CHAPTER 1

Introduction to Family Law

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CHAPTER OVERVIEW

Family law is one of the most challenging and rapidly evolving areas of law today. It involves elements of psychology, taxation, mathematics, accounting, and, of course, law, to name but a few. In addition, the accomplished practitioner in this field must excel at legal research and writing, trial advocacy, and human relations. It has often been said that family law is an area in which it is relatively easy to do poorly and difficult to do well.

This exciting area of the law involves virtually every aspect of the human condition; never will the practitioner see, hear, and experience the range of human emotion as in family law. When one catches a person involved in a marital dissolution, one is not seeing him at his best. Any unpleasant behavior is forgotten, though, the first time a parent thanks you for literally saving her child's life. Believe it; it happens.

This chapter will introduce some of the general concepts used in family law. You will review some basic aspects of civil procedure and study in some depth concepts of jurisdiction, service of process, and venue. You will be exposed to some of the ethical aspects of the practice of law in

general, and the practice of family law in particular. Finally, there is a general discussion and overview of the fundamental basis for family law in California: the Family Code.

A. The Approach to Family Law

The term "family law" is somewhat of a euphemism in that it is more accurately described, in many respects, as "unfamily law." Indeed, for the most part, when one thinks of family law, the first thought to come to mind is that of divorce or, more accurately from a California perspective, marital dissolution. However, divorce is only one aspect of a very complex and diverse study.

When the subject of family law is examined in any detail, it becomes apparent that this moniker is an umbrella encompassing many diverse and complex areas of study including juvenile law, adoption, guardianship and conservatorship (typically under the major heading "probate"), legal separation, and marital dissolution, to name but a few.

Due to the sheer volume of material, attempting to address all of these subjects would fail to do justice to any of them. Discussion of these subjects sufficient to do more than merely mention their major aspects would exceed the scope of most school terms. The focus of this work, then, is the termination of marital relationships. This study will emphasize division of property, child custody and visitation, issues of spousal and child support, and procedural considerations in the application of these concepts to everyday situations.

Because this book is designed primarily for a course of study leading to a career as a paralegal, this author combines a strong belief in the concept of "learn by doing" with a heavy emphasis on the conceptual aspects of the study of family law. This combination provides a strong foundation for the student to enter the workplace with a familiarity with the basic concepts involved and a working knowledge of the preparation and utilization of the various judicial council forms that are the cornerstone of everyday family law practice.

This book is divided into several main sections, each of which provides more detailed insights into the myriad of subjects encompassed by the general category. The major categories include a general introduction to the legal system and the legal process, the nature and origins of the community property system in use in California, the procedural aspects of family law (that is, *marital dissolution*) practice, child custody and visitation, spousal support ("alimony"), child support, enforcement of orders, and selected procedural and substantive issues, including a brief discussion of nonmarital relationships, discovery, marital settlement agreements, and paternity.

As you approach the study of family law, keep in mind that the law is a constantly changing creature. Family law is no exception. In fact, along with taxation, family law is one of the most rapidly evolving areas of law at this time. As such, the *concepts* become every bit as important as the specific code sections and case law in use at any given moment. Accordingly, the memorization of code sections and certain cases, while not necessarily disadvantageous, should not be the student's primary focus. Instead, that focus should be directed to a thorough understanding of the ideas underlying the statutes. In this way, as the statutes change (and they *will*), the student will be able to change and adapt along with them.

Second, and of equal importance, is the concept that the law, in many respects, represents not always the study of what things *are*, but what they *should* be. Very often the student will not necessarily be expected to know the right answer, but *will* be expected to be familiar enough with the concepts in question to fully address and argue both (that is "all") sides of the question presented. The student is thus cautioned not to rely entirely on an assessment of the right answer because in the next breath she may be called upon to challenge what she "knows" to be right, and vigorously argue the opposite position. The ability to do so represents a true command of the subject.

A working knowledge of these concepts is important in our context for several reasons. Foremost is the absolute requirement of understanding the environment into which the student is about to enter (here, of course, family law). Along a similar vein, an understanding of the general process of our court system will assist in the study and practice of *all* areas of law because, for the most part (and with apologies to Gertrude Stein), "a lawsuit is a lawsuit is a lawsuit." As the reader will soon discover, in many respects there is very little procedural difference between a termination of marriage proceeding and most other civil lawsuits. A brief review of these concepts of general civil litigation is thus recommended.

Most people are probably familiar, through personal experience or television, with what is known as a *personal injury* lawsuit (for example, one typically arising out of an automobile accident). Some may have been involved in a dispute over a broken promise or a product that failed to perform as expected. If so, then they most likely saw a *complaint*, which started the lawsuit, an *answer*, which responded to the complaint, and then various other documents involving pretrial requests for information from either or both parties or from the court. Then, ultimately, they may have participated in a trial, which typically resolved the matter, and some even may have participated in an appeal following trial.

With some general exceptions, this is exactly the same type of procedure that a participant in a marital termination proceeding will follow (with

certain changes in the names of documents and the designation of the parties). As such, a working knowledge of the structure of the court system and some of its basic procedures will assist you in your study of family law.

In most counties, the population is so numerous and the workload so great that the separate departments of the superior court (criminal, probate, family law, and so forth) are often characterized not simply by their own courtroom, but by their own section of the building. Indeed, in downtown Los Angeles the criminal caseload is so high that, even though the criminal cases are handled by a separate department of one superior court, they are heard in their own building, which is over 15 stories tall. Similarly, the family law department of the downtown Los Angeles Superior Court occupies nearly an entire floor of the courthouse with over 14 departments (courtrooms) devoted to family law.

From a procedural standpoint, the *branch court* concept bears mention. Each county in each state typically has its own headquarters or central office. Just as each state has its capitol, and each city has its city hall, each county has *its* center of government. Although the label may not be in current fashion, this concept is generally referred to as the *county seat*. While there is little need for such distinction in a small county where one courthouse will typically suffice, in the larger counties this concept is indeed present. In Los Angeles County, for example, the county seat is in downtown Los Angeles. In Orange County, the county seat is in Santa Ana. In San Francisco County, the county seat is San Francisco.

To meet the needs of a large population, and to obviate a trip downtown just to use the court system, most counties have adopted the use of a series of branch courts, sprinkled liberally throughout the county, to make the courts easily accessible to all areas in the region. In Los Angeles, for example, there are 50 separate courthouse locations 12 branch courts: Central (downtown Los Angeles and surrounding areas), East (Pomona and surrounding areas), North (Lancaster), North Central (Burbank, Glendale), North Valley (Chatsworth, San Fernando), Northeast (Pasadena and surrounding communities), Northwest (Van Nuys), South (Catalina, Long Beach and San Pedro), South Central (Compton), Southeast (Norwalk, Whittier and surrounding areas), Southwest (Torrance and nearby communities), West (Beverly Hills, Malibu, Santa Monica and related areas). The various branches are defined geographically, with the county being split up (generally by known cities or areas of the county) by territory. As a rule, in each of these branch courts you will find all the basic court services available in the county seat. There are various local rules that have been adopted by these many courts (including the county seat), especially in the context of a family law proceeding, and adherence to them is a requirement.

From a statutory standpoint, there are literally *thousands* of laws (code sections) in California that have been enacted over the years and are *still* operative. Fortunately, this course of study concerns itself with only a few.

