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ROUNDING OUT THE TEAM: WHEN AND HOW TO ENGAGE A FINANCIAL PLANNER TO APPLY STATE OF THE ART FINANCIAL TOOLS & TECHNIQUES IN COMPLEX DIVORCES

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I. Introduction

The financial world has gotten very complicated…

This article addresses the nature and scope of the short and long-term financial issues that a family law attorney must evaluate during a divorce case, and makes the case that a sophisticated financial planner/advisor should be hired up front, *during the pendente lite phase*, and not at or near the end of the case—as has been the traditional approach.

Over the last two decades, marital estates in California have become both much larger, in part because of the meteoric growth in the value of tech companies—both private and public, and increasingly complex, as a result of the proliferation of alternative investment vehicles of all kinds (e.g., venture capital, private equity, hedge funds, and other private and illiquid investment structures).

Correspondingly, there are now increasingly complex financial and investment-related issues that arise upon a married couples' separation. For reasons that we will explore, it is essential that these issues *be evaluated early in the case,* along with the typical pendente lite issues (e.g., support, custody, housing, interim payment of expenses, etc.), through and until final resolution. The best solution is for a family law attorney to employ an interdisciplinary approach, coordinating the analysis and advice from a wider circle of financial experts, including: forensic accountants, tax specialists, financial planners/advisers, valuation

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3. Promote and encourage ethical practice among members of the bar and their clients; and
4. Promote the specialty to the public and the family law bar.

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experts, estate planners, and other "micro" experts and specialists, as needed.

II. Preliminary Financial Analysis to be Considered by Family Law Attorneys

At a high level, there are three phases to a divorce case after the petition/response have been filed: (i) temporary or pendente lite orders; (ii) disclosures, discovery, and analysis of assets and income issues; and (iii) settlement or trial.

At the outset of a case, the retained family law attorney should determine the immediate needs of their client (e.g., temporary support, custody, housing, responsibility for interim expenses, attorney's fees and costs, etc.) and how best to obtain pendente lite orders addressing the same. The purpose of such pendente lite orders is to maintain the status quo for each party and to hold the assets in such a manner that the court satisfies the policy of the State of California, specifically:

(i) to marshal, preserve, and protect community and quasi-community assets and liabilities that exist at the date of separation so as to avoid dissipation[1] of the community estate before distribution,
(ii) to ensure fair and sufficient child and spousal support awards, and
(iii) to achieve a division of community and quasi-community assets and liabilities on the dissolution or nullity of marriage or legal separation of the parties as provided under California law.[2]

To best preserve the community property, the family law attorney must immediately assess the level of financial complexity present in the case. As part of this determination, a family law attorney's due diligence should include, when relevant, a review of the marital estate, including their investment portfolio. Among other matters, this preliminary due diligence should seek to identify any potentially complex or red flag issues involving the following:

- Concentrated stock positions, restricted securities, unusual asset allocation, lack of diversification, margined accounts, accounts at foreign banks, and leveraged instruments of any kind;
- Amount of overall cash, relative to living expenses and the size of assets;
- Alternative investments;
- Real estate, including evaluation of the interest rate on the mortgage;
- Privately held businesses;
- Equity compensation arrangements, including stock options, restricted stock, restricted stock units, deferred compensation, 10b5-1 plans (SEC safe harbor for insider selling), and similar structures; and
- Debts and all liabilities.

If any of these issues raise concern, then it may be prudent or necessary to obtain an agreement or court order to change the investment structure and/or rebalance the portfolio pending divorce.

Once the high-level financial survey has been completed by the family law attorney, the next step is to determine which of the following experts will be needed as part of the team: forensic accountant, tax specialists, valuation experts, estate planners, and/or the focal point of this article, financial planners/advisors.

III. Attorneys and Forensic CPAs: The Traditional Family Law Team

Traditionally, the family law attorney and the forensic accountant (and/or valuation expert, if necessary) have been the two primary members of the professional team. Forensic accountants are often retained to determine a spouse's true income, analyze the marital standard of living, prepare a post-separation accounting, and characterize and value the community and separate property. Forensic accountants are also trained to examine personal and business financial records with an eye not only for what they show, but for what is missing or potentially being intentionally withheld. This can include padding payroll, underreporting income, overpaying creditors, creating

fake debt, transferring assets to dummy corporations, and the list goes on. However, forensic accountants *are not forward-looking*. They do not untangle the mess, organize and classify the assets, or plan for the client's future.

A. Rounding out the Team: The Advantages of Adding a Financial Planner/Advisor at the Outset

Given the amplified complexity in family law cases with larger estates, it has become increasingly common to involve an estate planner and tax specialist early in a case to evaluate cross-over issues. Analysis of such estates often includes, (i) preparation of trans-generational wealth plans; (ii) minimization of taxes as part of asset division; and (iii) evaluation of potential breaches of spousal fiduciary duties by making investments or gifts without the other spouse's consent. As part of the pendente lite evaluation of the case, family law attorneys routinely send a copy of the existing estate plan to an independent estate planner for review and analysis. But, again, estate planning attorneys are neither equipped to, nor in the business of, advising clients about financial planning or how to invest their money.

It is less common, but equally important, for family law attorneys to engage a financial planner/advisor to evaluate the *totality of the marital estate*, including all assets (whether marketable securities, businesses, real estate, and other property of all kinds) and liabilities. The current investment portfolio should be immediately evaluated to determine if there are short-term issues or risks that should be addressed/remediated as part of obtaining the pendente lite orders in a case. Since divorces typically take 12-18 months, it is essential to ensure that all of a client's "short-term" issues are managed carefully such that the financial status quo pending the divorce is optimized, to the fullest extent possible. Retaining a financial planner/advisor early can play a key role in optimizing your client's financial future (and peace of mind).

B. Engaging the Financial Advisor

In determining who to retain as the financial advisor, family law attorneys should consider the advisor's role, scope of assignment, compensation, and written deliverables.

1. Determining the financial advisor's role

Consultant. Financial advisors can be retained as the family law attorney's consultant by means of a *Kovel Agreement*, named after *United States v. Kovel* (1961) 296 F.2d 918. A *Kovel Agreement* allows a lawyer to hire an accountant or financial advisor who reports directly to the lawyer. Assuming the *Kovel Agreement* is properly executed (and this is critical), the attorney-client privilege is extended to the accountant or financial advisor. By retaining the financial advisor as a consultant, their work and analysis will thereby be privileged. During the early stages of a case, when the analysis is being completed and the benefit/detriment to the client is unknown, the attorney may not want the financial advisor's work to be discoverable. Having the attorney retain the financial advisor as a consultant mitigates this issue. It is important to note that a *Kovel Agreement* only applies when the accountant or financial advisor's communications were "made in confidence for the purpose of obtaining legal advice from the lawyer." [3] As such, all communication should *always be addressed to the lawyer* and the information should be limited to issues in the case.

Expert. On occasion, financial advisors are retained as testifying experts in a family law case. For example, a financial advisor may testify about the reasonable expected rate of return in an investment portfolio (typically based on historical capital market assumptions). When retained as an expert, a financial advisor's analysis is discoverable, and their deposition is likely to be taken.

2. Crafting the scope of the financial advisor's work

The financial advisor assists in preparing a client's financial plan, considering both pending and post-divorce goals, and advising as to implementation of the same. A quality financial plan should be comprehensive, holistic, date-and dollar-specific, written, and cover the duration of a client's anticipated life. The deliverables should cover five core disciplines: (i) financial planning; (ii) investment management; (iii) tax; (iv) estate planning; and (v) insurance. The financial advisor orchestrates and coordinates the integrated conception and execution of the plan.

In addition to preparing a financial plan, the financial advisor may weigh in on matters throughout the divorce process. For example, the advisor may assist with completing the client's financial disclosures. He or she can also review the other party's financial disclosures, identify deficiencies, note areas requiring further inquiry, and possibly advise on alternative investment strategies. The advisor may analyze brokerage account statements, and offer insight into the complete nature, scope, and value of various investments. Additionally, it may be helpful to have financial advisors available at settlement conferences to aid in conceptualizing the post-divorce impact of asset division proposals. For example, the advisor may advise as to whether certain investments can and should be replicated, and if not, may assist in crafting an alternative solution for equitable allocation of the investment. Financial planners can also assist with analyzing spousal support needs and a spouse's ability to pay support given future projected investment earnings. Though beyond the scope of this article, a financial advisor should also closely coordinate with the client's professional team, including tax planners, estate planners, and insurance representatives, to ensure a cohesive future financial plan. A summary of the interplay of these various professionals is attached as **Appendix A**. In sum, the financial advisor may be a key part of the team to help keep perspective on the client's future financial goals.

3. Methods of engaging financial advisors

If a financial advisor is retained as a consultant under a *Kovel Agreement*, it is imperative that they are *retained by counsel* and not by the party. Of course, it is important that the client meet, feel comfortable with, and trust the financial advisor. To help build a lasting relationship, the financial advisor should be properly vetted. Family law attorneys can and should help with the selection process, especially during the early stages of a case when the financial advisor is serving as the attorney's consultant. As part of this process, attorneys should ask the financial advisor about how they are compensated, alliances to any particular funds or services, particular investment philosophies, and process for working with clients. A list of key questions to ask when vetting financial advisors are included at **Appendix B.**

4. Compensation of the financial advisor

During the divorce, financial advisors are typically compensated on an hourly basis for consultation work. Once the divorce is finalized, clients may continue working with the financial advisor. At that stage, they may be paid a percentage of assets under management, fixed fees, hourly rates, commissions, or performance-based fees. Additional information regarding the various types of financial advisors' compensation agreements is attached as **Appendix C.**

IV. The Role of the Financial Advisor During the Divorce Process in Evaluating Particular Assets and Strategies

For most clients, their divorce is the largest financial transaction of their lifetime. They cannot afford to get it wrong. It is all too easy for clients to get into the weeds on one emotionally-driven issue, and miss the bigger picture. This is an inefficient use of time, resources, and energy, and ultimately detrimental to the management of the case. Family law attorneys can try to help maintain perspective for the client, but ultimately the attorney's job falls short of long-term financial planning. Financial advisors can play a key role by helping maintain focus on the overall financial plan, and help the client see the forest through the trees.

Many "out spouses" are surprised to discover that their liquid net worth represents only a small fraction of their overall net worth. The simple explanation is that their real property and other assets (typically of the complex variety) constitute the bulk of the community estate. For organizational simplicity, we divide these assets into two categories: (i) liquid assets (e.g., cash and marketable securities, such as stocks and bonds); and (ii) illiquid assets (e.g., real estate, businesses, private equity, venture capital, hedge funds, carried interest for those managing alternative funds, non-marketable securities, and all other assets).

Financial advisors may be instrumental in helping to identify, evaluate, and strategize optimal division of these existing assets, as well as potential investment opportunities that may arise during the divorce. A checklist of issues to spot in a case is attached as **Appendix D.** The following discussion considers particular issues related to these assets in divorce cases, and how the financial advisor may be utilized in evaluating the same.

