

Family Law and Immigration Issues for Domestic Violence Survivors

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Domestic Violence

- Abuse (FC §6203)
 - Intentionally or recklessly cause or attempt to cause bodily injury;
 - Sexual assault;
 - To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another;
 - To engage in any behavior that has been or could be enjoined pursuant to FC §6320.

Domestic Violence

FC §6320:

- Molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, destroying personal, or disturbing the peace.
- Now includes protection of pets or companion animals.

Family Law Remedies

- Dissolution of Marriage (Divorce)
- Dissolution of Registered Domestic Partnership
- Legal Separation
- Nullity of Marriage (Annulment)
- Uniform Parentage Act (UPA)

Dissolution of Marriage

- Family Code § 2300: The effect of a judgment of dissolution of marriage when it becomes final is to restore the parties to the state of unmarried persons.
- CA is a no-fault divorce state.
 - Irreconcilable differences.
- CA does not have official common law marriage laws. Generally, not recognized.
- CA divorce judgment may not be recognized in other countries.

Dissolution of Marriage

- Division of community property.
- Assignment of community debt.
- Child custody and visitation orders.
- Child support order.
- Spousal support order.
- Parentage order.
- Attorney's fees.
- Restoration of former name.

Dissolution of Marriage

Requirements:

- Compliance with residency requirements.
- Filing of Summons (FL-110) & Petition (FL-100 or FL-103) plus other forms.
- Pay a filing fee or obtain a fee waiver order (FW-001 and FW-003).
- Personal service to Respondent.
- 6 months and 1 day from the date of service of Summons mandatory waiting period.
- Marriage not terminated until final Judgment signed by the court.

Dissolution of Marriage

- Residency Requirements (FC § 2320(a))
 - At least one of the parties was a resident of California for 6 months and of the county in which the petition is filed for 3 months.
 - Residency requirement is mandatory and may not be waived by stipulation or consent.
 - ❖ Alternate temporary solution to non-residency may be to petition for legal separation instead.

Dissolution of Marriage

- Service of Summons & Petition to Respondent:
 - Personal service;
 - Substitute service;
 - Posting/Publication
 - Requires permission from the court.

Domestic Partnerships

- Available to same-sex couples 18 years of age;
- Available to couples where one or both persons are over 62 years of age.
- The domestic partnership must be registered with the Secretary of State. No exceptions.
- May be terminated by dissolution of marriage, legal separation, or nullity.
- May be terminated through a State Department administrative action if certain requirements are met.

Legal Separation

- Does not have a residency requirement
 - *A party not meeting the 6 month dissolution residency requirement can file a petition for legal separation and later amend it to dissolution.*
- Parties may request the same orders available in a petition for dissolution.
- Judgment of legal separation may only be granted if:
 - Both parties consent; or
 - Respondent doesn't answer or appear.
- Does not terminate the marriage.

Legal Separation

Requirements:

- Filing of Summons (FL-110) & Petition (FL-100 or FL-103) plus other forms.
- Pay a filing fee or obtain a fee waiver order (FW-001 and FW-003).
- Personal service to Respondent.

Nullity of Marriage

- A judgment of nullity may be granted only when a marriage is adjudged void or voidable under conditions provided by statute. (FC §§ 2200-2201 and §2210)
- A judgment of nullity restores the parties to the status of unmarried persons.

Nullity of Marriage

Void Marriage:

- A void marriage is void from the beginning.
 - Incest
 - Bigamy

Voidable Marriage:

- A voidable marriage is valid until it is judicially declared a nullity.
 - Minority
 - Bigamy (spouse is believed to be dead)
 - Unsound mind
 - Fraud
 - Force (must be filed within 4 years after the date of marriage)
 - Physical incapacity (must be filed within 4 years after the date of marriage)

Nullity of Marriage

Requirements:

- No residency requirements.
- Filing of Summons (FL-110) & Petition (FL-100 or FL-103) plus other forms.
- Pay a filing fee or obtain a fee waiver order (FW-001 and FW-003).
- Personal service to Respondent.
- No requirement of consent or default.

