Anticipating Divorce

2016

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Printed in the United States of America; June, 1990; March 1, 1992; January 15, 1995;
September 1, 1995; January 1, 1997; January 1, 1998; June 7, 2000, January 15, 2008; July 1, 2009; December 1, 2016.

The law is in a constant state of flux.

The author cannot guarantee
that all of the information in this book will be
correct when you read it.

Avoid using this book in lieu of
professional services.

Please consult an attorney!

As the famous philosopher Rene Decartes may have said,
"I disclaim. Therefore, I am."

Preface

Marital discord pervades our culture. Every married couple contemplates divorce sooner or later.

This e-book will help you clarify the causes of your marital problems.

It will reduce the anxiety associated with the divorce process by providing you with valuable information about how the process works.

Armed with this information, you will be better prepared to make the decisions that must be made during the divorce process.

When you suffer, and you feel that your marriage causes your suffering, you may exacerbate your suffering by ruminating incessantly on what to do about it.

When minor children are involved, the question becomes more complex.

Divorce scars every family member. No one avoids it.

You must nevertheless confront the issue of whether the potential scars from divorce will cause less suffering than the scars caused by remaining in a destructive relationship.

What's worse is that you can only speculate; no one has a crystal ball. If you read nothing else in the booklet, please read this:

Do not proceed ambivalently.

You have made a big investment in your marriage. You owe it to yourself to resolve every doubt before dissolving it.

If you have difficulty making a decision, consult a mental health professional before you initiate divorce proceedings - more about this shortly.

Only after analyzing your marriage carefully and concluding that divorce is inevitable, plan rationally for divorce.

About the Author

Hello.

I'm Tom Noble.

I have been practicing family law for well over 35 years.

I've been a mediator for over 25 and a life coach for several.

My law practice has been a combination of family law litigation, family law mediation, and estate planning[1].

I have represented people in hundreds of divorces, and I have served as mediator in hundreds of divorce cases.

Add to that a smattering of custody modifications, paternity cases, and squabbles and turf wars of all sizes and flavors.

I originally wrote *Anticipating Divorce* in 1990 as a sort of "FAQ" for divorce clients.

After about ten years of hands-on divorce training and, at that time, one of my own (later to become two), I concluded that (a) people usually come into the divorce process with a high level of anxiety, and (b) one way to mitigate their anxiety is to give them information about the process.

Entering the divorce process is like landing in a foreign country.

Divorceland has its own language, timing, and customs.

I am your guide.

The vast majority of my practice has been in the Dallas-Fort Worth area.

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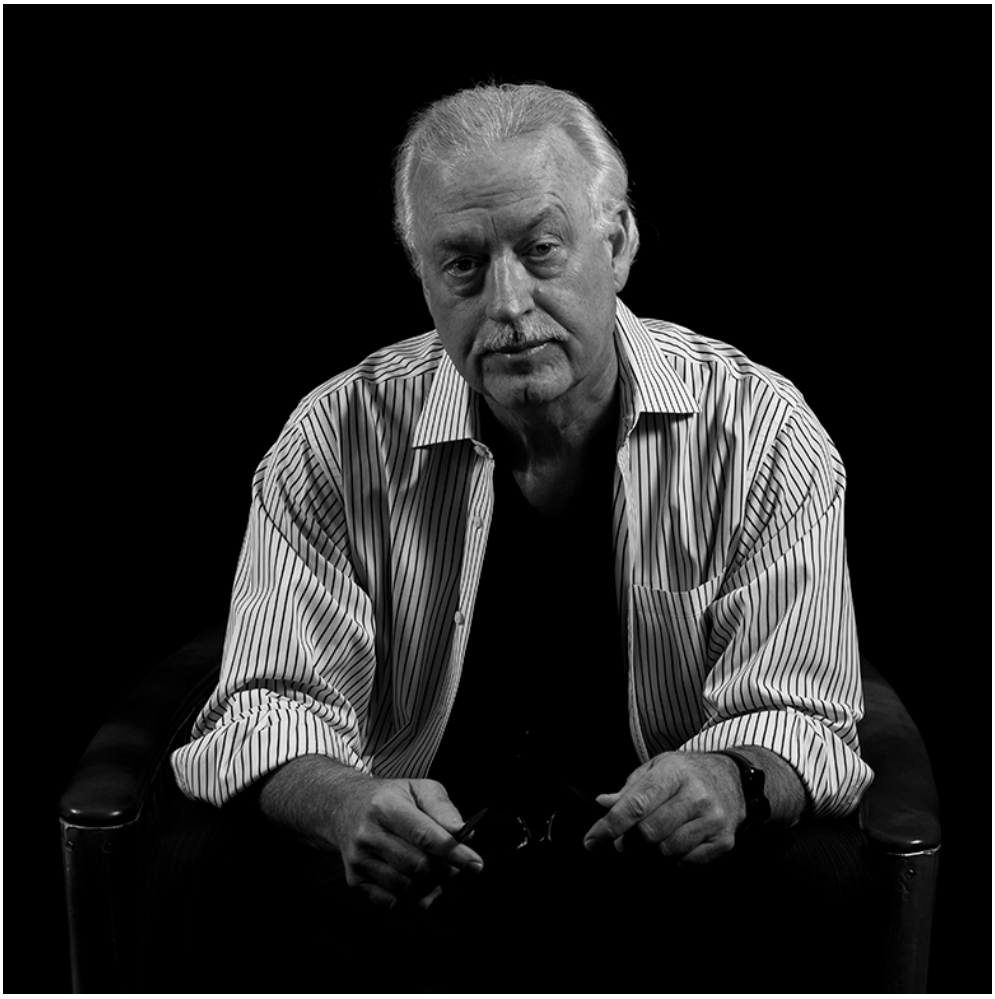
[1] Not certified by the Texas Board of Legal Specialization

Local practices vary; take everything I say with a grain of salt; double check whatever I say with your legal advisor; and we will do just fine.

Divorce can be the worst experience of your life or it can be a period of intense growth and learning.

I can help, but it's ultimately up to you.



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Chapter I: Evaluating Your Marriage

Aware that a primary relationship is the backbone of emotional stability, people hesitate to admit a serious marital rift, even in the face of a deteriorating sex life, loss of communication, conflict of opinion, and even evidence of dishonesty. (Ricci, 72).

I am probably not qualified to write this chapter but for 35+ years' experience as a divorce lawyer, two divorces of my own, and having read a bunch of books about the divorce process.

I can't help but find the topic irresistible, perhaps because marital problems can be so complex.

Marital problems can stem from financial problems, legal problems, emotional problems, sexual problems, stress-related disorders, alcoholism, workaholism, narcissism, power struggles over children, commitment issues, personality disorders, growth in different directions, no growth at all, suspicions about infidelity, or "unhappy and I'm not sure why."

Stated simply, marital problems are a bummer.

What can make them complex is how it can be hard to get your arms around them.

If you find yourself knowing that something is wrong, knowing that you are unhappy, and not knowing what to do about it, consider counseling.

Being a life coach, I also recommend that option: coaching.

Therapists believe that you have something wrong with you that needs to be fixed.

Coaches believe that you are ok and want to improve.

Please do not construe that to mean that I am down on therapists.

Some of my best friends and most favorite people are therapists who do great work with couples.

The point is to get some intelligent rational input from someone who is not in the fray and who has developed skills in dealing with marital issues.

How do you find one?

I may as well warn you now.

If you are reading this and anticipating divorce, one of the biggest challenges you are going to confront is vetting professionals.

For some of you that will mean a lawyer, a financial professional, a mental health professional, a coach or a mediator.

For some of you that will mean a team of lawyers, a team of financial professionals, and a team of mental health professionals; but, let's not get ahead of ourselves.

The first step is to take a snapshot, and evaluate it, acknowledging that some of us will view it through rose-colored glasses, and some will see black when the truth is gray.

The questions in this chapter are designed to increase your awareness of your marriage.

Some marriages are beyond hope.

If you are married to an extremely abusive spouse, skip this chapter. Get out now!

More often than not, however, we find ourselves involved in a situation that is not so well defined, marriage purgatory, fifty shades of gray (but not like that!).

We are not sure how we feel; if we know how we feel (usually: NOT GOOD), we are not sure why; and, if we feel good, it's usually not for long.

If that just might be you, spend a few minutes considering the following questions. Then, check your answers with those provided.

