

# **Basics of Texas Divorce Law**

## ***By Michelle May O'Neil***

Family law is a complex practice area, regulated by rules that vary slightly from state to state. In Texas, the Texas Family Code governs and guides attorneys and their clients through the divorce process.

Family law cases can be highly complex and involved. It also can be the most emotionally charged area of the law to deal with because of the difficult issues that must be addressed.

The procedures used in these cases are similar to other areas of the law, but there are important differences. Family law, unlike many types of litigation, goes directly to the issues that affect people the most: money and children.

It is imperative to have the best legal representation available to assist in navigating the treacherous waters of a divorce court.

There are three basic parts to the dissolution of marriage – the divorce itself, the division of property and issues related to children.

### **THE DIVORCE ITSELF**

Whether or not the couple has children, the legal procedure for a divorce is similar to the procedure for other lawsuits.

The first step should be to hire an attorney. Although, it is possible to get a divorce without the assistance of an attorney, the process will be incredibly difficult, and it will be virtually impossible to know if your rights are being protected. An attorney will be able to guide you and make sure you have full knowledge about the applicable statutes. But, perhaps most importantly, an attorney will be able to approach the issues objectively, without succumbing to the emotion of the divorce.

Like many states, Texas has a no-fault divorce system, which simplifies the divorce procedure. Under a no-fault system, the spouse seeking the divorce merely files a petition with the court saying that the marriage has failed due to conflict of personalities, with no reasonable expectation of reconciliation. Under a no-fault system, a divorce can be granted without either spouse being forced to prove that the other was at fault in breaking up the marriage.

That does not mean that fault is never considered.

A spouse may still note in the petition for divorce that the other person was at fault in breaking up the marriage. If a court agrees that one spouse's actions created fault, a bigger share of the property may be awarded to the spouse who is not at fault. Under Texas law, "fault" is defined as (1) adultery, (2) cruelty, (3) conviction of a felony and/or (4) abandonment.

### **THE DIVORCE PROCEEDING**

There are four basic steps to a divorce proceeding:

#### **FILING A DIVORCE PETITION**

Any divorce, even one on friendly terms, must begin with the filing of an “original petition for divorce” in a state district court.

Some counties, such as Dallas and Tarrant counties, have specialized courts that deal only with family law matters like divorce. Other counties send divorces through the same general district courts used for all types of civil and criminal matters.

In order to file for divorce in Texas, one of the spouses must have been a resident of the state for the six months prior to filing the petition *and* a resident of the county where the suit is filed for 90 days.

Most petitions include a request for a two-week temporary restraining order (TRO). This freezes things as they are and prevents one spouse from taking any action that harms the other.

The TRO prevents spouses from hiding money or spending money in abnormal ways. It also prevents the interference of the use of the marital residence. The restraining order cannot order that the party be excluded from the home without special circumstances, and it prevents the changing of locks or any other type of exclusionary action.

Before the TRO expires, a judge will schedule a temporary orders hearing to determine if the TRO needs to be made permanent while the divorce goes forward. The judge will also make provisions for temporary spousal support, temporary custody and possession arrangements, temporary child support, temporary use of property and payment of debts, and payment of interim attorney’s fees.

## **DISCOVERY PROCESS**

The next step in the divorce process is discovery. This procedure allows both sides to determine the size of the community estate and to learn the position the other party will take on certain issues. Discovery can be written or oral.

### *Written Discovery*

**Request for Disclosure:** These are standard questions that are asked in every civil suit. Parties are required to identify persons with information relevant to the case, identify expert witnesses, detail the legal contentions and specify any economic damages.

**Interrogatories:** One of the most useful pretrial discovery methods, interrogatories are a set of written questions sent to the opposing party that require responses about relevant issues, such as the location of bank accounts, balances in those accounts and signatory privileges on the accounts. Although almost anything relevant to the case can be asked, the total number of questions is limited to 25.

**Request for Production of Documents:** This discovery tool allows a party to request copies of documents relevant to the issues in the case. Just about any document can be requested. The most frequently requested items are records reflecting bank accounts, 401(k) plans, stock options, income, gifts to people other than the spouse, safe deposit boxes, telephone records and insurance plans.

**Request for Admission:** These are statements that the opposing party must either admit or deny. If they refuse, they must state a reason why the statements can neither be admitted nor denied. The person answering these requests will be stuck with the answers, and failure to answer them will result in all of the requests being deemed admitted.

Sworn Inventory and Appraisement: This type of discovery is unique to divorce cases. It requires the answering party to list every asset he or she knows about. It also requires the party to characterize the assets as either separate property or community property and to place a value on it. This document is signed under oath, so a party who deliberately hides assets and keeps them off of the inventory will be subject to punitive remedies from the court.

