

GENERAL INFORMATION CONCERNING DIVORCE

THE LAW OFFICES OF PAUL T. FANNING, P.C.

**P.O. Box 1460
Tyler, Texas 75710-1460**

**422 S. Spring Avenue
Tyler, Texas 75702-8138**

(903) 597-7878

Prepared Especially For

Mr. Jerome Gerber

May 25, 2005

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OUTLINE

Introduction 1

How To Pick A Lawyer For Your Divorce Case 1

 The New Lawyer 2

 The General Practitioner..... 3

 The Semi-Specialist..... 3

 The True Specialist..... 3

Experience..... 3

Efficiency..... 4

Commitment To Your Best Interest. 4

Confidentiality..... 5

Objectivity..... 6

Introduction To The Law Offices Of Paul T. Fanning, P.C.10

Our Views On Divorce And Counseling.....14

Emotional Problems While Case Is Pending.....15

Relationship Of Attorney And Client.....17

Regulation Of The Attorney-Client Relationship.....19

Grounds For Divorce	20
Timetables Of Divorce	21
Phases Of A Traditional Divorce Case.....	22
Preparation.....	22
Information Gathering.....	22
Who Should File.....	23
Notice To Your Spouse.....	24
Temporary Orders.....	24
Discovery	25
Preparation Of Position	25
Negotiations And Hearings.....	25
Mediation	26
Arbitration.....	26
Preparation Of Settlement Agreement.....	27
Trial	27
Division Of Property	27
Division Of Indebtedness.....	35
Alimony	36
Children.....	38
Three Basic Decisions - Custody, Support, And Access:.....	39
Conservatorship:	39
Support:	47
Enforcement Of Child Support -- Contempt	48
Enforcement Of Child Support -Involuntary Income Assignment.....	48
Access (Visitation) Rights:	48

Enforcement Of Access -- Contempt	49
Enforcement Of Access -- Damages	49
Criminal Penalties For Nonpayment Of Child Support And For Not Turning The Child(ren) Over For Access (Visitation) Or Return.....	50
Change Of Name	50
Collaborative Law	50
Attorneys' Fees	53
Divorce Basic Information Questionnaire; Fee For Initial Consultation.....	57

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*The courtroom is not a place where truth
and innocence inevitably triumph; it is
only an arena where contending lawyers
fight, not for justice, but to win.*

Clarence Darrow

Introduction

In this booklet we will try to set out only basic legal and procedural considerations in obtaining a divorce in Texas. Remember, this is only a *basic* outline. None of its contents contains anything specific to your individual case, although long experience indicates you will find most of it applicable. This booklet is not intended to take the place of consultation with the attorneys in this Firm. You should ask your attorney any questions which this memorandum does not answer for you. At the same time, we suggest you refer to this booklet frequently throughout your case, particularly when questions arise. Doing so will possibly save you money in legal fees and will generally keep you better advised on the progress of your case. As you read this, feel free to mark your questions on the margins or on the reverse sides.

How To Pick A Lawyer For Your Divorce Case

Laws concerning the family change rapidly, and the law is quite different from state to state within the United States. It has been said that the law follows changes in society by about ten years. If this is so, the upheaval seen in Family Law is simply a result of the upheaval in attitudes about family relationships prevalent in our nation.

It's simply not possible for the large majority of people facing separation and divorce to go through it without competent legal counsel. But how does a person choose a lawyer? It isn't easy.

First of all, both common good sense and the ethics of the legal profession prohibit any attorney from representing opposing parties to the same litigation.¹ Sometimes there is only one lawyer hired in a divorce case, but that lawyer has only *one client* and can only be expected to protect the legal interests of that *one client*. Lots of what a lawyer does – and what most clients can’t do – is issue-spotting. Most of the remainder of what a lawyer does is issue-resolving. If there is only one lawyer, that lawyer is only going to mention the issues that are advantageous to his own client, and will only propose solutions that are advantageous to his own client. If that doesn’t sound fair, it’s because it’s *not*. In the long run of life, that has some interesting and unexpected results. It has been well-said, “In life, you don’t get what you want; in life, you get what you *are*.”

Having passed a state bar exam, lawyers are free to pick any area of law in which they want to practice, without further training in that area and without any experience in it. Despite this, some states recognize legal specialization; and some states do not.

Legal specialization, like medical specialization, is recognized in the State of Texas. The Texas Board of Legal Specialization certifies legal specialists in many fields of law. Certification, and re-certification, is based upon the following factors: 1) years of experience generally, 2) amount of experience in the particular field, 3) comments from peers and judges which the Board solicits anonymously, 4) certified hours of continuing legal education generally and in the particular field, 5) the record of the attorney with the State Bar of Texas Grievance Committee (ethics complaints and enforcement), and 6) written examination.

Family Law is one of the areas in which this Board certifies attorneys who have proven special competence.

Not long ago virtually all lawyers were general practitioners except in large cities. Recently more and more lawyers have restricted the number of areas in which they practice. The result is that fewer and fewer lawyers will handle a messy or complicated divorce. Those who will generally fall into four (4) categories.

The New Lawyer

The **new lawyer** who has to take everything to make ends meet. Watch out for this fellow. He means well but has little experience and may be wrong in his tactics, strategies, and predictions. This could cost you dearly. If he works for an experienced Family Law attorney, he has someone to fall back on *if* that someone makes himself available. However, if you go to a well-known attorney who refers you to his associate, be careful. The associate is probably pretty much on his own. His boss is too busy to keep an eye on him and doesn’t want to take the time to do so anyway. In the legal profession, the boss is sometimes referred to as a “lightning rod.” He attracts new clients by reason of his

¹ **Texas Disciplinary Rules Of Professional Conduct, Rule 1.06(a)** “A lawyer shall not represent opposing parties to the same litigation.”

reputation, and then funnels them to associates who are relatively inexperienced. The lightning rod's time is taken up attracting new business, and he does not keep up with your case as a regular matter of his routine. That is why lightning rods seldom give answers to you about your case without having to "call you back later" (after they have time to check with their associates to get brought up to date). You thus pay for two lawyers, one expensive and one less expensive, and generally get the benefit of only the less expensive.

The General Practitioner

The **general practitioner**. There are many left. Some are surprisingly good at handling divorce cases. Most are not.

The Semi-Specialist

The **semi-specialist** is the lawyer who does only a few things, and divorce is one of them. This lawyer will likely be up-to-date and highly competent. He may not know quite as much as the true specialist, but the difference will be minimal in all but a few cases. He may also be less expensive than the true specialist.

The True Specialist

The **true specialist**. This group is growing all the time. True specialists tend to be found in most urban and suburban areas. In Texas they are generally "Board Certified - Family Law, Texas Board of Legal Specialization." They also tend to be the most expensive.

What, then, are the qualities one should look for in an attorney to handle a divorce?

Experience.

There simply is no substitute for experience. Litigation, negotiation, and counseling are all skills learned by experience, not out of a book. Five years' experience in Family Law is a minimum. Oliver Wendell Holmes is quoted as once writing, "The life of the law is not logic, but rather *experience*." (Emphasis added.) Perhaps that is why the Texas Board of Legal Specialization will not even accept an application for certification in Family Law from an attorney with less than *five (5)* years experience.

Experience also breeds the right sort of reputation (*i.e.*, how the lawyer is seen by other lawyers). It's very important that opposing counsel respects your lawyer's *competence*, both in and out of the courtroom. It is not important that opposing counsel personally likes or dislikes your lawyer's personality. If opposing counsel does not respect your lawyer's *competence*, your side of the case will not be negotiating with a full hand. Be wary of lawyers with big reputations among the public at large. That sort of reputation will generally cost you an arm and a leg and will probably not help you unless yours is among the very largest of cases. You will note the emphasis on respect for *competence* as opposed to popularity. It is not necessary that other lawyers think your lawyer is a nice guy or gal. In fact, that might do your case harm. A very eminent plaintiff's personal injury lawyer in Dallas has been quoted as saying, "When I die, I don't want the insurance defense bar to come to my funeral and say, 'Poor old _____. He sure was a nice guy.' Instead, I

want them to say, 'Thank God he's finally *dead*. Now maybe **I** can win a case once in a while.'"

Actually, the so-called "barbarian" credited with ending the 1000 year supremacy of the Roman Empire perhaps said it best:

*"Know that your most worthy efforts will be scorned by your peers, for it is they who suffer most when you excel. If your actions and ambitions do not threaten them, you are simply striving toward the insignificant."*²

Winning and losing are not easily defined in the context of divorce litigation, even in custody fights. In fact those two extremes might be impossible. Generally speaking, however, if your attorney can obtain a result reasonably close to what you say you want, he will consider it a "win." So will you.

Efficiency.

Second, there is efficiency. The biggest source of malpractice in the field of Family Law is the inability of a lawyer to get his work done on time. Many lawyers have piles of work on their desks and may be even months behind. *Their* problem quickly becomes *your* problem. A good lawyer must have gained the ability to get a day's work done in a day.

A corollary to this is communication. The client should receive a copy of *every* letter or document on the case that passes through the lawyer's hands. It should be transmitted to the client generally within one (1) working day. The sooner, the better. It is now possible to send most documents to our clients via the Internet if the client has a secure personal computer with a modem, checks for e-mail at least daily, and is a subscriber to one of many Internet Service Providers. Under such circumstances, the client and the attorney can communicate in writing in virtually real time. The client should also be informed, probably in writing, of every telephone call or conversation in the hallway of the courthouse that relates to the case. Obviously, only an efficient lawyer can do this.

Commitment To Your Best Interest.

Third, the lawyer should be committed to finding the quickest, least-expensive, and most-fair resolution of your case, by negotiation if possible. So should you. Get rid of the idea that going to court will vindicate your sense of justice. It almost never does. The sooner a settlement can be reached, the sooner your own level of emotional trauma and uncertainty will be brought under control.

In the Spring of 1996 I represented one of the wealthiest men in Dallas in a divorce case. His wife was represented by a high profile attorney who is one of the pretty-boy

² *Leadership Secrets of Attila the Hun*, by Wes Roberts.

darlings of the Dallas County Courthouse – socially prominent, very popular among the Judges and Associate Judges, and a “big hand man” and regular attendee at their fundraisers. My client sued his newly wedded wife for divorce because the wife had promised to sign a Premarital Agreement, then a Postmarital Agreement, but was dragging her feet with an obvious intent to commingle. Much more heat than light was generated by the wife’s legal counsel in response to the divorce suit filed by the husband. For several weeks the wife’s attorney uttered empty but bellicose threats with a particularly flamboyant flair. After just about one month of my client standing firm, however, the wife announced that she would, after all, sign a Postmarital Agreement which secured my client’s separate property assets and income. My client was in my office and listening to the speaker phone as my worthy opponent yelled at me, “G^*+it, Fanning, you f@#^*& this case up unbelievably. We could have milked this case for a quarter of a million dollars apiece over two years if you hadn’t allowed this settlement.” That’s an exact quote.

I found it ironic, to say the least, that more people at the Dallas County Courthouse would describe that lawyer as a “nice guy” than they would me. Every person upon becoming an “Attorney And Counselor At Law” in the State of Texas swears a statutorily prescribed oath. It reads, “I do solemnly swear that I will support the Constitution of the United States and of the State of Texas; that *I will honestly demean myself in the practice of law; and will discharge my duty to my client to the best of my ability.*”

From this you can deduce the obvious: Some people take their oaths more seriously than do others. I think being honest and ethical as an attorney makes me a “nice guy,” rather than my popularity with other local lawyers. Attila the Hun was right.

Confidentiality.

Fourth, the lawyer should be very careful about maintaining confidentiality regarding his clients. There is a simple way for you to find out about this. Simply pay close attention to his office and the things, if any, he says about his other clients. You should not be able to see the contents of papers pertaining to his other clients. There may be other papers on his desk, but you should not be able to see what they say. They should be covered or turned over. He should not mention the identities of his other clients and what they say to him. “War stories” are permissible, but not when accompanied by the *identities* of his clients. If he will talk about confidential information pertaining to other clients, he will surely talk about confidential information pertaining to you.

Lawyers are obligated by law to keep client’s confidences. This applies to people who just inquire about hiring the lawyer too. This is a professional obligation, enforced by the law and the Rules Of Professional Conduct. By the same token, however, the law specifies certain limitations upon this “attorney-client privilege.” A lawyer must *not* keep information confidential if withholding that information would lead to the perpetration or concealment of a crime or fraud or if the information is necessary to defend the lawyer against an accusation of professional wrongdoing or is relevant to the collection of a professional fee. A lawyer must disclose to a Tribunal, if the client will not, that a client

has not told the truth under oath; and a lawyer is required to report to the Texas Department Of Protective And Regulatory Services any information by which the lawyer is informed of the existence of child abuse.

Also, frequently people are nervous about talking with an attorney. Sometimes they think they will feel more comfortable if they are accompanied by a trusted friend or relative to the law office. If you do this, nothing you tell your attorney in the presence of your friend or relative will be protected by the laws of confidentiality.³ In effect, you will be waiving the protection of those laws.

Objectivity.

Lastly, the lawyer you choose should be able to maintain his objectivity. Don't misinterpret this as a lack of compassion for you or as a lack of loyalty to your case. In the same way that a surgeon would be of no use to the patient if he burst into tears upon entering the operating room because his patient is so sick, so a lawyer is of no use to his client if he assumes the same sense of moral crusade that many clients have. A good lawyer must be able to cut through the whole dramatic circumstance to the smaller percentage that has any legal relevance. The lawyer is not your pastoral or psychological counselor. Some lawyers have excellent "bedside manner." Bedside manner does not win lawsuits any more than it cures sick people, and may be of doubtful assistance to the client in finding practical solutions to legal problems. Most clients have friends and relatives who will sympathize with them. In addition, friends and relatives usually do not charge for their time. Lawyers generally do charge for their time. Furthermore, most clients need one good attorney to help resolve legal problems more than they need one additional sympathetic shoulder on which to cry. Constructive resolution of legal disputes in the context of Family Law requires every client to look – squarely in the eye – at his *own* weaknesses, as well as his spouse's. Sympathizers generally only agree with you and point out the other person's faults. That is not what the Family Law client needs. "As iron sharpens iron, so one man sharpens another." *Proverbs 27:17*. Look for a lawyer who has your legal interests at heart and who has a good bedside manner, but who maintains his objectivity and will tell you the truth about you - *both the good and the bad*.

So how do you find such a person? People seek lawyers in many ways. Because Texas is among the states that certify specialists in different areas of the law, perhaps you should start in the Yellow Pages under "Certified Specialists – Family Law." There you will find the true specialists who choose to advertise their specialty. Even if you don't need one of them, you can still call them with your questions about the *competence* of an attorney you may be interested in checking out. Nobody can better judge a lawyer than other lawyers who have tried cases against him and negotiated with him, or referred clients to him in the past and received good reports. If you call three lawyers who advertise in the

³ ***Ledisco Financial Serv., Inc. v. Viracola***, 533 S.W.2d 951, 959 (Tex. App.—Texarkana 1976, no writ) (no attorney-client privilege attaches to a communication to a lawyer in the presence of a third person who is not an agent or representative of the lawyer). An exception to this rule would occur if the friend or relative was covered by some other, additional privilege, *i.e.*, a subsequent spouse.

Yellow Pages that they handle Family Law and ask each one who “the most *competent*” divorce lawyers are in the locality, you will probably notice you’re hearing the same names repeatedly. Stick with “the most *competent*,” do not pay attention to any comment on personalities. Then ask if there is any personal or past professional or business relationship between him and any of the persons he recommends. That could indicate cronyism. If the lawyer tells you that he himself is the best, he might be right!

Another way is through professional counselors. Many psychologists, psychiatrists, and other licensed professional counselors deal with attorneys in divorce cases because the attorney has the same person as a client as the counselor has as a patient. Some of these counselors develop a great deal of experience over several years with divorce attorneys, both good and bad.

Other ways of selecting a lawyer include State Bar or local bar association referral systems and referrals by professional organizations. The American Bar Association and the State Bar of Texas have Family Law sections. Ask if the lawyer is a member of the Family Law Section.

Word-of-mouth referrals are generally not reliable. Word-of-mouth referrals may tell you a lot about an attorney’s manner, pleasant or unpleasant personality, and apparent competence (as it appears to a lay person), but they probably will tell you very little about *true competence*. After all, the only way you know your doctor is a good *physician* (as opposed to “a really nice guy”) is most likely because he hasn’t killed you yet. The same is true of lawyers. If the lawyer has a pleasant personality and projects an image of really caring, statistical studies indicate his clients will be pleased with him even though they lost their cases. Above all, *don’t* compare your case to somebody else’s. Most former divorce clients are left with inaccurate impressions and with many things they misunderstand. Their case is *not* your case and they are *not* you.

Inquire what the lawyer’s views are toward mediation. Has he used it? How often? What does he think of it? When should it be done?

Points you should look for in his answer are: Mediation bears serious consideration and should be attempted in *any* divorce case where there is a hot dispute over *any* issue. Most importantly, *it works*. Mediation only works fairly, however, when both parties are in possession of the relevant facts. For example, in a stereotypical case where the husband has managed all the financial assets and the wife has been the homemaker and mom, the beginning of the case when there has been no discovery of financial information is *not* the time for that particular wife to mediate. In an adversarial sense, it may be the perfect time for the husband to mediate.

If the attorney you interview does not respond with these points in some form or fashion *without* you suggesting them or dropping any hints, you had better look further for legal counsel.

