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'Til death, we divorce

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When we elect to exchange wedding vows promising each other "'til death do us part," most of us hope that we will blissfully spend the rest of our lives together with our chosen partners. However, with two out of every four couples who exchange these vows will be filing for a divorce, there is often an unspoken caveat to the wedding vows which whispers: "unless we get a divorce."

By now, with the divorce rate hovering around 50 percent for more than a decade, most people are aware of this forewarning. But few people realize that a divorce proceeding itself can also last for what feels like a lifetime.

In California, the minimum length of a traditional marriage dissolution proceeding is six months and one day from the date the divorce petition is served or a response is filed. It is not unusual for a marriage dissolution to take three to five years to actually be brought to trial. Some divorce cases take even longer. This is a stark contrast to civil actions, where stringent deadlines apply. Civil proceedings are subject to discretionary dismissals after three years, and the court is required to dismiss a case after five years, unless the parties voluntarily agree to extend this deadline. In divorce proceedings, neither the three-year discretionary dismissal nor the five-year mandatory dismissal is permitted when the court has made equitable orders for child custody, child support or spousal support. Oftentimes, there is no statutory limit to the length of a divorce case.

Another factor that can delay a divorce is the popularity of pendente lite and temporary orders in dissolution proceedings. Generally, in civil cases, the parties will file their initial pleadings, obtain a trial date, engage in discovery process, and attempt to reach settlement in preparation for trial.

Except for motions for summary judgment which adjudicate a civil case on its merits, all the legal steps referenced above still occur in a divorce proceeding, but the family court also has the ability to make a variety of orders prior to trial commencement. This includes orders for child custody, child support, spousal support, and attorney fees and costs. When substantive orders like these are made before the trial, they are referred to as pendente lite orders. When such an order lasts only until trial, it is called a temporary order. In this sense, pendente lite orders for child custody, child support and spousal support are always temporary orders. In divorce proceedings, it is common for the parties to request pendente lite or temporary orders on some or all of these issues.

Generally, by the time a divorce trial commences, orders have already been made on every issue to be decided by the court at trial, except for the division of marital assets and debts. In some cases, the family court may make temporary orders with regard to the marital estate as well. For example, the court may make temporary orders granting exclusive use and possession of a family residence, or any other property, to one of the spouses, if such orders are believed to be necessary for the safety of a particular spouse or the wellbeing of the children. The public policy behind these orders is important. For example, in appropriate cases, these temporary orders can provide for the safety and best interest of a minor child. Furthermore, these orders can also ensure that financially vulnerable parties have the funds they need to meet their daily living expenses and pursue their claims while the divorce is pending.

A common consequence of pendente lite and temporary orders is that parties must endure myriad "mini-trials" prior to the trial itself. At the time of the actual trial, the family court often re-adjudicates the very same issues that were addressed in the mini-trials. The court can make its temporary orders subject to reallocation at the time of the trial, which gives the court the ability to retroactively change the orders that the parties have been following throughout the case, or even negate them entirely. Unfortunately, if a divorce proceeding is improperly managed, this can result in wasted time and financial resources, as well as onerous legal fees.

Once a divorce decree is finally entered, the post-judgment procedures — e.g, motions for reconsideration, motions for a new trial, motions to set aside a judgment, or an appeal — can further prolong matters. Requests for relief from a judgment based on mistake, inadvertence, surprise or excusable neglect of counsel are also available. The difference is that in a divorce proceeding, such relief can be sought even after the six-month limit of Code of Civil Procedure Section 473. For example, a request based on mistake in a stipulation can be filed within a year after the judgment is entered.

A party may also file a request for relief from a judgment based on duress or mental incapacity, and such a request can be filed within two years after the entry of the judgment. Furthermore, a

party to a divorce can also file a request for relief from a divorce decree based on fraud, perjury or failure to comply with disclosure requirements within a year after the basis was or should have been discovered — which can be years or even decades after judgment was entered. A party may also seek to modify the judgment long after it is entered. For example, the court retains jurisdiction to modify orders for child custody and child support until the child reaches the age of majority. In the dissolution of longterm marriages (over 10 years), a spousal support order may last until a party dies, and the court can retain jurisdiction over the issue "indefinitely."

Motions to modify an order can be brought any time there has been a change of circumstances. This can be as simple as a change in one party's income, place of residence, or living arrangement. Under California Family Code Section 4326, the end of a child support order due to the child reaching the age of majority constitutes a change of circumstances for modifying spousal support.

Some final orders can be modified even if there has not been a change of circumstances. For example, in *In re Marriage of Schaefer,* the appellate court upheld the modification of an order for spousal support even though there had been no change of circumstances when the court found that a party had taken undue advantage of the unchanging situation for so long that other legal principles would be violated if the order was not modified. When a motion to modify an order from a divorce judgment is before the court, the court is often required to look at a very broad range of equitable facts, with almost the same scope as that of the original divorce proceeding.

If a marital asset or debt was not adjudicated in the original divorce proceeding, a party can file an "omitted asset" motion. This can result in a new trial on issues like whether the asset or debt is community property, whether it was actually omitted, its value, and how it should be divided and apportioned. In *In re Marriage of Melton*, the judgment included a division of the husband's pension plan, but the appellate court found that a portion of the pension still qualified as an omitted asset because the judgment's division of the pension was based on the parties' beliefs as to its value rather than its actual value. Similarly, in *In re Marriage of Mason*, the court held that if a judgment does not address a business' goodwill, the goodwill might be considered an omitted asset, even if the other assets of the business were divided in the original divorce decree.

Because there is no concrete statute of limitations on when an omitted asset motion can be brought, a divorce proceeding can reappear years or even decades after a person believes their divorce is over. As the California Supreme Court stated in *Henn v. Henn*, "a spouse's entitlement to a share of the community property arises at the time that the property is acquired." That interest is not altered except by judicial decree or an agreement between the parties. Hence, under settled principles of California community property law, "property which is not mentioned in the pleadings as community property is left unadjudicated by decree of divorce, and is subject to future litigation, the parties being tenants in common meanwhile." In conclusion, even a properly managed divorce proceeding can last much longer than initially anticipated, revisiting the same issues for what can feel like a lifetime. Therefore, it is important to choose your partner carefully before exchanging wedding vows, because, whether you stay married or get a divorce, you may find truth in the phrase "'til death do us part."

It is just as important that a divorcing party acquire the legal services of an experienced and certified family law practitioner who knows how to run the case as efficiently and summarily as possible, in order to reduce the possibility that the divorce proceedings will continue for the rest of one's life.

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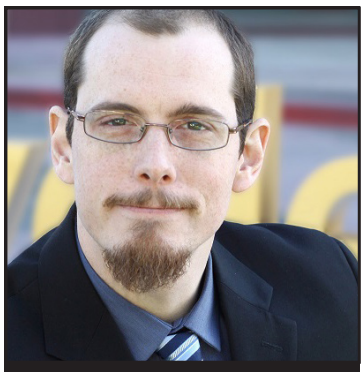
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