1. Liquid Assets

a. Cash

Cash is obviously not a complex asset—unless it is frozen, encumbered, or otherwise not available to the parties. A financial advisor should immediately review the parties' cash (and access to that cash) to determine if there is enough to pay the interim expenses, and that the cash is earning an appropriate rate of interest. Conversely, the community estate may hold an unjustifiably large allocation in cash. Depending on the pendente lite orders, financial advisors can also help strategize regarding preliminary distributions of cash to the parties—and how such cash can and should be optimally reallocated/reinvested.

b. Marketable Securities

"Marketable securities" include stocks, bonds, mutual funds, ETFs, publicly traded REITs, money market funds, and any/all other securities that can easily and readily be converted to cash. These assets are held in bank and brokerage accounts. A financial advisor should review the brokerage statements and analyze the totality of the current investment portfolio of the marital estate. This would include a review of overall asset allocation, individual securities holdings, expected return, volatility, projected portfolio income, etc.

Further, financial advisors may advise on best practices for issuing compliant notices to brokerage companies with instructions to restrict investment modifications absent joint approval of the spouses pending divorce, consistent with the requirements of California's Family Law Automatic Temporary Restraining Orders.[4]

2. Illiquid Assets

a. Real Estate

Houses are both an "emotional asset" and a financial investment. A commonplace pendente lite issue in most family law cases is whether the family residence, or other real estate, should be retained by either party. A financial advisor can help the client understand the value, liquidity, and cash flow issues related to real property—whether primary residence, second home, or an asset for income production. Clients need to carefully evaluate whether keeping an expensive family residence (that may not appreciate and will incur ongoing carrying costs) is wise in the context of an overall financial plan.

Because many couples have a mortgage on their family home, and/or other real property, as of the date of separation, it is prudent to evaluate and understand all the terms and conditions of the loan to determine if a restructuring or refinancing may be advisable. For example, if interest rates have dropped since the mortgage was taken out, a simple refinancing might save both parties money. Additionally, where the "out spouse" may not have sufficient historic

earnings to qualify for a refinance, the advisor may help that spouse develop a plan to establish sufficient income basis from support and other earnings to do so. The financial advisor may suggest the client both: (i) obtain an appraisal; and (ii) have the home inspected to ensure there are no material issues that would adversely impact value.

b. Alternative Investments

In the past two decades, alternative investments have become both more widespread and increasingly complex. Family law attorneys are routinely encountering new, alternative investments such as cryptocurrency, unique private equity investment structures, and real estate development enterprises. It is important to retain a financial advisor who is well-versed in alternative investment structures to properly analyze these assets and advise clients as to their options with respect to the same. Oftentimes, the role of the forensic accountant ends at identifying and analyzing the value and divisibility of the current investment. The financial advisor, however, could help clients evaluate settlement options and trial strategies related to these investments consistent with their overall, long term financial plans. For example, if the advisor believes a particular investment will not generate liquidity for many years, the advisor may suggest a buy out to a client in need of immediate liquidity.

Depending on the issues in each case, the financial advisor should understand and be able to advise on the full gamut of implications, including: (i) understanding the fund structure; evaluating performance (both in absolute and relative terms, over time); (ii) modeling capital calls, expected distributions, and other cash flow-related issues; explaining lockups, redemption procedures, and other features specific to private/illiquid investments; (iii) providing a framework for, and/or direct evaluation of, new investment "opportunities" that may be offered; and (iv) modeling expected returns (including what-if scenarios) into the overall, comprehensive financial plan.

c. Existing Investments

During the divorce process, financial obligations frequently come due on existing community investments. For example, capital calls may be required, or follow-on investment opportunities presented. The financial advisor may help develop a financial plan pending divorce to ensure sufficient cash flow to cover these existing obligations, or suggest a negotiating strategy to obtain an exemption/relief.

d. Equity-Based Compensation

Equity-based compensation can comprise a significant part of the community estate. It can be difficult to value and model such compensation because the potential benefits are uncertain and always in the future. Nonetheless, it is important to fully understand the form, value, and potential financial implications of the eventual monetization of equity-based compensation to effectively and completely divide the marital estate. Such compensation is typically comprised of employee stock options and restricted stock.

Employee stock options come in two basic flavors: (i) non-qualified stock options (NQSOs, also known as "non-statutory"); and (ii) incentive stock options (ISOs). The governing terms and conditions, cash flow implications, and tax treatment are completely different for each type of options. In addition to a qualified tax expert, it is suggested that an experienced financial advisor advise as to how the options fit into the client's overall financial plan.

Similarly, "restricted stock" and "restricted stock units" (or "RSUs"), though sounding similar in nature, are entirely different animals. Among other features, they each have different rights with respect to the form of issuance, voting, dividends, forfeiture, vesting, and tax consequences. Given that the immediate financial benefit of these rights is unknown, critical inquiry is warranted into their potential value, benefits, and potential liabilities. As with employee stock options, a tax expert and financial advisor could be of significant value to the client to help evaluate and contextualize these critical assets as part of his or her long-term financial plan.

e. Control Securities

Family law attorneys can retrieve a company's public financial and organizational filings via the U.S. Securities and Exchange Commission's (SEC) Electronic Data Gathering, Analysis, and Retrieval system (EDGAR).[5] However, it is suggested that analysis of these records and the publicly-traded stock in the context of the SEC Rules is beyond the scope of the family law attorney's expertise. Financial advisors may be useful in evaluating a spouse's publicly-traded stock given the particularized rules governing such assets. For example, Rule 10b5-1, established by the Securities and Exchange Commission in 2000, allows insiders of publicly traded corporations to set up a trading plan for selling stocks they own.[6] Rule 10b5-1 allows major holders to sell a predetermined number of shares over a predetermined time period based on predetermined terms and conditions (e.g., written formula or algorithm). As part of the disclosure process in a divorce involving publicly-traded stock, it is important the non-stock holding spouse receive and review the applicable 10b5-1 plan to understand any such restrictions. It is suggested that counsel consult with financial advisors in determining whether and when to disclose potential trade opportunities, given the potentially conflicting disclosure obligations in the divorce case and federal securities laws and regulations proscribing the disclosure and use of insider information.[7]

Financial advisors can help advise clients on how, when, and why to eliminate the restrictions on the non-stock holding spouse. For example, if timing is of the essence, the authors of this article suggest rounding out the team with corporate counsel and a financial advisor to evaluate whether to bifurcate and terminate marital status, to relieve the non-stock holding spouse from being considered an insider.

f. Solutions to Concentrated Stock Positions: Options, Collars, Hedges and Other Derivatives

An issue that arises frequently in Silicon Valley is risk associated with a concentrated stock position. This occurs when one spouse holds a significant number of shares, such as founder's shares in a company that has recently gone public through an IPO. A collar position can be created by holding an underlying stock, buying an out of the money put option, and selling an out of the money call option. Collars may be used when investors want to hedge a long position in the underlying asset from short-term downside risk. Sometimes a concentrated stock position may be coupled with a collar, put, swap, or some other type of instrument designed as a hedging vehicle.

Only a derivatives product specialist, or a qualified financial advisor with credentialed derivative product experience, should advise on stock options (of any type), and hedging strategies of all kinds. Of course, tax implications have to be fully considered and incorporated into any analysis and associated recommendation.

g. Tax Loss Carryforwards

Another potential asset to consider is the tax loss carryforward. This provision allows a taxpayer to carry over a tax loss to future years to offset a profit, but is subject to limitations which are often misunderstood. The tax loss carryforward can be claimed by one of the spouses, or even a business, to reduce future tax payments. It is a unique asset in that it has no market, yet potentially significant value to one or both spouses. The skilled expertise of a financial advisor may help identify the tax loss carryforward, determine its potential applicability and value to either or both parties going forward, and help determine when and how to apply the same. Tax loss carryforwards should be identified on Disclosures and listed on the balance sheet of the marital estate so as not to be overlooked in the ultimate allocation of assets in the divorce.

h. Retirement Assets

Although retirement assets are typically comprised of plain vanilla marketable securities, they are *effectively illiquid* because they cannot be withdrawn prematurely without incurring taxes (treated as ordinary income) and penalties. Also, there are a variety of nuanced Social Security "claiming strategies"—based on age, work, and marital circumstances—and these need to be carefully examined for optimization. Financial advisors can help explain and advise on the different forms of retirement accounts (e.g., IRAs, SEP IRAs, 401(k)s), and also recommend funding amounts, asset allocation, and plan for the issues related to the new withdrawal requirement rules that went into effect with the implementation of the SECURE Act on February 1, 2020.[8]

3. Investment Opportunities Presented During Divorce

During the pendency of a divorce, spouses have an obligation to make investment opportunities available to the community.[9] This obligation is consistent with spouses' continuing fiduciary duties owed to one another in transactions between themselves which impose a duty of the highest "good faith" and "fair dealing."[10] In many cases, investment opportunities arising during the divorce may be in the form of items on the illiquid asset list above such as company stock, alternatives (of any and all kinds), and private placements. The investment opportunities presented may be follow-on investments to existing positions or new stand-alone investments. Financial advisors can help advise clients on whether or not to participate in such investment, considering the context of his or her overall financial plan. Again, the need to look at the "forest" at all times is critical. In all cases, the expected return, volatility, tax, and potential cash flow implications have to be analyzed relative to the likelihood of the achievement of the client's financial goals.

V. Conclusion

Financial issues presented in divorce cases are becoming increasingly complex. Gone are the days of allocating a house and a retirement account. Equity compensation packages have become so layered with complexity they often come with voluminous agreements and addendums. The proliferation of startups now requires creative modeling to fairly account for and allocate these business interests. Concentrated wealth has led to the need for highly customized financial plans, tailored to particularized needs of each family. While in the past, family law attorneys and forensic accountants were able to navigate all issues in a case, as forms of compensation expand, alternative assets proliferate, and tax issues become more complicated, it is important to have a complete team in place at the beginning of every case to ensure comprehensive client representation. In addition to the family law attorney, this may include a forensic accountant, valuation expert, tax specialist, an estate planning attorney, and a financial planner/advisor. Establishing the complete team from the beginning of the case can help shape the important pendente lite orders and significantly improve the likelihood of long-term financial success for the client.

APPENDICES

Appendix A: Summary of Interplay of Various Professionals

Appendix B: List of Key Questions to Ask When Vetting Financial Advisors

Appendix C: Additional Information Regarding the Various Types of Financial Advisors' Compensation Agreements

Appendix D: A Checklist of Issues to Spot in a Case

1 "Dissipate" means "to cause to spread thin or scatter and gradually vanish." "Dissipate." The Merriam-Webster.com Dict., Merriam-Webster Inc. <https://www.merriam-webster.com/dictionary/dissipate?utm_campaign=sd&utm_medium=serp&utm_source=jsonld> (accessed Jan. 26, 2020).