In general, however, there is a large amount of legislation on the subject of family law. The following is a basic list of those laws and their location in the code:[1]

- **Abandonment and neglect of children:**
  Pen. C. §§270 et seq.
- **Adoptions:**
  Fam. C. §§8500 et seq.
- **Child support:**
  Fam. C. §§3900 et seq.
- **Spousal support:**
  Fam. C. §§4300 et seq.
- **Custody of children:**
  Fam. C. §§3000 et seq.
- **Division of property:**
  Fam. C. §§2500 et seq.
- **Conservatorships:**
  Prob. C. §§1400 et seq.
- **Dissolution, Nullity and Legal Separation of marriage:**
  Fam. C. §§2000 et seq.
- **Enforcement of Family Law Act judgments:**
  C.C.P. §683.310
- **Enforcement of support orders:**
  Fam. C. §4500
- **Guardianships:**
  Prob. C. §§1400 et seq.
- **Juvenile Court Law:**
  W.&I.C. §§200 et seq.
- **Marital agreements:**
  Fam. C. §§1500 et seq.
- **Parent and child relationships:**
  Fam. C. §§7500 et seq.
- **Uniform Reciprocal Enforcement of Support Act (URESA):**
  Fam. C. §§4800 et seq.
- **Spousal abuse:**
  Pen. C. §§273.8 et seq.
- **Uniform Parentage Act:**
  Fam. C. §§7600 et seq.
- **Uniform Child Custody Jurisdiction Act:**
  Fam. C. §§3400 et seq.
- **Uniform Premarital Agreement Act:**
  Fam. C. §§1600 et seq.
- **Void or voidable marriage:**
  Fam. C. §§2200 et seq.

- **Wage assignment for support:** Fam. C. §§5200 et seq.
- **Withholding order for support:** C.C.P. §§706.030, 706.051, 706.052

Along with those listed, there are other statutes throughout the California codes that pertain to or mention family law subjects. They will be discussed as required throughout this book.

In addition to case opinion and statutory law, there is (in California, at least) a panoply of treatises dealing with the subject of family law. Some of the more popular include:

- Witkin, Summary of California Law;
- Witkin, California Procedure;
- California Family Law Service (Bancroft Whitney);
- Hogoboom & King, Family Law (The Rutter Group);
- Markey, California Family Law (West's Publishing Co.);
- Stephen Adams, California Family Law Practice (CFLR, Sausalito, CA)

There are also numerous other works available including seminar materials, weekly and monthly update services (notably those provided by CFLR on a weekly and monthly basis), a quarterly update service put out by Bancroft Whitney as part of the above-mentioned California Family Law Service, and the many fine publications of the California Continuing Education of the Bar [CEB].[2]

B. Jurisdiction; Service of Process; Venue

Of paramount importance regarding basic litigation procedure are the concepts of *jurisdiction* (over what (and when) is the court empowered to render decisions), *service of process* (how does the court *obtain* this jurisdiction), and finally, *venue* (where should the action be filed and heard). In addition to these concepts is the related question of the *residence* of the parties.

Before a family law court can appropriately hear a family law case, it must first ensure that it has the *power* to hear that case. Contrary to what may be thought by the reader, the court does not automatically have jurisdiction (that is, power) over a particular case simply because it has been filed. Certain procedural hurdles and safeguards, involving questions of jurisdiction over the subject matter of the lawsuit and jurisdiction over the people and property of the marriage,[3] must first be met to insure that the

exercise of that power by the court is fair and appropriate under all the facts and circumstances.

Always ask two questions: (1) does the court have subject matter jurisdiction, and (2) does the court have personal jurisdiction? Answer these questions yes or no. If the answer is yes, the subject matter jurisdiction must come from some statute. Some specific source of statutory law must have given the court the power to hear the case.

1. Subject Matter Jurisdiction

The term *subject matter* jurisdiction means just that: Does the court have power over the *subject matter* of the case (for example, the dissolution of the marriage) and the issues to which that is related? Or, perhaps stated somewhat more specifically, *which* court has jurisdiction over the subject matter of a marital dissolution proceeding? And when is it appropriate to *exercise* this jurisdiction?

In California, pursuant to Family Code sections 200 and 2010, the superior court has exclusive jurisdiction to hear all issues arising out of a marital dissolution (or other Family Code) matter. Thus one will never see a family law matter in the municipal or small claims court.[4] Specifically stated, all issues in the following matters shall be decided (at the trial level) in the superior court:

- child custody
- child visitation
- child support
- spousal support
- property division
- issues related to or arising out of the above
- status of the parties as married persons

Although there are many "wrinkles" to these general concepts, for our purposes the above can be accepted as the general rule. There are also various other provisions of the Family Code that confer specific subject matter jurisdiction over certain issues to the superior court. For example, Family Code section 2060 refers to jurisdiction over pension plans, section 3100 deals with visitation rights of parents, and sections 3101, 3103 and 3104 address visitation rights of stepparents and grandparents.

Every once in a while, two different states may be competing for subject matter jurisdiction over a dissolution of marriage. Although not common, it does occur, typically where one of the spouses has moved out of state and subsequently decides to file for dissolution. Because subject matter jurisdiction is generally appropriate in the state of *domicile* of *either* spouse, there

can be instances of both parties filing for dissolution at or about the same time, thus vesting subject matter jurisdiction in two different jurisdictions at the same time. This is easily resolved, however: The state that is first to acquire jurisdiction over the other party by service of process will be the forum for ultimate resolution of the case, regardless of which case was filed first. It is the first to *serve* not the first to file that controls.

2. Residence and Domicile

The concept of *domicile* is mentioned above and involves the *permanent* location of a party within the state. The exercise of subject matter jurisdiction conferred by Family Code section 2010 is not available in all circumstances. There is an additional requirement that at least one of the parties be *domiciled* within California. This means that at least one of the parties, either husband or wife, must be living in California with the intention of making it his or her *permanent* home. This is not as clear a test as may first be assumed. In fact, it is almost defined in the negative.

By definition, a person can have only one domicile. This will continue to be that person's domicile until he leaves the state and establishes a presence in some other state, with the intent to remain there indefinitely. Mere absence from the state does not destroy a person's status as being domiciled there. Temporary absences, even if they add up to a majority of the time, will not destroy domicile. A person's *residence*, on the other hand, is not thought of in terms so permanent in nature. A residence can be any location where a person lives for any period of time. Indeed, one can have several residences, but only one domicile. It should also be noted that a person's nonimmigrant alien status (i.e., one visiting this country on a temporary visa) will not in and of itself preclude a finding by the court that they satisfy the domicile requirements of California.

The concept of domicile, as might be imagined, is not very clear cut, nor is it defined simply by referring to some time formula. To establish domicile, one must establish intent, and that is never easy, especially if the other party is fighting it. How then *is* it proven? It is proven by examining the details of a person's life. This requisite intent can very often be established employing evidence of the following factors: home (or other property) ownership, voter registration, location of tax filings, where an individual pays state taxes; all of these can help to establish one's "intent to remain indefinitely" in a particular state.

The importance of the question of domicile is significantly noticeable when analyzing the effect of decisions made in violation of the domicile requirements. Generally, there is little the court can do if the only basis for asserting jurisdiction is the petitioner's domicile.[5] In fact, the only matter to be adjudicated under these circumstances is the status of the marriage. All

other aspects of the dissolution proceeding (for example, property division, support) are deemed to be personal in nature, and exercise of the court's power over these issues is appropriate only when personal jurisdiction has been established over the *responding party*. If that party is not subject to California's jurisdiction, then California can make few decisions that affect that person. Of significant exception to this rule is the ability of the court to adjudicate a nullity proceeding, even if *neither* party is domiciled in California, so long as they both personally appear.

