

## Divorce Proceedings in Texas

The purpose of this article is to answer some of the questions that clients most often ask about divorce. Having the information in the form of an article hopefully will allow you to consider these issues at your leisure. Some of the rules below have exceptions, so be sure to discuss the particulars of your situation with your attorney.

### FIRST QUESTIONS:

#### 1. Can I keep them from divorcing me?

In Texas, if one spouse wants a divorce, he or she can get it, assuming the residency requirements have been met. There is no way one spouse can legally make the other spouse stay married against his or her will.

#### 2. How long does it take?

After the filing of the Original Petition for Divorce with the clerk's office, the court cannot grant the divorce for at least 60 days, the waiting period under Texas law. However, the divorce may take longer if the parties are trying to work out the terms of the divorce, such as property division, custody of children, child support, etc. If an agreement is not able to be reached, either party may schedule a trial at a time after the 60 day waiting period. At this trial the court will hear from each side and decide the issues that have not been agreed upon.

### STEP BY STEP:

#### 1. Filing the petition:

The first step taken to initiate a divorce is the filing of an Original Petition for Divorce. This is a simple document that names the parties and the children and states that one of the parties (the Petitioner), is seeking a divorce and why (the grounds). It may also state some of the things that the Petitioner may ask the court do decide, such as a division of property, orders providing for the children, and attorney's fees.

When the Petition is filed the Petitioner must pay a filing fee to the court of usually around \$250 to \$275.

The filing of the Petition begins the 60 day waiting period, but it is not a court order and does not establish anything legally. It is merely a statement by the Petitioner. Some counties will automatically enact a "Standing Order" upon the filing of the divorce, which prevents either party from doing things to harm the property or upset the children during the pendency of the divorce.

#### 2. Grounds:

The most common ground for divorce is insupportability. The sole allegation necessary in the divorce petition is that "the marriage has become insupportable because of discord or conflict of personality which has destroyed the legitimate ends of the marriage relationship"; also known as No-Fault divorce.

The law also provides as possible grounds: incurable insanity, living apart for three years, adultery, cruelty, abandonment, and conviction of a felony. These other grounds are rarely used, but, if you have such grounds, you should discuss them with your attorney.

### 3. Residency:

The next important item is residency. You or your spouse must have been a resident of the State of Texas for a period of six months and a resident of the county in which you seek to file suit for divorce for a period of ninety consecutive days immediately prior to filing the Petition.

### 4. Service on the Respondent:

The court must have some evidence that the other spouse (the Respondent) has notice of the filing of the divorce. One way to provide this evidence is for the Respondent to file a Waiver or an Answer.

The Waiver states that the Respondent has received a copy of the Petition. It is voluntarily signed by the Respondent and notarized and then filed with the Court. The Respondent is "waiving" the need to have them formally served (below).

If you are asked to sign a Waiver by your spouse or your spouse's attorney, you are advised not to do so without first consulting with your own attorney. A Waiver can contain additional language that can seriously affect your rights.

The Respondent may instead file an Answer, usually prepared by their attorney, thereby enter their appearance in the case.

If the Respondent does not file a Waiver or an Answer, the Petitioner must arrange for a constable or private process server to hand a copy of the Petition to the spouse. This method is called service of process. After service the constable or private process server returns the citation to the courthouse, where it is filed and establishes proof that the Respondent has received a copy of the Petition.

This method costs the Petitioner a service fee of approximately \$60 to \$120 and might be embarrassing to the Respondent. It can be avoided if the Respondent voluntarily enters an appearance in the case by filing a Waiver.

Once served, the Respondent will be under a deadline to file an Answer with the court within approximately three weeks.

## IMMEDIATE COURT RELIEF:

### 1. Temporary Orders:

One or both of the spouses may need court orders immediately after filing for the divorce. These Temporary Orders could include temporary child support, temporary alimony or spousal support, temporary child custody and visitation, or provisions as to who pays what debts while the divorce is pending and who has the right to temporary use of the house and other property. They may be worked out by agreement, or a hearing on these issues may be necessary.

If you believe you need Temporary Orders as part of your divorce, speak to your attorney about it.

## HOW ARE THE TERMS OF THE DIVORCE WORKED OUT?

### 1. By Agreement or by the Court:

The terms of the Final Decree of Divorce are determined by agreement of the parties or, if the parties are not able to agree, by the Court.

