



COLLABORATIVE
PRACTICE

Resolving Disputes Respectfully.

COMMONLY ASKED QUESTIONS ABOUT GETTING A DIVORCE IN CALIFORNIA

(ADAPTED FROM
COLLABORATIVE PRACTIC MATERIALS)

BY

CATHERINE ANN CONNER AND MARGARET L. ANDERSON)

(The following is intended only as a general overview of certain legal principals and procedures that apply in family law proceedings. It is not intended to constitute legal advice or a legal opinion. You should consult with an attorney to obtain information and advice specifically addressing your concerns and issues.)

1. How long will it take for my divorce to be completed?

A divorce is not a quick process. The earliest one can terminate marital status is six months and one day after service of a petition for dissolution of marriage on the other party (who is called the “respondent”). Other issues in the case can take a longer or shorter time to resolve. The timing of resolution may depend upon the amount of information to gather, the emotional state of the participants, and the complexity of the issues to resolve. The Collaborative Process moves at a pace mutually determined by the parties, and can result in an agreement in weeks or months. In contrast, litigated cases can take a number of months or even years to conclude.

2. Will I automatically be divorced in six months?

In California, you can obtain a dissolution of your marriage (formerly called a divorce) no earlier than six months and one day from the date the Petition is served on the Respondent. If the other issues of the divorce (i.e. property division, support and parenting issues) are not resolved within this six month time frame, you are entitled to request a "bifurcated judgment." This is a legal process by which your status as a married person is separated (“bifurcated”) from the other issues in your case, and a judgment terminating your status as a married person is obtained. This does not happen automatically. If you want to terminate your marital status before the other issues of your case are resolved, you must affirmatively ask the court for relief. However, there are very important legal and financial consequences of a bifurcation that must be considered in deciding whether to obtain a bifurcated judgment.

3. What is the difference between a "legal separation" and a "divorce"?

The main difference between obtaining a legal separation and a marital dissolution (“divorce”) is that marital status is not terminated in a legal separation proceeding. Occasionally parties choose to pursue a legal separation for personal reasons such as religious or ethical beliefs or health insurance concerns. They still, however, must address the same issues as parties undergoing a divorce (i.e. support, parenting, division of marital assets and debts). Also, in order to file for a *divorce*, you must reside in the

county in which you file for at least three months and be a resident of the state for six months. If you have not met these residency requirements, you can first seek a legal separation (which has no residency requirements for filing) and then later amend your petition to file for a divorce once you met the residency requirements.

4. What protects me from having my spouse take all of the money/assets?

While a dissolution proceeding is pending, there are certain duties and restraining orders which apply to both spouses. At the beginning of every divorce case, the court automatically issues automatic temporary restraining orders (ATROs). These are found on the back of the Summons. We also include them in the agreements that start the Collaborative Process. Generally, you are prohibited from doing any of the following:

- a. Taking minor children out of state without prior written consent of the other parent or court order;
- b. Making changes regarding your insurance, including canceling, borrowing against, cashing, or changing the beneficiaries. This includes all types of insurance;
- c. Transferring, selling, or concealing assets or using them as security for a loan, without the consent of the other spouse or court order; and
- d. Making certain types of changes in your estate plan.

In addition to these restraining orders, you have a fiduciary duty to manage and control community property properly. This duty is one of "the highest good faith and fair dealing." You must provide information or access to information which affects transactions regarding community property. If you obtain a profit from community property without the other spouse's consent, you hold that benefit as trustee for the other spouse.

5. How long will I be entitled to receive or be obligated to pay spousal support?

Under the law, the duration of spousal support is always within the discretion of the court. As a general framework, however, if the period between the date of marriage and the date of separation was less than ten years, you may be entitled to receive or be required to pay support for approximately one half the length of the marriage. For example, if you were married for six years, spousal support may be paid for three years.

If you were married for a period of greater than ten years, this is considered a marriage of "long duration", and the duration of support could extend for a much longer period of time, perhaps indefinitely. If litigated, a court would usually retain the ability (ie., "reserve jurisdiction") to make decisions in the future about changes to the amount and duration of spousal support. In the Collaborative Process, the length of time that spousal support is paid is typically one of the questions that is discussed and agreed upon.

