

WHAT
SHOULD I
KNOW
ABOUT
DIVORCE
AND
CUSTODY?

GET THE
LEGAL
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What should I know about divorce and custody?

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The Executive Committee and Alternative Dispute Resolution Committee of the State Bar's Family Law Section both played key roles in the development and editing of this pamphlet.

1 What are grounds for divorce in California?

In California, there are two grounds for divorce (also known as *dissolution*):

- **Irreconcilable differences.** You simply check this box on the dissolution petition and the court will grant your divorce.
- **Incurable insanity** (almost never used). Medical proof that one spouse was insane when the petition was filed – and remains incurably insane – is required.

In addition, you or your spouse must have lived in California for six months and in your county for three months before filing a petition to dissolve your marriage. There is no residency requirement for filing for legal separation (see #4).

2 Are there rules that my spouse and I must follow during the divorce process?

Yes. There are temporary *restraining orders* (rules prohibiting both of you from doing certain things) that go into effect automatically when the divorce process begins. For example, neither of you will be allowed to take your minor children out of state without the other spouse's written permission or a court order. Nor will either of you, in most instances, be allowed to cancel or change the beneficiaries on your insurance policies or transfer property. And you will be required to notify your spouse before any out-of-the-ordinary spending – and be prepared to account for such expenditures to a judge. These requirements are described on the back of the divorce *Summons* (see #6). For copies of a *Summons* and other divorce papers, visit the California Courts Web site at www.courtinfo.ca.gov (go to *self-help* in the menu).

3 *Do I have any options in how I handle my divorce?*

Yes. You have several alternatives, including the following:

- **Full attorney representation:** You can get a divorce by having an attorney represent you in court. You might qualify for free or low-cost legal assistance if you have very little income (see #16 and #17).
- **Limited attorney representation:** You can hire an attorney to assist you in a limited capacity with certain parts of the process (see #16).
- **Mediation:** You and your spouse can reach a negotiated resolution with the assistance of a mediator in a non-adversarial setting and without going to court (see #18).
- **Self-representation (pro per):** You can act as your own attorney. This pamphlet will help provide you with some of the basic information that you will need to know about the process (see #19).

There can be advantages and disadvantages to each one of these alternatives. The course of action most appropriate for you will depend on your particular situation. Factors such as time, cost, the impact on your children, the communication between you and your spouse, and a desire for control in the process may influence your decision. It is recommended that you have an attorney review any agreement before you sign it.

4 *Can I get a legal separation or an annulment instead of a divorce?*

Yes. You can get a legal separation or an *annulment* (also called a *nullity*) without having lived in California for six months or your county for three months before filing.

- **Legal separation.** You may have religious, insurance, tax or other reasons for wanting a legal

separation instead of a dissolution. If you obtain a legal separation, you and your spouse will remain married, but the court can divide your property and issue orders relating to child custody, visitation, child support and spousal support, and, if necessary, a restraining order.

- **Annulment.** If you are granted an annulment, it is as though your marriage never existed. You may be able to get an annulment if you married when you were a minor without the consent of your parents or guardian, or if certain types of fraud or deceit were involved. If you want an annulment, however, you will have to appear in court for a trial.

5 *Is there a simplified process for getting a divorce?*

Yes. California has a process called *summary dissolution*. If you qualify for a summary dissolution, you will have less paperwork to file and you will not have to appear in court. You may be eligible for such a process if you and your spouse have agreed in writing to a division of your assets and debts and if the following conditions exist:

- You have been married for five years or less.
- You have no children from the relationship.
- Neither of you own a home or other real estate.
- The value of all community property amounts to less than \$25,000.
- Your combined debt does not exceed \$5,000.
- Both of you waive spousal support.

