

The Purpose-Driven Divorce

When you hire a divorce lawyer, you are hiring him/her to help you get a divorce. What does that mean? Very simply put, at the end of this lengthy process, is a Judgment of Dissolution.

Your divorce is not final unless Judgment is entered. Sounds silly, but some people believe they are divorced even without that piece of paper. Some have come to my office after unsuccessful jaunts with lawyers who let the case drag on for years without obtaining judgment. Below are steps to Judgment, and the purpose of each step.

STEP ONE: FILING OF PETITION/RESPONSE

Purpose: To get the process started.

California is a “no-fault” state. This means that either spouse may file a divorce without proving someone is at fault (i.e. cheating, physical violence, etc.). Thus, in order to start a divorce, one party simply files a Petition for Dissolution. Currently, this petition costs \$320 to file.

After the petition is filed, the party who filed it must serve the other side with the papers in order to notify them that a divorce proceeding has been filed. I highly recommend that prior to serving the divorce papers, you notify the other side. We've all seen the video footage of the crestfallen face of Kevin Federline, who allegedly discovered via text message that Britney filed for divorce. Divorce is difficult enough. If there is any room for courtesy, apply it.

After the other side receives the papers, they have thirty days to respond to the Petition by filing a Response. The Response currently costs \$320 to file. If they do not file a response within thirty days, the person who filed the Petition (called the Petitioner), may request a default judgment. In this case, they will generally receive everything they ask for in their papers. (with some exceptions which you must discuss with an attorney).

In California, Judgment is entered no earlier than six months after the date the responding party (called the Respondent) is served with papers. Why six months? This is the waiting period created by the Legislature to encourage reconciliation. It is also a period where you can obtain all the financial information you need before entering into an agreement. Obviously, if you can get divorced as quickly as you can get married, our society would have greater problems than it already does.

After the initial Petition is filed, automatic temporary restraining orders (ATRO's) kick in. They apply to both the PETITIONER and the RESPONDENT. Some examples of ATRO's are the following: 1) cannot remove minor children out of state; 2) cannot take benefited party off of insurance; 3) cannot transfer, convey, encumber, or conceal property; 4) cannot create probate transfer without notice. The purpose of ATRO's, amongst other things, is to prevent angry parties from absconding with the children out of malice, and to waste away all community assets in order to spite the other side.

Filing and serving divorce papers is the first step. It is by far not the last step. To get a Judgment, you must keep going.

STEP TWO: GETTING TEMPORARY ORDERS VIA OSC

Purpose: To have a sense of peace and order by having temporary orders in writing pending the Judgment.

Because it takes six months (or longer) to obtain a Judgment, in the interim, some stuff needs to be sorted out. For example: Who stays in the house? Who pays for the mortgage? If you are the supported spouse, will you get your living expenses paid for? What about spousal support? If you have children, who has custodial rights? What about child support?

Because your questions need immediate answers, it is wise to get an immediate court date in order to resolve these issues. You get a court date by filing an OSC. This stands for “Order to Show Cause”, and can resolve issues of Child Custody/Visitation, Child Support, Spousal Support, Attorneys' Fees, etc., pending the issuance of a Judgment. Currently, this costs \$40 to file.

Filing an OSC does not mean you are trigger-happy, and immediately racing to court to win. Remember: At all stages of divorce, you always have the option to reach an agreement with the other side. You are always in control of whether you want to go to court or not. Usually, if you reach an agreement, you can file it the Court. Usually, the Judge will agree with you, and even commend you for settling. There are certain exceptions, of course. For example, in California, you can never totally take away the Court's power to rule on child support.

It is always a good idea to file an OSC when issues of custody/visitation and support arise. Again, it takes six months or longer to obtain a Judgment. In the meantime, both parties should desire temporary orders for peace of mind.

Of course, if both parties have been separated for a long period of time, and are self-supporting, and have no children, there may not be any issues to be resolved pending the Judgment. In this case, I would opt to forgo the OSC.

Although the orders obtained through use of an OSC are called “pendent lite” (Latin for “while the case is pending”) temporary orders, in some cases, they may end up being the permanent orders incorporated into the Judgment. This is especially true in custody cases, because “status quo” is favored, and the longer a “temporary order” stays in place, the firmer a “status quo” arrangement becomes. It is essential to understand the important role of an OSC.

STEP THREE: DOMESTIC VIOLENCE RESTRAINING ORDERS

Purpose: In a high-conflict divorce and custody case, to protect the parties and children involved.

