

The Smart Guide to Getting Divorced: What You
Need to Know to Be Safe, to Be Smart, and
Most Importantly, to Start Your New Life

Paul Staley

DEDICATION

This book is dedicated to my to my clients, the first of whom nearly twenty years ago bore with me as I navigated a steep learning curve figuring out how to solve their problems; to the mentor attorneys – most notably Gordon Cruse – who, along with other generous veterans of family court gave unselfishly of their time to this then-younger protégé; and to the mental health professionals – most especially Ruth Roth, Ph.D. and Penny Angel-Levy - who have supported my clients and taught me invaluable lessons in the process.

PREFACE

When you got married, you likely did not spend much time thinking about what it would take to end your marriage. Yet for many reasons, almost half of marriages *do* end. Whether or not you have children, the way you choose to end what began out of love can leave lasting imprints on everyone involved for better *and* for worse.

When things go wrong in a marriage, they can build up slowly over time or happen suddenly. Maybe you feel that both of you are responsible; maybe you blame each other. Either way you want a better future. You want to make sure that how you bring your union to a close puts you on a healing course to begin the next part of your life's journey. You want to be safe. You want to be secure. You want to be smart about doing what's best.

Even if you feel that a part of your life as you knew it, or dreamed it, is over, another part of your life is beginning. You are going to be in transition for a while, from here to where you want to be. The decisions you make in the process of becoming unmarried will affect how you and your family make a new start. To make a new beginning, it helps to first make a good ending.

Getting the right expert advice about the many things that can go wrong *and* right in your legal and financial decision making can help you in the process. That is the first step on your way to **taking charge of your future**.

There's a saying: "It takes a village to raise a child." Many of us who have been down the road of ending a marriage can tell you that it takes a village of professionals, friends, family, neighbors, colleagues, and wise counselors—co-travelers who can help you find your way and have been through the messy, scary, sad, confusing, and sometimes hopeful process of untying the knots.

It's said that we cannot go back and change the past. What we can do is make sure the past doesn't keep us from having a better future. Today you can begin with a smart start down that road — by finding someone you trust who has the experience to help you navigate, one step at a time, the emotional and legal labyrinth of becoming unmarried.

—Nance Guilmartin, author of *Healing Conversations: What to Say When You Don't Know What to Say*, and *The Power of Pause: How to Be More Effective in a Demanding 24/7 World*. More about Nance at www.nanceguilmartin.com

Remember that this short guide is not a substitute for legal advice from an astute lawyer familiar with your situation. In fact, there is no substitute for legal advice from a thoughtful lawyer familiar with your situation. Your receipt of this book in any form doesn't make you my client or me your attorney. When clients understand the topics in this booklet, I find they have a better chance for success. I also find they are able to endure the divorce process with less stress. This book is written by a California lawyer about divorce in California only.

INTRODUCTION

I'm Facing Divorce; Where Do I Start?

Right now you may feel like you've lost control of your life, like everything is uncertain. You undoubtedly have so many questions that you don't know where to start. This guide is a great place to begin because what you don't know *can* hurt you, and what you learn can *help* you.

Should I just leave?

Can I make my spouse get out?

What about money? What about debts?

Who's going to get the house? The property?

What about the children? Will they be protected?

Is it possible to have a good divorce?

Is there such thing as a good divorce? I'd like to think so. Even divorces that can't be made *good* can be made *better*. The people who enjoy the greatest sense of success in a divorce are those who can bring themselves to compromise. Compromise can be difficult, especially when there seems to be clear right and wrong. It requires thoughtfulness, conscious effort, and logic in the midst of what feels like a completely *illogical* experience. Having a *better* divorce, and not the urban guerrilla-warfare divorce, requires being self-aware and telling apart those battles which *must* be fought from those which *may* be fought.

When making a decision in my own life, I ask myself this question: **"Will this matter to me in six months? Next year? Five years from now?"** If the result of a decision is something I won't care about after a year, the decision probably isn't that important. Today, at the very beginning of your information-gathering mission, is the day to think about the decisions you'll be making soon.

