

Divorce Options™



What You Need to Know About Divorce
2011

Schedule of Topics

Registration
Welcome
Divorce Options
Legal Issues
Break
Financial Issues
Family Issues
Break
Q&A

Introductions

- Attorneys
- Financial
- Mental Health

Divorce Options

Divorce Is A Transition

- Affects the whole family
- Decision with emotional, legal and financial implications
- At a time when you are feeling unsure about what to do, you are faced with making some hard decisions that effect –
 - Both of you
 - Your children

Our Goal Today

Demystify the divorce process

Empower you to make informed choices

Process Options

- Self Representation
- Mediation
- Collaborative Law
- Litigation / Adversarial

Self Representation (Pro Per)

- Self Representation
 - Pro Per treated same as attorney
 - Family law facilitator in each county
 - Do It Yourself books available
 - Parties in control of process
 - Generally least costly

Mediation

- Non representing
- Can help facilitate couple in resolving issues
- No duty to protect a party
- Duty to inform of the law (cons) when there is a power imbalance
- Job is to facilitate an agreement not balance power
- Parties in control of process
- Typically less costly than litigation and collaborative law

Collaborative Law

- Parties work with a collaboratively trained team
 - Attorney for each party (helps resolve power imbalance issues)
 - Coach for each
 - Financial neutral
 - Child specialist (if minor children)
 - Other experts as necessary (i.e. business valuation, pension valuation, etc.)

Collaborative Law

- Agreement up front not to go to court
 - Resignation of team if a party litigates
 - Reinforces commitment to process
- Process is transparent
- Face-to-face team meetings
- Commitment of spouses to:
 - Act with integrity
 - Treat each other with respect
 - Open and full disclosure

Collaborative Law

- Uses informal conferences and discussions
- Parties in control of process
- Goals:
 - Family & needs focused
 - Maximize settlement options
 - Minimize negative economic and social consequences of litigation

Litigation

- Adversarial process by nature
- Disclosure requirements
- Non co-operation can drastically escalate costs
 - Discovery
 - Depositions
 - Mediation in custody cases
- Mandatory settlement conferences before trial

Litigation

- Litigation drags on
- At mercy of court calendar
- Judge decides
- Polarizes family by creating a winner/loser mindset
- Typically most costly (especially if goes to trial)
- Parties relinquish control to attorneys / court

Legal Issues

Jurisdiction / Residency

- Resident of CA for six (6) months
- Resident of county for three (3) months
- Legal Separation – above requirements not required.

How The Action Begins

- Filing of Petition (handout)
- Earliest divorce date is six (6) months + 1 day from Respondent's first appearance in the action either by:
 - Personal service
 - Filing of response

Date of Separation

- Date in your mind the marriage is over
- Communicate that to your spouse
- Take physical act to manifest that (i.e. separate quarters, move out, etc.)
- Post – DOS
 - Community period ends
 - Earnings become separate earnings
 - New debts are separate debts

Temporary Orders

- Glossary
- Automatic Temporary Restraining Orders (ATROS)
 - Neither party can remove a child from CA without prior written consent of the other party
 - Restrains both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community or separate, without the written consent of the other party or an order of the court

Temporary Orders

- Automatic Temporary Restraining Orders (ATROS) continued.....
 - Restrains both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability, held for the benefit of the parties and their minor children

Temporary Orders

- Restrains both parties from creating a non-probate transfer or modifying a non-probate transfer in a manner that affects the disposition of property subject to the transfer, without the written consent of the other party or an order of the court.
- Before revocation of a non-probate transfer can take effect or a right of survivorship can be eliminated, notice of the change must be served on the other party.

