



Divorce Mediation 102: Financial Realities of Divorce

There is no question that separation hurts both people in any relationship. Even when a couple comes in and appears congruent about their decision, there was a lot of anguish before they came to the point of agreement. Even when both people are “ready to go,” there are two questions that are almost always present. First, is “How long will this take?” which is quickly followed by, “What is it going to cost?”

That second question is important because the cost is not only the attorney fees, court filing fees and other expenses for professional support. There are the hidden costs that most are not aware of such as taxes that are unexpected, the value of assets that are not as the couple thought and much more.

This paper will address these matters in a broad perspective and work to bring a sense of what is happening in front and behind the curtains of divorce and finance.

How Long Does It Take?

The question about time is typically one of the first questions that will impact finances. The answer is one of those “it depends” responses. Oddly the honest reply to the question rests with the people wanting the divorce. We always caution that the process will typically take longer than what the couple expects.



In California, the legal time required for a divorce, which includes a cooling off period to see if the marriage is salvageable, is six months. That clock starts with the filing of the petition and the response. After six months have lapsed a judge can then grant the divorce, assuming everything is in order.

In a survey^j presented by Nolo press, the actual average time for a divorce was 11 months. Contested divorces averaged 17.6 months. Those that could settle agreements together averaged about nine months.

It is important to note that the clock for being legally divorced does not start until the couple files the petition and there is a response to the filing (or the statutory time for a response has elapsed). The process simply does not start because someone wants a divorce. Quite often there is a period of negotiation that goes on before the couple even files.

There are other factors that can make the process even longer. According to the Nolo survey, issues that caused the greatest delays and costs are:

child custody
alimony or spousal support
the division of debts
claims for reimbursement

child support
the division of property
attorney's fees
claims for breach of fiduciary duty

What is it going to cost?

Sorry, there is no accurate answer for this since there are so many variables. The hourly rate of the professionals involved, the number of people involved, any need for expert support in different areas of a dispute, the level of disagreement. All add to the costs.

As Nolo noted in their research, it is "...not surprisingly, the more issues that went to trial, the more the divorce cost." When people go to trial there are more costs involved. The cost of litigation also depends on what is being litigated. If there is a targeted issue that does not involve an expert witness or professional assistance, then the cost of legal counsel arguing before the judge is the extent of the issue. However, if there are involved claims such as fitness of a parent or the valuation of a business, then the costs increase significantly.

The real answer is that both sides need to recognize that the only winners in a litigation are those billing for their time. The best advice any good advisor can give couples in this situation is to talk it out themselves if that is possible. Get support where needed, but that the couple should do most of the work themselves. They save time, money and they are more vested in the results.



We do understand that some situations do not permit direct discussions. In cases of abuse, abandonment or addiction, there is a need to proceed unilaterally to get court protections and to move on with life. While these cases exist and need special attention, they are not the normal course of events in divorce.

How Do Issues Become Contentious, Leading To Court?

First, to understand how this happens, it helps to recognize that the two people perceive that they are trying to get away from each other. That is the general conception and stated goal for most people going through a divorce.

This is not the reality of divorce. The fact is that as long there is a settlement agreement that carries any type of obligation (support, long-term property issues, etc.) there is still a connection with each other. That creates tremendous friction in any process. This is sometimes a painful reality for couples in divorce – the fact that they remain connected and dependent on each other for something in their agreement.



This also plays into the typical divorce narrative that there is right and a wrong. The story line drives the ideas and concepts that there is something in a divorce that each side deserves. When there is a stated or held belief about entitlement, whether it is based on legal terms or moral beliefs, that leads to contention. If there is resistance from the other side, this also leads to resentment. There is a sense of something being extracted rather than negotiated. As lines are drawn, legal counsel takes the position that they are there to defend their client’s legal rights vigorously. The tools of negotiation are then expanded to include threats of going court. That threat may come in the form of a court date to which each side must respond.

Being Connected In Relationships After Divorce

The common result of these tactics is that most situations are settled before going to the judge. In some of those cases, the judge will order couples to step into the hall and work it out rather than having the judge pass judgment.

Emotion, fear and seeking “justice” are the critical parts that drive most people in the litigated process of divorce. We don’t know who first said it, but it seems true that criminals in court act their best while couples in court tend to be at their worst.

Before diving into this further, there is the matter that not all marriages end with couples working together. As noted, sometimes there are abuse issues, addiction, and pathologies that require legal actions for protection. At times egos and a sense of entitlement may also get in the way of settlement.

Another element is fear. Being frightened of the future and the change that is ahead can be a factor that drives people to rely too much on legal support in the effort to avoid the outcomes that are inevitable.



