NBI Course Manual: Handling California Divorce Cases from Start to Finish

II. DIVIDING ASSETS AND DEBTS

Preliminary Considerations:

The starting point for any discussion of marital property in California must start with a discussion of what is community versus separate property. This is the starting point for most of my initial client consultations and it should be the starting point for your analysis of the property segment of your case. In broad terms those definitions follow.

Community Property Defined. The California Family Code (simply "FC" hereinafter) at section 760 defines community property as "[e]xcept as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state…" For simplicity I explain to clients at the initial consultation that this means anything earned or acquired during the marriage, with some exceptions, is community property. For the most part the exceptions are things received by either party as a gift or bequest.

Separate Property Defined. If an item of property is not community property, it is the separate property of one of spouses. Separate property is defined by statute in FC 770 by listing, in nonexclusive terms as follows:

1. All property owned by the person before marriage;
2. All property acquired by the person after marriage by gift, bequest, devise, or descent.
3. The rents, issues, and profits of the property described in this section.

The Court's job, in part, is to characterize property as community versus separate. If property is separate property it is not subject to division in the court. If it is community property, it is subject to equal division. That is, the Court must divide the property equally between the parties. (see FC 2550). Equal division does not mean that each party gets ½ of an asset, but the community estate, all the assets of the community, will be accounted for and equitably divided between the parties. Liabilities and debts are characterized as community and separate property as well (see FC 2551).

Assets Acquired Before The Marriage:

For purposes of this discussion, I will refer to the person seeking to characterize property as separate property as the "Separator." As discussed above, according to FC770 "All property owned by the person before marriage" is separate property. The burden of proof, generally, will fall on the Separator. In general, the Separator will need to prove that the identified item is separate property by a preponderance of the Evidence. See Evid. Code Section 115.

The Separator has the cards stacked against her, especially in a marriage of longer duration. That is because the passage of time will make it more difficult for her to prove that an asset is separate. Evidence, other than each party's testimony, becomes harder to find over time. Memories fade as well.

Exceptions:

Pereira v. Van Camp

Where an assets was owned prior to marriage or is otherwise separate property and one or both of the spouses contributed efforts to the property, usually a business, we have a *Pereira/Van Camp* problem. These approaches stem from the cases *Pereira v. Pereira* (1909) 156 C 1 and *Van Camp v. Van Camp* (1921) 53 CA 17. In *Pereira* the Court allocated a fair return on the investment and the remaining increase in value of the property was allocated to the community. This approach makes the most sense when the property in dispute is a labor intensive business or the separate property investment was nominal. The *Van Camp* approach does the opposite of *Pereira* in that it allocates a fair reimbursement to the community for the labor of the community, the balance of the increase is separate property. This would be the approach to use were the business capital intensive. Note: The purpose of these alternating approaches is to determine what, if any, contribution to the increase in value was the result of community efforts and to allocate to the community its investment. There have been deviations from these approaches. Note as well that these approaches are used when we are trying to determine the community interest in separate property. When we need to determine a separate property reimbursement in a community asset, FC 2640 provides the statutory answer.

FC 2640 states that in the division of the community estate, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and shall not exceed the net value of the property at the time of the division.

Tracing:

Where an asset is purchased and paid for entirely before marriage, the analysis is simple. It becomes increasing more complex when:

1. The property is purchased prior to marriage but paid for during the marriage;
2. The property is owned prior marriage but refinanced during marriage;
3. The asset owned prior to marriage and combined with community assets, either in the form of a down payment or simple placed into a liquid account where it is combined with community assets.

Property Purchased Prior To Marriage But Paid for During The Marriage:

Usually this issue appears in cases where a house is owned by one party prior to marriage and the parties have paid down on the asset during marriage. As discussed above, anything earned or acquired during the marriage is community property. If these funds are used to pay down separate property assets, the community acquires a *pro tanto* interest in the property, see Marriage of Moore (1980) 28 C3d 366, 371, 373. The community does not receive an interest based on tax or interest paid on the house, the property right is acquired based on a pay down of the principle. In my experience, this interest is usually fairly small compared to the value of a home and the increases in value based simply on market appreciation. This is especially so in recent years.

The calculation used to determine community's *pro tanto* interest is explained in detail in Marriage of Marsden (1982) 130 CA3d, 426. As a practical matter, my office uses a spreadsheet that a secretary created a few years ago. Now most computer support

programs have a property function that allows you to run what is commonly referred to as the Moore/Marsden calculation. To determine the Moore/Marsden value it is necessary to obtain 3 values: Date of Marriage, Date of Separation, and Date of Valuation, which is usually the date of trial, or as close to the date of trial as practical. See FC 2552(a).

Please note that the Moore/Marsden calculation applies to community contributions to reduce debt on separate property, when the asset is community and we are attempting to calculate the separate property interest, we are mandated to take a completely different approach. In cases where an asset is purchased during the marriage, but paid in whole or in part with separate funds, the Separator first gets back her investment, up to the value of the asset. See FC 2640.

Please also note that FC 2640 was recently amended by SB 1407 to apply to one spouse's separate property contribution to the other spouse's separate property asset.

The Property Is Owned Prior Marriage But Refinanced During Marriage:

Consider the situation where a spouse owns an asset prior to marriage, but refinances during the marriage to take advantage of a lower interest rate and changes title joint tenancy. Should this transaction result differently than the one described above?

