court has the ability to sever off or "bifurcate" any issue, including the issue of the termination of the parties' marital status, and grant a Judgment on that issue only. This can occur no earlier than six months from the date the Respondent is served with the Summons and Petition or appeared in the action. The effect of a bifurcated dissolution is that the client can get married again. As a condition, however, health insurance for the other spouse must be maintained (among numerous other conditions).

Q. Should I hire a private eye to follow my spouse around? I think she may be seeing someone behind my back.

A. California is a "no fault" state. Either party can get a divorce on the grounds of irreconcilable differences, regardless of who did what to whom. The only time behavior matters is with respect to (1) custody and child sharing; (2) domestic violence; and (3) following the Court's orders.

Q. How long will I have to pay spousal support (alimony)?

A. Until the Court or the Judgment say you don't have to. Spousal support usually lasts half the length of the marriage, unless the recipient spouse remarries or begins cohabiting with a significant other who is providing financial support. The Court has BROAD DISCRETION in the area of spousal support. Over a dozen factors must be considered by the Court in ordering post-Judgment spousal support. *Pendente lite* spousal support is meant to maintain the status quo at date of separation, while post-Judgment spousal support is meant to maintain the payee at the marital standard of living, if possible (usually it's not).

Q. How long will I have to pay child support??

A. The obligation to pay child support will cease when a child marries, dies, reaches the age of eighteen (18) years, becomes emancipated, or upon further order of a court of competent jurisdiction. If, however, upon reaching the age of eighteen (18) years, a given child is unmarried, is not self-supporting and is a full-time high school student, the support obligation shall continue as to that child until that child marries, dies, becomes self-supporting, no longer is a full-time high school student, completes the 12th grade or reaches the age of nineteen (19) years, whichever occurs first.

The above rule does not apply to a disabled adult child who is incapable of self-support.

Q. Do I have to pay for college?

A. No. Unless both parties agree, neither parent is obligated to pay for college. Either parent may voluntarily pay for a child's college education; however, the other party is under no obligation to share the cost.

Q. My wife got to the Courthouse and filed a Petition for Dissolution first. Does she gain an advantage by being the Petitioner?

A. No, there is no strategic legal benefit to being the Petitioner.

Q. Can I stop my spouse from serving a wage garnishment on my employer? It's too embarrassing.

A. No, unless he agrees not to.