BayAreaDivorce.com – FAMILY LAW – INITIAL CONTULTATION to TEMPORARY ORDERS – FOR EDUCATIONAL PURPOSES ONLY – JANUARY 2008

PROLOGUE – PRELIMINARY CONSIDERATIONS

1. No *cookie cutter* divorces.

2. Alternative methods of resolution?

- Court provided ADR procedures / options.
- Mediation.
- Collaborative law.
- Private judging.

3. Pre-filing advice / strategies.

PROCEDURAL ISSUES – PART ONE
JURISDICTION, VENUE and INITIAL PAPERWORK

1. Jurisdiction - Jurisdiction refers to whether the court has the power to hear the case and make appropriate orders. The Superior Courts in all counties have concurrent jurisdiction over the subject matter of dissolution, nullity and legal separation. California has jurisdiction of the marriage or partnership if one of the parties is present in the state. There is a six-month residency requirement to obtain a dissolution, but legal separation and nullity have no such requirement.

2. Residency - A party filing a dissolution must have been a resident of the state for the six months and of the county in which the case is filed for the three months just preceding the filing. *Fam.C. §2320.*

There is no residency requirement for Legal Separation or Nullity.

3. Is there a valid Marriage or Domestic Partnership?

Civil Marriage recognized as legal where it was performed.

Hmong wedding ceremony performed in Laos is okay but same ceremony performed in U.S. not valid.

Common Law Marriage valid in several states. Check the state rules; it's not always 7 years.

States that recognize common law marriage:

Alabama
Colorado
Georgia (if created before 1/1/97)
Idaho (if created before 1/1/96)
Iowa
Kansas
Montana
New Hampshire (for inheritance purpose)
Ohio (if created before 10/10/91)
Oklahoma
Pennsylvania
Rhode Island
South Carolina
Texas

Utah

Domestic Partnership recognized anywhere and meets California standards. *Fam.C. §299.2*.

"*Marvin*" is a civil action to enforce a contract – not Family Law.

4. Venue

Refers to which court, or county, will have the power to actually hear the case. As a general principle, venue will lie in the first county where one of the parties files and serves the other. For dissolution, one party must be a resident of the filing county for the three months next preceding the filing.

For Legal Separation one party must be present in county and file. Legal separation is useful for someone coming to California or fleeing an abusive relationship, because the court can make the same kinds of support and custody orders as in a dissolution.

In general, venue will lie, and the court will have jurisdiction to hear the matter, where a party is first to file and serve (race/notice). [See *Marriage of Mungia (1964) 225 Cal. App. 2d 280*, for a discussion of how it used to be in the olden days. In that case H filed for legal separation in Kern County and served W who, the same day, filed for separate maintenance in Los Angeles and served H after receiving his summons. The court held that where the courts have concurrent jurisdiction, the first to obtain it by service, would keep it.]

The rule changed with the passage of *CCP §397(e)*. Now, the stay-behind party can make a motion to have the case returned to the county from which the move out party lived. The court can make temporary custody and support orders before returning the case to the other county. The downside is cost; filing fee to make motion and filing fee to transfer.

"Legal Separation" is an attractive idea to people who wish to avoid the harshness associated with terminating a marriage. However, legal separation requires consent of both parties. If the Response requests "Dissolution" then that is what it will be. Legal separation is useful if the parties have a religious or moral objection to divorce. It is also useful where the parties are older and do not expect to remarry and one of them has a serious illness while the other has excellent medical insurance or pension benefits.

A legal separation filed in contemplation of a later dissolution should indicate that it will be amended when the residency requirement is met. The amendment can be served by mail and the new amended Petition is deemed to have been served when the original was. It is not necessary to start a new 6-month clock. Paragraph 7 (j) is a good place to write: "Petitioner will amend the Petition to Dissolution when the residency requirement is met."

Keep in mind that a judgment of legal separation divides all the property and sets custody and support. It is res judicata on all financial issues. [See, *Fam.C. §772*; In *Marriage of Faught, (1973) 30 Cal.App.3d 875, 106 Cal.Rptr. 751*]. If the client later wants a divorce, a new case must be opened with a new case number and a new filing fee. Remarriage does not revive any community property interest in previously adjudicated property.

5. Summons FL110

An action for dissolution, legal separation or nullity is started by filing a Summons and Petition. The face of the Summons tells who the parties are and where the petitioner's attorney can be found. The back of the Summons contains very important language setting forth Standard Family Law Restraining Orders – known in the trade as "ATROs" from the former name Automatic Temporary Restraining Orders. These orders are intended to maintain the status quo. Parties are prohibited from disposing of property, canceling insurance policies and stealing children, among other things. Property can be sold to hire an attorney and to provide the necessities of life.

Standard Family Law Restraining Orders are effective on the Petitioner when the case is filed and on the Respondent when served. See note on Paragraph 9, below. If there is property in need of protection, such as community property real estate with title in respondent's name alone, it is good practice to seek other protection such as lis pendens. See note on Paragraph 5, below.

6. **Petition** – Plan for Default

Be sure your Petition includes all of the relief you will want in case the Respondent does not respond and you get a Judgment by default. In Family Law, as in other law, a default judgment can only produce whatever relief was requested in the Petition. So ask for everything.

[See In re Marriage of Lippel (1990) 51 Cal.3d 1160, 276 Cal.Rptr. 290, 801 P.2d 1041 (If petition does not pray for child support, default judgment ordering child support is void); In re Marriage of Andresen (1994) 28 Cal.App.4th 873, 34 Cal.Rptr.2d 147 (portion of the default judgment which gave the wife greater relief, in both nature and amount, than she had requested in her complaint was subject to being set aside at any time); but compare In re Marriage of Liss (1992) 10 Cal.App.4th 1426, 13 Cal.Rptr.2d 397 (different result where parties are before the court).]

There are two separate forms for the Petition:

Domestic Partnership FL 103

Marriage FL 100

They are identical in all respects except the wording is changed from "marriage" to "domestic partnership" as is required to make sense of it.

Paragraph 4, Separate Property, and Paragraph 5, Community Property, require some thought.

List any Separate Property in Paragraph 4 with a note as to whom it should be confirmed. Separate property is property acquired before marriage or after separation, or at any time by inheritance or gift. It is common practice to use some generic language until a full inventory is complete. An example of such language is:

“All property acquired prior to marriage; all property acquired during marriage by gift, inheritance or devise; all property acquired by reason of agreement of the parties; and all earnings and accumulations since the date of separation, according to proof. Petitioner will amend this petition when the full extent of such property is known”

List Community Property in Paragraph 5.

Community property is acquired by the efforts of one or both parties during the marriage, even if one convinces the other to put the property in only one name. Until Gale v. Superior Court (Gale) (2004) 122 Cal.App.4th 1388, it was not uncommon to use the same language in dealing with community property. Or, one might say “family residence” and some generic language. Marriage of Gale taught us that generic language is not enough to file a lis pendens. The Gale court said this:

“In this writ preceding we hold that a family law petition for dissolution of marriage which does not allege a community interest in specific real property does not state a "real property claim" so as to support the filing of a notice of lis pendens with regard to that property. The plain language of the governing statute, section 405.4 of the Code of Civil Procedure, requires a pleading which alleges a claim that affects title or possession to "specific real property."

The common practice of family lawyers in this state of being deliberately cagey or noncommittal in the family law petition or response by not specifying items of community and separate property (e.g., "such assets as may be discovered at a later date" or "the full nature and extent of petitioner's community property is unknown at this time") does not comply with the statutory requirements allowing the filing of a notice of lis pendens, and consequently will not support such a filing.”

So if you have a lis pendens in mind, put a full description of the property in your list. There are a number of “traps” for the unwary in arranging a les pendens, so be sure to read the book before you begin.

7. UCCJEA FL 105

If the parties have children, a Uniform Child Custody Jurisdiction and Enforcement Declaration (UCCJEA) must be completed and attached to the Petition and Response. This form tells the court where the children have lived for the past five years. On the back it asks if there have been other court cases involving the children and whether there is someone else who has a claim to custody. The form is straightforward and easy to complete. Alert clerks will not accept a petition for filing if this is required and not attached.