The answer is maybe. We must begin this analysis with the state of title presumptions:

Title is what title is:

According to Evidence Code Section 662, the owner of legal title to property is presumed to be the owner of the full beneficial title. This presumption can only be rebutted by clear and convincing evidence.

FC 2581, further states that:

"For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

(b) Proof that the parties have made a written agreement that the property is separate property.

Thus it would appear that when the separate property asset is refinanced and converted to joint form, it then becomes, unless a writing to the contrary, community property (the change of title is considered an acquisition during marriage). At first look, it would appear that the community acquired an interest in the property. However, this is not necessarily the case.

FC 721 states that, with limited exceptions "transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following:

(1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.

(2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions.

(3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property.

The confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other…" This duty was elaborated in *Marriage of Haines,* 33 Cal. App. 4th 277, 296, to require that the person receiving the benefit from the transaction, to show that the transaction was "freely and voluntarily made, and with a full knowledge of all of the facts, and with a complete understanding of the effect of the transfer."

This duty was expanded further by the First District Court of Appeals in *Marriage of Delaney*, 111 CA4th 991, to "any interspousal property transaction where evidence is offered that one spouse has been disadvantaged by the other." In *Delaney*, Steven Delaney purchased a house in 1982. He married Linda Sue in 1995. Soon after marriage, the couple obtained a $25,000 home-improvement loan secured by the house. As part of the transaction Steven executed a deed transferring the property from his separate property to himself and Linda Sue as joint tenants. The Court, then concluded, in essence that any transaction that disadvantages one spouse against the other will be null and void, as in this case.

Note, this case was essentially a transmutation case. Were the house sold and the proceeds used to purchase a new house in both parties' names, it is most likely that this transaction would be treated as a FC 2581 transaction and the proceeds from the separate property residence would be treated as a separate property contribution to a community property asset. The result would be that the Separator would have his FC 2640 right to reimbursement, but the entire increase in equity would be considered community property. See *Marriage of Walrath*, 17 CA4th 907 which stands for the proposition that the separate property payment, which gives rise to the Family Code 2640 right to reimbursement, can be traced from the asset of which the initial contribution is made though to subsequently purchased assets, with the proceeds from the initial contribution.

Reimbursement v. Tracing:

As discussed above, FC 2640 provides that unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. The amount reimbursed is without interest or adjustment for change in monetary values and cannot exceed the net value of the property at the time of the division. Again, effective January 1, 2005, this will apply equally to separate property contributions to the separate property purchases of the other spouse.

This claim for reimbursement raises the next question, which is: how can we show that the separate property remains? If separate property is combined into a new asset, the Separator will have her FC 2640 claim for reimbursement, but if the asset is in a commingled bank account, the answer is less clear. In order for the Separator to claim his right to reimbursement, she must show that the separate property funds still existed at the time an asset was purchased or, if the asset is the bank account, on the date of separation. This must be done by tracing the separate property contributions. The Separator has two methods by which she can trace her separate property, the direct method and the family expense method.

First, the direct method requires that the Separator show at the time of the acquisition of the community property, that there were available separate funds to make the purchase and the Separator intended to use and did use the money for that acquisition. See *Marriage of Mix*, (1975) 14 Cal.3d 604. This also requires a showing that the separate property funds remained at the time of acquisition and were not previously withdrawn.

Second, the family expense method requires that at the time of acquisition of the property in dispute, all community income in the commingled account has been exhausted for family expenses, then all funds remaining in the account at the time the property was purchased was necessarily separate funds. See *Marriage of Mix* at 612 citing to *See v. See*, (1966) 64 Cal.2d 788, 783. See also *Marriage of Cochran*, 87 CA4th 1050.

Valuation Issues:

The Court in *Marriage of Cream*, (1993) 13 CA4th 81, recognized a definition of value that harkens back to an undergraduate introduction to economics course. That is, value, for our purposes, is the fair market value of a marketable asset in marital dissolution cases is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no obligation or urgent necessity to do so, and a buyer, being ready, willing and able to buy but under no particular necessity for so doing.

In this section we will deal with valuation dates and methods of valuation. We will also address the issue of businesses that are part community and part separate property.

The valuation date preferred by the Court is the date of trial, or to cite to the language of FC 2552(a) as near as practical to the time of trial. The reasoning for the "near as practical to trial" language is that for community assets, the appreciation as well the depreciation is shared by the spouses, at least until the asset is distributed or otherwise disposed of.

The Court may deviate from the FC 2552(a) requirement upon 30 days' notice to the other party. The party moving for the alternate valuation date must show that using an earlier valuation date would accomplish a more equitable division of the community assets. See FC 2552(b). When seeking an alternate valuation date, the declaration setting forth the basis for alternate valuation date should state:

1. The proposed alternate valuation date;
2. Whether the proposed valuation date applies to all or only a portion of the assets and, if the motion is directed only to a portion of the assets, the declaration must separately identify each such asset;
3. The reasons supporting the alternate valuation date.

When a community asset cannot be accurately valued at the time of trial, the Court may and should reserve jurisdiction over the asset to divide at a later date. See FC 2550.

Marital Assets:

The Court is required to divide the community property estate equally between spouses. See FC 2550. This applies to all assets. The fundamental question that follows from this is how to value the identified asset.