Temporary Orders

- Physical restraining order
- Exclusive use of the home
- Child custody
- Support (child / spousal)
- Obtainable via
 - Stipulation
 - Emergency
 - Court hearing

Child Support

- Statewide guidelines
 - Mathematical formula
 - Software programs (DissoMaster / Xspouse)
 - Cannot be waived
- Variables include:
 - Timeshare
 - Income
 - Deductions (health insurance / union dues / mandatory retirement / R/E taxes / mortgage interest)

Child Support

- Termination
 - Continues until 18 or 19 (if still in high school)
- Always modifiable based on change in circumstance (i.e. income)
- Income & Expense (FL-150)
 - Salary / Wages / Self-Employment Income
 - Bonuses / Perks / Deferred Compensation
 - Rental Income / Partnerships / S Corps / LLCs
 - Trusts / Investment Income

Child Support

- Timeshare based on hours spent with the children.
- Mandatory Add-Ons
 - Child care (work / education related)
 - Unreimbursed medical
 - Typically split 50/50
 - Court may order a different split if large disparity in income (i.e. 40/60, 0/100, 30/70)

Child Support

- Discretionary Add-Ons
 - Travel expenses
 - Extracurricular activities
 - Private school tuition

Child Support

- Wage Assignment (WA)
 - Support amount withheld by employer and paid to state
 - State pays the party
- Complications where payor is self-employed
- Enforcement Mechanisms
 - Driver's license suspension
 - Seizure of tax refunds
 - Liens on assets (i.e. bank account / home)

Child Support

- Items taken into consideration
 - Taxability of CS
 - Exemptions
 - Filing status (i.e. head of household, etc.)

Spousal Support

Temporary vs. Permanent

- Temporary
 - Use guideline amount
 - 40% of high earner's net income minus 50% of lower earner's income
 - Rationale is maintaining as much of a marital standard of living before separation as possible given available \$\$\$

Spousal Support

- Permanent Support
 - Court cannot use computerized guidelines
 - Must use statutory factors set forth in Family Code §4320 to determine an appropriate number and duration

Spousal Support

- Permanent Support Factors include:
 - Age of parties
 - Health
 - Earning capacity
 - Education
 - Standard of living during marriage
 - Needs of the parties
 - Balance of hardships
 - Tax consequences
 - Whether there has been domestic violence
 - Any other factors the court feels are appropriate

Spousal Support

- Duration of Marriage
 - Factor in determining how long spousal support will be paid
 - Marriages of less than 10-years
 - Statutory presumption that spousal support should not go more than 1/2 the length of the marriage
 - Presumption can be rebutted by presenting facts indicating it should be -
 - Extended longer
 - Cut off sooner

Spousal Support

- Long-Term Marriage
 - Greater than 10-years
 - Court cannot terminate (retains jurisdiction)
 - Can be terminated by agreement

Child Custody

- General California policy
 - Frequent and continuing contact with both parents
 - Psychological studies support a positive relationship with both parents is beneficial emotionally for children in their own current and future relationships

Child Custody

- Joint Legal Custody vs Joint Physical Custody
 - Joint legal custody means both parents share the right and responsibility to make decisions relating to the health, education and welfare of the child
 - Joint physical custody means that each of the parents shall have significant periods of physical custody
 - Custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents

Child Custody

- Disputes
 - If there is a custody dispute and you are not in collaborative law or mediation – parents are required to attend custody mediation
 - Custody mediator can make recommendation as to what they believe is in the best interest of the children

Child Custody

- Disputes (continued)
 - Mediation may be done in FCS or Private
 - Difference is cost and time
 - FCS is free – provided by the county
 - Performed by unlicensed mental health professionals
 - Private custody mediation
 - Performed by licensed mental health professionals
 - Can see parties sooner – spend more time with family
 - Write more detailed reports
 - Drawback is cost (\$1,000 - \$2,500)
 - Sacramento, El Dorado, Placer & Yolo =
Recommending Counties

Settlement/Trial/Entry of Judgment

- Trial
 - The court will make orders based on evidence and testimony presented
 - Saved for very complex issues where reasonable minds differ
 - Pinnacle of conflict and expense for the parties
 - Parties left to the mercy of a decision by a judge who:
 - Doesn't know them
 - Doesn't know all the details of a situation
 - Decision out of parties control
 - Easily cost many thousands of \$\$\$\$

Marital Settlement Agreement

- Ultimate goal
- Contract between the parties
- Becomes a part of the order of dissolution
- Can be done at any stage of the process
- Not process dependent

Break
15-minutes

Financial Issues

Preparing for Divorce

- Not uncommon for one spouse to be the financial manager during the marriage
- If you are not the financial manager in your family, you will need to develop an understanding of your family's financial picture.

