

DIVORCE- TEXAS STYLE

A Handbook For Divorcing Couples

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WARNING

This pamphlet is provided to try and answer the most frequently asked questions about the divorce laws in the State of Texas and is not meant to be a substitute for competent legal advice. You are cautioned that this pamphlet does not contain all the laws or all the answers regarding divorce and that the laws change on a regular basis.

CONSULT AN ATTORNEY

INTRODUCTION

The purpose of this pamphlet is to explain the procedures for getting a divorce in Texas. This pamphlet in no way covers all the topics associated with divorce but hopefully it will assist the reader in understanding the steps necessary to obtain a divorce. The procedures for divorce are set out in the [Texas Family Code](#) which may be viewed for free on the Internet. For more specific information about these topics and your specific situation, consult an attorney nearest you or you may contact George M. Clifton, by calling 281-351-4040.

WHAT IT'S ALL ABOUT

Divorce is a procedure for splitting up a partnership. That is - the partnership between a husband and a wife. For the divorce to be completed successfully a divorce decree must be entered covering three areas: (1) division of the community property (2) child custody (3) child support. You cannot get a divorce without taking care of all three. That is, you can't get a divorce and work out the child support and custody later. If the parties can agree on what goes into the divorce decree then the court will generally go along with it but the court will look closely at the child custody and child support to see that it follows state guidelines. This will be covered in more detail later. There is no legal separation in Texas. You're either married or divorced. During a divorce the more the husband and wife fight, the more it costs them. If the couple can agree on the terms of the decree it's call an uncontested divorce. If they disagree about the terms and they both get lawyers it's called a contested divorce. The main point is that if the parties can work out the details before seeing a lawyer they can save themselves a lot of time, money and heartache.

HOW MUCH WILL IT COST?

Most lawyers charge a flat fee for an uncontested divorce that includes court costs and attorney's fees for filing the petition for divorce, preparing the divorce decree and getting it entered. Fees vary from lawyer to lawyer so call around to see what they charge. You may generally expect, however, that you get what you pay for. The less you pay for the divorce, the less time you may expect to spend with the lawyer. Most lawyers use legal assistants trained in divorce who can answer many of the most common questions but do not expect a lot of personal attention when you have selected the lawyer that charges the least. Word of mouth is the best guide so ask around and find out what your friends have to say about their lawyer. A contested divorce can be very expensive. Most divorces are contested because of a disagreement about who will have custody of the children. More about this later. Attorneys charge an hourly rate ranging from as low as \$100 per hour to as high as \$450. A full-blown contested divorce taken all the way through trial can cost the price of a new car! Each party can expect to pay \$25-\$40,000 depending on the lawyer and the work that is done. Needless to say, this money could better be spent on raising the kids than on paying the lawyers but everybody has gotta do what they gotta do.... The court may order one party to pay the other party's attorney's fees but the court does not have to award attorney's fees and often does not. In any event, you will have to pay your attorney first then hope the court will give you a judgment against the other spouse for those fees.

GETTING STARTED

After a party hires their lawyer, he or she will file a petition for divorce. The petition will set out some basic information about the husband, wife and children and ask the court for a divorce on one or more grounds: Insupportability , adultery, abandonment, cruelty, imprisonment, conviction for a felony, living apart, or confinement in a mental hospital. Most divorces in Texas are "no-fault", that is, they are granted for insupportability (incompatibility) where neither party is at fault and the husband and wife just can't get along. No other grounds are necessary. If one party wants a divorce, the other party can't stop it from happening just because they don't want a divorce. If a party can prove "fault" then the court can award more of the property to that spouse than to the other party, depending on the degree of fault. One of the parties must be a resident of Texas for at least 6 months and a resident of the county where the divorce is filed for at least 90 days before the divorce can be granted. There is a 60 day waiting period from the time the divorce petition is filed until the divorce can be entered. During that 60 days the parties can work out the terms of the divorce decree.

SERVICE

After the divorce petition is filed, the other spouse needs to be officially brought into the divorce proceedings. This can be done in one of two ways: waiver of citation or service. The filing lawyer can send the other spouse a copy of the petition along with a waiver of citation for him to sign, have notarized and returned for filing with the court. The waiver basically says that the party signing it got a copy of the petition and does not intend to contest the divorce. **BE AWARE** that when a party signs a waiver, they do not have to be consulted again and the party filing for divorce can have a divorce decree entered that contains basically whatever they want. **DO NOT SIGN A WAIVER WITHOUT CONSULTING A LAWYER.** If a party refuses to sign a waiver then they must be "served" with a copy of the petition by a process server and they must file an answer on the Monday following the expiration of 20 days after service of the petition. If the whereabouts of the other spouse are unknown, they can be served by publication in a newspaper or by other means.