Methods of Proof:

In determining the value of an asset, the court frequently has wide discretion. Some Courts have local rules that provide instruction as to methods the Court will use to issue certain values. The Contra Costa County Practice Guidelines (Local Rule 12.11) suggests the use of Kelly Blue Book or like publications for the purpose of determining values of cars as a simple method to select the value. The local rules go further to state that if the parties do not wish to use the Kelly Blue Book values, they "should be prepared to present a written appraisal of the disputed asset at the first settlement conference."

Other specific assets:

Household Furnishings: When the asset being distributed is a household item, furnishing or appliance, it rarely pays for the attorneys to spend a significant amount of time arguing over value. The value, as discussed above is market value and the market for used furnishing, appliances and household items is "garage sale value." The Contra Costa County local rules caution litigants that "The Parties should be aware that value assigned should be fair market value or replacement value of a similarly used item, not the value of the item when new or the replacement cost of a new item. Used furnishings typically has limited value…" There are appraisers that can value furnishings, but in many cases the cost of the appraisal and litigation can quickly exceed the value of the property in questions. Attorneys dealing with issues related to household furnishings, appliances and the like should be open to simple and creative approaches to dividing these assets. A method that I use in cases where these items are in dispute is to make a list of assets that are in dispute and having each spouse take turns selecting from the list until all of the assets are accounted for.

Antiques, business and real estate can be valued by an appraiser. There are essentially two methods by which property can be appraised. The first and preferred method is to attempt to reach an agreement between counsel regarding the selection of a joint appraiser. If an agreement can be reached regarding the appointment of the joint appraiser, that person can be appointed as the Court's Evidence Code Section 730 expert for the purposes of issuing the appraisal report. If the parties cannot reach an agreement regarding the appraisal, each party has the right to hire his or her own appraiser to issue a report and provide testimony regarding the value of the asset.

The benefit of the Section 730 appointment is that, at least in Contra Costa County, the written report of the joint expert is received into evidence without foundation, and over any hearsay objection. Obviously there is a huge economization to the Court in using the joint expert, but counsel should consider this against the practical problems of challenging the expert should the report be detrimental to the client.

The Valuation of Businesses Interests:

Business valuations is a subspecialty largely for accountants. In dealing with business valuations, as a practical matter, my first call is to my forensic accountant. They are paid to crunch the numbers that for the most part can be mind-numbing. As attorneys we do not need to get into the specifics of the accounting exercise to be effective. What the attorneys must know, is that a business value, like other assets, is the market value. A valuation of a business will include physical assets, account receivables and goodwill.

Long Term Assets – Retirement Plans, Insurance:

Retirement Plans

There are generally speaking, two types of retirement plans. They are defined benefits plans and defined contribution plans. The community interest in these plans, as well as other employment related benefits, is based on the extent to which they were earned during the marriage, as opposed to their actual vesting dates.

Retirement plans are to be divided equally between the parties as required by FC 2550 and 2610. For the Court to have jurisdiction over the retirement plan, it must be given notice of the proceedings. An order or judgment dividing the employee benefit

plan is not enforceable against the plan unless the plan is joined as a party in the marital proceedings. See FC 2060. It is a good practice to join the employee benefit plan as early in the litigation as possible. There are simple judicial counsel forms that the parties can use that require relatively little work to prepare. If a pension plan is not joined as a party or, at the very least, given notice of adverse interest, the party would have no recourse against the plan should it make distributions during or even after the dissolution.

Defined benefits plans are the plans that are traditionally considered to pension plans. These benefits are determined based on income level, age, years of service, etc. These plans can be valued, usually by an actuary or accountant.

Defined contribution plans are those plans in which the values are based on contributions paid in, not the specific benefits to be received. This type of plan includes 401Ks, IRA, and other similar types of investment plans. The values of this type of plan can easily be determined by bank balance and division is usually implemented by some form of a rollover account dividing ½ the community's interest from the employee's plan. If this type of plan is a mix of community and separate contributions, the value can be determined based on some form of an apportioning of the increased value. This is as well an exercise usually relegated to the forensic accountant or actuary.

Note that when the spouse claiming an interest in a pension has attempted to murder the pension holder spouse, the intended victim is entitled to retain all of the community interest in his or her retirement and pension benefits. See FC 782.5.

Life Insurance:

Whole life insurance is a form of life insurance that is part investment, part life insurance. Paying into a whole life police builds cash reserves, referred to as the cash surrender value. For purposes of division, the whole life policy is usually valued at its cash surrender value, see *Marriage of Holmgren* (1976) 60 CA3d 869, 871. However, the whole life policy may have a higher than cash value if the insured is uninsurable were she to attempt to obtain other insurance.

Conversely, term life insurance is a life insurance policy that expires at the end of its specified term. If the premium is not paid, the policy lapses and there is no cash

surrender value. Since there is no retained value, this type of policy is, at least initially, much cheaper to obtain. At division, a term life insurance policy is usually allocated a value of $0. When the insured has a continuing support obligation, child or spousal, it may be prudent to negotiate or request that the Court order the insurance policy be maintained for the benefit of the other party until the insured's obligation to pay support terminates.