Whomever you select, it is absolutely *essential* that you trust the individual and feel comfortable with him. It's one thing to insist on explanations, it's another to be constantly suspicious. The lawyer who knows his client trusts him will usually work harder and more efficiently than the lawyer who feels his client doubts him.

Judges and opposing counsel usually view this the same way. It is frequently disastrous to change lawyers in the middle of litigation. The successor counsel has to familiarize himself with all the facts – re-plowing the same ground, effectively doubling your hourly rate up to that point. Then successor counsel has to “catch up” tactically and strategically with both the case (Yes, it has a life of its own.) and his opposing counsel, as well as any active orders on file which the Court has signed. This is the reason that lawyers do not encourage clients to change lawyers. It has usually nothing to do with cronyism. By the same token, if you hear a lawyer say negative things about your lawyer, be suspicious of the possibility that he is just trying to steal your practice rather than truly help you. No *competent* lawyer would express an opinion about another lawyer's work on a case without a personal examination of the documentation of that case. The old adage given by Abraham Lincoln (himself a lawyer) is usually correct in the context of this subject: “If you don't trust a man, don't hire him. If you hire a man, trust him.”

A word about fees. Virtually all attorneys handle contested divorce cases on an hourly fee basis and require a retainer paid in advance. Rates do vary, and you should not be afraid to shop around. But you should remember that most often a lower hourly fee means a less-experienced, less-*competent* lawyer; and a flat fee from a clinic usually means a secretary will know your case better than the lawyer does. Your objective should be to pick the lawyer you think you need for your particular circumstances. Unfortunately, that may be easier said than done. A person who wins his litigation usually never knows if he has done too much. A person who loses his litigation usually believes he has done too little.

There are two sayings in our culture that come to mind at this point. Even though they stand for almost directly opposite propositions, ironically both are popular. One is, “You don't get something for nothing.” The other is, “You get what you pay for.” In fact, neither is true. You can get a dread disease for nothing; and, if people always got what they paid for, there would be no need for a Texas Deceptive Trade Practices - Consumer Protection Act (and there is). What I believe is correct is, “You don't get something *you want* without cost to you, unless it comes from God.”

The vast majority of lawyers are honest, reasonable individuals. However, there are also those who rarely try to really settle a case because they command the highest fees by projecting the image of a fighter. Too many people suffering the trauma of a divorce fall prey to the fighter image. The client potentially needs an attorney who can fight very effectively, has proven that he can, and therefore has the reputation for that ability. However, the route of actually fighting is very expensive and in most cases unnecessary. The vast majority of cases – approximately 98% – are ultimately settled by mutual agreement. Sometimes after spending many thousands of dollars, clients finally learn that

divorce is not a battle to be won but a complex circumstance to be settled, fairly. As a general rule, the sooner both parties to a divorce case – and their lawyers – learn this and can accept it emotionally, the sooner they will both benefit. Later in these materials there will be more about the topic of reasonable and necessary attorneys' fees.

Whoever you select should be able to provide you regularly (at least as often as monthly) with a detailed billing statement itemizing every action taken and the time and cost associated with it. The itemization should be in English (not computerese) and be explanatory. If all the itemization says is, "T/C .25 hrs.," that, in my view, is not an *explanatory* itemized statement. I might be able to figure out that "T/C" means "telephone conference"; but I won't know with whom it occurred or what was discussed. Find out if the attorney you are interviewing, and his Firm, give full and complete, *explanatory* itemized statements *in English* (not just symbols). It is wise to insist upon this and to review each statement carefully when it arrives. If you have questions about what a statement entry says, you should not be charged for inquiring about it. You may not understand *why* something was done because you're not a lawyer and don't need to become one; but you should be able to read the statement learn *what* was done without additional charge. If you want to know *why* and you inquire, it may be proper to charge you for advice and counsel.

The itemized statement should be so clear that it would be valuable to the opposing party if it should fall into his or her hands. Therefore, after careful review and if you are satisfied it is fair, the itemized statement should be destroyed or placed *absolutely* beyond even the imaginable grasp of your opponent.

Do not expect a cheap divorce, and be prepared to pay what it costs. It's ironic that people who do not hesitate to pay a realtor 6% of the gross value of only their house for what usually amounts to a few hours of work will balk at paying a lawyer a comparable fee for performing tasks entailing much greater responsibility, tasks which are many times more complex and time consuming, and tasks which are performed under much more adverse conditions. Many people have to borrow the amount of the retainer. Good legal advice can be worth many times its cost in property settlement or support figures. What price can be put on non-economic factors concerning custody of children, retirement benefits earned over an entire career, or the possession or control of a family business or home? It's far, far wiser, indeed, to pay what good counsel is worth than it is to seek a bargain and later – when it's too late – question whether you made a big mistake.

Remember, however, that whatever the married partners resolve on their own, with or without mediation through a neutral party, will mean less time your lawyer has to spend on your case. This may or may not be a good thing, depending on variables that one side may not unilaterally be able to control. However, the deliberate escalation of hostilities will always bring with it more cost to all parties.

Remember also, however, sometimes the alternatives to litigation are unacceptable, no matter how much money can be saved. Be very sure you retain control over this decision on *your side* of the case.

Introduction To The Law Offices Of Paul T. Fanning, P.C.

The Law Offices Of Paul T. Fanning, P.C., is a professional, legal service corporation. The lawyers and staff operate as a team, each primarily doing those tasks which he or she can most efficiently and effectively perform. For example, our Legal Assistants and Legal Secretaries will handle much of the information gathering and status reports. A Legal Assistant will assist the attorney throughout the handling of your case, just as a nurse assists your doctor in handling important aspects of your medical care. Our Firm uses Legal Assistants for many tasks the way most other firms use associates (young lawyers). It has been our experience that Legal Assistants stay with the Firm longer, are more detail-oriented, are more efficient, are more effective, and are more reliable for most tasks related to Family Law than are young lawyers. There is a famous lawyer from Dallas who pioneered the effective use of Legal Assistants in Family Law. He frequently tried cases against other famous lawyers who used young lawyer associates instead of Legal Assistants. He used to sometimes tell his opposing counsel before trial, "My dog can hunt better than your dog." Time and experience proved him right. He was Mr. Fanning's principal teacher and mentor in the area of Family Law. Legal Assistants are employed at The Law Offices Of Paul T. Fanning, P.C. because they are *efficient* and because they are *effective*. Legal Assistants always provide their professional services under the supervision of a licensed attorney, but their proper utilization almost always results in savings for the client. You will likely be dealing with more than one staff member during the course of our professional relationship, including perhaps more than one attorney.

Not only do the lawyers and staff operate as a team, whenever possible we attempt to incorporate our clients as part of the team too. A perfect example is what you are doing right now. As you read this, you are doing something very worthwhile and valuable. You are becoming educated. This will serve you well in dealing with what you are going through right now and will go through later. It is also valuable because it will assist us in carrying out our responsibility to assist you. In addition, you will shortly be filling out a questionnaire. That might seem mundane, but would you really prefer to pay a lawyer, or even a trained staff person, up to several hundred dollars to gather information about personal identification data, personal values and choices, and financial information while that lawyer or staff person sits across a desk or conference table from you, essentially doing the same mundane work of filling out a form? If it's got to be done and you can do it, why shouldn't you be allowed – and even expected – to be of assistance to your own case?

Mr. Fanning was born in Chicago, Illinois, on July 12, 1945. He was educated at Loras College, Dubuque, Iowa; Purdue University, West Lafayette, Indiana; and The University Of Texas At Austin, Austin, Texas. He earned a Bachelor of Arts Degree in 1968 from The University Of Texas At Austin, where he maintained double majors in Government (Political Science) and Economics. He earned the *Juris Doctor* Degree in 1972 from The University Of Texas School Of Law.

Mr. Fanning is double Board Certified, which is very rare. He is Board Certified in the specialized field of Family Law by the Texas Board of Legal Specialization. Mr. Fanning is also Board Certified in the specialized field of Civil Trial Law by the Texas Board of Legal Specialization. Approximately 1.33 percent (1.33%) of all Texas attorneys are double Board Certified. Of the 76,504 attorneys in Texas, 6,794 are Board Certified and only 1,018 are double Board Certified.⁴ That’s about 1 in 76.

Mr. Fanning is rated “*av*” by Martindale-Hubbell. Martindale-Hubbell has been authoritatively rating attorneys in the United States and around the world for more than 125 years. Its ratings are based primarily upon comments and recommendations solicited from the attorneys and judges who know the person being rated. Almost every attorney in the United States is listed. The ratings are for Legal Ability - “a,” “b,” and “c” – and General Ethical Standards – “v” and “x.” The meanings are:

LEGAL ABILITY RATING	GENERAL ETHICAL STANDARDS RATING
a - From Very High to Preeminent	v - Very High
b - From High to Very High	x - Does Not Meet Ethical Criteria
c - From Fair to High	

The “*av*” rating is the highest rating possible, and is earned by only about 13% of all attorneys.

Mr. Fanning is also a trained, experienced, and certified Attorney-Mediator, who is qualified under the Texas Alternate Dispute Resolution statute to mediate both general civil disputes and Family Law disputes. Mr. Fanning received the following formal mediation training: Basic Certified, Attorney-Mediators Institute, Houston, Texas; Family Law Certified, Attorney-Mediators Institute, Houston, Texas; Basic Courses, Dallas Bar Association Settlement Week; Texas Department Of Regulatory Services (TDPRS), Children’s Protective Services (CPS) and Children’s Justice Act (CJA) Certified, Dispute Resolution Center, Harris County, Texas, Houston, Texas. Mr. Fanning is also a Certified Advanced Practitioner in Neuro-Linguistic Programming (NLP).

Mr. Fanning has been a visiting guest lecturer at the Southern Methodist University School Of Law in 1994 and from 1976-1979 was an Instructor at the Southern Methodist University School of Continuing Education, where he taught courses on the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure regulate how litigation is conducted, and in some cases “fought,” in all state court civil cases, including divorce cases. During academic year 1999- 2000 Mr. Fanning served as a High School Teacher at

⁴ As of May 10, 2004, according to the State Bar Of Texas and the Texas Board Of Legal Specialization.

his high school *alma mater*, Marian Catholic High School, Chicago Heights, Illinois (one of the top 100 high schools in America, ***U.S. News & World Report***, as is the other high school Mr. Fanning attended, Quigley Preparatory Seminary) where he taught Juniors and Seniors Advanced Placement Economics.

Mr. Fanning was invited to, appointed to, and served for eight (8) years on the **Professional Efficiency and Economics Research (PEER)** Committee of the State Bar of Texas, from 1974 through 1982. During that time he served as a member of a pool of speakers, sponsored by the State Bar of Texas, which was available to and did give lectures to local bar associations throughout Texas. Mr. Fanning was a frequent speaker in Texas and throughout the United States on the subject of law office efficiency and economics. Mr. Fanning's invited lectures to lawyers have been as far East as Long Island, N.Y.; as far West as San Francisco, California; as far North as Minneapolis, Minnesota; and as far South as Cancun, Quintana Roo, Mexico.

Mr. Fanning has authored and presented many professional papers. Among them are: *"The New Word Processors: Floppies, Bubbles & Beads – Free At Last!(!?)"*, presented at the State Bar of Texas Tenth Annual Legal Secretaries Seminar, 1978; *"Salvation For The Solo Practitioner,"* an annual seminar for attorneys and their staffs sponsored by the State Bar of Texas from 1976 through 1981; *"Divorce: Division of Assets, Alimony, & Child Support,"* National Business Institute Domestic Law In Texas Seminar (for attorneys), 1991. *"Determining Marital Assets,"* National Business Institute Domestic Law In Texas Seminar (for attorneys), 1991. *"Retirement Plans: Valuation And Distribution Upon Divorce,"* National Business Institute Domestic Law In Texas Seminar (for attorneys), 1991. *"Avoiding Grievances And Malpractice In Family Law Litigation,"* Smith County (Tyler), Texas, Bar Association, Tyler, Texas, January 13, 1992. *"Preparing For The Grievance Committee Before The Client Even Walks In The Door,"* Plano (Texas) Bar Association, December 2, 1994. *"Negotiation And Mediation In Disciplinary Proceedings After Determination Of Discipline By Grievance Committee,"* Seminar for Investigators and Prosecutors of the Grievance Committee for the Sixth Bar District of the State Bar of Texas, June 4, 1997. *"Newly Enacted Legislation Affecting Texas Family Law Practice And Avoidance Of Selected Ethical Problems,"* Smith County (Tyler), Texas Bar Association, June 13, 1997. *"Preparing For The Grievance Committee In Family Law Cases Before The Client Even Walks In The Door,"* Tyler Area Association Of Legal Professionals, Tyler, Texas, September 6, 2000. *"Preparing For The Grievance Committee In Family Law Cases Before The Client Even Walks In The Door,"* Brazos County Bar Association, Bryan/College Station, Texas, October 27, 2000. *"Collaborative Law,"* East Texas Psychological Association, September 19, 2001.

Mr. Fanning is currently writing a book, presently in manuscript form, which he has tentatively titled ***Love Or Illusion***. This book consists of **"Thoughts Directed Primarily To Divorced Persons Who 'Do Not Want To Make The Same Mistake Again.'" If you are just beginning to go through a divorce right now, you're probably not ready to read it.**

Mr. Fanning is a member of the Texas, Illinois, and Smith County Bar Associations; and the Texas Academy of Family Law Specialists. Mr. Fanning is a former member of the Dallas, Plano, Collin Bar Associations; Texas Association of Matrimonial Lawyers; North Texas Association of Family Law Specialists; Texas Association of Civil Trial Law Specialists; Texas Trial Lawyers Association; American Trial Lawyers Association, and American Bar Association. Mr. Fanning was admitted to practice law by the Supreme Court of Texas in 1972; by the U.S. District Court, Northern District of Texas and U.S. Court of Appeals, Fifth Circuit, in 1973; by the United States Supreme Court in 1976, and by the Illinois Supreme Court in 2000. Mr. Fanning is a Member of the College of the State Bar of Texas. Approximately 8% of all attorneys in Texas are members of the College of the State Bar Of Texas. Mr. Fanning is a member of the Association of Attorney-Mediators and the Texas Association of Mediators. Mr. Fanning has completed the Basic Course of the Collaborative Law Institute of Texas.

Some of the reported cases in which Mr. Fanning has participated on the appellate court level are: **Misium v. Misium**, 902 S.W.2d 195 (Tex. App.—Eastland 1995, writ denied); **Young v. Young**, 854 S.W.2d 698 (Tex. App.—Dallas 1993, writ dismissed) (incorrectly listed as counsel for Appellee); **Ex Parte Craig Hall**, 854 S.W.2d 656 (Tex. 1993) (orig. proceeding) (writ of *habeas corpus* granted); **Naydan v. Naydan**, 800 S.W.2d 637 (Tex. App.—Dallas 1991, no writ); **Heissner v. Koons**, 679 S.W.2d 112 (Tex. App.—Dallas 1984, orig. proceeding) (writ of mandamus conditionally granted); **Ex Parte Jackman**, 663 S.W.2d 520 (Tex. App.—Dallas 1983, orig. proceeding); **Volpe v Schlobohm**, 614 S.W.2d 615 (Tex. Civ. App.—Texarkana 1981, no writ); **Cole v. Cole**, (unreported, but victorious) (Tex. Civ. App.—Eastland 1980, writ refused w.o.j.); **Volpe v. Stephens**, 589 S.W.2d 809 (Tex. Civ. App.—Dallas 1979, orig. proceeding) (writ of mandamus granted); **Cole v. Chapman**, 584 S.W.2d (Tex. Civ. App.—Dallas 1979 orig. proceeding); and **O'Brien v. Cole**, 532 S.W.2d 151 (Tex. Civ. App.—Dallas 1975, no writ).

Mr. Fanning is himself divorced and was the parent sole Managing Conservator of his three (3) children: Kevin Paul Fanning, Timothy Paul Fanning, and Katherine Michelle Fanning. He is now the proud grandfather of Joseph Trinity Fanning, his only grandchild (so far).

Mr. Fanning is a life member of the Texas Exes (Alumni Association of The University Of Texas At Austin), the National Rifle Association, and the Army National Guard Association of Texas. Former member, Willowbend Church, Plano, Texas and Scofield Memorial Church, Dallas, Texas; founded and served as the Coordinator of Scofield Memorial Church's Divorce Recovery Support Group. Other affiliations and memberships, past and present, include the Dallas Museum of Art; the Dallas Opera Society; the Dallas Zoological Society; the Chicago Zoological Society; the Metrocrest Republican Club; the **Harley Owners Group** (H.O.G. – Former Assistant Director [Board of Directors] Dallas Chapter; presently a member of the East Texas and Chicago Chapters. Formerly a member of North Texas, Dallas, and D/FW Texas USA Chapters); The Bros.

Club; Tyler Kiwanis Club; Tyler Lions Club⁵; the National Geographic Society, and American **MENSA**. Mr. Fanning is a Keeton Fellow, The University Of Texas School Of Law Alumni Association; a Master Mason, St. John's Lodge #53, Tyler, Texas (A.F.&A.M.)⁶; a 32° Mason, Scottish Rite of Free Masonry⁷; a Knight Templar of Commandry #25, Knights Templar⁸; Member, East Texas York Rite College; Noble of Sharon Temple, Ancient Arabic Order Nobles of the Mystic Shrine for North America ("Shriners"), Tyler, Texas (member, Directors Staff – Chief Raban First Section Initiation; member, Jeep Patrol; member, Sharon Shadows, member; Potentate's Badge Awards 2002 and 2003; Edward M. Evans Membership Award, 2003⁹); Member, Royal Order Of Jesters (2004 Play Director, Court 168, Book of the Play); member, Kachina Klub; member, Red Ass Chili Cook-Off Team, and member, The Tyler Centurions.