The legal effect of a judgment entered in California when neither party is domiciled here is that it is *void*; that is, it is not subject to recognition at all and is of no force and effect whatsoever; it is not entitled to full faith and credit (that is, recognition) by other states, and it is susceptible to being challenged either directly by a motion to dismiss, or indirectly by challenging any attempt to enforce its provisions.

Family Code section 2320 sets forth the residency requirement that must be met before entry of a decree of dissolution. This section requires that at least one of the parties to the marriage must be a resident of this state for six months and of the county in which the action is pending for three months immediately before commencement of the dissolution action. This requirement does not apply in actions for legal separation or nullity. Accordingly, if a party is new to the state and must initiate an action immediately,[6] the next step is to commence an action for legal separation,[7] wait the six-month period mandated in Family Code section 2320 to establish residency, and then amend the Petition to change the request from "legal separation" to "dissolution of marriage." Because California is a "no fault" state (an idea that is discussed below), this request will always be granted. In fact, this procedure is specifically provided for in Family Code section 2321.

In contrast to an order entered by a court lacking subject matter jurisdiction, this residency requirement is not *jurisdictional*. That is, failure to meet the requirement does not make the order void. Further, such an order is not subject to collateral attack once the order has been made. Failure to meet the residency requirement, however, can be raised in a *motion to quash the proceeding*, which is (more or less) the family law equivalent of a demurrer.[8]

3. Personal Jurisdiction

The next step in this inquiry is the establishment of the court's appropriate exercise of personal jurisdiction over the parties in question.[9] Just as the court must have power over the subject of a particular case, it must also be in a position to exercise power over the parties themselves, for without this power the orders made against these parties are not susceptible to enforcement.

B. *Jurisdiction; Service of Process; Venue*

The basis of the personal jurisdiction requirement has its genesis in the United States Constitution, and, concomitantly, the California State Constitution. The due process clause of these documents (the California Constitution is substantially similar to the United States Constitution in this area) is the enabling clause that mandates the presence of such jurisdiction before the state (through its courts) will be able to make an order against someone affecting their personal rights (including orders regarding money, property division rights, and so on).[10]

In California this requirement is not hard to meet. This state's exercise of personal jurisdiction will be deemed to be consistent with due process requirements so long as "it does not violate 'traditional notions of fair play and substantial justice.'" These "traditional notions of fair play and substantial justice" allow a court to exercise personal jurisdiction on either of the following bases:

- physical presence in the state (this assumes personal service of process)
- domicile in the state when the action is commenced
- consent to the exercise of personal jurisdiction by the respondent; or
- "minimum contacts" with the forum state

Mere physical presence in the state is sufficient to establish personal jurisdiction. California Code of Civil Procedure section 410.10 is the statute that defines the basis of personal jurisdiction. It says little more than words to the effect that *any* exercise of personal jurisdiction is appropriate as long as it comports with the United States Constitution. These bases are listed in C.C.P. section 410.10:

- presence in the state
- domicile in the state
- residence in the state
- citizenship in the state
- doing business in the state
- causing an *effect* in this state
- consent of the person in question
- ownership of property within the state
- any other such relationship with the state which makes the exercise of personal jurisdiction reasonable

As can be seen, it does not take much for California to grant its courts power over someone. This concept is typically thought of as the *minimum contacts* rule: So long as a person has certain *minimum* contacts with the state, and *purposefully* avails himself of the benefits and protection of California's law, then personal jurisdiction is appropriately exercised. As stated

above, although subject matter jurisdiction is something the court either has or does not have, regardless of the actions of the parties, personal jurisdiction can be conferred on the court simply by a party's *appearance* and consent to it.[11] Of course, court orders made in violation of this requirement are void.

For an excellent discussion of these concepts in the context of a California family law proceeding, the reader is invited to read the case of Burnham v. Superior Ct., 495 U.S. 604, 110 S. Ct. 2105 (1990). The question presented and the facts of this case as it presented to the United States Supreme Court are set forth by that Court as follows:

> The question presented is whether the Due Process Clause of the Fourteenth Amendment denies California courts jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State.
>
> Petitioner Dennis Burnham married Francie Burnham in 1976 in West Virginia. In 1977 the couple moved to New Jersey, where their two children were born. In July 1987 the Burnhams decided to separate. They agreed that Mrs. Burnham, who intended to move to California, would take custody of the children. Shortly before Mrs. Burnham departed for California that same month, she and petitioner agreed that she would file for divorce on grounds of "irreconcilable differences." In October 1987, petitioner filed for divorce in New Jersey state court on grounds of "desertion." Petitioner did not, however, obtain an issuance of summons against his wife and did not attempt to serve her with process. Mrs. Burnham, after unsuccessfully demanding that petitioner adhere to their prior agreement to submit to an "irreconcilable differences" divorce, brought suit for divorce in California state court in early January 1988. In late January, petitioner visited southern California on business, after which he went north to visit his children in the San Francisco Bay area, where his wife resided. He took the older child to San Francisco for the weekend. Upon returning the child to Mrs. Burnham's home on January 24, 1988, petitioner was served with a California court summons and a copy of Mrs. Burnham's divorce petition. He then returned to New Jersey. Later that year, petitioner made a special appearance in the California Superior Court, moving to quash the service of process on the ground that the court lacked personal jurisdiction over him because his only contacts with California were a few short visits to the State for the purposes of conducting business and visiting his children. The Superior Court denied the motion, and the California Court of Appeal denied mandamus relief, rejecting petitioner's contention that the Due Process Clause prohibited California courts from asserting jurisdiction over him because he lacked "minimum contacts" with the State. The court held it to be "a valid jurisdictional predicate for in personam jurisdiction" that the "defendant [was] present in the forum state and personally served with process." App. to Pet. for Cert. 5. We granted certiorari.

In affirming the Appellate Court's exercise of jurisdiction over this admitted nonresident, the Supreme Court gave great deference to the

benefits and protections afforded to people who visit a state (use of the roads and the related infrastructure inherent in virtually all of the states) and the effect voluntarily taking advantage of these benefits and protections will have on that nonresident.

4. Service of Process

The other concept fundamental to this discussion is that of notice and opportunity to be heard. One simply cannot go forward with a lawsuit without giving notice to the other side that it is pending, and allowing them an opportunity to come to court, tell their version of the facts and argue their position. Of course, very often parties to a lawsuit will choose to allow the proceeding to go forward in their absence, but even then, until and unless proper service and notice has been given to them of the specifics of the dispute, the court will not proceed.

The notice requirement is satisfied by properly *serving* the papers involved in the lawsuit on the opposing party. Code of Civil Procedure section 413.10 sets out the service requirements to be met in California. There are many ways in which to accomplish service, including personal service, substituted service, service by mail, and service by publication.[12]

The main principle of service of process is to advise one's adversary of the exact details of what is being requested in the lawsuit. This not only affords the adversary an opportunity to appear and respond or defend, but it also fully apprises them of the exact nature of the dispute so they can make an intelligent decision whether to appear and contest the litigation or not.

