

RESOLUTION 05-01-2017 (REVISED PER AMENDMENTS)

DIGEST

Family Law: Unilateral Waiver of Receipt of Financial Disclosures

Amends Family Code sections 2105 and 2107 to allow a complying party to unilaterally waive receiving disclosures from the other party in dissolution and legal separation matters.

RESOLUTIONS COMMITTEE ANALYSIS

History:

No similar resolutions found.

Reasons:

This resolution amends Family Code sections 2105 and 2107 to allow a complying party to unilaterally waive receiving disclosures from the other party in dissolution and legal separation matters. Amendments taken on the Conference Floor addressed Resolutions Committee's initial concerns.

The exchange of preliminary financial disclosures is mandatory to ensure that both parties in a dissolution or legal separation matter are fully informed of the assets, debts and incomes of the other party. Final disclosures may be waived by both parties. This mandatory exchange ensures that no party finalizes a divorce or legal separation without knowledge of the assets and debts that existed during the marriage. It is not uncommon for one party, who is either unwilling to proceed with a divorce or who does not want to equally divide the community assets, to refuse to cooperate with the exchange of financial disclosures. Currently, the only recourse for the party wishing to proceed with the divorce or legal separation is to file a motion to have the non-complying party's lack of cooperation excused. This resolution proposes to remedy this situation by allowing for the filing and service of a written declaration requesting a waiver of the non-complying party's financial disclosures.

This resolution's proposed language requirement requesting the waiver in the declaration is not in itself problematic, and appears to address the court's concerns that a party may be forced to relinquish his or her rights unknowingly. However, because a court cannot enter a judgment without the parties first demonstrating to the court that preliminary financial disclosures have been exchanged and final disclosures have either been exchanged or waived, the timing of the submission of this declaration after the entry of judgment is problematic. This issue could be eliminated if the resolution were amended to add language to state that this declaration must be filed 45 days prior to entry of judgment or perhaps along with the judgment. Further, the resolution as currently written limits the waiver of either the preliminary or final declarations, but not both.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code sections 2105 and 2107 to read as follows:

1 § 2105

2 (a) Except by court order for good cause or unless waived as provided in Section 2107,
3 before or at the time the parties enter into an agreement for the resolution of property or support
4 issues other than pendente lite support, or, if the case goes to trial, no later than 45 days before
5 the first assigned trial date, each party, or the attorney for the party in this matter, shall serve on
6 the other party a final declaration of disclosure and a current income and expense declaration,
7 executed under penalty of perjury on a form prescribed by the Judicial Council, unless the parties
8 mutually waive the final declaration of disclosure. The commission of perjury on the final
9 declaration of disclosure by a party may be grounds for setting aside the judgment, or any part or
10 parts thereof, pursuant to Chapter 10 (commencing with Section 2120), in addition to any and all
11 other remedies, civil or criminal, that otherwise are available under law for the commission of
12 perjury.

13 (b) The final declaration of disclosure shall include all of the following information:

14 (1) All material facts and information regarding the characterization of all assets and
15 liabilities.

16 (2) All material facts and information regarding the valuation of all assets that are
17 contended to be community property or in which it is contended the community has an interest.

18 (3) All material facts and information regarding the amounts of all obligations that are
19 contended to be community obligations or for which it is contended the community has liability.

20 (4) All material facts and information regarding the earnings, accumulations, and
21 expenses of each party that have been set forth in the income and expense declaration.

22 (c) In making an order setting aside a judgment for failure to comply with this section,
23 the court may limit the set aside to those portions of the judgment materially affected by the
24 nondisclosure.

25 (d) The parties may stipulate to a mutual waiver of the requirements of subdivision (a)
26 concerning the final declaration of disclosure, by execution of a waiver under penalty of perjury
27 entered into in open court or by separate stipulation. The waiver shall include all of the following
28 representations:

29 (1) Both parties have complied with Section 2104 and the preliminary declarations of
30 disclosure have been completed and exchanged.

31 (2) Both parties have completed and exchanged a current income and expense
32 declaration, that includes all material facts and information regarding that party's earnings,
33 accumulations, and expenses.

34 (3) Both parties have fully complied with Section 2102 and have fully augmented the
35 preliminary declarations of disclosure, including disclosure of all material facts and information
36 regarding the characterization of all assets and liabilities, the valuation of all assets that are
37 contended to be community property or in which it is contended the community has an interest,
38 and the amounts of all obligations that are contended to be community obligations or for which it
39 is contended the community has liability.

40 (4) The waiver is knowingly, intelligently, and voluntarily entered into by each of the
41 parties.

42 (5) Each party understands that this waiver does not limit the legal disclosure obligations
43 of the parties, but rather is a statement under penalty of perjury that those obligations have been
44 fulfilled. Each party further understands that noncompliance with those obligations will result in
45 the court setting aside the judgment.