> **"If a kingdom is divided against itself, that kingdom cannot stand. And if a house is divided against itself, that house will not be able to stand."**
>
> Mark 3:24

Evaluating Your Marriage Questionnaire

1. If you are contemplating divorce, describe when you first considered it and why.

2. Describe the best times you and your spouse have shared.

3. Describe each activity you and your spouse share on a regular basis that is fun for both of you.

4. How do you feel when you are alone?

5. How frequently do you and your spouse fight or argue?

Describe how intense it gets:

6. Try to feel the *whole* relationship. Does it feel good, bad, or is it difficult to define? Briefly describe it.

7. Do you feel like you are growing as an individual? _____ Why or why not?

8. Does your spouse prevent you from growing as an individual? _____ If so, how?

9. Is your relationship sexually satisfying? _____ Why or why not?

10. Has your marriage improved your financial condition? _____ If not, why not? If so, to what extent?

11. List all of the things you do *for* your spouse on a regular basis.

12. List all of the things your spouse does for you on a regular basis.

13. What is your financial contribution to the marriage?

14. What is your spouse's financial contribution to the marriage?

15. If you have children, do both of you spend approximately the same amount of time parenting? If not, why not?

16. What are the biggest problems with your relationship?

17. What have you done to solve these problems?

18. Would you be happier single? _____ If so, why?

19. Is your marriage the only cause of your problems? _____
What are other causes?

20. What is your current state of health?

How could you improve it?

21. What common goals do you and your spouse share?

22. What percentage of your marital problems involves communication problems between you and your spouse?

23. How could you improve your marriage?

24. Are you and your spouse each motivated to improve your marriage?

25. Is divorce the best option under the circumstances?

After answering those questions, please compare your answers to the following:

1. How long have you been agonizing, ambivalent about whether or not you should stay married or get divorced? Ambivalence takes its toll. If the marriage has not improved, and you have made reasonable efforts to change it, that should tell you something.

2. How long has it been since you and your spouse had fun together? Is this possible to revive? How much effort would it take on your part? Have you really tried?

3. If none, why not? Couldn't you think of something the two of you would enjoy on a regular basis?

4. Feeling "down" may not be your spouse's fault or the fault of the marriage. Beware of projecting your problems onto your marriage relationship and resenting your spouse for not solving problems that you should solve yourself.

5. Negative patterns, such as arguing, belittling, and neglect can be broken in therapy. Do not give up without counseling unless you are married to a real abuser.

6. Try to maintain this awareness instead of constantly analyzing and attempting to perform mental gymnastics.

7. If you're not growing as an individual, do not project your frustrations on your relationship.

8. If you feel prohibited from growth, decide how you might circumvent your obstacles.

9. This may be crucial to certain individuals, unimportant to others. You decide.

10. This can also be crucial. Many marriages fail because of financial problems. If you have marital problems, check to see if financial strain is contributing.

11.,12. Compare your answers on questions 11 and 12. Are you a slave or a tyrant? A healthy relationship is well balanced.

13.,14. The same logic applies to the next two questions. Many spouses take financial contributions of their spouses for granted. If you do, you may be in for a big surprise after a divorce is final.

15. Other spouses take parenting for granted. This is also a source of typical marital discord.

16. Are your problems really too significant to overcome? A little effort can go a long way! Should you see a marital therapist or life coach before consulting a divorce lawyer? Is the grass really greener? Visualize your future for the first year after divorce, three years, five years, etc. Again, be aware of causes of marital discord that do not relate to your spouse. Remember that it takes healthy individuals to make a healthy relationship. In my opinion, this is a crucial problem. Common purpose is the adhesion that keeps marriages together. If you are not working together for some shared result, what are you doing together, other than sharing space?

If you decide that a divorce may not be the solution to your marital problems, consider developing a "reconciliation plan."

This may consist of periodic counseling, a weekly date, a family night with or without children, regular roses, daily hugs, more space, less space, or whatever.

Be specific, include deadlines, and do not let your problems drag on month after month.

If you do not make progress, do what you have to do, knowing that you made every reasonable effort to save your marriage.

Or, consider a “financial divorce” but not a legal divorce. This entails entering into a marital agreement (or “post-nuptial agreement”), partitioning assets and/or future earnings. Entering into a marital agreement may allow you to stay married without all of the financial risks typically related to marriage.

Communication problems exist in almost every marriage.

Learning to listen can help a lot.

If you have tried everything you can think of, read on.

Common Purpose

IS THE ADHESION
That Keeps Marriages

Together.

Chapter II: Pre-Divorce Planning

If you are contemplating a divorce, or speculating that your spouse may be, first, you need a plan.

That = consult an attorney immediately!

Chapter III provides some tips on how to select an attorney.

Find out what your rights are. Determine how vulnerable you are to losing property or losing custody of your children.

Even if a divorce is not imminent, even if it never occurs, legal advice may be beneficial in helping you organize your estate and plan for worst-case scenarios. But, first …

People with marital problems may have urgent questions.

This chapter will attempt to address some of the more common ones.

Are you married?

To state the obvious, you cannot get divorced unless you are married. Most of us get married the old-fashioned way: we get a license and someone to conduct a ceremony, and we take vows that we soon forget.

Licensed or ordained Christian ministers; Jewish rabbis; "a person who is an officer of a religious organization and who is authorized by the organization to conduct a marriage ceremony"; and, just about any judge or justice of the peace or federal magistrate, including retired judges, can conduct a wedding ceremony.[2]

Others among us take a more Bohemian approach.

Some call this "common law marriage."

2 Texas Family Code section 2.202.

In legalese, we call this “informal marriage.”

Most people misunderstand this concept. If you think you may be informally married, or married by common law, as it is more commonly known, best to consult a professional right away.

This can be a tricky question, but here are the basics: to have a binding informal marriage in Texas, you have to: (1) agree to be married; (2) live together in Texas as husband and wife; (3) represent to others that you are married in Texas; and (4) file some sort of lawsuit about the marriage (e.g. a divorce petition) within 2 years after the date of separation.

Divorces with Children: Dual Suits

If you have children, a divorce case becomes two cases at the same time: (1) a case to determine how your property will be divided, and (2) a case to determine what happens to your children.

If you cannot agree about how to divide your property, including your debts, a trial judge will do that for you based upon what he or she believes is “just and right.” That may mean that someone gets more than 50% of the assets.

There are basically four aspects of the case regarding your children (lawyers call this the “parent-child case”): (1) conservatorship, (2) parental rights, (3) child support, and (4) possession (sometimes referred to as “visitation”).

Community Property and Separate Property

I am writing primarily for people who live in Texas.

If you live in Texas, it is important to understand that you live in a "community property state."

For purposes of divorce, probate, and many other legal matters, all of the property that you and your spouse owned is either community property or separate property.[3]

"Separate property" is: (a) property owned prior to marriage; (b) property inherited during the marriage; (c) gifts received during the marriage (including those given to you by your spouse); (d) certain judicial awards for personal injuries; and, (e) property "traceable" to separate property (sometimes referred to as "mutations" of separate property). The remainder of your property is community.

You own your separate property. Your spouse has no claim to it unless you have used community property to enhance it.

A court cannot divest you of your separate property. When you divorce, a court will award your separate property to you and divide the community property between you and your spouse.

Because separate property is not divisible, delineating between community and separate property is a common battleground.

Maintaining careful records of separate property is important because all property owned at the time of divorce is presumed by law to be community unless proven to be separate by clear and convincing evidence.

Even though a family court can divide community property, it does not have to divide it 50/50. This is a common myth.

In a divorce proceeding, a court may award more than 50% of the community to a spouse for a number of reasons, including fault, inferior earning ability, smaller separate estate, or poor health.

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[3] There is also property that is sometimes referred to as "quasi-community property." This is property that may have been acquired during marriage in a non-community property state, but is treated by a divorce court as if it were acquired in the state where the divorce case has been filed.

Many estates are complex mixtures of separate and community property.

This is often true in second marriages and marriages in which one or both of the spouses have received an inheritance.

Debts

You are liable for debts you incur.

Are you liable for debts incurred by your spouse?

In order to answer this question, it is necessary to further delineate community property as "sole management community" and "joint community."

Your sole management community property is property that you acquired during the marriage and is under your sole management and control.

If you deposit your paycheck to an account in your name only (i.e., not a joint account with your spouse), that is what we call sole management community property. It's community, but it is under your sole management.

Joint community property is property under the joint management or control of you and your spouse.

Your spouse's creditor can collect his debt only from joint community property, your spouse's sole management community property, and your spouse's separate property.

Here's the takeaway: if your spouse has problems with creditors, be wary of joint accounts.

Common Problems

Credit Cards

Marital distress and financial distress go hand in hand.

Excessive credit card debts often precede a divorce.

Unpaid credit card balances create anxiety for the frugal spouse.