2 FC, § 2100.

3 *Id.* at p. 922.

4 See FC, § 2040.

5 U.S. Securities and Exchange Com., EDGAR Company Filings <https://www.sec.gov/edgar/searchedgar/companysearch.html> (last visited Feb. 11, 2020).

6 This is a clarification of Rule 10b-5, created under the Securities and Exchange Act of 1934, which is the primary vehicle for investigation of securities fraud.

7 See *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1441 ("federal securities laws and regulations proscribing the use of insider information preempt any state statute purporting to impose a conflicting obligation of disclosure and use of such information.").

8 Setting Every Community Up for Retirement Enhancement Act of 2019, H.R. 1994, 116th Cong. (02/06/2019). The SECURE Act, among other things, includes changes to minimum required distribution rules, liberalization of the rules governing "multiple employer plans," and increased opportunity for part-time workers to participate in 401(k) plans.

9 California Family Code section 2102, subdivision (a)(2) generally provides that from the date of separation to the date of distribution of assets, each party is required to provide accurate and complete written disclosure of any investment opportunity, business opportunity, or other income-producing opportunity that presents itself after the date of separation, but is the result of any investment, significant business activity outside the ordinary course of business, or other income-producing opportunity of either spouse during the marriage. Such disclosure must be made in sufficient time for the other spouse to make an informed decision as to whether or not to participate in the opportunity, and for the court to weigh in to resolve any dispute.

10 See FC, §§ 721, subdivision (b), 1100, 2100, 2102–2105.

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Tim Keating is the President of Keating Wealth Management and has 34 years of Wall Street experience. Previously, he was the CEO of Keating Capital, the first of its kind publicly traded closed-end fund focused on pre-IPO investing. Mr. Keating is the author of numerous white papers on a variety of issues relating to the capital markets, ranging from IPOs to the Yale Endowment model of investing. He held senior management positions in the Equity Derivatives departments of Bear Stearns, Nomura and Kidder, Peabody in both London and New York. He is a 1985 cum laude graduate of Harvard College.

Gianna Assereto has practiced family law exclusively for over a decade, and she has been consistently recognized as a Northern California Rising Star by Super Lawyers Magazine from 2015-2019. She has experience negotiating the complex and nuanced details of dissolution cases and has a sub-subspecialty in cases that involve complex business issues such as venture capital, equity compensation, business valuations, and other sophisticated business interests. Additionally, Gianna has years of experience drafting and negotiating pre and post-marital agreements. Further, she is skilled in assisting clients through the mediation process and often acts as a consulting attorney to mediation. She strives to maintain compassion and an awareness of her client's individual challenges to determine the moist effective and efficient path to resolution.

Jane Taylor is an attorney at Hanson Crawford Crum Family Law Group. She has practiced family law for ten years, and is licensed in California and Colorado. Jane's practice focuses on complex financial issues in divorce, including equity compensation and business interests, and she has experience handling international custody disputes.

APPENDIX A

10 Client Deliverables Across 5 Disciplines

APPENDIX B

Key Questions to Ask in Hiring Financial Planner/Advisor

1. Are you always a fiduciary and will you state that in writing?
2. How are you compensated?
3. Do you receive commissions based on certain products or services you recommend?
4. Will you itemize all your fees and expenses in writing?
5. Do you earn fees for referring clients to specialists like estate attorneys or insurance agents?
6. Do you earn fees as an advisor to a private fund or other investments that you may recommend to clients?
7. Do you focus solely on investment management or do you also advise on taxes, estates and retirement, budgeting and debt management, and insurance?
8. What is your investment philosophy?
9. Do you believe you can beat the market?
10. How often do you trade?
11. After inflation, taxes, and fees, what is a reasonable estimated return on my portfolio over the long term?

APPENDIX C

Types of Compensation Agreements

1. **Percentage of assets under management**: Based on size of the portfolio.
2. **Fixed fees**: A set amount for a defined service, such as creating a financial plan.
3. **Hourly charges**: For a special project or ongoing consulting.
4. **Commissions**: Additional compensation earned when a purchase or a trade is made (this is typically for insurance products).
5. **Performance-based fees**: Additional fee if a defined investment benchmark is outperformed.

When determining who to retain as the financial planner/advisor on your team and the compensation structure, it is important to define the specific scope of work (and tasks) that will be assigned to the financial advisor and ensure the advisor's credentials and experience are a match. Hybrid structures are also possible. For example, the financial advisor may serve as an expert consultant during the divorce (and be paid on an hourly basis), and then convert to a financial planning/investment advisory role post settlement (and thereafter be paid based on a percentage of assets under management).

APPENDIX D

Check List of Short Term Financial Issues

Liquid Assets

- Bank Accounts
  - How much cash do they have?
  - Do they have enough cash to cover expenses during the divorce?
  - Is the cash earning a reasonable interest rate?
- Brokerage Accounts
  - Access to the account: who has the relationship with the institution? Who gets statements? Who has the passwords?
  - Do you need to send a letter requiring both signatures for changes or withdrawals?
  - Is there a concentrated stock position? If so should you get a stipulation to put in place reasonable protections?
  - How is the portfolio structured? Is there too much risk in the portfolio considering the current economic and political situation?
  - Is the account margined and if so for what purpose?
  - Is there a 10b5 plan? Should you terminate status to eliminate the "related party" issue?
  - What are the fees being paid for the account management and are they reasonable?

Illiquid Assets

- Real Estate
  - Is there a mortgage? What is the interest rate? Can it be improved to save money?
  - Can the spouse who wants to keep the house afford to keep it and will they be able to refinance the loan?
  - If one party is keeping the house, they should have it appraised and consider also having it inspected as they should view it as if they are buying a new house.
- Equity Compensation
  - Are there stock options? Check vesting schedules
  - Are there RSUs? Check vesting schedules
  - Get plan documents
  - Get grant documents
  - Evaluate formula for apportionment
- Limited Partnership Interests
  - Get subscription documents
  - Evaluate capital call obligations
  - Request information be sent to both parties
- Venture Capital/Private Equity Interests
  - Evaluate capital call obligations
  - Request information be sent to both parties
- Hedge Funds
  - Determine redemption windows for possible exits to create liquidity
- Shares in Private Companies
  - Founder's shares
  - Qualified Small Business Stock (QSBS) issues
  - Transfer restriction issues

PRESIDENT'S MESSAGE

DIANNE FETZER, CFLS | ACFLS PRESIDENT | SACRAMENTO COUNTY | DFETZER@FETZERLAW.COM

Due to the major social and political changes in our country today, together with the problems of the pandemic, ACFLS is moving forward with changes of its own. Our Education Director, Sherry Peterson, is working closely with our Technology Committee and many other members of our board to provide timely and educational programs to our members. Chris Melcher, one of ACFLS Coordinating Directors, has already put on two different programs: *ACFLS: Virtual Hearings, Making it Real* and *Dealing with Business Interests During the Economic Crisis*. Michele Brown, ACFLS's Vice President arranged to have the Labor and Employment section of her firm present, *Returning to the Office: What California Employers Should Know*, which touched on work safety issues. Our Sacramento Chapter brought us *COVID-19 Effects on Child Support* and our Bay Area Chapter has brought to us *COVID-19 QDRO Topics*. Our Orange County section has organized a virtual Summer Social: Divorce Corona Style, which is not only free, but should be very entertaining!

The education section of ACFLS will continue to provide to all members quality programing through virtual education. If you missed any of these programs, they can be found on our website in our education section.

The Spring Seminar Committee is working diligently to expand our space at the Omni Rancho Las Palmas to allow for enough social distancing as will be required and ways to keep everyone healthy and safe for our event: *Battle of the Experts—Preparing Your End Game* on March 5th through March 7, 2021 at the Omni Las Palmas Resort and Spa. We look forward to seeing all of you at this wonderful event!

Recently, there has been a change to our Amicus Committee. One of the Amicus Committee co-chairs, Stephen Temko, has decided to step down from this position; Rick Cohen is stepping into his seat. Rick has been the ACFLS liaison for the past several years. We thank Stephen Temko for all of his hard work in co-chairing our Amicus Committee with Leslie Shear. He has agreed to remain on the committee and continue to provide his input to many important decisions that come out of our higher courts. Over the years, Stephen Temko has put in a lot of time and effort into this committee ensuring that ACFLS actively weighs in on the publication and de-publication of family law cases, thereby shaping our practice of family law. We also look forward to Rick Cohen working together with Leslie Shear as the two co-chairs of this committee. Rick and Leslie will be making some other minor changes to the committee structure to encourage new appellate attorneys to become actively involved in our amicus process. We are pleased to have already received several new members to this very important and active committee.

Ms. Fetzer is an Advisor to the Family Law Executive Committee for the State Bar of California, having served as its Secretary for several years. She is on the Sacramento County Judiciary Review Committee and a member of the Family Law Sections of the American Bar Association, the State Bar of California, and the Sacramento County Bar Association, and a member of the National Association of Counsel for Children, the Association of Family and Conciliation Courts, and the AFCC/ACFLS Families in Crisis Joint Task Force. She has acted in various capacities as a volunteer for non-profit community groups and has been a panelist and presenter for CEB, Minor's Counsel seminars, the University of the Pacific, and the McGeorge School of Law.

Our Legislative Director, Avi Levy, has assisted in putting together a stakeholder's meeting to discuss Assembly Bill Number 1796, which is a domestic violence bill to add section 6307 to the Family Code. ACFLS has already weighed in on several bills. Seven letters are posted to our ACFLS website for the current legislative cycle. One of these bills, Senate Bill Number 1141, also deals with domestic violence and defining coercive control. Other bills deal with parentage cases, child support, and confidential marriages. Assembly Bill Number 2197 was proposed to develop a work group for child custody actions; our letter sets forth various problems with this proposed legislation. Currently, it has stalled in the process, although it is likely to return in another form. Our Legislative Committee has been working diligently to review and address all bills that are proposed in the Assembly and Senate related to our practice of family law.

Our editorial team led by our Editor, Naghmeh Bashar, are also working hard to ensure that we have the most relevant and timely articles for our *Specialist*. If any of you are presenting programs for virtual education, please convert those programs to articles that can be placed in our *Specialist*. This will enable many of our members that may have missed the program to obtain the information you are providing through our *Specialist*. Our editorial team is always looking for wonderful articles to include in our newsletter.

It is our hope that as an organization, we can continue working on developing ways to increase diversity, equality, inclusion, and social awareness. We are focusing on ways to bring this discussion to actual implementation throughout all aspects of our areas of practice. Each of us has cases wherein we need to become more aware of biases, whether our own, the courts', or our experts', as well as the various cultural issues that our clients bring to us. ACFLS is sponsoring, with several other organizations, a very important educational program: 8th Annual Cultural Competency in Family Law Practice Seminar, which took place on July 25, 2020. This program was offered at no cost to family law judicial officers. This year it will be brought to all family law practitioners via virtual programing. If you missed the program you can always obtain a copy of it directly from Iranian American Lawyers Association (IALA) and be certain to look for it next year! Each of us can learn so much from such cutting edge and socially relevant programming!