Petition Relief: Paragraph 6 of the Petition is a smorgasbord of optional ways to get rid of the other party. California being a “no fault” state, dissolution and legal separation must be based on irreconcilable differences or incurable insanity. Learn to pronounce the words. It is rare, but not uncommon, for one party to mark the box disputing the other party’s grounds. Advise your clients that it is both futile and depressing to object.

Nullity: The notion of getting a marriage annulled almost automatically if it is done within a specific time has been in the folklore for a long time. It gained national attention recently

when Brittany Spears annulled her 54-hour marriage in a matter of days. (Refer your client to her attorneys.) The fact is that nullity is based on statutory grounds and not time. Nullity cases divide easily into two groups: Void ab initio and Voidable upon petition timely made.

Void ab initio: A marriage is void ab initio if the parties are too closely related (Incestuous) or if one of them is already married (Bigamous). All states bar marriage between parent and child and between siblings. It is legal to marry your cousin throughout Canada, Mexico and Europe. The USA is the only western country with cousin marriage restrictions. Still, 26 states allow first cousins to marry.

A marriage void ab initio is considered to have never happened, but it is good practice to seek a judgment of nullity to resolve all issues, particularly if there is property that would belong to the community.

Nullity Voidable: A marriage is Voidable if one of the statutory conditions exists.

Age. Petitioner was under 18 without parental consent unless petitioner freely cohabited with spouse after attaining age 18.

Bigamy. At the time of marriage either party was married to someone else who had been absent for five consecutive years just before the marriage or at the time of the marriage the party's spouse was generally believed to be dead.

Unsound mind. At the time of the marriage either party was of unsound mind unless after coming to reason the party freely cohabited with the other.

Fraud. A party's consent was obtained by fraud and the case is filed within four years after discovering the fraud. The fraud must relate directly to some matter that is essential to the purpose of the deceived party in entering the marriage.

Force. Either party's consent was obtained by force. Threats alone are not enough unless they overcame the exercise of the injured party's free will. File four years from date of marriage.
Physical incapacity at the time of marriage a party was incapable of copulation. File by non-incapacitated spouse within four years of marriage.

Paragraph 7 asks for injunctive relief. Consider it carefully and mark the appropriate boxes, but remember this is not a motion for support or custody so file an OSC at the same time.

Sub paragraphs 7(a), (b) and (c) deal with custody and visitation. Include as much detail as you might want. Be sure to file OSC.

Sub 7(d) asks the court to determine parentage of children born to the parties before the wedding.

Sub 7(e) asks for attorney fees payable by the other party (file OSC).

Sub 7(f) asks for Spousal Support payable by other party (file OSC).

Sub 7(g) asks the court to terminate jurisdiction of court to order Petitioner to pay support to Respondent. Very important in a default.

Sub 7(h) asks that property rights be determined.

Sub 7(I) asks to restore Petitioner's former name. Note: if husband is Petitioner he can not make her change her name.

Sub 7 (j) Other, is a good place to tell the court you plan to amend when the residency requirement is met.

Paragraph 8 warns both parties that the court can make child support orders and charge 10% interest on arrears if a party fails to appear.

Paragraph 9 is an acknowledgment under penalty of perjury that Petitioner has read the Standard Family Law Orders (ATROs) and understands that they are effective upon filing.

8. Service of Summons

Proof of Service of Summons FL 115 has convenient boxes to check showing all the possible papers that can be served. Be sure to mark the UCCJEA box even though the document is attached to the Petition.

This is a convenient place to effect service of the Declaration of Disclosure and initial OSC.

Personal Service. The documents are handed to, or placed near the Respondent.

Substituted Service: Try to effect personal service first. Make declaration of due diligence. Then leave documents with some responsible looking person at the home or business, being careful to say what they are. Then send a copy of the documents to the Respondent by ordinary mail at the address where the papers were left.

First Class Mail: Send the documents to the Respondent by first class mail along with a form FL 117 Notice and Acknowledgment of Receipt. Respondent is supposed to sign the receipt and return it to you. If not, you can ask for costs of effecting service.

Certified Mail, Return Receipt requested: A Summons and Petition may be served by Certified Mail, Return Receipt requested to an address outside California. Attach the green card to the proof of service and file it. Keep a copy.

9. Response – Marriage FL 120 and Response Domestic Partnership FL123 are numbered identically to the Petitions and provide the Respondent a vehicle to respond to the statements in the Petition. Note that if the Respondent marks the box "Response and Request for dissolution" the case becomes a dissolution because legal separation requires consent.

10. Filing – Finding the courthouse:

There is a movement and pending legislation to standardize filing fees statewide. Even

when that becomes a reality it is likely that the courts will continue to have local fees and certainly local rues regarding filing documents and how they handle motions and temporary orders.

Essential Publisher's (Martin Dean's) program "Essential Courts" is the only source of all this information in one place. It sounds silly, but finding the actual courthouse building in a county where you do not practice regularly is sometimes a problem. Mapquest is one option; Essential Courts is another.

Essential Courts has authorized us to include a demonstration.

11. **Disclosure Issues** – A Summary

Fam.C. §2100 et seq. requires the preparation and service of Declarations of Disclosure in which complete, voluntary disclosure of information relating to all property owned by either of the parties is provided. The purposes behind the declarations are:

- To marshal, preserve, and protect community assets and liabilities so as to avoid their dissipation.
- To ensure fair and sufficient child and spousal support awards.
- To achieve division of community and quasi-community assets and liabilities as provided by law.
- To reduce the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery [*Fam.C. §2100; Elden v. Super. Ct., (1997) 53 Cal.App.4th 1497, 1505-1506, 62 Cal.Rptr.2d 322*].

In order to promote these public policies, both parties are required to make full and accurate disclosure of all assets and liabilities in which either may have an interest, whether community or separate, together with a disclosure of their income and expenses. Moreover, each party has a continuing duty to "immediately, fully, and accurately " update and augment that disclosure, to the extent there have been material changes, throughout the case so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts [*Fam.C. §2100 (c)*].

Public policy cannot be waived by agreement [See In re the *Marriage of Fell (1997) 55 Cal.App. 4th 1058, 64 Cal.Rptr.2d 522*.].

The parties are subject to the fiduciary duty established in *Fam.C. §721* and required to provide the other with full and accurate disclosure of all material information relating to their assets and liabilities from the date of separation until an asset is actually distributed pursuant to court order and about their income and expenses until a "permanent" spousal support, child support and attorney fee order is made. Moreover, they are required to "immediately, fully, and accurately" update and augment that disclosure with any material information affecting that asset or liability until it is distributed. The information that must be provided and updated includes:

- All assets and liabilities in which the party has or may have an interest or obligation.
- All current earnings, accumulations, and expenses.

- Any investment opportunity, business opportunity, or other income-producing opportunity that presents itself after the date of separation, but that results from any investment, significant business activity outside the ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive.

The operation or management of a business or an interest in a business in which the community may have an interest [*Fam.C. §2102*].

See, *Elden v Superior Court supra, 53 Cal.App.4th 1497, 62 Cal.Rptr.2d 322; In re the Marriage of Varner (1997) 55 Cal.App.4th 128, 63 Cal.Rptr.2d 894; In re Marriage of Jones (1998), 60 Cal.App.4th 685, 70 Cal.Rptr.2d 542; In re the Marriage of Rossi (2001) 90 Cal. App. 4th 34; 108 Cal. Rptr. 2d 270; In re Marriage of Brewer and Federici (2001) 93 Cal.App.4th 1334; 113 Cal.Rptr.2d 849; In re Marriage of Duffy (2001) 91 Cal. App. 4th 923, 111 Cal. Rptr. 2d 160; In re Marriage of Hixson (2003) 111 Cal.App.4th 1116, 4 Cal.Rptr.3d 483.*

12. Preliminary Declarations of Disclosure

After or concurrently with service of the petition for dissolution of marriage, nullity or legal separation, each party, or the attorney for the party in the matter, shall serve upon the other a preliminary declaration of disclosure, executed under penalty of perjury on a Judicial Council form. This form will not be filed, absent order of the court. However, each party must file a proof of service of the form with the court. The declaration shall contain:

- The identity and percentage of ownership of all assets in which the declarant has or may have an interest, whether community, quasi-community or separate.
- All liabilities and percentage of obligation thereof for which the declarant is or may be liable.
- May set forth his or her characterization of each asset or liability. This declaration may be amended without leave of court, but proof of service of any amendment must be filed with the court [*Fam.C. §§ 2103, 2104*].