### *Oral Discovery*

Oral discovery is in the form of depositions. These are pretrial witness examinations taken under oath in front of a court reporter. Any witness with information that will affect the case can be deposed. Under Texas law, the deposition testimony can be presented to the court as if the witness were testifying in person before the court.

The deposition is an incredibly useful tool because it locks the witness into the testimony he or she will give. The witness cannot come back later and change his or her story regarding a certain event. If they do this, then the deposition can be used to challenge their truthfulness as a witness.

### **TRIAL OR SETTLEMENT**

Not all divorce cases go to trial. First, after pretrial discovery is over, the spouses will probably be order to go into mediation. Mediation is a procedure where the parties and their attorneys meet with a neutral third-party (usually an experienced family lawyer) to try and negotiate a settlement. The vast majority of all family law cases are settled prior to trial.

If settlement is not possible, the case will go to a judge or jury. Either party has the right to request a jury trial.

Texas is the only state that continues to allow jury trials to determine child custody. A jury trial may also be held on other issues like character and value of marital property. If a jury is not requested or allowed, then the judge decides the contested issues.

### **DIVORCE DECREE**

After a decision is reached, whether by settlement or trial, a divorce decree is entered. This is usually a lengthy document that formalizes and finalizes all of the provisions of the divorce – including issues of property division and child custody. The decree must be drafted very carefully, because, once entered, this agreement will become the rules by which you must live.

### **THE DIVISION OF PROPERTY**

More than likely, each spouse entered into the marriage with *personal* assets. Just as likely, once married, the spouses accumulated *joint* assets including money, real estate, personal property such as cars and investments, and even debt. How to properly and fairly divide of this property can turn even the most amicable divorce into a bitter battle.

Texas, along with California, Louisiana and a handful of other states, use a “community property” system of property division, which was derived from Spanish law. Other states follow an English law tradition.

So what does it mean when we say Texas is a community property state? It means that a court can divide the community property between the spouses, but cannot divide separate property.

Separate property is something one person (1) owned before the marriage; (2) individually received during the marriage by gift or inheritance; or (3) in some circumstances, money received in a personal injuries lawsuit during the marriage (except for lost earning capacity.) Community property is everything other than separate property.

There is a presumption that all property owned at the time of divorce is community property. If either spouse insists that certain property is separate property, it is up to that person to prove their claim in court.

However, not every case has to go before a judge for asset division. After filing for divorce, the spouses are free to agree to divide their assets any way they see fit. They can even split their personal property or agree to pay alimony on their own.

### **PROVING SEPARATE PROPERTY**

If a spouse wants to keep certain property after the divorce, it must be proven in court that it should be considered separate property. That determination (also referred to as the "inception of title" rule) is usually made according to when the item was purchased. The simplest way to prove this is to produce a title or receipt that shows the purchase date was prior to the marriage.

Also, if clear and convincing evidence is presented, assets purchased during the marriage using separate property funds can also be considered as separate property. The courts refer to this as "tracing."

### **AGREEING AHEAD OF TIME ON WHAT PROPERTY IS SEPARATE**

Before the wedding, the couple may make a pre-marital agreement (commonly known as a "prenuptial agreement" or an "antenuptial agreement") that spells out who owns specific property in the event of a death or divorce.

The spouses may also create a post-marital agreement any time during the course of the marriage, as long as the agreement was not created in an attempt to defraud current creditors. A post-marital agreement might also change the status of property acquired in the future.

Both pre- and post-marital agreements must be in writing and signed willingly by both spouses. It is difficult to change the terms of these agreements when enforced at the time of divorce.

### **VALUING THE PROPERTY**

Once the extent of the community versus separate marital estates is established, the next step is to determine the value of the assets and debts. Various procedures are used depending on the nature of the asset. For cash assets, like bank accounts, brokerage accounts, and most types of retirement accounts, the value is obviously the balance of the account. Some retirement accounts such as pension plans have to be valued by a forensic accountant in combination with an actuarial to determine life expectancy. For a real property valuation, the tax value can be used or a realtor may be consulted to give an opinion on value.

For closely-held business interests, a forensic business valuation expert, usually an accountant that specializes in business valuations, will be hired by each party to examine the different approaches to business valuation and give an opinion as to the values of the business. In any closely-held business interest, there must be a distinction made between personal goodwill and professional goodwill. Personal goodwill is that value to the business that is unique to the individual; whereas, professional goodwill is that goodwill separate and apart from the individual.