Both spouses must agree to all of the terms of a summary dissolution. Also, either of you can cancel it for any reason before the dissolution is final. Further information on this simplified procedure may be available at your local court or on the

6 *How do I file for divorce?*

To obtain the proper forms, purchase a dissolution form packet for a minimal fee from the clerk of your county's superior court. Or, go to the California Courts Web site (www.courtinfo.ca.gov). You or your lawyer or mediator will have to prepare a *Petition* and a *Summons*. You begin the process by filing your *Petition* and *Summons* with the clerk of the superior court in the county where you or your spouse live. You will have to pay a fee to file these papers unless you have a very low income and qualify for a fee waiver.

Copies of the *Petition* and *Summons*, and a blank *Response*, must be officially delivered (or, in legal terms, *served*) to your spouse by someone other than yourself who is over the age of 18. The *Summons* is a paper that notifies your spouse that you are filing for a divorce and that he or she has 30 days in which to file the *Response*.

In the *Response*, your spouse then indicates what needs to be resolved by the court. For example, he or she might object to your request for spousal support or sole custody of your children.

There are several steps that may occur after you file.

- **Disclosure:** You will have to complete *disclosure declarations* that provide information about your income, expenses, assets and debts—and have them officially delivered to your spouse. (The court will require proof that you served your spouse with a *Final Disclosure Declaration*.)

- **Temporary orders:** You or your spouse may ask for a hearing so that a judge can decide any temporary child custody, visitation, support, requests for attorney fees or restraining order disputes. Such hearings are called *Order to Show Cause* hearings.

- **Agreement:** You and your spouse (and your mediator or lawyers, if you have any) will work on permanently resolving the issues raised in the dissolution. If you reach an agreement, you may not have to appear in court and a judgment based on your

agreement can be entered. You will have to submit a sworn statement to the court saying that the marriage is ending because of irreconcilable differences.

- **Trial:** If you are unable to reach an agreement, you and your spouse will appear in court for a trial in which a judge will make the decisions.

- **Default:** If your spouse does not file a Response, you may request a *default* and proceed to a default hearing to obtain a judgment. You will be asking the court to enter a judgment consistent with the requests in your petition.

- **Judgment:** A judgment can be entered at any time, but you would not be divorced until six months after your spouse was served with the petition. The court does not automatically end your marriage when the six months have passed. You cannot legally remarry until you obtain a judgment even if the six months have passed. If you want to remarry or have some other reason for wanting to be single at the end of six months, a judge can dissolve your marriage even though some property or other issues are not yet settled.

Not all of these steps will be necessary in every case. For example, you may simply reach an agreement and get a judgment without the need for temporary orders of any kind.

7 *What should I do if my spouse injures me?*

If your spouse injures you or anyone else in your household, call the police immediately. The police can, if warranted, contact an on-call judicial officer and issue an *Emergency Protective Order* (also called an EPO) on the spot. This would legally prohibit your spouse from coming within a certain distance of you. It also may grant you temporary custody of your children and bar your spouse from the family home. An EPO remains in effect for five court days. To obtain a longer-term restraining order, you would need to file for a *Temporary Restraining Order* (also referred to as a

TRO) from your local court. Most courts have *facilitators* who can help you fill out the necessary forms. For more information, request a free copy of the State Bar pamphlet *Can the Law Help Protect Me from Domestic Violence?* (See #17 for information on ordering the bar's pamphlets.)

8 *How can I get information from my spouse about our property and finances?*

There are several legal procedures. For example, you (and your attorney, if you have one) might take *depositions* (interview your spouse or other witnesses in person under oath), send *interrogatories* (written questions) or submit an *Inspection Demand* (a request that your spouse turn over certain important documents).

To gather information from others (an employer, bank or school, for example), you might have to subpoena them to appear with the documents in court or at an attorney's office.

Or, you may choose to rely on the *disclosure declarations* (see #6) that you and your spouse are both required to fill out.

9 *How will our property be divided?*

California law recognizes that both spouses make valuable contributions to a marriage. Most property will be labeled either *community property* or *separate property*.