We continue to wish each of you a safe and healthy re-opening of our new way of practicing law, whether by Zoom or social distancing in the actual courtroom! Please continue to reach out to us with ideas as to how we can better serve you as our members; we are always open to hearing great suggestions!

UPCOMING CHAPTER PROGRAMS

Orange County

The Orange County Chapter's 2020 Speakers Series will use both a teaching format and scripted demonstration to focus on cross-examination scenarios often encountered by family law lawyers. Each of our 4 seminars will be devoted to cross examination of a specific witness or witnesses:

- **Custody expert;**
- **Sole proprietor;**
- **Business valuation expert (and reasonable compensation expert); and**
- **Forensic accountant re income and support issues.**

The first seminar for April 6, 2020 with speakers Judge Palafox and Dorie Rogers will be rescheduled due to the current status of holding group programs. Future date to be: **November 9, 2020.**

Sacramento Chapter Speaker Series

October 28, 2020
Final Declarations of Disclosure: Do it Right and Avoid the Set Aside
Stephen J. Wagner and John Munsill

San Francisco Chapter

January 22, 2021
The Intersection of Family Law and Torts: Civil Remedies for Victims of Domestic Violence
Presented by Jessica Dayton, Partner; Certified Specialist, Family Law, The State Bar of California Board of Legal Specialization of ADZ Law, LLP

This event is a charged webinar event that will be held via Zoom.

EDITOR'S DESK

NAGHMEH BASHAR, CFLS | JOURNAL EDITOR | SAN DIEGO COUNTY | NAGHMEH@ANTONYANMIRANDA.COM

Change is understandably needed. No need to resist.

The Fall season is upon us and unfortunately COVID-19 continues to be a source of angst and frustration for many. By the end of the school season in May of 2020, we believed our children would surely return to school physically and we would be back into the office, as normal; yet it is Fall and our work and family life is anything but normal.

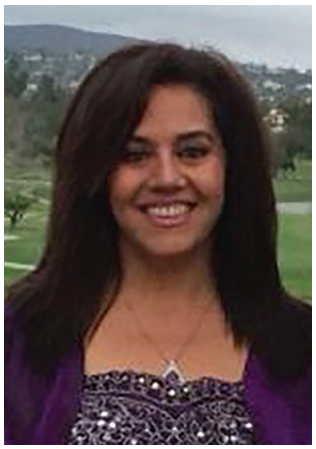
Many, having lost or nearly lost their livelihood have transformed their businesses and adapted to the current new-normal. We too, in the practice of law, had to adjust our home, work environment, and the manner in which we appear before the court and conduct depositions, etc. in order to survive and thrive. Unlike that which is said often – that people naturally resist change, we see that when we understand change is in our best interest, we do adapt, we do learn, we do grow, and the changes are more naturally accepted. Life will find a way.

Several of our authors in this Issue have written thought-provoking and educational pieces related to the practice of law in light of COVID-19, as a result of COVID-19, and despite of it. ACFLS Board Member, David M. Lederman, authored the timely piece, *Arguments and Proposed Standards for Virtual Appearances*, which explores a 2006 report that had encouraged "alternative means of work performance and communication should be explored" due to the possibilities of epidemics and the Courts' need to be adaptable. Neither the Courts nor many in the practice of law took heed and neither truly implemented a telecommuting system. Unfortunately, our cases and clients saw first-hand the resistance to such necessary change came at a heavy price. David Lederman's article explores the telecommuting process on whichever virtual platforms you use. Mr. Lederman also provides a detailed how-to review of the best way to set up your virtual platform for trials and exhibit sharing. You will enjoy this provocative read even if you may disagree with Mr. Lederman's opinion about virtual courtrooms.

Rod Firoozye authored *How COVID-19 May Impact Divorcing Couples in Different Jurisdictions* – exploring families' moves during the COVID-19, the residences established during the pandemic, the family law actions started in different jurisdictions, and the importance of forming your client's intent in making such decisions as a factor in deciding which court has jurisdiction. Mr. Firoozye sheds light on many other related issues surrounding jurisdiction and COVID-19.

Share your own thoughts on this matter and explore with our readers the advances your firm has taken in the COVID-19 era that have produced results and kept your clients and colleagues safe.

Do you handle complex family law cases? Why wait to hire the experts? Start the financial analysis early and during the *pendent lite* phase of the case. Should you obtain orders or agreements to change the investment structure and/or rebalance your client's portfolio pending divorce? Learn how to put together your winnable team from the outset by reading *Rounding Out the Team: When and How to Engage a Financial Planner to Apply State of the Art Financial Tools & Techniques in Complex Divorces* authored by Belinda Hanson and Tim Keating with contributing authors, Gianna Assereto and Jane Taylor.



Naghmeh Bashar has been practicing law for nearly 25 years. Ms. Bashar, who is bilingual in English-Farsi, is a Senior Associate attorney at Antonyan Miranda, LLP. She is also the 2019-2020 Chair of the San Diego County Regional Liaison Committee for legislation providing review and analysis to the Family Law Executive Committee of the California Lawyer's Association (FLEXCOM).

Our first-time author, April Ball, provides us *The Intersection of Trusts & Estates and Family Law: When These Parallel Practices Cross Paths and Why It Matters* and provides a preliminary look at the cross-over issues involved in both areas of practice, which routinely affect our family law clients. Ms. Ball provides us a two-part article series with the first educating us about the estate planning fundamentals any family law litigator should know. Ms. Ball's next article will discuss issues related to taxes, estate planning and transmutation, and protecting your clients' estates. This piece assists in issue spotting clients' cases from the outset in order to provide your clients a well-rounded full analysis of their estate planning that include much more than a will or trust.

Last but not least, is Part three and the last article in the series written by Mark Sullivan related to military pension titled *Guard and Reserve Retirement on the Day of Divorce - Unraveling the Mysteries (Part 3)*. Once the order is obtained what do you do? Where do you send the order and what are the requirements? Read on and expand your knowledge into this more specific area of family law practice.

This issue offers a variety of information in cross-over issues and how to navigate your practice during the COVID-19 era. Change is upon us and we must change with it – no need to resist, but to learn, explore, and grow.

Don't just be, be inspired!

ARGUMENTS AND PROPOSED STANDARDS FOR VIRTUAL APPEARANCES

DAVID M. LEDERMAN, CFLS | TECHNOLOGY DIRECTOR | CONTRA COSTA COUNTY | DAVID@LEDERMANLAW.NET

The COVID-19 pandemic revealed in bold the systemic failure of the court system to respond to crisis. Courts shut down and each of the 58 counties hobbled together their plans for opening, both virtually and physically. Many counties adopted a form of a remote hearing/trial platform: Zoom, BlueJeans, WebEx, and others. Many people on both sides of the well long for a physical "reopening." They should not.

Schumpeter's gale[1] rages and cannot be stopped. It should not be stopped. In 2006, the Administrative Office of the Courts in conjunction with the California Department of Health Services published a report titled *Epidemics and the California Courts*.[2] That report urged:

> In an effort to reduce face-to-face interaction and adapt to employee absenteeism, alternative means of work performance and communication should be explored, which could include:
>
> - Allow staff to telecommute. If a telecommuting policy is implemented, the court should determine the hardware and software requirements for staff working off site as well as the telecommunications protocols and associated security to establish connectivity to the mission-critical applications.
> - Use videoconference or teleconference technologies or both. For planning purposes, assume that most court proceedings included within the mission-critical functions and other tactical objectives can be held by videoconference or teleconference under the emergency conditions described in this document.
> - Increased use of video arraignments

That report was written in 2006. By 2020, very little of those recommendations were adopted before the COVID-19 pandemic. AFTER the pandemic started "we" started to use video conferencing for court appearances and trials. We learned that virtual appearances were a practical solution to in-person appearances. We learned that virtual appearances are a) cost effective; and b) in this writer's opinion, a superior mechanism to present evidence. In addition, it provides better access to justice for litigants, who can log into a virtual court and not need to take off an entire day of work for a hearing or figure out a way to get to the courthouse.

Prior to the pandemic, a hearing required attorneys to spend a significant number of hours traveling to court, parking, and printing physical exhibits. In the physical court days, a proceeding could proceed as follows:

> Lawyer: "Let me draw your attention to page 98 of binder 2, bates stamped page 3035."
> Litigant: "Is it the March 2017 Wells Fargo statement?"
> Lawyer: "No, it's in the other binder."
> Litigant: Hold on, I'll find it.
> Judge: "Let's take a 15 minute break for the court reporter."

Same exchange during a video trial:

> Lawyer: "Let me draw your attention to PDF page 63."
> Witness: "I am not seeing it."
> Lawyer: "Your honor, may I have screen controls."
> Judge: "You are elevated to host; you have the controls."
> Lawyer: "Thank you Your Honor. Can everyone see my screen? Let me direct your attention to the document on the screen…."

Documents are exchanged by PDF, there is no need to exchange physical binders or paper. With a little organization, which I discuss below, trials and hearings can be managed much more efficiently than physical trials.

There is some movement by the Judicial Council to mainstream virtual hearings. In its Strategic Plan for Technology 2019-2020, the Strategic Plan Update Workstream and the Judicial Council Technology Committee stated:

> Digital transformation is required for the judicial branch to meet the needs of the people of California. Innovative solutions will help automate the courts' manual processes, provide tools for judicial officers and staff, and expand digital services to the public. In addition to funding, creative approaches are required to deliver these solutions in an efficient and cost-effective manner across 58 counties with varying degrees of technological maturity, staff, and financial resources.[3]

This, in part led to LEG20-02 which proposes the addition of Code of Civil Procedure (CCP) section 367.7. CCP section 367.7, in its current proposed form reads as follows:

David Lederman is a past Chair of the State Bar of California, Family Law Section; current Technology Director for the Association of Certified Family Law Specialists; President Elect for the Contra Costa County Family Law Section; and a content editor for the CEB Guide, Practice under the California Family Code.

(a) It is the intent of this section to improve access to the courts and reduce litigation costs by providing that a court may, as appropriate and practical, permit parties to appear in court by video in all civil actions and proceedings including trials and evidentiary hearings.
(b) A court may permit a person to appear by video in any civil action or proceeding.
(c) The Judicial Council may adopt rules effectuating this section.

This is a step forward; however, it does not go far enough. The default method of conducting hearings and trials should be virtual with the court having the option to order in person appearances upon a showing of good cause.

Virtual appearances are easy! All you need is a virtual platform, a computer with a camera, microphone and a speaker, and Adobe Acrobat DC pro. If presenting larger, more document intensive hearings or trials, two monitors are helpful as you have more desktop space to work. The following is a proposed system for video presentation.