Child Custody and Visitation

- Under CA law, child custody has two parts:
 - Legal custody: The right and responsibility to make decisions regarding health, education, and welfare of the child.
 - Physical custody: Who the child lives with.
- Either type of custody may be awarded as:
 - Sole custody: to one parent; or
 - Joint custody: to both parents.
- The court may award a combination of custodies:
 - Ex: Joint legal to both parents and sole physical to one parent.
- The court's orders may be temporary or permanent.

Child Custody and Visitation

Visitation:

- When one parent is awarded sole physical custody, reasonable visitation rights must be awarded to the other parent unless it is shown that the visitation would be detrimental to the child's best interest.
- The court may award unsupervised or supervised visitation to the non-custodial parent depending on the circumstances.

Child Custody and Visitation

Mediation:

- Mediation is required whenever it appears that an issue of custody or visitation is contested, whether the order sought is an initial order or modification (FC §3170(a))
- A party's failure to mediate may prevent him or her from being heard on a custody or visitation request.

Child Support

- A court may order either or both parents of a child under 18 years of age to pay an amount necessary for the child's support.
- The court uses a statewide uniform guideline when determining a child support award.
- A non-custodial parent who does not have visitation with the minor child is still required to make child support payments ordered by a court.
- A parent may request child support either through a petition to the court or by opening a case with the local Department of Child Support Services.
 - ❖ When a custodial parent is receiving cash aid the county may initiate a child support case against the non-custodial parent.

Spousal Support

Temporary spousal support:

- While a dissolution or legal separation action is pending, the court may order either spouse to pay any amount necessary for the support of the other spouse.
- An action is pending from the time the petition is filed until its final adjudication or the time to appeal has passed.
- Temporary support may be ordered in any amount based on the party's needs and the payer's ability to pay.
- The court must take into consideration whether the payer is also paying child support.

Spousal Support

Long-term spousal support:

- In a judgment of dissolution or legal separation the court may order a party to pay spousal support to the other in any amount and for any period of time that the court deems just and reasonable. (FC 4330)
- In awarding long-term spousal support, the court must base its decision on the standard of living established during the marriage.
- In addition to considering the marital standard of living the court must consider all 14 factors listed under §4320 as they apply to each respective party.
- May be awarded for a specific period of time or indefinitely unless the supported party remarries or dies.

Spousal Support

FC §4320 factors:

- (a) The extent to which each party's earning capacity will maintain the standard of living.
- (b) The extent to which the supported party contributed to the supporting party's education, training, or a license.
- (c) The supporting party's ability to pay.
- (d) Each party's needs based on the marriage standard of living.

Spousal Support

- (e) Each party's assets and obligations.
- (f) The duration of the marriage.
- (g) The supported party's ability to be gainfully employed without interfering with the interests of dependent children in his or her custody.
- (h) Each party's age and health.
- (i) Documented evidence of domestic violence.

Spousal Support

- (j) Immediate and specific tax consequences to each party.
- (k) The balance of hardships to each party.
- (l) The goal that the supported party be self-supporting within a reasonable period of time.
- (m) The criminal conviction of an abusive spouse when the court is reducing or reducing a spousal support award.
- (n) Any other factors the court deems just and equitable.

Uniform Parentage Act

- Parentage law will recognizes who is a child's legal parent.
- The UPA provides grounds on which to claim the existence (or nonexistence) of a parent-child relationship.
- A petition to establish parental relationship may be filed in conjunction with other family law actions including requests for domestic violence restraining orders.

Uniform Parentage Act

Conclusive presumption of paternity:

- Four elements must exist at the time of a child's birth to trigger application of the presumption (FC §7540):
 - Valid Marriage;
 - Cohabitation;
 - Husband not sterile; and
 - Husband not impotent.

Uniform Parentage Act

Genetic Testing:

- FC §7541 creates a 2-year period following a child's birth within which a presumed father....can bring a motion for blood tests.
- Depending under which type of family law action the motion is brought under there may be a cost associated for the testing.