Consider the following options for handling your joint credit card accounts:

1. leave them as they are[4];

2. write the issuer of the credit card and advise it that you will no longer be liable for charges made on that account[5]; or

3. write the issuer of the credit card and advise it that you want to lower your credit limit and you will not be liable for charges over that amount.

Consider the following:

BlasterCard
Usury Bank of Virginia
Re:_____

To Whom It May Concern:

The purpose of this letter is to advise you that as of the date of this letter, I am not liable for charges made on account number _____. My spouse may want

[4] In many cases, divorce court judges will order a spouse to pay the debts he or she incurred during marriage without the consent of the other spouse, especially those incurred during periods of separation. A divorce court, however, is not empowered to limit the rights of a creditor. Thus, even if the court orders your spouse to pay a particular debt, if you also obligated yourself to pay the debt (i.e., signed the credit card application or car loan) the creditor may come after you regardless of what the divorce court decides.

[5] If you or your spouse has already filed a divorce petition, be careful that you do not violate a temporary injunction by doing this.

to continue the account. You may contact him/her at _____. If he/she does, he/she will be solely liable for all future charges.

If you have any questions, please call.

Many people do not want to be liable for expensive items charged by their spouses while the marriage is insufferable, but they also do not want to inflame their spouses by cutting off all of the credit cards.

When there is uncertainty about the prospects of the marriage, or when both spouses are responsible and mature about finances, consider the middle ground of instructing the credit card issuer to lower the credit limit of certain cards.

Send your letter by certified mail and keep a copy for your records.

Seek your spouse's prior consent, or advise your spouse that you are doing this, so that he or she does not learn it in an embarrassing situation.

Duties to Our Spouse

When we marry, we take on legal duties to one another.

One of those duties is to provide our spouse with "necessaries."

That typically means medical care, food, shelter, clothing, but courts have expanded the concept to include attorney's fees.

Additionally, spouses owe one another what lawyers call "fiduciary duties."

Fiduciary duties are a little hard to explain.

Think of a Trustee and a beneficiary.

Every Trustee must put the beneficiary's interests ahead of his own. He must make full disclosure to the beneficiary. He cannot engage in self-dealing.

Legally, fiduciaries owe more duties to their beneficiaries than run-of-the-mill people negotiating transactions.

When I entrust you with something, like my money, and you accept that trust, in many ways that has more legal implications than if you were, say, buying a used car for your undeserving teenager.

So what?

Spouses owe fiduciary duties to one another.

So, before you start trying to hide assets or documents or shred the evidence your spouse needs to trace his or her separate property, you may want to pay for an hour or two of lawyer time.

Interestingly, under prevailing case law, the fiduciary duties between spouses end when each spouse gets a lawyer.

Nevertheless, good divorce lawyers keep a sharp eye out for violations of fiduciary duties and will make them a battleground.

Bank Accounts

Prior to a divorce filing, funds in a joint account are vulnerable to attack by a hostile marital partner.

Spouses who are angry enough, ruthless enough, or insecure enough may raid these accounts.

It may be a real challenge to recover the funds withdrawn. What to do?

Consider the following options:

1. close these accounts and grab the loot before your spouse does;

2. take a portion (half?) of these funds and leave the remainder for your spouse;

3. proceed at your own risk; or,

4. file a divorce petition and seek a TRO, if need be (more about TROs below).

Joint Accounts Are Vulnerable!

Option 1 is justified in some cases. A mother with small children and no employment, for example, may need all of the $1,500 in the joint account for financial support.

Those of you who are married to financially irresponsible spouses might be prudent to grab a portion before your spouse's creditors wind up with it.

If you take control of the funds, and act responsibly, you can give your spouse money when necessary; if you lose control of these funds, you will not have this option.

Spouses who raid joint accounts without justification may put themselves in a bad light with a court at a later date.

Act irresponsibly with these funds and you may give your spouse a reason to sue you for breach of fiduciary duty.

If you do not have a good reason to take control of a joint account, but you are unsure about losing control, consider withdrawing one-half of the funds in the account. Then, tell your spouse so that he or she will not bounce any checks.

Case Study: Mrs. T is 58. Two years ago she quit her job with the State Department in Washington, D.C., married for the first time, and moved to Mount Pleasant, Texas. Mr. T is 70. He is a retired CPA in poor health. His children have financial difficulties, and he has begun to see Mrs. T as a liability. He decides to boot her out of his separate property home. Mrs. T owns only a modest amount of separate property. Because of the short duration of the marriage and an onerous prenuptial agreement, Mr. and Mrs. T have accumulated nominal community property. The only liquid funds available to Mrs. T consist of $7,000 in a joint account. After consultation with her attorney, Mrs. T. withdraws it all without prior notice to Mr. T. Mr. T decides that he will not contest this action in court. Mrs. T is probably much better off than if she had opted to leave the money in the account and sought temporary support or "interim attorney's fees" through a court proceeding.

Separation

Separation is usually the most difficult phase of a divorce.

John Haidt, the brilliant social psychologist from the University of Virginia, summarizes life as riding an elephant.

Just prior to the separation, the elephants are winning.

The not knowing what the heck is going on, why things have turned sour, and what, if anything can be done to remedy it, stresses us.

Who stays in the marital residence and who moves out is a common battleground.

Many spouses are reluctant to move out of the residence because they are concerned with appearing to give ground, losing "territorial rights."

What can you do when your spouse refuses to move?

Your options are:

1. move out yourself;[6]

2. persuade your spouse to participate in counseling and attempt to resolve the issue there (if it works it is usually less expensive than using lawyers to resolve the issue and it allows each spouse to vent in a therapeutic environment, which litigation is not; or

3. instruct your attorney to file suit for divorce and seek a court order awarding you exclusive use and possession of the residence until the divorce is final.

Many judges will leave the children in their home with the "primary caretaker" and oust the other spouse.

In some cases, however, judges order parents to get a one-bedroom apartment and take turns moving in and out of the house. For example, a parent will move in for a week while the other parent goes to the apartment. At the end of the week, they change places.

While this approach may result in a more stable situation for the children, it may also give them an unrealistic view of the situation. Their acclimation to the post-divorce family structure is delayed.

If you resort to the legal system to decide separation problems, you can expect to wait until (a) someone serves your spouse with a petition and (b) the court can schedule a time for a hearing.

This may take several weeks.

In the past, a judge could order a spouse to move out immediately upon the filing of a divorce petition. This procedure often caused a race to the courthouse. The Texas Legislature changed this process years ago. Now a hearing is

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[6] Consider negotiating a little first. Moving out can be a substantial concession for which some quid pro quo may be appropriate.

absolutely necessary before a court can order either party removed from his or her home, except in some cases of family violence.

Spouses who want a court to decide who stays and who goes without having to put up with the tension and hostility during the interim may consider staying with a friend or checking into a motel until the court makes a decision.

Changing the Locks. When your spouse has moved out, consider changing the locks immediately. Do this even if your spouse has personal effects in the house. Failure to heed this advice may cause you embarrassment, loss of property, or other problems.

Case Study: Mr. and Mrs. M squabbled for fifteen years. She got fatter every year, and he became more aloof. He finally moved into an apartment in a small apartment complex they had purchased with her separate funds during the marriage. He forgot that she had a master key. Throughout their two-year divorce proceeding, Mrs. M went into Mr. M's apartment when she knew he was out of town. She especially enjoyed reading the letters Mr. M received from his lawyer.

Case Study: Mr. and Mrs. Y were in their thirties. They had one child, age 11. Mr. Y packed his bags one night, told Mrs. Y that he had had enough, and left. The next night Mrs. Y took her son to the roller skating rink where she met a very attractive man who made her an offer she could not refuse. He came by her house that evening. They had an amorous liaison, leaving said man too exhausted to go home. Guess who decided to come back home the next morning? Mrs. Y ultimately lost custody of her son.

Gathering Records

During your marriage you should keep accurate records of your personal finances, property purchased and sold, and debts incurred. If you are one of those who don't, you are not alone. One of the first things a divorce lawyer should do is review all of the legal and financial documents that are relevant to your case. This usually includes:

1. tax returns for the past few years, including W-2s, 1099s, and K-1s;

2. bank statements and canceled checks (if available) for each of your and your spouse's accounts for the same period;

3. deeds and loan documents relating to purchases and sales of real estate during the marriage;

4. written materials relating to investments made during marriage or owned prior to marriage;

5. credit card statements and other documents about your debts;

6. current statements for your IRAs and retirement accounts;

7. financial statements prepared during the marriage; and

8. other documents relating to your income or property.

Even if you are not sure that a divorce will occur, you should have a complete set of records in a place where your spouse cannot tamper with them.

