# ALL ABOUT YOUR DIVORCE

A PRIMER ON TEXAS DIVORCE LAW AND PROCEDURE

**Provided for the use of clients of**


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# ALL ABOUT YOUR DIVORCE - A primer

## I. GENERAL INFORMATION

The following are basic rules regarding divorce. It is extremely important that you understand them completely, so please study them carefully. Keep this document to refer to throughout the course of your case.

Remember, however, that these are only some of the basic rules and are not substitutes for detailed discussions with your attorney and his staff. If you have any questions, do not hesitate to ask your attorney or the attorney's staff.

Caution: As will be discussed in detail below, this information sheet should not be shown to anyone who might hurt your position in your case.

## II. DECISION TO DIVORCE

At the outset, you should be absolutely sure that your marriage is beyond saving. If you are uncertain, you should encourage your spouse to join you in marriage counseling with a qualified counselor acceptable to both of you.

If you find you are experiencing emotional problems, please employ a professional counselor for your personal benefit. Your attorney is a specialist in law, not psychology or marriage counseling, and a counselor can help you with emotional problems much more effectively than your attorney.

Also, a new field of development is "divorce counseling", which consists of individual sessions or group sessions designed to assist persons through emotional trauma of a divorce. There are also such programs for children. Although somewhat new on the horizon, these programs seem to be getting very high marks. Many persons, approaching these programs with much skepticism, have reported them to be life savers and well worth the time and money.

Caution: Some people hope that filing for a divorce will shock their spouse into reality and, therefore, save the marriage. While filing for a divorce sometimes saves the marriage, this is a rarity. Usually, it causes the other spouse to become more hostile. Therefore, the filing of a divorce should be filed with the realization that if you are asking for a divorce, that is what you, in all probability will get.

If you are feeling overwhelmed, anxious, depressed, or stuck, GET PROFESSIONAL HELP. Therapy can provide a safe, supportive environment in which you can gain insight, learn problem solving skills and find solutions to dealing with the anger and pain of separation and divorce.

## III. ATTORNEY AND CLIENT

The following section discusses the relationship and interworkings between you and the attorney and his staff.

## A. ATTORNEY AND STAFF

The attorney and staff work as a team, each doing those tasks which they can do most efficiently. The legal assistant is billed out at a lower rate than the attorney; therefore, the legal assistant handles much of the time-consuming tasks involved in gathering information and day-to-day contact with the client. You will be dealing with both the attorney and the legal assistant, together and individually, throughout the relationship.

## B. YOUR ROLE AS CLIENT

This is your case, not your attorney's. There are a great number of things that you must do during your case.

### 1. Be Informed

You should be as informed and as involved in your case as possible. It is important that you read this document and understand all of its provisions and ask any questions that you might have at any time. You should read and understand any and all documents that are produced in your case.

### 2. Keep File

All correspondence and documents produced in your case will be forwarded to you. Please establish one file in which to keep all of your divorce-related documents. Please remember to bring that file with you each time that you visit your attorney's office.

### 3. Tell Your Attorney the Truth About All Facts

You should be totally honest with your attorney on every aspect of your case and give all information about anything of importance to your case. This includes not only information helpful to your case but, equally important, all facts which might be harmful to your case. Chances are your spouse's attorney is going to find out about them anyway, so please do not let your attorney be the last to know. These "bad facts" are usually not as harmful as you may think.

In this respect, you do need to be made aware that, at any time that you are placed under oath at a deposition or a trial, you will be required to tell the truth, the whole truth, and nothing but the truth. If you do not, you subject yourself to criminal perjury charges. Likewise, Texas law requires your attorney to see to it that you tell the truth; therefore, when you are under oath, your attorney cannot and will not condone any testimony by you which is less than the whole truth.

### 4. Information Gathering

Facts are the heart of your lawsuit. You will be given information sheets to fill out and requested to gather information and documents. This will be time-consuming and tedious work, but it is extremely important. It must be done. You, the client, have a much greater knowledge of and access to this factual information than your attorney. Further, as you research and piece together this information, you begin to develop the necessary understanding of your case. Also, you can do this work at no charge to yourself, whereas the lawyer or staff, if required to do it, will be billing you for their time and labor. For all of these reasons, you should do as much of the information gathering, under the direction of your attorney and staff, as possible.

### 5. **Review Spouse's Documents**

Your attorney will provide you with copies of all documents supplied by your spouse's attorney. It is very important that you review these documents immediately, familiarize yourself with them completely, and ask any questions or detect anything important or unusual in the documents (e.g., checks written for unusually high amounts or to unfamiliar persons or sources).

### 6. **Decision Making**

No final settlement of your case will be made without your approval and consent. Other major decisions will also be made with your approval and consent (e.g., to demand a jury or not, to seek child custody or not, etc.). However, you will need to allow your attorney the authority to make other decisions which bear on your case, but which involve professional judgement or courtesy. For example, your attorney should decide how to phrase allegations contained in your pleadings and when to file the pleading. On occasion, your spouse's attorney may ask for a continuance or postponement of a hearing on a motion, deposition, etc. Resistance to a legitimate request of this nature is often not in your best interest. For example, your attorney may know that your side will need to make a similar request in the future. Your attorney should be the decision maker for these and similar matters.

## C. **ATTORNEY-CLIENT RELATIONSHIP**

You and your attorney and his staff are in an attorney-client relationship, which is recognized by law to be a very special relationship. Your attorney and staff owe one hundred percent of the allegiance to you and your case and owe no allegiance to your spouse whatsoever. Your attorney is required to represent you zealously, but within the bounds of the law.

Do not be mislead if you find your attorney dealing with your spouse's attorney on a friendly basis. Professional and common courtesy dictate this. Good lawyers are perfectly capable of zealously defending and promoting their clients' best interest, without becoming personal enemies. Attorneys are in fact trained to be advocates for the children without becoming emotionally involved. One of the very reasons you hire a lawyer is to have someone on your behalf who not only has legal expertise, but who will not become emotionally involved. You want your lawyer to use his head, not his heart. Indeed, you should expect your lawyer to be objective and to remain unemotional on your behalf, because it will often be hard for you to do so.

## D. **ATTORNEY-CLIENT PRIVILEGE**

By virtue of the attorney-client relationship, there automatically arises what is known as the "attorney-client privilege." This privilege prohibits from disclosure any information, whether communicated orally or in writing, between the attorney and the client, so long as the communication was intended to be confidential. For example, this very information sheet you are reading is protected from disclosure to your spouse's attorney under the attorney-client privilege. Such communications also include all correspondence or documents from your attorney/staff to you, and vice versa (e.g., information sheets you prepare for us), as well as all telephone conversations and in-person conferences between you and your attorney and staff.

Caution: The attorney-client privilege exists only between you and your attorney and his immediate, in-house staff. The attorney-client privilege can be waived if the otherwise confidential information is disclosed to persons other than your attorney and his immediate staff.

For example, if you tell your spouse something that your attorney has told you, then that information will lose its privilege from disclosure and will have to be disclosed by you in court. Also, the privilege does not exist between you and other persons who may be involved in your case to assist you (e.g., CPAs, appraisers, etc.). Therefore, be very careful what you say to these persons, even if they are "on your side", for anything you do or say may be required to be disclosed to your spouse's attorney.

### E. CONTRACT

You should read and understand the fee contract, agreement for legal services, and/or the engagement letter supplied to you by your attorney. If you do not understand the financial obligations required of you under the contract, you should immediately discuss those questions with your attorney. You should not sign the contract unless you understand it.

### F. OTHER PROFESSIONALS

Besides your attorney and his immediate, in-house staff, other outside professionals are sometimes hired to assist in divorce cases. It may be necessary to engage an appraiser, a tax expert, CPA and other such professionals. Your attorney will discuss the necessity of these experts with you and hire only those that are necessary in your case and only with your consent. Caution: Again, even though these persons are hired on your behalf, information provided to them is not protected from disclosure by the attorney-client privilege (as discussed above).

## IV. ISSUES IN DIVORCE

This section covers the basic issues involved in a typical divorce case. If you have no children, you can skip the sections below regarding children. Otherwise, you should read each of these sections very carefully and go to this section first throughout your case if you have any questions regarding these issues.

### A. GROUNDS FOR DIVORCE

A divorce may be granted on one or more "fault" or "no-fault" grounds expressly set out in the Texas Family Code. Most divorces are founded on the no-fault ground of "insupportability" (i.e. incompatibility) , which can be granted to either spouse if that spouse feels that the marriage has become insupportable because of discord or conflict in personalities which makes any reasonable expectation of reconciliation impossible.

"Fault" grounds for divorce include adultery or cruel treatment. In that a court may consider "fault" in the breakup of a marriage as a factor in deciding how to divide the property and debts, a party may also choose to plead a "fault" ground for divorce.

### B. DOMICILE AND RESIDENCE

At least one spouse must have been "domiciled" in Texas for six months, and a "resident" of the county where the suit is filed for ninety days, before the petition may be filed. The terms "domicile" and "residence" have different legal meanings, which can be explained to you if need be.

### C. PROPERTY AND DEBTS

This subsection is an elementary discussion of some basic rules underlying Texas marital property law.

## 1. Types of Property

In the context of divorce law in Texas, all property, both real and personal, is characterized as two different types of property: (1) "separate property" and (2) "community property".

### a. Separate Property

"Separate property" is property either (1) owned or acquired by a spouse before marriage or (2) acquired by a spouse during marriage by either (a) gift or (b) inheritance. It is the date of acquisition and the source of the property that controls, not how it is eventually paid for. For example, if one spouse owned a house or a car before marriage, it will be characterized at the time of divorce as that spouse's separate property, even if it was paid off in whole or in part during marriage.

A gift includes, for example, any Christmas or birthday gifts from one spouse to another during marriage (even if purchased with community funds). If a gift or inheritance goes to both spouses (e.g., wedding gifts), then each spouse has an undivided fifty percent interest in that one piece of separate property.

Separate property can change forms without changing its character as separate property (this is often referred to as a "mutation"). For example, if wife has $5,000 in cash which is her separate property and uses that $5,000 cash alone to purchase outright a $5,000 boat, then the boat would likewise be her separate property.

A court has no authority to take a spouse's separate property from him or her at the time of divorce. Caution: Any property owned by either spouse at the time of divorce is, by law, presumed to be "community property" unless otherwise proved to be separate property (see discussion of "community property presumption" below); therefore, a spouse must (1) specifically plead and (2) prove by clear and convincing evidence each item of real or personal property claimed to be his separate property.