Our Views On Divorce And Counseling

Marriage can be a difficult proposition for any two people. It requires *both* spouses, working together, to make a happy marriage; but only requires *one* spouse to make a marriage unhappy for both. By the same token, it has been well said that success in marriage has less to do with finding the right person than being the right person.

Perhaps ironically, **the members of this Firm have a definite prejudice in favor of holding a marriage together.** We are also prejudiced in favor of our clients making the decisions that are right for their personal well-being, and in seeing to it that if they do seek a divorce, they receive fair or better-than-fair treatment at the hands of the legal system.

At the outset you should know we do ask you to be absolutely certain your marriage has passed the point of saving. This is not our decision; it is *yours*. Please do not ask us whether *we* think *you* should get a divorce. East Texas has a number of counseling resources available – psychologists, clinical social workers, clergy, *etc.* – who are skilled, licensed, and experienced in marriage counseling.

Counseling seldom works magic or provides immediate solutions. A good counselor seldom makes judgments as to who is at fault and seldom dictates to either spouse whether he or she should seek divorce. On the contrary, counseling at its best

⁵ Tail Twister, 2002-2004; Publicity Committee Chairman, 2002-2003; Projects include Salvation Army bell ringer 2001-3; Parking lot volunteer East Texas State Fair 2001 and 2003; and Texas Mission of Mercy 2001 -2.

⁶ Master of Ceremonies, 2002-2003, St. Johns Lodge #53, Tyler, Texas; Projects include fundraising for the Masonic Home And School Of Texas, Fort Worth, Texas; Tyler YMCA Capital Campaign volunteer.

⁷ Projects include fundraising for Texas Scottish Rite Hospital For Children.

⁸ Projects include Salvation Army bell ringer 2001 and 2002; and Texas Mission of Mercy 2001.

⁹ Fundraising for Shriners Childrens Hospitals.

helps the parties to understand better what they are doing to and for each other in their marriage relationship and why, what each person's individual needs are, and whether the other can comfortably meet those needs. Counseling often gives new perspectives on peoples' lives and often causes them to make changes in their lifestyles which make the marriage more mutually satisfying. At times after counseling some people decide they are better off divorced; but counseling usually still helps them to accept divorce in as positive a light as possible and to view themselves and their spouse with more understanding. This in turn should assist the formerly married person to more easily cope with his or her new single status and to develop coping mechanisms for unresolved feelings of bitterness, anxiety and/or lack of self-esteem.

If you would like, we can make recommendations concerning several counselors, including certain background information on each. If you feel there might be some stones left unturned before giving up on your marriage, we strongly encourage you to make contact with one of these counselors. If, after counseling, you are still of the opinion that divorce is the best course of action for you, we are here and ready to professionally serve you.

Emotional Problems While Case Is Pending

Divorce is never easy. It is never pleasant. It is the death of an important relationship. If you are normal, you are undergoing the human grieving process as you are reading this. When humans grieve they experience five (5) distinct emotional "stages" which proceed generally in chronological order but with spillovers back and forth. If you drew the five (5) stages on a horizontal line, left to right, the spillovers would be superimposed over the line like a vertically compressed, spiraled helix. This means that a grieving person will be experiencing more than one emotion at one time, but as he or she moves from left to right down the horizontal line, the grieving person will experience an emphasis of each individual stage. From first to last, the stages are: 1) Denial/Disbelief; 2) Anger; 3) Bargaining (sometimes with God-"I'll do anything to get the relationship back."); 4) Sadness/Depression (when bargaining inevitably fails [because, for example, God does not work like that]); and, finally, 5) Acceptance/Resolution.

The human grieving process impacts significantly on the attorney-client relationship in Family Law cases. As a client passes from one stage of the grieving process to the next during a time of personal pain and tragedy, frequently (actually "almost invariably") what the client wants to attempt to accomplish through the legal process will change. This is confusing both to the client and to the attorney. The **Texas Rules of Professional Conduct** applicable to attorneys in the practice of their profession are written with the incorrect presumption in Family Law cases that the client's aims are constant and that the attorney knows what they are. Experience shows this is not true of divorce clients or divorce cases. For example, compare stage 2 (anger) with stage 4 (sadness/depression) or stage 5 (acceptance/resolution). Attorneys must zealously seek to accomplish the lawful and ethical goals of their clients; but taking steps to ventilate a client's anger (stage 2) is inimical to taking steps to accomplish resolution through negotiation (stage 5). Yet it is a client's absolute right to "go for blood" now – only perhaps

to regret it later. It is an attorney's ethical responsibility to advise and counsel you concerning what the law allows and what his experience indicates will be the possible and/or probable consequences of the choices *you* make. It is *not* an attorney's responsibility to make *your* choices for you. You are an adult. It is your responsibility to choose among the choices which are available to you, and then to live with the consequences – win, lose, or something in between.

If you do find you are experiencing difficult emotional problems while the divorce is pending (which would be normal), we strongly encourage you to employ a professional counselor for your *personal* benefit. While we have had a lot of experience in these matters and may express our personal opinions, we are licensed specialists in law and trying cases; we are not licensed in psychology or related counseling. A professional counselor may help you with emotional problems much more effectively and much less expensively than we. If you do decide to employ a counselor to offer assistance to you while a suit for divorce is pending, please let us know **beforehand**. There are important legal considerations relating to privileged communications involved and the possible waiver of those privileges. You should obtain legal advice about these from your own lawyer.

In addition, several books may be helpful to you during this period of time, depending on your needs. We suggest you consider:

Baldwin, Eleanor, ***300 New Ways To Get A Better Job***, Bob Adams, Inc., 260 Center Street, Holbrook, Massachusetts 02343. The title says it. Among the 300 ways are: Accept radical change as the only constant. (New way #1.) Forget traditional job seeking techniques (including newspapers, employment agencies, *etc.* - New way #85). Make personal contacts instead of mailing resumes. (New way #149.)

Burns, Bob & Tom Whiteman, ***The Fresh Start Divorce Recovery Workbook***, Oliver-Nelson Books, Nashville, Tennessee. A step-by-step program of divorce recovery for those who are divorced or separated.

Burns, David D., M.D., ***Feeling Good, The New Mood Therapy***, Signet Books, 1633 Broadway, New York, New York 10019. Cognitive therapy approach to treating major depression. Also useful to gain insights into depression in others, how to recognize it, and how to react (or not react) to it.

Gardner, Richard A., M.D., ***The Boys And Girls Book About Divorce***, Bantam Books, 666 Fifth Avenue, New York, New York 10103. See also ***The Parents Book About Divorce*** and ***The Boys And Girls Book About One-Parent Families*** by the same author. How a young child perceives divorce, and practical suggestions on how to help the child cope.

Halpern, Howard M., Ph.D., ***How To Break Your Addiction To A Person***, Bantam Books, 666 Fifth Avenue, New York, New York 10103. Are you in love -- or addicted? How and when to call it quits.

Smoke, Jim, ***Growing Through Divorce***, Harvest House Publishers, Eugene, Oregon 97402. General practical issues regarding divorce and practical suggestions on how to cope.

Walker, Lenore E., ***The Battered Woman***, Harper & Rowe, Publishers, Inc., 10 East 53rd Street, New York, New York 10022. Describes the cyclical behavior syndrome that glues together a charming but violence-prone man and a loving, guilt-ridden woman. This is a common syndrome and knows no economic, racial, or other class boundaries.

All of these books are available from major bookstores in the area or, of course, from various web sites. If you are or soon will be separated, you will have more time to read. We suggest you use your time *wisely* and *constructively*.

Relationship Of Attorney And Client

You should know we will give our complete loyalty to you in your case for as long as we are your attorneys. Your spouse is not our client; and we will do nothing for or on behalf of your spouse unless you tell us otherwise.

However, don't be misled or confused if you find us dealing with your spouse's lawyer on a friendly basis. Professional and common courtesy (not to mention the tactics of settlement, negotiation, the ***Texas Lawyers Creed***, and manipulation) usually dictate we maintain at least the appearance of good relations with other lawyers in our practice. You will find that good lawyers are perfectly capable of fighting most zealously in a courtroom or at a negotiating table, and then discussing on an amicable basis personal matters between themselves when the controversy between their respective clients is over.

Be assured our loyalty to you comes first and your legal interests are always paramount, regardless of whether we are friendly with opposing counsel.

We will treat whatever you tell us in confidence. This is our professional obligation, enforced by the laws of Texas and the **Texas Rules Of Professional Conduct**. By the same token, be aware before you talk with any attorney that the law specifies limitations upon this "attorney-client privilege." These have been referred to previously.

We encourage you to be *totally* honest with us and the Court, and to give us *full* information on anything which you *or* we consider to be important in your case. If we have to go to trial on any part of your case, we will be in a poor position to help if we don't know *all* the relevant facts well beforehand, including facts which you may find embarrassing to disclose.

Don't allow embarrassment to prevent you from being candid. Often a client will believe something in his or her background to be harmful, whereas, in fact, it is not. We can probably do something about facts which actually *are* harmful if we have sufficient advance knowledge about them. They may not be as harmful as you think. But if you leave

us in the dark, you will usually end up worse off by having an attorney who is unprepared and subject to being taken by surprise by his opponent.¹⁰ This can also waste your investment in attorneys' fees.

For example, on the Questionnaire you will be asked at least one question concerning sexually transmitted disease ("S.T.D."). This is not a popular topic in polite society. However, this question is not asked out of idle or perverse curiosity. It is *legally* significant and has potential *legal* relevance in at least three (3) areas of this Firm's possible services to you in a divorce case:

1. Although Texas is a "no-fault" jurisdiction (see below), it is also a "fault" jurisdiction because it allows the granting of divorce based upon fault grounds as well as no-fault grounds. It has been held by the appellate courts repeatedly that evidence of fault, *i.e.*, adultery, S.T.D.'s, *etc.*, can even be used to prove "no-fault."

2. If an adversary intends to trap his opponent, it helps if he can keep his opponent unwary until after the trap is sprung.¹¹ Frequently a suit for divorce will be filed on innocuous "no-fault" grounds. Then pre-trial discovery will commence; and, after a person's opponent has made declarations and admissions against interest *because he was not properly prepared for the question by his attorney because his attorney did not know there was a possible issue in the case*, the petition is amended and the divorce is later sought on fault grounds rather than "no-fault" grounds.

It makes no difference that you may not wish to make an issue out of this subject. The *other side* may at some point make an issue out of this subject. Then you are going to *have* to engage the issue whether you like it or not. Litigation can be very cruel to those who don't prepare for it.

3. Whole and completely independent lawsuits for significant money damages can be and are filed based upon exactly this type of inquiry. Sometimes these damage lawsuits are combined and made a part of the divorce suit. Sometimes they are filed independently as separate, additional lawsuits.

Likewise, there are questions about other, potentially inflammatory or questionable matters, *i.e.*, employment history, breast augmentation, penile enlargement, and abortions. There are ways of handling just about anything satisfactorily, but only if your attorney knows the subject matter is pertinent in your case.

¹⁰ A young and surprisingly talented opposing counsel recently told me: "You can protect a client from another person, no matter what it is, about 85% of the time. But when your client isn't candid about your client's own mistakes or faults, there is just about nothing you can do. You just get ambushed."

¹¹ "If you want to stab a tiger, it helps if you can get close to its belly."

So ***please*** be completely candid in your answers to the Questionnaire even if you do not understand the reason for the question or if you think the question is unimportant. As stated previously, the information you share on your answers to the Questionnaire is kept confidential.

Sometimes we are asked to represent both spouses together. The **Texas Rules Of Professional Conduct** prohibit this, just as they prohibit an attorney from representing *any* client in any matter whose interest may be in conflict with the interest of another client.¹² Even in the most amicable divorce situations, rarely do both spouses' legal interests exactly coincide throughout the case. In addition, divorces can be complicated affairs; and the consequences of a divorce settlement will be felt far into the future. For these and other reasons, it is always preferable for each spouse to have independent legal counsel of his or her own choice.

Regulation Of The Attorney-Client Relationship

The relationship between a lawyer and client is private and confidential. It is, however, regulated to protect the public.

Notice To Clients

The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of General Counsel will provide any client with information about how to file a complaint. For more information, any client may call, toll-free, 1/800/932-1900.

The Grievance Committee of the State Bar of Texas is the arm of government which investigates complaints about professional misconduct involving attorneys. Its powers are limited to imposing a range of punishments upon attorneys which adversely affects the attorney's ability to support him/herself in the practice law, from private reprimand to disbarment.

The Grievance Committee does *not* involve itself with fee disputes or obtaining refunds for clients of attorney's fees. Usually the client and the attorney can satisfactorily negotiate such matters between themselves. If they can't, however, either may resort to the Courts or arbitration. Mr. Fanning served on the Fee Disputes Committee of the Dallas Bar Association for several years.

¹² **Texas Disciplinary Rules Of Professional Conduct, Rule 106(a).** "A lawyer shall not represent opposing parties to the same litigation."

Although clients have the absolute right to hire and fire their legal counsel subject to the payment of their fees, in litigation matters an attorney may only withdraw from a client's representation with the written permission of the court in which the litigation is pending. Courts do this by signing "orders." Courts usually sign orders only if someone asks the court to do so. A person asks a court to do so by filing a motion with the court, with notice to his opponent. This costs time and money in reasonable and necessary attorneys' fees.

Informal Marriage (Common Law Marriage)

Texas recognizes so-called "common law marriage." The Texas Family Code refers to these as "Informal Marriages."¹³ An informal marriage is just as good in Texas as if the marriage was performed by the pope in St. Peter's Basilica in Rome. Contrary to much popular belief, there is no minimum period of time to live together in order to establish an informal marriage in Texas. The only requirements are that the parties: 1) agreed to be married; 2) after the agreement, they lived together in Texas as husband and wife; and 3) there represented to others that they were married.¹⁴

Grounds For Divorce

Texas is a "no-fault" divorce state. It is not necessary, therefore, to say bad things about each other to get a divorce. The party who wishes the divorce must present evidence in court (usually through testimony) to prove that grounds do in fact exist.¹⁵

Most commonly, "no-fault" grounds are used. If one party to a marriage feels that the marriage has become "insupportable," because of personality conflict or discord, to the point where "the legitimate ends of the marriage relationship" have been destroyed and there is no reasonable expectation of a reconciliation,¹⁶ this is sufficient grounds for a divorce, regardless of the presence or absence of opposition.

¹³ **TEX. FAM. CODE ANN. §2.401.**

¹⁴ **TEX. FAM. CODE ANN. §2.401.**

¹⁵ In over a quarter of a century of divorce practice I have never seen this concept expressed better than by a young Chinese lady from Beijing with whom I corresponded over the Internet. These are her exact words, just as she typed them: "I talked with one of my girlfriends. She is 32 years and just divorced with her husband. I came to see her and said sorry for that and intent to comfort her, but she seemed very calm. You see, she is very beautiful (until now I still think so) and capable, her husband is handsome and wealthy, and all of people say that is a great marriage. She told me a lot and some sentences gave me very strong impression which are as follows: She was tidying up her clothing while we were talking. She chose a beautiful red coat, asked me whether it was beautiful. I say 'yes', then she chose a purple skirt which is also beautiful, and asked whether it looked nice, I say 'very smart' Then she put the coat and skirt together and asked 'do you think they are good matching when they are together?' Then suddenly I knew what she meant. In this world, there are many excellent women and men, but that do not mean one excellent man + one excellent woman =an excellent marriage."

¹⁶ **TEX. FAM. CODE ANN. §6.001.**

Other grounds for divorce exist which relate to fault. These grounds can be used also. Their use requires the making of value decisions by you and tactical decisions best left to the professional judgment of competent legal counsel. Their use frequently creates hard feelings that persist long after the ink is dry on the final judgment of divorce. The fault grounds include cruelty,¹⁷ adultery,¹⁸ abandonment,¹⁹ living apart for a long period,²⁰ confinement of the other spouse in a mental hospital under certain circumstances,²¹ and incarceration on a felony conviction of the other spouse under certain circumstances.²² Fault grounds can also be considered by the Court in making a disproportionate division of property in divorce cases.²³

Timetables Of Divorce

The Family Code requires a person to have been “domiciled” in the State of Texas for at least six continuous months, and to have “resided” in the county of his or her residence for at least 90 continuous days, preceding the filing of his or her Petition for

¹⁷ **TEX. FAM. CODE ANN. §6.002.** “The court may grant a divorce in favor of one spouse if the other spouse is guilty of cruel treatment toward the complaining spouse of a nature that renders further living together insupportable.”

¹⁸ **TEX. FAM. CODE ANN. §6.003.** “The court may grant a divorce in favor of one spouse if the other spouse has committed adultery.”

¹⁹ **TEX. FAM. CODE ANN. §6.005.** “The court may grant a divorce in favor of one spouse if the other spouse:

- (1) left the complaining spouse with the intention of abandonment; and
- (2) remained away for at least one year.”

²⁰ **TEX. FAM. CODE ANN. §6.006.** “The court may grant a divorce in favor of either spouse if the spouses have lived apart without cohabitation for at least three years.”