TEMPORARY ORDERS

If it looks like the divorce is going to be contested and won't be over in 60 days, and if it looks like the parties can't agree on the running of their affairs pending the divorce, either party may request the court to enter Temporary Orders. Temporary Orders are intended to protect the parties, and especially the children until the divorce is granted. Be aware that Temporary Orders are not usually part of an uncontested divorce. Temporary orders might include such things as orders for temporary support, temporary custody of the children, temporary maintenance (alimony) for a spouse, counseling, preservation of the community property, and injunctions for harassment and creating debts. If the parties cannot agree on what goes in the Temporary Orders there will be a hearing. A hearing for Temporary Orders is called a "show cause hearing" at which the parties can put on testimony and evidence to support their requests for Temporary Orders. It is like a mini divorce trial requiring witnesses and evidence. Obviously, this adds significantly to the cost of the divorce because of the time and effort needed for the hearing. In many courts there will not be show cause hearing until the parties have been to mediation to attempt to agree on the terms of the Temporary Orders. See Mediation below. Be aware however, that without Temporary Orders, either spouse may take the children, clean out the bank accounts, terminate

credit cards, sell vehicles and land, and harass the other party without interference from the law. Calling peace officers to assist in any of these matters will generally not result in assistance unless you can show them a certified copy of a court order but do not hesitate to call them if you are threatened.

PROPERTY DIVISION

In the divorce decree, the court must divide all the parties' community property. Community property is generally all property acquired during the marriage, except gifts and inheritances. Personal injury awards are not community property, unless it is to repay for earnings lost during the marriage or for medical expenses incurred during the marriage. Everything is presumed to be community property unless proven otherwise. The court will divide the community property equally between the parties in a no-fault divorce. If fault can be proven the court may award the property unequally, i.e., 60-40, 70-30 or 90-10. Separate property is anything acquired by before the marriage and anything acquired during the marriage as a gift, inheritance, or received for personal injuries, except when the personal injury recovery is to repay for earnings lost during the marriage or for medical expenses incurred during the marriage. Money received from the sale of separate property remains separate property if it can be traced to that separate property and has not become commingled with community property. Property purchased with separate property money continues to be separate property, even if the transaction occurred during the marriage. However, if separate property and community property are commingled so that the separate property cannot be clearly traced and identified, then all commingled property will be deemed community property. Generally, income earned during the marriage from separate property such as rent from a separate property house will be community property. However, the increase in value of separate property during the marriage, such as appreciation of a rent house, will remain the party's separate property. Debts created during the marriage by either party are usually community debts that both parties are obligated to pay. No agreement by the parties and no court order in a divorce proceeding can affect the right of creditors to attempt collection for either party. However, the court can order one party to pay particular debts.

CUSTODY

The court is going to consider primarily the "best interests of the child" in awarding custody. The courts do not favor splitting up the children between husband and wife nor do the courts favor shuttling the children back and forth between the parents to achieve "equal" joint custody. The courts feel children need a stable home environment and the desires of the parents are secondary. A parent can be a Sole Managing Conservator, a Sole Possessory Conservator or a Joint Managing Conservator. A Sole Managing Conservator is the parent that the child lives with most of the time - the "primary" conservator - and the parent who establishes the primary residence of the child. The Sole Possessory Conservator is the one who gets visitation rights with the child. Texas courts must award joint custody unless good cause is shown for not doing so. Parents who share the responsibilities for raising the child are called Joint Managing Conservators. Even in joint custody one parent is usually the "primary custodian" of the child and establishes the residence of the child. Joint custody does not mean that the child has to spend equal time with each parent, it means the parents have an equal say in raising the children.

VISITATION

Custody and visitation are established by the Possession Order in the divorce decree. The Texas Family Code sets out the Standard Possession Order which generally provides visitation for the non-custodial parent: First, third and fifth weekends from 6:00 p.m. on Friday to 9:00 p.m. on Sunday. Every Wednesday from 6:00 p.m. until 8:00 p.m. or until school resumes next day. Alternating holidays and the child's birthday. Four weeks during the summer.

The parent with the children (custodial parent) must turn over the children to the other parent (non-custodial parent) at the beginning of his or her visitation and that parent must return the children at the end of the visitation. The custodial parent must make the children go with the non-custodial parent even if they don't want to go. If a parent fails to follow the Possession Order they could be held in contempt by the court for which they could be fined or jailed or both. Failure of a spouse to pay child support is not grounds to prevent the spouse from getting his or her visitation as ordered. A sick child does not have to be surrendered to the other spouse but the custodial parent should have a doctor's receipt or note to prove the child was sick or risk being held in contempt. A child does not have to be surrendered to a non-custodial parent if it would endanger the child. That is, if the non-custodial parent is under the influence of drugs or alcohol.