Note: These rules/concepts are prepared predicated on the following principles in mind:

1. Review and tracking of exhibits must be easy for witnesses and the judicial officer.
2. The process should mimic or improve on physical world rules of practice and procedure.
3. The system needs to be simple and teachable based on readily available technology.
4. These procedures should be secure, stable, and scalable.

Trial Binders:

Trial binders shall be prepared using the same format as is used in the physical world. Exhibits must be marked using numbers for the petitioner and letters for the respondent. Binders shall be created using a Portable Document Format (PDF). It is highly recommended that users subscribe to Adobe Acrobat Pro DC, which costs approximately $15 per month per user.

All exhibits must be combined into a single PDF binder. The file name of the binder shall be as follows:

Date of trial, followed by party designation, followed by binder number, and case number. For example:

Year, month, and day in 2 digits:
200701.Petitioners.Trialbinder.1.D20-24689

Page Breaks:

Trial binders must have page breaks between the exhibits. The page break shall have, at the bottom of the page in 24 point font the identification letter or number for the exhibits. For example, petitioner's Exhibit 1 would appear as follows, center justified 2" from the bottom of the page:

Petitioner's Exhibit 1

Exhibit Bookmarks:

Each exhibit must be bookmarked with the exhibit number, and a brief description of the exhibit. For example:

Exhibit 1: Wells Fargo statements 1/1/20 - 6/30/20 (Note: Descriptions of each exhibit in the bookmark should not exceed three lines).

Exhibit Lists:

Each party must submit an exhibit list with the exhibit binder. The exhibit list must have five columns. One column for the exhibit number/letter designation; one column for the description of the exhibit; one column for the PDF page number, and two empty columns for the parties to use at trial to mark during trial as "marked" and "admitted." (Excel or Word is fine for this).

Rebuttal Exhibits:

Where practical, rebuttal exhibits should be created in a PDF binder similar to the process described above. Rebuttal exhibits, to the extent possible, should have a second rebuttal exhibit list. Rebuttal binders shall be designated in the same manner as the trial binder with the exception that the file name shall have added to it ".rebuttal." For example:

200701.Petitioner.Trialbinder.rebuttal.1.D20-24689

Cross Examination Exhibits:

Cross examination exhibits not shared before trial shall be exchanged prior to cross examination, where practical, or used during examination by sending a copy to the opposing party during trial and sharing the virtual screen. Remember, the court controls its courtroom. Always ask the court for permission to share the screen. If you are sharing a screen, make sure that the only document on the screen is the exhibit intended to be shared, and used for cross examination. Note: Zoom lets you share a specific document, BlueJeans only lets you share the whole screen. Be aware of the limitations of the platform being used.

When appearing for a virtual hearing or trial, remember you are in a virtual courtroom. Dress appropriately for court, be in a quiet location, preferably your office, with the door closed and no ambient noise. Use a computer with a microphone and video camera. Attorneys should not use their cellular phones.

Redundancy:

Murphy's Law: If something can go wrong, it will. Internet connections can fail, and urgent software programs can update at the wrong time (such as just before a hearing). Beyond the base computer and Internet system, all documents intended to be used should be a) saved to the desktop; 2) saved to a virtual folder; and 3) saved to your firm database. If you have the redundancy system set up and there is a failure of something, you can switch to a tablet or, as a last alternative, your mobile phone. For Internet redundancy make sure your computer can switch from your basic ISP to the 4G (or 5G) connection on your mobile phone.

Creating Exhibit Binders in Adobe – a Simple Approach:

Each exhibit should be created individually by exhibit number, for example:

1. email dated…
2. text message dated…
3. photo of xyz

After the exhibit's files are created, highlight all of the files, right click, and then click on the option to combine PDF. If the files are organized appropriately, they will self-bookmark with the appropriate exhibit numbers on the left column of the PDF.

Pro tip: The F4 key will open the bookmarks. You can drag and drop the bookmarks and change the designations as needed in the bookmark column.

Policy Recommendations:

Exchange and Lodging of Submission of Exhibits:

Exhibit binders and lists are to be exchanged five days prior to trial and lodged with the court using the following process:

1. Exhibit binders and lists are to be served on the opposing party by Dropbox link, or any other agreed upon method of electronic document exchange.
2. Exhibit binders and lists shall be lodged with the court by sending the clerk of the department a Dropbox link to the binder file (or any other form of electronic transfer allowed by the department clerk). Attorneys may subscribe to a free Dropbox account at www.dropbox.com.

Note: The State Bar of California Standing Committee on Professional Responsibility and Conduct issued in 2015, Formal Opinion Number 2015-193. That opinion, related to e-discovery, advises "[a]n attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law." That evolution is happening now. We must adapt and avoid being slammed into the rocks by Schumpeter's gale.

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1 Also known as "Creative Destruction," a term coined by Austrian economist Joseph Schumpeter in 1943 describing invocations in processes that result in the elimination of old processes.

2 Link to report is: https://www.cdph.ca.gov/Programs/CCLHO/CDPH%20Document%20Library/EpidemicsInTheCourts.pdf.

3 See <https://www.courts.ca.gov/documents/jctc-Court-Technology-Strategic-Plan.pdf>.

GUARD AND RESERVE RETIREMENT ON THE DAY OF DIVORCE—UNRAVELING THE MYSTERIES (PART 3)

MARK SULLIVAN | ATTORNEY AT LAW, SULLIVAN & TANNER, P.A. | MARK.SULLIVAN@NCFAMILYLAW.COM

[The second part of this article covered how to calculate retired pay for the Reserve Component (RC) member and how alternate calculations of the marital fraction are possible.]

Where to Send the Court Order

The military pension division order (MPDO) is sent to the appropriate "Designated Agent" for payments. See DoDFMR (Department of Defense Finance Management Regulation), volume 7B, chapter 29, section 290403 for the names and addresses of the designated agents for each branch of service.[1] Note that the order is not called a Qualified Domestic Relations Order (QDRO) because military retirement is a statutory governmental program, not a "qualified plan" divided by a QDRO.

Which Military Retirement Plan?

Military personnel get a monthly Leave and Earnings Statement (LES). The Active Duty LES usually contains blocks reading "RETPLAN" and "DIEMS," while the Reserve and Guard LES may lack these items. The "RETPLAN" block tells which retirement plan applies to the member: High-3, REDUX, or the Blended Retirement System. The plan is determined by the Date of Initial Entry into Military Service (DIEMS). Virtually every servicemember (SM) today will be in the High-3 plan, which uses the average of the highest three years of basic pay as the "retired pay base" for calculating retired pay.

Other Requirements for Direct Pay of the Pension Share

The MPDO, or military pension division order, can only be used for direct payments if, pursuant to section 1408(c)(4) of title 10 of the United States Code, there is court jurisdiction because the SM:

- is domiciled in the state in which the suit for the divorce or property division occurs; or
- resides in the state in which the lawsuit occurs (other than because of military assignment); or
- consents to the jurisdiction of the court in which the lawsuit occurs.[2]

If the order states that it has USFSPA jurisdiction, it must also state the basis for the finding (i.e., member's residence, member's domicile, or member's consent).[3]

Every former spouse wants to receive monthly payments from the retired pay center, not from the military retiree. Pension garnishments (as property division, as opposed to alimony or child support) require that the parties have been married for at least 10 years while the military member performed at least ten years of creditable service; this is known as "the 10/10 rule."[4]

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of "The Military Divorce Handbook" (Am. Bar Assn., 3rd Ed. 2019) and many Internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a Board-Certified specialist in family law in North Carolina since 1989. He works with attorneys nationwide as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and at mark.sullivan@ncfamilylaw.com.

Note that this rule is not a *jurisdictional requirement* for dividing military pensions. There is no limitation on the number of years of marriage overlapping military service as a requirement for military pension division, although this is a widely held misconception in the civilian bar. A military pension may be divided by court order whether the spouse has 30 years of marriage to the SM or 30 days of marriage. Rather, this time requirement is a prerequisite to *enforcement through the retired pay center*. The payment mechanism of a garnishment of the member's retired pay is not available unless this test is met.[5]

Some courts do not use the term "garnishment" for support payments that are withheld from one's pay. But that is the terminology used in section 659 of title 42 of the United States Code and title 5 of the Code of Federal Regulations part 581, and that term should be employed when dealing with any federal pension, whether military or civilian.

When there are 10 years of combined Guard/Reserve and active service, DFAS will aggregate them to allow the "10/10 rule" to be met. It should be noted that being in the Guard or Reserves for 10 years is not necessarily the same thing as "having ten good years," which are creditable toward retirement. A "good year" is one in which the Guard/Reserve SM has accumulated at least 50 points. A year with fewer points means the year is not creditable toward retirement (a

minimum of *20 good years*), although the points in that year still count in calculating retired pay.

The order must also provide for payment from military retired pay in an *acceptable clause*.[6] The court order must state the eligibility of the spouse or former spouse under the "10/10 rule," stated above. The right information must be in the order (e.g., names, addresses, jurisdictional basis), and the amount for the former spouse must be within the maximum limits (i.e., 50% of disposable retired pay for most orders). The SM remains liable for any amount still owing. In cases where there is an application for the direct payment of court-ordered division of military retired pay and a garnishment issued pursuant to section 659 of title 42 of the United States Code (child or spousal support), DFAS is authorized to deduct higher maximum amounts.[7] Taxes are withheld from the parties' respective shares before the pension-division payments are deposited in the bank.

The Hypothetical Clause

There are four acceptable methods of dividing military retired pay. The *fixed dollar amount*, *percentage award*, and *formula clause* have already been covered. The fourth method is the hypothetical clause, which is an award based on a pay grade or term of years of service that is different from what exists when the SM actually retires. This is usually used when the parties' interests are fixed as of some specific valuation date. For example, if the parties divorced while the wife was a Navy chief petty officer with 18 years of creditable military service, the hypothetical clause might state:

> **Husband is granted ___% of what a chief petty officer (E-7) would earn if she were to retire with 18 years of military service with a retired pay base of $_____.**

A hypothetical clause in a military pension division order for a still-serving Reserve Component (RC) member might be worded as follows:

> **Husband is awarded _____% of the disposable military retired pay that wife would have received had she become eligible to receive military retired pay with a retired pay base of $_____ and with _____ Reserve retirement points on (date).**

If the wording is not right, DFAS will return it for entry of a "clarifying order" by the court. Since there is no pre-signing review of draft MPDOs available at DFAS, counsel must get it right the first time. The Silent Partner info-letter, *Military Pension Division: Guidance for Lawyers*, explains how to word the division clause, and more help with wording may be found in the Silent Partner, *Getting Military Pension Orders Honored by the Retired Pay Center*.[8]

The Servicemembers Civil Relief Act

There must be a statement in the pension division order that "the member's rights under the Servicemembers Civil Relief Act (chapter 50 of title 50 of the United States Code) were observed."[9] The Servicemembers Civil Relief Act (SCRA) offers protection for military members who are on active duty at the time of the property division or divorce; it does not apply to retirees, but it would be a better practice to include such wording in all military pension division orders.