Assume, for example, that John owes Mary $500 and for whatever reason has not yet paid this debt even though the money is due. If Mary serves John with her complaint for money indicating that she is asking for $5,000, John may very well want to respond to the complaint and argue that the actual amount is really only $500. The only way John learns about this difference between what is claimed by Mary and what is actually owed to her is because of the notice requirement, which acts to protect John.

If Mary had asked for the actual amount owed of $500, John, realizing that he did in fact owe the money, might simply have decided not to appear and contest the lawsuit and thus would have allowed Mary to win, by default,[13] an award of $500. The requirement of notice has given John sufficient information with which to make an intelligent decision whether to appear and defend.

Mary cannot, however, simply state in her lawsuit "John owes me money" without being more specific as to the amount and expect to be awarded any amount she asks for at the subsequent court hearing. By framing her request in this vague fashion, she has not fully advised John of its

specifics. Since the court cannot give Mary anything in excess of what she notified John she would be seeking, and since by leaving the amount sought subject to speculation, the court cannot make an award in Mary's favor even though John has not even appeared. This is because John did not receive *notice* of exactly what Mary was seeking and is exactly the reason why certain matters must be pleaded (that is, set out in the requesting papers) completely and specifically.

This situation can arise in family law matters with some regularity and embarrassment. An "uncontested dissolution" is not all that unusual. When a relationship ends many people find any continuing dialogue with their former mate, especially in the context of litigation, painful and wish to avoid it. As such (and this is most common when there is little to resolve and divide) a responding party who is either resigned to the concept of getting divorced or wants it as well may simply choose to ignore the service of summons and allow the matter to proceed without him.

If this is the case, whether by chance or by design, care must be taken to insure that the petition that has been served on the respondent contains all the specifics of the request. If not, the petitioner (and her lawyer) may be placed in the unenviable position of having to amend the petition to reflect the missing specifics and re-serve the papers all over again. Not only does this delay the process significantly, but serving the respondent again may be difficult or even impossible (which will even *further* delay the proceedings, to say nothing of causing the attorney embarrassment, extra costs, and potential exposure to claims of malpractice).

In marital dissolution litigation, the California Rules of Court (CRC) provide a detailed discussion of the various documents that must be served in this context. In general, judicial council forms are mandated for use in Family Law Act matters. These are preprinted "fill in the blanks"-type forms, designed to make the process more accessible and intelligible for the public. In general, the bulk of the these forms are found in CRC section 1281 et seq.[14] and will be discussed in greater detail later in this book.

5. Venue

Of final consideration in this procedural section is the question of venue or, in other words, the question of *where* the action should be entertained. This can be an issue of international, interstate, or intrastate (that is, between counties) venue. Also considered hand in hand with the question of venue is that of *forum non conveniens*, or "inconvenient forum." Inasmuch as this simply deals with the best location for trial and is not jurisdictional, an improper court (from a venue perspective) *can* render an otherwise enforceable order (assuming venue is not challenged).

In California the venue rules in family law matters are relatively simple: Pursuant to Code of Civil Procedure section 395(a), venue in a marital dissolution proceeding is appropriate in the county where one of the parties has resided for three months immediately preceding the commencement of the action. As such, a petition for dissolution can be filed by the petitioner in the county where she has resided for at least three months prior to filing the petition, or in the county where the respondent has resided for at least three months prior to the commencement of the action. The same is true of *nullity* and *legal separation* actions, except there is no minimum time period for residence. In other words, in a nullity or legal separation action, the action may be commenced in such county as either of the parties make their residence, regardless how long (or short) they have been so residing.

For good cause, the court may relocate the proceedings to a different venue if it would serve the interests of justice by being more convenient for all concerned. For example, if an action is properly commenced in Los Angeles County but would be more conveniently tried in Ventura County (due to location of witnesses, for example), upon proper motion the court can order that the action be moved to Ventura. This objection based on inconvenient forum is waived if not raised at the first opportunity. Further, an order made in violation of the rules of venue is just as enforceable as if those rules had been followed because they are not jurisdictional and have no effect on the validity of the order.

Sometimes a situation arises where, after separation, the spouses relocate to different counties, and then each start their own dissolution actions. In this case, the first person to serve the other will have the benefit of having the matter heard in the county in which they filed the petition. Note that it is not the first to file—it is the first to serve.

6. Attacking the Judgment

Generally speaking, once a judgment in any civil action (which of course includes a family law matter) becomes final, it becomes subject only to *modification* and *enforcement*. This is not to say that a final judgment is immune from attack so much as it is generally not susceptible to attack. In the context of attacking a judgment, there are two types of "attacks" to be mentioned: *collateral* and *direct*.

A direct attack is raised in the context of the proceeding in which the offensive judgment was rendered; for example, a motion for a new trial or an appeal. A collateral attack, on the other hand, is raised in a separate proceeding whose goal is to demonstrate that the previous judgment is void based on (usually) some jurisdictional basis. A collateral attack is raised in one of two ways: an action filed to declare the judgment void or by asserting the invalidity of the judgment as a defense to its enforcement.[15]

The grounds upon which a judgment is generally attacked include lack of subject matter jurisdiction, lack of personal jurisdiction, lack of notice given to the respondent, a judgment entered in excess of the court's jurisdiction, and other due process violations. Conversely, there are two basic theories of law that will operate to defeat an attack on a judgment: *res judicata* and *collateral estoppel.*

Res judicata essentially prohibits any attack on a judgment if the claimed defect has already been litigated in prior proceedings between the same parties. Thus, if the attacking party participated in the earlier proceedings and had an opportunity to litigate the issue that forms the basis of the attack in that proceeding, then for all practical purposes there is nothing left to litigate in the subsequent proceeding, since that issue has already been decided. The reader should note that actual participation in the earlier proceeding is not required. All that is required is the *opportunity* to participate.

Collateral estoppel is similar to res judicata in that it will prevent a party from, essentially, "re-litigating" an issue under circumstances in which it would be inequitable to do so. In other words, a party will be denied the opportunity to re-litigate an issue if he participated in its earlier determination, or in some other way, by his action or inaction, allowed the situation to exist in the first place. In these circumstances, the courts look to the equities of the situation and seek to determine whether the objecting party is entitled to the relief he seeks. If he has somehow contributed to his situation, or undertaken a course of conduct that would require doing an inequity to the other party, the courts will deny his request.[16]

C. Ethics and the Paralegal

Many and various rules are assigned to govern and regulate the behavior of licensed attorneys in California. These rules have been codified as the California Rules of Professional Conduct (CRPC) and are published as part of the California codes. It is highly recommended that any individual interested in the legal system and its operations read these rules in their entirety. For the paralegal, knowledge of these rules is an absolute must.

These rules, generally referred to as "ethical considerations," are designed to insure that the public receives legal services that are competently, conscientiously, and fairly performed by the attorney of their choosing. The rules tend to be somewhat uniform in all jurisdictions and are typically enforced by the licensing agency of the state in which the attorney practices. In California, for example, the State Bar of California is assigned this task. Since this organization is comprised of all active members of the state bar, it can be said that the attorneys for this state are self-policing.

The sanctions for violating these rules can result in punishment including public reproval, suspension, and, if the offense is serious enough or if

the attorney has a long record of ethical violations, disbarment. Disbarment is the most serious punishment available and is meted out only under the most extreme circumstances. Its effect is, after all, to deprive the offending attorney of his or her license to practice law and, with that, the ability to earn a living in that chosen vocation.

