# Procedures to Bring A Family Law Case To Trial

**At-issue order or memorandum; request for trial setting:**
Family law cases are brought to trial when either the court deems the case to be at issue (an "at-issue order") or a party files an at-issue memorandum or request for trial setting.

[See S.D. Super.Ct. Rules, Div. V, Fam. Law Rule 5.2.8.K--court's local "Family Settlement Conference At Issue Form" required to set long cause cases for trial after unsuccessful MSC; S.F. Uniform Rule 11.11--filing court's local Family Law At-Issue Memorandum commences trial setting process for resolution of financial issues (custody/visitation calendared for trial only by court order); compare L.A. Super.Ct. Rule 14.13--either party "may file" request for trial setting to set contested case for trial; Santa Clara Super. Ct. Family Rule 6.A--request for trial not required "but may be filed" (except that custody/visitation calendared for trial only by court order)]

In the trial setting process (whether through a formal trial setting request or at case management, status or settlement conference), the parties will be expected to specify a trial time estimate, from which the case will be classified for further court processing as a "long cause" or "short cause." Generally, "short causes" are cases in which the time estimated for trial is no more than five hours (see generally, Ca Rules of Court Rule 214(a); L.A. Super. Ct. Rule 14.14); but the cut-off is shorter in some courts (see S.D. Super. Ct. Rules, Div. V, Fam. Law Rule 5.7.1.A--maximum three hours).

Typically, where trial setting is initiated by a formal "request for trial" (or at-issue memorandum), an opposing party who disagrees with the requesting party's trial time estimate may file his or her own request for trial (or counter-at-issue memorandum) indicating there is a conflict in the time estimate.

**Case Management (Status) Conference (CMC):**

Most family law departments hold some form of case management conference (CMC), or a series of such conferences, to review the status of the case and ready it for trial. Generally, these conferences are used to set a timeline for the completion of discovery, frame the issues for trial, bifurcate issues for trial, schedule a mandatory settlement conference and, if the case does not fully settle, set a trial date, exchange witness and expert witness lists, etc. Typically, the CMC concludes with a series of court orders to ensure the parties are prepared for the mandatory settlement conference and, if necessary, trial. [See L.A. Super. Ct. Rule 14.12; S.D. Super. Ct. Rules, Div. V, Fam. Law Rules 5.2.6, 5.2.7; Santa Clara Super. Ct. Family Rule 6.D; S.F. Uniform Rule 11.12]

**Priority settings:**

The general statutory grounds for a trial preference (Ca Civil Pro § 36) apply in family law cases (e.g., party over 70 years of age whose health is such that preference is necessary to prevent prejudice to party's interest in the case; or terminally-ill party). [Ca Rules of Court Rule 218] In addition, child custody matters must be given calendar preference over all other civil matters not entitled to special precedence by law. [Ca Fam § 3023] Likewise, questions of child custody jurisdiction under the UCCJEA must, upon party request, be given calendar priority and "handled expeditiously." [Ca Fam § 3407] Further, child support matters "may" be given trial priority on a showing of good cause. [Ca Fam § 4003]

Trial date continuances: Attorney scheduling conflicts are readily accommodated at the trial setting stage. On the other hand, a trial date once set generally is regarded as "firm"; and, at that point, courts are far less accommodating to trial continuance requests. [Ca Rules of Court Rule 375(a); see Lazarus v. Titmus (1998) 64 Cal.App.4th 1231, 1249-1251, 75 Cal.Rptr.2d 676, 680-681] The California Rules of Court set the general standard for continuance of a civil trial: "[C]ontinuances of trials are disfavored . . . The court may grant a continuance only upon an affirmative showing of good cause . . ." [Ca Rules of Court Rule 375(c) (emphasis added) (listing circumstances that may indicate "good cause"); see also Ca Rules of Court Rule 375(d) (additional facts and circumstances for court to consider in ruling on continuance request)]

**Mandatory Settlement Conference (MSC):**

Most courts require that long cause family law cases be set for a mandatory settlement conference (MSC) before trial. Typically, the MSC is held one to four weeks before the trial date; but some courts divert cases to MSC early in the case management process before a trial date is even assigned. Each party and his or her trial attorney must personally attend the MSC (unless excused by the court) and be prepared to negotiate in good faith for a resolution of the issues under risk of sanctions. The mandatory settlement conference is court-supervised, but not necessarily conducted by a sitting judge. Many courts utilize the services of experienced family law attorneys acting as volunteer settlement officers. The trial judge may act as settlement officer only if the parties sign a conflict waiver, indicating the judge's participation in settlement discussions will not prejudice his or her right to conduct the trial.

