CHOOSING APPROPRIATE MARITAL/DOMESTIC PARTNERSHIP STATUS RELIEF

Scope Note: For parties who have decided to terminate (or otherwise alter) their marital or domestic partnership status, there are three potential legal remedies—*dissolution*, *nullity* or *legal separation*. This Chapter addresses the basic differences between the three "status" proceedings (including, in narrow circumstances, the option to pursue a "summary dissolution") and the impact on the client's interests. To competently advise your clients, a thorough knowledge of the advantages and disadvantages of the respective legal remedies is, of course, essential.

[2:1] **Application to Domestic Partnerships**

The California Domestic Partner Rights and Responsibilities Act (Stats. 2003, Ch. 421) extends to registered domestic partners almost all of the rights, benefits, protections and obligations that apply to spouses under California law both during and upon termination of the union; and makes marriage dissolution, nullity and legal separation procedures applicable to domestic partnerships. [Fam.C. §§297.5, 299(d)]

In accordance with the Act, and unless otherwise indicated, the terms "spouse" and "spouses" used in this Practice Guide should be read as encompassing "domestic partner" and "domestic partners"; "father" and "mother" should be read as encompassing "parent"; and "marriage," "marital" and "marital status" should be read as encompassing "domestic partnership" and "domestic partnership status." [See generally CRC 5.76; Fam.C. §143—"spouse" includes "registered domestic partner," as required by Fam.C. §297.5]

[2:1.1-1.4] *Reserved.*

A. STATUS REMEDIES—DISSOLUTION, NULLITY, LEGAL SEPARATION

1. [2:1.5] **Methods of Dissolving/Altering Marital Status—In General:** The Legislature has full control over the conditions under which a marriage may be terminated. [*McClure v. Donovan* (1949) 33 C2d 717, 728, 205 P2d 17, 24; *Pryor v. Pryor* (2009) 177 CA4th 1448, 1454, 99 CR3d 853, 856-857]

   A marriage may be legally *dissolved* in California, restoring spouses to "single" status (Fam.C. §2300), *only* by (a) *death* of one of the parties; (b) a *judgment of marriage dissolution;* or (c) a *judgment of nullity of marriage*. [Fam.C. §310]

   Alternatively, marital rights and financial responsibilities may be adjudicated *without dissolving the marriage* in a proceeding for *legal separation*. [See generally, Fam.C. §2010 (court jurisdiction), §2347 (subsequent dissolution judgment not barred by legal separation judgment)]

a. [2:1.6] **Assertion of marital privileges:** Until a marriage is dissolved (¶*2:1.5*), the marital privileges (Ev.C. §970 et seq.) usually may not be asserted during a family law proceeding. This is so because the privileges do not apply in litigation between spouses. [See Ev.C. §§972(a), 984(a); *Jurcoane v. Sup.Ct.* (*People*) (2001) 93 CA4th 886, 896-900, 113 CR2d 483, 491-494 (addressing marital testimonial privileges in criminal proceeding)—because H and W never legally divorced, marital testimonial privileges applied even though parties had no contact for 17 years and their marriage was not viable; *People v. Barefield* (2021) 68 CA5th 890, 901-902, 283 CR3d 742, 750-751 (citing *Jorcoane* with approval)—because H and W remained legally married despite having separated years earlier, marital testimony privilege applied to preclude W's testimony regarding H's prior uncharged domestic violence acts]

The marital privileges are discussed further at ¶*11:172*.