### b. Community Property

"Community property" is any property acquired by either or both spouses during marriage by other than gift or inheritance. This includes virtually everything purchased during marriage. It is important to remember that a marriage legally endures even after your separation (whether before or after the divorce petition has been filed) will be characterized as community property. This is true even if the property is not physically received until after marriage. For example, if the day before the divorce is granted a wife contacts to purchase a new home (with closing set off for one month later), or husband enters into a partnership agreement, this will be characterized as community property.

All property which exists in whole or in part in the name of either spouse at the time of divorce is presumed by law to be community property. This is referred to as the "community property presumption". Therefore, if you have any separate property, or if you are in possession of property which does not belong to either you or your spouse, you must point this out to your attorney.

In Texas, earnings from separate property are community property. For example, if husband has $5,000 in a bank account at the date of marriage, the $5,000 remains his separate property, but all interest earned on the $5,000 becomes community property.

Unlike separate property, a court has the authority to divide community property in any manner that it deems to be "just and right" (as discussed in more detail below).

### c. **Out-of-State Real Property**

Real estate located outside of Texas, which was purchased while either or both spouses were domiciled outside of Texas, is treated somewhat differently than "community property" or "separate property". If such foreign realty exists, please let your attorney know.

### d. **Mixed Title to Property**

Title to property can be both separate property and community property in character. For example, suppose a car is bought during marriage for a total of $10,000 in cash; $6,000 of that was from husband's separate property account which he had prior to marriage, while $4,000 of it was from a bank account established during marriage and containing the community property earnings of the parties. In such event, title to the automobile would be sixty percent husband's separate property and forty percent community property.

## 2. **Debts and Liabilities: Taxes**

Debts and liabilities incurred before marriage, if still in existence at the time of divorce, shall remain the debt of liability of the party who incurred it. Debts incurred during marriage will be divided by the court between the parties at the time of divorce. One spouse may be required to assume a debt incurred solely by another spouse during marriage. Although not an absolute rule, the general rule of thumb is that, following the filing of the divorce petition, courts are usually going to award a debt to the spouse who incurred the debt during separation. Decisions will also need be made regarding contingent liabilities, such as past income tax liabilities which may arise in the future if the parties are audited, as well as tax liabilities for the year of divorce.

Caution: Although a court will order each spouse to be solely responsible for certain debts and to pay them immediately when due, this is binding only as between the parties. This division, however, is not binding upon the third party creditors who are not parties to the lawsuit. This is unavoidable unless every creditor (e.g., Mastercard, Visa, etc.) is actually made a party to your suit and, even then, the court would probably make one party primarily liable and the other party secondarily liable. The only protection is by way of indemnification, that is, if Spouse A is obligated to pay a bill, but does not do so and the creditor goes after Spouse B, Spouse B has the right to sue Spouse A to recoup those funds. Sure this is not a very good solution, it is the only practical one available. While a lien can be place against one spouse's property to assure the payment by that spouse of court-ordered debts, most parties and judges will not agree to so indefinitely tie up a person's property in this respect.

## 3. **Reimbursement**

Pursuant to the rules above, there may at the time of divorce exist three different "estates": (1) husband's separate property estate; (2) wife's separate property estate; and (3) the community estate. Each of these estates may have a "claim for reimbursement" back against the other estate or estates. For example, if Husband owned a car, as well as a note on that car, before marriage, then at the time of the divorce the car will belong to husband's separate estate, but the community estate would have a right to ask a court to order the husband (i.e., his separate estate) to "reimburse" the community estate for community funds used to pay off his separate property

car. This is one very simple example of the doctrine of "reimbursement". Again, reimbursement can be by, against, and between any of the three estates.

Since reimbursement is an "equitable" doctrine, a court is not required to order reimbursement, but may choose to do so if the court considers it equitable under all of the circumstances of the case. It should be noted: however, that to prove reimbursement, it often requires a great deal of time, accounting, "tracing" of funds (discussed below) and expense to prove the claim. Whether reimbursement should be sought is a decision you and your attorney will make after weighing all of the factors.

### 4. **Economic Contribution**

A claim for *Economic Contribution* under Chapter 3, entitled *Property Rights and Liabilities*, of the Texas Family Code, is a claim of a contributing marital estate against a benefitted marital estate. This statute was enacted in 1999, and has been amended several times since. The purpose of the new statute was to address the inequities in Texas case law that did not fairly recognize the claims of one marital estate for making an economic contribution to another marital estate. This is a very complex are of law, and the application thereof should be discussed with an experienced divorce attorney

### 5. **Tracing**

To determine title to property as being separate property and/or community property, and to determine rights to reimbursement between the different marital estates, an accounting method referred to as "tracing" is often employed in divorce cases. For example, one bank account may contain funds which consist of both separate property and community property. Or, community property funds may be used to pay off a balance of a separate property debt. Tracing is employed to determine the title to property or the amount of reimbursement.

Doctrine of commingling: If funds in an account contain both separate property funds and community property funds and these funds have been so commingled as to defy a clear divorce-time segregation by means of tracing, then the entire account will be characterized as community property (because of the "community property presumption" discussion above). This is referred to as the doctrine of "commingling".

### 6. **Division of Property and Debts**

The parties, by settlement or a court after trial, will divide all existing property and debts. While the parties may by agreement make any type of division that they want (e.g., give to husband certain of wife's separate property, agree to alimony, etc.), a court during litigation does not have such flexibility but is bound by the rules of law set out above with reference to property and debts. Also, these rules serve as the primary basis to guide the parties and their attorneys in reaching a settlement (see discussion regarding settlements below).

Basically, a court may give each party his separate property and separate debts, then may divide the community property and debts in a manner that the court deems to be "just and right". This may be an approximate 50/50 division of the net community estate, or a division which gives one of the spouses a disproportionately larger share of the community property (e.g., 70% to Spouse A, 30% to Spouse B). Contrary to popular belief, the courts are not required to divide property 50/50.

The division of property refers to the net community estate (i.e., all community property less all community debts equals net community estate). Obviously, this does not require an equal

division in kind of all property and debts. For example, suppose that the community estate consists of one home (with a mortgage), three cars (two with mortgages), two retirement accounts, miscellaneous personal property (e.g., furniture), and five bank accounts. All together, this amounts to $100,000 in assets, and $75,000 in debts, for a net community estate of $25,000. The court may give husband 70% of all of the assets ($70,000) and 80% of all of the debts (-$60,000) for a net award to husband of $10,000 (which amounts to only 40% of the total net community estate). Simultaneously, the wife would receive only 30% of the assets ($30,000), but only 20% of the debts (-$15,000), for a net to wife of $15,000 (which equals 60% of the total net community estate). Again, this is only a very simple example. Courts may enter almost any kind of order to effectuate what the court finds to be a just and right division, such as requiring the parties to sell the marital home and divide the proceeds in a certain manner, award certain community property to be held by both parties (and let them decide later to sell it or not to sell it), etc.

As a general rule of thumb, in order to reach a "just and right" division of the community estate, the court generally begins by presuming that a 50/50 division would be equitable, then varies from there based upon a number of factors, especially the length of marriage, a disparity in the earning capacity of the parties caused by the marriage (e.g., husband worked for 25 years while wife did not), whether there are minor or adult children being taken care of by a spouse, "fault" in the breakup of the marriage, etc. As discussed in some detail below, the very nature of divorce cases makes it difficult to predict in advance with any degree of certainty exactly how a given court will divide this property in a given case on a given day.

## D. SPOUSAL MAINTENANCE (ALIMONY)

"Alimony" is spousal support, that is, funds paid by one spouse to and for the support of the other spouse; Texas does not have alimony in the pure sense, however the parties may contract to provide alimony payable from one spouse to the other.

“Spousal Maintenance” is a term used in the Texas Family Code to provide certain forms of post divorce support; this is not alimony in the traditional sense. Texas enacted a new *Spousal Maintenance Statute* effective only for actions filed after September 1, 1995, which only applies if the parties were married over 10 years **or** if the spouse from whom maintenance is sought was convicted of, or received deferred adjudication probation for a criminal offense that constitutes family violence within two years before the divorce is filed or which occurs during the pendency of the divorce suit. This spousal maintenance is for a maximum of three years unless the former spouse is disabled, in which case payments may be extended indefinitely. The maximum maintenance payable is 20% of the payor's average gross monthly income, or $2500.00 whichever is less. The maintenance award is subject to reduction by filing an action to modify the support order. Maintenance can also be terminated upon remarriage or conjugal cohabitation by the former spouse receiving child support. Maintenance payments may be enforced by contempt and the court may render judgments for amounts unpaid. Maintenance is not authorized between unmarried cohabitants under any circumstances, (i.e. common law marriages do not count).

> Note: This area of law is complex and also relatively new in Texas, and you and your attorney must completely discuss whether or not the factors and eligibility requirements of court ordered spousal maintenance are available to either spouse in your divorce case. In most cases, where the spouse can meet his/her minimum reasonable needs through employment there is minimal hope of court ordered maintenance.

**TEMPORARY SPOUSAL MAINTENANCE (TEMPORARY ALIMONY)**

Texas courts do have the authority to order temporary alimony during the pendency of the divorce (from the day of filing the petition until the day the divorce is granted).

**AGREED SPOUSAL MAINTENANCE (CONTRACTUAL ALIMONY)**

Also, the parties may, by agreement (i.e., contact), provide for alimony to be paid after the final decree of divorce is entered. The party paying alimony may deduct these payments from this income to gain a tax benefit, while the alimony recipient must declare these payments as income. Contractual alimony is very often difficult to enforce in future years, and therefore is usually disfavored in most divorce actions.

## E. CHILDREN

If there are minor children of the parties, all divorce decrees and settlements will contain orders governing the custody, possession and support of the children after the divorce. A "child" is any minor who was born or adopted by the parties. Once a child turns eighteen, the court's jurisdiction over the adult child ends (with several exceptions regarding child support, which are discussed below).

### 1. Conservatorship

The Texas Family Code speaks in terms of post-divorce "conservatorship" of children, meaning the legal status between the children and their parents after the divorce as it relates to controlling the children's lives, having possession of and access to the children, and supporting the children.