CHILD SUPPORT

The court expects both parents to support the child. The amount of child support is based upon the needs of the child and the earning ability of the non-custodial parent. The Texas Family Code provides a formula for the amount of child support which is presumed to be in the best interest of the children:

- One child 20% of the net income of the parent paying support
- Two children 25% of net income
- Three children 30% of net income
- Four children 35% of net income

"Net income" is defined as gross income from all sources less only income tax, social security and medicare deductions. If the paying spouse is supporting other children, the amount of support will be reduced according to a formula. Overtime and income from second jobs will all be considered. Payments for health insurance will not be deducted in computing the net income. Pay stubs and income tax returns can all be examined to determine the earning ability of the child support payer. Refusal to work will not grounds for failing to award child support. If a party has not worked in several years, child support may be based on minimum wage income. A party who voluntarily takes a job paying less will not necessarily be entitled to a reduction in child support. The non-custodial parent is also expected to pay for health insurance for the children in addition to child support and both parties will be ordered to pay 50% of the uninsured health expenses of the children. If a party fails to pay child support as ordered, he or she can be held in contempt and jailed or fined or both. A party may not stop child support payments because they are being denied visitation with their children. In such case they should file their own motion for contempt.

ALIMONY

Alimony in Texas is called "maintenance." The court can order maintenance payments after the divorce is final. In some special circumstances, it is wise for the parties to agree to alimony, particularly when the amount of their future earnings will differ widely. An attorney's advice is necessary to ascertain whether or not an alimony agreement would be beneficial in a particular situation. A spouse is entitled to maintenance if the parties were married 10 years or longer and the spouse seeking alimony lacks sufficient property, including property distributed to the spouse, to provide for the spouse's minimum reasonable needs, and the spouse seeking maintenance:

- (1) is unable to support himself or herself through appropriate employment because of an incapacitating physical or mental disability; or
- (2) is the custodian of a child who requires substantial care makes it necessary, taking into consideration the needs of the child, that the spouse not be employed outside the home; or
- (3) clearly lacks earning ability in the labor market adequate to provide support for the spouse's minimum reasonable needs.

Factors that a court will consider in determining whether a spouse is eligible to receive maintenance include:

- (1) the financial resources of the spouse seeking maintenance, including the community and separate property and liabilities apportioned to that spouse in the dissolution proceeding, and that spouse's ability to meet his or her needs independently;
- (2) the education and employment skills of the spouse and the time necessary to acquire sufficient education or training to enable the spouse seeking maintenance to find appropriate employment, the availability of that education or training, and the feasibility of that education or training;
- (3) the duration of the marriage;
- (4) the age, employment history, earning ability, and physical and emotional condition of the spouse seeking maintenance;
- (5) the ability of the spouse from whom maintenance is sought to meet that spouse's personal needs and to provide periodic child support payments, if applicable, while meeting the personal needs of the spouse seeking maintenance;
- (6) acts by either spouse resulting in excessive or abnormal expenditures or destruction, concealment, or fraudulent disposition of community property, joint tenancy, or other property held in common;

- (7) the comparative financial resources of the spouses, including medical, retirement, insurance, or other benefits, and the separate property of each spouse;
- (8) the contribution by one spouse to the education, training, or increased earning power of the other spouse;
- (9) the property brought to the marriage by either spouse;
- (10) the contribution of a spouse as homemaker;
- (11) any marital misconduct of the spouse seeking maintenance; and
- (12) the efforts of the spouse seeking maintenance to pursue available employment counseling as provided by [Chapter 304, Labor Code](#).

It is presumed that maintenance is not warranted unless the spouse seeking maintenance has exercised diligence in:

- (1) seeking suitable employment; or
- (2) developing the necessary skills to become self-supporting during any period of separation and during the pendency of the divorce suit.

This presumption does not apply to a spouse who has an incapacitating physical or mental disability. The most a court can order is that a spouse pay either \$2,500 or 20% of the spouse's average monthly gross income, whichever is less. Veterans Administration service-connected disability compensation, social security benefits and disability benefits, and workers' compensation benefits are excluded from maintenance.

MEDIATION

It is the policy of the State of Texas to promote the amicable settlement of divorces through alternative dispute resolution, also called "mediation". That means that any party may ask that their Temporary Orders or divorce be mediated. In such case, the parties may agree on a mediator or the court can appoint one if the parties cannot agree. A mediator is a person who is trained to help people come to a mutually acceptable agreement to settle their dispute. A mediator has no authority to force either party to settle their case but if the parties do come to an agreement, it will be written down and signed. In that case the agreement is just as enforceable as an order of the court. Both Temporary Orders and the final divorce decree can be mediated. Ordinarily both parties share the cost of the mediator equally.

ODD & ENDS

Try to remember that divorce is hard on the children. Do not use the children as a weapon against your spouse. Do not use the children to carry messages to your spouse. Do not use your children to hurt your spouse. Remember that you are divorcing your spouse but your children are not. Your spouse will always be their mother or father and your children need them. You and your spouse are going to have to continue to communicate until the children turn 18 so you might as well start trying to get along for the children's benefit as soon as possible. Do not take out your anger and bitterness on the children . I highly recommend an excellent book on divorce called "The Divorce Lawyers :The People and Stories Behind Ten Dramatic Cases" by Emily Couric. You can order this through <http://www.amazon.com>

If you have a will leaving a portion of your estate to your spouse, you should change it the moment you decide to divorce.

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