Immigration Relief for Victims of Domestic Violence, Sexual Assault, and Other Serious Crimes

- Violence Against Women Act (VAWA) Self-Petitions (I-360)
- Petition for U Non-Immigrant Status (I-918)
- Petition to Remove the Conditions on Residence Waivers (I-751)
- Asylum for DV Survivors

VAWA Self-Petition (I-360)

Allows some immigrant domestic violence victims to apply for immigration status without help from their abusive spouse

➤ = “parallel system” for individuals whose immediate family member could, or may, have applied for them, but who don’t wish to depend upon that relative for their status due to domestic violence

VAWA Self-Petition (I-360)

Who Qualifies:

- Abused spouses of USC or LPR.
- Abused spouses of USC or LPR with children as derivatives.
- Abused children (unmarried and under 21*, can be step-child) of USC or LPR.
- “Non-abused” spouse/parent of abused children.
- Abused parents of adult U.S. citizen children.

VAWA Self-Petition (I-360)

Battered Spouse Eligibility:

- **Valid “good faith”** marriage to U.S. Citizen or LPR Abuser.
- **Battery or Extreme Cruelty**
 - Self-petitioner was “battered” or “subjected to extreme cruelty” (including verbal, emotional or economic cruelty/abuse).
 - Abuse doesn’t have to have occurred in the U.S.
- **Resided** with abusive spouse during marriage.
- **Good Moral Character** of the Victim (3+ years).

VAWA Self-Petition (I-360)

Benefits:

- Access to public benefits.
- Employment authorization.
- Adjust status to LPR - but look for inadmissibility issues which may need to be waived.
- Some relaxed adjustment of status (AOS) rules.
- AOS for derivative beneficiaries: unmarried children under 21 when self-petition filed.

U Nonimmigrant Status

- **PURPOSE** is to encourage undocumented immigrant victims of certain violent crimes to report crime to law enforcement without fear of removal (deportation) AND to assist law enforcement in the investigation and prosecution of crimes.
- Confers nonimmigrant status rather than a visa.

U Nonimmigrant Status

Eligibility:

- **Suffered substantial physical or mental abuse** resulting from being a victim of certain crimes;
- **2) Possesses information about the crime; and**
- **3) Has been, is being, or is likely to be helpful in the investigation or prosecution of crime.**
 - Signed Form I-918 Supplement B, U Nonimmigrant Status Certification.

U Nonimmigrant Status

Benefits:

- Nonimmigrant status in U.S. for 4 years.
- Public benefits eligibility in CA under SB 1569.
- Employment Authorization.
 - Social Security Number
 - Drivers License/State ID
- Possibility of nonimmigrant status for family members (“derivatives”).
- Eligible to adjust status to LPR after 3 years of U Visa nonimmigrant status.
- Does not allow for travel outside the United States.

U Nonimmigrant Status

- **Crime(s)** is one specified in the Immigration and Nationality Act (INA) § 101 (a)(15)(U).
- **Crime occurred in U.S. or U.S. territories or possessions or can be prosecuted in U.S. under extraterritorial statute.**
- Can be indirect victim if principal victim is a close enough family member who died or a U.S. Citizen child.
- Can also be a “bystander victim” if suffered enough harm from witnessing a crime. Rare.

U Nonimmigrant Status

- **Certification** (I-918 Supplement B) that Petitioner “has been helpful, is being helpful or is likely to be helpful in investigation or prosecution of the listed criminal activity.”

Petition to Remove the Conditions on Residence Waivers (I-751)

A spouse holding a 2-year conditional “green card” may apply for a waiver requiring the abusive spouse to apply for the removal of conditions if:

- The Petitioner has faced extreme cruelty from the spouse and/or has been battered; and
- The marriage was entered in good faith.
 - ❖ Dependent children who received conditional resident status may also be included in the petition.

Asylum for DV Survivors

- Fleeing domestic violence in the home country.
- Home country won't (or isn't able to) protect the client.
- 1 year deadline.
- Risky – can lead to removal proceedings.