Although as a practical matter, term life insurance usually has a $0 value, the cases addressing this issue are split. In the *Estate of Logan* (1987) 191 CA3d 319, 325, the Court held that term insurance is community property subject to division only if the insured died, or became uninsurable and the premiums were paid for with community funds. The Court's specific holding was:

> "[T]erm life insurance policy upon the life of one spouse is not divisible as community property under the Family Law Act, even though premiums for the policy before separation were paid with community property funds. An exception will arise if the insured spouse becomes uninsurable during the term paid with community funds, since the right to continued coverage upon payment of future premiums is a valuable community property asset for one who is uninsurable. If the insured dies during the term paid with community funds, the proceeds of the policy are community property. When premiums for a new term have been paid from post-separation separate property earnings and the insured remains insurable, the policy must be confirmed to the insured as separate property."

In *Marriage of Elfmont*, (1995) 9 Cal.4th 1026, 1034, the Court surmised that an insured who is not medically "insurable," however, may be unable after separation to continue life insurance coverage except by exercising the policy's renewal right, previously purchased with community funds, and paying renewal premiums for one or more additional terms out of his or her separate property. If the insured then dies during an additional term thus purchased, it has been held that the community has an interest in the life insurance proceeds commensurate with its contributions to the right of renewal.

<u>Dividing Debt:</u>

Like assets, the Court must equally divide the marital debts between the parties. See FC 2550 and 2556. However, if the community debts exceed the entire value of the community assets (the negative asset community), the Court will assign the excess debt

"as the court deems just and equitable, taking into account factors such as the parties' relative ability to pay." See FC 2622.

Marital Debts Incurred After The Date Of Separation:

Debts incurred by either spouse for the common necessities of life for either spouse or children of the parties, absent a court order or written agreement, shall be confirmed to either spouse according the parties respective needs and abilities to pay at the time the debts were incurred. See FC 2623(a).

Debts incurred for the non-necessities of life shall be confirmed to the party that incurred the debt. See FC 2623(b).

Separate Debts:

Separate debts that were incurred by a spouse during the marriage, but were not incurred for the benefit of the community are confirmed the spouse that incurred the debt. See FC 2625.

Educational Loans:

A loan incurred during marriage for the education or training of a spouse is not included among the debts of the community for the purposes of equal division, but is assigned to the party that incurred the debt, unless such an assignment would be unjust. See FC 2641(b).

Note: The community has a right to reimbursement for community funds (and interest at the legal rate) used for the education or training of a party that substantially enhances that parties earning capacity, unless to do so would be unjust. See FC 2641(b).

Reimbursement for Community Debts paid by One Party After Separation.

When a party uses his or her separate property to pay for a community property debt, after separation, that party is entitled to reimbursement. See *Marriage of Epstein* (1979) 24 C3d 76, 84.

III. CUSTODY, VISITATION, AND SUPPORT

Child Custody Jurisdiction:

Generally:

The general grant of jurisdiction for child custody in dissolution actions is FC 2010 (c) which grants jurisdiction to determine child custody, visitation and support. See *Perry v. Superior Court* (1980) 108 CA3d 480. Beyond that, the family law practitioner must become familiar with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) at FC 3400, et. seq.

Note that in reviewing child custody jurisdiction cases, the UCCJEA replaced, in its entirety the old Uniform Child Custody Jurisdiction Act (UCCJA) as of January 1, 2000. Be sensitive to the statutory differences.

Note as well that the UCCJEA applies to conflicting jurisdiction with foreign counties as well as states where those factual circumstances are in *substantial conformity* with the UCCJEA. See FC 3405. However, the UCCJEA need not apply if the child custody laws of the foreign country violates fundamental principles of human rights. See FC 3405(c).

Under the UCCJEA, a court of this state may make an **initial** child custody determination only if one of the following apply:

1. This is the home state of the child on the date of the commencement of the proceedings. See FC 3421(1)(a). "Home state" means the state in which the child lived with a parent or a person acting as parent for at least six consecutive months immediately before a commencement of child custody proceedings, or in the case of a child less than six months old, the state the child lived in since birth. See FC 2402(g). Note as well that all of the provision of the UCCJEA apply to persons acting as a parent." Persons acting as a parent means a person, other than a parent who: (1) has physical custody of the child or has had physical custody for at least 6 consecutive months within one year immediately preceding the commencement of a child custody proceeding and (2) has been awarded legal custody by a court or claims a right to legal custody under California law. See FC 3402(m).

2. The home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum and
    ii. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with the state other then mere physical presence; and
    iii. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.
3. All courts having jurisdiction as provided above have declined to exercise jurisdiction on the grounds that this state is the more appropriate forum
4. No other state would have jurisdiction as specified above. See FC 3421.

A court of this state that has jurisdiction pursuant to FC 3421, has continuing jurisdiction until either of the following:

1. A court of this state determines that neither the child, nor the child and one parent, or a person acting as parent have a significant contact with the state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships.

2. A Court of this state or a Court of another state determines that the child, the child's parents, or a person acting as parent, do not presently reside in this state.

<u>Declining to Exercise Jurisdiction:</u>

If California is a home state, it must decline to exercise jurisdiction if another state is exercising jurisdiction in substantial compliance with the UCCJEA unless those proceedings have been terminated or the court of the foreign court exercising jurisdiction determines that the court of this state is the more appropriate forum.