Local rules require the parties to exchange specified settlement conference statements (or "settlement briefs"), along with certain other information (current income and expense declarations, etc.) at a specified point before the MSC. Broadly, the statement must describe the issues, contentions and supporting authorities (without extensive

argument); but the exact form and content are prescribed by local rule in fairly extensive detail and must be followed under penalty of sanctions. [See L.A. Super. Ct. Rule 14.14(b); O.C. Super. Ct. Rule 705.A.2; S.D. Super. Ct. Rules, Div. V, Fam. Law Rule 5.2.8.E-J; S.F. Uniform Rule 11.13.D & E; Santa Clara Super. Ct. Family Rule 6.E(5)]

Attorneys have inherent authority to bind their clients on procedural matters incidental to management of the action. But a settlement that will end the litigation affects the client's substantial rights; it is such a serious step that it requires the client's knowledge and express consent.

Where the parties have ostensibly settled all or part of the case (whether at a court-conducted settlement conference or privately outside court) but either thereafter disputes the validity or terms of the alleged settlement agreement, Ca Civil Pro § 664.6 may provide an expeditious remedy. Pursuant to Ca Civil Pro § 664.6, "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." And, if requested, the court may retain jurisdiction over the parties to enforce the settlement until it has been performed in full. [Ca Civil Pro § 664.6] Only the following settlements are amenable to § 664.6 enforcement:

- An out-of-court written settlement signed by the "parties"; or
- An oral settlement stipulated to by the parties "before the court." [Ca Civ Pro § 664.6]

**Contested Family Law Trials**

Most family law trials are conducted somewhat less formally than their general civil counterparts, as a means of alleviating residual hostility and putting the contestants at ease. However, the relative informal nature of many family law trials does not dispense with normal rules of evidence applicable to civil trials (receipt of evidence on the record, necessity for legal objections on the record, authentication of documents and qualification of experts, hearsay rule, etc.). Likewise, the court is bound to follow normal rules of evidence in resolving contested issues. The judge's decision must be based upon admissible evidence presented on the disputed issues of fact. A judgment based only on counsel's unsworn statements or declarations is based on no evidence and thus is reversible error.

**Pretrial Discussions:**

Some ttrial judges will request both counsels' participation in an informal in-chambers discussion of the case before commencing trial. Such discussions are usually held without the parties and are not attended by a court reporter. The general purpose of the informal conference is to further refine the issues and reorganize the case for trial. Specifically, the time may be used to:

- Delineate unresolved issues;
- Establish orders of proof;
- Determine the necessity of taking witnesses out of order;
- Discuss the intent to call minor children as witnesses, frame the boundaries for such interrogation and, perhaps, agree on the use of other evidence instead
- Reconcile court or counsel trial-time conflicts;
- Schedule nonresident witnesses;
- Resolve evidentiary problems;
- Premark exhibits for admission into evidence; and
- Make further attempts toward reaching a settlement of some or all of the remaining issues

The trial judge will usually want to review counsels' trial briefs before consulting. The briefs should therefore be given to the clerk for presentation to the judge upon arriving for the conference. Some courts may require submission of briefs in advance of the conference date; check with the judge's clerk.

The pretrial discussion time should be used to dispose of all uncontested but yet unresolved issues by stipulation. Contested matters should be identified and the issues scheduled for the order in which they will be tried.

Frequently, the court will require child custody/visitation (including, upon request, UCCJEA jurisdiction) issues to be severed and tried first, and may do the same for child support issues. A severance of child custody disputes for separate trial is especially important where there are allegations of "fault" or "misconduct" so as to ensure that "fault" evidence will not taint the disposition of other contested issues. [See Ca Fam § 2335--evidence of misconduct inadmissible "(e)xcept as otherwise provided by statute"] In direct calendar courts, where a single judge hears all aspects of the case, the judge's trial calendar is usually limited to two or three days a week; and, necessarily, cases are often tried issue-by-issue rather than by a single trial of all issues.