Squeezing the stone for water will not result in more water. Knowing what the couple is dealing with before starting the divorce process can help them evaluate what the realistic options are ahead for them, which may be different for each couple. Divorce in any forum is not a place to take advantage of either side. It is a place to work out how to move on in life. The financial side is a critical part of that.

As noted, the financial side of divorce can keep people in a relationship well beyond the date their divorce is final. We often hear clients comment years later about their sentiments when they write that support check. The reality is that both sides remain connected financially as long as there are obligations that must be met under their agreement. That, by default, requires ongoing interaction.

The Truth About Divorce: F-A-C-C-T™

In our practice we teach couples F-A-C-C-T™ which is a simple structure about families, marital separation, and how life moves forward through conflict. It stands for Family Re-Formation, Awareness, Communication, Commitment, and Trust. These simple concepts sound euphemistic, but in reality, they are solid guiding principals that apply to family separation.

When it comes to the hostility and pain that can accompany separation, it is useful to recognize that divorce is a change in life. What is actually happening is that the family is Re-Forming. This reformation means life will be different and that can be a painful

realization. Separation and divorce are the restructuring of a relationship. This is especially true when there are children of that marriage.

There are also connections to extended family and friends. When couples separate, there is an awkward period in which family members and friends seek to understand what happened. They may have seen the divorce coming even before the couple recognizes there is a problem. Yet people on the outside tend to see one side as “good” and the other side as “bad.”

We recently had a couple in our office that knew their marriage was “done.” They had no children, but there was an extensive social structure. This was a self-aware couple that knew what happened in their relationship and simply needed to move forward.



When they announced their pending divorce, they also invited everyone they knew to embrace their partner.

They had nothing derogatory to say about the other person. In fact, when it came to social engagements they encouraged everyone to be open about inviting them separately or offering the invitation to both. This came as a shock to their circle of family and friends and was an interesting adjustment for everyone. There was no “right” and no “wrong.” There were no sides to choose.

Here is an example of how “Re-Formation” is coupled with “Awareness.” Being mindful of how a couple got to this point of separation is critical. It is so common to hear people say that they did not see it coming and that it happened suddenly. Their perception is that they did not know anything was wrong. Yet there was a path which led to this point. There was a problem or many issues that compounded over time. If these are not understood, the couple may be destined to repeat the entire relationship again with their new partner with the same results.

How Is Re-Formation and Awareness A Financial Issue?

How is all this emotional information “financial” in nature? The animosity that may be felt in separation can breed distrust and contempt. Once the seeds of contempt are in place, there arises suspicion, questioning and a “need” to discover what the other side is doing. In a legal forum, this translates to demands for financial information and disclosures. Such requests may require court interventions and legal fees each time an issue arises.

As the divorce relationship evolves under these circumstances, couples rely on intermediaries to lay out their position. Those representatives are typically the attorneys. These legal professionals know the law, they understand what can and cannot be done. They also know the impact each legal move may have on the other side.

The other impact this has is to reduce direct communication with the other spouse. In some instances, such as abuse, this is important and necessary to protect and injured and weakened person. However, in most marriages, this becomes a very expensive form of the old game of “telephone.” When legal counsel is retained, each side is advised not to speak with the other side. Each attorney does not want to deal with inadvertent communications that may disrupt their narrative.



As this legal relationship gets established there is spouse A talking with attorney A who then talks with attorney B who is acting for spouse B. Then spouse B talks to attorney B about how to respond to attorney A who then relays the response to spouse A. This is a very expensive conversation and in many cases a waste of money.

Some argue that such structures are necessary to protect the “interests” of the spouse. However, it is important to understand what those “interests” are.

Support Payments

A primary discussion in divorce is spousal support. In many situations, spouse payments are established to help one person get back on their feet and to re-establish themselves in life. In some instances, it is a payment in recognition of a situation, such as the stay-at-home parent that did not participate in the workforce to any large degree. This person may require extensive support or even lifelong support, depending on their age and situation. If there is a disability or other factors, these have weight in support considerations.

In California, the law offers some insight about support, from the legal perspective. The code section (Family Code section 4320ⁱⁱ) was designed with the idea that people should not become dependent on the state for support based on divorce. It is an effort to put responsibility for the financial consequences of separation with the couple.

The law notes that “In ordering spousal support under this part, the court shall consider all of the following circumstances...” The statute then cites many elements to be considered. In summary form, these include:

1. The earning capacity of each party to maintain the standard of living established during the marriage, including:
 - a. The marketable skills of the supported party
 - b. The job market for those skills
 - c. The time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and
 - d. The possible need for retraining or education to acquire other, more marketable skills or employment.
2. If a supported spouse was impaired by periods of unemployment during the marriage based on agreed upon devotion to domestic duties.
3. How one spouse contributed to the other spouse attaining an education, training, a career position, or a license.
4. The ability to pay spousal support.
5. The needs of each side based on the standard of living established during the marriage.
6. Obligations and assets, including the separate property, of each party.
7. How long of marriage was it.
8. Is there an ability for the supported spouse to find gainful employment.
9. Is there an impact of employment unduly interfering with the interests of dependent children in the custody of the party.
10. What is the age and health of both spouses.
11. Is there any history of domestic violence and criminal convictions for violence by one spouse.
12. Tax consequences to each spouse.
13. Hardships imposed on to each spouse based on support or the lack of support.
14. How likely and how long before a supported spouse can become self-supporting.
15. And the nebulous factor of anything that a court determines as just and equitable.