The Code expressly sets out a non-exclusive list of the rights, privileges, duties and powers of parents. In a nutshell, these rights and duties may be categorized into three areas: (1) the right to make major decisions regarding the children; (2) the right to have physical possession of the children; and (3) the duty to financially support the children. Conservatorship orders divide these various rights and duties among the parents after the divorce.

#### a. Conservators

The Code refers to two types of conservators: (1) the managing conservator(s) and (2) the possessory conservator. These terms are confusing, because the "managing" conservator is, generally speaking, the primary custodian of the children, while the "possessory" conservator is not the primary custodian of the children (the "possessory conservator" merely has some "possessory" rights to the children, e.g., visitation).

##### 1. Managing Conservator(s)

A "managing conservator" is generally given all of the rights, privileges, duties and powers of a parent, to the exclusion of all others, including the other parent, except as otherwise ordered by the court. In short, the managing conservator is the primary custodian of the children, and (1) has the right to make all of most of the major decisions governing the children's lives, (2) has the primary physical possession of the children (custody) and (3) has the right to receive child support on behalf of the children. As discussed below, there are now two types of managing conservators, "sole managing conservatorship" and "joint managing conservatorship".

### 2. **Possessory Conservator**

A "possessory conservator" is generally given (1) only a handful of rights and duties to make decisions for the children which can be exercised only when the children are actually in the physical session of the possessory conservator, (2) the right to certain limited times of possession of the children (often referred to "visitation rights"), and (3) the duty to pay the managing conservator child support for the benefit of the children.

## b. **Types of Managing Conservatorship**

_____A managing conservatorship can be either a "sole managing conservator" (SMC) or a "joint managing conservatorship" (JMC) [Unless very extreme circumstances exist, a parent will be appointed the managing conservator of the children. A non-parental managing conservator(e.g., grandparent) can only be appointed if the appointment of a parent would create an extreme danger to the child, or unless the parents agree.]

### 1. **Sole Managing Conservatorship**

A "sole managing conservatorship" exists when one parent alone is appointed the managing conservator of the child and given virtually all of the rights, privileges, duties and powers of a parent to the exclusion of the other parent. In such event, the other parent will be the "possessory conservator." There used to be an advantage to being SMC because it was more difficult to modify, but the law has changed, and there is no specific advantage between SMC and JMC in relation to future modifications

### 2. **Joint Managing Conservatorship**

There is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. (eff. Sept. 1, 1995). A court may order that both parties are to be "joint managing conservators" of the children. This is true, whether or not the parties agree to the joint appointment. Thus, both parents are, jointly, managing conservators, and neither is a possessory conservator. Joint managing conservatorship is often agreed to by the parties. While a court is not required to appoint joint managing conservatorship, even when the parties request it, courts usually do so if both parties request it.

It should be noted, however, that joint managing conservatorships vary. A joint managing conservatorship order may be either a "pure" or "real" joint managing conservator, or a joint managing conservatorship in name only, or any combination thereof. A "pure" (real) joint managing conservatorship authorizes both parents to equally exercise jointly all of the rights, privileges, duties and powers of a parent. On the other hand, under a joint managing conservatorship which exists in name only, while both parents are given the title of joint managing conservator, one parent is in reality, by the detailed terms of the joint managing conservatorship order, given all of the rights and duties of a sole managing conservator, while the other "joint managing conservator" is in reality treated like a possessory conservator. There are advantages and disadvantages to going either route, which will be discussed with you by your attorney.

The Court will usually appoint one parent as the sole parent to furnish the primary and hence primary possession or the child. Joint Conservatorship does not mean that each parent will have equal or nearly equal periods of physical possession.

### c. **Possession of and Access to Child (e.g., Visitation)**

The managing conservator and the possessory conservator will be given certain exact times of possession of and access to the children. Usually, one parent (e.g., sole managing conservator) is considered to be the primary custodian of the child and has the child at all times except for those times of possession given to the other parent, while the other parent (e.g., possessory conservator) is given certain court-ordered times of possession of and access to the children (sometimes referred to as "visitation rights").

The legislature has by statue adopted what is referred to as a "Standard Possession Order". Basically, the Standard Possession Order gives the non-custodial parent the right to possession of the children on every first, third and fifth weekend (Friday through Sunday), every Thursday evening, with the option of asking for Thursday and Sunday overnights, and one-half of all holidays. Additionally, the possession order grants the non-pimary parent either 30 or 42 days in the summer. Excluding the time that the children are asleep or in school, the schedule gives the non-custodial parent about 40% of the quality time with the children. For many reasons, judges rarely vary from this Standard Possession Order and only do so under unusual circumstances (e.g., child is under three years of age). There is a presumption that the Standard Possession schedule is in the best interest of the child over three years of age. Under three years of age, the parties or the court will decide what the possession schedule will be. The obligations as to pickup and delivery of the child and other conditions of possession should be thoroughly discussed with your lawyer.

## 2. **Child Support**

The non-custodial parent (e.g., possessory conservator), who has less physical possession of the children, is generally required to pay financial child support to the primary custodial parent for the benefit of the children. Although this can take many forms, child support usually consists of periodic (e.g., monthly) payments to the custodial parent.

The legislature by statute has adopted *Child Support Guidelines*. Basically, the amount of child support under the Guidelines will be based upon percentages (based on the number of children) of the support payor's "net resources" (as defined in the Guidelines). For example, the guidelines require the payor to pay 20% of his "net resources" for one child, 25% for two children, etc, in addition to providing or paying for the health insurance for the children. Most courts generally follow the guidelines in the usual case, absent unusual circumstances such as children who have special needs. If a payor has more than one family, the child support for each child is reduced. The child support guidelines currently cap out at $7,500.00 of net resources per month. For obligors who earn more than $7,500.00 “net” per month, potential child support should be carefully discussed with the attorney.

Also, the Family Code requires that, all "earnings" shall be including in the computations for child support and whether withholding orders apply to persons or entities who owe the obligor money.

Texas Family Section 101.011 provides that "Earnings" is defined as "any payment to or due an individual, regardless of source and how denominated. The term includes a periodic or lump sum payment for:

(1) wages, salary, compensation received as an independent contractor, overtime pay, severance pay, commission, bonus, and interest income;

(2) payments made under a pension, an annuity, worker's compensation, and a disability or retirement program; and

(3) unemployment benefits. Therefore, if the support payor is a salaried employee, or an independent contractor, the payor's child support (or a portion thereof) can be withheld from his wages by his employer or any other person or entity providing payments or income to the payor, and will be paid directly to the custodial parent. Although the transmittal of

the withholding order can be waived by your spouse, it rarely is by the court, and if the payor becomes over 30 days delinquent, then the wage withholding can become automatic upon request.

Child support is usually ordered to be paid through the Texas Child Support Disbursement Unit, located in San Antonio, Texas. This agency is charged with recording child support payments, and transferring the payments to the parent entitled to receive them. The Disbursement unit then keeps a record of all payments received and forwards the payment to the child support recipient. A major reason this is done is that, if the support obligor fails to pay support as ordered, the payment registry is presumed to be correct, and will either show timely and full payment of child support obligations, or will show delinquencies.

Other "child support" is also required in the form of a requirement to provide and pay for major medical health insurance for the children, orders requiring the payment of non-covered medical expenses, etc. The Court can order that the employer deal directly with the parent with primary possession utilizing a court order entitled *Qualified Medical Support Order.*

Child support is due until the child turns eighteen or, thereafter, until the end of the school year in which the child graduates from high school or other qualified schooling. IMPORTANT: If a child is mentally or physically impaired to the extent of requiring continuous care, child support may be ordered to be paid indefinitely past the child's 18th birthday. If this is the case with any of your children, be sure to inform your attorney.

### 3. **Tax Considerations**

Generally, the pursuant to IRS regulations, the custodial parent is entitled to the tax exemption for the child, unless otherwise agreed to by the parties. Also, certain child care deductions are available. Discuss these with your attorney and/or tax advisor. A Texas District Family Court cannot allocate between the parties the federal tax dependency exemption for the child, however the parties can between themselves designate via a IRS approved form, which parent will receive the exemption for a child.

## F. **OTHER ISSUES**

There are also a number of other issues which may or may not directly relate to the dissolution of your marriage, but which are available to you at the time of your divorce and which, as a general rule, must be raised at the time of divorce, or they will be waived. These issues do not arise in the typical case, but they may be applicable to yours. If so, you should discuss them with your attorney.

### 1. **Causes of Action Against Spouse**

Besides the typical causes of action raised in a divorce, one spouse may have a cause of action back against the other spouse for acts or omissions which may directly relate to the dissolution of the marriage. These include, for example, a civil cause of action for assault (e.g., one spouse hits the other), false imprisonment(e.g., one spouse locks the other up in the basement), invasion of privacy (e.g., one spouse installs a telephone tap on the phone of the other spouse), one spouse intentionally defrauds the other of their separate property, one spouse takes the other's separate property and gives it to another person, etc. There also may be a cause of action for mental anguish against a spouse. If anything like these examples seem to apply to your case, discuss it with your attorney.

### 2. **Causes of Action Against Third Persons**

There are also certain causes of action which one spouse may have against third persons which may be joined with the divorce. These include, for example, a request that a third party transfer back to one spouse property that was wrongfully given to that third person by the other spouse in an attempt to defraud the spouse, a suit against a trustee of a trust being held for the benefit of a spouse, etc. If any of these or similar matters exist in your case, let your attorney know.

Note: The action known as "alienation of affection" which allowed a spouse to sue the lover of the other spouse, has been abolished in Texas.

## G. **ATTORNEY'S FEES, COSTS & EXPENSES**

Attorney's fees, costs and expenses related to litigation are treated as any other debt or liability of the parties and will be divided by the court in a manner that the court deems "just and right." The court can sometimes order one spouse to pay the other spouse's fees, costs and expenses either in whole, or in part. An order to pay these fees and expenses is within the discretion of the judge. There is no automatic right to the award of these fees and expenses.

Caution: One of the reasons a judge might require a spouse to pay the fees of the other is if that spouse or his/her lawyer has not been cooperative and has not followed the law and the rules of procedure with reference to the divorce proceeding.