Unfortunately, sometimes, after a divorce or custody case is filed, someone gets angry and becomes physically or emotionally violent. This is particularly troublesome if there are minor children involved. In order to protect yourself, it may be vital to obtain a temporary restraining order against the other side.

Temporary restraining orders (usually lasting no more than 20 days) may be granted without a full evidentiary hearing (based on declaration alone). Since they are granted based on one party's declaration, they are set for hearing, where the Judge will take evidence from both sides before entering an Order for a longer restraining order. (lasting up to five years).

In California, there is a rebuttable presumption that an award of custody to a perpetrator of domestic violence is detrimental to the best interests of the child. Because of the weight this carries, restraining orders are often abused in custody cases. It is essential to immediately consult with a competent family attorney if you are experiencing domestic violence in your case.

STEP FOUR: DISCLOSURES OF FINANCES

Purpose: To Reach a Fair Settlement, and Ensure the Settlement is Not Later Overturned For Failure to Disclose

Frequently in relationships, one person knows more about their finances than the other. California is a community property state. This means, all property acquired after the date of marriage, before the date of separation, except for gift and inheritance, is community property. Community property assumes the notion that even in relationships where only one spouse works, the other spouse is contributing to the marriage by staying at home and providing domestic duties.

Sometimes, the spouse that doesn't work stays at home and does nothing. In a community property state, that doesn't matter. The law assumes they are contributing something. Thus, in a divorce, both parties are entitled to half of what was earned during the marriage.

Because of the community property laws, the law mandates that both parties must make extensive financial disclosures. Generally, they will come in two parts – the Preliminary Declarations of Disclosures (served at the outset); and the Final Declarations of Disclosures (prior to settlement or trial). Because one party may know more than the other, these mandatory disclosures are the court's way of preventing foul play. You must exchange disclosures. You cannot waive them.

If you are the supporting spouse, you may wonder: What happens if I don't disclose my assets? He or she does not know of my offshore bank account in the British Virgin Islands.

There are several consequences to not disclosing. The Judge may overturn your agreement. The Judge may punish you by awarding the non-disclosed asset to the other side. In a famous 1996 case against non-disclosure, Marriage of Rossi, Denise Rossi won \$1.3 million in the California State Lottery. 11 days later, she filed for divorce, from her 25-year marriage, never telling her husband. Judgment was entered. 2 years later, her ex-husband discovered that his ex-wife had won the lottery. (They always find out.) He filed a Motion and the judge gave the ENTIRE \$1.3 million dollar lottery winnings to the husband, since the wife had intentionally not disclosed her winnings in the divorce proceedings.

Always disclose.

STEP FIVE: REACHING AN AGREEMENT OR PREPARING FOR TRIAL

Purpose: To Get the Judgment Finalizing your Divorce Case

After disclosures have been completed, it is time to start negotiating settlement. For example, who will keep the house? How much support will you pay? And for how long? Who will have the children for Christmas or Hannukah this year?

Because both of you have completed full and thorough disclosures, you are both now in a good position to discuss settlement. It is a good idea at this time to simultaneously request the court for a trial date. I do this for my clients because with a looming trial date, both parties are more eager to resolve the case. In addition, if settlement discussions fall apart, there is already a trial date set in the future, so as not to delay the dissolution. Other attorneys prefer not to do this, so they will have more time to prepare for the trial.

If you reach an agreement, you can file a Stipulated Judgment, or a Marital Settlement Agreement (MSA). The difference between both is that in addition to being attached to the Judgment, the MSA is also a contract, and if either party breaches it, you have an additional remedy – to sue for breach of contract.

Once the Judgment is stamped by the Judge, you should receive a Notice of Entry of Judgment, which gives you a date of divorce. Only when this piece of paper has been filed is your divorce final. Congratulations!

Of course, in divorce cases, nothing is final. You may always file for Modification, but there are legal standards you must meet before the Judge will grant you one. Please consult with a competent family attorney.

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About the Author

Kelly Chang Rickert founded the Law Offices of Kelly Chang, A Professional Law Corporation. Her firm specializes in Divorce and Family Law, and handles all areas of Divorce, Annulment, Spousal Support, Child Support; Modification, Child Custody and Visitation, Prenuptial and Postnuptial Agreements, Adoptions, Property Division; Restraining Orders; and Family Law Mediation. She practices in Los Angeles and San Francisco and is happily married.