46
47 § 2107

48 (a) If one party fails to serve on the other party a preliminary declaration of disclosure
49 under Section 2104, unless that party is not required to serve a preliminary declaration of
50 disclosure pursuant to Section 2110, or a final declaration of disclosure under Section 2105, or
51 fails to provide the information required in the respective declarations with sufficient
52 particularity, and if the other party has served the respective declaration of disclosure on the
53 noncomplying party, the complying party may, within a reasonable time, request preparation of
54 the appropriate declaration of disclosure or further particularity.

55 (b) If the noncomplying party fails to comply with a request under subdivision (a), the
56 complying party may do one or more of the following:

57 (1) File a motion to compel a further response.

58 (2) File a motion for an order preventing the noncomplying party from presenting
59 evidence on issues that should have been covered in the declaration of disclosure.

60 (3) File and serve by mail a motion showing good cause for the court to grant declaration,
61 executed under penalty of perjury, unilaterally waiving receipt of the noncomplying party's
62 preliminary and/or final declaration of disclosure pursuant to section 2104 or final declaration of
63 disclosure pursuant to Section 2105, no later than 45 days from prior to entry of final judgment
64 on support and property issues. The ~~voluntary waiver declaration~~ does not affect the rights
65 enumerated in subdivision (d). The declaration shall include all of the following representations
66 by the complying party:

67 (A) Complying party has complied with Family Code sections 2104 and 2105 by serving
68 his or her preliminary and final declarations of disclosure on the noncomplying party.

69 (B) Complying party has made at least three attempts to have the noncomplying party
70 produce financial disclosures as required by Family Code section 2104 and 2105, listing the
71 dates, mode of communication and results of each attempt.

72 (C) As of the date of execution of the declaration, the noncomplying party has not
73 responded to demands nor has he or she complied with Family Code sections 2104 and 2105.

74 (D) Complying party is advised and informed that he or she is entitled to full financial
75 disclosure from the other party pursuant to Family Code Section 2100 et seq. and waives that
76 right knowingly, intelligently and voluntarily.

77 (c) If a party fails to comply with any provision of this chapter, the court shall, in addition
78 to any other remedy provided by law, impose money sanctions against the noncomplying party.
79 Sanctions shall be in an amount sufficient to deter repetition of the conduct or comparable
80 conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless the court
81 finds that the noncomplying party acted with substantial justification or that other circumstances
82 make the imposition of the sanction unjust.

83 (d) Except as otherwise provided in this subdivision, if a court enters a judgment when
84 the parties have failed to comply with all disclosure requirements of this chapter, the court shall
85 set aside the judgment. The failure to comply with the disclosure requirements does not

86 constitute harmless error. If the court granted the complying party's voluntary waiver of receipt
87 of the noncomplying party's preliminary and/or final declaration of disclosure pursuant to
88 paragraph (3) of subdivision (b), the court shall set aside the judgment only at the request of the
89 complying party, unless the motion to set aside the judgment is based on one of the following:

90 (1) Actual fraud if the defrauded party was kept in ignorance or in some other manner
91 was fraudulently prevented from fully participating in the proceeding.

92 (2) Perjury, as defined in Section 118 of the Penal Code, in the preliminary or final
93 declaration of disclosure, in the waiver of the final declaration of disclosure, or in the current
94 income and expense statement.

95 (e) Upon the motion to set aside judgment, the court may order the parties to provide the
96 preliminary and final declarations of disclosure that were exchanged between them. Absent a
97 court order to the contrary, the disclosure declarations shall not be filed with the court and shall
98 be returned to the parties.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS

The Problem: Family Code section 2107 was amended in 2009 to create a process by which a party to a contested dissolution or legal separation matter relating to a marriage or domestic partnership could waive receiving mandatory financial disclosures from the other party. This was and is still a great concept as, but for the newly created waiver process, a noncomplying party could prevent final judgment from being entered simply by not serving his/her mandatory financial disclosures. However, in practice, the requirement of a noticed motion has proven to be unnecessary and burdensome as it has caused much hardship and delay for complying parties, mostly self-represented, the court and all court users since backlog for hearings is increased. These hearings are unnecessary as waivers are regularly granted and it is difficult to imagine a situation in which they would be denied. Unlike the other subsections of the affected statute, 2107(b)(1) & (2), it has become evident that this waiver needs to become self-executing with some safeguards to avoid situations where the complying party is acting in bad faith to use noncomplying party's unintended delays as a quick way to get a one-sided judgment in a contested case.

The Solution: This proposal amends Family Code section 2107 to change the mode of waiver from a noticed motion to filing and service of a declaration stating the efforts made by the complying party to obtain the disclosures from the other party while giving ample time to the other party to act in response. Family Code section 2105 must be amended accordingly to reflect the new waiver by declaration provision in section 2107.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

Family Code section 2107 was amended in 2009 to create a waiver process as stated above.
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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FLEXCOM - Approve as Amended

The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) approves with the amendment: At line 87 add “and/or final” after the word preliminary.

Rationale:

FLEXCOM agrees with the rationale set out by the proponent for such a self-executing waiver in these situations. This will allow the process to move more quickly toward resolution with reasonable safeguards in place.

Disclaimer:

This position is only that of the FAMILY LAW SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

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