In a proceeding to modify a child custody determination, a California court must determine whether there is an enforcement action pending in another state. If an enforcement action is pending in another state, the California court may do one of the following:

1. Stay proceedings for modification pending the entry of an order of the state enforcing, denying, or dismissing the proceeding for enforcement;

2. Enjoin the parties from continuing with the enforcement proceeding;

3. Proceed with modification under conditions it considers appropriate. See FC 3426.

A California court that has home state jurisdiction, may decline to exercise that jurisdiction if, at any time, it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon a motion of a party, the court's own motion, or a request from a foreign court. See FC 3427.

In determining whether to decline jurisdiction and allow a foreign court to proceed with jurisdiction the California court must consider all relevant factors, including:

(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.

(2) The length of time the child has resided outside this state.

(3) The distance between the court in this state and the court in the state that would assume jurisdiction.

(4) The degree of financial hardship to the parties in litigating in one forum over the other.

(5) Any agreement of the parties as to which state should assume jurisdiction.

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child.

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.

(8) The familiarity of the court of each state with the facts and issues in the pending litigation. See FC 3427(b).

If a California court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition

that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper. See FC 3427(c).

A California court may decline to exercise its jurisdiction if a child custody determination is incidental to an action for dissolution of marriage or another proceeding while still retaining jurisdiction over the dissolution of marriage or other proceeding. See FC 3427(d).

If it appears to the court that it is clearly an inappropriate forum, the court may require the party who commenced the proceeding to pay, in addition to the costs of the proceeding in this state, necessary travel and other expenses, including attorney's fees, incurred by the other parties or their witnesses. See FC 3427(e).

Unjustifiable conduct by a party:

If a California court has home state jurisdiction under the UCCJEA because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless one of the following are true:

(1) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction.

(2) A court of the state otherwise having home state jurisdiction determines that California is a more convenient.

(3) No court of any other state would have home state jurisdiction. See FC 3428(a).

If a California court declines to exercise jurisdiction, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustified conduct, including staying the proceeding until a child custody proceeding is started in another home state’s court. See FC 3428(b).

If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction due to the unjustifiable of a party, it shall assess against the party seeking to invoke its jurisdiction any necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care incurred during the course of the proceedings, unless the

party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless otherwise authorized by law. See FC 3428(c).

In making a determination under Section 3428, a court shall not consider as a factor weighing against the petitioner any taking of the child, or retention of the child after a visit or other temporary relinquishment of physical custody, from the person who has legal custody, if there is evidence that the taking or retention of the child was a result of domestic violence against the petitioner, as defined in Section 6211. See FC 3428 (d).

Modification After Issuance of an Out of State Order:

Temporary Emergency Jurisdiction:

Even if another state has exclusive continuing jurisdiction, California may exercise **temporary** child custody jurisdiction if the child is present in this state and:

1. The child has been abandoned in this state; or

2. The exercise of jurisdiction in this state is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse. See FC 3424(a).

If no previous child custody determination has been made, the temporary order issued as described above will become a final determination should California become the home state. See FC 3424(b).

If there is a prior custody determination by a foreign jurisdiction or custody proceedings have been initiated in the foreign proceedings, the court must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having home state jurisdiction. The temporary order issued by the California court will remain effective until the home state court issues its order, the period specified by the California court expired. See FC 3424(c).

As soon as the California court has information that child custody proceedings have commenced in another state or that another state has issued a child custody order in substantial compliance with the UCCJEA, the California court must communicate with the other Court.

Non Emergency Modification Jurisdiction:

A California court cannot modify a child custody determination of another state unless one of the basis for initial child custody jurisdiction is present and

1. The court of the other state determines that it no longer has exclusive continuing jurisdiction or that California would be a more convenient forum; or

2. A court of this state or the issuing state determines that the child, the child's parents, and a person acting as parent, do not presently reside in the other state. See FC 3423.

Types Of Custody Arrangements:

Forms of Custody:

There are two types of child custody: legal custody and physical custody. Legal custody relates simply to a parent's rights and responsibilities to make decision related to the health, education and welfare of a child. These rights and responsibilities may rest with one parent, called sole legal custody, or shared between both parents called joint legal custody. See FCs 3003 and 3006.

Physical custody refers to time share. Parents will have joint physical custody if each of the parents has significant periods of physical custody in such a manner as to assure a child of frequent and continuing contact with both parents. See FC 3004. A parent will have sole physical custody when a child resides primarily with and is under the supervision of one parent, subject to the Court's power to award visitation to the other parent. See FC 3007.

Visitation And Custodial Determinations:

Legislative Declarations:

The California legislature declares in FC 3020 that:

1. It is the public policy of California to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children.

2. The perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.

3. It is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011.

4. Where the above policies are in conflict, any court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members.

As is clear from the above that the court's guiding principle in issuing a custody order is what custody or visitation plan is in the best interest of the child. In determining what is in the child's best interest, the court must consider the following:

(a) The health, safety, and welfare of the child.

(b) Any history of abuse by one parent or any other person seeking custody against any of the following:

(1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary.

(2) The other parent.

(3) A parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship.

As a prerequisite to the consideration of allegations of abuse, the court **may** require substantial independent corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services

to victims of sexual assault or domestic violence. As used in Section 3011 "abuse against a child" means "child abuse" as defined in Section 11165.6 of the Penal Code and abuse against any of the other persons described in paragraph (2) or (3) means "abuse" as defined in FC 6203.