### 2. By Agreement:

During the 60 day waiting period, and possibly beyond, the spouses and their lawyers usually attempt to work out the terms of the divorce, such as custody of the children, child support, visitation schedules, property and debt division, etc. The parties can negotiate directly with each other, if they can be civil, or let the lawyers try to work it out with their approval- or some combination of both approaches. Or they may try mediation.

In mediation, the spouses and attorneys meet with a mediator - a neutral third party who helps the parties try to reach an agreement. The idea is to reach agreement on the disputed terms of your divorce in a less expensive and less acrimonious manner.

If the spouses come to an agreement, the mediator will write up the agreement in a Mediated Settlement Agreement, and its terms will be part of the Final Decree of Divorce. Both parties and their lawyers will sign the MSA, and when it's been prepared, the Decree. If this occurs, the judge will sign the Decree after a very short appearance in court by one of the parties accompanied by their attorney.

### 3. A Contested Trial:

If the parties do not come to an agreement, all of the issues not agreed on are set for a trial, and at that time the judge and/or jury listens to all of the testimony and evidence and decides those issues. Most family law cases are heard by the judge without a jury. If you want a jury trial, it must be formally requested of the court in advance.

If a trial is necessary, the parties' attorney's fees will be considerably higher because much more time is necessary to prepare for and conduct a trial. The jury trial takes a good deal more time than a trial by a judge alone and is therefore even more expensive.

#### 4. Can the Decree Ever Be Changed?

The property division, if agreed to, is final and, barring extraordinary circumstances, the parties cannot later change their minds about who gets what. If the Final Decree is ordered by the judge after a trial, it may be appealable, but only if the judge made legal errors that caused an unjust result or made decisions that were grossly contrary to the evidence. Not liking the judge's order is not sufficient grounds to appeal it. If the Decree is not appealed within 30 days, it is normally final as to the property division and cannot be changed.

However, the orders regarding the children are subject to change. Thus either party can come back to Court later and ask that child support be increased or decreased or that visitation or custody be changed. However, the party wanting the change must show the court that there has been a "material and significant change of circumstances" that make the requested changes necessary or the last order unworkable. Such changes are not made lightly. Child support can be revisited after three years unless there's been a significant change.

#### LEARNING ABOUT THE OTHER SPOUSE'S PROPERTY AND ACTIVITIES:

Often, one of the spouses knows little about the property of the marriage. It may be impossible for that spouse to intelligently negotiate regarding property division without more information. In that case, the lawyer can require the other spouse to provide all relevant information about the spouse's property, debts and income. This process is called "Discovery" and may take some time if the property belonging to the parties is complex. Of course, if the spouses are willing to voluntarily exchange needed information and documents, much expense can be avoided. For more on property and debt division, see the section below.

Similarly, if custody is an issue, either side may require information from each other about the spouse's or children's activities that are relevant to this issue.

#### CUSTODY OF THE CHILDREN:

Most people think "custody" means which parent has possession of the children most of the time. In Texas, the law uses different terminology. The parties will be Joint Managing Conservators, or one will be Sole Managing Conservator of the children, but those terms are often misunderstood. That designation determines how important decisions about the children are made, such as major medical and educational decisions. The law presumes that the parties will be Joint Managing Conservators,

working together on such important decisions, unless evidence exists as to why a Sole Managing Conservatorship is necessary.

However, within a Joint Managing Conservatorship, one parent will still usually have “the right to establish the primary residence of the children.” This is the element that most people think of as “custody”.

If one parent establishes the primary residence, the other usually has a possession schedule and usually pays child support.

## PERIODS OF POSSESSION

The parties are free to work out any schedule for each parent's periods of possession of the children that fits their needs and those of the children. In fact, the court encourages the parents to arrange periods of possession by agreement and to stay flexible to adjust to circumstances. However, it is highly recommended that the Decree contain a schedule that will control if the parties cannot agree in the future. It is hoped that the parties will agree on a written schedule to be placed in their decree, but, if they don't and the judge must order a schedule, the judge will usually order a "Standard Possession Order."