Six months from now, or after your court case is over, what do you hope your life will look like? If you can look further ahead than six months, do it. It is this vision of your future—not that of tomorrow or next week—that must drive your decision-making process.

This eye-opening guide is designed to answer some of your questions, explain the basics of the divorce process, and give you practical advice about helping yourself and moving forward in your life. The process isn't going to be easy. You may feel angry, and you probably feel hurt. For most, that gets better with time, but not usually as a direct result of the legal process. It's important not to expect family court to be therapeutic. While the process can bring closure and certainty, few look back on their divorce as a pleasant experience. Take heart, though. It can at least be made *less* unpleasant. This guide is offered to educate and empower you. A happy, satisfying future for you and your children depends on you getting good information and preparation, which lead to realistic expectations.

1 No-Fault Divorce: Is There Such A Thing?

Whose Fault Is This Mess Anyway?

No legal matter I come across is shrouded in more misinformation than no-fault divorce. It's natural when you're getting a divorce to want to blame someone. It makes perfect sense emotionally. I have seen people expend much emotional energy trying to identify or sometimes *create* fault. In a no-fault state like California, those efforts are misdirected. Does that mean there is no fault, ever? No. Sometimes there definitely is fault. *No-fault* just means the law doesn't always see your situation in the same way you or your spouse might.

California is a no-fault-divorce state. This means that ***in California***, if you want a divorce, you can get one without having to prove that your spouse has done something wrong. Of course, this also means that if your spouse wants a divorce, there's really no way to prevent it from happening, even though you yourself may have done nothing wrong.

Under current California no-fault divorce law, the only legal ground necessary for divorce is the existence of irreconcilable differences.

Irreconcilable differences is a term that really means one of you no longer wants to be with the other. Irreconcilable differences is a state of mind understood only by the divorcee, so ***the only proof needed of irreconcilable differences is for one spouse to say they exist***. If one of you says that you have irreconcilable differences, the claim cannot be legally disputed.

Why Do We Have No-Fault Divorce?

A generation or so ago, California eliminated the old law of fault-based divorce. "Fault" law would only allow you to get a divorce if you could prove that your spouse had cheated on you, had abandoned you, or was guilty of extreme cruelty to you or your children. You also had to be fault-free yourself.

Prior to the change in law, many people found themselves stuck in unwanted marriages. They couldn't prove fault, which would have allowed them to get a divorce. In those days, not getting along wasn't enough. Not even what today would be considered extreme mental or emotional abuse qualified a suffering spouse for divorce.

The coming of no-fault divorce law has helped eliminate these problems. No one is legally forced to remain in a broken marriage just because there is no good proof of fault. Likewise, no longer can one spouse gain a legal advantage in family court by accusing the other of having an affair or abandoning the marriage.

How Does No-Fault Divorce Work?

How does no-fault law affect my divorce case?

Can I tell the judge what my spouse did wrong?

Can my spouse stop me from getting a divorce?

Can I prevent my cheating spouse from having access to our children?

For starters, no-fault law provides that even though you may be outraged by what you view as your spouse's shocking, disgraceful, appallingly indecent or deceitful behavior, ***you may never get to mention***

a word about it in family court. It also means that if you want to leave a marriage for reasons your spouse disagrees with (say, irreconcilable differences?), he or she cannot use any fault of your own to stop you from getting a divorce.

What you can expect is not always what you think, even when you're certain of what you deserve.

When considering granting a divorce, a California family court judge doesn't want to hear that a husband was a serial adulterer or that a wife took the children and ran off to move in with her boyfriend before the divorce was final. Fault plays no part in a spouse's right to end the marital relationship. The absence of misbehavior from divorce court discussion can be frustrating for those who expect an opportunity to vent their anger and (sometimes quite justified) frustration.

Don't expect family court to be an open forum where your grievances against one another are aired.