What protections for our servicemember, Janet Green, (see parts 1 & 2) are involved? A checklist for SCRA protections would include at least the following:

SCRA Checklist for Servicemember Pension Division Protections

___1. If the SM, Janet Green, has not entered an appearance in the divorce case, or the pension or property division lawsuit, a stay (continuance) must be granted for at least 90 days when–

- ___a. the judge determines that there may be a defense to the action, and such defense cannot be presented in the SM's absence, or
- ___b. with the exercise of due diligence, counsel has been unable to contact the SM (or otherwise determine if a meritorious defense exists).[10]

___2. If Janet has actual notice of the lawsuit, a similar mandatory 90-day stay (minimum) of proceedings applies if she requests it properly.[11]

___3. She may ask for an additional stay at the time of the original request or later.[12] If the judge will not grant an additional stay, then counsel must be appointed to represent her in the action.[13]

___4. The stay request does not constitute an appearance for jurisdictional purposes in the lawsuit, and it does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction).[14]

___5. If Janet has been served but has not entered an appearance by filing an answer or otherwise, her husband may not obtain a default judgment (i.e., an adverse ruling) under section 3931 of title 50 of the United States Code unless the court first determines whether she is in military service. This means that Sam Green must file an affidavit stating, "whether or not the defendant is in military service and showing necessary facts in support of the affidavit."[15]

___6. If Sam Green states in the affidavit that Janet is a member of the armed forces, no default may be taken until the court has appointed an attorney for Janet in the pension division case.

___7. If the appointed attorney cannot locate Janet, actions by the attorney may not waive any defense she has or otherwise bind her in the pension action.[16]

___8. If a default decree is entered against Janet during active duty or within 60 days thereafter and she has not received notice of the proceeding, she may move to reopen it so long as -

- ___a. She does so while on active duty or within 90 days thereafter;[17]
- ___b. She can prove that, at the time the judgment was rendered, she was prejudiced in her ability to defend herself due to military service; and
- ___c. She has a meritorious or legal defense to the initial claim.

If, at a minimum, these rights have been honored, then the court order for pension division could truthfully state that Janet Green's rights under the SCRA had been observed. Such a statement would read:

The court has complied with the rights of the defendant, Janet Green, under the Servicemembers Civil Relief Act (chapter 50 of title 50 of the United States Code).

Other Terms for Consideration

The attorney who drafts the military pension division order will want to know about whether an indemnification clause should be included to protect Sam if Janet later elects to receive VA disability compensation and this reduces the share or amount paid to Sam. The issue of indemnification is too lengthy for this article; it is covered in the Silent Partner, *The Death of Indemnification?*

An additional issue is what retired pay is divisible, in light of changes made to USFSPA in 2016. The "Frozen Benefit Rule," mandated in section 641 of the National Defense Authorization Act for 2017 and codified at section 1408(a)(4)(B) of title 10 of the United States Code, is also beyond the scope of this info-letter; there are several Silent Partner info-letters on this subject.[18]

Starting the Process

The spouse or former spouse usually starts the process of division of the military pension by notifying DFAS by facsimile or electronic submission, by mail, or by personal service; service is effective when a complete application is received by DFAS. The notification form is DD Form 2293 ("Request for Former Spouse Payments from Retired Pay").[19]

Payments are made once a month, starting no earlier than 90 days after service of the decree on the retired pay center or the start of retired pay, whichever is later. The payments end no later than the death of the member or spouse, whichever occurs first.[20] Payments are prospective only; the Designated Agent will not go back and collect arrears. USFSPA does not provide for garnishment of payments missed prior to the approval of the application by the retired pay center.

Survivor Benefit Plan

In regard to Sam Green's questions about the death of Janet before him, the answers about continued payments lie in the Survivor Benefit Plan (SBP), which is a joint and survivor annuity available to active-duty and RC retirees to ensure the continuation of payments after the SM/retiree dies. The surviving spouse or ex-spouse, when this is chosen, receives 55% of the selected base amount for the rest of his life, so long as he does not remarry before age 55. This should always be considered in a settlement or trial judgment when one represents the former spouse.[21]

When Janet got her "20-year letter," also known as the NOE (Notice of Eligibility), she also received a form to be used in deciding on SBP; this is currently called DD Form 2656-5. Shown on the form were these options:

- Option A – defer the decision until "pay status," which is usually age 60.
- Option B – elect coverage, but defer the payments until the SM attains pay status, usually at age 60.
- Option C – immediate coverage, which means that the survivor receives payments starting when the SM dies.

Any choice except Option C requires the consent of one's spouse. If Janet did not return the form within 90 days of receipt, she was defaulted into Option C.

Counsel will want to review the form; thus it will be necessary to have Janet produce a copy in discovery. If that does not work, Sam can attempt to obtain it from the government by using a court order or a subpoena signed by a judge. The subpoena or order is sent to the address under Instructions on DD Form 2656-5 if Janet is not yet in pay status; it is sent to the retired pay center if she is already receiving retired pay. If the government accepts the order or subpoena, it may take a month or so before the document is produced.

There is one hitch in coverage for Sam, however. He will lose his "spouse coverage" upon divorce. If he decides to request SBP coverage, he needs to obtain a court order requiring Janet to elect *former-spouse coverage* for him. His submission of such an order, along with the divorce decree, and his "deemed election" (on DD Form 2656-10) within one year of the order, ensures that he will be covered. If Janet submits an election for his coverage, it must be done within one year of the divorce decree.

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1 This can be found by typing "DoDFMR" into any internet search engine.
2 DoDFMR, Vol. 7B, ch. 29, § 290604.A; *see also* 10 U.S.C. § 1408(c)(4).
3 DoDFMR, Vol. 7B, ch. 29, § 290605.
4 DoDFMR, Vol. 7B, ch. 29, § 290604.B*; see also* 10 U.S.C. § 1408(d)(2).
5 See, e.g., *In re Marriage of Beltran* (1986) 183 Cal.App.3d 292; *Carranza v. Carranza* (Ky. App. 1989) 765 S.W.2d 32.
6 10 U.S.C. § 1408(a)(2)(C).
7 DoDFMR, Vol. 7B, ch. 29, § 291001.
8 Both may be found at www.nclamp.gov > Publications.
9 DoDFMR, Vol. 7B, ch. 29, § 290602.B; see also 10 U.S.C. § 1408(b)(1)(D).
10 50 U.S.C. § 3931(d).
11 50 U.S.C. § 3932.
12 50 U.S.C. § 3932 (d)(2).
13 50 U.S.C. § 3932(d)(2).
14 50 U.S.C. § 3932(c).
15 50 U.S.C. § 3931(c).
16 50 U.S.C. § 3931(b)(2).
17 50 U.S.C. § 3931(g)
18 All may be located at www.nclamp.gov > Publications.
19 This can be found by typing "DD Form 2293" into any search engine.
20 DoDFMR, Vol. 7B, ch. 29, § 291202.A.
21 A full explanation of how this works is found at the Silent Partner info-letter, *Military Pension Division: The Spouse's Strategy.*

THE INTERSECTION OF TRUSTS & ESTATES AND FAMILY LAW: WHEN THESE PARALLEL PRACTICES CROSS PATHS AND WHY IT MATTERS (PART 1 OF 2)

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At first glance, a tax practice which consists of both trust litigation and estate planning (herein "T&E" for short) may seem completely incongruent with the practice of family law. However, upon further reflection, these two seemingly different practices are actually quite parallel. Both practices involve planning around life events that involve major assets and that affect the nuclear family during a time of stress, whether the stress stems from a marital dissolution or the death of a loved one. The focus of this two-part article is the intersection of these two parallel practices.

This first article will address estate fundamentals—all the things that family law attorneys should know about T&E for their family practice. The second part of the article will build on that knowledge to address taxes, transmutation in the context of estate planning, and protecting divorcing clients' estates: pre, post, and during dissolution (within the realm of ATROs). But first, T&E fundamentals.

T&E FUNDAMENTALS

Intake

A holistic review of your client's estate plan as part of your routine intake is best practice. To gain control over what can feel like an out of control scenario to the client, you, as the practitioner need to know who holds decision making powers as to the asset, estate, and as to the person. Because—believe it or not—they might not lie with your client. To verify, you need to review estate documents.

At intake, ask your client whether they have an estate plan. If your client is like most, they may have one but maintain only a vague recollection of its contents or barely recall where the documents are stored. For many outside T&E, an "estate plan" means *either* a will or trust. But, in T&E, an estate plan is actually an intricate set of documents that exceed simply a will or trust (and even in the most simplistic setting, there is usually both a will and a trust). Therefore, to start, ask for the widest scope of documents that the client can bring to you. For example, tell the client to bring "anything and everything related to the estate." That way your client will hopefully bring more than just the will and/or trust.

Will & Trust

There are two types of basic written documents that distribute assets upon death, a will and a trust.[1] While both accomplish the same goal of giving certain assets to intended beneficiaries, the administrative path taken by each is very different.

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A will has no legal consequence on the title to a decedent's property until death.[2] Once a person dies (the "decedent"), then a will directs the distribution of assets from the estate by a nominated executor to named beneficiaries. For a will, with limited exceptions under California law,[3] the administration and distribution of a decedent's estate per the terms of the will is overseen by the probate court.[4] This process, known as the probate of a decedent's estate, involves time in court (typically, pre-COVID-19, 12 months for non-objected probate matters) as well as statutory personal representative and attorney compensation for ordinary (and sometimes extraordinary) services.[5]

A trust, on the other hand, simplistically holds title to property currently.[6] Like a will, a trust directs the distribution of assets by the named trustee. However, trusts are not typically overseen by the courts since the trustee has a duty to administer the trust per its terms.[7] This means that unless there is some sort of litigation concerning the trust,[8] there are no court hearings and little to no public record containing the terms and beneficiaries of a trust. The trustee is free to begin distributions to named beneficiaries immediately if the trust so provides, with the caveat as to

a notice and waiting periods per California Probate Code sections 16061.7 and 16061.8.

You may already realize that estate planning documents provide a snapshot of the family dynamics, revealed in the recital's intent language, in named disinherited persons and no-contest provisions, and in asset distributions tied-up based on age or other factors. These documents also typically contain valuable family-law related initial information. In a trust, the schedule of assets provides a picture of the financial holdings at a period of time (and sometimes property characterization information), and the current trustee illuminates who holds control to those assets. Also, the will clarifies who the parties nominated as guardians for their minor children.

As mentioned, typical estate planning in California includes both a trust document and a pour-over will. In simplistic terms, the pour-over will is primarily used as a safety net that scoops up after-purchased or forgotten assets held in the deceased person's name and places them into the trust so as to avoid probate.[9]

While knowing the differences between these documents at intake is important, later we will see that knowing the difference is crucial in the family law matter's discovery phase. But before moving forward, it is best to find out if there are additional controlling estate documents.