- **Community property.** All property that you and your spouse acquired through labor or skill during the marriage is, at least in part, *community property*. You and your spouse may have more community property than you realize. For example, you may have an interest in pension and profit-sharing benefits, stock options, other retirement benefits or a business owned by one or both of you. Each spouse owns half of the community property. This is true even if only one spouse worked outside of the home during the marriage – and even if the property is in only one spouse's name.

With few exceptions, debts incurred during

the marriage are community debts as well. This includes credit card bills, even if the card is in your name only. Student loans are an exception and are considered *separate property* debts.

Community property possessions and debts are divided equally unless you and your spouse agree to an unequal division—or unless there are more debts than assets. Keep in mind that if your spouse agrees to pay a community debt and fails to do so (or files for bankruptcy and discharges the debt), you may have to pay the creditor.

Division of possessions and debts can be complicated. You should seek legal advice before entering into any such agreement. And if you have already signed away your rights to certain property, consult an attorney to find out if you are bound by the agreement. Finally, if you and your spouse cannot agree on the division of your debts and possessions, a judge will make the decision for you. He or she may not split everything in half; instead, the judge might give each of you items of equal value. For example, if your spouse gets the furniture and appliances, you might get the family car.

- **Separate property.** *Separate property* is property acquired before your marriage, including rents or profits received from these items; property received after the date of your separation with your separate earnings; inheritances that were received either before or during the marriage; and gifts to you alone, not you and your spouse. Separate property is not divided during dissolution. Problems with identifying separate property occur when separate property has been mixed with community property. (The community may acquire an interest in separate property over time.) However, you may be entitled to receive your separate property back even if it has been mixed. There are complex tracing requirements where property has been mixed. Debts incurred before your marriage or after your separation are considered your separate property debts as well.

You will be required to file proof that you delivered your spouse a list of all of your community and separate property, and your income and expenses, which is attached to documents called the *preliminary* and *final declarations of disclosure*

(see #6). Determining the character of property can be complicated and mistakes can be costly. Obtain legal advice to make sure that your property is correctly listed as community or separate.

10 *What is spousal support? Is it the same as alimony?*

Spousal support is the term for alimony in California. Spousal support is money that one spouse pays to help support the other after the filing of a dissolution. The spouse receiving such support will pay federal and state income taxes on it, and the one making such payments will be entitled to a tax deduction. Consult with a lawyer to make sure the orders are drafted correctly or you may not be entitled to the deduction.

To determine the amount of spousal support, the judge will consider such factors as the standard of living during the marriage, the length of the marriage, and the age, health, earning capacity and job histories of both individuals. If the marriage lasted less than 10 years, it is unlikely that a judge will order spousal support for longer than half the length of the marriage.

Perhaps neither of you need spousal support. Since circumstances can change (you could become ill, for example, or lose your job), you may ask the judge to *reserve jurisdiction* to order spousal support in the future. (The judge will be more likely to do this if your marriage lasted 10 years or close to it.) This will leave the door open so you can ask for such support at a later time. Under certain circumstances, you or your spouse may go back to court and ask the judge to change the amount of support. The judge also can order a wage assignment directing a spouse's employer to pay spousal support.

11 *What happens to our children when we separate?*

You can determine what happens. The best solution for the children is for the parents to reach an agreement on who will take care of them. If you and the other parent agree on a parenting plan, you should attach a copy of the plan to the dissolution

papers. Your parenting plan can become a court order; in most cases, a judge will approve a custody plan agreed upon by both parents.

You and the other parent are both responsible for supporting your children if they are under age 18. And this duty may extend beyond age 18 if certain conditions are met.

The amount of support to be paid by one parent to the other is based on established guidelines. Computer programs are available for helping parents determine who will pay such support, and how much is to be paid. Significant factors include each parent's income and the amount of custodial time each of you spends with the children.

Such support need not be reported as income for federal and state tax purposes, and the parent paying such support is not entitled to a tax deduction.

If necessary, you may request a wage assignment order. This is an order that requires a parent's employer to make child support payments directly to the parent entitled to receive support.