²¹ **TEX. FAM. CODE ANN. §6.007.** “The court may grant a divorce in favor of one spouse if at the time the suit is filed:

- (1) the other spouse has been confined in a state mental hospital or private mental hospital, as defined in **Section 571.003, Health and Safety Code**, in this state or another state for at least three years; and
- (2) it appears that the hospitalized spouse’s mental disorder is of such a degree and nature that adjustment is unlikely or that, if adjustment occurs, a relapse is probable.

²² **TEX. FAM. CODE ANN. §6.004.** “(a) The court may grant a divorce in favor of one spouse if during the marriage the other spouse:

- (1) has been convicted of a felony;
- (2) has been imprisoned for at least one year in the state penitentiary, a federal penitentiary, or the penitentiary of another state; and
- (3) has not been pardoned.

(b) The court may not grant a divorce under this section against a spouse who was convicted on the testimony of the other spouse.”

²³ ***Murff v. Murff***, 615 S.W.2d 696 (Tex. 1982).

Divorce in order to “maintain” the suit.²⁴ The terms “residence,” “domicile,” and “maintain” have special meanings in law; and even if you have not been physically living in Texas or in your county during the periods required, you may still have satisfied the requirements in the legal sense. If you think there might be a problem with this, take a pen or pencil and mark the outline here *right now* so you will remember to discuss this with your attorney during your first conference. There in fact may be no problem, but any questions about this matter need to be discussed with your attorney at the outset. Also, even if the person filing the suit has not satisfied the residency requirements but the other spouse has, the law provides the suit may be “maintained.”²⁵ These are divorce suits filed by nonresident spouses.

The most significant date in divorce proceedings is the date the divorce petition is filed. The petition is the initial statement to the Court of the basic facts of the marriage and family situation, and a request for a divorce and other court orders. The date of filing is the measuring stick for calculating the “domicile” and “residence” requirements. It also begins the minimum waiting period before either party is entitled to seek a final judgment of divorce, which is 60 days from date of filing.²⁶ Please clearly understand, however, that the 60-day period is a *minimum* waiting period. The average divorce takes longer than 60 days to complete, even in amicable situations, simply because there are usually too many things you and your attorney must investigate and work out before the case can be put in a proper posture to be concluded. In addition, in contested matters where significant problems are encountered with respect to property or children, and also with respect to crowded court dockets, sometimes it takes longer than one year. In contested cases, it is impossible to give accurate estimates of the time that will be required, regardless of what your case involves. Our Firm will not attempt to do so.

Phases Of A Traditional Divorce Case

Preparation

If you have the opportunity, it is usually wise to plan for any anticipated divorce ahead of time. This can be complicated in some technical cases. But in technical cases it usually proves very worthwhile. Divorce preparation depends upon numerous factors and must be specifically tailored to each client’s situation.

Information Gathering

It is generally wise to have the clearest picture possible of what you can prove *before* filing pleadings alleging what you are going to prove. This makes sense but is not always possible in reality. However, unless tactical considerations dictate otherwise, we

²⁴ TEX. FAM. CODE ANN. §6.301.

²⁵ TEX. FAM. CODE ANN. §6.302.

²⁶ TEX. FAM. CODE ANN. §6.702(a). “The court may not grant a divorce before the 60th day after the date the suit was filed. A decree rendered in violation of this subsection is not subject to collateral attack.”

will suggest that you embark on a procedure of information and document gathering *before* filing formal pleadings.

Who Should File

In the eyes of the law, divorces are civil suits, like suits for personal injury or for breach of contract. In other civil suits, the person who files the suit (usually called the “Plaintiff”) has the burden of proof. The Plaintiff must usually prove his/her/its case against the party being sued (usually called the “Defendant”) by a preponderance of the evidence. If there is a tie, the Defendant is supposed to win.

To compensate the Plaintiff for the greater “burden of proof,” the law over centuries has developed civil procedures to help ease the greater “burden.” The person who files the suit has a greater “burden of evidence,” but has procedural advantages over the person who is sued. The procedural advantages are related to creating both the first and the last impressions in the mind of the trier of fact, be that judge or jury. These are important advantages in a contest that is mostly one of persuasion.

The person who first files suit has the following procedural advantages: 1) in jury cases, opening *voir dire* (jury panel examination); 2) in all two-party cases, opening argument; 3) in all two-party cases, the right to put on evidence (proof) first; 4) in all two-party cases, the right to put on evidence in rebuttal last; 5) in all two-party cases, the right to give summary arguments first; and 6) in all two-party cases, the right to give summary argument in rebuttal last. These can usually be used effectively with proper, prior preparation.

Divorce cases have all these same rules *but* with one significant difference: usually in divorce cases both parties have *equal* “burdens of proof”; *yet* the person who files a divorce suit first still has all the procedural advantages applicable in civil suits in the contest of persuasion. You see the obvious advantages to filing first, as a general rule.

In addition, there are two (2) more advantages. Usually there is a *human* presumption that a person does not file suit unless he or she thinks he has been wronged. That may or may not be true, but if true it creates a suspicion, and certainly a curiosity, about whether the person sued has done something wrong. The second advantage is psychological and is related to the human grieving process. Usually the person who files a divorce suit (“Petitioner”) is past emphasizing Denial and is into emphasizing Anger. Frequently the person sued (“Respondent”) is still in Denial, and much less psychologically willing to take reasonable steps initially to protect him/herself. If the Petitioner presses the advantage right away, or if the Respondent waits too long to recognize and deal positively with the reality of the situation and circumstance, it may very well be too late for the Respondent to overcome advantages initially wrested by the Petitioner and/or conceded by the Respondent without incurring extra expense, if at all.

Therefore, as a general rule, if divorce is inevitable, it is advantageous to be the person who files suit. However, this is just the general rule. There are also exceptions which might apply to your case.

Notice To Your Spouse

The person who brings the lawsuit must give notice to the other spouse. This of course is necessary to satisfy “due process of law” requirements of both the Texas and United States Constitutions. This can be done in several ways. Where the parties are on reasonably friendly terms and have negotiated an agreement beforehand, it is usually the best practice for the Petitioner’s attorneys simply to file the suit and mail a file-marked copy of the petition to the other spouse. We would also send a letter requesting your spouse promptly to either get in touch with an attorney or sign a Waiver of Citation and return it to us. A Waiver of Citation is a document which acknowledges notice of the proceeding and dispenses with the necessity of being personally served with the same pleadings by a Deputy Sheriff, Deputy Constable, or private process server. Such Waivers can also contain other things which are potentially dangerous. We do not recommend a Waiver be signed in the absence of legal counsel under any circumstances.

If, in our opinion, the protection of your legal interests requires a different approach, *e.g.*, your spouse has demonstrated an intention not to cooperate in the divorce proceedings, your spouse has threatened to leave the jurisdiction of the Court, or an emergency situation exists requiring immediate action, it is normal to place a copy of the petition in the hands of a Deputy Constable, Deputy Sheriff, or private process server, and ask for personal delivery to the other spouse without prior notice. This is what is ordinarily called “service of citation” or “service of process.”

If your spouse has already left the jurisdiction, or was never present in the jurisdiction in the first place, it is still possible to proceed with the divorce action by having citation served upon your spouse in a foreign jurisdiction or by being published in a newspaper or by being posted at the courthouse. There are, however, certain special problems and exceptional expenses involved in this procedure, and your attorney will discuss this further with you, if appropriate to your case.

Temporary Orders

The Court has the power to make virtually any kind of order which may be required to govern the relations of the parties while the divorce suit is pending.²⁷ These include orders for temporary support, injunctions aimed at maintaining the *status quo* (or at least orderly handling) of property and debts, injunctions concerning personal behavior, and many other controls. The Court can even make certain kinds of orders of limited duration without a hearing and without prior notice to either you or your spouse. However, in all cases *except* where temporary orders are agreed to, a hearing must be held

²⁷ TEX. FAM. CODE ANN. §§6.501 and 6.502.

to obtain court orders to regulate and govern the conduct of both parties during the course of the litigation.

Disobedience of temporary orders (just as disobedience of permanent orders) can subject a person to fine or jail or both for contempt of court.

After consultation with you, we will advise whether you should seek temporary orders; but the final decision must be yours alone, if not insisted upon by your spouse.

Discovery

Gathering accurate information concerning your income and expenses, property and indebtedness, is of vital importance to your case. This is commonly referred to as the “pre-trial discovery phase” of a divorce proceeding. You will be asked to furnish your attorneys with as much information as you have in your possession, and we will supply you with certain forms to aid you in this task. In some cases, you will not have access to all of the information which is needed. If your spouse is unwilling to cooperate in providing information, your attorneys can attempt to compel disclosure of virtually anything that is needed. Usually, both spouses will be required to prepare and furnish a document called an “inventory and appraisal,” which lists property and debts and gives a value or amount for each item. Ordinarily, such information is required to be sworn to (verified under oath).

There is usually some type of legal discovery as well. The rules that govern lawsuits provide for a number of different discovery techniques. The most common are depositions, written interrogatories, requests for production, requests for disclosure, and requests for admission. We will explain these in greater detail should you decide to retain our services.

Preparation Of Position

Once we have all the necessary information, we will usually have a conference with you to work out your initial settlement proposal, covering all issues which must be resolved. We will, of course, be bound by your own desires, but we will also advise you as to what, in our professional judgment, you can realistically expect to obtain.

Negotiations And Hearings²⁸

Ordinarily it is possible to negotiate a voluntary agreement settling all issues, and then go to court at the end of the negotiation process simply to ask for dissolution of the marriage and for approval of the settlement agreement. We attempt to handle our cases in this way whenever possible.

²⁸ A “hearing” means approximately the same thing as a trial. This illustrates a rather significant and distinguishing feature of Family Law practice. Whereas most litigators have months, if not years, to prepare for a trial/hearing that is in many cases outcome determinative, a Family Law litigator could have as little as a few days. Where hearings on Temporary Orders are necessary, this necessity for “scrambling” is usually reflected in reasonable and necessary attorneys’ fees.

However, keep in mind that what you can get in a negotiated settlement depends in large part on what you would probably get from the Court if the issues were presented to the Court to decide. This means two things: First, your attorney will base his advice in large part on what he believes would be the settlement ordered by the Court, based on his experience, his knowledge of the law, and how the facts of your case appear to be developing. Second, you must be prepared to go to Court if your spouse is unwilling to agree to what you and your attorney believe is the proper settlement *and* you are unwilling or unable to settle for less. Being prepared involves both our legal preparation of necessary pleadings and fact gathering, and also your personal, psychological and factual preparation. You must actually *be* prepared to stand up and fight for your rights. Remember, your spouse has known you much longer than we; and your spouse is likely to be sensitive to any communication (verbal or non-verbal) you send out indicating a lack of resolve or an unwillingness to “stick it out.” Your only other choice is to give up, if that is even possible.

Keep in mind, also, that compromise lies at the core of negotiation. All good negotiators usually begin the process by asking for more than that for which they would actually settle; and a good negotiator seldom reveals his “bottom line” or minimum position. Accordingly, unless we specify to the contrary, you must *not* discuss settlement of *any* issues with your spouse, or tell your spouse what the minimum is that you are willing to settle for. (One exception to this rule concerns visitation arrangements with children, when custody or terms of access are *not* in issue. Here we recommend free and open communication between the parents, with the primary concern being what is best for the children.)

Mediation

Sometimes mediation is a useful, less-expensive means of dispute resolution. Mediation is sometimes called “Alternate Dispute Resolution” or (“ADR”). Some Courts routinely require this; some do not. Basically this is a process which brings all parties together with an independent mediator who identifies the concerns of each and attempts to facilitate a settlement of the issues. The actual settlement is arrived at by the parties with or without the advice and counsel of attorneys. The settlement is *not* imposed by the mediator. If this is appropriate in your case, we will talk about this and help prepare you for your mediation sessions. Parties are usually assisted by their own legal counsel during mediation, as is their legal right. Most Courts require mediation prior to trial.

Arbitration

Another form of ADR is Arbitration. The law provides that where both parties agree, the Court may refer the trial of their case to an independent arbitrator for arbitration. This roughly means that the trial is conducted in front of an arbitrator instead of a judge in accordance with certain rules. The arbitrator makes an “award” much like a judge makes a judgment. The award is in writing and presented to both sides, who in turn type it up and present it to the judge for signature in the form of final court judgment.

Arbitration is advantageous where the parties and their attorneys have confidence in the knowledge and fairness of the arbitrator and when long court dockets would otherwise prevent them from getting to trial in a speedy fashion.

Preparation Of Settlement Agreement

If an agreement is reached through negotiations and/or mediation, it will thereafter be reduced to writing, either in the form of an Agreed Judgment Of Divorce alone, or in the form of an Agreement Incident To Divorce drawn in conjunction with an Agreed Judgment Of Divorce. The specifics of the language used in such documents is very important; and ordinarily a fair amount of time is required in working out the specific language of such an agreement. If no agreement is reached through negotiations, this phase of the proceedings may be omitted.

Trial

If negotiations and mediation do not produce a settlement, your only recourse is to present the facts and your proposals to the Court, and let the Court decide the issues. Ordinarily a judge, sitting alone without a jury, will make the decisions. However, in some cases, including child custody cases, you have a right to require a jury of twelve citizens to decide certain questions. We will advise you whether we think you should ask for a jury trial and whether the other side has asked for a jury.

We hope we can save you the time and expense of contested hearings. However, if one or more issues are taken to Court for a hearing, don't be afraid of the experience.

The preceding sentence may sound 'easy enough for ..[you].. to say,' but not really true. Let me explain. First of all, sometimes you simply don't have a realistic alternative. So if you have to do it anyway, why be afraid? Second, contested hearings usually don't have the tension and spectacle of the trial portrayals one sees on TV and in the movies. Third, and moreover, we will prepare you for whatever role you will play. The best preparation for any contested hearing is to familiarize yourself with the legal issues, understand the facts, and then relax and tell the truth when called to testify.

Division Of Property

One of the major considerations of any divorce is "who gets what property?" In the absence of a valid Premarital Agreement, in which case special rules apply,²⁹ the Texas Family Code generally provides that anything you and your spouse have acquired since marriage is "*community property*," except for property which you have inherited or which has been given to you. Property which was "owned or claimed" before you married and property which was acquired during marriage by gift or inheritance is generally "*separate property*." In a normal case, the community property will be divided, but any separate property will remain the separate property of the original owner. It is the law of the State of Texas that title to separate property, whether realty or personalty, cannot be forcibly

²⁹ See generally Chapter 8 of the Texas Family Code.

divested by a Court.³⁰ As in most legal matters, however, there are sometimes practical exceptions to this general rule.

Keep in mind these are only the *basic* rules. There are other rules which sometimes come into play and we will advise you of any special laws which may affect your case.

During a marriage, as a general, basic rule of thumb, each spouse owns one-half of all community property and Courts divide community property fifty-fifty, but **fifty-fifty is not necessarily the way community property is divided when divorce occurs**. Our law provides that “the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.”³¹ The “just and right” standard vests considerable discretion in the trial judge. There is, therefore, *no automatic formula for division of community property*; but certain principles do exist to guide us.

Sections 7.001 and 7.002 of the Texas Family Code are the most important sections in Title 1 of the Texas Family Code. The origins of the statute date from 1841; the mandate consistently has been for the courts to divide the property in a manner that the judge deems “just and right,” **not “50-50” or “equally” as many people seem to think**. The Supreme Court of Texas has held that this section applies only to community property and that this section does not authorize the divesting or division of a spouse’s separate property.³²

While the statutory mandate quoted above to the divide the property in a “just and right” manner may sound simple, its application is fraught with complexity. The valuation of marital assets, factors to be considered in making a just and right division of the property, and the technique for dividing the marital assets can become complicated. Issues regarding disposition of the homestead, division of retirement benefits, as well as payment of reasonable and necessary attorneys’ fees, compound the problems. Decrees of divorce often exceeding 50 to 75 pages are necessary in order to properly divide and dispose of property.

Always looming in the background in the specter that a spouse may abscond with property, waste assets, fail to disclose important assets, or even in the event of an undesired ruling, seek the protection of a United States Bankruptcy Court. Finally, an

³⁰ *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977) and *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982).

³¹ **TEX. FAM. CODE ANN. §7.001.**

³² *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982); and *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977).

aggrieved spouse may appeal the case, seeking a reversal of the division of property and a new trial for a re-division of the assets.

Factors which a Court may consider in making a *disproportionate* (unequal) division of property include:

1. If one spouse is more at fault in causing the dissolution of the marriage or in preventing any reasonable reconciliation than the other.³³
2. If an innocent spouse would gain financially and otherwise if the marriage could be maintained in a healthy fashion.³⁴
3. If one spouse has a greater earning capacity than the other.³⁵
4. If one spouse has a greater present income or ability to support him/herself than the other.³⁶
5. If one spouse is in generally worse physical condition than the other.³⁷

³³ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *In Re: Marriage Of Jackson*, 506 S.W.2d 261, 270 (Tex. Civ. App.—Amarillo 1974, writ dismissed); *Kidd v. Kidd*, 584 S.W.2d 552, 557 (Tex. Civ. App.—Austin 1979, no writ).

³⁴ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *In Re: Marriage Of Jackson*, 506 S.W.2d 261, 267 (Tex. Civ. App.—Amarillo 1974, writ dismissed); *Welch v. Welch*, 694 S.W.2d 374, 376 (Tex. App.—Houston [14th Dist.] 1985, no writ).