Supplemental Documents

To best serve your client, you need to look beyond the basic understanding of a trust and will and review the estate plan's "supplemental documents." These are the mighty giants to the heavy hitting will and trust, and equally, if not more important, to the client on a day-to-day basis.

For example, take a few minutes to review the financial power of attorney and the health care power of attorney. Are they the typical type of "springing" power,[10] meaning they become active upon incapacity? Or were they effective immediately upon execution, meaning that your client, technically, has no right to make financial, health care, or HIPAA decisions for themselves in the present moment? You may be surprised to learn (as I am many times) that the opposing party to your dissolution matter actually holds all the power to the financial assets or decisions over your client. There may also be "special" or "limited" powers of attorney[11] contained in your client's stack of estate documents that allow the opposing party to move assets, liquidate assets, or change beneficiaries of assets. Outside the context of ATROs, these documents may surrender powers that your clients may never have fully understood existed in their soon-to-be ex-spouse.

Therefore, review the powers of attorney carefully. Even the "initial the box" statutory forms potentially give unanticipated power to an opposing party on occasion, particularly when reading the many delineated powers associated with each category of a statutory power.[12] Sometimes, the drafter of the power of attorney adds an expiration date,[13] and then a person acting as an agent or attorney-in-fact has been acting outside the period of authority without realizing it.

The next article will address details on how to take corrective action to issues with estate planning documents. But initially, you simply need to know what potential issues exist with these documents.

ESTATE PLANS IN FAMILY LAW LITIGATION

Discovery

A basic understanding of estate planning documents, particularly wills and trusts, assists in family law litigation in different aspects. First, in discovery of such documents, it is important to request the production of documents that may lead to admissible evidence. For discovery purposes, a will may not be relevant or lead to admissible evidence since it does not have a consequence as to assets until decedent's death. However, language as to the distribution of the estate and/or pour over provisions can be very helpful in finding whether there is a trust. Many times, your client will be able to supply a copy of the will rather than you having to request its production. If the will is relevant to your case, when requesting production of documents, useful wording includes: "will,[14]" "codicil," and documents for which opposing party is nominated as "executor," and/or "personal representative."

A trust, for discovery purposes, has several layers. First, there is a trust document, which can either be a "trust agreement" or a "declaration of trust," and the person in charge can either be a trustee, co-trustee, or successor trustee. It may take some navigation to find the actual controlling trust document, because many times trusts are updated and revised over time. When requesting a copy of a trust for discovery purposes, it is important to request the appropriate document by its correct title, such as: "trust," "declaration of trust," "trust agreement," "amendment(s)," "restatement(s)," and documents for which opposing party is named as "trustee," or "co-trustee."[15]

A trust is typically stored in a "safe place," which can be anywhere from a binder on the client's shelf to a safe deposit box at a bank. There is no requirement during life that a trust be recorded anywhere, so it makes the existence hard to verify. However, you can find evidence of a trust in places that record title. For example, a search of the grantor/grantee index of the County Recorder where real property is thought to be located may reveal the existence of a trust that did or does hold title to real property.

Once trust documents are produced, which document controls? Per California law, a restatement wipes out the prior versions of the trust such that the "terms of the trust" include only the restated trust (and any subsequent amendments thereto) moving forward.[16] In contrast are amendments to the trust, which when reviewed in reverse chronological order, reveal the current terms of the trust. They also reveal a path of changes to the trust settlor's intent which can expose, among other things, financial abuse, elder abuse, or capacity concerns. As mentioned

previously, the trust schedule of assets can be used to cross-check for assets and may provide some clues as to community and separate property character. This topic will be addressed more fully in the second article.

Settlement

The second place that a basic understanding of the types of estate planning documents, particularly wills and trusts, assist in family law litigation is at the settlement or close of a dissolution matter. Probate law does allow for court enforcement of support judgments.[17] A martial settlement agreement may contemplate the use of estate planning documents to provide for parties or the parties' children. Most commonly, parties agree to amend an inter vivos trust or may contemplate using an irrevocable trust. Simply put, an inter vivos trust is a revocable, changeable[18] trust document that is not currently taxed as a separate entity[19] and represents the majority of trusts. Unless stated otherwise, a "trust" refers to an inter vivos trust with its presumption of revocability.[20]

As mentioned before, a trust is created with manifested intent and holds trust property.[21] A created trust then needs to be "funded." Simply put, trust funding is the process of placing assets into the trust (currently or in the future) to have the trust terms apply such that the trustee has control over asset(s) to then distribute pursuant to the trust terms. This can be shown as simply as a transfer of property per a document, taking effect upon the owner's death, to another person as trustee.[22]

However, what if the trust is not funded immediately? While the majority of trusts are at least partially funded easily[23] and immediately to alleviate T&E concerns, for family law purposes sometimes the relevant time for the trust funding, per the terms of a marital settlement agreement, is not until a later triggering event, such as upon the sale of a business or even upon the death of a party. Sometimes current funding is not required at all. If the marital settlement agreement contemplates a mere modification to the trust language only,[24] then current funding may not be at issue for family law or marital settlement agreement enforcement purposes. For example, this is seen in a marital settlement agreement that requires parties to amend their respective trusts to name their children as certain specific gift beneficiaries.

Whenever funded per the martial settlement agreement details, the trustee of the trust has a fiduciary duty to follow the "terms of the trust," which includes not only the trust document(s) but also any directions or instructions that affect the disposition of the trust.[25]

Contrast a trust with an irrevocable trust that sometimes is thought of as the end all, be all of a dissolution settlement. Irrevocable trusts seem ideal since the settlor (maker) cannot make changes or at least has their hands tightly tied such that terms cannot be undone after the ink of the marital settlement agreement has dried. But, just having an irrevocable trust is not enough. You have to beware of pitfalls by looking at:

1. the trustee and discretion given. Sometimes in an irrevocable trust the trustee is given wide latitude to take action as to assets and/or distributions that essentially negates the protections imagined by using an irrevocable trust. For example, an irrevocable trust that contains a provision allowing the trustee to dispose of "all of the trust assets at any time" likely was not what your client was imagining for protection as to a settlement right; and
2. how the irrevocable trust is to be funded. Is there a nebulous promise to contribute assets in the future, is there a listing of an asset (say a house) but title to the house is not required to be changed, or is the trust asset an "IOU" from the settlor to pay in the future? Or are there hard solid concrete transfers presently to the trust itself with no wiggle room by the trustee to quietly take it back out when the divorce dust has settled?

It is also important to further note that irrevocable trusts can actually be modified or terminated by the court under a situation where all beneficiaries consent[26] or even without court petition where there is an uneconomically low principal.[27]

All of these creation and funding nuances can introduce ambiguity in a martial settlement agreement. Therefore, a call to a T&E attorney while drafting your marital settlement agreement can ensure proper wording is used so that the parties' agreement is enforceable.

Now that you know the fundamentals of estate planning documents and some of the issues to be aware of when looking at your client's estate plan, stay tuned for the next article which will address taxes, transmutation within the context of estate planning, and protecting clients' estates.

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1 Cal. Prob. Code, §§ 6110, 15200. This article described non-statutory documents, unless otherwise denoted. For example, "will" as used herein does not include California Statutory Wills per California Probate Code sections 6200 et seq.
2 Cal. Prob. Code, § 7000.
3 Cal. Prob. Code, §§ 13100, 13200, 13500.
4 Cal. Prob. Code, §§ 8000 et. seq.
5 Cal. Prob. Code, §§ 10800-10802 et seq.
6 Cal. Prob. Code, § 15200. The true timing of when a trust holds property will be discussed later in the article. Further, references to "trust" are to revocable inter vivos trusts, unless otherwise delineated in the text.
7 Cal. Prob. Code, §§ 16000 et seq.
8 For example, litigation pursuant to California Probate Code sections §§ 850, 17200 et seq., or per Estate of Heggstad, 16 Cal.App.4th 946 (1993).
9 Cal. Prob. Code, § 6300.
10 Cal. Prob. Code, § 4030.
11 Cal. Prob. Code, § 4408.
12 California Probate Code sections 4450 et seq. contains the construction of powers for the statutory form power of attorney.
13 Cal. Prob. Code, § 4127.
14 Even though California Probate Code section 88 defines "will" to include "codicil" and "testamentary instrument," I still

find delineating them separately to be helpful for discovery purposes.

15 California Probate Code section 82, subdivision (a) states that "trust" includes an express trust or similar. California Probate Code section 84 defines "trustee" as the original, additional, or successor trustee, which you may incorporate into your request for production.

16 Cal. Prob. Code, § 16060.5.

17 Cal. Prob. Code, § 15305.

18 Cal. Prob. Code, § 15400 et seq.

19 U.S. Treas. Regs., § 301.6109-1(a)(2).

20 Cal. Prob. Code, § 15400.

21 Cal. Prob. Code, §§ 15201, 15202.

22 Cal. Prob. Code, § 15200, subd. (c).

23 California Probate Code section § 15200 includes very broad terms for funding.

24 Allowable under California Probate Code § 15402.

25 Cal. Prob. Code, § 16060.5. For this article, "terms of the trust" does not include any terms variations afforded by the Uniform Trust Decanting Act at California Probate Code sections 19501 et seq.

26 Cal. Prob. Code, § 15403.

27 Cal. Prob. Code, § 15408.

HOW COVID-19 MAY IMPACT DIVORCING COUPLES IN DIFFERENT JURISDICTIONS

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1. Introduction

The global outbreak of COVID-19 and shelter-in-place orders have impacted married couples in different ways throughout the world.

Many couples have become closer together working through these difficult times. Unfortunately, for many others these recent issues have caused them to realize that they are better off separating and racing to court as soon as their shelter-in-place orders were lifted.[1]

However, another issue faced by some separating couples may be related to the choices they made at the outset, or even before the outbreak of the Coronavirus.

In today's global economy, many parties own homes in multiple jurisdictions and frequently spend time in different countries.

Prior to the Coronavirus outbreak such couples may have spent most of their time in one location, but due to the onset of the pandemic they began staying in another location.

This article examines the issues that may arise with parties maintaining conflicting actions in different jurisdictions and how establishing each party's intent is a vital and frequently difficult factor in determining which court has jurisdiction.

2. A Hypothetical Case

Let us consider a hypothetical couple, Jack and Jill. Jack and Jill met in Paris and after a few years they got married there. Shortly after their marriage, while still in France they had two young boys but soon after the birth of their youngest child they moved to Hong Kong.

After a few years living in Hong Kong, the parties moved to California, where Jack was expanding the operations of his biotech company. The parties then began spending most of their time in San Jose, California, and the children both attended school there. Over the past few years, the parties would also spend several months in Paris and Hong Kong, where they maintained homes.