If the parties live within 100 miles of each other, this standard schedule allows for possession by the “non-primary” parent on the 1st, 3rd, and 5th weekends of each month from 6:00 p.m. on Friday until 6:00 p.m. on the following Sunday; one weeknight (usually Thursday) each week from 6:00 p.m. to 8:00 p.m.; alternating Thanksgiving and Spring Break holidays; approximately one-half of the Christmas break; and thirty days during the summer break. If this parent lives over 100 miles away, the weekend and weekday periods may be adjusted and he or she is given every Spring Break and six weeks of summer visitation.

If the parent with the visitation schedule wishes, they can request that the weekends extend from the time the children get out of school on Friday until Monday morning when school begins, and that their Thursday possessions extend from the time school gets out on Thursday until it begins on Friday.

Sometimes one parent believes that the other's time with the children should be restricted to less than the standard possession order either because the children are very young or because one parent doesn't trust the other one to take proper care of the children. Such restrictions might, for example, mean no overnight periods of possession, not taking the children out of the country, or supervised possession. If the other parent does not agree to this restriction, the Court will order it only if the Court finds that such limitation is necessary for the safety of the children.

The court will, however, often reduce or restrict overnight possession or lengthy summer periods for infants or very young children. The standard possession schedule described above does not automatically apply to children under three years of age.

Parent often ask if a child must go with the other parent if the child does not want to. The answer is yes. The child should be encouraged to maintain his or her relationship with both parents, and each parent must turn the child over to the other as ordered unless to do so would endanger the child, in which case that parent must seek new orders of the Court with diligence.

#### CHILD SUPPORT:

Texas has child support guidelines which recommend that the payor of child support pay a certain percentage of his or her net resources in child support. "Net resources" is income after taxes, social security, union dues, and health care insurance for the children are subtracted. The guidelines provide for the following percentages, depending on the number of children:

- One child - 20%
- Two children - 25%
- Three children - 30%
- Four children - 35%
- Five children - 40%

The percentage can be varied if the court finds that extraordinary circumstances call for higher or lower support. The percentage is also adjusted if the payor is financially responsible for other children outside this case.

These guidelines apply only to the first \$7,500.00 of the monthly net resources. The court presumes that the appropriate percentage of \$7,500.00 is adequate support, and it is up to the receiving parent to convince the court that the children need more. If the paying parent nets considerable more than \$7,500.00 a month and the children's needs justify higher child support, the court may order higher support.

The court normally orders that the paying spouse also pay the premium for the children's medical insurance and that each parent pay one-half of all uninsured medical expenses.

#### 1. Withholding child support or possession:

Unfortunately, nonpayment of child support is sometimes used as a way to punish the other parent for real or imagined wrongs, just as denial of possession rights may be used. These are both very bad ideas. While these tactics may indeed hurt the other parent, they will also hurt the children, both directly and indirectly. Whatever causes increased friction between the parents ultimately hurts the children as well. Conflict between their parents confuses and frightens children. Therefore it is very important that both parents faithfully abide by the court's order of child support and periods of possession. Refusal to obey court orders can result in new court filings for punishments and attorney's fees.

## 2. Paid through the State Disbursement Unit in San Antonio:

All child support payments must be made through the Child Support Disbursement Unit, located in San Antonio. This is helpful because there is a neutral third-party record of what has and has not been paid.

## 3. Withholding Child Support from Earnings:

All child support payments are to be withheld from the payor's paycheck unless the parties agree otherwise or the payor is self-employer. Judges generally do not like agreements not to withhold from wages because they believe that this provision avoids later litigation to collect unpaid child support. However, language can be added that the child support will not be withheld from earnings unless the payor falls behind.

## 4. Paid through High School:

Child support is to be paid until the child finishes high school, even if the child turns eighteen before graduating, so long as the child is a full-time student.

## 5. Disabled Child:

If you have a child that requires substantial care and personal supervision because of a mental or physical disability and cannot or will not be able to support himself, the court may order child support continue after their eighteenth birthday. Consult with your attorney on this subject.

## 6. College:

Parents often wonder if they can obligate the other parent to help pay the children's college or other expenses after the children are eighteen. The Judge cannot order either parent to pay the child's expenses after he or she is eighteen (or out of high school) because there is no legal duty for a parent to support a child after that age, as they are now an adult. However, the parties can agree by contract to pay those expenses, and that agreement can be included in your divorce decree, and is enforceable as a contract. That agreement must be voluntary and cannot be required.