In general, the ethical rules governing attorneys regulate the level of competence that the attorney must possess in order to practice law, the type and amount of fees charged for legal services, the manner in which the attorney maintains certain office records, and the manner in which the attorney accounts for monies held on behalf of her clients. The California Rules of Professional Conduct are organized into the following major topic areas:

Chapter 1:	Professional Integrity in General	Rule 1-100
Chapter 2:	Relationship among Members	Rule 2-100
Chapter 3:	Professional Relationship with Clients	Rule 3-101
Chapter 4:	Financial Relationship with Clients	Rule 4-100
Chapter 5:	Advocacy and Representation	Rule 5-100

As of this writing, there are no such rules to govern and regulate the conduct of paralegals. In this author's opinion, however, this will change in the near future. And, inasmuch as those rules will no doubt be based in no small part on the existing rules governing an attorney's behavior, a review of those rules will prove helpful.

For the most part, the Rules of Professional Conduct deal with the attorney's relationship with his clients. Paralegals by definition are not attorneys licensed to practice law and thus are not allowed to give legal advice to clients. Therefore one might wonder why the paralegal should become familiar with rules regulating the behavior of attorneys. Generally speaking, the paralegal's role in a family law practice will focus on research and preparation of some of the basic documents used in dissolution matters, including preparation and review of discovery (interrogatories, document production requests, for example), and deposition summaries. Some paralegals may also find themselves joining in client interviews with the attorney and acting as a "liaison" between the attorney and the client (being careful, of course, not to dispense any legal advice, even if requested). Even in this somewhat restricted capacity, however, and due in part to the lack of definition of the role of the paralegal in the law office, strict adherence to the CRPC, if not in letter then in spirit, is well advised.

While paralegals are not (for the time being) held to the same standard of conduct as attorneys, there are certain situations that are somewhat unique to the practice of family law and about which the paralegal working in that field should be familiar. These typically involve representation by the attorney of both sides to a family law matter, as well as the avoidance of

conflicts of interest that may arise in the course of a marital dissolution proceeding.

The mandates found in CRPC 3-310 provide a wide basis for potential problems for the family law attorney. That section, divided into specific subsections, generally provides:

3-310(A): If an attorney has or had a relationship with another party in the litigation or is interested in the subject matter of the litigation, that attorney cannot accept or continue the representation without first obtaining the client's *informed written consent.*

3-310(B): No dual representation of both sides to a proceeding where their respective interests conflict is allowed without first obtaining *both* of their *informed written consents.*

3-310(C): An attorney must not undertake representation adverse to the interests of a former client (that is, must not represent someone who is suing a former client of the lawyer's) if, by virtue of the former representation that lawyer has obtained *confidential information* pertinent to the current subject matter of the representation, without first obtaining the former client's *informed written consent.*

3-310(F): This section defines "informed" as used above in the context of consent as *disclosure and advice* to the client as to *any* actual or likely adverse effects to the client. Any client who is in the position of signing such an *informed written consent* must first be referred to some other attorney to advise him as to the consequences of that act.

In addition to the rules mentioned above, litigation guidelines adopted by the Los Angeles County Bar Association Board of Trustees expands the professional code of conduct to be adhered to by members of that association. With particular focus on family law practitioners, the following list sets forth a brief listing of these new rules. A review of this list will not only provide guidance to the reader in her work in this area, it will also give an interesting insight into the general condition of the Bar and the sheer necessity for its evolution:

1. Family Law Attorneys (FLAs) should not engage in churning a case. This refers to the practice of unnecessarily running up fees in order to either gain an advantage in the litigation (by "burying" the opposition with paper, discovery, motions, etc.) or to simply run up the attorney's fees to his own advantage, in the absence of any legal necessity for his actions;

2. The FLA should not engage in economic warfare of harassment of the opposing party simply to gain a litigation advantage over an unsophisticated or underfunded litigant.
3. The FLA should not participate in vindictive litigation, such as litigation where the primary goal is simply to cause the other party harm, as opposed to solving a legitimate problem for the client.
4. The FLA should not take any action that will unnecessarily exacerbate the emotional level of a family law dispute.
5. The FLA should actively participate in preparing his client for the mediation process so as to make it more meaningful.
6. The FLA should, as soon as possible, disclose the existence of any preexisting social or professional relationship between herself and any expert witness appointed by the court or obtained pursuant to stipulation of the parties.
7. The FLA should not participate in a child custody or visitation dispute motivated primarily by harassment, coercion, or vindictiveness.
8. The FLA should not communicate ex parte with a child custody evaluator or court-appointed witness.
9. The FLA should never make a personal attack on opposing counsel.
10. The FLA should utilize the ex parte process with restraint—only when the circumstances truly warrant emergency judicial intervention.
11. The FLA should promptly return her telephone calls to opposing counsel, or, if that is not possible, have someone else return the calls for her.
12. The FLA should not harass the opposing counsel through the use of unnecessary motions, faxes, etc. (in other words: "don't play games!").
13. The FLA should cooperate with the opposing counsel to ensure an effective and efficient resolution of family law matters.[17]

Perhaps one of the most frequent situations directly impacted by these rules is where a husband and wife go to an attorney together and declare: "We agree on everything—we just want you to write up the agreement and make it official." Clearly there is a conflict, unless the only issue to be decided is the termination of marital status. But that is quite rare. Often there are issues of property division, support, and child custody to be resolved as well.

Even though the parties may "agree," more often than not such agreement is the product of overreaching or undue pressure being brought to bear upon the "agreeing" spouse by the "insisting" spouse. Perhaps the agreement is based upon an incorrect understanding of the law. Indeed, an agreement can easily fall apart once the parties are fully informed of the law and what the options available to them may be. How then can an attorney

effectively advocate for the rights of one party when she also represents the other party? Indeed, she cannot, and should not place herself in that position.

This representation conflict also occurs when one spouse, for example, the husband, requests an attorney to represent him in a dissolution proceeding notwithstanding the fact that the attorney had, in the past, represented the wife in an unrelated business matter. While not as blatant, the conflict is just as present.

In both of the above situations, representation by one attorney, while not necessarily technically prohibited (assuming both spouses agree), is a big mistake and should be avoided. Access to certain confidential information as well as the foolish attempt to advocate on behalf of both sides to a contested issue seriously compromises the attorney's duty of loyalty to *each* client.

This prohibition against conflicting representation even extends to *prospective* clients of the attorney. For example, if a wife goes to an attorney, discloses the facts of her situation, discusses with the attorney the rules of law and her options in the dissolution, and then decides to retain some other lawyer, then the lawyer with whom she first spoke is precluded from representing the husband.

The potential for conflict extends beyond what might seem to be the obvious situations mentioned above. For example, what about the attorney who has represented both husband and wife in business dealings, or the purchase of a home, or in an automobile accident? What about the attorney who drafts mutual wills or performs other estate-planning services? When a wife then comes to this attorney and asks for representation against her husband in a dissolution proceeding, should the attorney accept this representation? Should an attorney agree to represent a husband (or wife) when the attorney has a *social* relationship with either or both of them? In all of these cases, the answer is "no."

These potential conflict problems can also extend to situations in which the attorney has (or had) a confidential relationship with opposing *counsel*. For example, a father and daughter should never represent opposite sides in the same lawsuit.

