



DISSOLUTION OF MARRIAGE: A LEGAL PROCESS



The legal procedures to dissolve a marriage can be divided into four categories:

1. **The Primary Action:** This is the essence of the dissolution action. It is commenced by filing a Petition for Dissolution of Marriage, and is concluded by a trial or settlement agreement. In the Primary Action, the parties and the judge resolve the child custody, property division and support issues.
2. **Temporary Procedures:** These procedures, typically motions for a temporary order involving child custody, spousal support and the use of property, provide a means for resolving problems which arise while the dissolution action is pending.
3. **Modification Procedures:** A motion to modify a previous court order is usually sought on the grounds of a change in circumstances.
4. **Enforcement Procedures:** These procedures compel compliance with a court order regarding support, child custody, etc.



I. THE PRIMARY ACTION

A. **The Petition for Dissolution:** An action to dissolve a marriage begins with filing a Petition for Dissolution. This is a simple, two-sided court form which lists the legal relief requested and the grounds for dissolving the marriage. California is a “*no-fault*” state. Virtually all dissolutions are sought and granted because “*irreconcilable differences have led to the irremediable breakdown of the marriage relationship.*” No proof of the breakdown is required or even permitted. One spouse’s desire to end the marriage is all that is necessary. No attempt is made during the dissolution proceedings to determine who is at fault for the marriage’s failure. This is essence of the so-called “*no-fault*” system which originated in California and has since been adopted by 48 of the remaining 50 states. Note however that only 15 states are true “*no fault*” states. In the remainder, a party can either elect to pursue the divorce on a “*no fault*” or a “*with fault*” basis

The spouse who files the Petition is called the “*Petitioner*” and the other spouse is called the “*Respondent.*” Once the Petition is filed with the Superior Court clerk, it is numbered, indexed, placed in a new folder and a Summons is issued. If an emergency involving the loss of property or threat of injury exists, temporary relief, as discussed below, also can be requested at this time.

Couples involved in dissolutions often think that some advantage exists in being the first to the courthouse to file the Petition. It is not a race to the courthouse. There is no legal significance to being the Petitioner or Respondent.

At the minimum, obtaining the order for final dissolution takes six months from the

date the Petition is filed. It usually will take much longer. In longer cases there is a procedure available to terminate the status as married persons while the remaining issues are being sorted out. (See Section V.A., below headed “Bifurcation.”)

B. Service of the Summons: The Summons is a formal court document which advises the Respondent that the action for dissolution of marriage has been filed and that he or she must file a formal Response with 30 days. The Summons and Petition can be delivered by a private process server, a law enforcement officer or by mail.

Unless the situation suggests a potential for violence, the Petitioner is usually advised to tell the Respondent that the Petition is about to be filed. Service can then be attempted by mailing the documents to the Respondent with a non-adversarial letter in which the Respondent is asked to acknowledge receipt of the pleadings in writing. The Respondent is also advised to obtain legal counsel. If the Respondent will not acknowledge receipt of the pleadings, personal service must be attempted by a law enforcement agency representative, private process server or other person who is not a party in the case.

C. The Response: The Respondent “*appears*” in the case by filing a Response. The Response is similar to the Petition. No actual appearance in court is made at this time. In fact, no court personnel will examine the substantive content of the file until and unless there is a trial, default or other hearing.

It is estimated that 90% of dissolutions are concluded by settlement and without a trial. If all aspects of the case are settled, neither the parties nor their attorneys are required to make a physical appearance at the courthouse. A judge will approve the settlement agreement. The judge will order the parties to abide by their agreement’s terms and incorporate it into (i.e. make it a part of) the Judgment of Dissolution of Marriage. Rarely will a judge actually examine the agreement.

D. Mandatory Financial Disclosures: Once the Petition has been filed and served, the attorneys will begin an information-gathering process referred to as “*Discovery*” or “*Mandatory Financial Disclosure.*” The Family Code requires that each party cooperate to exchange all information regarding the following:

1. Identify assets and liabilities;
2. Determine whether the assets are community property or separate property;
3. Determine whether the debts are community debts or separate debts;
4. Determine the value of community assets as necessary. Cash in bank accounts and actively traded corporate securities



are easy to value. Real estate usually can be appraised. The present value of pension benefits can be determined by actuaries. Other experts are available to value businesses and professional practices. Most family law attorneys have various experts with whom they have worked before who can provide appraisal services for almost anything;

5. Determine guideline child support and reasonable spousal support levels by investigating each spouse’s income and needs, the ability to pay support, and the standard of living established during marriage; and

6. Develop the information needed to determine child custody.



Mandatory Financial Disclosure can be completed in a day or two or it may take years, depending on the case’s complexity and the degree of cooperation encountered. If the parties fail to exchange the information necessary voluntarily, then the formal discovery process can be used. Either party can be legally compelled to produce relevant information or documents. Third parties can be subpoenaed, required to produce relevant records and required to answer questions under oath. In every case, it is hoped that information will be freely exchanged. If it is not, it may be necessary to resort to a variety of remedies and procedures, although considerable expense is usually incurred.