Financial Disclosures

- As part of the divorce process you will be required to submit financial information
 - Income & Expense (FL-150)
 - Assets & Debts (FL-142)
- Preliminary and Final

Property Issues

- Community Property – property acquired during the marriage
- Separate Property – property acquired before or after the marriage or during the marriage by gift or inheritance
- Quasi Community Property – property acquired during the marriage in another state or country that would have been treated as CP if it would have been acquired in CA

Property Issues

- Identification
- Characterization (separate vs. community)
- Valuation
- Division

Tax Returns

- Good starting point for identifying financial accounts
 - Schedule B: Interest & Dividends
 - Schedule C: Profit or Loss From Business
 - Schedule D: Capital Gains/Losses
 - Schedule E: Supplemental Income & Loss

Financial Accounts

- Bank Accounts (Joint & Separate)
 - Checking
 - Savings
 - Money Market
 - Certificates of Deposit (CDs)
 - Business Accounts
 - Checking
 - Savings
 - Money Market

Financial Accounts

- Brokerage Accounts
 - Mutual Funds
 - Stock Accounts
 - Bond Accounts
- Annuity Accounts
- Notes Receivable
- Life Insurance Contracts
 - Term Policies
 - Whole Life Policies

Financial Accounts

- Retirement Accounts
 - IRAs
 - 401(k) Plans
 - 403(b) Plans
 - 457 Plans
 - Simplified Employee Plans (SEP)
 - SEP IRAs
 - Pensions

Financial Accounts

- Pensions
 - Defined Benefit Plan
 - CalPERS, CalSTRS
 - Other
 - Annual statement does not reflect the value of the pension benefit
 - Actuarial valuation required to calculate present value of retirement benefit and marital portion thereof

Assets

- Financial Accounts
- Real Estate (Residence/Vacation/Timeshares)
- Business Interests
 - Partnerships
 - LLC/LLP/S Corp
 - C Corporation
 - Sole Proprietorships
- Cars/Boats/RVs/Toys

Assets

- Furniture & Fixtures
- Artwork
- Jewelry
- Coin Collections
- Safe Deposit Box(es)
- Anything Else

Valuation of Assets

- Can be valued by an expert
 - Real estate appraiser
 - Pension actuary
 - Business valuation
- Reference to published reports
 - Stock quotes
 - Kelley Blue Book (Private Party Value)
- Parties can agree to acceptable value between themselves
- F&F = garage sale prices

Debts

• Mortgages	• Auto Loans
• Lines of Credit / HELOCs	• Boat Loans
• Student Loans	• RV Loans
• Notes Payable	• Business Loans
• 401(k) Loans	• Liens
• Timeshare Loans	• Personal Loans
• Credit Cards	• Back Taxes

Mixed Property

- May be situations where there may be both community property and separate property interests with respect to an asset

Example 1

Separate property funds used as down payment on marital residence.

Example 2

Community property payments on a separate property debt

Marital Home

- Is there current equity in the home?
 Is current value greater than loans?
- Many homes are "underwater"
- Options
 - Sell
 - Short Sale
 - Foreclosure
 - Bankruptcy

Marital Home

- Swap interest for other marital assets
- Sell / Buyout Interest
- Joint Ownership
- Rent

Marital Home

- Sale of home may generate capital gain
- Tax break
 - Capital gains generally taxable
 - Capital gains of up to \$250k (\$500k married couple) may be excluded (nontaxable)
- Eligibility
 - Must have lived in the home for 2 out of last 5 years