# V. **STEPS IN DIVORCE**

## A. **GENERALLY**

While these proceedings may be confusing and strange to you, there are six typical phases which the average divorce case may go through:

1st - Initiating the divorce
2nd - Temporary orders
3rd - Discovery of evidence
4th - Settlement negotiations / Mediation
5th - Trial(if no settlement)
6th - After trial/settlement

Although each divorce case takes on its own unique personality, these basic steps occur in one form or another in most divorce cases.

Note: The law prohibits a divorce decree from being entered until at least 60 days have elapsed from the date the divorce petition was filed. This "cooling off" period is, of course, just a minimum period of time. Most cases take much longer to complete.

## B. **INITIATING THE DIVORCE**

A divorce is initiated by the filing of a divorce petition by one of the spouses (the "petitioner"), the service of the petition on the other spouse (the "respondent" and the filing of a written response (and usually a counter-petition) by the respondent. The manner in which a divorce is initiated can set the tone for the rest of the divorce case; therefore, how it is initiated must be carefully considered.

### 1. **Emergencies**

Sometimes emergencies may exist requiring immediate action. For example, one spouse may be destroying property, running up unusual debts, hiding or threatening to run off with the children, abusing or threatening the other spouse or the children, etc. In these cases, a Temporary Restraining Order (discussed in detail below) can be issued.

### 2. **Petition for Divorce**

The first legal step taken by the petitioner's attorney is the drafting of a Petition for Divorce. It sets out the basic information required by the Texas Family Code, states the grounds for and requests a divorce, requests a division of community property and a recognition of the petitioner's separate property, and requests orders concerning the children, etc. These are standard provisions. If an emergency exists, the petition may contain a request for a Temporary Restraining Order (discussed in detail below), and it may request the court to make temporary orders (discussed below).

A petition can be amended time and again when necessary, provided it is not later than seven days prior to trial or some other deadline imposed by the court. Often the original petition is very mild, without containing any inflammatory allegation, like adultery. There are several reasons for this. First, it helps start the process on a less combative basis, which may help to keep the costs of the litigation from escalating. Second, your attorney may not want to reveal all of your legal positions at the beginning, unless to do so might promote settlement or otherwise benefit you.

The petition will be filed with the court clerk (for which a filing fee is charged), and the clerk will assign your case a cause number. The clerk keeps a file and docket sheet on your case.

### 3. **Service of Petition**

The respondent must receive a copy of the petition. This may be done in one of two ways. The petition may be formally served on the respondent by a Sheriff, Constable or private process server. Or, the petition may be informally given or mailed to the respondent or his attorney. Formal service is required if a Temporary Restraining Order is requested and it may be preferred in many situations; however, it also can be embarrassing to the respondent to be served at his place of business, and this in turn starts the case off on a bad footing. While informal service may be less antagonistic, it has its drawbacks. A respondent is required to file a formal "response" (discussed below) within a certain time, but only if formally served. Your attorney will discuss these options with you before the filing of the petition.

### 4. **Response & Counter-Petition**

If formally served, the respondent must file a written response to the petition within a stated time from the date of service, usually 20 days. This response is usually called and "answer" in which the respondent "denies all of the allegations in the original petition." This is a standard form which serves to prevent the petitioner from taking a default judgement against the respondent. The respondent may file a counter-petition for divorce against the petitioner. It is usually delivered to the petitioner's attorney, without formal service on the petitioner.

## C. TEMPORARY ORDERS

Between the time of the filing of the petition and the granting of the divorce, the parties usually enter into temporary orders, either by agreement or by court order, to govern the parties, their property, debts and children pending the granting of the final divorce.

1. **Standing Orders** Many Family Courts have "Standing Orders", which are enacted to be effective in all cases filed. The effect of these types of orders is to put into place restrictions on the conduct of parties related to children and property in family law cases.

The Denton County District Courts have enacted, effective for all cases filed on or after February 2, 2007, a standing order entitled: "DENTON COUNTY STANDING ORDER REGARDING CHILDREN PROPERTY AND CONDUCT OF THE PARTIES." These standing orders will serve to replace may TRO's that your attorney in the past may have requested. The Denton standing order applies against both the petitioner and the respondent. Therefore, if you desire to do some act prohibited by the standing order, you should consider doing the act prior to the filing of the petition for relief. Prior to the suit being filed, planning must be undertaken to ensure that all actions necessary to protect your property, your child(ren) and your legal position are done. This is a very important issue, and needs to be fully explored with your attorney.

1. **Temporary Restraining Order (TRO)**

If emergencies exist requiring immediate action to protect a spouse, a child, or any property, a Temporary Restraining Order (TRO) can be signed by the judge and served on the respondent along with the petition. It immediately restrains the respondent from the acts described in the order. If you are served with a TRO, you should be certain to obey all of its terms, failure to do so is punishable by contempt of court. The TRO expires 14 days after it is issued; therefore, a hearing on temporary orders must be held within the 14-day period, so that temporary orders of a more indefinite duration can be entered. Do not confuse TRO's with Protective Orders, which are discussed below.

2. **Temporary Orders**

A temporary order may be entered by agreement of the parties or by the court after a temporary hearing. If by agreement, the parties save the expense of a pre-trial hearing. A temporary order may be entered whether or not a TRO has been issued. Temporary orders normally stay in effect until the final decree is granted.

The temporary order may provide for an injunction against the parties hiding, wasting or destroying property, prohibiting them from incurring any unusual debts, and contain orders for temporary custody and support of children. The court may also order one spouse to pay temporary alimony to the other spouse. You should be prepared to provide your attorney with details of your monthly living expenses as well as payments on debts. This information is essential for determining amount of temporary support to be paid or received. The temporary order usually requires the parties to produce documents and/or to file a formal inventory (discussed below).

## D. DISCOVERY OF EVIDENCE

The facts regarding the property, debts, the parties and the children form the foundation of any divorce case. Therefore, information gathering is one of the most important and time consuming aspects of the divorce. You have more knowledge of or access to the necessary information and documents than does your attorney. The more you can gather, the less time

must be spent on this aspect of your case by the attorney. The more you are involved in this process, the more you learn about the facts necessary to make appropriate decisions regarding your own case. For all of these reasons, you need to be as personally involved as possible in gathering information.

### 1. Information Sheets

You will be given detailed information sheets to be completed. While tedious and time-consuming, it is extremely important for you to complete these with as much detail as possible.

### 2. Gathering Documents

You may be requested to gather and bring to your attorney many different documents, such as real estate deeds, bank statements, insurance policies, etc. If you do not have these in your possession, try to get them from other sources (except your spouse). If you cannot, notify your attorney as soon as possible.

### 3. Inventory of property and debt

In most cases, the parties are required to prepare and file an "*Inventory and Appraisement,*" which is a listing of all community and separate real and personal property as well as liabilities of the parties. Your attorney will assist you with the form of the Inventory. You will be asked to state the value of the property and the exact amount of any liability. You are required to sign the inventory, under oath.

This is a very important part of your case. You must be complete and truthful in your Inventory. If your case is not settled and a trial becomes necessary, the judge uses the information contained in the Inventory to assist in dividing the property. If you swear to one thing in your Inventory and later, at the trial, attempt to take a different position, your testimony will be suspect.

### 4. Appraisers

Often it is necessary to hire appraisers to help establish the value of property, including real estate, retirement benefits, businesses, or other assets. Your attorney will advise you if this is necessary in your case.

### 5. Formal Discovery

Under Texas law, parties to any suit, including divorce, are allowed to discover a great deal of information from the other party by means of formal discovery devices. These include oral deposition of a party or witness, interrogatories (written questions which are answered in writing and under oath), requests for production of documents and requests for admissions, and requests for disclosure. One or more of these may be used in your case. Your attorney will advise you with respect to these matters.

Caution: Most forms of formal discovery require strict compliance deadlines, usually 30 days from the day they are served on your attorney. There are harsh sanctions for failure to comply, including payment of fines and/or attorney's fees. Further, failure to supplement your answers 30 days prior to trial may result in undesirable consequences. For example, failure to list a witness in answer to an interrogatory will mean that person is excluded from testifying at the time of trial.

## E. **SETTLEMENT**

After all discovery is concluded, the parties will enter into settlement negotiations. Rest assured that no settlement offer will be made or accepted by your attorney until you have fully understood and approved the proposal. Usually several offers and counter-offers are made back and forth between the parties before a settlement is hammered out.

Probably over 90% of all cases are settled out of court, although this often happens just prior to trial, by informal negotiations, or formal mediation, or at the eve of trial (e.g., "on the courthouse steps") or, sometimes, in the middle of trial. Although settlements may appear to be possible, if not probable, your attorney cannot ignore trial preparations if settlement negotiations are not successful and the trial date is approaching.

One reason parties settle is to avoid the expense of trial. Also, neither party nor their attorneys can predict in advance exactly how a particular judge on a particular day is going to rule in any given case.

The key to any settlement is compromise. While no settlement can be forced on you or your spouse, both you and your spouse need to understand that compromise and a reasonable attitude of "give and take" is necessary if there is going to be any reasonable chance of a meaningful settlement. Neither party ever gets all that they want. **Important:** To effectively negotiate a settlement, you must try to look at these settlement negotiations from your spouse's point of view; a good negotiator always attempts to put himself in the shoes of the opponent and try to determine what issues are most important to the opponent, where the opponent will draw the line on what issues, etc.

As can be expected, attorneys generally advise clients with regard to settlement based on a number of factors, but the major factor is a determination by the attorney of what a court would probably do if the case went to trial. Any settlement offers which are unreasonably out of line with what a court would probably do are rarely accepted except under the most extreme and unusual circumstances.

Settlement may be achieved by way of a process known as mediation. The parties may agree to seek mediation or they may be ordered to mediation by the court. A neutral third party, usually an experienced lawyer or a retired judge, is selected to serve as the mediator. The fees for the mediator are usually shared by the parties. Both spouses and their attorneys appear before the mediator in efforts to settle the case.

The mediator is not an arbitrator. That is, he has no power to "force" a settlement or otherwise adjudicate the dispute. He does attempt to compromise the legal differences between the parties and encourage a resolution. Usually, a portion of the time spent with the mediator is devoted to the parties "venting" their grievances against the other. Following that phase, the mediator will ask each side to express his or her suggestion for settlement. From there the mediator discusses, in private with each side, possible compromises to the differences. If successful, this process eventually results in a settlement. Most cases are mediated in one day's time. Normally, it does not occur over days or weeks. Statements made in mediation are confidential and are subject to the "settlement rule," discussed below. This allows the parties to freely exchange their views without fear that they will be admissible at the time of trial. Your attorney will advise you as to the suitability of mediation for your particular case.