A Preliminary Declarations of Disclosure cannot be waived [*In re the Marriage of Fell supra, 55 Cal.App. 4th 1058, 64 Cal.Rptr.2d 522*].

Each party shall also serve on the other a completed income and expense declaration unless one has already been provided and is current and valid.

13. Final Declaration of Disclosure

Prior to, or simultaneously with, the time the parties enter into an agreement for the resolution of property or permanent support, or, in the event the case goes to trial, no later than 45 days before the first assigned trial date, each party, or the attorney for the party in the matter, shall serve upon the other a completed final declaration of disclosure upon a Judicial Council form and a current income and expense declaration. Each party or his/her attorney shall execute and file with the court a declaration signed under penalty of perjury stating that service of the final declaration of disclosure and current income and expense declaration was made on the other party, unless the declarations have been waived.

All of the following information must be included in the final declaration of disclosure:

- All material facts and information regarding the characterization of all assets and liabilities.
- All material facts and information regarding the valuation of all assets which are contended to be community or in which it is contended the community has an interest.
- All material facts and information regarding the amounts of all obligations which are contended to be community obligations or in which it is contended the community has liability.
- All material facts and information regarding the earnings, accumulations, and expenses of each party which have been set forth in the income and expense declaration.

In the case of a default judgment, the petitioner may waive the final declaration of disclosure requirements provided in this chapter, and shall not be required to serve a final declaration of disclosure on the respondent nor receive a final declaration of disclosure from the respondent. However, a preliminary declaration of disclosure by the petitioner is required [*Fam.C. §§ 2105, 2106, 2110*].

14. Final declarations may be waived

The parties may stipulate to mutual waivers of the final declaration of disclosures. The waiver must be under penalty of perjury and executed in open court or in a separate stipulation. It may no longer be solely in the Marital Settlement Agreement or the judgment of dissolution.

The waiver must recite that parties have completed and exchanged current Income and Expense Declarations and Preliminary Declarations of Disclosure; have fully augmented the preliminary declarations of disclosure, including disclosure of all material facts and information regarding the characterization of all assets and liabilities, the valuation of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability; that the waivers are entered into knowingly, intelligently and voluntarily; that each party understands that the waiver does not limit their legal disclosure obligations, but rather is a statement under penalty of perjury that those obligations have been fulfilled; and that each party further understands that noncompliance with those obligations will result in the court setting aside the judgment [*Fam.C. §2105 (d)*].

15. Penalties

The complying party must, within a reasonable time, request preparation of the appropriate declaration or further particularity. In the event the noncomplying party fails to comply, then the following may occur:

- No judgment cam be entered with respect to the parties' property rights without each party having executed and served a copy of the final declaration of disclosure,

absent good cause or a waiver pursuant to Fam.C. §2105 (d). 2

- Complying party may file a motion to compel a further response.
- Complying party may file a motion for an order preventing the non-complying party from presenting evidence on issues that should have been covered in the declaration of disclosure.
- The court shall, in addition to any other remedy provided by law, impose money sanctions against the non-complying party in an amount sufficient to deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless it finds that the non-complying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust. The remedy of contempt is also available (See *Elden v. Super. Ct. supra, 53 Cal.App.4th 1497*).

Although the *Fam.C. §2107 (d)* provides that the failure to comply with all disclosure provisions requires the judgment to be set aside and there is "no harmless error," in *In re Marriage of Steiner & Hosseini (2004) 117 Cal.App.4th 519, 11 Cal.Rptr.3d 671,* held that this is provision is subject to *Cal. Const., art. VI, §13*, which mandates that no judgment may be set aside or new trial granted unless there has been a miscarriage of justice moving party must still comply with *Cal. Const., art. VI, §13* and show that a "miscarriage of justice" occurred.

These last three remedies are available only to the complying party. They are not available if both parties failed to comply. [In re Marriage of Fell, supra,55 Cal.App.4th 1058.]

16. Perjury Issues

The commission of perjury on either declaration of disclosure may be grounds for setting aside the judgment, or any part or parts thereof, in addition to any and all other remedies, civil or criminal, that otherwise are available under existing law for the commission of perjury [*Fam.C. §§ 2105 (a), 2120 et seq.]*

When complying with the statutes regarding the preliminary and final disclosure declarations, especially including the waiver of the final declaration, to permit a client to provide false information may result in criminal or disciplinary action against the attorney.

One of the major pitfalls is with waiving the final disclosure declaration. In a proper waiver, the parties must state, under penalty of perjury, that all material facts and information have previously been disclosed. If counsel knows that all material facts and information have not been disclosed then, when counsel requests his or her client to execute the waiver (or the final disclosure declaration itself), counsel is soliciting testimony, under the penalty of perjury, known to be false. This is subornation of perjury [*See Penal Code §§ 118 (a), 125, 126 and 127*].

Likewise, if the attorney prepares a proper waiver of the Final Declarations of Disclosure pursuant to *Fam.C. §2105(d)*, which is also executed under the penalty of perjury, knowing that all material facts and information have not been supplied in an alternative manner, and request the client to execute that document, it is also likely guilty of subornation of perjury within the meaning of *Penal Code §127*.

PROCEDURAL ISSUES – PART TWO

TEMPORARY RELIEF

Temporary orders, also referred to as *pendente lite* orders, are available for a variety of issues pending trial and final judgment. These orders can be specifically designed to maintain the status quo, preserve the marital assets, permit financial relief, and help insure the safety of a party and/or children in a domestic violence situation.

1. Circumstances Warranting Temporary Orders

- **Domestic Violence Protective Orders**: Number one reason for seeking immediate relief. Your client, a minor child, other family member, or other household member is the object of actual or threatened physical or sexual abuse.
- **Spousal Support**: A client has inadequate income to satisfy support needs. Caution: Where you represent the supporting spouse, also referred to as the "payor", note that only support payments made pursuant to a "divorce or separation instrument" are tax deductible. *I.R.C. §71(b)(1) and (2)*. See also Keegan v. Commr. TC Memo. 1997-359.
- **Custody/Visitation of Minor Children**: The parties are unable to agree to either custody, or custodial timeshare of their minor children.
- **Child Support**: Financial assistance is needed in order to support the minor child(ren) while in the care of one of the parties.
- **Property Restraint**: The parties need the ATRO.'s, issued with the Summons, confirmed and/or expanded.
- **Exclusive Use**: A party needs a piece of property temporarily and exclusively confirmed to them, subject to the payments of any encumbrances on the property.
- **Payment of Debt**: In order to preserve a piece of community property, or to preserve the community credit, one party is needed to be responsible for payment of that debt, subject to reimbursement at a later date.
- **Attorney Fees**: A party is in need of financial assistance in order to protect their rights during the pendency of the proceeding. Fam.C. §2030.
- **Sealing Orders**: Prevents public access to pleadings containing identifying information. Fam.C. §2024.6

2. Moving Papers

Requests for temporary orders commence with the filing, and service of, appropriate moving papers. These include Domestic Violence Restraining Orders, and an Order to Show Cause or a Notice of Motion.

Domestic Violence Restraining Orders: Where a party is seeking domestic violence restraining orders, a party, whether represented or not, must use Judicial Counsel form DV-100.

Order to Show Cause or Notice of Motion: Where a party is not seeking Domestic Violence Restraining Orders, or is, and is also seeking a temporary spousal support, a party, must use Judicial Counsel form FL-300 (Order to Show Cause), or form FL-301 (Noticed Motion).

Motions Distinguished: Caution - While these two forms of request can accomplish the same objective of giving notice of requested relief and the opportunity to respond, they are not interchangeable. The Notice of Motion can only be used where the responding party has already made a general appearance, and can never be used when requesting ex-parte relief. Conversely, an Order to Show Cause must be used where the responding party has not made a general appearance, or where ex-parte or temporary relief is requested.

Stipulation: Any available temporary relief may be obtained by stipulation between the parties, via a written agreement signed by the parties and filed with the court, or stated orally on the record.

3. Domestic Violence

Where due to actual or threatened acts of domestic abuse, protective orders are necessary in order to protect a party, a minor child, and or a household or family member. These protective orders are made pursuant to the Domestic Violence Prevention Act, more commonly referred to as DVPA orders. *Fam.C. §6200* et seq., specifically defined in *§§6203 and 6320*. The intent of this act is to prevent reoccurrences of acts of domestic violence, and to provide for a separation of the parties for a period sufficient to enable them to seek resolution of their differences.