(c) The nature and amount of contact with both parents, except as provided in FC 3046.

(d) The habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent. Before considering these allegations, the court **may** first require independent corroboration, including, but not limited to, written reports from law enforcement agencies, courts, probation departments, social welfare agencies, medical facilities, rehabilitation facilities, or other public agencies or nonprofit organizations providing drug and alcohol abuse services. For these purposes, "controlled substances" has the same meaning as defined in the California Uniform Controlled Substances Act, Division 10 (commencing with Section 11000) of the Health and Safety Code.

(e) Where allegations about a parent as described above in sections (b) or (d) have been brought to the attention of the court, and the court makes an order for sole or joint custody to that parent, the court must state its reasons in writing or on the record. In these circumstances, the court must also ensure that any order regarding custody or visitation is specific as to time, day, place, and manner of transfer of the child.

Although the court is required to consider the above in making a child custody determination, the Court may also consider any other factors it finds relevant. See FC 3011. This gives the court broad discretion in making child custody orders. Note as well that although the Court is required by FC 3011(d) to consider the habitual or continual use of drugs by a parent, this does not authorize the court to order drug testing to independently confirm an allegation of drug use by a parent. See *Wainwright v. Superior Court* (2000) 84 CA4th 262.

Kid's Choice:

The court may consider the child's wishes, if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody. See FC 3042, but the child does not get to make the custodial decisions. Evidence of the child's preferences is usually admitted through the family court services mediator or a child custody evaluator.

Presumptions Against Perpetrators of Domestic Violence:

If the Court makes a finding that a party seeking custody of a child is a perpetrator of domestic violence, or has been so within the last 5 years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence. In determining whether this presumption has been overcome, the court shall consider all of the following factors:

(1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. This best interest of the child determination cannot be based on FCs 3011 or 3040.

(2) Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

(3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.

(4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.

(5) Whether the perpetrator is on probation or parole and whether he or she has complied with the terms and conditions of probation or parole.

(6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.

(7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

Bars to custody and visitation:

The following classifications of people, with some exceptions, cannot be granted custody or visitation of a minor child:

1. The person is required to be registered as a sex offender under Sections 290 of the Penal Code where the victim was a minor, or if the person has been convicted under Section 273a, 273d, or 647.6 of the Penal Code.

2. The person has been convicted of rape and the child was conceived as a result of that crime.

3. The person has been convicted of murder in the first degree, as defined in Section 189 of the Penal Code, and the victim of the murder was the other parent of the child who is the subject of the order, unless the murder was in self defense, again with other restrictions. See FC 3030.

Visitation:

When one parent is granted sole physical custody, this is subject to the court's authority grant visitation to the other parent. See FC 3007. The court is required to grant visitation to the non-custodial parent, unless it is shown that the visitation would be detrimental to the best interest of the child. See FC 3100.

Procedural Framework:

Much of the legal framework regarding child custody and visitation is discussed above. When we are discussing child custody and visitation we are really discussing what relationship a child or children will have with their parents. Will one parent have primary physical custody or will the parents have joint physical custody and effectively be able to co-parent? To determine just what arrangement is in a child's best interest, the courts need assistance. This assistance is provided in the form of a process. In a contested custody/visitation case, FC 3170 requires that the parties attend mediation. Mediation must be set before or concurrent with the custody hearing (FC 3175).

Mediation is a service provided by the court to reduce the acrimony that may exist between the parties, to develop an agreement assuring the child close and continuing contact with both parents that is in the child's best interest consistent with FCs 3011 and 3020, and to effect a settlement of the issue of visitation rights of all parties that is in the child's best interest. See FC 3160 and 3161. Mediators are professionals possessing at least a Masters degree in psychology, social work, marriage, family and child counseling, or other behavioral science substantially related to marriage and family interpersonal relationships. Their minimal experiential qualifications as specified in FC 1815.

Mediation usually takes place without the assistance of counsel, so it is imperative that counsel adequately explain and prepare their clients for the mediation process.

As a practical matter there are two forms of court-sponsored mediation: confidential and recommending. In confidential mediation, if the parties do not reach an agreement, the mediator will not submit a recommendation to the court. If the parties do not reach an agreement in a recommending mediation the mediator will submit a recommendation to the Court. Each county is free to decide whether to have confidential or recommending mediation.

Note: FC 3177 states that mediation shall be held in private and shall be confidential and that all communications, verbal or written, from the parties to the mediator made in the proceeding, are official information within the meaning of Cal. Evidence Code Section 1040. However, this means that court personal cannot release this information to the public. If local rules permit, Section 3177 does not restrict the mediator's ability or duty to report such information, and its recommendations to the Court. In short, as far as our clients are concerned mediation is not confidential.

FC 3180 allows the mediator to interview a minor. If the County is a recommending county, this is the preferred method in which the child's wishes and opinions can be disseminated to the court. As a practical matter, the courts are protective of children and will not, except in very special circumstances allow a child to testify. The writer knows of one judge who has stated on the record that "any parent willing to bring a

child into these proceedings to testify is an unfit parent." Bear this in mind when your client asks to let the child "talk to the judge."

