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10 Common Misconceptions about Family Law

By Michelle S. Robins



IT IS VERY COMMON FOR family law attorneys to hear clients and other attorneys (who don't practice family law) make statements about family law issues that are incorrect or based on outdated laws or laws in other states. This article sets forth some of the most common misconceptions and the current state of the law on those issues.

1. Common Law Marriage

Contrary to the belief of many people, there is no such thing as common law marriage in California. The doctrine of common law marriage was abolished by statute in 1895. However, this does not preclude unmarried cohabitators from attempting to establish a contractual obligation for support and rights to ownership of property. These claims simply cannot be based upon the Family Law Act (i.e., in *Marvin v. Marvin [Marvin I]* (1976) 18 Cal.3d 660, the Court held that the Family Law Act could not be applied to nonmarital relationships). Litigation over these kinds of contractual disputes is heard in civil courtrooms rather than family law courtrooms.

Although a common law marriage cannot be entered into in California, California recognizes the validity of such marriages if they are validly entered into in another state.

California also recognizes domestic partnerships where two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring register their relationship with the state. These individuals must live together and be either of the following: (1) both persons are members of the same sex or (2) one or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals.

2. Dissolution of Marriage versus Legal Separation

The major difference between a Dissolution of Marriage and Legal Separation in California is that a dissolution ends a marriage contract between two individuals and both

parties are free to marry again. If the parties are granted a Judgment of Legal Separation, they are only legally separated, their marital status remains intact and they are not free to marry again.

There is no residency requirement for filing a petition for legal separation. There is a residency requirement for filing a petition for dissolution of marriage. Where one of the parties files for legal separation because at the time of commencement of the proceeding neither party has complied with the residence requirements for a dissolution, either party may amend their petition to request a dissolution of marriage. However, once a Judgment of Legal Separation is granted, one of the parties has to file a Petition for Dissolution of Marriage in order for the parties to obtain a Judgment of Dissolution of their marriage.

3. No Fault Divorces

There is no need in California to prove specific acts of misconduct by a spouse in order to be divorced. Family Code section 2335 provides that: "Except as otherwise provided by statute, in a

pleading or proceeding for dissolution of marriage or legal separation of the parties, including depositions and discovery proceedings, evidence of specific acts of misconduct is improper and inadmissible" (Fam. Code §2335.).

The most common ground for dissolving a marriage is called "irreconcilable difference". The irreconcilable differences ground is purposely broad and makes questions of fault or misconduct by either party irrelevant. Thus, in California a marriage can be terminated simply because one of the parties decides that he or she no longer wants to be married. This is contrary to other states where misconduct by a party may be punished by a party getting a smaller share of the marital property.

When a party files an action for Annulment rather than Dissolution of Marriage, the specific acts of the parties is admissible, including evidence of bigamy, incest, unsound mind, invalid consent and fraudulent inducement.

4. Standard Used by Courts in Custody Disputes

In California, the court uses a "best interests" standard to determine the custodial arrangement for the children. The court usually considers the parents' wishes, the mental and physical health of the parents and the children, any history of domestic abuse, the child's age and attachment to each parent and with older children, sometimes the child's wishes.

5. Age When Child Can State a Preference in Custody Disputes

Contrary to popular belief, there is no specific age at which a court will consider a child's preference in a custody dispute. Instead, the court applies its discretion and considers the maturity of the child.

Family Code section 3042 provides "(a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody".

Furthermore, some courts will not consider the child's preference irrespective of a child's maturity since giving such power to a child often damages the relationship between the child and the parent not preferred by the child.

6. Joint Physical Custody

The term "joint physical custody" does not mean that the parties have equal custodial time with the child (i.e., 50/50). In California, "joint physical custody" means that each of the parents has significant periods of physical custody with the child and custody is shared by the parents in such a way so as to ensure a child of frequent and continuing contact with both parents.

7. Computation of Child Support

California uses a child support guideline as a basis for determining the amount of child support a party will pay. The guidelines consider the incomes of the parties, the times the parties spend with their children, and a variety of income tax factors.

Courts can adjust the guideline amounts in very limited circumstances. The gender of the party requesting or receiving child support is irrelevant. Computer programs have been created based on these guidelines and the courts use these computer programs to compute child support.

8. Wage Assignments

Even if a party has no history of failing to pay child support, the court is required to issue a wage assignment. *Family Code* §5230 provides that: "When the court orders a party to pay an amount for support or orders a modification of the amount of support to be paid, the court shall include in its order an earnings assignment order for support that orders the employer of the obligor to pay to the obligee that portion of the obligor's earnings due or to become due in the future. . ." Despite this code section, many parties stipulate that the court may stay the service of the Wage Assignment on the supporting parties' employer.

9. Division of Property

People often ask if the court has to divide community property equally. California law requires that unless the parties agree to an unequal division of property (which for various reasons some people do), or a party has engaged in a specific kind of misconduct (like not disclosing a community asset to the other party), the court must divide community assets and debts equally.

The Family Law Court also has jurisdiction to divide property that was omitted from the original property



division. Family Code §2556 provides that "In a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding.

A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. In these cases, the court shall equally divide the omitted or unadjudicated community estate asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division of the asset or liability."

10. The Cost of Divorces

Divorces do not have to bankrupt the parties. As in other fields of law, there are alternatives to litigation. One of the most popular and cost-effective means of dissolving a marriage in California is mediation where an individual acts as an impartial third party that assists the parties in reaching an amicable agreement regarding all of their disputed issues. ⚡

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