³⁵ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Wisdom v. Wisdom*, 575 S.W.2d 124 (Tex. Civ. App.—Fort Worth, writ dismissed); *Munns v. Munns*, 567 S.W.2d 563 (Tex. Civ. App.—Dallas 1978, no writ); *Bokhoven v. Bokhoven*, 559 S.W.2d 142 (Tex. Civ. App.—Tyler 1977, no writ); *Cole v. Cole*, 532 S.W.2d 102 (Tex. Civ. App.—Dallas 1975, no writ); *Goren v. Goren*, 531 S.W.2d 897 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dismissed); *Cooper v. Cooper*, 513 S.W.2d 229, 233-34 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); *In Re: Marriage Of Jackson*, 506 S.W.2d 261, 266 (Tex. Civ. App.—Amarillo 1974, writ dismissed); *Maddox v. Maddox*, 489 S.W.2d 391 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ); *Waggener v. Waggener*, 460 S.W.2d 251 (Tex. Civ. App.—Dallas 1970, no writ); *Dorfman v. Dorfman*, 457 S.W.2d 417 (Tex. Civ. App.—Texarkana 1970, no writ); *Picket v. Picket*, 401 S.W.2d 846 (Tex. Civ. App.—Tyler 1966, no writ).

³⁶ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Wisdom v. Wisdom*, 575 S.W.2d 124 (Tex. Civ. App.—Fort Worth, writ dismissed); *Munns v. Munns*, 567 S.W.2d 563 (Tex. Civ. App.—Dallas 1978, no writ); *Duncan v. Duncan*, 374 S.W.2d 800 (Tex. Civ. App.—Eastland 1964, no writ); *Mozisek v. Mozisek*, 365 S.W.2d 669 (Tex. Civ. App.—Fort Worth 1963, writ dismissed); *Hedtke v. Hedtke*, 112 Tex. 404, 248 S.W.2d 21 (1923).

6. If one spouse for any reason has greater financial needs than the other (such as caused by medical problems, children, children by prior marriage, etc.).³⁸
7. If one spouse has more formal education or future employability than the other.³⁹
8. If one spouse incurred substantial community indebtedness or created substantial community liabilities in matters which did not really involve or benefit the other (such as a business venture gone bust after the other spouse protested getting involved in it beforehand, or a lawsuit brought against both of you because of one spouse's negligence or folly).⁴⁰
9. If there will be oppressive tax consequences because of a property division by divorce.⁴¹
10. If there is a significant age disparity between the spouses.⁴²
11. If one spouse presently has greater earning power, business opportunities, capacities, or abilities than the other.⁴³

³⁷ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Cook v. Cook*, 679 S.W.2d 581, 585 (Tex. App.—San Antonio 1984, no writ).

³⁸ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Padon v. Padon*, 670 S.W.2d 354, 359 (Tex. App.—San Antonio 1984, no writ); *Harrell v. Harrell*, 684 S.W.2d 118, 121 (Tex. App.—Corpus Christi 1984, no writ).

³⁹ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Cole v. Cole*, 532 S.W.2d 102 (Tex. Civ. App.—Dallas 1975, no writ); *Goren v. Goren*, 531 S.W.2d 897 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ dismissed).

⁴⁰ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Horlock v. Horlock*, 533 S.W.2d 52, 58-59 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed); *Finn v. Finn*, 658 S.W.2d 735, 748 (Tex. App.—Dallas 1983, writ refused n.r.e.).

⁴¹ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Robbins v. Robbins*, 601 S.W.2d 90, 92, (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); *Cook v. Cook*, 679 S.W.2d 581, 584 (Tex. App.—San Antonio 1984, no writ).

⁴² TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Housler v. Housler*, 636 S.W.2d 874 (Tex. App.—Waco 1982, no writ); *Welch v. Welch*, 694 S.W.2d 374, 376 (Tex. App.—Houston [14th Dist.] 1985, no writ).

12. If one spouse has a greater need for future support after divorce than the other.⁴⁴
13. If the *nature* of the property is such that it cannot realistically be divided fairly (*e.g.*, if your spouse is doctor, the medical practice is a valuable asset -- but only your *spouse* will be able to use it upon divorce).⁴⁵
14. If one spouse has wasted any community assets without the consent or knowledge of the other.⁴⁶
15. If one spouse has to pay temporary alimony to the other spouse during the pendency of the divorce action.⁴⁷
16. If there has been any expenditure of community funds to purchase out-of-state property in the name of only one spouse.⁴⁸
17. If one spouse has received or made (other than to a spouse) any substantial gifts during marriage.⁴⁹

⁴³ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 762 (Tex. 1980); *Cook v. Cook*, 679 S.W.2d 581, 586 (Tex. App.—San Antonio 1984, no writ); *Harrell v. Harrell*, 684 S.W.2d 118, 121 (Tex. App.—Corpus Christi 1984, no writ).

⁴⁴ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Padon v. Padon*, 670 S.W.2d 354, 359 (Tex. App.—San Antonio 1984, no writ); *Harrell v. Harrell*, 684 S.W.2d 118, 121 (Tex. App.—Corpus Christi 1984, no writ).

⁴⁵ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972); *Cook v. Cook*, 679 S.W.2d 581, 582-584 (Tex. App.—San Antonio 1984, no writ); *Frausto v. Frausto*, 611 S.W.2d 656, 659-660 (Tex. App.—San Antonio 1981, writ dismissed) (The value of a professional education is not a community property right, and an automatic reimbursement for expenditure of community funds cannot be awarded, absent a specific pleading.).

⁴⁶ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Simpson v. Simpson*, 679 S.W.2d 39, 42 (Tex. App.—Dallas 1984, no writ); *Jackson v. Smith*, 703 S.W.2d 791, 795-796 (Tex. App.—Dallas 1985, no writ to date).

⁴⁷ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Cluck v. Cluck*, 647 S.W.2d 338, 343 (Tex. App.—San Antonio 1982, writ dismissed).

⁴⁸ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *In The Matter Of The Marriage Of Read*, 634 S.W.2d 343, 348-349 (Tex. App.—Amarillo 1982, writ dismissed).

⁴⁹ TEX. FAM. CODE ANN. §7.001; *Murff v. Murff*, 615 S.W.2d 696, 698-699 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758, 761-762 (Tex. 1980); *Simpson v. Simpson*, 679 S.W.2d 39, 42 (Tex. App.—Dallas 1984, no writ to date).

18. If one spouse has greater wealth (separate property) than the other.⁵⁰
19. If there has been any increase in the value of one spouse's separate property because of the expenditure of time, talent, labor, or effort during the marriage without adequate compensation to the community property estate.⁵¹
20. If one spouse has made any excessive gifts of community property to any child during marriage (including any child of his/her own by a prior marriage).⁵²
21. If any community funds (money earned during marriage) have been used to pay off the indebtedness of one spouse's separate property (such as mortgage payments on that spouse's separate realty).⁵³
22. If one spouse presently has a greater expectation of receiving wealth than the other (e.g., suit for damages pending, or likelihood of inheritance).⁵⁴
23. If one spouse helped put the other spouse through school or taught the other spouse.⁵⁵

App.—Dallas 1984, no writ); **Jackson v. Smith**, 703 S.W.2d 791, 795-796 (Tex. App.—Dallas 1985, no writ to date).

⁵⁰ **TEX. FAM. CODE ANN. §7.001**; **Murff v. Murff**, 615 S.W.2d 696, 698-699 (Tex. 1981); **Young v. Young**, 609 S.W.2d 758, 761-762 (Tex. 1980); **Kidd v. Kidd**, 584 S.W.2d 552, 555-557 (Tex. Civ. App.—Austin 1979, no writ); **Jones v. Jones**, 699 S.W.2d 583, 585 (Tex. App.—Texarkana 1985, no writ to date).

⁵¹ **TEX. FAM. CODE ANN. §7.001**; **Jensen v. Jensen**, 665 S.W.2d 107 (Tex. 1984); **Vallone v. Vallone**, 644 S.W.2d 455 (Tex. 1982); **Murff v. Murff**, 615 S.W.2d 696, 698-699 (Tex. 1981); **Young v. Young**, 609 S.W.2d 758, 761-762 (Tex. 1980); **Jones v. Jones**, 699 S.W.2d 583, 586 (Tex. App.—Texarkana 1985, no writ to date).

⁵² **TEX. FAM. CODE ANN. §7.001**; **Murff v. Murff**, 615 S.W.2d 696, 698-699 (Tex. 1981); **Young v. Young**, 609 S.W.2d 758, 761-762 (Tex. 1980); **In Re The Marriage Of McCurdy**, 499 S.W.2d 712, 717 (Tex. Civ. App.—Amarillo 1973, writ dismissed); **Estate Of Bridges v. Mosebrook**, 662 S.W.2d 116, 122 (Tex. App.—Fort Worth 1983, writ refused n.r.e.).

⁵³ **TEX. FAM. CODE ANN. §7.001**; **Murff v. Murff**, 615 S.W.2d 696, 698-699 (Tex. 1981); **Young v. Young**, 609 S.W.2d 758, 761-762 (Tex. 1980); **Arrington v. Arrington**, 613 S.W.2d 565, 568 (Tex. Civ. App.—Fort Worth 1981, no writ).

⁵⁴ **TEX. FAM. CODE ANN. §7.001**; **Murff v. Murff**, 615 S.W.2d 696, 698-699 (Tex. 1981); **Young v. Young**, 609 S.W.2d 758, 761-762 (Tex. 1980); **Freeman v. Freeman**, 497 S.W.2d 97, 99-100 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); **Simpson v. Simpson**, 679 S.W.2d 39, 42 (Tex. App.—Dallas 1984, no writ).

⁵⁵ **TEX. FAM. CODE ANN. §7.001**; **Murff v. Murff**, 615 S.W.2d 696, 698-699 (Tex. 1981); **Young v. Young**, 609 S.W.2d 758, 761-762 (Tex. 1980); **Frausto v. Frausto**, 611 S.W.2d 656, 659-660

24. If one spouse assisted the other in attaining a valuable present business position.⁵⁶
25. If an innocent spouse gave up any good opportunities (such as career) or benefits (such as alimony) to become or to stay married to the other.⁵⁷
26. If one spouse created community property through the use of his/her separate property.⁵⁸
27. If any community property was created by the efforts or the lack of effort of either spouse.⁵⁹
28. If the child(ren) of the marriage will be residing with one spouse who will be required to tend and see to the needs of the child(ren) in addition to his/her own needs day in and day out.⁶⁰
29. If one spouse will be appointed the Managing Conservator of the child(ren) of the marriage.⁶¹

(Tex. App.—San Antonio 1981, writ dismiss'd) (The value of a professional education is not a community property right, and an automatic reimbursement for expenditure of community funds cannot be awarded, absent a specific pleading.).

⁵⁶ **TEX. FAM. CODE ANN. §7.001; *Murff v. Murff***, 615 S.W.2d 696, 698-699 (Tex. 1981); ***Young v. Young***, 609 S.W.2d 758, 761-762 (Tex. 1980); ***Arrington v. Arrington***, 613 S.W.2d 565, 568 (Tex. Civ. App.—Fort Worth 1981, no writ).

⁵⁷ **TEX. FAM. CODE ANN. §7.001; *Murff v. Murff***, 615 S.W.2d 696, 698-699 (Tex. 1981); ***Young v. Young***, 609 S.W.2d 758, 761-762 (Tex. 1980); ***Housler v. Housler***, 636 S.W.2d 874, 875 (Tex. App.—Waco 1982, no writ).

⁵⁸ **TEX. FAM. CODE ANN. §7.001; *Murff v. Murff***, 615 S.W.2d 696, 698-699 (Tex. 1981); ***Young v. Young***, 609 S.W.2d 758, 761-762 (Tex. 1980); ***Cockerham v. Cockerham***, 527 S.W.2d 162, 167-168 (Tex. 1975); ***In Re The Matter Of The Marriage Of Read***, 634 S.W.2d 343, 346 (Tex. App.—Amarillo 1982, writ dismiss'd).

⁵⁹ **TEX. FAM. CODE ANN. §7.001; *Murff v. Murff***, 615 S.W.2d 696, 698-699 (Tex. 1981); ***Young v. Young***, 609 S.W.2d 758, 761-762 (Tex. 1980); ***In Re The Matter Of The Marriage Of Read***, 634 S.W.2d 343, 346, 349 (Tex. App.—Amarillo 1982, writ dismiss'd).

⁶⁰ **TEX. FAM. CODE ANN. §7.001; *Murff v. Murff***, 615 S.W.2d 696, 698-699 (Tex. 1981); ***Young v. Young***, 609 S.W.2d 758, 761-762 (Tex. 1980); ***Rice v. Rice***, 21 Tex. 58 (1858); ***McKnight v. McKnight***, 535 S.W.2d 658, 661 (Tex. Civ. App. El Paso 1976, rev'd on other grounds at 543 S.W.2d 863); ***Cockerham v. Cockerham***, 527 S.W.2d 237, 243 (Tex. Civ. App.—Corpus Christi, writ dismiss'd).

⁶¹ **TEX. FAM. CODE ANN. §7.001; *Murff v. Murff***, 615 S.W.2d 696, 698-699 (Tex. 1981); ***Young v. Young***, 609 S.W.2d 758, 761-762 (Tex. 1980); ***Housler v. Housler***, 636 S.W.2d 874, 875 (Tex. App.—Waco 1982, no writ); ***Rice v. Rice***, 21 Tex. 58 (1858); ***McKnight v. McKnight***, 535 S.W.2d 658, 661

Having said all that, and mindful that **“fifty-fifty is not necessarily the way community property is divided when divorce occurs,”** it is very important to understand *how* courts work. The first bitter pill of truth for you to swallow is to understand that the law is *not truth-oriented*. Rather, the law is *solution-oriented*. Philosophy is truth-oriented. For example, two people of differing views could argue the issue of whether God exists for two years, at the end of which both may separate neither having changed his mind. In litigation, however, two people of differing views could argue a case for two years, at the end of which the legal system would impose a solution; and we would call that solution “justice.” “Justice,” therefore, is a rhetorical word that is broad enough to accommodate *anyone’s* notion of what it might mean.

The second bitter pill for you to swallow is what Mr. Fanning calls the priorities of the legal system. What we learned in Civics Class is not very realistic. If we asked average citizens to rank the following considerations in importance in the legal system – administrative, economic, prophylactic, social, and justice – the priorities we would get are:

Justice
Social
Prophylactic
Economic
Administrative

Extensive studies of the considerations which judges factor into their decisions prove that judges have the exact *opposite priorities* in making the decisions they make. In other words, the person who decides your case in litigation has a view of important considerations *exactly the opposite* of your view of important considerations. Judges universally rank the factors in the following order of importance:

Administrative
Economic
Prophylactic
Social
Justice

Why does it work this way? Simple. Two reasons.

First, Judges are politicians. The most important thing for any politician is to be re-elected. The most effective way to un-elect an incumbent judge is to show the “backlog” of cases has grown during his/her term of office. Therefore, the most important thing for a judge is to reduce, or certainly not increase, the backlog of cases. If a judge divides the community property of all or almost all divorce cases 50-50, then the lawyers who practice

(Tex. Civ. App.—El Paso 1976, rev’d on other grounds at 543 S.W.2d 863); *Cockerham v. Cockerham*, 527 S.W.2d 237, 243 (Tex. Civ. App.—Corpus Christi, writ dism’d.).

before that judge quickly learn that it won't do their clients any good to fight and squabble. It makes predicting the outcome of litigation easier; it reduces the likelihood that the judge will make enemies of the lawyers (by making "winners" and "losers"); and it reduces the likelihood that the judge will make enemies among the constituency that is ultimately responsible for elections. Bottom line: in all but the most outrageous and egregious cases, it makes sense to settle and to settle early. Another way of saying this is that in all but the most outrageous and egregious cases extensive litigation benefits only the lawyer.

Second, in addition to being politicians, Judges are human beings – and usually *normal* human beings of above average intelligence. That means, among other things, they don't like working any more or any harder than is necessary. This doesn't necessarily mean Judges are lazy. It does necessarily mean that Judges don't like to work when work is unnecessary or, phrased differently, to make work for themselves when that work isn't going to do anyone any good. Almost all divorce cases that go to appellate courts are appealed because of disproportionate division of community property. Solution? Make the division of community property 50-50 and eliminate the appeal.

A wise, old, experienced litigator from San Antonio sometimes tells his divorce clients, "I'll protect your legal interests right down to your last nickel." So it is better to learn sooner, rather than later, about the realities of the legal system. Unfortunately, it is precisely *now*, at the *beginning* of the divorce process, that both clients are least likely emotionally to be able to heed this advice. Be in the minority. Heed the advice early. If your attorney advises you that your case is not among the most outrageous and egregious, believe him and aim for a realistic outcome, not one of emotional vindication (which the legal system will not ever yield).

If you learn nothing else from this *General Information Brochure*, if you just learn the above your investment in buying and reading this material will be magnificently worthwhile. Most lawyers don't tell their clients this until their clients begin to fall behind in paying their monthly statements, and then rationalize that their clients should have known these things all along. If one is a lawyer, such logic is very convenient.

Obviously, these principles are general in nature. It is our job to know when these or other principles may affect your case. We will discuss this with you, and we will advise you in light of the facts and our experience. You can count on us to try to get the best possible settlement, but we must necessarily be realistic in our advice and our approach; and so must you. For example, frequently divorces become more expensive and protracted because one spouse pursues a course of litigation designed and intended to obtain more than one-half of the community property and the other spouse resists.