2. [2:2] **Dissolution vs. Nullity Proceedings:** Although the grounds for a judgment of nullity might also be the basis of irreconcilable differences and thus support a dissolution judgment (*see* ¶*2:32*), the two remedies are not generally interchangeable.

a. [2:3] **Validity of marriage threshold question:** Petitioning for a judgment of nullity (rather than marriage dissolution) should be considered only where the *validity* of the marriage is in doubt. This is because marital dissolution and nullity of a marriage are premised on contradictory assumptions:

- [2:3.1] A dissolution action is maintained to terminate a *valid* marriage on grounds arising *after* the marriage (Fam.C. §2310; *Marriage of Garcia* (2017) 13 CA5th 1334, 1348, 221 CR3d 319, 330);

- [2:3.2] Conversely, a nullity proceeding is maintained on the theory that, for reasons *existing at the time of the marriage, no valid marriage ever occurred* (i.e., the marriage, from its inception, is either *void or voidable;* Fam.C. §2200 et seq.). In other words, whereas a dissolution action seeks to terminate marital status, a nullity action seeks to inquire whether any such status ever existed. [*Millar v. Millar* (1917) 175 C 797, 806-807, 167 P 394, 398; *Marriage of Garcia* (2017) 13 CA5th 1334, 1348, 221 CR3d 319, 330 (same); see also *Marriage of Seaton* (2011) 200 CA4th 800, 806, 133 CR3d 50, 55—void marriage's "invalidity may be shown collaterally in any proceeding in which the fact of marriage may be material"]

A fortiori, a marriage valid from its inception (see Fam.C. §300 et seq.) may be judicially dissolved *only* by an action for marriage dissolution. [See *Marriage of Seaton,* supra, 200 CA4th at 806, 133 CR3d at 55—judgment nul-

lifying marriage between W and H-3 reversed because W's bigamous marriage to H-2 was void from its inception (even absent a judgment of nullity), rendering marriage with H-3 valid; *Marriage of Johnston* (1993) 18 CA4th 499, 502-503, 22 CR2d 253, 255-256—judgment of nullity (obtained on W's petition) reversed with directions to enter judgment of dissolution (on H's response) since insufficient grounds (here, alleged fraud) to render marriage void or voidable]

(1) [2:4] **Determining validity of marriage:** A marriage may be invalid from its inception because of irregularities in statutory formalization procedures (ordinarily, license, solemnization and authentication; Fam.C. §306) or because of other legal impediments that, notwithstanding proper formalization, render the marriage void or voidable (incestuous, bigamous, induced by fraud or force, party under age 18 unless they entered into marriage as statutorily prescribed, etc.; Fam.C. §§2200, 2201, 2210). [*Estate of DePasse* (2002) 97 CA4th 92, 105-106, 118 CR2d 143, 154-155 (disapproved on other grounds in *Ceja v. Rudolph & Sletten, Inc.* (2013) 56 C4th 1113, 1126, 153 CR3d 21, 31)]

Cross-refer: Statutory requirements to perfect a valid marriage and the bases upon which a marriage may be deemed void or voidable and thus ground for a judgment of nullity are explained in detail in *Ch. 19*.

b. [2:5] **Alternative remedies to terminate voidable marriage:** As discussed in *Ch. 19*, some marriages, though defective, are simply "voidable" rather than "void" (e.g., because of minority, fraud or force). A *voidable* marriage (unlike a "void" marriage, which is *invalid per se*) is *valid unless and until adjudged a nullity;* and it may be terminated by judgment of dissolution unless the party entitled to have it annulled raises the issue of nullity. [See *Marriage of Seaton* (2011) 200 CA4th 800, 807, 133 CR3d 50, 55—voidable marriage is valid for all purposes until judicially declared a nullity and may only be challenged by party entitled by statute to assert its voidability]

In such cases, counsel should advise the client of the pros and cons of the alternative remedies.

(1) [2:6] **Disadvantages of nullity proceeding:** There are several potential disadvantages to a nullity proceeding not encountered in an action for marriage dissolution. Notably:

(a) [2:7] **Proving "grounds":** The grounds for dissolution are relatively simple to establish (usually, "irreconcilable differences," ¶*2:32 ff.*).