12 *What happens if we cannot agree on custody?*

If you and the other parent are unable to agree on custody or visitation, a judge will make the decision for you. There are several steps to finalizing a custody plan. However, custody and visitation can be decided on a temporary basis if there are immediate problems. For example, a new school year may be approaching and you cannot agree on a school for your children. Or, one parent intends to move and wants to take the children along. (Keep in mind that you may not be able to prevent such a move unless you typically spend a lot of time with your children.)

Before any hearing or trial involving child custody or visitation, both parents are required to meet with a trained counselor hired by the court. The counselor will try to help you agree on a custody and parenting plan. These sessions are arranged through Conciliation Court or mediation offices, and are held in private offices located in the courthouse. In some counties, the assigned mediation

court counselor will submit a recommendation to the judge even if you and your spouse did not reach an agreement. In other counties, these sessions are entirely confidential and the counselor can only report agreements reached by the parents. You should inquire about the rules in your county.

Depending on the nature of the custody dispute, the judge may order a psychological evaluation of the family as well, and may appoint an attorney to represent the children. If an attorney is appointed for your child, you and the other parent may be required to bear all or part of the cost.

13 *What choices does the judge have in granting custody or visitation rights?*

The judge may give custody to one or both parents, or, in some cases, to another adult based on the best interests of the child. Considerations include the child's health, safety and welfare, as well as any history of abuse by one parent. For custody to be awarded to someone other than a parent, however, the judge would have to believe that giving custody to either parent would be detrimental or harmful to the children.

- **Joint legal custody.** The parents share the right and responsibility to make important decisions about their children's health, education and welfare. Such decisions might include, for example, where the children will attend school or whether they should get braces on their teeth.
- **Sole legal custody.** One parent has the right to make decisions related to the health, education and welfare of the children.
- **Joint physical custody.** The children spend time living with each parent on a regular basis. This does not mean, however, that the children must spend equal amounts of time with each parent.
- **Sole physical custody.** The child lives with one parent and the other parent has visitation.

Try to keep in mind that the actual time spent with your children is probably more important than the legal terminology used to describe the arrangement. Also, the specifics of such custody orders can vary. For example, a judge who orders joint legal and physical custody may name one parent as the primary caretaker and one home as the primary residence. Or, a judge might order sole physical custody to one parent and supervised or no visitation to the other if it appears that a parent may present a threat to the child's welfare or safety. In addition, stepparents and grandparents may be given visitation in certain circumstances. Be clear and specific in writing your parenting plan.

Law enforcement may help you enforce a custody or visitation order, if necessary. You will need a certified copy of the order. Or, if you are unable to locate your child, you may seek assistance from your local district attorney. The person violating the order could possibly, at your request, be found in contempt of court. If the other parent won't obey the order and these suggestions don't work, you may want to consult an attorney.

It is important, too, to remember that your custody plan can be changed if it doesn't work. If your circumstances change, you can return to court and request a change in the parenting plan even if a temporary or permanent order has already been established. The same procedures discussed in question #12 would apply to such a request.

Or, if you and the other parent can reach an agreement, you may submit it to the judge and ask for a court order. Judges often approve changes even without a hearing if you both request them.

14 *Will the judge consider our children's wishes?*

It depends. The judge must consider what the child wants if the child is "of sufficient age and capacity to reason." The judge is not required, however, to follow the child's wishes.

It may be difficult to determine the child's true wishes if one or both parents have coached the child. Most often, children don't want to hurt either parent. Avoid trying to persuade your child to choose you over the other parent; this puts a

tremendous emotional strain on the child. The court mediator or other evaluator may meet with the child to help convey the child's real desires.

15 *Is the dissolution process the same for registered domestic partners?*

Yes, for the most part, as long as your domestic partnership has been registered with the State of California. You may want to seek a family law attorney's advice before reaching any agreements. In addition, you should be aware that federal law does not recognize registered domestic partnerships, which means that tax laws do not apply to domestic partners and married couples in the same way. If partner support is an issue or you own property, you also may want to consult a tax specialist.