Finally, there often comes a time when settlement negotiations reach the point of negative return, and the attorneys must finally turn their energies to preparing for trial.

Caution: In Texas, a rule referred to as the "settlement rule" generally keeps out of evidence any settlement negotiations going on between attorneys; however, this only applies to formal settlement negotiations between or conducted by the attorneys. This rule does not apply to private settlement discussions between the individual spouses; therefore, anything that you say to your spouse can (and most likely will) be admissible into evidence if the case goes to trial. This can be devastating. For example, in one case, a husband told his wife in a phone conversation that he really didn't want the children, that he was only asking for custody of the

children in order to try to help him on the property settlement, and that if she would just not ask for so much property and child support, then he would gladly let her have custody of the children. As you can expect, all of this conversation was brought out to the court, and it was quite harmful to husband's case.

## F. TRIAL (IF NO SETTLEMENT)

If settlement negotiations fail, then the case must go to trial. Do not be unduly fearful of trial. Trials in real life are not what they are on TV or in the movies. Rarely is there anybody present in the entire courtroom except the two parties and their attorneys and staff, the judge, a clerk and the court reporter. The atmosphere is usually very formal and subdued. No one gets up in a witness's face and mercilessly grills the witness on cross-examination until they break down. No judge would allow such conduct in real life. Your attorney and the staff will prepare you extensively for any and all roles you will have at trial.

Sometimes only the parties testify, while in other trials a large number of expert and fact witnesses will be called to testify. The vast majority of divorce cases are tried before the judge, not a jury. For one reason, jury trials are much more expensive and time-consuming than trial to the court. In some cases, however, jury trials are appropriate. Your attorney will discuss these two options with you.

At the conclusion of trial, the judge will enter his rulings and orders, usually right there in the courtroom or, sometimes, days later by way of a letter to the attorneys.

## G. AFTER SETTLEMENT/TRIAL

After a settlement has been reached or the trial court has entered its orders, there is still a great deal of work to be completed.

### 1. Post-Trial Motions

If the case has been tried, very often one or both parties may file various post-trial motions with the court, asking the court to reconsider its rulings, etc. There are certain deadlines for the filing of these motions (e.g., 30 days after the divorce decree is signed). You and your attorney can decide whether or not you need to file any post-trial motions, but you cannot control what your spouse and his/her attorney does. In any event, these post-trial matters can sometimes be quite time-consuming.

### 2. Drafting Documents

Whether your case is settled or tried, there is a great deal of work to be done with respect to drafting of the divorce decree and other documents. Any agreed or litigated judgment for divorce is only as good as it is understandable and enforceable, and its enforceability depends in large part on how carefully and specifically it is drafted. Many lawyers have done well for their clients at trial or in settlement, only to end up losing much of what they had gained because of the of attorney leaving important items out or drafting the wording ambiguously with respect to the decree and/or agreement. Therefore, a great deal of time and care must go into the tedious drafting of your unique decree and the documents related to your divorce.

You should make sure that you and your attorney understand that you will approve in advance any and all important documents before they are finalized and signed by the parties and entered by the court.

### a. Divorce Decree (Agreement Incident to Divorce)

If your divorce case is settled, it may result in two documents - a lengthy *"Agreement Incident to Divorce*," which is signed by the parties (this is a contract between the parties), and a short Agreed Final Decree of Divorce, which incorporates and approves the parties' agreement and is signed by the judge (this is a judgement by the court). Or, as is now usually the case, your settled divorce will result in only one document entitled an *Agreed Decree of Divorce*, which is signed by the parties and the judge and serves, simultaneously, as both a contract between the parties and a judgement of the court. The consensual decree is enforceable not only as a private contract between the parties, but also as a decree which is enforceable as any other judgment entered by a court.

If your divorce is litigated to final trial, then only one judgment - a Final Decree of Divorce - will be signed by the judge. It is enforceable as any other civil judgment, but it is not enforceable as a contract between the parties.

### b. Other Documents

Besides the decree and the agreement discussed above, many other documents often need to be drafted to implement the terms of the divorce decree or agreement, such as real estate documents, etc. Again, your attorney and you will fully review these documents before they are signed.

### 3. Appeal

Neither party can appeal a settled divorce, but either party can appeal the ruling of a court following a litigated divorce. Although appeals are extremely difficult to win and can be very costly, they are available. Your attorney will discuss the option of an appeal with you should the need arise.

## VI. THINGS TO AVOID

There are a number of very important things for you to carefully avoid throughout your entire divorce case. Despite what your spouse may do, it is important that you keep a "white hat" on throughout these proceedings. Violating any of the following rules can be very detrimental to your case. Although most of these rules have been discussed above, they bear repeating.

### A. DON'T DISCLOSE CONFIDENTIAL INFORMATION TO OTHERS

Remember, the attorney-client privilege only exists between you and your attorney and his immediate, in-house staff. Therefore, in order to keep this type of confidential information privileged from disclosure, do not discuss it with or give it to anybody, including your spouse and including any professional hired to assist you in this case.

### B. DON'T HIDE/DESTROY PROPERTY OR DOCUMENTS

Whether or not any temporary orders have been entered, never destroy, waste, hide, alter, collateralize or otherwise do anything to affect the title or the value of any property, or destroy or alter any documents. Be sure to consult with your attorney regarding any question that you have with respect to dealing with present property and existing documents.

## C. DON'T INCUR UNUSUAL DEBTS/LIABILITIES

Whether or not temporary orders have been entered, never incur unusual debts or liabilities (e.g., charge an unusually high amount of clothes, an expensive vacation, etc.). This will generally be considered against you by the judge and, more often than not, the judge will first make an overall "just and right" division of the property and debts and then, thereafter, order that you be solely responsible for any such unusual liabilities.

## D. DON'T DISCUSS THE SETTLEMENT WITH SPOUSE

As discussed, the rule precluding evidence at trial of settlement negotiations between attorneys does not apply to settlement negotiations between spouses. Therefore, do not discuss settlement with your spouse unless authorized in advance by your attorney.

## E. BEWARE OF TELEPHONE TAPE RECORDINGS

It is not unusual for one spouse to tape record the telephone conversations he has with the other spouse. These recordings are admissible into evidence and have been the downfall of many irrational spouses. Any time you speak to your spouse on the phone, you should presume that it is being taped.

## F. DON'T BELITTLE YOUR SPOUSE TO OTHER PEOPLE, ESPECIALLY THE CHILDREN

Judges and juries do not take kindly to one spouse belittling the other spouse to third persons, and especially the children. Everyone realizes that there are certain people with whom you will confide about your divorce and that some criticism of your spouse is natural; however, try as hard as you can to keep this to a minimum, for these people may have to testify under oath as to all of the negative remarks or hot-headed threats you may have made against your spouse in a moment of anger. It is not uncommon to take the deposition of the best friend of one of the spouses, who will admit that the spouse has stated that "I'm going to take that so-and-so to the cleaners, and I don't care what it costs, even if I have to lie to the court to do it." These remarks will have extremely undesirable consequences.

Above all else, never criticize your spouse in front of or to the children. It cannot be overemphasized how detrimental this will be to your case. It has literally cost many a parent custody of the children. Judges and juries are extremely critical of this behavior. Most mental health professionals will tell you that the children get their own self-esteem from both parents; therefore, when one parent tells the child that the other parent is "no good", this can leave long-lasting scars on the child's self-image. Also, child psychologists warn that eventually this criticism of the other parent will backfire on the criticizing parent; the child, as he grows older, starts to know the other parent in a different and better light and feels that his earlier alienation from that parent was unjustified and caused by the other parent; they eventually resent the criticizing parent. In any event, you are strongly advised against making any criticism of the other parent or taking any action which could remotely tend to alienate the affections of the children for the other parent.

## G. DON'T START A BUSINESS, OR CONTRACT FOR OR PURCHASE PROPERTY

Even if you are separated and the divorce petition has been filed, you are still legally married, and any property purchased, even if it is on the day before the divorce, will be

considered community property. If that property is not divided at the time of the divorce, then it will be considered undivided community property to which both parties have and interest. Even years after the divorce, the court can require you to partition that property or order it sold, so that your spouse can own a share of the property. The same rule applies to the establishment of a business. Before you purchase any property or enter into any contracts during the pendency of your divorce, consult your attorney.

## VII. COMMON QUESTIONS

The following are questions frequently asked by persons at the beginning of divorce litigation. The answers provided are general. You should ask your attorney to discuss the specifics of your case.

### WHEN CAN I BEGIN TO DATE?

Not until the divorce is final. Adultery is a ground for the granting of a divorce based upon fault. Your legal status as a married person does not change until a divorce is granted. Although some judges are lenient regarding dating while a divorce is pending, you should be cautious about taking this risk. The fact that your spouse may be dating should not be an excuse or justification for your conduct. You need to wear the "white hat." If you do decide to date, you should know that it may impact adversely on a child custody dispute. In no event should you introduce the children to your dates. No community funds should be spent for the entertainment of third parties.

### HOW DO I GET A "LEGAL SEPARATION"?

There is no such thing as a "legal separation" under Texas law. Even though temporary orders may be entered by the court, they are not to be construed as a legal separation.

### CAN I OPEN MY SPOUSE'S MAIL?

No. If you receive any mail addressed solely to your spouse, it should be forwarded to him or to her by you or through your attorney.

### SHOULD I CLOSE BANK ACCOUNTS AND/OR CREDIT ACCOUNTS?

If you have been served with a Temporary Restraining Order, you will be prohibited from closing accounts. If you have not, you are free to close the accounts. You should consider the possible consequences. Closing an account without notice to your spouse may cause unnecessary embarrassment. It may also increase hostility and mistrust.

If your spouse is likely to spend or hide money in an account or run up large balances on a credit cared, it may be a wise decision. If you close bank accounts, you should not spend the funds. The best plan is to deposit all the funds from the closed account into a new account, solely in your name, so that you can fully account for the transaction later.

### CAN I RECORD TELEPHONE CONVERSATIONS?

Wiretapping is a felony and can subject you to criminal prosecution. However, it is lawful to tape record a conversation as long as one party to the conversation consents to the recording. Therefore, you may record a conversation between yourself and another person. You may NOT secretly install a recording device so as to intercept conversations between others. To

do so is a felony. The whole issue of recording telephone conversations is very sensitive. You should carefully discuss it with your attorney.