Protected Persons. *Fam.C. §6211* sets forth the categories of the persons protected under the DVPA. These include a spouse or former spouse, a co-habitant, a dating or engagement relationship, a co-parent, a person with whom the requesting party has had a child, or a blood relative. Note: Should a person not fall into one of these categories, they may seek injunctive relief pursuant to *CCP §527.6*, however if possible, it is recommended to file under the DVPA due to the fact that the DVPA authorizes restitution whereas the Harassment statutes do not.

Filing of Dissolution, Legal Separation, or Nullity Not a Requirement. The filing of any of these family law actions is not a requirement. *Fam.C. §6301(b)*. This relief may be requested under a dissolution, legal separation, or nullity case number, or may be later joined.

No Filing Fees. There is no filing fee for motions brought pursuant to the DVPA, nor is there a cost for up to five conformed copies, or incident reports.

Emergency Protective Orders. Also known as EPO.'s. Domestic Violence Restraining Order applications take time to draft, file, obtain, and serve. Advise your clients that the first telephone call should be to local law enforcement. These agencies are empowered to issue protective orders on an emergency basis in cases of imminently threatened domestic violence, child abuse and or child abduction, stalking, or elder or dependant abuse. *Fam.C. §6240* et seq and *Penal Code §646.91*. These orders expire no later than the earlier of 1) the close of judicial business on the fifth court day following the date of issuance, or 2) the seventh calendar day following the date of issuance. This gives the party seeking protection under the DVPA time to safely obtain their desired orders.

Application for Orders. Application must be made on Judicial Counsel Form DV-100 along with a DV-101, Description of Abuse, and the following forms as required: a DV-105 where

custody, visitation, and child support are also at issue, a DV-140 where only custody and visitation are at issue, a DV-160 where only child support is at issue, a DV-290 for an order for free service of restraining order, a DV-108 where restricted travel is requested, and a DV-150 where supervised visitation is requested. Where any financial matters are at issue, such as child support, or attorney fees, an Income and Expense Declaration (FL-150) must be concurrently filed and served. These forms are then submitted to the court along with a DV-110, a proposed temporary order. Note: These forms must be signed by the declarant as it is signed under penalty of perjury in lieu of sworn testimony. Counsel can not sign on their client's behalf [*In re Marriage of Heggie (2002) 99 CA4th 28*]. Burden, "reasonable proof of a past act or acts of abuse." Fam.C. §6300.

Ex-Parte Filing. A request for DVPA temporary orders may issue with, or without notice in order to prevent a recurrence of domestic violence upon reasonable proof, to the court's satisfaction, of past acts, or acts of abuse. *Fam.C. §241*. Note: *CRC 379*, and all local court rules, require some form of advance notice of intent to present an ex-parte application to the court. See local rules and forms required. It is therefore critical where irreparable injury would result if notice where given, that sufficient facts are plead in the required format, so that the desired orders and protections can be obtained.

Issuance of Ex-Parte Order. The court must act on this ex-parte application on the same day that it is submitted (unless filed late in which case the next judicial day). *Fam.C. §246*. In addition, *Fam.C. §6387* confirms that the applicant is entitled to five no cost certified stamped and endorsed orders.

Service. The ex-parte order takes effect upon proper service. Proper service is obtained where copies of all documents filed with the court are served upon the opposing party, along with a blank DV-120, Answer to Temporary Restraining Order, in a manner authorized for initial service of process. However, where any temporary orders are granted, opposing party must be personally served. A Proof of Service, DV-200 must be used, and completed to the court's satisfaction prior to the commencement of the hearing. Failure to do so will result in the court dissolving the court's orders.

Response. A response may be made on DV-120, however it must be filed and served no less than two days prior to the hearing.

4. Hearing

Setting. A hearing must be set, requiring cause why a permanent order should not be granted, on the earliest day the court business will permit, but not later than 20 days or, if good cause appears to the court, 25 days from the date of the order. *Fam.C. § 242(a)*.

Orders expire absent re-issuance. Once the 20/25 day period from issuance expires, the orders are unenforceable unless re-issued. *Fam.C. § 242(b)*.

Re-issuance procedure. Application must be made on form DV-125, Reissue Temporary Restraining Order. An endorsed copy of the form is attached to the paperwork previously served, and then again, must be personally served on the opposing party and another DV-200 must be completed and filed with the court.

20 Minute Calendar. A majority of the courts limit these hearings to twenty minutes. Moving party is required to proceed. Fam.C. §243(a).

Order. Once the court makes a determination on the items requested, the moving party completes DV-130 as directed, files it with the court, and serves as appropriate. Note, although called a Permanent Restraining Order, these orders can be made anywhere up to a maximum of five years. Fam.C. §6345

5. Orders to Show Cause and Noticed Motions

Pleadings. Along with FL-300 for an Order to Show Cause, or FL-301 for a Notice of Motion (face sheets), an Application for Order, FL- 310 must be attached.

Declarations. The court has the discretion to grant or deny temporary relief solely on the basis of the pleadings. It is critical that the declaration be based upon competent and complete evidence substantiating the relief requested.

Signatures. As discussed above, the declaration must be signed by the moving party themselves.

Income and Expense Declaration. In the event any financial issues are present, an Income and Expense Declaration, FL-150 must also be completed. Note: Where the only financial issue present is child support, a Simplified Financial Statement, FL-155 may be used unless the applicant is self employed ore receives income from any source other than public assistance, salary, wages, disability, unemployment, interest, workers compensation, social security, or retirement.

Filing. Upon filing, a hearing must be set by the court at least 16 days after filing and completion of service. *CCP §1005(b).* Courts require a filing fee that varies by County. See local rules for specific filing fees.

***Ex Parte Relief**. Granted only where it appears from the facts shown in the application that "great or irreparable injury would result to the applicant before the matter can be heard on notice". *Fam.C. §241*. However, this requirement is in addition to the procedural requirements set forth in CRC 379 that must be strictly adhered to. Also refer to any supplemental local rules for additional requirement or forms that must be simultaneously filed with the application. Note, these requests must be made on an Order to Show Cause and accompanied by FL-310, Temporary Orders for the court to complete.

Service. Proper service is dependent upon whether an Order to Show Cause or a Notice of Motion is used.

Order to Show Cause. Where the opposing party has not made a general appearance, service must be made in a manner authorized for initial service of process. After the opposing party has made a general appearance, service may be upon opposing counsel or in a manner prescribed by a Notice of Motion.

Notice of Motion. Service may be made by mail pursuant to *CCP §1010*.

Post Judgment Motions. Any motion, in either form filed post judgment, must be served on the opposing party only, service on counsel insufficient, either personally or by mail.

Documents Served. Copies of all paperwork filed with the court must be served, along with a blank Response to Order to Show Cause or Noticed Motion (FL-320), and a blank Income and Expense Declaration (FL-150) if any financial issue is present.

Proof of Service. A proof of service must be filed no later than five days prior to the hearing. *CRC 317*.

Response. A responding party that wishes to oppose, in whole or in part, any temporary relief requested by opposing party, must complete, file, and serve FL-320, Responsive Declaration to Order to Show Cause or Noticed Motion.

Scope of Relief. Responding party may consent or object to any request made on the moving paperwork. In addition, a responding party may request affirmative relief only on same issues raised. *Fam.C. §213*. In the event new issues are raised, a new and separate motion must be filed.

Declaration. Here again, the declaration is critical. This may be the only opportunity for opposition to the relief requested to be heard. It is critical to state all facts in opposition to the relief requested.

Filing. All responsive pleadings must be filed and served no later than 9 days prior to the hearing unless the court prescribes a shorter time. There is no court filing fee for responsive pleadings.

Service. All responsive pleadings must be served upon the moving party or their counsel by any means consistent with *CCP §§1010, 1011, 1012, or 1013*, so to be reasonably calculated to ensure delivery no later than close of business the next business day after filing.

Order after Hearing. Many family law courts follow *CRC 391* in regards to the drafting and submission of an Order after Hearing. See local rules for standards in your County.

General Rule. The general rule is that the prevailing party drafts a proposed order within five days of the court's ruling. The opposing party then has five days to respond to the prevailing party of any objections as to form and content of the order in relationship to the order's made by the court, stating any reasons for disagreement.