Marital Home

- Short sale of residence results in cancellation of debt
- Cancellation of debt generates phantom (possibly taxable) income
- Determining factor is whether debt is purchase acquisition debt, refinance debt or HELOC debt
- Need to consult with a CDFA or CPA

Tax Consequences of Support

- Spousal Support
 - Deductible by payor
 - Taxable to recipient
 - Parties can agree to have it not be taxable/deductible
- Child Support
 - Nondeductible by payor
 - Nontaxable to recipient

Tax Consequences of Support

- Family Support
 - Hybrid of Spousal & Child Support
 - Designed to make child support deductible
 - Takes advantage in differences in tax rates of payor and recipient
 - Deductible by payor
 - Taxable to recipient
 - Typically more than SS & CS combined
 - Recapture risks

Budgets

- Most couples do not have a clear picture of their monthly cash outflows
- Expenses typically exceed income
- Primary reason for increasing debt (credit cards / HELOCs)
- Budgets become critical component of support discussions in mediated / collaborative cases

Transfer of Property in Divorce

- General rule = no gain or loss is recognized upon the transfer of property between persons pursuant to a divorce (IRC §1041)

Assets Not Equal

Example 1

- Swapping a \$50,000 interest in a joint savings account is not the same as receiving a \$50,000 interest in a 401(k) plan
 - There will be no tax consequences to tapping into the savings account
 - Tapping into the 401(k) plan will trigger income taxes and possibly a 10% penalty

Assets Not Equal

Example 2

Family residence with a cost of \$200k is sold for \$300k. Gain of \$100k is not taxable due to the \$250k exclusion. Cash available = \$100k

Stock with a cost of \$100k is sold for \$200k. Gain of \$100k is taxed at 24.3% or \$24.3k. Cash available = \$75.7k

Social Security

- If married for 10 years (DOM to DOD) or more you will be entitled to greater of:
 - 50% of your spouse’s benefit
 - or
 - 100% of your own benefit
- Claiming 50% of your spouse’s benefit will not decrease his/her benefit

Prior Year Tax Returns

- Make copies of complete federal and state income tax returns for three (3) preceding tax years
- If there are separate legal entities (i.e. C corporation, S Corporation, LLC, LLP or partnership) make copies of tax returns or Schedule K-1 for three (3) preceding tax years.

Current Year Tax Returns

- If divorce is final by December 31st you are considered single for the entire tax year.
- Filing options
 - Single
 - Head of household

Current Year Tax Returns

- If divorce is not final by 12/31 filing options are:
 - Joint
 - Married, filing separately
 - Head of household (a qualifying child lived with the taxpayer for more than one-half of the tax year) and spouse did not live with taxpayer last six months of the tax year

Family Issues

Emotional Process of Divorce

- Gambit of emotional experiences and feelings
 - Felt by all (including children)
 - Intensity and duration of experiences varies depending on the individual
- Intense emotions can:
 - Make it difficult to think clearly
 - Impair judgment
 - Make it difficult to make rational decisions

Grief and Loss

- Sadness is a normal feeling at loss of relationship
- Grief at loss of a relationship can have the emotional impact of a death

Grief and Loss

- Stages of Grief and Loss
 - Denial
 - Anger – Resentment
 - Bargaining
 - Depression
 - Acceptance
- Making decisions early in this process may be difficult
- Knowing where you are in the process

Guilt and Shame

- Comes from a sense of failing one's own and society's standards
- May come from prior behavior which hurt spouse and/or family
- Shame and guilt is painful
 - May quickly change into more tolerable emotions such as anger and depression
 - May happen so quickly that you are not aware

Guilt and Shame

- Strong feelings of shame and guilt make it
 - Difficult to take in more balanced information
 - Maintain perspective
 - Consider realistic alternatives to resolve problems
- Guilt may cause spouses to feel they have no right to ask for what they need

Guilt and Shame

- Guilt may cause a spouse to negotiate unbalanced, unrealistic and imprudent settlements they later regret
- Shame often transforms into blame, anger or rage directed at the other spouse
 - May lead to protracted bitter fights over
 - Children
 - Property