When there is a history of domestic violence, and upon the request of the individual claimed to be the victim of domestic violence, the mediator can conduct separate mediation. That is mediation held between the parties on different days. As a practical matter, this form of mediation, forces the mediation to make a recommendation to the court based on each party's respective mediation (which is more of an interview by the mediator). See FC 3181.

If the parties can't reach an agreement in mediation, in a recommending county the mediator will issue a recommendation to the court. The recommendation may provide a detailed parenting plan, or it may suggest further evaluation, a private child custody evaluation or, the appointment of counsel for the minor. See FC 3110-3118, 3150-3153.

Child Custody Evaluation:

In any contested child custody proceeding, the court may appoint a child custody evaluator, if the Court determines that to do so will be in the best interest of the child or children. The minimum requirements for the child custody evaluation are delineated in FC 3118(b). Once the investigation is complete, the evaluator must file a confidential written report with the clerk of the court and serve the parties with a copy of the report no later than 10 days prior to the custody hearing.

Other Options for the Court:

A court may require parents or any other party involved in a custody or visitation dispute, and the minor child, to participate in outpatient counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling, including, but not limited to, mental health or substance abuse services, for not more than one year, provided that the program selected has counseling available for the designated period of time, if the court finds both of the following:

(1) The dispute between the parents, between the parent or parents and the child, between the parent or parents and another party seeking custody or visitation rights with the child, or between a party seeking custody or visitation rights and the child, poses a substantial danger to the best interest of the child.

(2) The counseling is in the best interest of the child.

Modification Of Custody And Visitation Terms.

An order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child requires modification or termination of the order. If either parent opposes the modification or termination order, the court shall state in its decision the reasons for modification or termination of the joint custody order. See FC 3087.

A party seeking to modify a custody order must show a substantial change of circumstance since the custody order was made to justify a change of custody of a judgment custody decree. See *Marriage of Carney* (1979) 24 C3d 725. However, if the order issued was a temporary order, or a stipulated order, the court may modify the order based on a showing that such a modification is in the child's best interest. See *Montenegro v. Diaz,* (2001) 26 C4th. 249.

When a court is modifying a custodial decree, it must apply the same standards as the initial child custody/visitation order. See *Marriage of Rosson* (1986) 178 CA3d 1094. 1102.

Determining Support:

Child Support:

Preliminary considerations:

Both parents have an equal obligation to support their children in a manner suitable for the child circumstances. See FC 3900. The duration of this obligation continues to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the time the child completes the 12th grade or attains the age of 19 years, whichever comes first. See FC 3901.

Both parents as well, have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means. See FC 3910.

The Statewide Uniform Guideline (FC 4050-4076):

The statewide uniform child support guideline was adopted by statute effective July 1, 1992. The guideline mandatory and the court can only depart from the guideline in special circumstances.

The statewide guideline is actually an algebraic formula adopted by statute at FC 4055. The formula is CS=K [HN-(H%)(TN)]. For our purposes, you do not need to understand the mathematics of the formula. There are a myriad of support calculation programs approved by the judicial counsel for use. The most common of these programs are Dissomaster™, Xspouse™, and SupportTax™.

The guideline formula calculates child support based on the parents net disposable income. See FC 4059-4060. The net income is derived by deducting from a party's gross income the following deductions:

> (a) The state and federal income tax liability resulting from the parties' taxable income. Federal and state income tax deductions shall bear an accurate relationship to the tax status of the parties (that is, single, married, married filing separately, or head of household) and number of dependents. State and federal income taxes shall be those actually payable (not necessarily current withholding) after considering appropriate filing status, all available exclusions, deductions, and credits.
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> (b) Deductions attributed to the employee's contribution or the self-employed worker's contribution pursuant to the Federal Insurance Contributions Act (FICA), or an amount not to exceed that allowed under FICA for persons not subject to FICA, provided that the deducted amount is used to secure retirement or disability benefits for the parent.
>
> (c) Deductions for mandatory union dues and retirement benefits, provided that they are required as a condition of employment.

(d) Deductions for health insurance or health plan premiums for the parent and for any children the parent has an obligation to support and deductions for state disability insurance premiums.

(e) Any child or spousal support actually being paid by the parent pursuant to a court order, to or for the benefit of any person who is not a subject of the order to be established by the court. In the absence of a court order, any child support actually being paid, not to exceed the amount established by the guideline, for natural or adopted children of the parent not residing in that parent's home, who are not the subject of the order to be established by the court, and of whom the parent has a duty of support.

(f) Job-related expenses, if allowed by the court after consideration of whether the expenses are necessary, the benefit to the employee, and any other relevant facts.

(g) A deduction for hardship. The amount of the hardship shall not be deducted from the amount of child support, but shall be deducted from the income of the party to whom it applies. In applying any hardship, the court shall seek to provide equity between competing child support orders.

The allowable hardships are listed in FC 4071 as: Extraordinary health expenses for which the parent is financially responsible, uninsured catastrophic losses, and the minimum basic living expenses of other parent's natural or adopted children for which the parent has an obligation to support.

Note: The maximum amount of the hardship deduction is the support amount allocated for each child under the support order. See FC 4071(b). As a practical consideration, most courts will limit the hardship amount to ½ of the amount of support allocated under the order if there are 2 parents available for the support of that child.