If your records are incomplete, contact your bank, the IRS, and other sources necessary to acquire duplicates. This should be done without delay. It may take weeks to get reproductions.

Organize Your Legal and Financial Documents Now!

Tracing Assets

If you have owned any property that might be considered separate property, and you have not kept that property intact throughout the marriage, you may have to "trace" this property in order to avoid dividing it with your spouse upon divorce.

Tracing can be a time consuming and complex process. Start it as soon as possible.

The Financially Irresponsible Spouse

Many of us are married to spouses who are ignorant or negligent about finances. They incur debts without any thought of how these debts will be paid. They charge gifts in an attempt to smooth rough waters, or they charge new clothes preparing for single life. Whatever their justification, they find a reason to spend money that they do not have. This may go as far as forging your signature or endorsement on checks. **If this is similar to your situation, you should consider filing suit for divorce as soon as possible.**

Financial Problems Always Increase Marital Distress!

The Financially Uninformed Spouse

Others of us have no idea what our spouse earns, owns, or spends.

If this sounds familiar, investigate!

Financial statements submitted to your spouse's banker are a good source of information. So are tax returns.

Your lawyer can assist you with this, but the more you can do on your own, the less you will have to pay for legal fees.

In some cases, it is important to analyze an estate prior to filing a divorce petition to determine what the financial future has to hold.

If that future is bleak, it may be advantageous to delay the legal process while someone goes back to school or looks for a job.

The Non-Working Spouse

If you have been out of the job market for a substantial period of time (forever qualifies), and you are not one of the fortunate folks with lots of money, best to address that issue ASAP.

Lots of family law judges are female. They have worked and raised kids and have little sympathy for women who consider themselves "entitled."

If your spouse is working and you are not, the court may award you "temporary spousal support" to be paid by your spouse for some limited period. This period may be anywhere from 30 days to over a year. Many judges will limit spousal support, however, to 90 days to encourage non-working spouses to get a job.

Post-divorce Maintenance

Texas was the last state in the nation to pass legislation allowing a court to award alimony.

Even then, we don't call it "alimony"; we call it "spousal maintenance."

Being eligible is not easy.

You have to have been married for at least 10 years or the victim of a domestic violence crime[7], and you have to be lacking the skills and the property to meet your "minimal reasonable needs" (whatever that means) or taking care of a disabled child.

Because this is relatively recent legislation, lawyers do not have a lot of history to draw upon to tell you whether a court may award you alimony if you qualify.

To err on the side of safety, if you do qualify, don't count on it.

At first, the Legislature limited post-divorce maintenance to three years and $2,500 per month.

More recently, the Legislature increased the amount that a trial court can award and how long.

Now, a court can award up to $5,000 per month:

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[7] Within two years before filing, which creates some incentive for victims to file for divorce; like so many things in life, you snooze, you lose.

- For 5 years if the marriage has been between 10-20 years;
- For 7 years if the marriage has been between 20-30 years; and
- For 10 years if you have made it over 30 years.

So, as you can see, financially dependent spouses may be smart to put up with things to get past the 10-year mark (that is also the point that Social Security retirement benefits kick in); after that, the Texas Legislature does not provide much financial incentive to wander through the Sinai of 10-20 years, but, if you make it that far, anything over 30 better be for reasons other than post-divorce maintenance.

If you qualify and happen to be mentally or physically disabled, first, let me say that you have my compassion.

The minor degree of silver lining in your dark cloud is that the court can order your spouse to pay you maintenance indefinitely: tough cases!

Ambivalence

Do not start the divorce process unless you are absolutely sure that a divorce is the only solution to your problems.

If you are ambivalent, seek counseling.

One relatively new and unique approach to marital problems is to submit them to a mediator instead of a marriage counselor.

Book recommendation: *Too Good to Leave, Too Bad to Stay*, by Mira Kirshenbaum.

Affairs

Beware of affairs.

The Texas family law system is still somewhat moralistic.

Generally, dating after separation is OK, although it may inflame your spouse, which means that your trial judge will not care, but your spouse can make the whole process much more difficult because you are having fun, and s/he isn't.

Intercourse, as opposed to dating, is not OK.

I realize this can be easy advice to give and hard to follow, but by sleeping with someone other than your spouse prior to divorce, **you subject your lover to subpoena as a witness in your divorce case**.

Both of you may be asked a barrage of embarrassing questions.

You may provide your spouse with ammunition to harass you into a favorable property settlement.

If you are fighting over custody, having an active sex life provides dubious value.

Remember, having sexual relations with someone other than your spouse before divorce, even if you are separated, is still considered adultery under the law.

Case Study: Dr. W had been a good, nurturing mother to her 3-year-old daughter. Dr. W's husband, Dr. H, had an affair while Dr. W was pregnant. When Dr. W learned of the affair she insisted that Dr. H move out of their residence. After consultation with his attorney, Dr. H began playing the role of the caring, involved father. Dr. W had trouble with the stress of separation. Within six months she had five one-night stands (true story)! She was operating! Dr. W's promiscuity neutralized that of her husband. As a result, she wound up losing rights to her child that should would otherwise not have lost.

Spousal Abuse

If your spouse is physically abusive with you, call the police first; call a lawyer second.

A court can order that abusers stay away from your home and office.

You can get help, but you will have to ask for it.

Experienced family lawyers understand that, more often than not, victims of family violence go back.

If your lawyer is not cynical, you may want to keep shopping; if he is, get out your checkbook.

Telling Your Children

No matter how old they may be, if you have children, you will need to tell your children that mom and dad are getting a divorce.

This is almost always a challenging, highly emotional, problem to solve.

There are not many rules to guide you, but I am relatively confident in these:

- Do not discuss your divorce with them prematurely; if you are in the midst of an emotional nightmare, it serves little purpose to share it with loved ones.

- If you can pull it off, it is usually best for you and your spouse to tell them together. This avoids the situation where one of you says, "Your father/mother told you what???" "Ok. If s/he wants to be that way, let me tell you my side of the story."

- They really don't need to hear all of the dirt about your lack of sex life, the emails you discovered, or the results of the private investigator's report.

- Let them know that this is between you and your spouse, that you two will work it out, that you both love them, and everything is going to be ok.

Book recommendation: *Divorce Without Victims*, by Dr. Stuart Berger.

Attempts at Reconciliation

If you think there is any hope of reconciliation, consult a professional.

Most people go to a mental health professional or turn to their church.

I don't mean to demean the brothers of the cloth, but I have never heard a success story as a result of "Christian counseling."

I'm sure there are some, but my theory is that the seminary prepares a minister, pastor, or priest (one day I may delve into the distinctions and nuances of these roles) for many things, but resolution of disputes between couples is a low priority.

Or, maybe it's just me.

I believe that if you are having marital conflict, which you wish to mitigate, if not resolve, the best approach is to engage a professional who is familiar with the territory.

If you and your spouse are having spiritual problems, a minister may be a good idea; if your problems are more financial, perhaps a neutral accountant would be more effective.

Mediation?

I discuss mediation more fully below, but, if you are working through the dissolution process sequentially, this may be a good time to consider a mediator.

If you are not sure what the problem is, mediation is a good place to start.

Mediation may not solve all of your problems immediately, but it should help you see the problem in clearer focus.

You will then know whether you need a mental health professional or a real estate appraiser or a lot of happy pills!

Coping with Marital Distress

Speaking of which, marital distress can be just as stressful as the most difficult business problems or the most serious health issues.

In extreme cases marital distress kills.

Even if your marital distress is not that severe, it will be a day-to-day drain on you.

This may lead to insomnia, excessive drinking, hypertension, passive-aggressive behavior, headaches, fatigue, boils, neuritis, neuralgia, flatulence[8], and a myriad of other stress-related problems.

Marital distress will have a ripple effect and affect your children, parents, and co-workers.

Sufferers of marital distress are well advised to set aside extra time to relieve stress in a healthy way.

Walk a few extra miles.

Start doing yoga.

Learn racquetball.

Go camping for a few days.

Practice relaxation techniques.

Take pills (under a doctor's supervision, of course).

Do whatever you enjoy that is not destructive but, remember, extra stress will take its toll if you do not do **something** about it.

[8] Just one form of passive-aggressive behavior.

Spend Extra Time Managing Your Stress!

Keeping a Journal

Keep a journal until your divorce is resolved, especially if you have children.

Write down everything that happens involving you, your spouse, and your minor children: telephone conversations, confrontations regarding the children, settlement discussions – everything.

If you have minor children, continue keeping a journal after your divorce.

You may have to return to court to modify custody or support issues.

Keeping a journal is not only good therapy; it's good evidence.