Note: A 2008 state Supreme Court ruling legalized same-sex marriage, which may eliminate the need for many domestic partnerships in the future.

16 *Do I need a lawyer?*

Property settlements, support and child custody disputes can be very complicated. A lawyer can tell you how a judge may divide your property and help you put your property settlement agreement into writing. A lawyer can help you understand your rights and duties concerning your children. A lawyer can assist you if an unexpected problem comes up. And a lawyer can advise you on how much money, if any, you should pay or receive for spousal or child support.

Lawyers who handle dissolution and custody cases are called family law attorneys. Some are "certified specialists" in family law. This means that they have met the State Bar's standards for certification. Keep in mind, however, that there are lawyers with experience in family law who have not sought such certification.

In addition, there are alternatives to hiring a lawyer who will represent you throughout all stages of your divorce. You could, for example, choose limited representation instead — hiring an

attorney who will assist you at particular stages of your divorce. Whether this would be a good option for you could depend on the complexity of your case and your financial situation. Generally, limited representation involves less cost.

While some attorneys will not work solely on portions of a case, others will agree to act as *collaborative attorneys* or *consulting attorneys* (also called *coaches* or *providers of unbundled legal services*).

- **Collaborative attorney.** The role of a collaborative attorney is to work with you, your spouse and your spouse's attorney towards the goal of reaching a settlement on all issues. This could involve exchanging necessary information, selecting common experts and focusing on negotiating family issues in a cooperative, informal manner. Because collaborative attorneys will not represent you in court on any unresolved issues, you and your spouse must agree initially to retain new attorneys if you need to go to court to resolve remaining issues.

- **Consulting attorney.** The role of the consulting attorney, unlike a collaborative attorney, is to assist you on a limited basis. A consulting attorney does not take on full responsibility for overseeing or handling your case. The limits of the representation are set by agreement. You should make sure that you understand the extent of the attorney's services. Such services might include, for example, helping you to develop a negotiation strategy, teaching you how to present an argument in court, accompanying you to mediation or "signing off" on any agreement.

Or you might consider hiring a lawyer who can act as a neutral mediator between you and your spouse. A lawyer/mediator can provide you with legal information, as well as some creative alternatives for handling your divorce (see #18). This is not a substitute for legal advice.

17 *How can I find and hire the right lawyer?*

To find a lawyer, you could call a State Bar-certified lawyer referral service in your area. To locate one, look in the Yellow Pages of your telephone

directory or call your local bar association. For an online list of certified lawyer referral services, visit the State Bar's Web site at www.calbar.ca.gov/lrs. Or, for a recorded message with the phone numbers of certified services in your county, call 1-866-44-CA-LAW (442-2529). From out of state, call 415-538-2250 for the same message.

State Bar-certified lawyer referral services, which must meet minimum standards established by the California Supreme Court, can assist you in finding the right lawyer for your particular problem. Most of these services offer half-hour consultations for a modest fee.

Attorneys who are members of certified lawyer referral services must carry insurance, agree to fee arbitration for fee disputes, meet certain standards of experience and be State Bar members in good standing.

Lawyer referral service fees do vary. Don't forget to ask whether there is a fee for the referral or initial consultation. And if you decide to hire a lawyer, make sure you understand what you will be paying for, how much it will cost and when you will be expected to pay your bill.

You may belong to a legal insurance plan that covers the kind of services you need. Or, if you have very little income, you may qualify for free or low-cost legal help through volunteer service organizations. Check the white pages of your telephone directory for a legal services program located in your county. (California's statewide legal services Web site — www.LawHelpCalifornia.org — can help you locate a local program.)

In addition, the courts in most counties have on-site clinics where you may be able to obtain forms and guidance on how to proceed. Your local bar association may have information on what resources are available as well.