This list is not intended to be a legal discussion or legal advice. This is provided to offer insight into the scope and depth of this issue.

While there are some formulas used to figure this out, such mathematical results may not take into account all the true factors a couple needs to consider. That is why discussions between the spouses are so crucial. A legal solution is not a financial plan.

For example, one situation had a wife that could have asked for payment over the rest of her life. If she went down that road, she would have received enough to survive, but not actually move on.

She decided to work out another option with her husband. She wanted him to pay a significantly higher amount for a short period of time. Her goal was to return to school and obtain a degree. This would be a hardship on both sides for several years. But, in the long run, the husband would be free of the obligation and able to rebuild his financial circumstance. She, on the other hand, would be able to gain a professional career and build her life going forward after having raised a family.

Looking at the situation, this couple had two goals – one stated goal of moving on and one implied goal of cooperation to get through this change in their lives. Had they decided to argue over this in court, the costs alone could have been as much as her entire education.

In the end, they wrote their own agreement, had it transcribed into a legal document and recorded with the court. Years later they were able to meet and dance together at their daughter’s wedding. They each had a new spouse and were happily moving forward in life.

We know that not all situations have the resources or inclination for such a result. Yet the idea of cooperation within the context of moving forward in life is an important goal. If followed, couples can save valuable resources for themselves.

Child Support Is Not An Option; It Is An Obligation

Support for children is a requirement in California, as it is in all states. This comes from the belief that children should be supported by the parents and not become dependents of the state welfare system. To arrive at this obligation amount, California has developed a formulaⁱⁱⁱ that looks at several key points which impact a person’s ability to provide for the financial assistance of a child. The factors used are:

- The income of both parent's
- How many children in the family
- The amount of time each parent spends with the children

These three parts make up a scale that, in the perception of the court, balances the interest of a child against the ability and obligation of the parents to support that child.



Sadly, for children of divorce, child support becomes a stumbling block in many negotiations. People try to manipulate the factors of income and time to reduce their obligation for support payments. The stay-at-home parent may have needs that the person employed does not want to support. Often there is the desire of the “paying”

person to mandate how funds are to be used. There is the perception, right or wrong, that the payments have to be used only for the child. Yet there are no controls that allow this to happen. This tension can result in extended court battles over custody – not for the best interest of a child, but for a reduction or some form of control over support payments.

Information about child support factors can be found online at divorcenet.com online^{iv}.



In some cases, the vitriol and pain are so deep that one parent may feel motivated to try avoiding the support obligations by reducing income or becoming unemployed. Courts do not look lightly at this and may impute income to the person forcing some level of court-ordered support to be paid. There is no getting out of child support.

Not all couples act this way. In our work with families we find that once they recognize the reality of Family Re-Formation, they start looking at support and other financial elements as part of a puzzle. They tend to balance their desire for separation against the costs of reaching that goal. They see that there is something they want more than the financial discomfort of meeting their obligations surrounding divorce.

This attitude is important to move forward in life with children. Support lasts until a child is emancipated, age 18 (or 19 if still in high school), marries or in some other way becomes legally and financially independent of their parents. Couples with special needs children may have joint obligations for the life of the child.

Support, whether for children or a spouse, are matters of financial concern and attitude. They balance the desire for separation against the costs of reaching that goal to be physically separated. The desire for separation drives the effort to make agreements that work for both sides. No one is ever happy with these outcomes. They are agreements couples can live with, something they can tolerate based on their overriding goals.

One last note on support is that these payments and obligations can be changed. They are not absolutes that live in a vacuum separated from the events of life. When people are married incidents such as unemployment, salary cuts, health issues or disability happen. This may be written into agreements so that planned changes are taken into account – three children going to two children and ultimately no children. Agreements can also take into account the mechanism of mediation for people to negotiate their circumstances and changes that may precipitate from life events. The point is that couples, in divorce, do not get out of a relationship. They change a relationship as the family is re-formed on the other side of marriage.

Support Versus Property – Keeping The Two Straight

When couples negotiate their support deals, there may be a desire to “buy out” the obligation. While this can work for spousal support, the courts generally do not see this as an option for child support. The possibility that life changes will impact that need of a child for financial assistance is seen as the core reasoning that such settlements are not in the best interest of society and children as a whole.