In addition to the matters discussed above, there are regulations governing the nature of the relationship between the attorney and the client, for example, avoidance of acquiring any interest adverse to one's client, avoidance of a sexual relationship with one's client (unless the sexual relationship preceded the attorney-client relationship) and things of a similar nature.[18]

What then are the *practical* aspects of this discussion?[19] If a case comes to an attorney under these circumstances and it is contested in any aspect, or if litigation of any kind arises, the attorney *cannot* represent both spouses. As a matter of law, it has been held that under those circumstances, even if

consent was obtained, that consent was neither intelligent nor informed. As such it is prohibited. Where there is no *actual* conflict present, although not a good idea, the court will generally permit dual representation. This situation arises where the parties have, in fact, resolved all of their differences and are in agreement on all issues. In this occurrence, after a full disclosure by the attorney of the conflict, coupled with an intelligent and informed waiver of the conflict of interest, the attorney may proceed to represent both sides. However, if any actual conflict arises, that lawyer must withdraw immediately from representation of both of them and cannot continue to represent either of them.

Generally in uncontested proceedings the attorney advises the clients *up front* that he cannot actually represent both of them. The attorney should select one of the clients to be the subject of the representation (usually the one who was initially referred to the attorney) and advise the other that once the preparation of the documentation necessary to conclude the matter is complete, she (the other [unrepresented] party) will be required to have all that documentation reviewed and explained to her by an attorney of her choosing.

This party will then sign a statement incorporated into the agreement acknowledging that the preparing attorney does not represent her, has not given her any advice or answered any questions upon which she relied in entering into the agreement, and finally that she has been advised to seek independent counsel to review the documents and their legal effect and that she has either done so or intelligently chosen not to. If at all possible, it is wise to have the reviewing attorney "sign off" on the agreement as well.[20]

A few words about malpractice is prudent at this point. Almost everyone knows or has heard of the concept of malpractice. That is the name given to the cause of action one pursues when claiming that a professional (in this case, an attorney) made mistakes in the representation that could have been avoided had the attorney not been negligent. As might be imagined, these lawsuits are not uncommon in a situation where the attorney was not necessarily negligent, but where the client was not happy with the outcome.[21]

In situations such as this, it is not unusual for a plaintiff in a malpractice case to sue everybody having anything to do with his file (from a decision-making standpoint). Due to the "gray" nature of the paralegal's role in the law office, the suit might well include the paralegal. Accordingly, it would behoove the paralegal to insure that his interests in this regard are adequately protected in the workplace. Whether this extends to the acquisition of Errors and Omissions Insurance is an undecided question, but these are issues that should be addressed at the employment level.[22]

Many paralegals have heard that as long as they are working for an attorney when their alleged malpractice took place they need not worry about their own liability. This is not the case, however. The concept at the

source of this confusion is known as *respondeat superior*, which operates to hold an employer liable for the negligence of their employees so long as the employees were working within the course and scope of their employment when the negligent act occurred. Respondeat superior will not, however, shield the offending employee; it merely *expands* the pool of persons liable for the negligence. Typically the potential plaintiff will pursue the attorney in cases of this type because the attorney is usually insured and also the party most likely to have money. To rely on a plaintiff choosing in this manner is an invitation to disaster, however. It is far easier to protect oneself simply by putting out a good work product and adhering to the ethical considerations discussed in this chapter.

D. The Family Code

Historically, California has placed the basic framework of its family law in the Family Law Act located in Division 4 (General Provisions), Part 5 of the California Civil Code (C.C.), commencing at section 4000 with Title 1, "Marriage." Effective January 1, 1994, however, this structure was radically changed by the California legislature. Recognizing that the statutes impacting on family law matters were spread out over no less than five separate codes, the legislature undertook the task of gathering most (if not all) of the statutes that pertain to family law matters and reorganized and updated them in the context of a separate code devoted exclusively to family law. Hence, the Family Code was enacted.

The creation of this Code took over five years to complete, the first incarnation of it seeing light in 1989. Careful attention was paid to reorganizing the existing laws and eliminating conflicts in the laws that preexisted this effort due to the fact that this subject matter was previously treated in so many different places in California's laws.

The Family Code is divided into 18 Divisions,[23] each containing various subdivisions, called "Parts," which are further subdivided into "Chapters," with the final level of division being called "Articles," depending on the breadth of the subject covered and the need for such detail. Division 20, for example, has but one level of subdivision, contained in its "Part 1." Division 9, on the other hand, is divided into five separate Parts, containing 26 separate Chapters and 44 different Articles. The 18 divisions of the Family Code are as follows:

Division 1:	Preliminary Provisions and Definitions (§100)
Division 2:	General Provisions (§200)
Division 2.5:	Domestic Partner Registration (§297)
Division 3:	Marriage (§300)
Division 4:	Rights and Obligations During Marriage (§700)

Division 5:	Conciliation Proceedings (§1800)
Division 6:	Nullity, Dissolution, and Legal Separation (§2000)
Division 7:	Division of Property (§2500)
Division 8:	Custody of Children (§3000)
Division 9:	Support (§3500)
Division 10:	Prevention of Domestic Violence (§6200)
Division 11:	Minors (§6500)
Division 12:	Parent and Child Relationship (§7500)
Division 13:	Adoption (§8500)
Division 14:	Family Law Facilitator Act (§10000)
Division 16:	Family Law Information Centers (§15000)
Division 17:	Support Services (§17000)
Division 20:	Pilot Projects (§20000)

An example of the manner in which a division is further subdivided into parts, chapters, and articles is seen in Division 9, "Support":

Division 9: Support (§3500)
- Part 1: Definitions and General Provisions (§3500)
  - Chapter 1: Definitions (§3500)
  - Chapter 2: General Provisions (§3550)
  - Chapter 3: Support Agreements (§3580)
    - Article 1: General Provisions (§3580)
    - Article 2: Child Support (§3585)
    - Article 3: Spousal Support (§3590)
  - Chapter 4: Spousal and Child Support During Pendency of Proceedings (§3600)

And so on. A complete table of these divisions of the Family Code and their related subdivisions showing their placement and organizations within the Code is included in the appendices of this book. This detailed organization of the law is done to distill the subject matter down to a manageable level for ease of use. As can be seen by even a cursory review of the Family Code, family law is primarily a creature of statute: Most everything needed to be known in family law has its genesis either in these code sections or in the cases that have interpreted them.

Of particular note in the Family Code are some of its explanatory provisions, which sections help orient the reader to the fundamental concepts underlying the laws and provide a theoretical base for the other more specific statutes. With a thorough comprehension of the concepts, extrapolation in the absence of specific statutes is possible. For example, by understanding that a primary concern of the Family Code is to provide for the best interests of minor children, we are able to make a decision, in a situation not precisely

covered by the Code, guided by the expressed principle of achieving what is in the best interests of the minor child.

A brief example of some of these provisions follows:

- **Family Code §3900: Equal Duty of Parents to Support Child**
  Subject to this division, the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances.

- **Family Code §4400: Duty of Adult Children to Support Parents**
  Except as otherwise provided by law, an adult child shall, to the extent of his or her ability, support a parent who is in need and unable to maintain himself or herself by work.

- **Family Code §300: Consent; Issuance of license and solemnization**
  Marriage is a personal relation arising out of a civil contract between a man and a woman to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division . . . .

- **Family Code §2300: Effect of Dissolution**
  The effect of a judgment of dissolution of marriage when it becomes final is to restore the parties to the state of unmarried persons.