Personal property, like furniture, clothing, dishes, etc., will be valued at sales value – what the item can be sold for, usually garage sale value.

## **DIVIDING THE PROPERTY**

Once it is determined the nature of the community estate and the value of the assets, the next step is to determine the division. Judges have tremendous latitude when dividing property – there is no set formula for who gets how much and there is no guarantee that assets will be split evenly. The legal standard for division is a “just and right” division – not necessarily 50/50, but what division, according to the Judge, is just and right.

Among the factors a judge may consider when dividing property:

- Age and physical condition of each spouse;
- Relative ability and earning power;
- Relative need for future support;
- Size of the estate;
- Benefits a spouse would have received if the marriage had continued; and
- Fault in the break-up of the marriage.

Even though Texas has adopted no-fault divorce, determining “fault” can still play a very important part in the division of the community assets. Also, judges are likely to award a slightly larger portion of the community property to a spouse who has not worked outside the home during the marriage. This is done because that spouse may find it difficult to secure employment that will provide adequate support.

The division of property (assets and debts) is similar to a balance sheet in the business world, with assets and debts being assigned to each spouse. Many people misunderstand the rules of division – the court does not have to divide each asset according to the percentage division assigned, but may make an award of each individual asset, with consideration of the percentage division being evaluated as to the overall division of the entire community estate.

## **ALIMONY/MAINTENANCE**

Until recent years, Texas did not allow for the payment of alimony and even now, it is available in extremely limited circumstances and only for a limited period of time.

A spouse can be awarded alimony/maintenance only if two specific conditions exist.

The first is if the other spouse was convicted of a crime involving family violence within the two years prior to filing of the divorce suit.

The other starts with a 10-year marriage, where the spouse seeking maintenance lacks sufficient property (including property awarded in the divorce) to provide for his or her minimum reasonable needs. Then, if that factor exists, then the inquiry turns to whether the spouse can or cannot work outside the home because he/she has an incapacitating personal physical or mental disability; or, he/she is the primary caregiver of a child requiring substantial care due to a physical or mental disability; or the spouse clearly lacks adequate skills to find a job to support minimum reasonable needs.

Most alimony claims rely on the second of the conditions. But for the request to be successful, the spouse must be able to show a reasonable attempt to find an appropriate job or get job training.

Judges are further limited in the right to award maintenance by state law that says support can continue for no longer than necessary to provide for the spouses needs, but more than three years after the divorce is finalized. The exception to this rule is when the maintenance is awarded based on a disability, in which case the award may be indefinite in duration. Also, monthly payment amount is limited to either \$2,500 or 20 percent of the paying spouse's average gross income – whichever amount is lower.

## **ISSUES RELATED TO CHILDREN**

There are four areas that must be addressed when spouses have minor children. All of the issues are related (although each must be reviewed separately) and all must be determined to be within the "best interests" of the child.

It is important to note that the gender of the parent plays no part in decisions involving children.

### **CONSERVATORSHIP**

Conservatorship is the term used to describe the legal relationship between the parent and the child. In Texas, there are two basic arrangements. In one, both parents are "joint managing conservators." In the other, one parent is the "managing conservator" and the other parent is the "possessory conservator." Even though the word "possessory" is used, none of these terms are related to the amount of visitation a parent has with a child. Instead, the terms refer to the legal relationship and the authority a parent has to make decisions affecting the child's life.

Texas law presumes that parents should be named as joint managing conservators after a divorce. In assessing whether it is appropriate to appoint the parents as joint managing conservators, the court will consider the questions of whether:

- The child's physical, psychological or emotional needs will benefit from the arrangement;
- The parents have shown the ability to reach shared decisions;
- Both parents have participated in child rearing before the suit was filed; and
- The geographical proximity of the homes of the parties is problematic.

If the parents are joint managing conservators, either they will agree between themselves or the court will select one to have primary custody of the children with the other parent receiving visitation rights.

To avoid joint conservatorship, one parent must prove that it is not in the child's best interest. Usually this is reserved for situations where a parent has committed domestic violence against a member of the family, has substance abuse problems, or has engaged in other actions or behaviors that could endanger the child.