**CAN A WITNESS TESTIFY BY AFFIDAVIT?**

No, except in very limited circumstances relating to business records. Generally, testimony must be given in person at the time of trial, or by pre-trial deposition. This gives each side the opportunity to examine and cross-examine the witness. An affidavit cannot be cross-examined.

## VIII. SPECIAL ISSUES

If your case involves domestic violence and/or child abuse, you should make these matters known to your attorney immediately.

### A. VIOLENCE

If your spouse has a history of violence or threats of violence toward you or others, you should be aware of the availability of **protective orders** (not the same as a temporary restraining order or temporary orders) which can be issued by the court. These orders will prohibit your spouse from coming near you, your residence or place of business. Violation of a Protective Order can result in immediate arrest and prosecution. Violation of a Temporary Ex-Parte Protective Order is punishable by contempt. Protective Order applications are costly and time consuming, and almost always contested, and the need or wisdom of attempting to get a protective order should be discussed with your lawyer.

However, if a person is intent on causing harm to another, no court order will provide full protection from danger. You may need to consider taking refuge in a shelter or other secure location. These are serious matters and you should employ all means to protect yourself from harm. This also means that you should IMMEDIATELY cease any contact with your spouse.

### B. CHILD ABUSE

If you have reason to believe that your child has been abused, you should immediately report it to the local police or child welfare authority as well as your attorney. However, you should never make unfounded or capricious allegations of child abuse. That will adversely impact your position in a child custody dispute. In most cases there is a statutory duty to report allegations of child abuse, so don't tell your attorney about allegations against your spouse unless you want him/her to report the allegations. In addition, allegations against you of child abuse reported even to your attorney may require your attorney to report the allegations to the proper authorities. This is an exception to the attorney-client privilege.

If the allegation is based upon sound evidence, your attorney will discuss the methods available to protect the child from further abuse. In most cases, the child should be seen by a physician and/or mental health professional as soon as you learn of the abuse.

## IX. THE NATURE OF DIVORCE CASES

Divorce cases are unlike virtually all other civil litigation. For one thing, they are extremely emotion-charged. Further, they require a working knowledge of such a wide variety of different areas of the law. Also, judges have much broader discretion in family law cases than they do in most other areas of the law.

Another major distinction between divorce cases and most other areas of litigation is that there is virtually never a clear-cut "winner" or "loser" in a divorce case. Both divorcing parties are usually asking for the same thing - a "fair" division of the assets and debts, and a "proper" decision that is in the best interest of the children. The problem is, each has a completely different view of "fair" and "proper." Because judges have such broad discretion in family law cases and because each judge brings his own set of values to the bench, the results in a divorce case are frequently unpredictable in virtually identical cases.

Additionally, judges have a tendency to "play Solomon" in divorce cases. They try to be fair by splitting things down the middle i.e., to give both parties some, but not all, of what they want. For example, a husband will say that his business (which he will want to receive in the decree) is worth only $10,000. Wife's expert will swear it is worth $50,000, and the judge will determine it is worth $25,000, which pleases neither party. Unfortunately, this is often the rule rather than the exception in divorce cases.

Each spouse, convinced that his or her points of view are the only "fair" and "proper" views, feel that they need to somehow be vindicated for all of the pain and hurt they have gone through. They set up false expectations. They expect courts to "solve" their financial and other problems. In reality, courts cannot usually "solve" a party's problems; all a court can do is to divide up what presently exists and grant a divorce.

Because of all of the above, it has become an unfortunate but an often-stated saying among divorce attorneys that, if the court enters an order which is not satisfactory to either party, it is probably a fair decision.

Also, because of the above, it is very difficult for any attorney to predict with any degree of certainty exactly what a judge will do in a particular case. All attorneys have won some that they thought they should lose and have lost some that they thought they should have won, and while attorneys can generally give a broad ballpark idea of what a judge will probably do (if everything falls into place), there is no way for any lawyer to guarantee what a judge is going to do on a given case. This is one of the reasons so many cases settle.

Finally, it is very difficult for any party to come out of a divorce feeling as if he is the "winner," no matter what the result is. Sometimes this is because of false expectations, and often it is because there is simply no way for either party to be a "winner" or "loser" in the overall scheme of things.

## X. COLLABORATIVE LAW

The conventional process of divorce and other types of suits involving children can drive the parties who are already separated from each other even farther apart. It takes a toll on individual dignity, and often children suffer the most. Collaborative Law presents a more humane, respectful choice. It is a process in which the parties and their counsel agree in writing to make a good faith attempt to reach a mutually-agreeable settlement without court intervention. Working together, they craft a way to dissolve their marriage in a way that considers everyone's needs and minimizes conflict.

Collaborative Law is a process where the husband, wife and both their attorneys agree to resolve all issues in their case without involving a court. They work together, in private, to find a way to meet each individual's needs so that the couple may make a smoother transition from being married to being single.

Collaborative Law is a solution-oriented alternative to traditional divorce. Instead of focusing on getting the largest financial reward no matter the human or financial cost, the parties try to find "win-win" solutions that meet the needs of both sides.

All participants agree to work together respectfully, honestly and in good faith. No one may go to court, or even threaten to do so, as long as they are in the Collaborative Process. In the unlikely event that a party feels that court is a better alternative, the Collaborative Law process terminates and both spouses must hire new lawyers to take their case to court.

Each professional on the Collaborative Law team owes a primary allegiance and duty to their own clients. But they also know that the way to serve the highest interests of their clients is to act with integrity in the spirit of cooperation and mutual respect.

While a marriage may be ending, the Collaborative Law process recognizes that relationships and obligations often continue - especially when children are involved. It allows spouses to formulate an agreement that focuses on their most important individual and mutual goals. This process helps all family members move forward in a positive way, rather than dwell on the past.

## XI. MEDIATION - ARBITRATION - ALTERNATE DISPUTE RESOLUTION

***Mediation*** is an process that allows the parties to control the settlement of their divorce case and resolve all issues as to property and children. The main benefits include time and cost savings, , the ability to explore creative solutions, confidentiality and privacy, the ability of a party to make decisions that are self-determining, the ability to explore resolution to emotional feelings, the opportunity to help preserve relationships rather than continue to injure, and the ability to avoid negative legal outcomes. The resolution of a family law conflict involves the restructuring of the relationships of parents/spouse, and the possession and parenting plan for the parents. When divorcing or separating, one positive effect of mediation is to help the disputing parties shift from the negative form of conflict to the positive form. The traditional response to conflict is the tendency for litigants to use the paradigms of a win-lose/ right-wrong, and avoidance in their approach to the conflict. The process of formal mediation helps the parties to make a paradigm shift to a much more positive approach. The roots of formal dispute resolution are found in biblical references, and in the United States, as far back as colonial times.
In Texas, mediation can be made to be made fully binding and in effect, a *Mediated Settlement Agreement* (MSA), becomes the agreement that will be drafted into the final orders of the case. Since the agreement is binding, it induces both parties and their attorneys to work hard and in good faith to reach an amicable and mutually agreeable settlement; not having to worry that one side will withdraw their agreement as can be done with the usual settlement process. An MSA can be enforced by the Court and used to enter final judgment, even if one party changes their mind.

After each party and their attorneys have identified all property and children's issues and have determined all facts required to intelligently resolve the contested issues, they attend mediation.

At mediation, the parties and attorneys appear at a Mediator's office. The Mediator is generally agreed to by the parties, with the advice of their attorneys. If, for some reason, the parties and their attorneys cannot agree on a Mediator, the Court will appoint one.

The Mediator in a Family Law case is doubly-trained. They are usually *Board Certified in Family Law* and are active practicing Family Law Attorneys who are also trained in Mediation. Any mediator selected for a client of Gary Kollmeier will usually be well experienced and appropriate to both the parties needs, and sensitive and experienced in the subject matter being mediated.

At mediation you and your attorney are usually in one room and your spouse and their attorneys are in another room, in comfortable surroundings in the Mediator's office. The Mediator goes through several rounds (that is, time with your room and time with your spouse's room). During these sessions, the Mediator determines what are the unresolved issues between the parties and what can be done to find a middle ground to resolve these disputes. Some mediators will use joint sessions in which both parties and their attorneys are present to discuss the mediation process and develop common interests and explore viable options. Whether the mediator utilizes joint or separate sessions will be determined by the circumstances, the party's preferences, and the mediators style.

Under the *Rules of Mediation*, everything that is said or considered during mediation is confidential. No one can discuss at Court what went on at mediation, what the offers were, what the demands were or any other details or facts brought out during the mediation. The mediator cannot disclose to the other party, or their attorney, what is said in your room without your express permission. These rules allow a free flow discussion of settlement offers and responses.

In the unlikely event the case does not settle at mediation, then the parties may continue the litigation and ultimately resort to the Courts to make the final decisions. Many of the cases that do not settle in mediation settle otherwise shortly thereafter because of the progress made in mediation. In some cases, some issues are resolved at Mediation and then the parties request the Court to decide the remaining matters.

## ARBITRATION:

***Arbitration*** is an adjudicatory ADR process different from mediation, in that the parties, in effect, hire a private judge to decide certain issues in their case. Historically, the Arbitration process has been used in commercial and labor areas. Recently, Arbitration has been used more frequenting in complex family law cases, especially property disputes. In Texas, the *arbitrator* is usually *Board Certified in Family Law* and/or a former practicing judge with *Family Law* experience, who is also trained in arbitration techniques and process. Both sides will present detailed evidence and argument, sometimes utilizing experts, in a formal and traditional adversarial manner. After presentation of the case the arbiter makes a decision(s), often times called an award, typically set forth in a written opinion. Arbitration in Family Law cases is still not commonly used because it is usually much more expensive than mediation; however the process can be very helpful and cost effective in complex property characterization issues.

## OTHER FORMS OF ALTERNATE DISPUTE RESOLUTION:

There are other forms of *ADR* that are available in disputes in Texas, although not used very often in family law disputes. These include several forms that provide useful information to the parties and their attorneys to use to help in settlement negotiations and mediation. Sometimes the parties will agree to the use of an independent neutral case evaluation to provide the litigants an opinion on the merits of the case. A summary jury trial is available to have an independent non-binding trial presided over by a "judge" of sorts, where the parties present an abbreviated from of evidence and narrative argument, to see what the "jury" renders as a verdict. This process may help parties to in reaching a settlement of the case. A "Mini-Trial" is usually reserved for large business disputes, and utilizes a neutral expert advisor to help the parties facilitate their own agreement that is mutually beneficial to everyone.