If you need help coping with the stress of your situation, a good private counselor can provide more relief and practical help than a family court judge or attorney could. In a divorce where child custody is at issue, parenting ability may be discussed. Fault has no impact on this discussion either, unless the bad behavior has a particular effect on the children. Examples include criminal activity directed at or engaged in, in the presence of the children, lewd behavior, drug or alcohol abuse and, of course, child abuse or domestic violence. One parent may have trouble with the idea that the court may consider a former spouse who commits adultery or loses his or her 401(k) at the gaming tables to nevertheless be a suitable co-parent.

In court, judges sometimes say: "While the parents may no longer be right for one another as husband and wife, they're divorcing each other, not the children."

Does Fault Ever Matter When Ending a Marriage?

On some very specific issues, facts showing fault can still be relevant. Their relevance, though, goes not to the ending of the marriage but to the judge's orders about custody and visitation. This guide will explain these situations in more detail later, so keep reading to learn how a spouse's behaving badly can affect the outcome of a case.

Custody Mediation And Family Court

The Rule to Remember: Avoid a Meltdown

If you're involved in a child custody or visitation dispute in family court in the state of California, you will be meeting in **Family Court Services mediation** with a court-appointed counselor (formerly called "mediator"); that is, unless you're one of the fortunate who can afford a private mediator. Those who do private mediation can bypass Family Court Services. In either event, **preparation is everything.**

One of the most frequent damage control calls I get is the kind received from a parent **after** this critical meeting. He went to the meeting righteously angry and resentful, yet unprepared, believing that somehow justice would be done. Weeks later, the counselor publishes a report, and it shocks and stings the parent. Sometimes, the parent hadn't understood the importance or the point of the meeting, and things went south.

The mediation process is extremely important in any **recommending** county, like San Diego. Yet, I am convinced it is the most misunderstood and underappreciated function of family court. If you have children, mediation is usually your first meeting *before* you meet a judge. During this meeting, you dialogue with a social worker. The goal is establishment of a child custody arrangement.

In "recommending counties", including San Diego, if parents can't reach an agreement in mediation, the counselor makes recommendations to the judge in your case. **Participation in Family Court Services or private mediation is your first chance (and in most cases your best chance) to present your case to an impartial third party** who will offer the judge input about your specifics of child custody and visitation. Often, judges adopt counselors' recommendations, with or without changes. In other words, **what a mediation counselor recommends is likely to be a significant part of the court-ordered terms of your final divorce judgment.**

A mediation counselor's recommendations have influence, even though a judge has the final say. You only get one shot at this. There are no do-overs for mediation if you don't like the result. Being ready, really ready, for mediation is vital.

I learned early in my practice that being well prepared for mediation saved my clients stress. I have a short list of professional consultants to whom I refer clients. These caring professionals do nothing but prepare parents for mediation. Many, if not most, of these experts are themselves veterans of Family Court Services. They know what mediation counselors are looking for. These consultants, or coaches, can educate you, play devil's advocate with you and conduct a test run of the verbal sparring you're likely to experience in mediation.

Make no mistake: mediation may be quiet and seem subtle, but it nevertheless is an intellectual and emotional struggle. To forego training for it is naive. You have probably never participated in mediation before and may never do so again, but if you'll spend a little effort and money on a prep session, it will be *sooooo* worth it.

The most heartbreaking cases are those where a parent comes to me **after mediation** and hires me to do what amounts to damage control. It's tough to recover from a bad outcome in mediation. Happily, the worst results are usually preventable with knowledgeable preparation.

Preparation is the key to getting the best possible results in mediation!

“Give me six hours to chop down a tree and I will spend the first four sharpening the axe.” Attributed to

Abraham Lincoln by www.quotationreference.com (and by many other sources)

We prepare ourselves for all kinds of natural disasters—earthquakes, wildfires, even tsunamis. In Southern California most of us have an escape route planned in case of a wildfire. Here in San Diego, we have marked routes along the coast in the event of a tsunami. We train to compete in sports. We realize the value of preparation in virtually every area of our lives. Yet, because we are either distracted or overwhelmed, we don't prepare for the emotional roller coaster of family court proceedings. **Don't be lulled into the naive sense that truth will prevail in your divorce or that its results will surely be fair and sensible.**

What Happens During Mediation?