Spousal support, on the other hand, may be negotiated as a lump sum settlement between two adults. But caution needs to be taken in this regard. Since this is referred to by the couple as support, it is common that they also view this as “alimony” from a tax perspective. The intention is that person A makes a large payment to person B. Person A then wants to deduct the payment on his/her taxes. Person B will claim it on his/her taxes. The reasoning is that the higher income person is getting a tax advantage by moving funds from a higher tax bracket to a lower one. Such a settlement may entice the paying spouse to offer more cash in exchange for the savings that such a deal may generate. But the tax courts do not allow this.

Any large payments between two people that are incident to the divorce are considered a property settlement and are neither income or a deduction to either side. This extends forward for three tax years with the IRS having the opportunity to look back at support payments that decline by more than \$15,000 in any given year. If the payments do drop, the amount is trapped as “re-captured income” on the tax return. The payer must re-trap those funds and pay the taxes that were not paid at the time the payments were made. The person that received the funds does get the chance to amend their returns to get the taxes back that they paid on those funds.

The concept is that the IRS sees this as a transfer of capital or a disguised property transfer.

There are other factors surrounding the payments that also tie into changes in child support that can trigger negative tax issues. Family support agreements are the most notable.

Family Support is not a “tax-acknowledged” payment under the Internal Revenue Code. It is the creation of the legal system under which a couple agrees to combine all support payments – child and spousal – into one single deductible payment. Unlike the ill-fated concept of buyouts for support, this concept can work. From the tax authorities point of view, if it looks like alimony, has the attributes of alimony and is paid like alimony – it’s treated as a deductible alimony payment. California is one state that acknowledges this form of support as valid. The IRS was pushed into accepting this based on the results of a tax court case that found it as a valid alimony structure^v.

This is where the IRS puts some teeth into the enforcement side of this effort. Where possible, if the IRS detects that the amount of family support changes at or near the date a child reaches a particular benchmark (like turning age 18 or 19 if still in high school) the amount of the reduction is recharacterized as non-deductible child support. That incremental amount is then assessed to the paying person all the way back to inception, and they need to pay the taxes and penalties on that as undeclared income. If the amount is significant, this can involve large penalties for underreporting of income. If there are more than two or more children, this can be even worse since the changes for each child would be assessed.

This is a potential win-win for the IRS since the recipient spouse can only recover their taxes paid for the most recent three years.

The workaround here is to make sure that there are not changes to support that are close to contingent events for a child. That way, there is nothing for the IRS to view as child support.

This does not mean that support cannot change for other reasons. There simply needs to be clear and convincing evidence that the change had nothing to do with the children. Some examples could be an ex-spouse graduating from college and starting a new job. Perhaps the ex-spouse changes employment and receives a bonus and a salary increase. As long as the reason for the change is not contingent on the events in the child's life, the change can stand up to scrutiny.

The Next Chapter

Income and support are one side of this financial question. The activities around property and how that is handled is the next step. How do people protect themselves from debts of the other person. How do you hold title to assets? Is there any reason to keep the house and have both people on the title after the marriage is ended? Is that even legal? These and more will be treated in our next paper about the financial realities of divorce.

About the Authors

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Marriage and Divorce,” which teaches about divorce and how to navigate the process emotionally and economically (www.youronelastlook.com).

Useful websites to consider:

<http://www.courts.ca.gov/selfhelp-facilitators.htm>

Your local Department of Child Support Services office can also help you. Click here for locations:

<http://www.childsup.ca.gov/Home/LCSAOffices.aspx>

ⁱ <http://www.nolo.com/legal-encyclopedia/ctp/cost-of-divorce.html>

ⁱⁱ

https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=9.&title=&part=3.&chapter=2.&article=

ⁱⁱⁱ <http://www.divorcenet.com/states/california/cafaq02#>

^{iv} <http://www.divorcenet.com/states/california/cafaq02#>

^v Under the version of 71 existing prior to enactment of the Deficit Reduction Act of 1984, the general rule as set forth in the case of *Lester v. Commissioner*, 366 U.S. 299 (1961), now codified in IRC 71(c)(1) was that a support payment, so long as it did not specifically fix an amount payable for support of children, was "alimony" which would be deductible in its entirety. Conversely stated, if any payment was specifically fixed in amount and character as child support, it was treated as such and was therefore non-deductible to the payor, and excluded from the payee's income. The rule of *Lester* created an incentive to combine child and spousal support together in a single payment. So long as none of it was specifically fixed in amount and character as child support, it was deductible in its entirety. - See more at:

<http://corporate.findlaw.com/law-library/california-family-support-tax-consequences-after-wells-v.html#sthash.6Dpo8uPe.dpuf>