# Rights of Children of Divorce  Appendix A

1. Continue to love both parents without guilt or disapproval (subtle or overt) by either parent or other relatives.

2. Be repeatedly reassured that the divorce is not their fault.
3. Be reassured they are safe and their needs will be provided for.

4. Have a special place for their own belongings at both parents' residences.

5. Visit both parents regardless of what the adults in the situation feel, and regardless of convenience, or money situations.

6. Express anger and sadness in their own way, according to age and personality(not have to give justification for their feelings or have to cope with trying to be talked out of their feelings by adults).

7. Not be messengers between parents; not to carry notes, legal papers, money or requests between parents.

8. Not make adult decisions, including where they will live, where and when they will be picked up or dropped off, or who is to blame.

9. Love as many people as they choose without being made to feel guilty or disloyal. (Loving and being loved by many people is good for children; there is not a limit on the number of people a child can love.)

10. Continue to be kids, i.e., not take on adult duties and responsibilities or become a parent's special confidant, companion or comforter (i.e., not to hear repeatedly about financial problems or relationship difficulties).

11. Stay in contact with relatives, including grandparents and special family friends.

12. Choose to spend at least one week a year living apart from their custodial parent.

13. Not be on an airplane, train or bus on major holidays for the convenience of adults.

14. Have teachers and school informed about the new status of their family.

15. Have time with each parent doing activities that create a sense of closeness and special memories.

16. Have a daily and weekly routine that is predictable and can be verified by looking at a schedule on a calendar in a system understandable to the child. (For instance: a green line represents the scheduled time with dad, and a purple line represents the scheduled time with mom, etc.)

17. Participate in sports, special classes or clubs that support their unique interests, and have adults that will get them to these events, on time without guilt or shame.

18. Contact the absent parent and have phone conversations without eavesdropping or tape-recording.

19. Ask questions and have them answered respectfully with age-appropriate answers that do not include blaming or belittlement's of anyone.

20. Be exposed to both parents' religious ideas (without shame), hobbies, interests and tastes in food.

21. Have consistent and predictable boundaries in each home. (Although the rules in each house may differ significantly, each parent's set of rules needs to be predictable within their household.)

22. Be protected from hearing adult arguments and disputes.

23. Have parents communicate (even if only in writing) about their medical treatment, psychological treatment, educational issues, accidents and illnesses.

24. Not be interrogated or inspected upon return from the other parent's home or asked to spy in the other parent's home.

25. Own and display freely pictures of both parents.

26. Choose to talk with a special adult about their concerns and issues (counselor, therapist or special friend).

# TEXAS STANDARD POSSESSION ORDER *Appendix B*

Possession Schedules

There are many options available in the "standard possession order." A Court will approve any reasonable agreement of the parties. A Court ,or the parties can chose either to start possession at the time the school day ends, or at 6:00 p.m., and if the non-primary parent elects at the time of divorce, to return the child to school at the end of the period of possession. Most variations require approval from the Court, unless agreed to by the parties.

The Court can also order that Thursday possession during the school year begin end at the time school is dismissed, and end at the time school resumes on the following Friday, unless the court finds that the Thursday overnight possession would not be in the best interest of the child.

The Court can also order that Sunday possession end at the time school resumes on the following day, or at a specific time, unless the court finds that Sunday overnight possession would not be in the best interest of the child.

Under the standard order, the non-primary possessory parent can either pick and deliver the child, or each can do one portion of the transportation of the child. In the event that the non-primary possessory parent is ordered to pick-up and re-deliver the child, then if the primary possessory parent moves outside the county that they reside in at the time of the rendition of the order, that parent must then pick-up the child from the other parent at the end of possession.

There are also options available for long-distance possession schedules, and arrangements for airline flight transportation which are intended to facilitate cooperation for long distance transportation. Most lawyers also have a split possession schedule for instances in which two or more children are split between the parties.

**The following schedule is one interpretation of the Standard Possession Order as set out in the Texas Family Code. There are other interpretations, such as the one contained in the Texas Family Practice Manual, and split possession models, and some attorneys have their own versions unique to their drafting style.**

## Texas Family Code Sections 153.311-153.317

**Policy.** It is the policy of this state to encourage frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and child. It is preferable for all children in a family to be together during periods of possession.

**Application of Statutory Guidelines.** The guidelines established in the Standard Possession Order are intended to guide the Courts in ordering the terms and conditions for possession of a child by a parent named as a possessory conservator or as the minimum possession for a joint managing conservator.

**School.** The term school means the primary or secondary school in which the child is enrolled, or

if the child is not enrolled in a primary or secondary school, the public school district in which the child primarily resides.

**Child.** The term child shall refer to any child or children of the parties and shall include the plural form whenever appropriate to the context.

**Managing Conservator.** The term managing conservator shall refer to the sole managing conservator, managing conservator, or a joint managing conservator with primary possession of the child.

**Possessory** Conservator. The term possessory conservator shall refer to the possessory conservator or a joint managing conservator who does not have primary possession of the child.

IT IS ORDERED AND DECREED that the parties shall have possession of the child at any and all times mutually agreed to in advance by the parties and, in the absence of mutual agreement, shall have possession of the child under the specified terms set out in this Standard Possession Order.

**PARENTS WHO RESIDE 100 MILES OR LESS APART**

1. If the possessory conservator resides 100 miles or less from the primary residence of the child, the possessory conservator shall have the right to possession of the child as follows:

A) **Weekends** - On weekends, beginning at 6:00 p.m. on the first, third, and fifth Friday of each month unless the possessory conservator has elected one of the following options: (check one if electing an option)

_____ if the child is enrolled in school, at the time the child's school is regularly dismissed on the first, third, and fifth Friday of each month; or

_____ if the child is enrolled in school, at _____ p.m. (specify time elected between the time the child's school is regularly dismissed and 6:00 p.m.) on the first, third, and fifth Friday of each month; and ending at 6:00 p.m. on the following Sunday unless the possessory conservator has elected the following option: (check if electing the option)

_____ if the child is enrolled in school, at the time the child's school resumes after the weekend.

B) **Weekend Possession Extended by a Holiday** - If a weekend period of possession of the possessory conservator coincides with a school holiday during the regular school term, or with a federal, state, or local holiday during the summer months in which school is not in session, the weekend possession shall begin at 6:00 p.m. Thursday for a Friday holiday unless the possessory conservator has elected one of the following options: (check one if electing an option)

_____ at the time the child's school is regularly dismissed for a Friday holiday or school holiday; or

_____ if the child is enrolled in school, at _____ p.m. (specify time elected between the time the child's school is regularly dismissed and 6:00 p.m.) on the date that the child's school is regularly dismissed for a Friday holiday or school holiday; and ending at 6:00 p.m. on a Monday holiday or school holiday unless the possessory conservator has elected the following option: (check if electing the option)

_____ if the child is enrolled in school, at the time the child's school resumes after a Monday

holiday or school holiday.

C) **Thursdays** - On Thursdays of each week during the regular school term beginning at 6:00 p.m. unless the possessory conservator has elected one of the following options: (check one if electing an option)

_____ if the child is enrolled in school, at the time the child's school is regularly dismissed; or

_____ if the child is enrolled in school, at _____ p.m. (specify time elected between the time the child's school is regularly dismissed and 6:00 p.m.); and ending at 8:00 p.m. unless the possessory conservator has elected the following option: (check if electing the option)

_____ if the child is enrolled in school, at the time the child's school resumes.

2. The following provisions govern possession of the child for vacation and certain holidays and supersede conflicting weekend of Wednesday periods of possession. The possessory conservator and the managing conservator shall have rights of possession of the child as follows:

A) **Spring Vacation** - The possessory conservator shall have possession of the child in even-numbered years beginning at 6:00 p.m. on the day the child is dismissed from school for the school's spring vacation unless the possessory conservator has elected one of the following options: (check one if electing an option)

_____ if the child is enrolled in school, at the time the child's school is regularly dismissed for the school's spring vacation; or

_____ if the child is enrolled at school, at _____ p.m. (specify time elected between the time the child's school is regularly dismissed and 6:00 p.m.) on the day the child is dismissed from school for the school's spring vacation; and ending at 6:00 p.m. on the day before school resumes after that vacation unless the possessory conservator has elected the following option: (check if electing the option)

_____ if the child is enrolled in school, at the time the child's school resumes after that spring vacation.

The managing conservator shall have possession of the child for the same period in odd-numbered years.

B) **Summer**

I) If the possessory conservator gives the managing conservator written notice by April 1 of each year, specifying an extended period or periods of summer possession, the possessory conservator shall have possession of the child for thirty (30) days beginning not earlier than the day after the child's school is dismissed for the summer vacation and ending not later than seven (7) days before school resumes at the end of summer vacation, to be exercised in not more than two (2) separate periods of at least seven (7) consecutive days each.

ii) If the possessory conservator does not give the managing conservator written notice by April 1 of each year, specifying an extended period or periods of summer possession, the possessory conservator shall have possession of the child for thirty (30) consecutive days beginning at 6:00 p.m. on July 1 and ending at 6:00 p.m. on July 31.

iii) If the managing conservator gives the possessory conservator written notice by April 15 of

each year, the managing conservator shall have possession of the child on any one weekend beginning Friday at 6:00 p.m. and ending at 6:00 p.m. on the following Sunday during one period of possession by the possessory conservator under Subdivision (B)(I) or (B)(ii), provided that the managing conservator picks up the child from the possessory conservator and returns the child to that same place; and

iv) If the managing conservator gives the possessory conservator written notice by April 15 of each year or gives the possessory conservator fourteen (14) days written notice on or after April 16 of each year, the managing conservator may designate one weekend beginning not earlier than the day after the child's school is dismissed for the summer vacation and ending not later than seven (7) days before school resumes at the end of the summer vacation, during which an otherwise scheduled weekend period of possession by the possessory conservator will not take place, provided that the weekend so designated does not interfere with the possessory conservator's period or periods of extended summer possession or with Father's Day weekend if the possessory conservator is the father of the child.