6. How are spousal support and child support calculated?

In the Collaborative Process, you and your spouse are able to determine how you want to calculate support. Different people consider different factors, but typically we look at the income,

expenses, resources available, and standard of living. In the absence of an agreement, the following is how a court will determine support:

Child support in a litigated case is calculated by using a "guideline" formula. Attorneys and the courts in California use a computer program which calculates guideline child support. This guideline formula takes into consideration only certain specifically described factors, including: the respective incomes of each party and the percentage of time the child has with each parent. Most living expenses are not considered under "guideline." The "guideline" amount must be ordered by the courts with very limited exceptions. In a collaborative case, the parties will consider and determine whether the "guideline" formula or some other approach is suitable and appropriate to meet the needs and interests of the parties and their children.

Temporary spousal support (that which is typically entered into during the period from separation until judgment is entered dividing property) is usually in a litigated case calculated by computer derived formula adopted by the particular county in which the case is pending. The computer formula generates a support award based upon the parties' net incomes, after calculation of child support according to the particular "guideline" formula in use in that county. Most living expenses are excluded from consideration in the formula calculation. A court may, however, exercise its discretion to depart from the computer formula. In a collaborative case, as with all other issues, the parties will assemble and consider all relevant information and collectively determine the appropriate amount of support to be paid and its duration, giving proper regard to the reasonable interests and needs of the parties.

Permanent spousal support is typically determined and set at the time the permanent financial settlement is finalized. In determining spousal support in a litigated case, the court is required to consider the following factors under the law:

- a. The standard of living enjoyed by the parties during their marriage;
- b. The income or earning capacity of each party;
- c. The marketable skills, job training or education needed for the supported spouse to develop or increase earning ability;
- d. The extent to which the supported party's present or future earning capacity is impaired due to periods of unemployment to care for the children and the household;
- e. The extent to which the supported party contributed to the attainment of education, training, or career of the paying party;
- f. The needs of each party based on the standard of living established during the marriage;
- g. The obligations and assets of each party;
- h. The duration of the marriage;
- i. The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in that spouse's custody;
- j. The age and health of the parties;
- k. Documented history of domestic violence, including criminal conviction of an abusive spouse;
- l. The immediate tax consequences to each party;
- m. The balance of the hardships to each party;
- n. The goal that the supported spouse be self-supporting within a reasonable period of time. For marriages of less than ten years, this is generally one-half the length of the marriage;
- o. Any other facts the court determines are just and reasonable.

In determining long-term support, the court is not permitted to use a formula. The possible range of support that could be ordered is broad because the judge who makes the decision has substantial discretion.

In a collaborative resolution of the case, the parties may chose to consider any or all of the foregoing factors, as well as any other considerations which they deem appropriate in order to best meet each party's reasonable needs and interests, and those of their family. Although a court may exercise considerable discretion in determining the amount and duration of a spousal support order, the parties in a collaborative case have greater flexibility and latitude in negotiating terms of spousal support arrangements than would be available in a court-determined resolution of their case.

7. What happens to gifts or inheritances or assets I owned prior to marriage?

Under the litigation model, a gift or inheritance (unless directed to *both spouses*) is the separate property of the party receiving the gift or inheritance and not subject to consideration or disposition by the court. Separate property also includes assets owned prior to marriage. Subsequent actions of the gift recipient can alter the ownership of or rights associated with the ownership of separate property, depending on the particular facts involved with the property.

In the Collaborative Process, you and your spouse decide how to distribute property. In some marriages, the understandings regarding gifts or inheritances have not been clear and become a subject of discussion and consideration in the Collaborative Process.

8. Do I ever have to appear in court?

It is not necessary to appear in court unless you and your spouse have to rely on a judge to make decisions about support, parenting and property division. If you and your spouse are able to settle these issues, a written agreement which sets forth the division of the property, support and parenting arrangements, will be submitted and adopted by the court without a personal appearance by the attorneys or the spouses/parents.

9. How do I help our children deal with this process?

Talk with your children and be open and honest, without disparaging the other parent. Saying or implying negative things about the other parent in front of your children is harmful and will cause long term harm to your children and their relationships with you and the other parent. There are also many resources available to help children deal with the transition. Programs for children are offered through programs such as Footsteps and Kids Turn, as well as an abundance of reading material and counseling services are available.

10. What is the difference between "legal custody" and "physical custody"?

Legal custody refers to the right and the responsibility to make major decisions relating to the health, education, and welfare of a child and a corresponding duty to share information and records with the other parent. Physical custody refers to the periods in which a parent physically cares for the child.