By contrast, the bases for a judgment of nullity—particularly where the grounds urged go to a *voidable*

(rather than void) marriage—are likely to be more difficult and costly to prove. [See, e.g., *Marriage of Goodwin-Mitchell & Mitchell* (2019) 40 CA5th 232, 239, 253 CR3d 123, 129—despite H's fraudulent intent to be unfaithful at time parties married, error to grant W's annulment petition where she continued to reside and have sexual relations with H for eight months after discovering his conduct; *Marriage of Garcia* (2017) 13 CA5th 1334, 1347, 221 CR3d 319, 330, fn. 10—false representation/concealment sufficient to support annulment must go to *very essence* of marital relationship; *Marriage of Johnston* (1993) 18 CA4th 499, 502, 22 CR2d 253, 255—spouse's concealment of severe drinking problem, refusal to work after marriage, etc. does not establish fraudulently-induced consent sufficient for annulment (Fam.C. §2210(d)); *and detailed discussion in Ch. 19*]

The party seeking a judgment of nullity may also have to overcome *statutes of limitations* hurdles. [Fam.C. §2211]

(b) [2:8] **Role of "fault":** Broadly, allegations of "fault" play *no role* in a marriage dissolution proceeding. [See Fam.C. §2335 (evidence of specific acts of misconduct generally "improper and inadmissible"), §2550 (equal division of community estate ordinarily mandatory); *and* ¶*2:34*]

On the other hand, issues of "innocence" or "fault" are highly probative in a nullity proceeding . . . on the questions of *support* and an *attorney fees and costs award*, as well as marital (quasi-marital) property rights (¶*2:9*). [Fam.C. §2254 (support awardable only to party found to be "putative spouse"), §2255 (party applying for fees and costs award must be "innocent of fraud or wrongdoing in inducing or entering into the marriage . . .")]

(c) [2:9] **Marital property rights:** Parties to an invalid marriage have no "community property" rights per se. However, if the court finds that either or both parties believed in good faith that the marriage was valid (i.e., either or both are a *putative spouse*), property acquired during the void or voidable marriage that *would have been community property* but for the impediment to a valid marriage is deemed "quasi-marital property." The court, however, must divide it as if it were community property *only upon request of a party declared to have putative spouse status*. In other words, §2251's community property division can only be invoked at the request and for the benefit

of the putative spouse. [Fam.C. §2251(a)(2); *see discussion at* ¶*19:61 ff.*]

If there is doubt about the client's "putative spouse" status or whether the void or voidable marriage would qualify as a "putative marriage," a client seeking a 50% interest in the other party's acquisitions and accumulations during marriage would probably be best advised to proceed by petition for marriage dissolution, where (unless raised by the respondent) the validity of the marriage will not be in issue and *community property* rights will be fully respected. [Fam.C. §2500 et seq.]

(d) [2:9.1] **Appearance required:** An uncontested or default judgment of dissolution ordinarily may be granted upon proof by affidavit (i.e., no appearances are required; *see* ¶*12:42 ff., 12:80 ff.*). By contrast, a judgment of nullity requires an appearance and testimony.

(2) [2:10] **Advantages of nullity proceeding:** By the same token, there occasionally may be circumstances where petitioning for a judgment of nullity will go further in promoting and protecting the client's interests than would a dissolution proceeding. For example:

(a) [2:11] **No minimum "residence" requirement:** With one exception (same-sex couples validly married in California but who now reside in a jurisdiction that will not dissolve their marriage, Fam.C. §2320(b)), a dissolution judgment cannot be entered in California unless one of the spouses satisfies a minimum *six-months/three-months* residence requirement (Fam.C. §2320(a), ¶*3:160 ff.*). There is no minimum residence prerequisite to a judgment of nullity. [See *Millar v. Millar* (1917) 175 C 797, 808, 167 P 394, 399 (decided under predecessor statutes, but analysis equally applicable under present law)]

1) [2:12] **Comment:** This should not necessarily be the pivotal factor in opting for a nullity proceeding over a marriage dissolution action: A petition for legal separation may be filed without regard to the residence requirements and then *amended* to request a judgment of dissolution when the residence requirements are met. [See Fam.C. §2321, ¶*2:29; and further discussion at* ¶*3:167 ff.*]