**PARENTS WHO RESIDE OVER 100 MILES APART**

1. If the possessory conservator resides more than 100 miles from the residence of the child, the possessory conservator shall have the right to possession of the child as follows:

A) **Weekends** - On weekends, beginning at 6:00 p.m. on the first, third, and fifth Friday of each month unless the possessory conservator has elected one of the following options: (check one if electing an option)

_____ if the child is enrolled in school, at the time the child's school is regularly dismissed on the first, third, and fifth Friday of each month; or

_____ if the child is enrolled in school, at _____ p.m. (specify time elected between the time the child's school is regularly dismissed and 6:00 p.m.) on the first, third, and fifth Friday of each month; and ending at 6:00 p.m. on the following Sunday unless the possessory conservator has *elected* the following option: (check if electing the option)

_____ if the child is enrolled in school, at the time the child's school resumes after the weekend.

B) **Alternative Weekend Possession** - In lieu of the foregoing, the possessory conservator shall have the right to possession of the child not more than one weekend per month of the possessory conservator's choice beginning at 6:00 p.m. on the day school recesses for the weekend unless the possessory conservator has elected one of the following options: (check one if electing an option)

_____ if the child is enrolled in school, at the time the child's school is regularly dismissed on the first, third, and fifth Friday of each month; or

_____ if the child is enrolled in school, at _____ p.m. (specify time elected between the time the child's school is regularly dismissed and 6:00 p.m.) on the first, third, and fifth Friday of each month; and ending at 6:00 p.m. on the day before school resumes after the weekend unless the possessory conservator has elected the following option: (check if electing the option)

_____ if the child is enrolled in school, at the time the child's school resumes after the weekend.

The possessory conservator may elect an option for this alternative period of possession by giving written notice to the managing conservator within ninety (90) days after the parties begin to reside more than 100 miles apart. If the possessory conservator makes this election, the possessory conservator shall give the managing conservator fourteen (14) days written or telephone notice preceding a designated weekend.

C) **Weekend Possession Extended by a Holiday** - If a weekend period of possession of the possessory conservator coincides with a school holiday during the regular school term, or with a federal, state, or local holiday during the summer months in which school is not in session, the weekend possession shall begin at 6:00 p.m. Thursday for a Friday holiday unless the possessory conservator has elected one of the following options: (check one if electing an option)

_____ at the time the child's school is regularly dismissed for a Friday holiday or school holiday; or

_____ if the child is enrolled in school, at _____ p.m. (specify time elected between the time the child's school is regularly dismissed and 6:00 p.m.) on the date that the child's school is regularly dismissed for a Friday holiday or school holiday; and ending at 6:00 p.m. on a Monday holiday or school holiday unless the possessory conservator has elected the following option: (check if electing the option)

_____ if the child is enrolled in school, at the time the child's school resumes after a Monday holiday or school holiday.

D) **Spring Vacation** - Each year, beginning at 6:00 p.m. on the day the child is dismissed from school for the school's spring vacation unless the possessory conservator has elected one of the following options: (check one if electing an option)

_____ if the child is enrolled in school, at the time the child's school is regularly dismissed for the school's spring vacation; or

_____ if the child is enrolled at school, at _____ p.m. (specify time elected between the time the child's school is regularly dismissed and 6:00 p.m.) on the day the child is dismissed from school for the school's spring vacation; and ending at 6:00 p.m. on the day before school resumes after that vacation unless the possessory conservator has elected the following option: (check if electing the option)

_____ if the child is enrolled in school, at the time the child's school resumes after that spring vacation.

E) **Summer** -

I) If the possessory conservator gives the managing conservator written notice by April 1 of each year, specifying an extended period or periods of summer possession, the possessory conservator shall have possession of the child for forty-two (42) days beginning not earlier than the day after the child's school is dismissed for the summer vacation and ending not later than seven (7) days before school resumes at the end of summer vacation, to be exercised in not more than two (2) separate periods of at least seven (7) consecutive days each.

ii) If the possessory conservator does not give the managing conservator written notice by April 1 of each year, specifying an extended period or periods of summer possession, the possessory conservator shall have possession of the child for forty-two (42) consecutive days beginning at 6:00 p.m. on June 15 and ending at 6:00 p.m. on July 27.

iii) If the managing conservator gives the possessory conservator written notice by April 15 of each year, the managing conservator shall have possession of the child on any one weekend beginning Friday at 6:00 p.m. and ending at 6:00 p.m. on the following Sunday during any one period of possession by the possessory conservator under Subdivision (E)(I) or (E)(ii), provided that if a period of possession by the possessory conservator exceeds thirty (30) days, the managing conservator may have possession of the child under the terms of this subdivision on any two (2) nonconsecutive weekends during that time period, and further provided that the managing conservator picks up the child from the possessory conservator and returns the child to that same place.

iv) If the managing conservator gives the possessory conservator written notice by April 15 of each year, the managing conservator may designate twenty-one (21) days beginning not earlier than the day after the child's school is dismissed for the summer vacation and ending not later than seven (7) days before school resumes at the end of the summer vacation, to be exercised in not more than two (2) separate periods of at least seven (7) consecutive days, during which the possessory conservator may not have possession of the child, provided that the period or periods so designated do not interfere with the possessory conservator's period or periods of extended summer possession or with Father's Day weekend if the possessory conservator is the father of the child.

**HOLIDAY POSSESSION**

1. The following provisions govern possession of the child for certain specific holidays and supersede conflicting weekend or Thursday periods of possession without regard to the distance the parents reside apart. The possessory conservator and the managing conservator shall have rights of possession of the child as follows:

A) **Christmas**

I) The possessory conservator shall have possession of the child in even-numbered years, beginning at 6:00 p.m. on the day the child is dismissed from school for the Christmas vacation unless the possessory conservator has elected one of the following options: (check one if electing an option)

_____ if the child is enrolled in school, at the time the child's school is regularly dismissed for the school's Christmas vacation; or

_____ if the child is enrolled at school, at _____ p.m. (specify time elected between the time the child's school is regularly dismissed and 6:00 p.m.) on the day the child is dismissed from school for the school's Christmas vacation; and ending at noon on December 28.

The managing conservator shall have possession for the same period in odd-numbered years.

ii) The possessory conservator shall have possession of the child in odd-numbered years, beginning at noon on December 28 and ending at 6:00 p.m. on the day before school resumes after that vacation unless the possessory conservator has elected the following option: (check if electing the option)

_____ if the child is enrolled in school, at the time the child's school resumes after that Christmas vacation.

The managing conservator shall have possession for the same period in even-numbered years.

B) **Thanksgiving** - The possessory conservator shall have possession of the child in odd-numbered years beginning at 6:00 p.m. on the day the child is dismissed from school before Thanksgiving unless the possessory conservator has elected one of the following options: (check one if electing an option)

_____ if the child is enrolled in school, at the time the child's school is regularly dismissed for the school's Thanksgiving vacation; or

_____ if the child is enrolled at school, at _____ p.m. (specify time elected between the time the child's school is regularly dismissed and 6:00 p.m.) on the day the child is dismissed from school for the school's Thanksgiving vacation; and ending at 6:00 p.m. on the following Sunday unless the possessory conservator has elected the following option: (check if electing the option)

_____ if the child is enrolled in school, at the time the child's school resumes after the Thanksgiving vacation.

The managing conservator shall have possession for the same period in even-numbered years.

C) **Child's Birthday** - The parent not otherwise entitled under this Standard Possession Order to present possession of the child on the child's birthday shall have possession of the child beginning at 6:00 p.m. and ending at 8:00 p.m. on that day, provided that said parent picks up the child from the residence of the conservator entitled to possession and returns the child to that same place.

D) **Father's Day Weekend** - If a conservator, the father shall have possession of the child beginning at 6:00 p.m. on the Friday preceding Father's Day and ending on Father's Day at 6:00 p.m., provided that, if he is not otherwise entitled under this Standard Possession Order to present possession of the child, he picks up the child from the residence of the conservator entitled to possession and returns the child to that same place.

E) **Mother's Day Weekend** - If a conservator, the mother shall have possession of the child beginning at 6:00 p.m. on the Friday preceding Mother's Day and ending on Mother's Day at 6:00 p.m., provided that, if she is not otherwise entitled under this Standard Possession Order to present possession of the child, she picks up the child from the residence of the conservator entitled to possession and returns the child to that same place.

## GENERAL TERMS AND CONDITIONS

Without regard to the distance between the residence of the parent and the child:

1. The managing conservator shall surrender the child to the possessory conservator at the beginning of each period of the possessory conservator's possession at the residence of the managing conservator.

2. If the possessory conservator elects to begin a period of possession at the time the child's school is regularly dismissed, the managing conservator shall surrender the child to the possessory conservator at the beginning of each such period of possession at the school in which the child is enrolled.

3. The possessory conservator shall (check one)

_____ surrender the child to the managing conservator at the end of each period of possession at the residence of the possessory conservator; or

_____ return the child to the residence of the managing conservator at the end of each period of possession. The possessory conservator shall surrender the child to the managing conservator if (1) the possessory conservator's county of residence remains the same after the rendition of the order, and the managing conservator's county of residence changes, effective on the date of the change of domicile by the managing conservator, or (2) the possessory conservator and managing conservator lived in the same residence at any time during a six-month period preceding the date on which a suit for dissolution of the marriage was filed and the possessory conservator's county of residence remains the same and the managing conservator's county of residence changes after they no longer live in the same residence, effective on the date the order is rendered.

4. If the possessory conservator elects to end a period of possession at the time the child's school resumes, the possessory conservator shall surrender the child to the managing conservator at the end of each such period of possession at the school in which the child is enrolled.

5. Each conservator shall return with the child the personal effects that the child brought at the beginning of the period of possession.

6. Either parent may designate any competent adult to pick up and return the child, as applicable. A parent or a designated competent adult shall be present when the child is picked up or returned.

7. A parent shall give notice to the person in possession of the child on each occasion that the parent will be unable to exercise that parent's right of possession for any specified period. Repeated failure of a parent to give notice of an inability to exercise possessory rights may be considered as a factor in a modification of those possessory rights.

8. Written notice shall be deemed to have been timely made if received or postmarked before or at the time that notice is due.

9. If a conservator's time of possession of a child ends at the time school resumes and for any reason the child is not or will not be returned to school, the conservator in possession of the child shall immediately notify the school and the other conservator that the child will not be or has not been returned to school.