Note that gross income for child support purposes is income from whatever source derived, excluding child support payments actually received as well as need based public assistance. See FC 4058(a) and (c).

The court may, in its discretion, consider a parent's earning capacity, in lieu of a parent's actual income, when the exercise of this discretion is consistent with the best interest of the child. See FC 4058(b).

The amount of support specified under statewide uniform guideline is presumptively correct. See FC 4057(a). This presumption is a rebuttable presumption affecting the burden of proof and may be rebutted by showing, by a preponderance of the evidence, that the application of the formula would be unjust or inappropriate consistent with the goals established by establishing the guideline delineated in FC 4053. See FC 4057.

The court can only deviate from issuing an guideline support order if: (1) The parties have stipulated to a different amount of child support under subdivision (a) of FC 4065. (2) The sale of the family residence is deferred and the rental value of the family residence in which the children reside exceeds the mortgage payments, homeowner's insurance, and property taxes. (3) The parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children. (4) A party is not contributing to the needs of the children at a level commensurate with that party's custodial time. (5) Application of the formula would be unjust or inappropriate due to special circumstances in the particular case. These special circumstances include, but are not limited to, cases in which the parents have different time-sharing arrangements for different children; cases in which both parents have substantially equal time-sharing of the children and one parent has a much lower or higher percentage of income used for housing than the other parent; cases in which the children have special medical or other needs that could require child support that would be greater than the formula amount. See FC 4057.

If the court deviates from the guideline formula amount, the court must state, on the record the (1) The amount of support that would have been ordered under the guideline formula. (2) The reasons the amount of support ordered differs from the guideline formula amount. (3) The reasons the amount of support ordered is consistent with the best interests of the children. See FC 4056.

Should the parties wish to enter into a below-guideline support amount, the parties must declare, in writing or on the record that:

(1) They are fully informed of their rights concerning child support.

(2) The order is being agreed to without coercion or duress.

(3) The agreement is in the best interests of the children involved.

(4) The needs of the children will be adequately met by the stipulated amount.

(5) The right to support has not been assigned to the county pursuant to Section 11477 of the Welfare and Institutions Code and no public assistance application is pending.

Additions to Guideline:

The court must order, as an add on to child support, child care costs related to employment or to reasonable necessary education or training for employment; and the reasonable uninsured health care costs for the children.

The court may order, as an addition to child support, costs related to the education or other special needs of the children; as well as travel expenses for visitation.

Note: The court may adjust the child support order to take into consideration fluctuating or seasonal income. See FC 4064. However, if the court issues an order that deviates from the guideline, the court must make findings on the record in writing in compliance with FC 4056. See *Marriage of Hall* (2000) 81 CA4th 313.

Spousal Support:

There are two forms of spousal support: temporary and judgment (also called permanent).

Temporary Spousal Support:

Most courts have established local temporary spousal support guidelines. Temporary spousal support is the form of spousal support available during the pendency of the dissolution action. The trial court has wide discretion in awarding a local guideline temporary support order or to deviate from the local guideline, should circumstances warrant it. See *Marriage of Wittgrove* (2004) 120 Cal. App 4th 1317. Its purpose is to

maintain the living conditions and standards of the parties in as close to the status quo as possible pending trial and the division of the assets and debts. See *Marriage of Winter* (1992) 7 Cal.App.4th 1926. Even where the amount of temporary spousal support set through the local guidelines exceed the marital standard of living that the parties are accustomed to, the use of the guideline is still proper. See *Marriage of Wittgrove* at 1328. The courts have wide discretion in setting temporary support and their decision on temporary support will only be set aside by the appellate court if the trial court has "abuse[d] its discretion." See *Wittgrove* at 1327.

Judgment Spousal Support:

Judgment support (also called permanent support) is awarded at the conclusion of the dissolution proceedings and must be based on a weighing of the factors enumerated in FC 4320. It is reversible error for the court to make a judgment support order based on the local spousal support guideline. The court should not even use the temporary support guideline as a starting point for analysis. See *Marriage of Schulze* (1997) 60 CA4th 519, 527.

In making a judgment support order the court must consider **all** of the factors listed in FC 4320. These factors are:

(a)The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

(2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

(c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

(d) The needs of each party based on the standard of living established during the marriage.

(e) The obligations and assets, including the separate property, of each party.

(f) The duration of the marriage.
(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.
(h) The age and health of the parties.
(i) Documented evidence of any history of domestic violence, as defined in FC 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.
(j) The immediate and specific tax consequences to each party.
(k) The balance of the hardships to each party.
(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of ten years or longer, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in FC 4320, 4336, and the circumstances of the parties.
(m) The criminal conviction of an abusive spouse and the presumption against an award of support such a spouse pursuant to FC 4325.
(n) Any other factors the court determines are just and equitable.

In a contested spousal support trial, counsel should be prepared to argue each and every factor in FC 4320. Unless otherwise agreed to in writing, an award of spousal support shall terminate on the death of either party, or the remarriage of the party receiving support. See FC 4337.

Further, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabiting with a person of the opposite sex. Upon a determination that circumstances have changed, the court may modify or terminate the spousal support. See FC 4323.

When making an award of judgment spousal support, counsel for the payor spouse should request court make a warning that it is the policy of this state that a supported spouse become self supporting within a reasonable amount of time. See *Marriage of Gavron* (1988) 203 CA3d 705**.**