2) [2:12.1] **Compare—not a factor for domestic partnership terminations:** Nor, in any event, is the Fam.C. §2320(a) residence requirement a factor in deciding between the nullity and dissolution procedures to terminate a voidable

California-registered domestic partnership: Unlike marriage dissolution, there is *no* domicile or minimum residency prerequisite to the dissolution of a domestic partnership established by registration in California after 2004. [Fam.C. §§298(c), 299(d); *see also* ¶*3:161.1 & 20:302*]

Limitation: But (subject to the Fam.C. §2320(b) exception for certain nonresident same-sex married couples, ¶*2:11*), the minimum residence requirement *will* be a factor if registered domestic partners who are *also married* to each other seek to dissolve *both* the partnership *and* their marriage in a single proceeding (Fam.C. §299(e); see also Judicial Council form FL-100).

(b) [2:13] **No "waiting period":** The six-month "waiting period" prerequisite to finality of a dissolution judgment terminating marital status (Fam.C. §2339, *see* ¶*15:211*) does not apply to judgments of nullity. A judgment of nullity terminates the marriage immediately, thus potentially freeing the parties to remarry sooner. [Fam.C. §2212]

(c) [2:14] **Avoidance of interspousal property transactions:** *Fraud* supporting a petition to annul a voidable marriage (Fam.C. §2210(d)) might also establish ground to avoid interspousal property transactions during the voidable marriage—such as a deed transferring title to the client's separately-owned real property into the names of the client and spouse jointly.

By contrast, in a dissolution action, the separate to community property transmutation would ordinarily be respected (absent a showing of breach of fiduciary duty) and the property apportioned between community and separate property interests (*Ch. 8*). [*Marriage of Johnston* (1993) 18 CA4th 499, 502, 22 CR2d 253, 255—reversal of judgment of nullity based on insufficient showing of "fraud" also required reversal of trial court set-aside of interspousal deed and consequent SP vs. CP apportionment]

1) [2:15] **Comment:** That fraudulently-obtained consent to marry may permeate subsequent property transactions during marriage, and give rise to damages and/or rescission claims, should not necessarily be the deciding factor in choosing a nullity proceeding over a dissolution action.

While a cause of action between spouses for fraud or misrepresentation (as well as any

intraspousal tort or breach of contract claim) must initially proceed by independent civil suit (see CRC 5.17), the family court has jurisdiction to order it *consolidated* with a pending dissolution action and to provide appropriate relief therein (CCP §1048). [See *Marriage of McNeill* (1984) 160 CA3d 548, 556-558, 206 CR 641, 644-645 (disapproved on other grounds in *Marriage of Fabian* (1986) 41 C3d 440, 451, 224 CR 333, 340, fn. 13)—H's civil action against W to rescind deed and recover damages on ground of fraud properly consolidated with W's dissolution action; *and further discussion at ¶3:286 ff.*]

[2:16] *Reserved.*

(d) [2:16.1] **"Survival" of pending cause of action:** Once commenced, an action for nullity *survives* the petitioner spouse's death (per CCP §377.20). The deceased petitioner's personal representative may be substituted into the action (see CCP §377.30 et seq.), whereupon the issue of whether a valid marriage ever existed is then properly brought to judgment before the family law court. Where there are grounds for a nullity proceeding (e.g., fraud), this "survival" feature may offer significant advantages to a terminally-ill or aged spouse . . . because a judgment of nullity (adjudication that there never was a valid marriage) will cut off the other spouse's "surviving spouse" claim to a share of the deceased spouse's estate. [*Marriage of Goldberg* (1994) 22 CA4th 265, 271, 273, 277, 27 CR2d 298, 301, 303, 305]