Financial Documents

Importance: The legal community has worked hard in the past few years to "de-emotionalize" the divorce process.

This began in the '60's with no-fault divorce laws and has continued into the '90's with innovations such as mandatory mediation in custody disputes and broader application of joint custody.

Most recently, the Texas legislature addressed a flashpoint by passing guidelines for periods of possession for children under three.

The result is a system involving less mud-slinging (at least, theoretically).

The family law system is now more concerned with the financial aspects of the divorce.[9]

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[9] Lenore J. Weitzman, *The Divorce Revolution* (1985). p. 99.

For this reason, in most cases, the preparation of accurate financial documents is the most important part of the case.

Personal Financial Statements: The most helpful thing you can do for your attorney is to prepare an accurate, current personal financial statement.

I have seen numerous cases where thousands of dollars of attorney time had to be spent preparing a financial statement.

You can save yourself a lot of money by doing this yourself or, if your estate is complex, by employing a CPA to do it.

An accountant's hourly rate is usually less than your attorney's.

How detailed should it be? As detailed as possible, but, please, don't value the furniture.[10]

How do you place a value on your assets?

Consult appraisers, or give it your best shot.

Value home furnishings at liquidation value or, better yet, not at all.

Any value you come up with for used furniture will be based upon voodoo economics because there really isn't a market for your used stuff.

On the other hand, if you have antiques, collectibles, collections, that sort of thing, consulting an appraiser can pay big dividends in future negotiations.

Cash Flow Statement: If you have children, or anticipate any issue in your case regarding financial support for you or your spouse, prepare a cash flow statement describing your average monthly income and expenses.

This exercise should also assist you in your post-divorce financial planning.

[10] Rich folks excluded.

Back-up documentation: Your financial statement and cash flow statement should be substantiated by appropriate supporting evidence such as pay-stubs, amortization statements, appraisals, bank statements, and credit card statements.

Timing: In too many cases, once the petition is filed, battle lines are drawn. This usually means that financial information is easier to obtain before someone files a petition.

Consider "doing your homework" before you start a legal proceeding: The results will help you better understand the strengths and weaknesses of your situation before you begin.

Other Documents
Estate Planning: The typical injunction entered by most courts as soon as a divorce case is filed will prohibit each of you from changing life insurance beneficiaries and retirement plan beneficiaries (but not your will)[11].

> Case Study: Mr. B was 65 when he began to suspect that his wife of ten years was having an affair with **a local evangelist**. At the time, Mr. B's will provided that his estate would pass to his wife. After sniffing out her indiscretions, Mr. B contacted his attorney and revised his will, leaving his estate to his four adult children from a prior marriage. Two weeks later, his wife filed for divorce. Before the divorce became final, Mr. B died unexpectedly. If he had not changed his will when he did, that cheating b%^*&(*(tch would have inherited Mr. B's entire estate, which, upon her death, would wind up as either a significant offering or the blessed inheritance of the evangelist, leaving Mr. B's children with zip.

[11] The current trend is for counties to adopt "standing orders," which impose temporary injunctions to every case filed. This is a good innovation because it saves the litigant from having to pay a lawyer to prepare a TRO and find a judge to sign it, and it saves the courts the time from having to review every request for glitches.

Consider re-evaluating your estate plan before the divorce gets under way. This is especially important in larger estates.

Chronology. A chronology of salient events during the marriage will be very helpful to your attorney.

Witness Lists. If you think that your case might not be settled out of court, list each person who knows anything about the disputes between you and your spouse. Include their addresses and telephone numbers and a brief synopsis of what he or she knows that is important to your case.

Tape Recordings

I'm not sure I like it, but the law clearly allows you to tape record any telephone conversation to which you are a party.

If you're on the phone, you can legally tape it.

Taping verbal abusers or spouses who make threats can result in devastating evidence.

Can you tape phone conversations between a child and your spouse?

A recent case suggests that you may be able to because, under certain circumstances, a parent can consent to the recording on behalf of the child.[12]

Personally, I prefer to make agreements that neither parent will tape record the other except in cases where my client is the victim of verbal abuse.

When people think they may be recorded, they will be guarded, if they communicate orally at all.

In some cases, however, all is fair, and you have to do what you have to do.

But, be very cautious tape recording people.

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[12] *Allen v. Mancini*, 170 S.W.3d 167 (Tex. App. – Eastland 2005, pet. denied).

There is a state statute and a federal statute making wiretapping a crime and allowing for civil penalties.

If you don't know what you are doing and get too aggressive, you can get burned.

Mediation

What is "mediation"? In 1987 the Texas legislature passed the Alternative Dispute Resolution Act authorizing judges to utilize more innovative methods of settling civil disputes.

One of these methods is mediation.

Mediation is a structured settlement conference where a person acts as a neutral go-between to bridge communication gaps between parties in a lawsuit.

Mediators are trained in techniques proven to facilitate resolution of disputes.

How Does It Work? Although there is no right way or wrong way to conduct a mediation, and every mediation is a little different, there are currently several primary "models" for mediating a divorce case in Texas.

In the "conventional approach":

The attorneys agree on a mediator and schedule a day with him or her.

It is not unusual for popular mediators to be booked 30 days out, so plan accordingly.

Prior to the mediation, a good mediator will want to talk to the lawyers, and good lawyers will want to meet with their clients to prepare a negotiating strategy.

Some mediators have their own space; some use the offices of one of the lawyers.

While in civil cases, mediators typically begin the mediation with a "joint session," in family law cases, because they tend to be so emotionally charged, many times the mediator will avoid putting everyone in the same room together;

indeed, in many family law mediations, you and your attorney may be there all day without seeing the other side.

Many litigants prefer this.

When I am acting as mediator, I often put the parties in offices on different floors in my building. I have had cases where conflict erupted in the hallway between my office and the restrooms.

Learning and growing is what it is all about.

Many times family law mediations last 10-12 hours or more. Either bring your sleeping bag and a sack of snacks or draw a healthy boundary before you go.

Let people know that you are leaving at 6:00 p.m. or whenever.

If you get sucked in and play it out, the idea is that the mediator will prepare a mediated settlement agreement ("MSA") for everyone to sign before you leave.

Don't.

MSAs are one of the most binding forms of contracts in western jurisprudence; you don't get three days to change your mind.

In family law cases, instead of beginning with a joint session involving both parties and their lawyers, the mediator is more likely to meet with the lawyers only or begin the meeting with one side or the other and then proceed to shuttle from room to room ("caucusing").

That is more or less how the conventional model works.

In the next approach, what I call the "mental health model," which I rarely see, the parties attend mediation without their attorneys.

The mediator seats the parties in the same room, and conducts the mediation without separating the parties and meeting with them privately.

Mediators who employ this model usually schedule sessions for an hour or two and continue the mediation over several sessions, giving the parties

“homework” between sessions, which may include consulting with their attorneys.

Relatively amicable couples may utilize this form of mediation before the legal process becomes litigious.

The disadvantage of this model is that the "weaker" spouse can be at a serious disadvantage because her attorney is not there with her to assist her in the negotiations.

The mental health model had a measure of popularity in the early 90s, utilized primarily by – you guessed it - mental health professionals.

When lawyers gained hegemony in local mediation practice, the mental health model transformed itself into collaborative law.

How Much Does It Cost? Customary rates for experienced mediators in Dallas County as of this writing vary between $600 and $2,500 per party per day based upon the complexity of the case and the experience (if not the ego) of the mediator.

Does It Work? Personally, I don’t trust statistics.

And, what does “work” mean anyway?

Some mediators brag about their settlement rates; some would say that a high percentage of cases settle.

My personal experience is that mediation is an important tool in settling tough cases (easy cases do not require mediators).

As an advocate, I always learn something important at mediation (and better to find out there than in court); as a mediator, even when we do not settle the case on the day of mediation, we always make progress and, if nothing else, we bring the problem into sharper focus.

Advantages of Mediation.

1. Mediation empowers the parties to formulate their own solution to their dispute.

2. Mediators are typically more accessible than judges.

3. Mediation, if successful, will terminate the dispute. Resolving a dispute by trial may lead to an appeal.

4. Cases resolved in mediation usually result in lower attorney's fees.

   According to what may be a dated *ABA Journal*, lawyers generally charge $20,000 and up for resolving a divorce case resolved through litigation and rarely more than $10,000 for resolving a case through mediation. As a mediator, I see a lot of cases where the lawyers charge more than $10,000, but, generally, I think that most divorce lawyers would agree that mediation reduces litigation costs.[13]

5. Unlike court proceedings, mediation is confidential.[14]

When Should Mediation Be Utilized? If you and your spouse have a simple estate and no children; or, if you have a simple estate and no dispute about who will have custody of the children and how parenting will be shared after divorce, you do not need a mediator.

