Husband and Wife Must Live Apart to Be Legally Separated

By Mitchell A. Jacobs and Steven R. Landes

The second item on a petition for dissolution of marriage asks for the date of marriage and the date of separation. There usually isn't much to argue about regarding the date of marriage, but the date of separation can be a different matter.

As the court says in *In re Marriage of Norviel*, 2002 DJDAR 12005 (Cal. App. 6th Dist. Oct. 15, 2002), "Despite the importance of the determination, 'the Legislature has neither defined 'date of separation', nor specified a standard for determining it.'"

The only statutory reference to this term is found in Family Code Section 771, which provides that the "earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse." This characterizes property, it does not define "living separate and apart."

The Norviels were married in 1983. When the petition was filed in 1998, they had two children. Their marriage always had been somewhat difficult, and they had discussed divorce repeatedly.

During a Sunday night dinner on June 28, 1998, the husband took the opportunity to tell the wife that "this was the end of the marriage." It may not have been the most opportune moment because, as the court observed, angry words ensued.

After the exchange, however, the parties agreed that the husband would move into a rental house that the parties were in the process of buying. The husband immediately began to prepare the rental house for his use. Also on the night of June 28, the husband sat down with their son and told him about the impending divorce.

The husband did not move until Aug. 15, 48 days later. The court notes that he continued to have his laundry done at home by the maid. In July, the family took a long-planned vacation to Canada. Until mid-September, they maintained joint checking and credit card accounts. In July, they closed escrow on the rental house and took joint-tenancy title as husband and wife.

On the other hand, in mid-July, the parties sat down and worked out a visitation schedule, discussed property division and made extensive notes on the meeting. In September, the husband established his own bank and credit card accounts and, on Sept. 15, filed his petition for dissolution of marriage.

In the petition, the husband stated that the date of separation had been June 21. The wife initially said that it was Aug. 15, the day that the husband actually vacated the premises. The question of the date of separation was bifurcated, and the parties agreed to try that issue first. The trial court found the date of separation to be June 28, 1998, and the wife appealed.

The dispute was over a period of less than three months. The immediate question is how this very short period became important enough to warrant an appeal. The economic consequences of the ruling were substantial because during the period from the end of June to the middle of September, the husband earned stock options worth a considerable sum.

The appellate court held that two factors are prerequisites to separation. First, one spouse, at least, must have the subjective intent to end the marriage. Second, there must be objective evidence of conduct furthering that intent.

The court quoted *In re Marriage of Baragry*, 73 Cal.App.3d 444 (1977), "The real dispute in this case is 'whether the parties' conduct evidences a complete and final break in the marital relationship.'"

The wife argued that present intent to separate combined with conduct is necessary and that, until the second element occurs, the date of separation does not exist.

The husband, citing *In re Marriage of Hardin*, 38 Cal.App.4th 448 (1995), contended that the trial court must examine the conduct during the entire disputed time.

The court agreed but noted that "that examination must focus on conduct that is contemporaneous with and demonstrative of the necessary subjective intent. Later conduct that is merely consistent with an earlier decision to separate does not support an earlier separation date .... In our view, then, separation cannot occur until intent and conduct are present simultaneously."

The court correctly said that the statutory phrase "living separate and apart" has been the subject of only a handful of published opinions in California. Those decisions recognize that parties may be living in separate residences and not be separated.

The question for decision in this case is whether the reverse may be true; for example, whether the parties may be living together but be separated. The court concluded that this cannot be.

Thus, the holding of this case is that "living apart physically is an indispensable threshold requirement to separation, whether or not it is sufficient, by itself, to establish separation."

This is a new standard on this issue. The court concluded by reversing, remanding and instructing the trial court that, in determining the date of separation, the parties' physical separation is a threshold prerequisite to separation and that the parties' other conduct may be considered only to the extent that it is contemporaneous with the intent to separate.

In reaching this decision, the court relied heavily on three cases: *In re Marriage of Baragry*, 73 Cal.App.3d 444 (1977); *In re Marriage of von der Nuell*, 23 Cal.App.4th 730 (1994); and *In re Marriage of Hardin*, 38 Cal.App.4th 448 (1995).

In *Hardin*, the length of the disputed period was less than three months, but there was 14 years between the move out and the date of the dissolution. In *von der Nuell*, the period between the move out and the dissolution was 3½ years.

In *Baragry*, the case everyone remembers because the decision makes such delightful reading, the husband moved out of the house after a 20-year marriage and took an apartment with his 28-year-old girlfriend-employee. He continued to eat dinner with his family and brought his laundry home twice a month for his wife to wash and iron.

The disapproval in the opinion is palpable. What seemed to incense the court most was that the husband tendered his extramarital activities as proof of the date of separation. More important is that this state of affairs continued for four years.

It is hard to see how relevant these cases are to the Norviel marriage.

Acting Presiding Justice Patricia Bamattre-Manoukian respectfully, but vigorously, disagreed with the majority. Bamattre-Manoukian believes that the court must defer to the trial court's determination. This deference is particularly appropriate in family law matters where the trial court is called on to make credibility judgments.

The majority concluded that the intent to end the marriage and the conduct furthering that intent must be present simultaneously.

Bamattre-Manoukian disagreed.

"I do not believe this is a workable rule in the realm of family law," the justice wrote. "Parties who have reached a decision as difficult and emotional as ending a lengthy marriage may often be unable to simultaneously engage in such clear-headed conduct as changing legal title on properties, closing bank accounts ...."

The dissent expressed the view that a rule that would require that conduct be absolutely contemporaneous with the expression of intent unduly restricts the trial court's ability to weigh the evidence of the parties' conduct.

Ambiguity is part of the human condition. In fact, from a practitioner's point of view, the *Norviel* dissolution, difficult as it must have been for the parties, reads like an account of relatively civilized and civil behavior, which is to be encouraged.

The dissent would affirm the trial court's determination: "I believe the standards developed in the cases discussing the date of separation, within the meaning of Family Code section 771, provide sufficient guidance for trial courts. The court is entitled to consider and evaluate all of the evidence bearing on the relevant span of time in the parties' relationship, and to draw reasonable inferences ...."

This seems to be an example of difficult situations making questionable law. The majorities' announced new standard is overly restrictive for trial courts. One may wonder whether the two justices who chose to reverse were influenced by the fact that the husband timed his announcement of the end of the relationship to immediately precede receiving significant stock options. Perhaps there was a feeling that allowing the June date of separation to stand would work an equitable injustice on the wife.

Attorneys obviously can not ignore this new standard. They must make certain that their client, if he or she is the party leaving the relationship, takes unambiguous steps to evidence intent to separate as soon as possible. Nothing short of physical separation will suffice.

On the other hand, those representing the lower earner should encourage their clients to take a more measured approach to separation, all else being equal. However, under no circumstances should the party trying to separatize property ever bring home their laundry for the other party to wash and iron.

FAMILY LAW

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