## Best interest of children:

Whenever the court makes orders that affect the children, the primary consideration of the court is the best interest of the children, not the best interest or the convenience of the parents.

## WHAT TO TELL THE CHILDREN:

Parents are often concerned about what and how much to tell the children about their divorces. If you are seeing a professional counselor, ask that person for advice.

Generally, however, these guidelines apply: (1) assure the children that the divorce is because of a problem between the parents and is not because of the children, that the children are in no way responsible for their divorce, and that both parents still love them and will continue to do so; and (2) do not discuss your marital disputes with your children or even in their presence. If you are angry with your spouse, it may be difficult not to discuss him or her around the kids, but it is very important that the children do not overhear your angry or disparaging comments about their other parent, as it is confusing and damaging to them.

## PROPERTY AND DEBT ISSUES:

Upon divorce, all of the property owned by the parties must be divided between them. The first issue to be tackled is whether particular property is community or separate property.

### 1. Separate and community property:

Basically, community property is all of the property the spouses have acquired during the marriage due to your earnings and income during the marriage. Basically, separate property is any property you owned before marriage or have acquired by gift or inheritance, and other small exceptions. A helpful way to think of it is to start with all property owned by the parties, eliminate that which can be identified as separate property, and what's left is the community property of the marriage.

Separate debts are debts incurred before marriage and debts incurred during marriage but secured by the separate property of one spouse with the lender to look only to that spouse's separate property for security.

All separate property and separate debts are automatically awarded to the spouse whose name they are in. The other spouse has no claim on the property and no obligation for the debts.

Community property is usually divided fairly evenly between the spouses, as well as all community debts. However, if you do not agree on the division of property and the judge must decide, the judge will have some discretion in dividing the property unevenly. If one spouse has a significantly lesser earning capacity than the other, the judge may take that into account and award that spouse somewhat more than half of the community property. The judge may do the same for a spouse who has suffered from the other's abuse, mismanagement of funds, or adultery. More uneven divisions may be made in unusual circumstances, such as the disability of one of the spouses or a child.

Also, if community funds have been used to make payments on one spouse's separate property, the "community estate" may have a right to be reimbursed for that expense. For example, if the husband owned before marriage the home that the spouses live in, and during the marriage the spouses made payments on the house from their earnings,

the community estate may be entitled to some reimbursement, called economic contribution, for those payments at divorce.

Similarly if one spouse's separate property has contributed to the community estate or to the other spouse's separate estate, that contributing spouse's separate estate may be entitled to reimbursement.

Figuring out whether property is separate or community and whether there is any right to reimbursement can be complicated. You may be asked a lot of questions about date of acquisition, source of funds, and credit used to purchase.

## 2. Inventory:

You may be asked to complete an Inventory of your property by filling out a form. It will give information needed to help determine a reasonable distribution of property. If you don't have all the information needed, your lawyer can get information from your spouse with Discovery techniques, as discussed above.

## 3. How to divide the property:

Whenever possible, the community property should be divided at divorce so that each party gets an equitable share. When cash or other liquid assets are involved, it is easier to make such a division.

If an asset cannot be divided or the parties do not want to divide it, it can be given to one spouse and items of similar value given to the other spouse. The parties may argue about who gets the lawn mower and whether the bed is worth more than the refrigerator. Such arguments can cost both parties more in attorney's fees than the property is worth, so it is best to be prepared to be reasonable and willing to compromise.

Sometimes there is no way to divide an asset evenly. For example, the parties may own a home or a family business which constitutes most of their community assets. If one of them takes the house, the other cannot be compensated with something else of equal value. This problem can be dealt with in various ways. The other party may be given a lien against the house to be paid off over time or when the house is sold, or both parties may continue to own the house together after the divorce with an agreement to sell it and split the proceeds or loss, or the sale of the asset may become necessary.

## 4. How to divide the debts:

Also, one party may receive more than half of the community assets if he or she also takes a compensating extra share of the debts. It is the net share of community estate that matters in the end.