Submission to Court. After the five day period for approval. The prevailing party must promptly transmit the proposed order to the court, along with a summary of opposing party's response if any. In the event that prevailing party fails to draft a proposed order, the other party may do so.

Form of Order. Judicial Counsel Form FL-340, a mandatory form, called Findings and Order after Hearing has several attachments that are to be included as relevant to the applicable hearing. These include FL-341, Child Custody and Visitation Order Attachment (supplemental forms to FL-341 include: FL-341(A) Supervised Visitation, FL-341(B) Child

Abduction Prevention Order Attachment, FL-341)

Additional Forms. Children's Holiday Schedule Attachment, FI-341(D) Additional Provisions - Physical Custody Attachment, FL-341(E) Joint Legal Custody Attachment, FL-342 Child Support Information Attachment, FL-342(A) Non-Guideline Child Support Findings Attachment, FL-343 Spousal, Partner, or Family Support Order Attachment, or FL-344 Property Order Attachment to Findings and Order After Hearing.

SUBSTANTIVE ISSUES – PART ONE
CUSTODY AND VISITATION

1. Custody

Types of Custody Defined.

Sole Legal Custody. One parent is awarded the exclusive right and responsibility to make decisions relating to the child's health, education, and welfare. *Fam.C. §3006*.

Sole Physical Custody. One parent is granted exclusive physical custody, thereby the child resides primarily with that parent, subject to the power of the court to order visitation. *Fam.C. §3007*. Note, the terms "primary physical custody", "primary caretaker" and "resides primarily with" have no legal meaning. Their purpose is to distinguish levels of physical responsibility under various types of parenting plans. Caution, if a move away is, or could potentially be at issue, be aware of presumption raised that move is permissible [See *In re Marriage of La Musga (2004) 32 C4th 941*, and *In re Marriage of Burgess (1996) 13 C4th 25*].

Joint Legal. Both parents share the right and responsibility to make decisions regarding the health, education, and welfare of the child. *Fam.C. §3003*.

Joint Physical. Each parent has significant periods of physical custody, insuring frequent and continuing contact with both parents. *Fam.C. §3004*.

Process Determination

Mediation. All contested custody and visitation matters must be set for mediation pursuant to *Fam.C. §3160* et seq. See local rules regarding recommending mediation or confidential mediation for your county. No cost to clients.

Full Custody Evaluation. In any custody or visitation dispute, the may order a full custody evaluation resulting in a confidential written report for the court's consideration when determining what is in the child's best interest. *Fam.C. §3011*. Costs range from $2,500.00 to $10,000.00 and up.

Factors to Be Considered. The court has broad powers in making custody orders that they deem necessary and proper. *Fam.C. §3022*. However, these decisions are guided by, (1) the primary concern is the child's health, safety, and welfare. The perpetration of child abuse and domestic violence has been deemed detrimental. (2) Assure frequent and continuing contact between the parents. (3) Custody determinations are to be made from the standpoint of the child's best interest.

2. Visitation

Unless it would detrimental to the best interest of the child, reasonable visitation must be granted to the non-custodial parent. *Fam.C. §3100*. Note, a parent can not be granted visitation or custody of a child conceived by rape for which the parent was convicted of rape. *Fam.C. §3030*.

Parameters of Reasonable Visitation

Policy. Visitation orders must take into account the policy of assuring the child's health, safety, and welfare to the extent possible while the policy of frequent and continuing contact with both parents. Subsequent to these policies, the courts must also consider the child's age, maturity, the distance between the parents, and where appropriate, the child's preferences.

Improper Factors. (1) Child support - payment of child support can not be tied to or conditioned upon payment of child support. (2) parent's absence from home - can not be considered so long as (a) time frame was short and the parent demonstrated an interest in maintaining contact and no intent to abandon, (b) the absence was the result of actual or threatened domestic violence by the other parent, and (3) unconventional lifestyles such as sexual preferences or religious beliefs.

Supervised Visitation. Visitation orders must take into consideration when a parent is the subject of a *Fam.C. §6218* protective order. *Fam.C. §3100*. Absent a finding of "no significant risk", mandatory supervision where parent is a registered sex offender, convicted of child abuse, or convicted of 1st degree murder of the other parent. Supervision may be ordered if substantial evidence is found that a parent, with the intent to interfere with visitation, made a false report of child sexual abuse, or as a preventative measure to prevent child abduction.

Domestic Violence. Where domestic violence is alleged or found, a visitation order must specify the time, day, place, and manner of transfer of a child in order to limit the exposure of a child to potential conflict or violence, and insure the safety of all family members.

Specifics of Reasonable Visitation

Detail of Schedule. While some families work best with a schedule of "as reasonably agreed to between the parties", others require more specificity including factors such as exchange days, exchange times, exchange locations, parties responsible for transportation, rights of first refusal, and notice and methods of communication regarding delays and needs to reschedule. For orders requiring more specificity, be sure to include detail regarding the regular schedule, holidays, and vacations.

Time Share. Once a schedule is identified, the percentage of time a child spends with each parent is identified so that it can be included in a child support calculation. This number is specified on page four, item 17(b) of the Income and Expense Declaration (FL-150). This number can be calculated in a number of ways. See your local rules for input on your court's approach to this calculation. Most courts will typically use a default percentage of 20% time with the non-custodial parent where the schedule approximates every other weekend, shared holidays, and vacation time.

SUBSTANTIVE ISSUES – PART TWO
CHILD SUPPORT

The determination of a child support obligation is a highly regulated area of the law, and the only discretion a trial court possesses is the discretion provided by statute or rule. [In re Marriage of Butler & Gill *(1997) 53 Cal.App.4th 462, 61 Cal.Rptr.2d 781*]. The court has continuing jurisdiction over matters involving children, even after judgment [In re Marriage of Kreiss *(2004) 122 Cal.App.4th 1082, 19 Cal.Rptr.3d 260*] until the reach the age of majority at age 18 or 19 if still attending high school. [*Fam.C. §6500*].

Child support is determined by statute under uniform guidelines [*Fam.C. §§4052, 4053*] that a court cannot deviate from. [In re Marriage of Carter *(1994) 26 Cal.App.4th 1024, 33 Cal.Rptr.2d 1;* In re Marriage of Hall *(2000) 81 Cal.App.4th 313, 96 Cal.Rptr.2d 772*.]

As a practical matter, child support is determined by use of approved computer programs. The data, income etc., inputted into the appropriate boxes in the program, "hit" the button and the program calculates the child support. What goes into the input screens is what is important. Ninety-five percent (95%) of the information needed is on the Income and Expense Declaration (I&E).

The statutes define gross income [*Fam.C. §4058*] and the allowable deductions to determine net disposable income [*Fam.C. §4059*], and the formula for calculation support [*Fam.C. §4055*]. Although some might argue the formula is so complex that attorneys and judicial officers utilize computer programs to make the calculation, of which three are readily available, **Dissomaster™, Support Tax™** and **XSpouse™**, because they cannot do so without one of these computer programs, the truth is that computer programs are an expediency; a way of coming up with a number that attorneys and judges can point to and say, "…the support number is that which is calculated by the computer." Nevertheless the computer programs perform a very important function; they consistently calculate, rightly or wrongly, net income from which the support calculation formula is applied. The Income and Expense Declaration [FL-150] has been designed to include the necessary items inputted into the computer program.

The Income and Expense Declaration [FL-150]

The Income and Expense Declaration (I&E) is perhaps the single most important document drafted at any stage in the dissolution proceeding. The I&E not only has an immediate effect in that proceeding, but it may also affect the outcome of subsequent modification motions years later.

Page 1

Item 1. Pay stubs, other jobs, gross pay, pay period. This information is of vital importance for wage assignment and to verify income or that which is considered "income," and for discovery purposes.

Item 2. Personal information.

Item 3. Tax information.

Item 4. Other party's income.

Page 2

Item 5. Items listed in a. through k. follow the items of income defined in *Fam.C. §4058*.

Gross salary or wages. Immediate prospective earnings; see *In re Marriage of Riddle (2005) 125 Cal.App.4th 1075, 23 Cal.Rptr.3d 273*.