It may also be possible during the conference to stipulate or agree to the admissibility of exhibits - thus eliminating need for foundational testimony at trial. Counsel should therefore come prepared to furnish both the judge and the other side with a list of

proposed exhibits and a copy of those exhibits, prenumbered according to the procedure used in that particular court.

**Resolving evidentiary problems:**

It is generally a good idea to anticipate evidentiary problems (e.g., use of discovery at trial, admissibility of expert reports) in advance of trial and attempt to resolve them during the pretrial discussions. Even if all problems cannot be resolved at this time, the judge, having been exposed to the issues, will usually be in a better position to rule on admissibility during trial.

One way to resolve evidentiary problems at trial is through a "motion in liminie." A motion in limine is the formal method of resolving evidentiary and related concerns during pretrial in-chambers conferences. Indeed, most judges expect such matters to be resolved before trial commences, in the interest of avoiding unnecessary trial delays. Motions in limine may reach any kind of evidence that could be objected to at trial, either because irrelevant or subject to discretionary exclusion (Ca Evid § 352).

Settlement: Often, last minute settlement can be reached on some, if not all, issues remaining in dispute, and many judges make it a point to discuss possible settlement just before commencing trial--particularly in regard to custody and visitation matters. However, this aspect of the conference will usually not be pushed on the parties, and if either side objects, the judge will probably refrain from further settlement discussions.

Disqualification of judge by Ca Civ Pro § 170.6 peremptory challenge: One of the immediate tactical points to consider upon being assigned to a particular judge is whether to accept the assignment or file a Ca Civ Pro § 170.6 "peremptory challenge" removing the judge from the case. Each side has the right to exercise one such challenge in the case on general grounds of "prejudice"; no "cause" need be shown. [Ca Civ Pro § 170.6]

**But Note:** The exercise of a § 170.6 challenge is subject to rigid statutory time constraints; once the applicable deadline passes, the right is waived. [Ca Civ Pro § 170.6]

Courtroom Decorum: Parties and attorneys should keep the following in mind when conducting or participating in a family law trial:

**Approaching witness:**

In questioning a witness, counsel should ordinarily remain at the counsel table. Requests to approach a witness should be addressed to the court, and will usually be granted only when necessary to show the witness exhibits or documented testimony.

Addressing Witness: Witnesses should be addressed by surname (Mrs., Ms., Miss or Mr. . . .). Do not address any adult witness, opposing counsel, party or court personnel by first name or nickname.

**Conduct of witnesses:**

Witnesses should not:

- Traverse the area between counsel table and the bench (i.e., the "well");
- Speak or answer questions other than when on the witness stand, and only then in response to a direct question;
- Engage in any discussion with the court staff or opposing party or counsel during trial proceedings.

**Presenting argument:**

Attorneys or parties in pro per should stand when arguing objections or other matters (some judges also prefer that counsel stand when making objections). And, once the judge has heard argument on objections to evidence and ruled, do not reargue or continue argument (such recalcitrant conduct can be punished summarily as a direct contempt of court).

**"Off the record" discussions:**

Communications not for the record (between counsel or between client and counsel) must be preceded by a request addressed to the court for "off the record" consultation; i.e., "Your honor, may we go off the record?".

**"Support person" accompanying domestic violence victim at trial:**

Ordinarily, only parties and their counsel may sit at the table reserved for counsel during trial. However, a special statute authorizes a "support person" to accompany a party to a family law proceeding or hearing where there are allegations or threats of domestic violence; and, where the party is not represented by an attorney, permits the support person to sit with the party "at the table that is generally reserved for the party and the party's attorney." [Ca Fam § 6303(d)]

**Issues Regarding Presentation Of Evidence**

**Witness testimony; affidavits disallowed:**

At a contested trial, affidavits are not competent evidence; though made under oath, they are hearsay (out-of-court statement offered for its truth). [See Ca Civ Pro § 2003; Ca Evid § 1200] Therefore, absent stipulation to receive testimony by affidavit, most evidence is presented by in-court witness testimony. (Distinguish from OSC, motion or uncontested hearing, where affidavits are allowed by statute; Ca Civ Pro § 2009; Ca Fam § 2336.)