If you wish to obtain more than half, we are here to serve you; but you should make a business decision as to whether the cost will be worth the very uncertain prize. If your spouse wishes to obtain more than half, you will have to make a similar decision as to whether the cost of resisting will be worthwhile. Remember, all of that decision is based

not of the facts, but on the evidence. In other words, it's not enough to *know* the truth; it is necessary to *prove* the truth.

Division Of Indebtedness

As of September 1, 1989, Texas enacted a new statute which has taken quite a few divorcing parties and their lawyers by surprise. **TEX. FAM. CODE ANN. §3.201** provides that a person is *not* personally liable for the acts (including the incursion of debt) of the person's spouse unless: a) the spouse acts as an agent for the person; or b) the spouse incurs a debt for necessities. What this section of the Family Code does is destroy the previously popular notion of "community debt." It is clear that Texas has community property, which is divisible upon divorce. It is now clear that Texas does *not* have community debt that is divisible upon divorce unless it was incurred jointly, or through agency (joint application for a credit card), or for necessities.

It thus now appears possible to divide a community property estate and then as a practical matter wipe out the portion partitioned to one party because he or she incurred all the debt. Merely because it is possible, however, does not mean that a court will do it. But it appears it could.

Additionally, if you and your spouse are jointly and severally liable for charges made on any credit card, it is extremely important that such credit card liability be terminated as soon as possible after a decision for divorce is made. Failure to take proper action on this can subject you to liability to the credit card company for charges your spouse makes and concerning which you only obtain after-the-fact knowledge.

Alimony

"Alimony" is the term used to describe payments made for the support of a spouse or a former spouse (usually, but not necessarily, the wife), as distinguished from payments made for the support of children. Prior to September 1, 1995, Texas Courts had no power to order the payment of alimony at the time the Judgment Of Divorce was signed, although Texas Courts did (and still do) have broad power to award alimony while a divorce suit is pending. A written agreement to pay alimony is as enforceable as any other contract, and is sometimes economically beneficial to *both* former spouses. We will discuss this with you and will advise whether you should consider alimony as part of your settlement.

Commencing with suits filed September 1, 1995, and after, Texas' first alimony statute became effective. It applies only to new cases filed after September 1, 1995. It does not apply to cases already pending or to suits filed between January 1, 1995 and August 31, 1995 which are non-suited by the spouse seeking maintenance and re-filed on or before January, 1997.

Important features of the alimony law⁶² include the following:

⁶² Chapter 8 of the Texas Family Code.

1. Alimony will not exceed **three (3)** years except in circumstances where the former spouse cannot become self-supporting by reason of an “incapacitating physical or mental disability” as defined in the statute;
2. Alimony may be granted as follows:
 - a. **Criminal Family Violence.** If the spouse from whom maintenance is sought was **convicted** of or **received deferred adjudication** for a **criminal** offense of family violence which occurred within two years before the date the suit for divorce was filed or during the pendency of the suit; or
 - b. **Ten Year Marriage And Insufficient Estate.** The parties have been married at least ten (10) years *and* there is insufficient property to provide for the spouse’s reasonable minimal needs *and*: 1) the spouse is unable to support himself or herself because of incapacitating physical or mental disability, *or* 2) is the custodian of the child with a physical or mental disability that precludes employment outside the home *or* 3) the spouse lacks the labor market skills adequate to provide minimal needs as defined in the statute.

3. **Factors The Court Can Consider In Setting The Amount Of Alimony.**

- a. division of community property and the separate property owned by the spouse seeking maintenance;
- b. education and employment skills of the spouses;
- c. duration of the marriage;
- d. age, employment history and earning ability and physical and emotional condition of the spouse seeking maintenance;
- e. the ability of the other spouse to provide for and meet his or her personal needs and child support payments;
- f. acts by either spouse resulting in excessive or abnormal expenditures or destruction, concealment, or fraudulent disposition of property;
- g. the comparative financial resources of the spouses including medical and insurance benefits;
- h. the contribution by one spouse to the education, training or increased earning power of the other spouse;

- i. contributions as a homemaker,
 - j. marital misconduct of the spouse seeking maintenance;
 - k. efforts of the spouse seeking maintenance to pursue available employment counseling; and
 - l. the separate property of either spouse.
4. No alimony will be awarded if the spouse seeking the award of alimony does not exercise and prove due diligence to become employed or self-supporting, unless there is an incapacitating physical or mental disability. Alimony may be for an indefinite period to exceed three years *if* the recipient is mentally or physically incapacitated.
 5. Alimony shall not exceed **\$2,500.00** per month or **20%** of the payor's average monthly gross income, whichever is *less*;
 6. The alimony terminates on the death of *either* party **or** remarriage of the party *receiving* maintenance **or** cohabitation of the spouse *receiving* support *after notice and hearing*;
 7. Alimony can be modified upon a showing of a material and substantial change in the circumstances of either party for payments accruing after the filing of the Motion;
 8. Loss of employment or incapacitation *after* divorce or annulment are *not* grounds for spousal maintenance;
 9. Agreed or court ordered alimony is enforceable by contempt;
 10. Affirmative defenses for failure to pay alimony are:
 - a. inability to provide support;
 - b. insufficient property to be sold or mortgaged; and
 - c. inability to borrow the funds.

This affirmative defense does not arise unless evidence is admitted supporting the defense. (A putative spouse is a spouse who marries a person who is already married.)

If you think you may qualify to obtain alimony, be sure to mention this to your attorney in your very first conference.

Children

(If you do not have minor children, born or adopted, to this marriage, you may skip this section *unless* one or more of them suffers from a permanent disability.)

In Texas, suits regarding children are generally called “Suits Affecting The Parent-Child Relationship.” In Texas, if parents are divorcing, their divorce suit must have combined with it a Suit Affecting The Parent-Child Relationship.

The public policy of the State of Texas is to:

- (1) assure that each child will have frequent and continuing contact with parents who have shown the ability to act in the child’s best interest;
- (2) provide a stable environment for the child; and
- (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.

TEX. FAM. CODE ANN. §153.001(a).

The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.⁶³ This is another simple sounding legal mandate that is actually complex in application. Simple psychological reality indicates parents frequently and in good faith confuse the best interest of the child with their own desires and emotional needs.

The State of Texas does not permit discrimination in Suits Affecting The Parent-Child Relationship based upon marital status, sex of a party, or sex of a child in determining which party to appoint as sole Managing Conservator, whether to appoint a party as Joint Managing Conservator, and the terms and conditions of conservatorship and possession of and access to the child.⁶⁴

Three Basic Decisions - Custody, Support, And Access:

Three basic decisions must be made concerning children in a divorce. First, with whom will they primarily live, or stated another way, who will have custody? Second, what amount of child support shall be paid? Third, what rights of access to and possession of the children shall be granted to the parent who does not have custody?

Conservatorship:

Conservatorship battles (“custody fights”) should occur only after exhaustive soul-searching and when sincerely believed to be *absolutely necessary*. Custody fights

⁶³ TEX. FAM. CODE ANN. §153.002.

⁶⁴ TEX. FAM. CODE ANN. §153.003.

inevitably cause anxiety and bitterness to everyone involved, and they are especially damaging to the children. They are time-consuming and expensive. Typically, a divorce involving a custody contest will take *at least* six months, and more likely one year, to resolve and will cost each spouse *at least* \$75,000.00 in attorneys' fees, child expert fees, and related costs of litigation. Furthermore, it has been our experience after these many years that any person who has and is willing to spend enough money can win custody of any child in any court. This does not vindicate a person who is right. It merely recognizes the reality that "might makes right," in this case *financial* might. No amount of money, however, can put the children back together again after they have undergone the trauma of their parents warring over them, regardless of the altruism of their parents' motivations.

Obviously then, every effort should be used to avoid a custody fight. We strongly recommend that spouses who cannot agree on custody seek professional counseling from a licensed professional who is knowledgeable in the area of child psychology or psychiatry. We can and will recommend professionals in this area if requested. Generally, mediation or arbitration of this issue is far less expensive and far less damaging to the parents and the child(ren) than litigation. Mediation or arbitration is also considered by many more likely to lead to the best possible result for the children.

The former disparity of rights, duties, powers, and privileges between a "Managing" Conservator and a "Possessory" Conservator, combined with politics, as well as a philosophy that has been chosen by the Texas Legislature in preference to competing philosophies, has led the Texas Legislature (like the legislatures of many other states) to pass laws which permit courts to appoint more than one parent a "Managing" Conservator. This is referred to as "Joint Managing Conservatorship"; and, when the heat and anxiety of battle cools, can usually work out to the child(ren)'s best interest (provided it is not used as a tool to constantly embroil the former spouse in post-divorce custody fights). The statute is found at **TEX. FAM. CODE ANN. §153.131**.

TEX. FAM. CODE ANN. §153.131(b) creates in law a rebuttable presumption that the appointment of the parents of a child as Joint Managing Conservators is in the best interest of the child. A *rebuttable* presumption means that this is the *starting* place of legal analysis, requiring some evidence that it is not in the child's best interest in order to overcome, or rebut, the presumption. Interestingly, the presumption seems to obtain in the statutory scheme only if both parents agree that it obtains in their particular case.⁶⁵

TEX. FAM. CODE ANN. §153.134 reads:

(a) If a written agreement of the parents is not filed with the court, the court may render an order appointing the parents joint managing conservators of the child only if the appointment is in the best interest of the child considering the following factors:

⁶⁵ See **TEX. FAM. CODE ANN. §153.134(a)**.

- (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;
- (2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
- (3) whether each parent can encourage and accept a positive relationship between the child and the other parent;
- (4) whether both parents participated in child rearing before the filing of the suit;
- (5) the geographical proximity of the homes of the parents' residences;
- (6) if the child is 12 years of age or older, the child's preference, if any, regarding the appointment of joint managing conservators; and
- (7) any other relevant factor.

(b) In rendering an order appointing Joint Managing Conservators, the court shall:

- (1) establish the county of residence of the child until altered by further order or designate the conservator who has the exclusive right to determine the primary residence of the child;
- (2) specify the rights and duties of each parent regarding the child's physical care, support, and education;
- (3) include provisions to minimize disruption of the child's education, daily routine, and association with friends;
- (4) allocate between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent as provided by Chapter 151 [*The Parent-Child Relationship*]; and
- (5) if feasible, recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency.

Other factors can play an important part in the mind of the trier of fact, such as: the daily society (that would have to be given up) of half siblings from other marriages; the fact that a certain person who in the past functioned quite well as a married parent might not be able to function very well at all as a single parent, *etc.* The judges of some courts have a personal bias against Joint Managing Conservatorship. The judges of most courts

have a personal bias in favor of Joint Managing Conservatorship. If there is an issue in your case about conservatorship, you need to discuss it with your attorney.

As a general guide, where there is a “custody fight,” the parent who has historically been the “primary parent” will be appointed the “Joint Managing Conservator with primary custody” or the “Managing Conservator,” or custodial parent unless he or she is doing a bad job *and* the other parent *both can and will* do a better job. The other parent may be appointed a “Joint Managing Conservator” or “Possessory Conservator,” which is misleading in the sense that one would usually equate primary “possession” with the word “Possessory.”

The legal issue is *not* which parent has been the better parent while the couple was together. The legal issue is which parent will be the better *single* parent. The answer to the second question is directly related, in the mind of the trier of fact, to the answer to the first. This may be unrealistic and inappropriate; but, initially, past is considered prologue.

It is tough sometimes to figure out who the “primary parent” has been and/or is, and therefore (usually) who the permanent parent Managing Conservator should be. This is not just a function of time spent with or for the child(ren) but, rather, influence. This is sometimes referred to as “bonding.” It is also a function of capacity.

Tactically, the person appointed on a temporary basis to be “Temporary Managing Conservator” may have a distinct advantage at time of trial in an effort to be appointed the “permanent parent sole Managing Conservator.” Being able to show a positive track record as a quasi-single parent during the pendency of the divorce case is usually an advantage over being appointed the Temporary Possessory Conservator - who cannot show such a track record. On the other hand, if the track record of the Temporary Managing Conservator is a poor one, the Temporary Possessory Conservator may have the advantage instead.

The Legislature has decided that a wide disparity of rights, duties, powers, and privileges between parents who are former spouses only leads to more bitterness and controversy, with innocent children unfortunately caught in the middle. Therefore, through relatively recent legislation, there is a statutory preference (rebuttable presumption that it is in the best interest of the child[ren]) for the Court in a divorce case to appoint both parents Joint Managing Conservators of their children⁶⁶ **and** the legal difference between being a sole Managing Conservator and being a Possessory Conservator has also been minimized. All children, whether their parents are divorced or not, need regular, consistent, and healthy nurturing from both their parents. If they are going to get it, their parents are going to have to get along with each other even if they don't like each

⁶⁶ **TEX. FAM. CODE ANN. §153.131(b).** “A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.”

other. If their parents don't get along with each other, the children just flat are not going to get what they need.

A parent sole Managing Conservator alone has certain rights, duties, powers, and privileges with respect to each child.⁶⁷ These are listed below in statutory language,⁶⁸ 1 through 8, with Mr. Fanning's comments about each footnoted:

1. **Primary Residence**. The right to establish the primary residence of the child;⁶⁹
2. **Medical And Psychiatric Treatment**. The right to consent to medical, dental, and surgical treatment involving invasive procedures, and to psychiatric and psychological treatment;⁷⁰
3. **Receipt Of Support Payments**. The right 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;⁷¹

⁶⁷ **TEX. FAM. CODE ANN. §153.132.** *et seq.*

⁶⁸ **TEX. FAM. CODE ANN. §153.132.** These change slightly and insignificantly when a nonparent is appointed a sole Managing Conservator. See **TEX. FAM. CODE ANN. §153.371.**

⁶⁹ This is the stuff of what *substantial* custody litigation frequently concerns itself. The parent who unilaterally has this singular right has the power to unilaterally move with the child(ren) to a distant location. This potentially presents the other parent with significant, practical limitations in maintaining a vibrant, healthy relationship with his/her child(ren). For this reason, and because it is the public policy of the State of Texas that each child should have frequent contact with *both* parents, that Courts routinely limit the geographic area where the conservator who has this right may exercise it.

⁷⁰ Generally, unless there are statistically unusual religious reasons, both parents will be anxious for their children to get whatever medical and dental treatment is indicated from the most competent practitioners available. However, there is room for debate with respect to the importance of the unilateral power to consent to psychiatric or psychological treatment. This can be significant in a variety of circumstances and should be discussed if you believe any child has or may develop a need.

⁷¹ The right to receive child support can also be illusory. Statistically, proper performance of the obligation to pay child support has dramatically increased over the past few years. That, however, is not a guarantee of actual payment. Furthermore, there is the cost of enforcement involved - both financial and emotional. Judges seem to forget they were once lawyers when it comes to awarding reasonable and necessary attorneys' fees, even in actions involving the enforcement of child support where the law encourages those expenses to be recoverable against the non-compliant party. Another practical limitation is the fact that it is impossible for a child to know without suffering that his/her parent is/was in jail because that parent failed to support him or her. Another practical limitation is the fact that it is always traumatic for a child to know one parent put the other parent in jail because of him or her. Furthermore, there is an insidious gender bias when it comes to child support. The Legislature, combined with the Courts, has put practical ceilings on monetary child support obligations in Texas. For example, *as a practical matter*, the maximum Guidelines child support obligation is what it is *regardless* of gender, *regardless* of need, and consists of a fixed number of dollars per month. (This is not the theory or the way the law is written; but it *is* the practice.) Present economic statistics show that in spite of significant recent change (the figure was 60% within the past ten years), women in our nation typically are paid 74% of what a man is paid for doing *exactly* the same job.

4. **Legal Representation.** The right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;⁷²
5. **Consents.** The right to consent to the child's marriage and to the child's enlistment in the armed forces of the United States of America;⁷³
6. **Education.** The right to make decisions concerning the child's education;⁷⁴
7. **Services And Earnings.** The right to the services and earnings of the child;⁷⁵and
8. **Agent.** Except when a guardian of the child's estate or a guardian or attorney *ad litem* has been appointed for the child, a 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.⁷⁶

Usually the key right of a Managing Conservator is found in number 1, *i.e.*, the right to establish the primary residence of the child, and number 3, the right to receive and

Granted, it is not supposed to be that way; but statistics are statistics; and only fools and psychotics are reality impaired. The bottom line is that frequently a woman cannot afford to be the non-custodial parent because she cannot afford to pay Guidelines child support, while simultaneously she cannot afford to be the custodial parent because Guidelines child support when combined with her practical earning power is insufficient to meet her potential single-parent family's needs. There is real unfairness, and the potential for real cruelty, here; but it exists. The children, once again, pay the price. Children aren't stupid. In fact, few miss a thing. A child feels bad when one of his parents lives luxuriously while the other lives hand-to-mouth and child support over him is involved. The only solution that is healthy for the children is for both parents to be and stay flexible and be fair in providing for their children.

⁷² This is potentially a significant right, but usually only when a child is injured and can recover personal injury damages. This happens during childhood more often than most parents would like to think. The parent which this right has the unilateral power to select legal counsel for the child, to make the decision when or whether to settle the claim, and what to do with the settlement proceeds, *i.e.*, how to invest them and with/through whom.

⁷³ The consent powers with respect to marriage and enlistment in the armed services are usually not very significant. Most children are no longer interested in getting married or in enlisting in the armed services before age 18, at which time they no longer require parental consent.