E. The Timing of Trial or Settlement: Santa Barbara County has one of the most current Superior Court trial calendars in the state. If a trial is expected to take one day or less, it can take place within 60 to 90 days after filing the Response. A longer trial can be scheduled for approximately 120 days after filing the Response. Rarely do the parties or their attorneys want a trial this quickly.

On the other hand, after the initial Mandatory Financial Disclosures are completed and served, cases can be settled at any time by both parties’ agreement to the terms of a Marital Settlement Agreement. Many cases can be settled in an afternoon if both parties want to settle, but because a dissolution’s emotional implications, it often takes one to three years after separation before the parties are able to really come to terms with each other. A responsible attorney will seek a fair settlement before trying a case. If the trial is expected to require more than one day to try, there will be a mandatory settlement conference supervised by a judge one or two weeks before the scheduled trial date. Any child custody and visitation issues must be discussed by the parties with a court mediator before a case can be tried.



Once a case is settled, the agreement is put into writing and submitted to a court clerk for processing. A judge will approve the agreement and sign a judgment within a few weeks after its submission.



G. Trial Proceedings: If the parties cannot settle all the issues, those which remain are the subject of a trial before a judge. There is no such thing as a jury trial in a California

dissolution of marriage proceeding.

II. TEMPORARY RELIEF

A. Temporary Relief - Why? Until the dissolution is concluded by settlement or trial, many problems may have to be addressed and solved on a temporary basis. The parties and their attorneys usually can settle such problems, but if they cannot, the court can hold a very brief hearing and issue temporary orders.

B. Emergency Orders: If an emergency exists and a substantial threat to life or property can be demonstrated to the judge's satisfaction, a Temporary Restraining Order ("TRO") can be obtained to keep one party away from the other or to prohibit asset transfers. It should be noted however that judges strongly dislike making an order without giving each side a chance to be heard and that dislike is increased when a temporary order is sought for a minor matter. While sometimes true emergencies exist, judges do not look favorably on parties that seek emergency orders just to gain an advantage over the other party.

The TRO remains in effect for no more than 15 days, at which time a judge will consider the written and sworn statements of both parties and then decide whether to issue an order "*pendente lite*" — an order which will remain in effect until superseded by another order.

C. Pendente Lite Orders: Common subjects of pendente lite relief are temporary child support, spousal support, custody, restraint on behavior, restraint on property disposition and use or control of assets such as the family home or a family business.

D. Hearings: Hearings on requests for temporary relief (or motions) are, by necessity, concise and brief and the potential for judicial error exists. It is best to avoid resorting to temporary motions whenever possible.

III. MODIFICATION PROCEEDINGS

Procedures are available to request changes of existing family law orders and judgments. These procedures apply to orders and judgments entered pending the trial and those granted by the marriage termination decree. Typical requests include motions to modify child and spousal support orders, child custody and visitation orders, attorneys fees and temporary property division orders.

IV. ENFORCEMENT

The power of any judge rests ultimately on his ability to have his order implemented by force. If a party to any lawsuit fails to obey a court order, the party who requested the judgment or order

can seek the assistance of the court and law enforcement personnel in getting the order enforced.

The most common enforcement forms are a Wage Assignment and a Writ of Execution. A common way to collect unpaid support is to have wages attached using a Wage Assignment. A Writ of Execution is a procedure for seizure and sale, if necessary, of a judgment debtor's property to satisfy the a judgment creditor's claim. Often is used to have the sheriff or marshal execute a writ against bank accounts or tangible property.

If the failure to obey an order of the court is willful, the defaulting party can be fined or sent to jail after a careful hearing which is similar to a criminal trial.

V. MISCELLANEOUS PROCEEDINGS

A. Bifurcation: Bifurcation is a simple legal maneuver to sever the issue of the status of the marriage from all other unresolved issues. This enables the parties to dissolve the marriage before all the issues are resolved. The parties can then legally remarry, while leaving all other issues (i.e. custody, division of property, etc.) subject to later resolution.

B. Simple Dissolutions: Although there are benefits in the parties' maximum participation in the dissolution proceedings, it is almost always a false economy for them to attempt to handle the procedures themselves unless the case is extremely simple. However, if the marriage was very short, there are no valuable community assets or substantial debts, there are no children, and other requirements are met, the couple can undertake a Summary Dissolution. This procedure can be followed without the assistance of counsel. Procedural brochures in non-technical language are available at the Superior Court Clerk's Office.