**Financial declarations:**

As to contested monetary and property issues, both sides should be prepared to present into evidence current income and expense declarations and property disclosure declarations. [See Ca Rules of Court Rule 5.128] These documents are usually received by stipulation, subject to cross-examination.

**Tax returns in support hearings:**

In support hearings, the parties must have ready for the court's (and adversary's) examination, the party's most recent state and federal income tax returns. These are required by statute.

**Court's Duty of court to control mode of interrogation:**

It is the judge's duty, as in all civil litigation, to control the trial, and specifically the questioning of witnesses, to make it "as rapid . . . distinct, and . . . effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment." [CA Evid § 765(a)]

**Special precautions re child witnesses:**

The court's duty is specially cast in regard to child witnesses under age 14: The court shall take "special care" to protect such children from undue harassment or embarrassment, to restrict unnecessary repetition of questions, and to ensure that questions are stated in a form appropriate for witnesses of the child's age; and, on objection of a party, the court may forbid the asking of questions in a form not reasonably likely to be understood by the child. [Ca Evid § 765(b)] Additionally, where a minor child's preferences are relevant to resolution of a custody dispute (Ca Fam § 3042(a)), the court has an independent obligation to control examination of the child so as to protect the child's best interests; and may require that information regarding the

child's preferences be obtained by a means other than calling the child as a witness. [Ca Fam § 3042(b)] For example, in highly acrimonious litigation, where certain testimony by the parties' minor children might later affect their relationship with the parents, the court acts properly when it requires any interrogation of the children to take place in chambers with only a court reporter and the parents' attorneys present. [Marriage of Okum (1987) 195 Cal.App.3d 176, 240 Cal.Rptr. 458]

**Form of the question:** On direct examination, counsel are limited to questions calling for specific response by the witness (i.e., questions requiring a narrative answer are improper).

- Leading questions (those suggestive of the desired answer) usually cannot be asked on direct or redirect examination--except when posed to expert witnesses; but they may--and should--be asked on cross-examination. [Ca Evid § 767]
- Argumentative questions (those attempting to persuade the judge rather than elicit facts, or which call for a witness to agree or disagree with an inference suggested by the examiner) are objectionable and should be avoided. (They also tend to earmark counsel as inexperienced, and could, to that extent, put counsel at a tactical disadvantage.)
- Questions not suitable for children: Again, when the witness is a child under age 14, the form of the question may be objectionable because "not reasonably likely to be understood by a witness of the child's age." [Ca Evid § 765(b)]

**Controlling scope of answer:**

Often the witness will answer the question indirectly, or include information beyond the scope of the question. Nonresponsive answers may be stricken on motion of either party, and will thereby be excluded from evidence in the record on appeal. [Ca Evid § 766]

**Questions concerning documentary evidence:**

When the interrogation concerns a document, it's not necessary to show, read, or disclose any part of the document to the witness. However, if a writing is shown to a witness, the opposing side must be given an opportunity to inspect it before interrogation concerning the writing can proceed. [Ca Evid § 768]

**Documentary evidence to refresh witness memory:**

Where a writing is used to refresh a witness' recollection, the writing must be produced at the request of the opposing side for purposes of inspection, cross-examination and introduction of any portion relevant to the testimony. (Exception if the writing is not in possession or control of witness or proponent and is not reasonably procurable.) [Ca Evid § 771]

Special exclusionary rules in family law cases: Certain special exclusionary rules apply in family law cases:

**Evidence of misconduct ordinarily prohibited:**

Since California is a "no-fault" divorce state, evidence of the wrondoing of the parties (infidelity, etc.) is not relevant except in custody disputes where misconduct evidence is relevant to "best interests" determination. [Ca Fam § 2335]

**Evidence through eavesdropping inadmissible:**

The Family Code also expressly makes inadmissible any evidence obtained by eavesdropping in violation of the Privacy Act (Ca Penal § 630 et seq.). [Ca Fam § 2022]