⁷⁴ This is the power to select schools. When children are in public schools, this is generally a function of geographical neighborhood. However, this can be a significant right in the event one parent desires a child to attend private school and the other objects, or both parents desire a child to attend private school but do not agree upon the school.

⁷⁵ Unless the child(ren) is/are extremely wealthy, such as in a situation involving an heir, an heiress, or a movie star, this right is largely illusory. Most children who go to work as teenagers keep control of the money they earn. Just *try* to tell one differently.

⁷⁶ This is another right of usually only potential significance.

give receipt for child support. The rest of the unique rights of a Managing Conservator are of varying importance for practical reasons. (See footnotes.) For example, as any parent of a working teenager (other than a Hollywood child movie star) knows, if the child earns the money, the child is going to keep it as a practical matter. This statement is only general, however, and your particular circumstances may make other rights important.

Since both parents usually have rights to have access to the child(ren), what the law is really talking about in number 1 is *primary* possession **and** the right to establish the child(ren)'s domicile. This means that when the Managing Conservator moves to New Hampshire, the child(ren) go(es) too. For this reason, and because it is the Public Policy of the State of Texas that children have frequent, positive contact with *both* parents, that Courts routinely limit the geographic area where either conservator may establish the child(ren)'s residence. The most narrow, but frequently employed limitation, is "within the county where the conservatorship order is rendered or within an immediately contiguous county." This Public Policy is strong and heavily favored by the Courts. Some real life examples of situations where the Conservator with the right to establish the child's residence has not been permitted to remove the child(ren) from the same geographic area as the other parent are: a) a job promotion contingent upon relocation, the Court believing that the child's need for both parents is more important than the parent's need for a promotion; and b) remarriage to a person who gets a job promotion contingent upon relocation, the Court believing that the child's need for both parents is more important than the parent's spouse's need for a promotion. Another real life example is that of a woman who was awarded primary custody of a child. Her former husband was a lawyer living in Dallas who did not contest primary conservatorship in their divorce. After divorce, the woman fell in love, married, and became pregnant by a man she met online and who lived on a island off the coast of the State of Washington. She gave the sixty-day notice of her intent to move. The husband filed suit to prevent it. The 254th Judicial District Court in and for Dallas County, Texas, ruled that the woman could go to the State of Washington if she chose, but the child's residence would remain in Dallas County, Texas. When this decision was delivered in 1994, it was met at the time with shock and disbelief. Now, however, it would be expected. This is the rationale: No one *required* the woman to date someone so distant from the child's father. That was her *choice*. No one required the woman to marry someone who lived so distant. That was her *choice*. Finally, no one *required* the woman to become pregnant by her new husband. That, likewise, was her *choice*. Why should the father's relationship with his daughter suffer, and the daughter's relationship with her father suffer, simply because the woman made a series of selfish choices heedless of them both.

Not being able to differentiate between what is in the parent's best interests from what is in the child(ren)'s best interests is potentially disastrous in today's legal climate.

Both the parents are equal when it comes to all the other enumerated rights, powers, privileges and duties. For example, Texas law provides that each parent retains the right to receive information from the other parent concerning the health, education, and welfare of the child(ren) and, to the extent possible, the right to confer with the other

parent before making a decision concerning the health, education, and welfare of the child(ren).

Texas law additionally provides that *each parent* has, *during his/her respective possessions* of the child(ren),⁷⁷ the following rights, privileges, duties and powers with respect to each child:

1. **Care, Control, Protection, Discipline.** The duty of care, control, protection, and reasonable discipline of the child;
2. **Support.** The duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure, except as otherwise provided in this judgment;
3. **Non-Invasive Procedures.** The right to consent for the child to medical and dental care not involving an invasive procedure, except as otherwise provided in this judgment;
4. **Emergency Consents.** The right to consent for the child to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and
5. **Moral And Religious Training.** The right to direct the moral and religious training of the child.

Texas law additionally provides that *each parent* has *at all times*⁷⁸ the following rights, privileges, duties and powers with respect to the child(ren):

1. **Right To Information And Conference By Court Order.** As specified by court order:
 - A. **Information.** The right to receive information from the other parent concerning the health, education, and welfare of the child; and
 - B. **Conference.** To confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child;
2. **Access To Records.** The right of access to medical, dental, psychological, and educational records of the child;

⁷⁷ TEX. FAM. CODE ANN. §153.074.

⁷⁸ TEX. FAM. CODE ANN. §153.073.

3. **Professional Consultation.** The right to consult with any physician, dentist, or psychologist of the child;
4. **Educational Consultation.** The right to consult with school officials concerning the child's welfare and educational status, including school activities;
5. **Attendance At School Activities.** The right to receive notice of and to attend school activities of the child;
6. **Emergency Notifications.** The right to be designated on any records as a person to be notified in case of an emergency involving the child;
7. **Emergency Consents.** The right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and
8. **Management Of Estate.** The right to manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

In contests over managing conservatorship, the Court almost always orders a Social Study conducted by impartial persons. These are generally government social workers, but can also be clinical psychologists or social workers in private practice, depending upon whether that is preferred by the parties and can be financially afforded by the parties. These people then come to court at trial and testify as "experts" as to whom they think is qualified for the various responsibilities, sometimes making recommendations and sometimes not.

In contests over managing conservatorship, many courts require the parents to undergo court-ordered mediation. The mediator may *not* come to court to testify.

One of the factors which obviously must be considered is the possibility of a later modification of the divorce custody order. It is easier, because of easier legal criteria, to modify a Joint Managing Conservatorship order later than to modify a divorce order providing that one parent is the parent sole Managing Conservator and the other is a Possessory Conservator. It is sometimes wise to plan for the future.

As stated previously, conservatorship contests are complicated and expensive, both monetarily and emotionally, for the parents and the child(ren). They should be avoided if at all possible.

Support:

The second basic decision concerning children is, what amount of child support shall be paid. There is at present a legally established scale for the proper amount of child support. Its application is more or less automatic, although reading the statute would lead to an opposite conclusion. The scale is published by the Legislature and is embodied in

TEX. FAM. CODE ANN. §154.001, *et seq.* Some think it is fair; others think it is not. Regardless, it is presently the law, will almost always be automatically followed, and is found as Exhibit A to this publication.

As the children become older, and as the number of children eligible for support decreases, the amount of support is to decrease in accordance with the published guidelines, *not per capita*. The reason is that, for example, it is generally not twice as expensive to raise two children as it is to raise one, *etc.*

Enforcement Of Child Support – Contempt

If a person is under court order to pay child support, and if the court order is clear and unambiguous, and if it was possible for the person to comply, the Court order may be enforced by contempt. This means that the Court may order the person incarcerated for up to six (6) months per failure to punish him/her for past disobedience.

In addition, if the person cannot convince the Court that compliance by payment of the total arrearage is impossible at the time of the hearing, the Court may order him/her further confined until he/she pays the entire arrearage, plus reasonable and necessary attorneys' fees and court costs.

Contempt actions for child support must be brought within six (6) months of the child no longer being eligible for child support or they are barred by limitations.⁷⁹

There is no *quid pro quo*. Failure of one former spouse to pay child support does not legally justify the other former spouse in withholding the child from visitation. Child support is not "paid" to "buy" time with a child. It is paid for the support and general welfare of the child while that child is dependent on its parents.

Enforcement Of Child Support – Involuntary Income Assignment

In all final judgments in which child support is ordered, the Court must order involuntary income assignment if the Possessory Conservator is employed in Texas. If the Possessory Conservator is self-employed or employed by an employer outside of Texas, it is possible for the Court to require the Possessory Conservator to post a bond as security for the Possessory Conservator's payment of child support.

Access (Visitation) Rights:

The third basic decision is, what visitation rights shall be granted to the parent who does not have custody. (The Family Code usually calls the parent without custody the "Possessory Conservator.") It is best for the children, when both parents are employed outside the home, to assure the children that the divorce will not affect either parent's love and devotion to them. When both parents, after they are divorced, continue to work together on matters involving the children, the children *and* the parents benefit in both the

⁷⁹ **TEX. CIV. PRAC. & REM. CODE §31.006.**

short and long runs. This is not always possible. But where it is possible, the parents should try to arrange their lives so that each can have a fair share of time with the children, and especially a fair share of time to play with and enjoy the children.

Once again the Texas Legislature has promulgated a law. **TEX. FAM. CODE ANN. §153.311**, *et seq.*, sets forth the parameters of the Texas Standard Possession Order. Lawyers sometimes call this “S.P.O.” A copy of this law is attached to this publication as Exhibit B. This law generally provides for generous visitation - sometimes more than the Possessory Conservator even wants. In the absence of almost compelling circumstances (such as when access by a parent would endanger the physical and/or emotional welfare of a child), the application of the Standard Possession Order is also automatic.

The Texas Family Code requires the Court to insist upon specific times for visitation (rather than “reasonable times and places” alone), so that visitation is enforceable by contempt just like the payment of child support.

Enforcement Of Access – Contempt

If a Managing Conservator or a Possessory Conservator is under court order to deliver a child to the other or to someone else, and if the court order is clear and unambiguous, and if it was possible to comply and either the Managing Conservator or Possessory Conservator do not comply, the court order may be enforced by contempt. This means the Court may order the contemnor (non-complying party) incarcerated for up to six (6) months per failure to punish him/her for past disobedience.

Contempt actions for obstruction of access must be brought within six (6) months of the final time a person is entitled to access by court order or they are barred by limitations.⁸⁰

There is no *quid pro quo*. Failure of one former spouse to pay child support does not legally justify the other former spouse in withholding the child from visitation, and *vice versa*.⁸¹ Child support payments are not the purchase price for visitation, nor is visitation with a child for sale. The remedy of contempt for failure to deliver access is equally available to both the Managing Conservator and the Possessory Conservator.

Enforcement Of Access – Damages

Monetary damages are recoverable for interference with possessory rights to children. If either mother or father (*regardless* of which one is the Managing Conservator and which one is the Possessory Conservator) takes or retains possession of a child or conceals the whereabouts of a child in violation of a court order which provides for

⁸⁰ **TEX. CIV. PRAC. & REM. CODE §36.001.**

⁸¹ **TEX. FAM. CODE ANN. §153.001(b).** “A court may not render an order that conditions the right of a conservator to possession of or access to a child on the payment of child support.”

possessory interests in that child, he or she may be and probably will be liable for both actual and punitive damages to the other. This basically means that when your former spouse is entitled by court order to the child, you are not. It also means the reverse.

These actions (sounding in tort) are covered by Chapter 42 of the Texas Family Code. The law provides for recovery of the actual costs and expenses for locating the child, recovering the possession of the child, reasonable and necessary attorneys' fees for enforcing the court orders violated (contempt), reasonable and necessary attorneys' fees for bringing the tort action, and the value of mental suffering and anguish incurred by the moving party as a result of the violation of the court order by the responding party. In addition, if the Court finds that the person liable acted with malice or an intent to cause harm to the person who is denied a possessory interest, exemplary damages may also be awarded.

Criminal Penalties For Nonpayment Of Child Support And For Not Turning The Child(ren) Over For Access (Visitation) Or Return

Texas law provides *criminal*, as well as civil, penalties for both failure to pay child support and for violation of the other parent's access (visitation) rights. These penalties are serious, and create a criminal record for any parent who is convicted of a violation regardless of male or female.

Change Of Name

The Family Code permits either person in a divorce action to request a name change.⁸² If the request is for a change to a name the person used previously, the Court *must* grant the request. Where there were one or more children, some Courts traditionally took a dim view of changing a parent's last name to one different from the last names of the children. This view has been specifically repudiated by the Legislature.⁸³

Collaborative Law

For the man who only has a hammer in his tool kit, every problem looks like a nail.

Abraham Maslow

⁸² **TEX. FAM. CODE ANN. §6.706.**

⁸³ **TEX. FAM. CODE ANN. §6.706(b):** "The court may not deny a change of name solely to keep last names of family members the same."

Collaborative Law provides clients with specially trained lawyers committed to resolving legal problems without the financially and emotionally draining litigation process. Collaborative Law facilitates the resolution of Family Law disputes with dignity and support, rather than additional trauma and financial devastation.

Collaborative Law encourages mature, cooperative and non-combative behavior. Both parties agree up front to eliminate litigation as an option, and to seek an efficient, mutually agreeable settlement – out of court.

There is a story of a lawyer who arrogantly chided a medical doctor that at the time the lawyer's professional forebears were drafting Magna Carta, the Declaration of Independence, and the U. S. Constitution, the doctor's professional forebears were still bleeding people with leeches. The doctor thought for a moment, acknowledged that what the lawyer said is true, and then rhetorically asked, "Yeah, but what have you done for us lately?"

When divorce is accompanied by a high degree of conflict, the consequences for the adults and the children are more severe. Both children and adults, but especially children, become incapable of forming lasting relationships. This has enormously far-reaching consequences for them, their families, our neighborhoods, our society, our culture, and our world. For clients to engage in avoidable conflict in more than wasteful of money and assets; it is immoral.

Family Law lawyers can't really deal with primitive emotions precisely of the nature most excited by the divorce process, so we define them as "irrelevant." We listen, but we can't really use them to help in the arena of litigation struggle. Yet primitive emotion is a commodity in which our clients are inordinately rich. We refer our clients to professional counselors not just because we are required to do so, but because we are helpless to do otherwise. Most Family Law lawyers have genuine sympathy and empathy for our clients; yet we feel helpless because our clients' pain and loss is intense in spite of our best efforts to help them.

Moreover, most Family Law clients approach the legal system with a desire to have a judge with a black robe sitting in a tall chair in front of an American flag vindicate their hurt feelings and denounce their former loved one as "bad." Dear reader, let me tell you that this practically *never* happens. What the judge wants to do is minimize (not "eliminate," because that is impossible, just "minimize") the trauma to any children; divide the community property; find and confirm the separate property, if any; and get the adults out of the courtroom as quickly as possible so the Court can dispose of one more case on its backlog. *So the client isn't going to get what the client initially thinks he or she is bargaining for from the legal system anyway.*

Lastly, it is worth noting that lawyers are unhappy as a profession. Ours has among the highest rates of alcoholism, drug addiction, clinical depression, divorce and

suicide. Clients are unhappy. Huge numbers just say “no.” Almost *nobody* can afford the litigation process. *It doesn't have to be that way.*

As a client, you have the *right* to demand your attorney attempt to resolve your Family Law matter through the Collaborative Law process rather than the litigation process. Lawyers at present are resistant to Collaborative Law because it is new. Any psychologist will tell you that the *only* stimulus that produces stress in a human being is change. Many lawyers feel threatened by Collaborative Law because it signals change. In fact, lawyers who do not offer this solution to their clients are simply going to become obsolete. Most clients will soon learn not to tolerate being abused by the litigation process when 99% of all divorces end in settlement anyway. Why not start at that process and save the time, trauma, expense, and psychological damage?

There is nothing so irresistible as an idea whose time has come.

Victor Hugo

When most of us who became lawyers first attended law school, we did it because we wanted to help people. We wanted to be creative problem solvers for people who were going through the darkest moment of their lives. We were dedicated and hard working. For approximately three years we honed our minds until each of us mastered the uniform goal: “To think like a lawyer.” We acquired the tools of advocacy and were taught that, as long as we didn't know that what our clients wanted was criminal, fraudulent, or unethical, we had to “zealously” attempt to attain it. In fact, if we took a case and failed to perform “zealously,” we ourselves were guilty of unethical behavior and could lose our precious licenses as Attorneys And Counselors At Law for which we had worked so hard, sacrificed so much, and made our parents so proud. Then we were cast into the gladiator arena of “litigation” where the rules were phrased genteelly, but what happened really boiled down to “Kill Or Be Killed.” So much for altruism, helping people, and making a valuable contribution to civilization.

Now the legal profession is in an unprecedented crisis, and crisis requires change if things are to improve. One of the trends in the legal profession which will affect Family Law lawyers and necessitate change is the *demand* of civilized clients *not* to engage in the unnecessary squandering of their assets and goodwill toward one another simply because they have come to a parting of the ways. While certain cases – especially those involving fraud on a spouse, abuse of children, or domestic violence – may need to be litigated, overwhelmingly potential Family Law clients (and Family Law lawyers) believe the litigation model is not appropriate for resolving Family Law disputes. Litigation forces both clients to take extreme positions and dig in their heels. This invariably causes tremendous collateral damage and hurt feelings with a person who, one way or another, the client is going to have to coexist for the rest of their mutual lives. Litigation forces people to take extreme positions that are really unrealistic. In a courtroom you always have to ask for more than you really need or want because judges always award less than

what is asked. Judges expect puffing and so automatically cut back on the positions advocated by each party. There is thus an insane and illogical “War Of Approximation” for which each party pays professional fees equivalent to the most precise cardiac surgery, all in an attempt to get a result that is “somewhere in the ballpark” of what is fair. If a lawyer really *does* advocate for the bare minimum his client can live on and then gets less, where does that leave the client?

That is what I mean when I say litigation forces both clients to take extreme positions and dig in their heels.

Yet this “illogic” and “insanity” comes with a very high price tag. Consider the likely effect of two fine lawyers, each at \$300.00 per hour, and two Legal Assistants, each at \$90.00 per hour, fist-pounding, strutting, puffing, and engaging in courtroom oratory most of which the client does not even comprehend, all the while eating up an average family’s wealth at a combined rate of \$780.00 per hour. This includes travel and waiting-around-in-the-courtroom-hallway time. Then add expenses and additional hours for doubletalk designed and calculated to preserve the lawyer’s ego and insulate the lawyer from malpractice or ethics complaints.