- **Family Code §3020: Legislative Findings and Declarations [Custody]**
  The Legislature finds and declares that it is the public policy of this state to assure minor children 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 interests of the child, except as provided in Section 3011.

- **Family Code §3100(a): Visitation Rights**
  . . . in making an order pursuant to [Section 3080], the court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child. . . .

- **Family Code §2550: Equal Division of Community Estate**
  Except upon the written agreement of the parties, or on oral stipulation of

the parties . . . the court shall . . . divide the community estate of the parties equally.

- **Family Code §2310: Grounds for Dissolution or Legal Separation**
  Dissolution of the marriage or legal separation of the parties may be based on either of the following grounds, which shall be pleaded generally:
  (a) Irreconcilable differences, which have caused the irremedial breakdown of the marriage.
  (b) Incurable insanity.

These are but a few of the many sections expressive of legislative policy and intent with regard to family law. They can be summed up in more simplistic terms as follows:

California is a "no-fault" state when it comes to dissolving marriages. This basically means that all one needs to do to obtain a divorce[24] in California is to *ask* for it. This is in contrast to the states in which fault (or the reason for the divorce) must be pleaded and proven by the requesting party. The most common grounds for divorce in those states are adultery, mental cruelty, and insanity.

In California, Family Code section 2310 codifies this no-fault concept by providing that dissolution of marriage (or legal separation) is available if "irreconcilable differences" exist, which have caused an "irremedial breakdown" of the marriage. These are the magic words, and so long as one of the parties is prepared to testify to the existence of these facts, the marriage will be dissolved.[25] California formerly required fault as a grounds for marital dissolution, but this was changed in 1970 when no-fault became the new grounds for dissolution.[26] This change coincided with the establishment and adoption of the Family Law Act, which became operative on January 1, 1970. That act completely overhauled the concept of marital dissolution in California and was carried over into the Family Code.

The basic rules regarding the division of property, set out in sections 2500 et seq. of the Family Code, provide for an equal division of all marital property *and* debts upon dissolution of marriage or legal separation. As simple as this may sound, this particular area of family law practice is actually one of the most complex. Dozens of statutes and hundreds (if not thousands) of appellate opinions have been devoted to the many nuances contained in this rather simple statement.

The same can be said of Family Code section 3020's seemingly innocent statement that child custody is to be determined by evaluating the best interests of the minor child and the requirement to insure the minor child's frequent and continuing contact with both parents. This legislative declaration has produced a seemingly endless series of opinions and editorial comment on how best to interpret and provide for these requirements.

It should be clear by now that this field of law, even limited to the area of termination of marriage (and other areas of the Family Law Act), is detailed and complex. It is by no means an insurmountable task to grasp and understand its concepts, however, as the following pages will show.

E. Validity of Marriage

1. Generally

Even though this text is primarily devoted to the law surrounding termination of a marital relationship, a few words on the subject of *creating* a valid marriage are appropriate to begin. This subject is addressed in Division 3 of the Family Code. That division is further divided into five parts, covering most every aspect of issues surrounding the creation of a valid marital union.

As seen earlier in the text, section 300 of the Family Code establishes the basic nature of the marital relation as one of consent and contract between a man and a woman. Consent alone, however, will not validate the union. There is also a requirement of the issuance of a license and certain acts of "solemnization." The consent required prior to being able to enter into a marriage is the same as that required for entering into any other contract: The parties to the marital contract must both be at least 18 years of age, or entering into the marriage with their parent's consent unless a minor is an "emancipated minor" (discussed later in this book), in which event he is treated as an adult for these purposes.

The concept of solemnization of the marriage literally refers to the ceremony involved. It is not enough to simply get married in California; there must be some "ceremony" involved. The Family Code, at section 420, provides the essential elements of solemnization as follows: "No particular form for the ceremony of marriage is required for solemnization of the marriage, but the parties shall declare, in the presence of the person solemnizing the marriage and necessary witnesses, that they take each other as husband and wife. . . . "

A person authorized to solemnize marriages must be a "priest, minister or rabbi of any religious denomination . . . a judge or retired judge, commissioner of civil marriages or retired commissioner of civil marriages . . . a judge or magistrate who has resigned from office. . . . " or one of miscellaneous other federal and state judges, justices, magistrates, and retired judges, justices and magistrates. The duties imposed upon the person solemnizing the marriage include conducting the service, insuring the correctness of the facts set out in the marriage license, issuance of the marriage certificate, and returning the license, endorsed with the fact of the marriage,

to the county recorder of the county in which the marriage ceremony was performed.

The Family Code also establishes various provisions for the issuance and registration of the marriage license, which are found at sections 350 through 360, and generally discuss the ministerial aspects related to the license. Generally, the marriage license must state the names of the parties, their ages, and their place of residence. Once issued, the bride and groom must also obtain from the county clerk a certificate of registry of marriage. The person solemnizing this certificate then returns it to the county recorder where it is subsequently recorded.

As a prerequisite to obtaining a license to marry, the parties must undergo a medical examination. Family Code sections 400 et seq. require that "each applicant for [a marriage] license shall file with the [person issuing the marriage license] a certificate from a licensed physician and surgeon that satisfies the requirements of this part." What, then, satisfies those requirements?

The requirements of this part of the Family Code are statutorily established as follows:

1. That the applicants have been given a standard serological test for syphilis and either are not so infected or, if infected, that the infection is not at a stage where it can be communicated to the marital partner;
2. A similar statement regarding the presence of rubella (German measles) in the female applicant.[27]
3. That an HIV test was offered to the applicants.

Under certain limited circumstances the court is allowed to waive these requirements. The existence of an "emergency" (a determination left to the discretion of the judge of the superior court) will be sufficient to provide the grounds for waiving this requirement of a medical certificate. That request must be made, however, by joint application to the superior court, with good cause shown.

2. Confidential Marriages

Another basis for waiving the requirement of a medical certificate is found in the provisions relating to "confidential marriages" found at sections 500 et seq. of the Code. The basic condition for obtaining a confidential marriage is that the applicants have been living together prior to their marriage. If this is the case, a health certificate is not necessary.

All that is required to obtain the issuance of a confidential marriage license is that the applicants appear personally, pay the required fees, and

complete the appropriate application and affidavit. Once issued, the confidential marriage license is treated basically the same as a "normal" marriage license except that the county recorder maintains these confidential licenses in a special location, and the public is not allowed to inspect them. Further, the county clerk is allowed to search these records to establish the existence of the marriage, but no other information (date of marriage, for example) will be made available except upon court order.

Summary

Family law is primarily a creature of statute. Previously located throughout various portions of the codes, in 1994 the California legislature gathered and codified over 18 Divisions of this vast body of law under the umbrella of the Family Code. The Family Code is designed to provide guidance in virtually every aspect of marital relations: the relationship of parent and child, the division of property upon marital dissolution or legal separation, and aspects of the regulation of behavior between parties who are "at war" with each other.

Subject matter jurisdiction over Family Code (marital) proceedings is vested in the superior court. In addition, in order to completely adjudicate the rights and obligations of the parties incident to a family law proceeding, it is necessary that the court also exercise personal jurisdiction over the parties. Such jurisdiction is typically achieved through service of process of the litigation on the responding party. Further, under appropriate circumstances, a judgment entered in a family law action may be subject to either direct or collateral attack.