If, however, there are disputes or complexities about your divorce, you should consider employing a mediator. But, when?

I usually test the waters with some negotiations before scheduling mediation. After all, if you can settle the case without spending the money on a mediator, why not?

If, however, negotiations among the parties and the lawyers are not promising, it's best to get on with the mediation process.

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[13] Jensen, Rita Henley. "Divorce – Mediation Style." February, 1997.

[14] In some states, including California, mediators make recommendations to the court about a case after mediation (*Id.* at 56). In Texas, a mediator can only report to a court that the case settled or it did not.

Even though mediation is an expense, it is one that can save other litigation expenses.

I hate to tell you, but most lawyers are poor negotiators.

To make it worse, they refuse to acknowledge that they are poor negotiators.

And, you are trusting them to help you make major life decisions!

Ineffective negotiations often lead to depositions and trips to the courthouse; that approach can cost a lot more than hiring a mediator, and once the downward spiral of acrimony begins, it can be hard to reverse it.

Attorneys representing relatively uninformed spouses will usually want to gather information before agreeing to mediate. This makes sense. You cannot negotiate without sufficient information to allow for an effective dialogue. And, of course, knowledge is power.

Collaborative Law

Collaborative law is a relatively new development, showing that even the legal system is dynamic sometimes.

Basically, in collaborative law, the lawyers agree that they will not go to court; if there is some reason to go to court for a contested hearing or trial, the parties have to change lawyers.

The threat of going to court is taken out of the equation.

While that sounds admirable, as I see it, and trying to keep people out of court is what I do, many cases settle because of the threat of going to court.

And, most of my clients cannot afford to change lawyers when negotiations break down.

And, the ones who can may not want to be in the position of having to do that.

The more invested you become in the collaborative law procedure you get, the more economic pressure there can be to make a deal, even a bad deal.

In October of 2000, I wrote a short article describing all of the theoretical problems I see with collaborative law, but I won't go into all of that here. If you are interested in more detail, contact me.

Many of my most respected colleagues are practicing collaborative law. Personally, I have not yet jumped on this band wagon. The jury is still out on collaborative law. Stay tuned!

Mental Health Professionals

As far as I am concerned, mental health professionals are almost an indispensable part of the divorce process. Even the simplest divorce (from a lawyer's perspective), represents the destruction of someone's hopes and dreams about a major life event. It's traumatic. If you were ever inclined to get a little counseling, this is it. In many ways, divorce is worse than experiencing the death of a loved one. Death is final; divorce lingers.

Those of you with custody issues should be especially interested in what a mental health professional can do for you, especially one who is willing to testify.

Do your kids need counseling?

Pre-Divorce Checklist

- Consider counseling.
- Understand the difference between community property and separate property.
- Evaluate your credit cards.
- Evaluate joint accounts.
- Confront separation.

- If you are separated, and you have remained in the marital residence, change the locks on the doors.
- Gather and organize all important financial and legal documents.
- Determine whether it will be necessary to trace separate property. If so, consider professional assistance.
- Some counties require that you acquire a restraining order to prevent bad behavior during the divorce process. Find out what your county's policy is.
- If your spouse has been abusive, consider requesting a Protective Order, and, for God's sake, take it seriously!
- Anticipate your post-divorce financial condition. If necessary, go back to school and/or seek employment.
- It's OK to date, but be careful about too much too soon.
- When you are sure, tell your children but not until then.
- Extra-marital relationships tend to inflame your spouse, which may be what you want, but, if you are smart, you will be discreet and do not take him or her around your children.
- Manage your stress constructively.
- Keep a journal.
- Prepare a current personal financial statement.
- Prepare a current cash flow/budget.
- Should you consider tape recording your spouse?
- Consider changing your will, life insurance beneficiaries, and retirement plan beneficiaries.

- Consider employing a mediator.

- If you anticipate a custody battle, take the children to a psychologist for evaluation.

Chapter III: How to Select a Divorce Lawyer

Contemplating divorce? Your spouse may have had similar thoughts.

What if your spouse has been conferring with a lawyer for months? Could that disadvantage you?

I don't want to scare you, but perhaps you should consult a lawyer sooner rather than later to find out how to protect your rights.

If you do not find a lawyer until you are served with a divorce petition, you could find yourself at a serious disadvantage in a contest that may affect the rest of your life.

It's not easy to call a divorce lawyer, but many of us (but not all) give free consultations.

Personally, I would rather help someone avoid a train wreck than to get involved when viable options are foreclosed.

The sooner you contact me, the better I can help.

The lawyer's lament: "If only you would have called me sooner …"

Even if you do not get divorced, a competent lawyer can help you organize your affairs.

That may be important in the event of disability or an untimely death.

A probate proceeding is, in many ways, similar to a divorce proceeding.

When you die, the property that passes under your will is your one-half of the community estate and your separate property.

Whether divorce or probate, what comprises your total estate can be a complex question.

Sooner or later, you or your heirs will confront this.

If your affairs are in order, probate fees will be nominal; if your affairs are a mess, it may be costly to ascertain and distribute your estate.

Using One Lawyer

Lawyers are ethically prohibited from representing both parties in a divorce.

Lawyers are advocates, and it is impossible to advocate both sides of a case.

This does not mean, however, that divorcing couples always need two lawyers.

You can always use one lawyer.

You would be smart if s/he were YOUR lawyer, but you already knew this.

It does mean that no one can mediate your divorce *and* prepare all of the documents required to finalize it.

A recent ethical opinion held that this sort of "one-stop shopping" is unethical.

Where to Look

Internet. I used to tell people to avoid large ads in the Yellow Pages or TV guide, but I'm showing my age.

These days most law firms advertise to some extent on the Internet.

This can be a good place to start.

Bar Associations.

Your local bar association can be a good source of information.

Most lawyers who do a significant amount of family law are members of the family law section of local, state, and national bar associations.

Your local bar association can give you a list of attorneys who are members of the local family law section.

This will give you some measure of assurance that the lawyer you choose is qualified to handle your divorce.

Friends.

Everyone has an opinion.

More importantly, everyone has a bias.

Consider the source.

Lawyers.

Lawyers are a good source of information if you know one well enough to get a candid, objective opinion.

Lawyers know more about the practices of their colleagues than the public could ever know.

Some lawyers have reputations among their peers for overcharging their clients, not working their cases, not knowing the law, or being overly litigious.

If you are considering hiring a certain lawyer for your divorce, try to check him out with other lawyers in advance.

Other Professionals.

CPAs, CFPs, mediators, therapists, CLUs, and bank officers can also be valuable resources.

The Initial Interview - What to Ask

You may have numerous questions for your first interview with a divorce lawyer, but make sure to ask the following:

- How will I be charged?
- Who will actually handle my case?

- Have you handled other divorce cases similar to mine?
- What percentage of your practice is divorce, or family law, related?
- Do you employ associates, paralegals, law clerks or legal assistants? If so, what is the charge for their time?
- Do you having any long vacations coming up?
- If so, can I come along?[15]

Fee Arrangements

What is a retainer?

A retainer is an advance payment.

You could consider it an attorney's security blanket.

Most attorneys wrestle with substantial monthly overhead and cannot afford to extend credit to their clients.

They require an advance as a credit against the time they expect to expend on your case in the short run.

If they do not get enough of a retainer, and you get behind paying your bills, they may not be too enthusiastic about working on your case.

Sorry, but that's human nature.

If you get too far behind, you may find yourself learning law the hard way – through self-study.

What do I do if I can't afford much?

[15] Not really!

Many communities offer legal services to low-income people.

If you do not know where to find them, check with the local bar association.

Some of the most challenging cases are those where the divorcing spouses make too much to qualify for pro bono services but have too little for much in the way of legal services.

If that is your case, a young lawyer looking for some experience may be something to consider.

Refundable and Non-Refundable Retainers.

Beware of the non-refundable retainer.

Your attorney may charge you $5,000 as a non-refundable retainer.

If he spends two hours on your case, and then you and your spouse decide to reconcile, you have just paid $5,000 for the two hours of services rendered. Is this ethical? Good question.

Written Fee Agreements.

Many lawyers want you to sign a written employment contract before they begin working for you.

This is mutually beneficial because a good contract clarifies how your lawyer will charge for handling your case.

This will prevent a lot of future misunderstandings.

Do not sign such a contract, of course, unless you understand it.

Other lawyers prefer to use "engagement letters."

Rather than asking you to sign a contract, they will send you a letter setting out the terms of their fee arrangement.

How it is done is unimportant, but make sure that the terms of your lawyer's fee arrangement are clearly stated in writing.