For more information on finding an attorney, see the State Bar pamphlet *How Can I Find and Hire the Right Lawyer?* To order a free copy of this pamphlet or for a list of other consumer pamphlets available free of charge, send an e-mail to pamphlets@calbar.ca.gov. For information on ordering the bar's consumer publications by mail, call 1-888-875-LAWS (5297). Or,

visit the bar's Web site — www.calbar.ca.gov — where you'll find the consumer pamphlets, as well as information on ordering them.

18 *How can I get a divorce through mediation?*

If you choose mediation, you and your spouse will meet with a neutral third party who will help you resolve your custody, property and support issues. The goal is to obtain a legally binding, stipulated *Judgment of Dissolution*. In addition to dealing with legal and financial issues, an effective mediator is trained to help you and your spouse:

- Communicate more effectively.
- Explore a wide range of settlement options.
- Reach decisions that will work best for you and your family.

You will make your decisions in a private setting. Unlike a judicial officer, the mediator does not make decisions for you. Nor can he or she give you legal advice. Instead, he or she will help you explore alternatives. The aim is for you and your spouse to reach solutions tailored to the specific needs and wishes of you and your family.

You should, however, hire a consulting attorney to advise you during the process or to review the final agreement. Or, you may choose to have an attorney accompany you to your mediation sessions. Or, if your spouse appears to be hiding important information, you may need an attorney to conduct formal discovery (to request information or take a deposition, for example). This is unusual in mediation but can be done with an agreement from you and your spouse.

Generally, mediation is less expensive than traditional adversarial representation. The cost is greatly reduced in many instances because you and your spouse voluntarily exchange important financial information, jointly retain experts when necessary and avoid the expense of trial preparation and court appearances.

Mediation also can significantly reduce the time it takes to finalize a divorce. And mediators point to other benefits as well. Working through divorce issues with a trained mediator may help you and your estranged spouse better handle family and parenting issues in the years to come. In addition, you may prefer hammering out your own solutions in private mediation rather than going to court. Mediators suggest that divorced couples also may be more likely to abide by a mediation agreement because it was reached voluntarily.

To find mediation services in your area, you might try checking with your county bar association or with the family law facilitator or family court services at your local court.

19 *Can I handle my own divorce without a lawyer?*

Yes. Many people handle their own divorces without formal attorney representation. The term for someone who represents himself or herself in a legal matter is *in propria persona*, more commonly known as *pro per*.

When someone chooses this option, it is usually to avoid the cost of hiring an attorney. Still, many people do handle their own divorces successfully, particularly when they have very little property and no children. But be aware that, as a *pro per*, you could accidentally make expensive mistakes. And if your spouse has an attorney, it may be even more difficult for you to effectively represent yourself.

If you are considering self-representation simply because you cannot afford an attorney, a judge may order your spouse—if he or she has more resources than you—to help pay for your legal representation. Or, if you have very little income, you might qualify for free or cut-rate assistance (see #17).

As a *pro per*, you may use the services of a consulting attorney or a mediator, or you may handle your divorce entirely on your own. For assistance, you might turn to self-help books, the Internet or a family law facilitator (if one is available at your local court). In addition, the librarian at your local county law library may be able to guide you to the appropriate resources and

forms for your particular issues. You will need to educate yourself about the court requirements. For example, be aware that you should:

- Prepare and serve the applicable official disclosure forms.
- Put all agreements in writing and file them with the court for a judicial officer's signature.
- Follow the rules of evidence and legal procedures governing how and what you may present for the court's review.
- Make sure that your court filings are in the correct format and that they comply with any specific requirements. (Many forms and instructions can be found on the California Courts Web site at www.courtinfo.ca.gov.)
- Present evidence that is admissible.
- Argue issues that the judge has a legal right to consider. (For example, fault in the marriage or moral obligations generally would not be taken into account.)

The purpose of this pamphlet is to provide general information on the law, which is subject to change. It is not legal advice. Consult a lawyer if you have a specific legal problem.

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