Anyone practicing in this field should pay significant attention to the subject of ethics. In a family law context, it is very easy to become drawn into the personal problems of the clients. It is only natural to empathize with a client who is going through an arduous ordeal. Care must be taken, however, to maintain a professional distance; sympathize, perhaps; empathize, never. Care must also be taken to insure that the interests of the client are served and are not jeopardized by dual representation. Finally, be aware of the ever-present threat of malpractice. The best preventative is thorough preparation, competence, and a readiness to communicate.

The study of family law is primarily the study of the Family Code, although explanatory judicial interpretation and explanation of those statutes abound. We have seen that in order to be legally married in this state, the parties must (normally) be at least 18 years of age, have received a license to marry and undergone a premarital medical examination, and have participated in a ceremony sufficient to satisfy the solemnization requirement of the Family Code. Finally, the Family Code makes provision for a "confidential marriage" under certain, rather limited, circumstances.

Key Terms

The following is a list of key terms and phrases that you should be able to define and use in context. Only then will you have demonstrated a command of the material in this chapter.

- county seat
- statutory law
- common law
- California Rules of Professional Conduct
- informed written consent
- errors and omissions insurance
- full disclosure
- confidential information
- jurisdiction
- service of process
- venue
- subject matter jurisdiction
- domicile
- residence
- residency requirement
- personal jurisdiction
- due process
- notice and opportunity to be heard
- minimum contacts
- forum non conveniens
- change of venue
- trial court jurisdiction
- Family Code
- titles
- articles
- chapters
- divisions
- no fault
- irreconcilable differences
- irremedial breakdown
- res judicata
- collateral estoppel

Questions for Discussion

1. To what extent is it necessary or advisable for the paralegal to adhere to the rules of ethics, which govern attorney conduct?

2. Where there is no actual conflict, explain the circumstances, if any, under which it would be appropriate to represent both sides to a marital dissolution proceeding.
3. In what way are the concepts of notice and due process important in American jurisprudence?
4. Compare and contrast the concepts of residence and domicile, discussing the manner and degree of proof for each. What is the significance of these concepts in a family law context?
5. What is meant by the term "venue," and what is its significance, if any, to a family law proceeding?

ENDNOTES

1. Most references will be made to the Family Code (Fam. C.). Other abbreviations used in this book include C.C. (Civil Code), C.C.P. (Code of Civil Procedure), W.&I.C. (Welfare and Institutions Code), Pen. C. (Penal Code), and Prob. C. (Probate Code).

2. The list of publications, seminars, update materials, and computer-assisted research and analysis software is too extensive for this author to list in complete detail. My sincerest apologies to those who read this and feel that their work was unfairly omitted from the above discussion.

3. The reader should note that this discussion will be very limited. A more thorough treatment of this subject is deferred to a treatise on civil procedure.

4. One exception to this rule is found in the Municipal Court's power to issue a temporary restraining order in the context of domestic violence in cases where the Superior Court cannot do so "in a timely manner." (See generally Family Code sections 240 et seq.)

5. In other words, little can be done when the court does not possess *personal* jurisdiction.

6. This might occur if, for example, temporary orders as to custody, support or injunctive relief (to name but a few) are desired.

7. As will be discussed further below, actions for nullity are very rare and typically not available to the average litigant.

8. The procedure is discussed below in the section dealing with the respondent's alternatives when filing a response.

9. The exercise of personal jurisdiction is typically only a question regarding the respondent. Since the petitioner is the party commencing the proceedings, their submission to the court's exercise of personal jurisdiction is evident.

10. The constitutions of both California and the United States provide, among other things, that each person is entitled to certain fundamental rights vis-à-vis their dealings with the state. Three of these are the right to *due process*, the right to *notice*, and the *opportunity to be heard*. Whenever a court makes an order against someone that affects their *personal* rights (for example, when someone is sentenced to jail or ordered to pay money), it is generally taking something of value to him away (for example, the right to liberty or property). The states look upon this as a serious matter (as does the federal government) and so before the state *gives* that kind of power to the court, the court must first satisfy the state that the exercise of this jurisdiction (i.e., power) is fair and appropriate.

11. When child custody is in issue, the question becomes one of the *child's* relationship to the state rather than the parties'. This concept is discussed in greater detail later in this book in the section dealing with the Uniform Child Custody Jurisdiction Act (UCCJA).

12. All of these methods are discussed in detail in the Code of Civil Procedure and elsewhere, and this book will defer to those sources. This material must be mastered, either in a civil procedure class or on one's own, if one plans on working in this field.

13. If someone is served with a lawsuit and chooses to ignore the warnings on the summons (one of the papers served) and not appear to defend, the court will go ahead and rule without him.

14. This is Latin for "and the following. . . ."

15. The reader should also note that there are some special rules regarding attacks on foreign judgments (judgments entered outside of California). These tend to be rather hyper-technical and are outside the scope of this discussion. The reader is thus directed to research this specific area thoroughly before undertaking such a task.

16. These concepts of res judicata and collateral estoppel are the bane of many a law student, and this brief mention barely does them justice. There are many, many permutations, exceptions, and technicalities associated with the application of these rules. Should the reader find herself encountering these issues in the future, it is strongly recommended that she supplement her analysis by referring to a civil procedure textbook.

17. That guidelines such as these even had to be adopted is, in this author's opinion, a sad commentary on the current state of affairs of the practicing bar.

18. As will be stated often throughout this book, the above comments are merely the tip of the iceberg in this area. From a paralegal's standpoint, you are not required to police the attorney for whom you work. For the most part these rules impact upon the attorneys and are not directed towards paralegals. Adherence to their intent, however, and the swift disassociation from those who do not follow it, is, in this author's opinion, sound advice.

19. Because, as a practical matter, very often attorneys *do* represent both spouses in a dissolution proceeding.

20. That is, sign a statement incorporated into the agreement to the effect that the attorney has reviewed the agreement and advised his client accordingly.

21. This is not so unusual. As stated before, there are usually no winners in family law. Rarely does a litigant to a dissolution proceeding leave the process with a sense of happiness. It is an extremely emotionally upsetting time in a person's life. Also, regardless of what amount of property the client owns going into a marital termination proceeding, he or she generally comes out of that proceeding with one-half of that amount.

22. Errors and omissions insurance is insurance that is purchased by the professional in the event he is sued for malpractice. This is a cause of action based on concepts of negligence, which seek to assign fault to the attorney for some problem that has arisen in the proceedings and caused the client harm (typically financial) on the theory that had the attorney not been negligent, the loss would not have occurred. The paralegal should inquire of her employer whether or not she is named as an insured on their insurance policy. If no such coverage is present (or available) then the paralegal may wish to discuss with her employer some other arrangement (for example, indemnification) in the event of a lawsuit by a disgruntled client.

23. Note that the third division is labeled "Division 2.5," the fifteenth division is labeled "Division 16" (the number 15 was simply skipped) and the eighteenth Division is labeled "Division 20" rather than "Division 18."

Endnotes

24. This is technically known as a dissolution of marriage.

25. This section also provides that incurable insanity is a ground for dissolution or legal separation, but this does not come up too often. The reader should also note that in this context, the idea of dissolving a marriage includes marital dissolution *and* legal separation, a distinction discussed later in this book.

26. This is not to say the idea of fault has been completely abandoned. For the most part it has, although its concepts seem to creep back into the practice every once in a while.

27. This is not required where the applicant is over 50 years of age, has been surgically sterilized, or presents evidence that she is otherwise immune to rubella.