**Proving content of writings:**

The content of a writing (e.g., a premarital or marital agreement, a transmutation agreement, etc.) may be proved by an otherwise admissible (properly authenticated, etc.) original. [Ca Evid § 1520 et seq.; see CA Evid § 1520] The content of a writing may also be proved by otherwise admissible secondary evidence (a duplicate or other copy) unless the court determines (a) there is a genuine dispute concerning material terms of the writing and justice requires that the secondary evidence be excluded; or (b) admission of the secondary evidence would be unfair. [CA Evid § 1521 ("secondary evidence rule")] Oral testimony is admissible to prove the content of a writing under the secondary evidence rule (Ca Evid § 1521, above) only if either (CA Evid §§ 1521(b), 1523(c)):

- The proponent does not have possession or control of a copy and the original is lost or has been destroyed without fraudulent intent by the proponent (Ca Evid § 1523(b)); or
- The proponent does not have possession or control of the original or a copy and either (i) neither the original nor a copy is "reasonably procurable" by the proponent through use of the court's process "or by other available means"; or (ii) the original is "not clearly related

to the controlling issues" and it would be "inexpedient to require its production" (Ca Evid § 1523(c)(1) & (2)); or

- The writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is "only the general result of the whole" (Ca Evid § 1523(d)).

Verbatim proof is not required where such secondary evidence is admissible. The contents of a lost writing may be established by secondary evidence of its substance. "[T]he law does not require the contents of such documents be proved verbatim." [Dart Industries, Inc. v. Commercial Union Insurance Co. (2002) 28 Cal.4th 1059, 1069, 124 Cal.Rptr.2d 142, 150]

**Use of discovery at trial:**

Depositions: Subject to the limitations below, a deposition transcript is admissible against any party who was present at the deposition, or who had notice thereof and did not make a valid objection. [Ca Civil Pro § 2025.620]

**Deposition of party or "party affiliated" witnesses:**

An adverse party may use depositions of a party or "party affiliated" witness (officer, director, managing agent or employee of a party) for any purpose (i.e., for impeachment or substantive evidence). It is immaterial whether the deponent is available to testify in person at trial. [Ca Civ Pro § 2025.620(b)]

Deposition of nonparties: Depositions of a nonparty (not a party or "party affiliated" deponent) may be used to impeach or contradict live testimony given by that witness at trial. However, if the witness is no longer on the stand and has been excused from giving further testimony, the witness cannot be impeached in this manner unless first given the opportunity to explain or deny the impeaching evidence. [Ca Civil Pro § 2025.620(a); CA Evid § 770]

**Other depositions admissible under special circumstances:**

Depositions of any deponent may be used by any party for any purpose under the following circumstances (Ca Civil Pro § 2025.620(c)):

- Deponent "unavailable" to testify: (because dead, presently suffering from physical or mental illness or infirmity, beyond reach of California subpoena power, cannot be served with subpoena despite "reasonable diligence," exempted by

privilege, or otherwise disqualified from testifying). In such cases, the deposition transcript is admissible under the "recorded testimony" exception to the hearsay rule (Ca Evid §§ 1291, 240). [Ca Civ Pro § 2025.620(c) (2)]

- Residence more than 150 miles from place of trial: (in which case, no showing of the witness' "unavailability" is required). [See Ca Civ Pro § 2025.620(c)(1)]
- "Exceptional circumstances": This is a "catch-all" category: The court has discretion to permit introduction of a deposition transcript for any purpose upon a finding that "exceptional circumstances" justify such use. [Ca Civ Pro § 2025.620(c)(3)]

**Interrogatories:**

Any party may introduce interrogatory answers against the party who gave the answers. Admissibility depends upon the normal rules of evidence; but it is not ground for objection that the responding party is present and available to testify at trial. [Ca Civ Pro § 2030.410] The answers are generally not conclusive at trial; they may be rebutted or explained by other evidence.