Overtime. See *In re Marriage of Simpson (1992) 4 Cal.4th 225, 14 Cal.Rptr.2d 411, 841 P.2d 931; County of Placer v. Andrade supra, 55 Cal.App.4th 1393, 64 Cal.Rptr.2d 739*.

Commissions or bonus. See *In re Marriage of Ostler & Smith (1990) 223 Cal.App.3d 33, 272 Cal.Rptr. 560*.

Public assistance.

- TANF - Temporary Aid to Needy Famlies.
- SSI - Social Security.
- GA -General Assistance (County).
- GR - General Relief (County).

Spousal Support.

Partner Support.

Pension or retirement payments.

Social Security retirement.

Disability.

Unemployment compensation.

Workers' compensation.

Other. Military (get pay stub, Basic Allowance for Quarters etc.).

Gifts. See *In re Marriage of Scheppers (2001) 86 Cal.App.4th 646, 103 Cal.Rptr.2d 529; In re Marriage of Schulze (1997) 60 Cal.App.4th 519, 70 Cal.Rptr.2d 488, County of Kern v. Castle (1990)75 Cal.App.4th 1442, 89 Cal.Rptr.2d 874; In re Marriage of Schulze (1997) 60 Cal.App.4th 519, 70 Cal.Rptr.2d 488; In re Marriage of McQuoid (1991) 9 Cal.App.4th 1353, 12 Cal.Rptr.2d 737; In re Marriage of Kirk (1990) 217 Cal.App.3d 597, 266 Cal.Rptr. 76,* ***Straub v. Straub*** *(1963) 213 Cal.App.2d 792, 29 Cal.Rptr. 183; In re Marriage of Ostler & Smith, supra. 223 Cal.App.3d 33, 272 Cal.Rptr. 560*.

Imputation of rate of return to non-income producing assets. See *In re Marriage of Destein (2001) 91 Cal.App.4th 1385, 111 Cal.Rptr.2d 487; In re*

Marriage of Cheriton (2001) 92 Cal.App.4th 269, 111 Cal.Rptr.2d 755.

Imputation of earning capacity. See *Fam.C. §4058 (b); In re Marriage of Hinman [Hinman II] (1997) 55 Cal.App.4th 988, 64 Cal.Rptr.2d 383,* with citation to *In re Marriage of Padilla (1995) 38 Cal.App.4th 1212, 1218, 45 Cal.Rptr.2d 555.* See also *In re Marriage of Ilas (1993) 12 Cal.App.4th 1630, 16 Cal.Rptr.2d 345; In re Marriage of Regnery (1989) 214 Cal.App.3d 1367, 263 Cal.Rptr. 243; In re Marriage of Simpson (1992) 4 Cal.4th 225, 14 Cal.Rptr.2d 411, 841 P.2d 931; In re Marriage of Paulin (1996) 46 Cal.App.4th 1378, 54 Cal.Rptr.2d 314; In re Marriage of McQuoid (1991) 9 Cal.App.4th 1353, 12 Cal.Rptr.2d 737; Stewart v. Gomez (1996) 47 Cal.App.4th 1748, 55 Cal.Rptr.2d 531*.

Earning ability includes ability to generate income from investments. *In re Marriage of Dacumos (1999) 76 Cal.App.4th 150, 90 Cal.Rptr.2d 159*.

Inheritance is not income for support purposes, but income that it can generate is. See *County of Kern v. Castle (1999) 75 Cal.App.4th 1442, 89 Cal.Rptr.2d 874;* and *Straub v. Straub (1963) 213 Cal.App.2d 792, 29 Cal.Rptr. 183* (imminent receipt of inheritance).

Life insurance death benefits are not income for child support purposes but income that it can generate is. *In re Marriage of Scheppers (2001) 86 Cal.App.4th 646, 103 Cal.Rptr.2d 529*.

Increased equity in family residence is not income for child support purposes. *In re Marriage of Henry (2004) 126 Cal.App.4th 111, 23 Cal.Rptr.3d 707*.

Where the **supporting parent enjoys a lifestyle that far exceeds that of the custodial parent**, child support must to some degree reflect the more opulent lifestyle even though this may, as a practical matter, produce a benefit for the custodial parent. *In re Marriage of Hubner (1988) 205 Cal.App.3d 660, 252 Cal.Rptr. 428; White v. Marciano (1987) 190 Cal.App.3d 1026, 235 Cal.Rptr. 779; In re Marriage of Aylesworth (1980) 106 Cal.App.3d 869, 877, 165 Cal.Rptr. 389*.

Item 6. Investment Income

Dividends/ Interest.

Rental Income [reduced by expenditures required to produce income, *Fam.C. §4058 (2)*.

Trust Income.

Other.

Item 7. Income from self-employment, after business expenses for all businesses. Schedule C, if attached, may have "paper" numbers, such as depreciation.

Item 8. Additional Income (lottery, inheritance etc.). See *County of Contra Costa v. Lemon* *(1988) 205 Cal.App.3d 683, 252 Cal.Rptr. 455*.

Item 9. Change in income.

Item 10. Deductions. *Fam.C. § 4059*; also check local rules.

Required Union dues.

Required retirement payments, not social security, FICA, 401(k), or IRA.

Medical, hospital, dental, and other insurance premiums.

Child support, other relationships.

Spousal support, court order, different marriage.

Partner support, court order, different partner.

Necessary job related expenses, not reimbursed.

Item 11. Assets.

Cash, checking, savings credit union, money market & other deposits.

Stocks, bonds, and other assets easily sold.

All other property, real and personal.

Page 3

Item 12. People living with me.

Item 13. Average month expenses: Estimated, actual and proposed? Reality versus fiction.

Home. **Rent or mortgage**. Check the appropriate box. If you have an adjustable rate mortgage, indicate what you expect the payments to be for the next six month period.

Determine the amount of principal and interest included in the monthly payment. This affects tax deductions, and net spendable income.

If **property taxes** are not included as part of the monthly payment, they are paid twice per year, add the total and divide by 12 for the monthly number.

Indicate the average monthly amount paid for **property insurance**. Remember, this is a monthly number. Also include earthquake and renter's contents insurance.

Maintenance and repair. If the client owns the home, determine a reasonable yearly amount for repairs and upkeep, and divide by 12 for a monthly average. Other items that you need to list separately under maintenance include gardener, pool service, and housekeeper expense.

Health care costs not paid by insurance. Determine the yearly amount for uncovered expenses, and divide by 12 for a monthly average. Include here only the amount paid "out-of-pocket" after insurance coverage, such as deductibles, co-payments and uninsured expenses.

Child care. Show the monthly cost for all children. This includes after school care, preschool expenses, "nanny" expenses, and summer expenses (the later of which may be much higher).

Groceries and household supplies. Calculate the amount spent weekly at the grocery store and multiply by 4.3 (there are an average of 4⅓ weeks per month).

Eating out. Calculate the cost per week for meals outside the home (including fast food etc.) And again multiply by 4.3 (an average of 4⅓ weeks per month).

Utilities (gas, electric, water, trash). Calculate the average monthly amount spent for gas, electric, water, garbage. Due to climate changes, some month may be higher than others, so you may have to take the yearly average and divide by 12.

Telephone, cell, phone and e-mail. Included the average monthly cost for personal use; do not include business-related telephone expense, which should be deducted in business profit and loss, or as a Schedule C deduction on the tax return.

Laundry and cleaning. Determine the average monthly amount for laundromats and cleaners.

Clothes. Estimate (using last year a guide) the total yearly amount spent on all household members whose expense are included, divide by 12, and enter the average estimated monthly amount.

Education. Determine the average monthly amount for such things as tuition, fees, books and supplies, parking and licensing examinations. It also includes "out-of-pocket" continuing education costs, unless they have been deducted as a business expense.

Entertainment, gifts and vacation. Entertainment should be a reasonable amount for entertainment and recreational activities, including sports, cultural activities, movies, video, cable or satellite services and other home-based entertainment. Gift should not include charitable contributions which are a separate item. Include all vacation expense for the year, divided by 12 for a monthly average.

Auto expenses and transportation (insurance, gas, repairs, bus, etc.). As to gasoline (and oil) figure the average weekly expense and multiply by 4.3 (an average of 4⅓ weeks per month). As to car insurance, repairs and maintenance, licensing and registrations fees, calculate the annual total and divide by 12. Combine both to get the average car expense. Then, add in any commuting expenses (such as Bus, Rapid Transit, Ferry, or car pool fares or expense).