Shortly after Jack heard about the outbreak of the Coronavirus, he and Jill decided to stay closer to Jack's main business operations in Hong Kong. Since the parties were unsure when they would return, they planned to stay in Hong Kong for the foreseeable future. When the parties left for Hong Kong, the children were six and four years old.

From January 2020 until August 2020, the parties stayed in Hong Kong with their children. Unfortunately, the extended time alone with each other did not help the parties' relationship problems.

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In August 2020 after the shelter-in-place orders were further lessened in California, Jill informed Jack that she wished to go back to California with the children to visit some friends.

Jack was then unaware that the main reason for Jill's return to California was to visit a former boyfriend.

While Jill was gone, Jack, suspecting that something was amiss, discovered that Jill was having an affair with her old boyfriend. Irate, Jack texted Jill, and informed her that he would be immediately filing for divorce in Hong Kong.

After hearing this, Jill decided to race to court herself and file for divorce in California.

Unfortunately, Jill was informed by her California counsel that she might not be able to commence divorce proceedings there, since she and Jack had not been present in California for the preceding six (6) months. Jill could either wait six (6) more months or she could proceed immediately with filing a legal separation action, which did not require the six-month residency requirement.

Jill decided to file for legal separation and request temporary custody of the children in the California court.

Even though Jack filed his Petition for Dissolution in Hong Kong first, before he could serve, Jill was able to have Jack served with her California petition in Hong Kong.

3. Jurisdictional Battles Across Borders

So, what usually happens when parties file in different jurisdictions?

In our hypothetical case, Jack would likely file a motion to quash in the California court, claiming that a Hong Kong court should have jurisdiction over the parties. Jill would likely file a similar motion in the Hong Kong court, claiming that California should have jurisdiction.[2]

The court in California will need to conduct a detailed hearing regarding Jack's motion before making a final decision.

The California court will need to determine if it has jurisdictional basis for each of the following matters: 1. subject matter jurisdiction; 2. in rem jurisdiction; and 3. personal jurisdiction.[3]

Both parties will want to submit facts related to each of these jurisdictional matters. Different types of evidence and potentially the testimony of witnesses will need to be provided, which would cause the court to schedule the case for a several-day hearing.

However, a significant issue that will have a bearing on the jurisdictional issues, is establishing the parties' intent when they relocated to Hong Kong and later travel to California.

What are some of the factual and legal issues the court may consider in deciding whether to maintain the case in California or deferring the matter to Hong Kong?

a. Does a Dissolution Action Take Precedence Over a Legal Separation Case?

In California, a judgment for dissolution of marriage may not be entered unless one of the spouses has been a "resident" of California for six months and of the county where the proceeding is filed for three months immediately preceding the filing of the petition for dissolution.[4]

Courts have determined that the term "residency" is synonymous with "domicile" which requires both physical presence and an *intent* to remain "indefinitely."[5]

Whether the residency requirement has been met is a question of fact and the burden of establishing residency is on the party asserting it.[6]

However, in an action for legal separation, domicile is not controlling. A court's jurisdiction is dependent on personal jurisdiction over a party.[7]

Additionally, based upon the principles of divisible divorce, parties could entertain concurrent legal separation and dissolution proceedings in different jurisdictions.[8]

Therefore, in our hypothetical case even if the California court determines that it does not have *in rem jurisdiction* over the parties' dissolution proceedings, technically it could still decide to maintain the legal separation proceeding, so long as the court finds that it has personal jurisdiction over Jack.

b. How about Personal Jurisdiction?

Even if Jill is allowed to maintain her legal separation proceeding in California, she would have to show that the court has personal jurisdiction over Jack.

If Jack were in California when he was served with Jill's Petition for Legal Separation, this would not be an issue. However, since Jack was served in Hong Kong, Jill would have to establish that Jack has "minimum contacts" with California for the court to have jurisdiction over him based upon the court's Long Arm Statute.[9]

The extent to which "minimum contacts" personal jurisdiction may be exercised (i.e., where jurisdiction is predicated solely on minimum contacts, and not domicile, consent, or in-state service of process) would depend on the nature and quality of Jack's contacts with California, and if Jack had "purposely" conducted certain activities immediately prior to the filing of the petition to "avail" himself of activities in the State.[10]

Jack's activities in California that occurred a significant time prior to the filing of Jill's petition may not be adequate to establish sufficient minimum contacts with California.[11]

Therefore, Jill would have to establish that Jack had *intentionally* continued to have certain minimum contacts with California in order to have an expectation that he would be subject to personal jurisdiction there.

However, even if California determines that it does have personal jurisdiction over Jack, it could still decide that based on the inconvenience to the parties or witnesses, Hong Kong is a more convenient forum.[12]

c. What About Custody (UCCJEA) Jurisdiction?

If a California court is advised that another jurisdiction may have a similar pending custody proceeding, it will seek to communicate with that court about such matters.[13]

However, frequently scheduling an appropriate time for the courts to communicate in different time zones can be difficult.

Pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), for a California court to determine custody visitation and matters, the children must have resided in California for the six months before the filing of Jill's petition for dissolution.[14]

In determining habitual residence, a court would need to consider "the *intentions* and circumstances of caregiving parents."[15]

However, Jill may be able to argue that the parties were only in Hong Kong on a temporary basis and therefore California should still have jurisdiction over custody.

Periods of temporary absence may still be considered by the court in determining jurisdiction over custody.[16]

In determining whether the children's absence from California was temporary or not, the court is required to consider the parents' *intentions*, as well as other factors relating to the circumstances of the child's or family's departure from the state where they had been residing.[17]

d. Does Filing or Serving First Matter?

When two parties file simultaneous dissolution proceedings, the person who is able to serve first may be able to seek abatement of the later proceeding.[18]

However, an order for abatement is a matter of court discretion and subject to consideration of various factors

including: "the seriousness of threat of multiple and vexatious litigation, convenience of parties, status of foreign action, and competing interests of two forums."[19]

Therefore, in our hypothetical case, it really does not matter whether Jack filed first or Jill. Rather the court will need to still make a detailed jurisdictional analysis.

4. So How can Parties Establish Intent Needed for Jurisdictional Purposes?

Various types of circumstantial evidence can be provided to a court to establish a party's intent.[20]

Evidence in support of such intent can be manifested by both past declarations and specific actions in a certain jurisdiction including owning property, maintaining a local driver's license and automobile registration, filing local taxes, and registering to vote.[21]

In our hypothetical, either party may also seek to submit various written communications (such as emails or texts) between them to establish their intent, and whether they planned on staying in Hong Kong indefinitely or not.

However, while one party's statement(s) may supply evidence of the intention requisite to establish domicile at a given place of residence, it cannot alone supply the fact of residence there.[22]

Counsel should also be aware that submitting only one type of evidence may be insufficient to establish intent. For example, merely owning a residence in a jurisdiction may not be sufficient to demonstrate intent to acquire a domicile if contradicted by other substantial evidence of intent.[23] Similarly, filing taxes alone in a given jurisdiction may not be enough.[24]

5. Can a Party's Immigration Status Impact the Court's Finding of Jurisdictional Intent?

California courts had previously deemed that a child or party's immigration status itself would not bar a party from filing a dissolution action in California.[25]

However, counsel should be aware that recently a federal court in California has determined that a nonimmigrant who entered the United States legally, but unlawfully overstayed her visa is precluded from establishing domiciliary intent required for obtaining a divorce in California.[26]

6. Conclusion

Any decision to relocate for an indefinite period of time, including those taken after the onset of COVID-19 may impact a party's ability to commence (or halt) family law proceedings in California. Appropriately establishing the intent for the move (and return) are vital factors in determining the proper jurisdiction.

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1 *China's Divorce Spike Is a Warning to Rest of Locked-Down World*, Bloomberg Businessweek (Mar. 31, 2020, 1:00 AM PDT) < https://www.bloomberg.com/news/articles/2020-03-31/divorces-spike-in-china-after-coronavirus-quarantines>.

2 Code Civ. Proc., § 418.10; Cal. Code Regs., tit. 5 Rules, § 5.63.

3 See Hogoboom & King, Cal. Prac. Guide: Fam. Law (The Rutter Group 2019) § 3:1.5.

4 FC, § 2320.

5 See *In re Marriage of Thornton* (1982) 135 Cal.App.3d 500, 507; *In re Marriage of Tucker* (1991) 226 Cal.App.3d 1249, 1258–1259.

6 *In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 153.

7 See *Goodwine v. Super. Ct.* (1965) 63 Cal.2d 481, 483 (The residence requirements applicable to the plaintiff in divorce actions are inapplicable in actions for separate maintenance).

8 See *Estin v. Estin* (1948) 334 U.S. 541, 549; *Marriage of Gray* (1988) 204 Cal.App.3d 1239, 1250-1251 (Wife's legal separation action in her domiciliary state of Washington, D.C. no bar to H's dissolution action in his domiciliary state of California); see also *Marriage of Hattis* (1987) 196 Cal.3d 1162, 1170 (California courts may both have jurisdiction over nonpension issues in the dissolution proceeding and at the same time lack jurisdiction to divide the military member's pension under the USFSPA).

9 See *Khan v. Super. Ct.* (1988) 204 Cal.App.3d 1168, 1170.

10 See *Muckle v. Super. Ct.* (*Burgess-Muckle*) (2002) 102 Cal. App.4th 218, 228-230.

11 *Burgess-Muckle*, *supra*, 102 Cal.App.4th at 227; see also *Tarvin v. Tarvin* (1986) 187 Cal.App.3d 56, 60-61.

12 Code Civ. Proc., § 410.30(a); see *Marriage of Tucker* (1991) 226 Cal.App.3d 1249.

13 FC, § 3424(d)

14 FC, § 3421(a)(1).

15 *Monasky v. Taglieri* (2020) 140 S.Ct. 719, 727.

16 FC, § 3402(g).

17 See *In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 493, fn. 12; *In re Aiden L.* (2017) 16 Cal.App.5th 508, 518.

18 See *Marriage of Hanley* (1988) 199 Cal.App.3d 1109, 1115-1116.

19 *Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574.

20 Witkin, Cal. Evidence (2019) 5th ed., ch. IV, § 122.

21 *In re Marriage of Leff* (1972) 25 Cal.App.3d 630, 633.

22 *Penn Mut. Life Ins. Co. v. Fields* (1948) 81 F.Supp. 54, 60.

23 *Johnson v. Johnson* (1960) 245 Cal.App.2d 40, 44-45.

24 *Penn Mut. Life Ins. Co. v. Fields*, *supra*, 81 F.Supp. at p. 61.

25 *In re B. Del C.S.B.* (2009) 559 F.3d 999, 1010-1014; *In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 154 (Nonimmigrant status does not preclude a finding of residence under California law for the purposes of obtaining a dissolution of marriage).

26 *Park v. Barr* (2020) 946 F.3d 1096, 1099.

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