The Contingency Fee.

Some lawyers will agree to represent you and defer all or part of their fee until the case is over, taking a percentage of what you ultimately receive.

This sounds like a great deal: no monthly bills to worry about, no worry that your attorney will withdraw from your case because he is not paid.

The percentage, however, may be as much as 25-40% of each dollar he recovers for you.

This may apply regardless of how much is actually in dispute.

For example, if you have an estate worth $100,000, and you and your spouse have agreed to the division of 90% of it, your lawyer may get paid a fee of $20,000 (40% of half) for fighting over $10,000.

Some would consider this an excessive fee.

Lawyers may put contingency fee cases on the back burner and work on them only when they have few cases on which they are paid an hourly fee.

The Texas State Bar discourages contingency fee agreements in divorce cases for various reasons, including the obvious complications if the parties reconcile.

Be circumspect of any proposal to handle your divorce on a contingency fee basis.[16]

Types of Lawyers.

Divorce lawyers are like snowflakes; no two are alike. OK – bad analogy.

Still, we all have different styles and different approaches to how to solve our

[16] They are "rarely justified" under Comment 9, Rule 1.04, Texas Rules of Professional Responsibility.

clients' problems. Here are a few examples:

Specialists.

Specialists are a fairly new addition to our age-old legal system, dating back to the mid-1970's when the State Bar began "certifying" lawyers as "specialists" if they met certain qualifications of experience and knowledge.

In the family law area, they emphasized experience in courtroom battles and left little room for lawyers who prefer to resolve their cases privately through negotiation.

The current roster of specialists emphasizes warriors and disenfranchises diplomats.

I have found that this is exactly the opposite of what many consumers want.

The vast majority of people with whom I have counseled on family law issues during the past 35+ years have expressed a strong desire to stay out of court.

They usually want to dissolve their marriages with as little expense and trauma as possible.

So, if the State Bar's list of specialists is not a good source of lawyers who will try to keep you out of court, where do you look?

This is a real problem for every consumer of divorce and family law services.

The fact that the State Bar has certified your lawyer does give you some measure of assurance, however.

It means that the lawyer has had a minimum number of hours of continuing legal education in family law, s/he has had a fair amount of trial experience, and s/he has passed a written examination designed to establish certain competence in family law.

It does not mean, however, that s/he will be conciliatory, superior, know anything whatsoever about negotiation, or effective in resolving your case promptly and economically without rancor or contention.

While there are certainly a number of many fine family lawyers who are board certified, there are many others who are not.

If I were looking for a lawyer, this would not be my acid test, but then, I am biased.

I have resisted board certification.

Perhaps that is because, like Groucho Marx, I would never join any club that would have me as a member.

Attorney-Mediators

A newer breed of lawyer is the "attorney-mediator."

The State Bar has nothing to do with this label.

Attorney-mediators are attorneys who have had special training as negotiators and problem solvers.

The amount or quality of this training may vary considerably from practitioner to practitioner.

Attorney-mediators often represent parties in divorce cases and serve as mediators in other cases; other attorney-mediators are full-time mediators.

Attorney-mediators typically handle cases using methods that emphasize cooperation rather than confrontation.

Their objectives are often to keep their clients out of court.

This is not to say that an attorney-mediator is necessarily unfamiliar with, or uncomfortable with, court procedures.

Some are experienced trial lawyers, but their emphasis differs from that of their colleagues.

Collaborative Lawyers

Many specialists have embraced collaborative law (discussed above).

In the collaborative law model, each of the parties agrees that, no matter what happens, they will not instruct these lawyers to go to court for anything except to submit an agreed order.

Typically, the lawyers engage the assistance of a mental health professional to facilitate "four-way meetings" and a neutral financial professional.

The idea is that we will meet, the mental health professional will keep a lid on the meetings, the financial neutral will gather and analyze the necessary financial information, everyone plays nice, and, at the end of the day, we all hold hands and walk out together in peace and harmony.

I'm all for that – except do we always need four professionals at every meeting?

That "burn rate" makes collaborative law, to a large extent, a rich man's game from my middle class perspective.

If the parties hit a snag in their negotiations, they keep meeting until one hollers, "Uncle!"

Then, if they cannot find a way to resolve the impasse, they have to fire the collaborative lawyers and start all over with new lawyers.

Consider this scenario: you have been a stay-at-home mom; your husband has his own business, about which you know little; he tells you that business is bad, and you need to settle; you have just spent $36,000 on a collaborative law proceeding; if you do not accept your husband's low-ball offer, you will have to start over with a new lawyer who will require a $20,000 retainer; the expert you and your husband employed during the collaborative proceeding will be disqualified, so even though he says your husband's business is worth a lot more than your husband says, you will have to find another expert at substantial cost.

At what point does all of that become coercive?

Collaborative law is a relatively rigid process.

I contend that it works best in cases that don't need it, cases in which there is little or no power imbalance between the spouses, both act like civil adults and understand that making lawyers rich to vent one's spleen is rarely worth the cost of admission.

When collaborative cases "bust out," they typically bust out with a vengeance.

Some collaborative lawyers stay up late looking for ways to create "soft landings."

Although a good collaborative lawyer can do one heck of an infomercial, this procedure is not for everyone.

Cooperative Lawyers

Even more cutting edge than attorney-mediators and collaborative lawyers may be cooperative lawyers.

Cooperative law is whatever the parties want it to be.

It may be collaborative law without the trauma of changing lawyers and hiring new experts if you hit an impasse.

In other words, why kick out the negotiators just because of a measly hearing?

At this time, there is no standard format for cooperative law.

Other Factors to Consider

- **Personality**: Will you enjoy working with this person for three months to two years? Do not choose a lawyer you do not like.

- **Telephone calls**: Most lawyers charge you for time they spend talking to you on the telephone. Some charge a minimum of a quarter hour per call; others charge by the tenth of an hour. Find out. Consider writing out your questions before you call and confirming your understanding of what was decided to avoid misunderstandings.

- **Location**: Is your lawyer's office in a convenient location? You may have to make numerous trips to your lawyer's office during your divorce case (although the trend is towards electronic communication). Make sure that the additional travel time is not a hardship on you.

- **Confidence**: Do you trust this person? This can be a crucial consideration in complex cases where the fees will be significant.

- **Style**: Most lawyers are either cooperative or contentious. Which kind do you want?

Chapter IV: The Divorce Process

Getting divorced is like going to a foreign country.

The divorce process has its own language, its own set of rules, and its own sense of time.

This chapter previews the legal system to better prepare you for divorce and to reduce the anxiety intrinsically related to the divorce process.

Topics are presented according to when you usually confront them during the process; in other words, from start to finish.

Initial Considerations

Technology

Technology has changed the divorce process in many ways.

I started practicing law in the days of Selectric typewriters, before dedicated word processors and dot-matrix printers that needed the big sound covers to keep those within earshot from going bonkers.

The evolution of the process, interesting though it may be, is not of great practical value.

What you need to know is that you can cause yourself a lot of trouble by using your cell phone, your laptop, your iPad, your blog, and your Facebook page.

Take Anthony Weiner.

And, then, there is also match.com, and various single sites, where you can misrepresent your marital status, and lots of sexually explicit sites where you can do major damage to your case.

Facebook

More specifically, if you're a Facebook addict, you're not going to like this part.

What is it about Facebook that causes us to post the most self-destructive reflections of ourselves?

“Look at me! Another drunken selfie!”

Divorce lawyers feed on Facebook pages like piranhas because people are stupid enough to post stuff on Facebook that makes for good evidence against them.

Even if your posts are not worth much in court, seemingly innocuous photos may be misinterpreted by your spouse.

The best advice, which I believe you would hear from ten out of ten lawyers, is just stop.

Once your divorce is finalized, you can get back to Facebook.

Collaborative Law

Although I know of no reason why you could not make the decision to elect the collaborative law process after you had begun and were well into the divorce proceeding, as I understand it, most people make this election at the beginning of the case.

Collaborative law is well-intentioned, and many people like it, or have been satisfied with the results of a collaborative divorce; but, please remember that the decision to have a collaborative divorce proceeding is *tactical*; it may also be emotional, but it is naïve to fail to consider the tactical implications of this decision.

Electing the collaborative model locks you into a rigid system.

If it works, great. If not, it can be an expensive adventure.

When you agree to a collaborative law agreement, you will sign a lengthy, complicated document that says, among other things, your lawyer will not appear for you in court except to submit an agreed order.

That means that if you hit a snag, you have to change lawyers.

Starting over with a new lawyer can be expensive.

The prospects of this expense can be coercive.