### **RIGHTS AND DUTIES**

Subject to court approval, a parent of a child has the following rights and duties at all times:

- To receive information concerning the child's health, education and welfare;
- To confer with the other parent, to the best extent possible, before making a decision concerning the child's health, education and welfare;

- To have access to the child's
- To consult with the child's physician, dentist or psychologist;
- To consult with school officials concerning the child's welfare and educational status, including school activities;
- To attend school activities;
- To be designated on the child's records as a person to be notified in case of emergency;
- To consent to the child's medical, dental and surgical treatment during an emergency involving an immediate danger to health and

- medical, dental, psychological and educational records;
- safety;
- To manage the child's estate that has been created by the parent or the parent's family;
- To inform the other parent in a timely manner of significant information concerning the child's health, education, and welfare; and
- To inform the other parent if the parent resides for at least 30 days with, marries or intends to marry a person who the parent knows is a registered sex offender under applicable state law.

While the child is in their care, a parent also has the following rights and duties, subject to the court's approval:

- The care, control, protection and reasonable discipline of the child;
- To support the child, including providing clothing, food and shelter;
- To provide and consent for the child's noninvasive medical and dental care;

- To consent to the child's medical, dental and surgical treatment during an emergency involving an immediate danger to health and safety; and
- To direct the moral and religious training of the child.

A court may require that joint managing conservators consult with or obtain the consent of the other parent in the exercise of these rights; or, a court may allow each joint conservator to exercise these rights independently of the other. This can become problematic, particularly with regard to medical and educational decisions, if the lines of communication are faulty between the parents.

The following rights and duties are generally afforded to both parents in a joint managing conservatorship arrangement, or to the sole managing conservator.

- The right to consent to the child's medical, dental and surgical treatment involving invasive procedures;
- The right to consent to the child's psychiatric and psychological treatment;
- The right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- The right to consent to marriage and enlistment in the armed services of the United States;
- The right to make decisions

- concerning the child's education;
- The right to the services and earnings of the child;
- The right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government – except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed; and
- The duty to manage the estate of the child to the extent the estate has been created by community or joint property of the parents.

The rights typically allocated only to one parent, regardless of the type of conservatorship involved, include:

- Establishment of the child's primary residence; and
- To receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child.

A recent trend has developed in many counties to restrict the establishment of the children's primary residence to a particular geographic area. Dallas County judges routinely restrict a child's residence either to Dallas County or to Dallas and its contiguous counties, as do Judges in Collin County, Tarrant County, and Denton County. If the primary parent chooses to relocate outside the designated area, he or she must seek permission from the court before moving the children or risk losing primary conservatorship.

### **PARENTING TIME SCHEDULING (aka VISITATION)**

A schedule must be established to govern when parent and the child get to be together. Modern terminology for this is "parenting time", although it is also commonly called "visitation" or "possession and access".

Judges have wide discretion to determine schedules that will create a stable environment for the child, while also providing both parents with significant parenting time periods with their child. Texas has developed standard possession schedules, but by mutual agreement, parents can deviate from those standards.

#### **Texas' Standard Schedule for Parents Who Live Within 100 Miles of Each Other:**

- The non-primary parent has visitation from 6 p.m. on the first, third and fifth Fridays of every month until the immediately following Sunday at 6 p.m.
- At the option of the non-primary parent, he or she may pick up the child on the Fridays of their weekends at the time school is dismissed for the day and retain possession until the immediately following Monday morning when school resumes.
- The non-primary parent has visitation with the child from 6 p.m. to 8 p.m. on each Thursday night when the child's school is in session.
- At the election of the non-primary parent, he or she may choose to pick up the child at school at the time the child is dismissed from school on Thursday and then return the child to school the next morning.
- The non-primary parent receives the right to have the child for 30 days during the child's summer vacation.
- In even-numbered years, the non-primary parent has the right to possession of the child during the child's spring vacation from school.
- In even-numbered years, the non-primary parent has possession of the child from the time school is dismissed for Christmas vacation until Noon on Dec. 28.
- In odd-numbered years the schedule flips, with the non-primary parent receiving the children beginning at Noon on Dec. 28 until school resumes following the Christmas vacation.
- In odd numbered years, the non-primary parent receives possession of the child for the Thanksgiving holidays.
- The mother always gets to spend Mother's Day weekend with the child. The father always has possession during Father's Day weekend.



### **Texas' Standard Schedule for Parents Who Live More Than 100 Miles From Each Other:**

- At the option of the non-primary parent, he or she may have either the first, third and fifth weekends of a month, or one more weekend per month of his or her choosing.
- There is no Thursday visitation in the standard possession order.
- The non-primary parent receives custody during the spring vacation in every school year.
- Summer visitation for the parent who lives more than 100 miles from the child has 42 uninterrupted days with the child during the child's summer vacation.
- Holiday possession is the same as that for parents who live under 100 miles away.

If the child is too young to be in school, the parenting time order for vacations follows the calendar of the public school district where the child lives.