If all this was not bad enough, litigation is a fertile ground for miscommunication, misunderstanding, and unnecessary pain. Client A tells “X” to Lawyer A who tells “X plus or minus something” to Lawyer B who tells “X plus or minus something else” to Client B. Ever play the game in school where a simple sentence started at the front of the class becomes unintelligible by the time it gets to the back of the class? It is unlikely that what Client B hears is what Client A meant.

Litigation takes families who are already traumatized and *further* traumatizes the spouses and the children with depositions, written pre-trial discovery, acrimonious correspondence, hearings, bellicose oratory, and court orders – the guts of which many do not understand but can be jailed if they do not obey. Hoping to avoid this pain, many clients are now seeking more humane methods of resolving the issues of their Family Law matters and are demanding them from lawyers. Lawyers who remain unresponsive to this demand will simply become obsolete.

The Collaborative Law solution – wherein the parties and their attorneys sign a written contract they will not litigate the case and that if it is not resolved in collaborative settlement conferences, the attorneys must withdraw and new attorneys must be hired to litigate – has become increasingly popular. In all sane cases, Collaborative Law can accomplish through settlement negotiations and agreement everything the traditional approach can (but too often do not), *and* leave the parties with a much better taste in their mouths than the alternative and at approximately 20%-40% of the cost of litigation. The parties and their lawyers agree in writing that they will negotiate a settlement in the case. Neither side will resort to court or even threaten to take the matter to court *during* the settlement negotiations. If the parties can’t reach an agreement and the matter heads to court, the lawyers for *both* sides *must* withdraw – and the parties have to hire new lawyers

to litigate the case. The old lawyers assist the new lawyers in the transition without charge. Both parties and their attorneys agree to be fair and to cooperate in settlement negotiations by being positive, not dwelling on the past or hurt feelings, and by being solely constructive *regardless* of frustrations and hurt feelings.

“Breaking Up Is Hard To Do” is not just the title to an old song. Hurt feelings accompany the dissolution of any significant relationship, whether by death, divorce, or just “breaking up.” Mature people understand and accept this. Hurt feelings are simply not helpful in arriving at a satisfactory settlement that both parties can live with for the rest of their lives. Hurt feelings, then, must be constructively dealt with but left outside the door to settlement negotiations.

The Collaborative Law case solution is generally achieved through a series of meetings attended by both spouses and their legal counsel. These are commonly called “Four Way Conferences.” All bi-party settlement negotiations are conducted *exclusively* within these sessions. What would normally be accomplished by pre-trial discovery is accomplished by agreement. If outside experts need to be consulted, it is done by agreement and informally. The distinctive feature of Collaborative Law is that both attorneys promise that if either party abandons the Collaborative Law forum and instead goes to court for a solution, *both* attorneys must withdraw and *both* parties must start all over with new attorneys after a 15-day or 30-day period to allow new legal counsel to be brought up to speed. This provides a very powerful negative incentive for either party or attorney to be dishonest, to be disrespectful of the other, or to prolong the divorce process. Collaborative Law solutions are usually much less costly – in time, trouble, trauma, tedium, emotional damage and expense – than traditional divorce solutions using the litigation model.

Collaborative Law is not appropriate for every case. The parties must really be willing to be fair.⁸⁴ The attorneys must really trust each other – both as to legal knowledge and as to integrity. The parties must really be mature (because it is extremely difficult, when feelings are hurt, not to be negative about the other spouse, which is strictly forbidden by written agreement). Collaborative Law is only appropriate when both parties, and both attorneys, can approach the issues in a constructive, mature, and adult-like fashion in a spirit of cooperation and fairness. Both sides must become and remain issue oriented, not history oriented.

Collaborative Law is relatively new in our society. Several years ago Mediation was new in our society and many lawyers decried it as useless and a waste of time. Collaborative Law will prove itself just like Mediation proved itself, and for precisely the same reason – because it works successfully. Divorce does not end relationships. Divorce only changes relationships. This is especially true in marriages where there are children.

⁸⁴ Usually both parties are really willing to be fair near the end of the litigation process after much damage and waste. So why not before?

There will still be soccer, Little League, appendectomies, broken limbs at the hospital, weddings, births of grandchildren, funerals, *etc.* Does any sane person want to diminish or ruin all of life's major experiences and be the cause of fear and embarrassment to one's own children by failing to maintain a constructive working relationship with a former spouse and still partner parent?

Just as in a successful marriage, a successful divorce requires cooperation and understanding from both sides. If you think your case is appropriate and that you *and* your spouse would prefer using the Collaborative Law model to work to a fair solution to your Family Law matter, please let us know during your initial office conference with your attorney. For some additional comments about Collaborative Family Law, please see Exhibit "D."

Attorneys' Fees

"How can I ever thank you?" gushed a woman to Clarence Darrow, after he had solved her legal troubles. "My dear woman," Darrow replied, "ever since the Phoenicians invented money there has been only one answer to that question."

Quality professional services for divorce cases, just like quality professional services of any kind, are not cheap. While perhaps appearing complex, this booklet has given you only a *superficial* idea of the complexities which may arise in a divorce, and of the many and varied tasks which attorneys and their staffs must perform.

Attorneys are not uniform in their billing practices. It is fair that before you make a decision to hire this Firm you know how we charge fees for Family Law cases.

Legal costs are generally proportionate to the difficulty of the case, the responsibility assumed by the attorney, and the results obtained. For example, a contested conservatorship case will usually be more expensive than a case where merely the amount of child support is at issue. By way of further illustration, when an estate of \$10,000,000.00 is at issue, a higher fee may be more fair than when an estate of \$10,000.00 is at issue, even though both cases take the same amount of time. The responsibility in the former case is much greater. The formula of time applied to the minimum hourly rates is merely the most convenient measuring tool while the suit is pending.

We don't suggest you invest more in legal expenses than the case is worth; however real life is not like the old Perry Mason T.V. show; and:

a) we do not know at this juncture all that will be required to properly represent you;

- b) you are the person who decides when you are satisfied at the negotiation level, not us, and what you find satisfactory later may not be the same as what you find satisfactory now;
- c) what is required in cases is not unilaterally controlled by either you or your attorney (there are also the Court and the other side, and sometimes a court-appointed Guardian *Ad Litem*, as well as fortuitous circumstances);
- d) we are far less familiar with the facts (including personalities) of your case at this time than you are; therefore you have us at a distinct disadvantage;
- e) sometimes you (and we) get caught in a “career case” where even giving up is not possible; and
- f) what your case is worth is up to *you*, not us, because it depends upon *your* own subjective values and principles.

The Firm bills its clients monthly or more frequently at the Firm’s option. The statements contain a *confidential narrative* of services rendered. The narrative is quite detailed and usually contains *confidential information* revealing and explaining *attorney-client communications* and *privileged attorney’s work product*. Therefore, the Firm advises its clients, after they read and are satisfied with the statements, to very carefully dispose of or store each of them after payment.

Any amount due the Firm will be payable immediately unless other arrangements are made by the client with the Firm in advance. A negative (minus) figure on a statement does not indicate a credit is due the client; rather, it merely makes disclosure to the client so the client can better anticipate whether and when he or she should make provision for the payment of additional fees. If a client has a disagreement or question about the validity of any charge, the client must immediately give notice of the complaint or question as called for in the Contract.

Failure to raise a complaint or question by the 10th day from statement date shall conclusively be deemed an acceptance of the correctness of the billing.

A word about “career cases” is in order. Sometimes, and not infrequently in divorce cases, one or both spouses will embark on “career cases” of spite, ill will, and “obsessive revenge” even when there are no serious child custody issues and where there is no justification for protracted litigation by reason of the property issues. This has nothing to do with whether the divorce is requested by either or both spouses on “no-fault” grounds or on fault grounds. (The vast majority of cases are filed and maintained on no-fault grounds whether in fact fault grounds exist or not.) As should be clear already from what has been written above, this Firm does *not* encourage this type of conduct and will *not* knowingly sponsor it. However, at the beginning of, and during, such a process, this Firm

has nothing to rely upon other than the word and representations of its own client. Since you are hereby warned about this, you have another reason to be frank and candid with us now, as well as throughout our relationship. If you insist that we prosecute or explore issues which you know are unjustified *and* if we act in ignorance of the truth but in reliance upon your representations to us, *i.e.*, you “con” us, we will take a very dim view of any complaint you make about paying the fees you will inevitably mount up.

If, on the other hand, you encounter these kinds of tactics in your case from your opposing party, your only choice will be to pay the additional and very high expenses of the resultant (futile) legal battle or give in. Sometimes even “giving in” is not possible. This happens when one client does not want settlement on *any* basis (even most favorable to him or her), but just wants to engage in protracted “legal warfare” out of spite and bitterness. We will not necessarily abandon you if you are confronted with such behavior by your spouse. All we can do is warn you that it is expensive; and usually both spouses are the losers because at the end of the wasteful process there is just that much less property to divide. Also, you should know that in such cases courts frequently divide the community property assets evenly, but then have each side pay his or her own legal fees and other debts. Therefore, engaging in such tactics one-sidedly can leave the side that engages in them very disadvantaged. This is true even in large estates. For example, even a million dollar estate, when divided by half, does not leave much for a party when from his or her half he or she must subtract substantial legal fees. This has actually happened in a few cases.

As you might have guessed by now, there is a story behind almost every sentence of this section of this booklet!

You should also know it is our experience that “legal warlike” clients are more frequently encountered in Family Law cases than in any other kind or types of litigation. It is too late to regret the incursion of legal fees based upon impulsive decisions after those legal fees have been earned. Not being perfectly candid with your attorney can, and probably will, lead to the needless incursion of legal fees. If your attorney has to spend a lot of time and/or money finding out what you could have told him in the beginning, time and charges will have been wasted through your own fault; and it is *still* your responsibility to pay for them. Therefore, again, every reasonable effort should be made to avoid unnecessary legal controversies and their accompanying legal fees. Furthermore, no matter how badly you feel toward your spouse right now, we do not recommend you ever be less than completely candid with us about the facts of your case.

If you want this Firm to represent you, you should also know at the outset that we require more than money from you. We also require your candor and your cooperation, *i.e.*, hard work, with us in representing you. This is the team concept we talked about earlier. The terms and conditions of our employment will be set forth in a written contract of employment which you will be required to read and have the opportunity to approve in every detail before our representation will commence. The contract means exactly what it says; and before you sign it you should read it very carefully. It is lengthy and contains a

lot of explanations so that you should have no questions, and need no explanations, concerning what it means. A sample copy of a typical contract is attached to this as Exhibit C. Be sure to read it carefully and be sure you understand all of it before you fill out the questionnaire. If you decide to hire the Firm, a personalized contract will be prepared for and sent to you. It may vary in part from the sample provided as the exhibit so as to reflect the personal particulars of your case. It *will* be the way the Firm will handle your case. You will have the opportunity to take the proposed contract to another attorney for advice and counsel. We do not want you to sign it until or unless you understand *all* of it and are completely satisfied with it.

The Firm requires the payment of a non-refundable retainer fee in every litigation case. The retainer is fully earned when paid, will not be refunded under any circumstances, and is required to enlist the services of this Firm and to prohibit us from representing your spouse against you. It is your minimum total fee for legal services, exclusive of expense reimbursements, regardless of the time or labor involved. This is true even if you reconcile your marriage with your spouse.

In addition, the Firm requires that litigation clients maintain a minimum escrow deposit amount to secure the payment of additional fees for services and the payment of reimbursement for expenses advanced. The minimum balance in this escrow account must be maintained throughout the handling of your case. The Firm will draw from this fund (or any similar fund if the Firm for some reason is handling more than one case for you at a time) the amount of money necessary to pay for your legal services and expenses as reflected on periodic itemized statements sent. As periodic statements are sent to you, they are paid from the minimum escrow funds on deposit in this or a similar escrow account. During the handling of your case, you should expect to maintain a balance on deposit to secure our continued representation not less than the minimum escrow deposit.

At the conclusion of your case the Firm may request the payment of an additional sum to make your fee reasonable in light of the entirety of our representation, including the results which we obtained for you. If there is such an additional charge, however, its amount will be the product of our mutual agreement. It is not the usual event that such a request is made. However, if this Firm obtains a remarkable result for you, it is proper that we be paid more than minimum fees.

The factors properly taken into consideration in determining a reasonable fee in divorce cases include thirteen (13) factors and are set out with approval in the **Texas Disciplinary Rules Of Professional Conduct, Rule 1.04** and the cases of *Martin v. Body*, 533 S.W.2d 461 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Casterline v. Burden*, 560 S.W.2d 499 (Tex. Civ. App.—Dallas 1977, no writ); and *Gill Savings Association v. International Supply Company, Inc.*, 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied). Some of the factors may (and probably will) not apply to your case. Others (“results obtained”) cannot possibly be known until the conclusion of the case. The thirteen (13) factors are: (1) The time and labor required; (2) The novelty and difficulty of the question; (3) The skill requisite to perform the legal

service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee in the locality; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or the circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The “undesirability” of the case; (11) The nature and length of the professional relationship with the client; (12) Awards in similar cases; and (13) The relative conditions and needs of the persons involved.

As stated, some of these factors, *i.e.*, “the results obtained,” cannot be known until the conclusion of a case. Therefore, the Firm bills monthly or less frequently, at its option, only for the time expended (based upon the minimum hourly rates applicable to a particular case) and reimbursable expenses incurred. Since *minimums* are in fact only what they say they are, *i.e.*, “*minimums*,” at the conclusion of each case the Firm reserves the right to request more than the minimum hourly rates and expense reimbursements specified in the contract, based upon the mutual assessment of *all* the factors made by the two of us at that time.

We will, under certain circumstances, require you to increase the amount of your minimum escrow account deposit to secure payments for additional services. In extraordinary situations, where the monthly statements cannot be paid on time (immediately upon receipt of statement), we will do our best to assist with a payment arrangement tailored to your financial situation; however, to some extent this will affect the sixth factor listed above.

In addition, as will be specified in the contract, you will also be required to pay for expenses.

The obligation to this Firm for your fees and costs is yours, *and yours alone*, even though the law permits you to request your attorneys’ fees and costs be paid or contributed to by your spouse and even though the Court may so order. Whether or not attorneys’ fees are charged against your former spouse depends upon several factors, including the relative incomes of the parties, the relative good faith shown by the parties, fault, and others. We will discuss this with you and will advise whether you should seek to have your attorneys’ fees paid by your spouse.

You may be sure that any fees and costs actually collected from your former spouse will be reimbursed to you or credited to your account, as the case may be, less the costs incurred, including additional attorneys’ fees, in connection with actually collecting money on any such judgment. In this regard, you should know that judgments may not be paid automatically, and usually are not in Family Law cases. Please keep in mind that your obligation for the fees and costs due the Firm must be borne by you, and you alone.

If it appears you are not financially able by yourself to afford the Firm’s legal services, and if for one or more reasons the Firm is willing to nevertheless accept your case, it is our practice to require that payment of your fees be guaranteed in writing by one

or more persons, usually family members. If this situation applies to your case, it may be wise to have a meeting at our offices early in the case with those who will furnish such guarantees.

You can rely upon us to be frank and candid with you when discussing finances and attorneys' fees. You are encouraged to do the same. This topic must be covered in your initial office conference. We will not be able to predict accurately the total amount of your fee. That will depend upon factors beyond our (and your) unilateral control. We cannot predict accurately the length of time it will take to complete your representation. That too will depend upon factors beyond our (and your) unilateral control. Nor can we pledge any particular result will be reached in your case.

Divorce Basic Information Questionnaire; Fee For Initial Consultation; Fee For Cancellation Without Notice.

It has been our intention in furnishing you this information to enlighten you about divorce in Texas. It is never easy. It is never fun. However, it has been uniformly our experience that the client who knows more about the process and the substantive law involved makes better choices and has a huge advantage over the client who is uninformed. It has also been our experience that the sooner this occurs the better things ultimately turn out for the client. That is why your assimilation of this information has been our first order of business. Hopefully it will work for your benefit.

At this point, if you think you may wish to hire The Law Offices Of Paul T. Fanning, P.C., to represent you in your divorce case, we ask you to fill out as much of the **Divorce Basic Information Questionnaire** as you can, then call for an appointment. This is the most economical way for you to give us the information we will need to begin our representation of you, including knowing what issues to explore in depth during your initial interview with your attorney. Please be accurate and as complete as time will allow prior to your appointment. When you finish, please bring your completed questionnaire to the Legal Assistant at your initial consultation.

As a public service, our Firm does not charge for the first 30 minutes of your initial consultation. If you have a legal problem, we want you to visit us without fear. When that time is up, you will be notified. If you decide to continue, you will be charged at the Firm's normal hourly rates (*currently \$300.00 per hour*) beyond the first 30 minutes. These charges are made in quarter hour increments, with each portion of a quarter hour charged as a full quarter hour.

If you make an appointment and later decide you do not wish to speak with an attorney, please notify the Firm as soon as possible so we will be able to re-allocate for someone or something else the time we have set aside to meet with you. This is simple courtesy. If you fail to appear at your initial appointment and have not given the Firm at least one hour's notice of your intention to break our appointment, you will be charged the sum of \$300.00 for the Firm's time.

Thank you very much.

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