For example, you might consider giving your spouse \$5,000.00 more in assets and balancing it out by also giving him or her \$5,000.00 more in credit card debt. But if the debt is in your or joint name, and your spouse doesn't pay that debt, the credit card company can come after you for the amount owing because the creditor is not bound by the division of property in your decree. Therefore, it is not a good idea to balance out the division of property by giving your spouse debts that he or she may not pay.

#### 5. The home mortgage:

Suppose you've agreed that your spouse will keep the house after divorce. Are you still liable for the mortgage, and will that debt affect your credit?

Technically, you will remain liable for that house mortgage until your spouse pays it off or refinances the note into their own name. In the Decree, the judge will order your spouse to pay off the note, but if he or she doesn't, the mortgage company can still look to you for payment.

To protect you in that situation, your spouse will normally sign a Deed of Trust to Secure Assumption, giving you the right to foreclose the loan or take back ownership of the house if he or she defaults on the mortgage. So if the house is worth more than the amount owed on it, you will have some protection. It's not perfect protection, but a refinance into the sole name of the spouse taking ownership is not always possible, as the original mortgage may have been based on both spouse's earnings.

Your name on debts may still show up on credit reports, thus hindering your credit. Sometimes if you send a future mortgage lender a copy of the Decree and Deed of Trust to Secure Assumption, they will sometimes remove that mortgage from the equation in considering you for a new mortgage. Also, if you send the same documents to lenders from whom you are seeking other forms of future credit, they may be willing to ignore that mortgage obligation.

#### 6. Knowing what property and debts exist:

Your attorney will not ordinarily make an independent search for property or debts in you or your spouse's name. They will depend on what you and your spouse tell them you own and what debts you have. If you believe that there may be assets or debts that you don't know about, be sure to inform your attorney, as an outside investigator may be advisable. Be sure to inform your attorney of any liens on property listed as assets of the marriage.

#### 7. Property and debts during the divorce:

Do not purchase or sell any property of significant value or incur a significant debt during your divorce without first consulting your lawyer. You could be penalized by the court for doing so.

## 8. Separating credit cards:

You and your spouse must decide who is going to keep which credit cards, and then it is up to you to notify the credit card companies that you are divorcing and that (1) if the account is one that your spouse is keeping, you are not responsible for any future debts on it, and (2) if it is an account that you are keeping, you are not responsible for any future debt that your spouse incurs on it. It is a good idea to send letters signed by both of you if you can.

## ALIMONY:

The court may order that one spouse pay support to the other spousal maintenance ("alimony") after the divorce if final. This right to support is, however, limited to cases in which (1) the marriage lasted at least ten years, (2) the spouse seeking support lacks sufficient property to provide for his or her minimum reasonable needs, and (3) that spouse (a) is unable to support herself or himself due to an incapacitation physical or mental disability that prevents that spouse from being employed, or (b) lacks earning ability adequate to support his or her minimum reasonable needs.

A spouse may also, however, seek alimony if the other spouse has been convicted of or received deferred adjudication for a criminal offense involving family violence within two years before the divorce was filed or during the pendency of the suit.

Unless the spouse seeking alimony has a serious physical mental disability, the court may not order support for more than three years.

The amount of court-ordered alimony is not to exceed the lesser of \$2,500.00 or 20% of the spouse's average gross monthly income and in no event should it be for more than the "minimum reasonable needs" of the spouse seeking support.

However, all of the limitations stated above apply only to court-ordered alimony. The parties may agree contractually to alimony in any amount and for any length of item.

## COUNSELING

Clients often wonder if they can make their spouse get counseling to repair the marriage or to help the children. A Judge can order counseling during the divorce process if it appears to be necessary for the health of the children.

## ADDITIONAL COMMENTS

Divorce is almost always a painful experience for the whole family. However, that does not mean that it is wrong or has to be a disaster. As difficult as the separation may be, it may be better for everyone, including the children, than maintaining a destructive family

relationship. It can also be an opportunity for you to grow and to explore new parts of yourself.

Professional counseling during this time is a very good idea. No matter how balanced and sane you are, you will probably be emotionally overwrought while going through this major change in your life. A good counselor can help you work through those emotions in a manner that promotes your mental health and peace of mind.

A good counselor can also advise you as to how to help your children through this time. All children need special help when their parents divorce, no matter how calmly they may seem to be taking it.

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