On the other hand, a spouse's death *prior to* a marital status judgment or submission for decision in a *dissolution* action *abates* the action. The dissolution action "does *not* 'survive', because its purpose [termination of marital status] has been abruptly accomplished by the death . . ." (*see ¶3:19, 8:47, 15:290*); the family law court would have no further jurisdiction over the matter and no power to defeat or otherwise adjudicate the other spouse's "surviving spouse" rights to the deceased spouse's estate. [*Marriage of Goldberg*, supra, 22 CA4th at 270-271, 27 CR2d at 301; see also Fam.C. §2337(c), (d) & (g) (*¶11:483 ff.*) re conditional bifurcation orders preserving various "surviving spouse" rights despite bifurcated "status only" judgment and despite party's death after entry of status only judgment; *and ¶3:19 ff.* for detailed discussion of abatement by death issues in marital status actions]

(e) [2:17] **"Relation back":** Because a judgment of nullity (unlike a judgment of dissolution) effectively determines that no legal contract of marriage ever came into being, it "relates back" to the date of the purported marriage and "*erases* all of the consequences of any mistaken reliance on there being such a relationship." [*Marriage of Goldberg* (1994) 22 CA4th 265, 271, 27 CR2d 298, 302 (emphasis added); *Marriage of Garcia* (2017) 13 CA5th 1334, 1348, 221 CR3d 319, 330 (same); see also *Marriage of Seaton* (2011) 200 CA4th 800, 807, 133 CR3d 50, 55—"relation back" is legal fiction designed to do substantial justice between parties and is desirable only when used to achieve that purpose]

Thus, this "relation-back" effect may effectively restore the client to certain preexisting rights that had been terminated by the supposed marriage. [See, e.g., *Clark v. City of Los Angeles* (1960) 187 CA2d 792, 798-801, 9 CR 913, 918-919—restoration of widow's pension following W's annulment of second marriage; *and more detailed discussion at* ¶*19:156 ff.*]

(f) [2:18] **Avoiding spousal support/attorney fee award exposure:** Where the other spouse is not free of fault, a nullity proceeding is clearly preferable to protect against the client's exposure to a possible spousal support and/or attorney fees and costs order. Neither support nor attorney fees and costs are awardable in a nullity proceeding to a party lacking "putative spouse" status or who is otherwise tainted by fraud or wrongdoing in inducing or entering into the marriage. [Fam.C. §§2254, 2255]

(g) [2:19] **Religious tenets:** Finally, all other concerns aside, a party to a void or voidable marriage may feel compelled by religious beliefs to opt for a judgment of nullity over a judgment of dissolution (dissolution might offend the tenets of the client's religion, whereas an annulment would not).

(3) [2:20] **Compare—"neutral" factors:** Several rights and remedies attach in any marital status proceeding and thus will have no bearing on the dissolution vs. nullity decision. Notably:

- Various *ex parte restraining orders* are authorized in any domestic relations case. [Fam.C. §§2045, 6218, 6320 et seq.; *see Ch. 5*]
- *Child custody/visitation rights* will be determined under identical Code provisions. [Fam.C. §§2010, 2253, 3000 et seq.]
- Likewise, *child support* will be ordered under identical

Code standards. [Fam.C. §§2010, 4001, 4050 et seq.]

c. [2:21] **Tactic—pleading in the alternative:** The decision to seek a judgment of nullity vs. a judgment of dissolution need not be reached at the time the petition is filed. The actions may be pleaded *in the alternative* (CRC 5.60(b)), deferring the ultimate choice for later amendment of the pleadings. (Of course, this tactic should *not* be used where it clearly appears from the outset that the marriage is neither void nor voidable by law.)

[2:22-24] *Reserved.*

3. [2:25] **Legal Separation Compared:** Although separation proceedings can be maintained on the same grounds as dissolution actions (¶*2:31*), a judgment of legal separation does not terminate marital status. It is an *alternative* to dissolution and is generally sought upon breakdown of the marriage where for religious or other personal reasons the petitioner does not want the legal status relationship absolutely severed. [See *Irvin v. Contra Costa County Employees' Retirement Ass'n* (2017) 13 CA5th 162, 167-168, 220 CR3d 510, 515-516 (discussing history behind legal separation remedy)—although legal separation divides couples' economic interests, it does not terminate marital status]