Fear and Anxiety

- Natural response to stressors
- Fight or flight mechanism
- Physiological – increased heart rate / adrenaline
- Limited or no ability to take in new information
- Chronic and severe stress can lead to:
 - Anxiety attacks
 - Feeling overwhelmed
 - Confusion

Fear and Anxiety

- Vulnerable to falling back into old habits
- Blocks ability to:
 - Look intelligently at facts of current situation
 - Weighing best choices for the future
- Reliance on old habits of dealing with differences leads to fights rather than solutions

“Unfortunately, both our court system and our culture at large encourage us to take action in divorces based on how we feel when we are at the bottom of the emotional rollercoaster, when we are gripped by anxiety, fear, grief, guilt and shame”

Pauline H. Tesler, MA, JD & Peggy Thompson PhD

So What Should I Do?

- Take time to get the support you need to manage strong emotions
- Gain clarity about what it is you really believe is in the best interest of your family – post divorce
- Doing so will enable you to:
 - Take in information that will help you see possibilities
 - Make the best decisions possible
 - Protect your children from unnecessary conflict
 - Preserve a manageable co-parenting relationship

Telling Your Children

- How you tell your children that a decision has been made to divorce models how your family
 - Talks about difficult topics
 - Manages difficult emotions
 - Solves problems
 - Plans for the future
- How you tell your children lays the foundation for how they will deal with your divorce

Telling Your Children

- Plan timing of discussion with your spouse
 - Prior to separation is best
- Plan what you will tell them
 - Both parents should take responsibility
 - Neither parent should be portrayed as good or bad
 - Agree on the basic facts
 - Avoid giving contradictory information

Telling Your Children

- Plan what you will tell them (continued)
 - Where will the children be living
 - Where will the parents be living
 - How often will the children be spending time with each parent
 - What will change and what will stay the same

The Meeting

- Both parents should be present unless –
 - There is a restraining order
 - Either parent is unable to manage their anger, sadness or other strong emotion
- Meet together with all the children including infants / toddlers
- Explain that genuine but unsuccessful attempts have been made to preserve the marriage

The Meeting

- Explain that both parents have made the decision to divorce
- Stress that the divorce is not the fault of the children
 - Reassure them that they did not cause the divorce or conflict
 - There is nothing they can do to prevent the divorce or to get you back together.

The Meeting

- Reassure them that:
 - You will both continue to be their parents
 - They will continue to have a close relationship with each of you
- Tell them where you will be living
- Tell them where they will be living, going to school

Impact of Divorce on Children

- Good news is that children can be resilient after divorce
- Important ingredient in their resiliency is absence of conflict

Impact of Divorce on Children

- Divorce is difficult for children – even grown children when they first hear of it

- More children of divorce get mental health services and have behavioral problems when they are involved in or are exposed to the conflict between their parents

How Can I Protect My Children?

- You can protect your children from the negative effects of divorce
 - Learn to co-parent with the other parent
 - Protect them from the conflict / keep them out of the middle
 - Don't say negative things about the other parent
 - Learn to make decisions on what will work best for your children
 - Don't talk about specifics or the financial impacts on them
 - Use "The Divorce Rules" handout

Co-Parenting Plan

- Opportunity to craft a document that will help you co-parent your children
- Key ingredients
 - When the children will be with each of you and how they will get from one home to the other
 - Holiday/Vacation schedule
 - How extracurricular activities will be decided on, supported and paid for

Co-Parenting Plan

- Key Ingredients (continued)
 - Make clear agreements about children’s belongings (clothing, toys, etc.)
 - Regular communication between the parents is essential to the well-being of children
 - When traveling with your children what agreements would you like to make with each other?

Co-Parenting Plan

- Key Ingredients (continued)
 - Make clear agreement regarding medical treatment
 - Do they keep the same doctors
 - Who makes and takes them to their appointments
 - How will expenses be paid
 - What to do in an emergency
 - What are the steps you agree to take if there is an impasse?

Break
15-minutes

Questions & Answers