**Requests for Admissions:**

Except to the extent relief is properly granted to withdraw or amend express or deemed admissions (Ca Civ Pro § 2033.300), RFA admissions are conclusive evidence against the admitting party at trial of the pending action. [Ca Civ Pro § 2033.410]

Objections relating to competency of the witness, or to relevancy, materiality or admissibility at trial, may be raised for the first time at trial (no "waiver" by failure to object during the discovery process). But objections as to the form of the questions asked or discoverability of the information sought (e.g., privilege, work product) must be timely raised during the discovery process or they are waived. [Ca Civ Pro § 2025.460; and see Ca Civ Pro § 2030.290(a)]

**Use of expert testimony**

Family law trials typically involve introduction of expert opinion testimony, particularly on complicated valuation and tracing issues (appraisers and accountants) or custody disputes (psychiatrists and psychologists). In addition, an expert witness can be cross-examined on the matter of his or her compensation and expenses, as relevant to issues

of credibility and weight to be given the testimony (e.g., exorbitant fee may show bias). [Ca Evid § 722]

Before the testimony can be received, the witness must be "qualified" as an expert; i.e., his or her special knowledge, skill, experience, training or education on the subject to be testified to must be shown by admissible evidence. [Ca Evid § 720(a); and see Ca Evid § 801] "Qualification" can be shown by the witness' own testimony on matters such as education and training, experience, articles and books written in the field, and membership in professional associations. [Ca Evid § 720(b)]

Whether a proper foundation has been laid to "qualify" a proposed expert witness is a preliminary fact issue for the trial court to determine. The decision that a witness is or is not qualified to testify as an expert on a particular subject lies within the court's sound discretion. [Ca Evid §§ 400, 405]

Even a "qualified" expert witness may be barred from testifying where the proponenthas "unreasonably" failed to comply with the Ca Civ Pro § 2034.260 expert witness list exchange requirements. [Ca Civ Pro § 2034.300] However, a party may call as a witness an expert who was not previously designated by that party if the expert was designated by another party and thereafter deposed pursuant to Ca Civ Pro § 2034.410 et seq. [Ca Civ Pro § 2034.310(a)] Also, the § 2034.300 "testimony exclusion sanction" does not bar an undesignated expert's testimony to impeach the testimony of another party's expert witness. (Such impeachment may include testimony to the falsity or nonexistence of any fact used as the foundationfor the other expert's opinion, but may not include testimony that contradicts the opinion.) [See Ca Civ Pro § 2034.310(b)]

Typically, expert testimony comes at the behest of a party who has retained the expert for consultation, advice and opinion evidence. Occasionally, however, the case involves court-appointed experts: Trial courts are empowered, on their own motion or motion of a party, to appoint one or more experts to investigate, render a report to the court, and testify as an expert at trial--e.g., independent psychologists and custody evaluators. (But the court's authority to appoint experts may not be construed as permitting unlicensed persons to perform any act for which a license is required.) [Ca Evid § 730]

As with other evidence in the case, expert witness testimony is not binding on the trial court. So long as it does not act arbitrarily, the court (acting as trier of fact) is free to determine the weight to be given expert testimony; and, in the exercise of its discretion, may accept, totally reject, or give little or great weight to the testimony even if the testimony is un-contradicted.

**Use of expert reports**

Absent stipulation between the parties, written reports of experts generally cannot be received into evidence unless qualified under an exception to the hearsay rule (Ca Evid §§ 1220-1341) and in compliance with the foundational requirements for admission of expert testimony (CA Evid § 801)

Opening statements: In civil cases opening statements are used to inform the court (and jury, if there is a jury) of the nature of the case and to highlight the issues and probative facts ("what the evidence will show"). In family law cases, however, an opening statement is seldom needed, as the court is the trier of fact (no jury) and has already been made aware of these matters in pretrial chambers discussions or in the pleadings on file.

**Closing ("final") arguments:**

Each side has a right to present final argument to the court once all evidence has been taken. Unless otherwise directed by the court, petitioner proceeds first, followed by respondent; and petitioner is then entitled to conclude the argument. [Ca Civil Pro §§ 631.7, 607(7)]

**Request for Statement of Decision; Submission of Proposed Judgment:**

After all evidence has been taken and final arguments concluded, counsel should be prepared to timely request a Ca Civil Pro § 632 statement of decision. (The court has no obligation to render a Ca Civil Pro § 632 statement of decision absent timely request. But its absence can be quite prejudicial to success on a possible appeal or post-judgment modification.)