Insurance (life, accident, etc; do not include auto, home or health insurance). Figure the annual premiums and divide by 12 for the monthly average. This includes any premiums for disability insurance.

Savings and investments. If there was an established pattern of savings or investment, the average monthly amount should be included here.

Charitable contributions. Use the average monthly by taking the annual and dividing by 12.

Monthly payments listed in item 14. First complete a list of all installment payments. Use a separate sheet if necessary. Include credit cards, and other installment payments. DO NOT include anything included as an expense elsewhere on this page (e.g. if you buy clothes on credit, then you should not include the total on the bills here, if you are showing it under Item 13 l, clothes.) Otherwise, the list should include all credit cards, lines of credit, installment purchases etc. It should also include car purchase or lease payments. Show the name of the creditor (briefly), a brief description (e.g. miscellaneous, clothes, etc.), the monthly payment, current balance and month and year the last payment was made. Enter the total in Item 13 p.

Other. This is a “catch-all” that should include anything not listed above. It might be helpful to make a separate list here. Include things like hair cuts, other personal care, newspapers, magazines, pet care, professional fees for tax preparation or accountant fees (if not deducted as a business expense), stamps, stationary, books, smoking materials, storage fees, and club memberships. As with other items.

Total expenses. Enter the total as instructed. Most of the computer programs will do this calculation for you including for “other” expenses.

Amount of expenses paid by others. If any other person contributes to paying any of the listed expenses, then you must show the amount of the expenses paid by that person here. You must make state as accurately as you can how much (in dollars) that person pay monthly.

Item 14. Installment payments and debts not listed above. See Item 13 p above.

Item 15. Attorney’s fees. Enter the total amount actually paid by the client, including costs; show the source of money the client utilized; if there was a previous attorney in this case before you, even if in another county or state,

itemize, by attorney, and include the total paid. Enter the total amount owed to you an all previous attorneys. Indicate your hourly rate, and I find it good practice to insert the language "pursuant to a written fee agreement."

Page 4

Item 16. Number of children.

Number of children AND percent of time with client.

This should reflect the current custodial or time share arrangement with the parties that has existed for at least some reasonable period of time. This should include the time the child(ren) are in daycare, school, or away form home, other than with the other parent. If there does not exist an arrangement, give the best estimate pending a determination by agreement or order of the court.

Item 17. Children's health-care expenses.

Item 18. Additional expenses for the children in this case.

Child care for work or job training: Enter the amounts presently being paid, even if it is part of a "cafeteria" plan. DO NOT include babysitting and child care expenses for non-employment or job training related activities. If paid by the week, remember to multiply by the average of 4.3 weeks per month.

Children's health care not covered by insurance. If the client has health insurance, this should include the annual deductible amounts for the child(ren)'s coverage as well as the portion of covered expenses not paid by insurance. This will also include expenses not covered at all, such as orthodontia or therapy.

Travel expense for visitation. If the other parent lives beyond a reasonable driving distance, this would include specific transportation (air, rail or bus fares) and travel related expenses incurred to carry out the visitation; again you may have to take an annual cost, and divide by 12.

Children's education or other special needs. This could include private school tuition, special education, school-related expenses such as tutoring, books or supplies, sports fees (including sports insurance fees), school trips, lunches etc. This could also include other expenses which are unique to the child(ren) such as gifted child programs.

Item 19. Special hardships.

Extraordinary health expenses (not included in 18 b.) If there is a severe or chronic health problem with significant expenses not covered by insurance, these should be listed.

Major losses not covered by insurance. This generally includes things classified as "catastrophic losses;" like loss of home, business, or perhaps a vehicle that is

necessary for employment, and not covered by insurance.

(1) Expenses for minor children who are from other relationships and are living with the client. The client may be allowed to deduct from his or her income, the necessary (and provable) living expenses for other children living in his/her home for whom they are legally responsible. This does not include step-child(ren) if not adopted, even if the biological parent provides no support. There is a maximum limit permitted for such hardship expenses, and it must established that it is a hardship, i.e., the client do not otherwise (with his/her spouse) have sufficient income to pay those specific expenses for the other child(ren). You should try to calculate the specific average monthly amount (using page 3 MONTHLY EXPENSES as a guide) that the client pays to support and care for the eligible child(ren).

(2) List name and ages of these children.

(3) List the child support, if any, actually received for these children.

Explain the financial hardship with detail.

Item 20. Other Information.

Stipulated Child Support Orders

The parties may stipulate to a child support amount subject to approval of the court. [*Fam.C. §4065*]. However, the court cannot approve a stipulated agreement for child support below the guideline formula amount unless the parties declare all of the following:

- They are fully informed of their rights concerning child support.
- The order is being agreed to without coercion or duress.
- The agreement is in the best interests of the children involved.
- The needs of the children will be adequately met by the stipulated amount.
- The right to support has not been assigned to the county pursuant to Section 11477 of the Welfare and Institutions Code and no public assistance application is pending.

Note, subsection (d) provides that if the parties stipulate to a below guideline child support order, no change of circumstances need be demonstrated to obtain a modification of the child support order to the applicable guideline level or above. However, that is not true as to a stipulated amount above guideline, which requires a showing of "change of circumstances." [See *In re Marriage of Laudeman (2001) 92 Cal.App.4th 1009, 112 Cal.Rptr.2d 378.*]

Support Calculation as an attachment to motion / OSC for child support.

- Consult local rules.
- Attorney Support Calculation Declaration.
- Attach Support Calculation printout from computer program.

SUBSTANTIVE ISSUES – PART THREE
TEMPORARY SPOUSAL SUPPORT

During the pendency of any proceeding for dissolution of marriage or for legal separation of the parties, *Fam.C. §3600* grants to the court jurisdiction to award *pendente lite* spousal support.

Awards of temporary spousal support rest within the broad discretion of the trial court and may be ordered in 'any amount'. [*In re Marriage of Murray (2002) 101 Cal.App.4th 581, 121 Cal.Rptr.2d 342; In re Marriage of Dick (1993) 15 Cal.App.4th 144, 18 Cal.Rptr.2d 743*.]

A temporary spousal support order may be made retroactive to the date of the filing of the petition and is not limited to the date of the filing of the Order to Show Cause or Notice of Motion. [*In re Marriage of Dick, supra, 15 Cal.App.4th 144, 166, 18 Cal.Rptr.2d 743*.]

"*Pendente lite* allowances and permanent allowances differ fundamentally in nature and function. The manifest purposes of *pendente lite* allowances to a wife are to enable her to live in her accustomed manner pending the disposition of the action and to provide her with whatever is needed by her to litigate properly her side of the controversy. [Citations.] 'On the other hand the object of permanent allowance is to make an equitable apportionment between the parties.'" [*In re Marriage of Dick, supra, 15 Cal.App.4th 144, 166, 18 Cal.Rptr.2d 743*].

The purpose of a temporary support order is to maintain the parties in a status quo pending the outcome of the controversy. [*In re Marriage of Burlini (1983) 143 Cal.App.3d 65, 191 Cal.Rptr. 541*.]

A court is not restricted by any set of statutory guidelines in fixing a temporary spousal support amount; may award amount necessary to maintain status quo even if higher than needs.

Temporary support orders may be ordered in any amount based upon need and ability to pay with a goal towards maintaining the status quo until assets are divided.

"Whereas permanent spousal support 'provide[s] financial assistance, if appropriate, as determined by the financial circumstances of the parties after their dissolution and the division of their community property,' temporary spousal support '…is utilized to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and obligations.' [Citations.] The court is not restricted by any set of statutory guidelines in fixing a temporary spousal support amount." [*In re Marriage of Wittgrove (2004) 120 Cal.App.4th 1317, 16 Cal.Rptr.3d 489*.]

Guidelines. Unlike child support, which is controlled by uniform state guidelines, counties are free to adopt their own temporary spousal support guidelines. The most commonly accepted are the Santa Clara and Alameda County guidelines. In hearing for temporary spousal support, courts commonly utilize the computer programs used to determine guideline child support to arrive at a "starting" number. [Note, it is reversible error for a court to utilize a computer program to determine "permanent" support under *Fam.C. §4320. In re Marriage of Schulze (1997) 60 Cal.App.4th 519, 70 Cal.Rptr.2d 488*.