[2:25.1] ***PRACTICE POINTER:*** Spouses who have come to a parting of the ways often seek a legal separation instead of a dissolution in order to retain eligibility for *medical insurance* that would otherwise be lost by a termination of the marriage. This can be a very important consideration where a party has a preexisting medical condition (for which new coverage would not be obtainable) or insufficient financial resources to defray the cost of conversion or replacement coverage.

a. [2:26] **Similarities to dissolution:** As an action to conclusively determine and settle the spouses' property rights and financial responsibilities to one another and to their minor children, a legal separation proceeding is similar to any marriage termination proceeding: i.e., a judgment of legal separation adjudicates support, custody/visitation and community property rights and obligations under the same standards and in the same manner as a judgment of dissolution. [*Faught v. Faught* (1973) 30 CA3d 875, 878, 106 CR 751, 753; *Estate of Lahey* (1999) 76 CA4th 1056, 1059, 91 CR2d 30, 33; see also Fam.C. §2000, Law Rev. Comm'n Comment; *Irvin v. Contra Costa County Employees' Retirement Ass'n* (2017) 13 CA5th 162, 168, 220 CR3d 510, 517—following entry of judgment for legal separation, each party's earnings are deemed separate property and their assets cannot be used to satisfy each other's debts]

A judgment of legal separation leaves the marriage bonds intact. In effect, however, the parties remain "married" in name

only, without the concomitant rights and responsibilities that attach to marital status. They cannot enter into a new marriage unless and until the existing marriage is dissolved by death or judgment of dissolution; but the judgment finally adjudicates the financial issues between the parties, including determination of their support obligations and a division of their community estate (except that, pursuant to Fam.C. §2556, *unadjudicated* CP assets and debts remain subject to the family court's continuing jurisdiction to divide; ¶*8:1513 ff.*). [*Estate of Lahey*, supra, 76 CA4th at 1059, 91 CR2d at 33 & fn. 4]

Following a judgment of legal separation, the parties acquire no further community property and owe each other no spousal duties of care and support except as ordered by the court pursuant to the judgment. [Fam.C. §§772, 4300 et seq.; see *Estate of Lahey*, supra, 76 CA4th at 1059-1060, 91 CR2d at 32-33—judgment of legal separation finally determining marital property rights effectively terminates eligibility as "surviving spouse" for purposes of intestate succession through deceased spouse (see also Prob.C. §78); compare *Irvin v. Contra Costa County Employees' Retirement Ass'n*, supra, 13 CA5th at 174, 180, 220 CR3d at 522, 526 & fn. 10 (applying County Employees Retirement Law)—notwithstanding Prob.C. §78's express exclusion of legally separated spouses from its definition of "surviving spouse," judgment of legal separation did *not* invalidate widow's "surviving spouse" status for purposes of receiving continuous pension benefits through her deceased husband's membership in county retirement association]

b. [2:27] **Consent limitation:** There is one potential stumbling block to a judgment of legal separation that is not encountered on the road to a judgment of marriage dissolution:

The court may not enter a judgment of legal separation on a petition requesting same unless *both parties* consent thereto . . . except where the respondent has not made a general appearance (i.e., default cases). [Fam.C. §2345; see also *Irvin v. Contra Costa County Employees' Retirement Ass'n* (2017) 13 CA5th 162, 168, 220 CR3d 510, 517—unlike divorce, legal separation is "wholly voluntary remedy" that requires both parties' consent unless judgment is taken by default]

Thus, if one spouse petitions for legal separation but the other responds with a request for marriage dissolution, legal separation may not be granted. However, the case may proceed to a judgment of dissolution (there being no "consent" limitation) so long as the residency requirement has been met. [*Marriage of Patel* (2025) 117 CA5th 262, 267, 340 CR3d 35, 38—petition for legal separation dismissed where H did not consent to legal separation and W did not satisfy residency requirement to seek dissolution at time of filing]

c. [2:28] **No bar to subsequent dissolution judgment:** Though a judgment of legal separation, once final, conclusively determines