Mediation usually takes place in a courthouse, but not in a courtroom. The parents and the mediation counselor meet for a couple of hours. ***No lawyers, children, or witnesses are allowed to attend unless by special request of the mediation counselor.*** The mediation counselor is a mental health professional who is knowledgeable about custody and visitation issues.

Each parent may be allowed to show evidence to the mediation counselor. Each county has its own local court rules about this subject. These rules are ***changeable***, so be sure to ***check the most recent revisions of local court rules***. Each parent explains to the mediation counselor what he or she believes to be the best parenting plan, and why.

The mediation counselor may offer you an impartial opinion about your position, then give the other parent an opinion about his or hers. Or the mediation counselor may remain poker-faced about her recommendations and tell each of you to wait for her report.

The purpose of mediation is to pull two polarized parties closer to agreement on child custody. If successful, the process helps the parents avoid the stress and expense of court. It also gives the children closure and insulates them the added emotional trauma that may otherwise befall them. When mediation is over, a shared-custody agreement is reached, not reached, or partially reached. If complete agreement isn't reached, the mediation counselor writes a report with recommendations, provides a copy of it to each parent and attorney, and files it with the court. The recommendations will include a proposed schedule, often broken down into school year versus summer break, and allocating the division of major holidays. A judge then has the final word.

What do I need to know to get the most out of the mediation session?

*You should approach your mediation with the same importance that you would give to a court proceeding. **Respect your mediation counselor** as you would a judge. Talk about *the* children, or even better *our* children, not *my* children, and calmly describe the schedule you think works best. Be prepared to explain why. Even though you might be terribly hurt or angry, keep your emotions in check.*

It can be hard to decide what to keep quiet about and what to mention during mediation. You might be aware of scandalous behavior by the other parent. You might also be shocked to find that scandalous

behavior frequently does not translate to a mediation counselor as a predictor of bad parenting, and that your accusations can come across as petty at best, vindictive at worst. Gossip about adultery and kinky sexual idiosyncrasies is often considered just that. My favorite “gotcha” question from a mediation counselor: “Can you tell me something good about your spouse?” If you can’t find *any* virtue in your ex-to-be, your mediation counselor is likely to conclude you’re irrationally biased.

You are there to discuss the children and what’s best for them, nothing else. Don’t bring up finances. Parents who talk about money in mediation find it’s a sure way to turn off the mediation counselor and give the impression they’re more concerned about money than their children’s well-being.

Your mediation counselor has influence on the outcome of your case. Don’t give him the wrong impression about yourself. Mediation *can* be a stressful event, but it does not *have to* be. No matter what you do, stay calm in mediation. Wait your turn to speak and be polite. It will serve you well.

From Mediation to Orders to Judgment: Recommendations to the Court

If parents cannot reach agreement by the conclusion of mediation, and the divorce proceedings are taking place in a *recommending* county, the mediation counselor will exercise special power. In a recommending county, such as San Diego, a family court mediation counselor will make recommendations to a family court judge based on the information provided by the parents and sometimes by *collateral contacts*—teachers, doctors, therapists, et al. Copies of these recommendations will be forwarded to the parents and their attorneys. If either parent lacks a factual or legal basis for objecting to the mediation counselor’s recommendations, the family court judge adopts, often verbatim, the mediation counselor’s recommendations as an order of the court. **In other words, the mediation counselor’s recommendations, or a modified version of them, can become terms of your temporary child custody and visitation orders and often those of your final divorce judgment.**

Preparation is so important, it’s worth repeating: since the stakes are so high, professional preparation is critical. Prepare to spend a little money on your mediation. Recommendations that result from mediation will in many cases powerfully influence your final outcome.