The parenting time order continues in effect until the child reaches the age of 18 or graduates from high school, whichever is later. The visitation order may, of course, always be altered by the court should the need arise.

Again, the spouses are free to agree to any arrangement that works for both of them and the child.

Some parents choose to implement a plan where the child spends one week with one parent and the next week with the other parent. Other parents create more complex schedules for possession of the children. Even if the court enters a standard possession order, parents are still free to modify it by mutual agreement. So long as both the parties agree, there is no limit to the parties' authority to change their respective visitation periods.

A parent who withholds the child from the other is in violation of court order and can be subjected to a contempt order, which can result in fines or even jail time. However, there is no punitive remedy for the non-primary parent who fails to exercise his or her scheduled visitation.

### **CHILD SUPPORT**

Child support is the money a judge orders the non-primary parent to pay the primary parent for the child's benefit. How exactly the money is used is up to the sole discretion of the primary parent; the parent who pays has no authority to dictate the manner of use of the money.

#### **HOW LONG DO PAYMENTS LAST?**

Usually, payments last only until the child reaches the age of 18 or graduates from high school, whichever is later. An exception is made when a disabled child is involved. In that instance, support may be continued indefinitely.

Texas law provides no authority for payment of college tuition or any other expenses following high school graduation. Of course, the parents can agree between themselves concerning payment of college expenses for their children.

#### **HOW MUCH IS EACH PAYMENT?**

Texas, like most states, created "child support guidelines" to determine how much a non-primary parent should be required to pay. Like the standard possession order, these are suggestions, and are not written in stone. However, judges are reluctant to stray from these guidelines without good cause.

The guidelines base the percentage of that parent's net income to be paid in support on the number of children involved. For one child, the guideline for payment is 20 percent of the parent's net resources, 25 percent for two children and so on. The percentage is capped at 40 percent for five or more children. Where a parent has children the subject of this suit and also children from another relationship that are not the subject of the court proceedings, the percentages will be discounted slightly to account for the support obligations for the other children.

The calculating of percentage is limited to the first \$7,500 of net resources. Therefore, if the non-primary parent earns \$7,500 or more in net resources and is paying support for one child, the amount of support would be capped at \$1,500 per month. In order for the primary parent to receive more than the guideline amount, he or she would have to show that the needs of the child surpass the allotted amount.

What income is used to determine the non-primary parent's net resources? It is:

- 100 percent of wages and salary, including tips, commissions and bonuses;
- Interest, dividend and royalty income;
- Self-employment income;
- Net rental income; and/or
- All other income actually being received. This includes severance pay, retirement benefits, pensions, trust income, annuities, capital gains, Social Security benefits, unemployment benefits, disability and workers' compensation benefits, interest income from notes regardless of the source, gifts and prizes, spousal maintenance and alimony.

At his or her discretion, the judge can deduct these from the equation:

- Social Security taxes;
- Federal income tax;
- State income tax;
- Union dues; and/or
- Expenses for health insurance for the child.

Either parent can argue that child support should be more or less than what the guidelines suggest. To receive more, the parent must show that the child has special needs that cannot be met with the guideline amount of support. To argue for less, the parent must show that the guidelines are excessively burdensome.

Of course, the parties are free to make their own agreement on child support, setting the amount higher or lower. The court, however, will review these agreements closely to make sure that the children's needs are being met.

The parents also can agree that child support will extend beyond the later of the child's graduation from high school or the child's 18th birthday. The spouses are free to agree that the non-primary parent will have to pay for private school, extracurricular activities and college tuition.

### **WHAT HAPPENS IF PAYMENTS AREN'T MADE?**

The court finalizes child support agreements and violations of court orders can be dealt with severely. Enforcement options for violations may include jail time and fines.

There are several methods to ensure that court-ordered child support money is paid.

*Wage withholding:* A judge will send a notice to the parent's employer directing the employer to automatically deduct the amount of child support from the parent's salary. This money is sent to the child support office, which distributes it to the child.

*Contempt:* If a parent continually fails to pay, the primary parent can file for contempt of the court's order. There are severe sanctions for failure to pay child support. The parent can be jailed or the court can place the parent on community supervision (probation) for up to five years. The parent can be ordered to pay the primary parent's attorney's fees related to the enforcement action. The court also can order 12 percent interest be added to the outstanding past-due amount of support owed.

Failure to support the child for more than a year can result in the termination of the parent's parental rights. If a parent's rights are terminated, this severs all ties between the parent and his or her child. The effect of this judgment is extreme and will only be used in the most extreme cases and only if the court determines that the child will not suffer because of it.