Income and Expense Declaration. See Substantive Issues, Part 2, supra, for details.

As stated above in the section 2, Child Support, the Income and Expense Declaration (I&E) is the single most important document drafted at any stage in the dissolution proceeding. The I&E not only has an immediate effect in that proceeding, but it may also affect the outcome of subsequent modification motions years later.

With particular regard to spousal support, drafting an I&E involves a tension between reality and fiction. Now that the marital standard of living is a primary factor for consideration in determining the amount of support to award, this problem has been exacerbated. Although this marital standard of living is most applicable in "permanent" spousal support awards under *Fam.C. §4320*, that standard should be considered early on, including in the drafting of the I&E for the first hearing where there is an issue of temporary spousal support. Should the I&E accurately reflect what the preparer is currently spending, needs to spend, or would like to spend to maintain the marital standard of living? The answer is all 3! There are three boxes, check all three. The attorney must assist the client in preparing an "accurate" I&E which reflects both the parties' accustomed standard of living and reality, yet will not prejudice the supported spouse in later hearings. [See *In re Marriage of Hoffmeister [Hoffmeister II] (1987) 191 Cal.App.3d 351, 236 Cal.Rptr. 543*.]

The key to preparing an I&E at any stage is to make it realistic, both in terms of the parties' reasonable needs and the other spouse's likely ability to pay. Always consider its impact not only in the current proceeding, but in any future modification proceedings.

See the Comment to *In re Marriage of Smith (1990) 225 Cal.App.3d 469*, wherein Justice King recognized that expenses listed may need to be "projected" rather than "actual," especially in modifications.

With respect to earning capacity of either party, in *In re Marriage of Kepley (1987) 193 Cal.App.3d 946, 238 Cal.Rptr. 691*, husband argued that wife's earnings, vis-à-vis her live-in partner, should be controlled by *In re Marriage of Leib (1978) 80 Cal.App.3d 629, 145 Cal.Rptr. 763*. Wife responded that Leib was not controlling, as it was a spousal support case. The court in Kepley found that "earning capacity is relevant in child support actions as well (id. at p. 952), and in so ruling apparently concluded that "earning capacity" cases are interchangeable between the child and spousal support arenas.

Vocational Evaluations. *Fam.C. §4331*, "In a proceeding for dissolution of marriage or for legal separation of the parties, the court may order a party to submit to an examination by a vocational training counselor. The examination shall include an assessment of the party's ability to obtain employment based upon the party's age, health, education, marketable skills, employment history, and the current availability of employment opportunities. The focus of the examination shall be on an assessment of the party's ability to obtain employment that would allow the party to maintain him or herself at the marital standard of living."

Consult local rules.

Attach a support calculation to pleadings, or as a separate pleading.

SUBSTANTIVE ISSUES – PART FOUR
ATTORNEY FEES

Under *Fam.C. §2030*, "In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding."

Section (2) provides, "Whether one party shall be ordered to pay attorney's fees and costs for another party, and what amount shall be paid, shall be determined based upon, (a) the respective incomes and needs of the parties, and (b) any factors affecting the parties' respective abilities to pay. A party who lacks the financial ability to hire an attorney may request, as an in pro per litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward.

Fees may be awarded for legal services rendered or costs incurred before or after the commencement of the proceeding; the court shall augment or modify the original award for attorney's fees and costs as may be reasonably necessary, including after any appeal has been concluded.

Pursuant to *Fam.C. §2031*, an application for a temporary order making, augmenting, or modifying an award of attorney's fees, including a reasonable retainer to hire an attorney, or costs or both is made by motion on notice or by an order to show cause, and the court must rule on an application within 15 days of the hearing on the motion or order to show cause.

An award may also be made without notice by an oral motion in open court at either (1) at the time of the hearing of the cause on the merits, or (2) at any time before entry of judgment against a party whose default has been entered, and as to the latter, the court must rule within 15 days and prior to the entry of any judgment.

Fam.C. §2032 provides that in making an award of attorney's fees and costs under *§§2030 or 2031*, the amount of the award should be just and reasonable under the relative circumstances of the respective parties.

In determining what is just and reasonable under the relative circumstances, the court must take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in *Fam.C. §4320* ("permanent" spousal support). The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.

The court may order payment of an award of attorney's fees and costs from any type of property, whether community or separate, principal or income.

***Fam.C. §2033* provides for a Family Law Attorneys Real Property Lien.**

Either party may encumber his or her interest in community real property to pay reasonable attorney's fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties.

Notice of a family law attorney's real property lien shall be served either personally or on the other party's attorney of record at least 15 days before the encumbrance is recorded. This notice shall contain a declaration signed under penalty of perjury containing all of the following:

- A full description of the real property.
- The party's belief as to the fair market value of the property and documentation supporting that belief.
- Encumbrances on the property as of the date of the declaration.
- A list of community assets and liabilities and their estimated values as of the date of the declaration.
- The amount of the family law attorney's real property lien.

The non-encumbering party may file an ex parte objection to the family law attorney's real property lien. The objection shall include a request to stay the recordation until further notice of the court and shall contain a copy of the notice received. The objection shall also include a declaration signed under penalty of perjury as to all of the following:

- Specific objections to the family law attorney's real property lien and to the specific items in the notice.
- The objector's belief as to the appropriate items or value and any documentation supporting that belief.
- A declaration specifically stating why recordation of the encumbrance at this time would likely result in an unequal division of property or would otherwise be unjust under the circumstances of the case.

NOTE, the section also specifically provides: "An attorney for whom a family law attorney's real property lien is obtained shall comply with *Rule 3-300* of the *Rules of Professional Conduct of the State Bar of California*."

Fam.C. §2034 provides further procedures concerning objections and limitations on Family Law Attorneys Real Property liens.

It is an abuse of discretion for a trial court to deny attorneys fees *pendente lite*, without considering need and ability to pay. [*In re <u>Marriage of Hatch</u> (1985) 169 Cal.App.3d 1213, 215 Cal.Rptr. 789; <u>In re Marriage of Keech</u> (1999) 75 Cal.App.4th 860, 89 Cal.Rptr.2d 525; <u>In re Marriage of Munguia</u> (1983) 146 Cal.App.3d 853, 195 Cal.Rptr. 199; <u>In re Marriage of Hargrave</u> (1985) 163 Cal.App.3d 346, 209 Cal.Rptr. 764; <u>In re Marriage of Fransen</u> (1983) 142 Cal.App.3d 419, 190 Cal.Rptr. 885; <u>In re Marriage of Harrison</u> (1986) 179 Cal.App.3d 1216, 225 Cal.Rptr. 234; <u>In re Marriage of Hopkins</u> (1977) 74 Cal.App.3d 591, 141 Cal.Rptr. 597; <u>In re Marriage of Jacobs</u> (1982) 128 Cal.App.3d 273, 180 Cal.Rptr. 234.*]

A court may reduce the amount of the award if services are not actually rendered. [Warner v. Warner *(1950) 34 Cal.2d 838, 215 P.2d 20*.]

Although "need" is a factor to be considered, the 1990 amendment to the predecessor of Fam. C. §2032 made it clear that the fact that the requesting party has resources from which attorney fees could be paid does not preclude an award. [See *In re Marriage of O'Connor (1997) 59 Cal.App.4th 877, 69 Cal.Rptr.2d 480*; and *In re Marriage of Millet (1974) 41 Cal.App.3d 729, 116 Cal.Rptr. 390*, which held that no specific finding of supported spouse's inability to pay is required.]

An Attorney fee award is not a reward for winning party. The purpose is to provide a party with the amount needed to properly litigate the controversy. [See *Perry v. Super. Ct. (Gillem) (1970) 7 Cal.App.3d 236, 86 Cal.Rptr. 607; Marriage of Hublou (1991) 231 CA3d 956, 966, 282 Cal.Rptr. 695, 700; Marriage of Siller (1986) 187 CA3d 36, 44, 231 Cal.Rptr. 757;* see also *In re Marriage of Crobarger (1986) 178 Cal.App.3d 56, 223 Cal.Rptr. 480*.]

Income and Expense Declaration required by *California Rules of Court Rule 5.128* [which needs to be amended].

Consult local rules.

Attorney Fee declarations, example attached.

Consider *Fam.C. §271* and *CCP §128.6* "sanctions" as fees.