You may find yourself between a rock and a hard place, a location I enjoy avoiding.

Some of my respected colleagues practice collaborative law.

Some have applied it with great success.

If you are going to use it, be prepared to sit in a number of long meetings with your soon-to-be ex, along with at least two lawyers and, typically, a mental health professional, and a financial neutral.

The “burn rate” for those meetings should be a factor in your decision making.

The Temporary Restraining Order and Standing Orders

The "TRO" is a court order prohibiting all transactions except expenditures for normal living expenses, normal business expenses, and legal fees.

A TRO will limit the financial transactions you or your spouse may conduct and it prohibits various forms of harassment.

TRO practice has changed in the past few years.

Used to be that lawyers had to prepare an order, take it to court, persuade a judge to sign it, thus, having to “walk it through” the process.

Because TROs in divorce cases are usually automatic, many counties have adopted “standing orders.”

That means that you no longer have to ask a judge to sign a TRO unless you want some unusual relief; otherwise, it is automatic when someone files a petition for divorce.

The court clerk simply attaches a copy of the standing order to the petition.

In the past, clients all had to decide if they wanted a TRO.

With standing orders, you no longer need to make that decision; it is made for you.

As discussed below, one of your initial decisions is whether to serve your spouse with the petition, rather than using "softer" methods, such as providing him/her a copy by mail.

If you do not live in a county that utilizes standing orders, you may request that the court issue a TRO when a divorce suit is filed or at any time during the pendency of the case.

A TRO is valid for only 14 days.

You may request that the Court renew it once without the agreement of the other party.

After that, the court must conduct a hearing to extend it further.

It is common for courts to extend the TRO for the duration of the case.

When this occurs, however, the law no longer refers to it as a TRO, which is a term denoting a short-term order; when extended for the duration of the case, it becomes a "temporary injunction."

Standing orders typically become temporary injunctions if neither party objects within 14 days after the petition is filed.

Protective Orders

There are a couple of different court orders that go by the name of "Protective Orders."

One type of Protective Order is designed to protect a party from an unreasonable request for information.

In cases where someone has threatened or committed family violence, however, the court can issue a Protective Order that prohibits one party from coming anywhere close to the other party or his or her residence or business.

While police may do little because of a violation of a TRO, they must enforce a Protective Order.

If you believe that you have been a victim of family violence, please consult a lawyer as soon as possible!

Service of Citation

You have the right to "serve" the divorce petition on your spouse.

Typically, this means that a local constable or private process server goes to your spouse's residence or business and hands him or her a copy of the petition.

In uncontested divorces, spouses sometimes "waive service" by signing and filing a waiver with the court; this saves the expense of paying someone to serve papers.

In cases where both spouses have consulted attorneys before one of them files a petition, they can avoid service by having the non-filing spouse's attorney file an "answer" to the petition.

Once someone serves you with a citation, you must file a written answer with the court where the suit was filed by 10:00 a.m. on the Monday following 20 days after the date of service.

The Petition

In order to invoke the divorce process, you must file a "petition" with the district clerk of the county where you have resided for the past 90 days.

In this petition, you request that a state court dissolve your marriage and make appropriate orders concerning a variety of related matters including:

- dividing your community estate;
- awarding you your separate property;

- awarding conservatorship, possession, and support of minor children;
- changing your name;
- assessing attorney's fees;
- resolving claims for assault and other bad acts; and,
- resolving claims for reimbursement between estates.

The Counter-Petition

If your spouse files first, you may: (1) file a counter-petition describing what you want the court to do or (2) file an "answer" to the petition.

An answer acknowledges that you have received the petition but does not request that the court grant any extensive relief.

An answer is sufficient if you do not want a divorce and think reconciliation is a possibility.

Filing a counterclaim prevents your spouse from dismissing his or her suit unexpectedly[17], leaving you in a state of uncertainty.

This may require that you re-file, starting the process all over again, at unneeded delay and expense.

Suits Against Third Parties

Lovers: Suits for "alienation of affection" have not been legal in Texas since long before Brad, Jen, and Angelina.[18]

Legal Entities: Corporations are viewed as distinct legal entities unless they have been used for purposes of fraud.

The question of whether to join a closely held corporation, LLC, or partnership can be complicated and should be determined based upon the facts of the particular case.

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[17] This may occur just after the court rules against your spouse on an important issue.
18 Of course, that was then, and this is now.

Torts

You may have legal claims against your spouse for wrongful acts committed during the marriage, such as assault.

These claims are referred to as "tort claims."

Tort claims should be included in the petition or counterclaim.

Most tort claims must be filed within two years after your discovery of the wrongful act; otherwise, the claim will be barred by the statute of limitations.

Many divorce lawyers do not handle tort claims; you may need a separate lawyer for this.

Reimbursement

Claims of reimbursement usually arise when funds from one marital estate (community or separate) are used to benefit another.

For example, if you come into the marriage with debts (separate property debts), and you use your marital earnings (community assets) to pay those debts, your separate estate owes reimbursement to the community.

If you come into the marriage with a house and spend community funds improving it, your separate estate will owe reimbursement to the community.

Reimbursement claims are difficult to evaluate, however, because they are "equitable."

That means that the trial judge has broad discretion in awarding you all or part of a reimbursement claim.

In other words, they could be worth their face value, or they could be worth nothing.

It's strictly up to the judge.

Reimbursement claims are measured by "enhancement in value" (not necessarily how much you spent), but they may be offset by the benefits received – that is unless we are talking about your primary residence.

If I have been living in my spouse's separate property residence, will I lose my right to reimbursement because I have enjoyed the benefits of it?

For years the Texas Legislature has been wrestling with the problem of what to do when a woman moves into her husband's separate property house, they pay the mortgage from community earnings for, say, 25 years, and the house has appreciated substantially for one reason or another.

For many years, women in this situation simply got screwed.

The "common law" of reimbursement theory proclaimed that if someone was entitled to something because of all of those mortgage payments, the person/estate who owed it was entitled to an offset for "use and enjoyment."

Translation: you may have been entitled to reimbursement for the community payments, but, because you got the use and enjoyment of the property for 25 years, that offset your claim.

Result: Homeowner (usually the husband) took all.

Some people do not think that is fair.

So, we have tried to remedy it with legislation about "equitable interests" and "economic contribution," but, despite their good intentions, both have been repealed.

To some extent that is because some of us lawyers are just not that smart.

The family law bar reared up over economic contribution because (a) the legislation was more complex than it had to be, and (b) it required lawyers to do math, an experience reminiscent of pouring water on the wicked witch in The Wizard of Oz.

Under traditional reimbursement theory, the court could do whatever it wanted; you could get 100 cents on the dollar for your claim, or you could walk away empty handed.

It was a total crap shoot.

Economic contribution law mandated that the trial court give you something for your claim.

Current law is back to reimbursement theory without the prior offset for "use and enjoyment."

Are your eyes crossing?

If you have a situation in which separate property and community property have been mixed, best to get counsel.

Temporary Orders

Temporary Orders govern the parties' conduct while the case is pending and usually address interim problems such as those set out below.

Child Support

If you have primary custody of your children, you are entitled to receive monetary support for them.

Unless you have unusual circumstances, the Court will determine how much support to award by applying a fixed percentage, as provided by the Texas child support guidelines, to the paying parent's net income[19] as follows:

One Child	**20%**
Two Children	**25%**
Three Children	**30%**
Four Children	**35%**

These guidelines apply to the first $8,550 per month of "net resources."

For higher income earners, the court may order additional child support if a child's financial "needs" exceed the guideline amount.

Texas courts have failed to establish a clear definition of "needs," so child support issues in cases involving high-income earners currently present fertile ground for litigation.

Payors with children of two or more families have different guidelines.

They get a break.

In appropriate cases, the Court may order that one spouse pay the other child support retroactive to the date of filing.

What about 50/50 schedules?

[19] Texas Family Code §154.125 requires that a court apply the applicable percentage to a party's "net resources." This term is defined to include all forms of compensation and net passive income less federal taxes for a single person with one exemption.

Although many courts will not order a 50/50 possession schedule, if you and your spouse agree to one, but cannot agree to the child support, many courts will take your income and his or hers, and apply the child support guidelines to the difference.

Moms beware: Many fathers will try to get an agreement for a 50/50 possession schedule and then argue for no or less child support.

If you agree to it, and then they stop showing up so often or bringing them back early, then what?

Temporary Spousal Support

Trial courts may award "temporary spousal support" to spouses who need financial assistance while the divorce proceeding is pending.
There are no current legislative guidelines for determining how much temporary spousal support a court should award or how long a court should require payment.

Some judges will award spousal support just long enough to allow the recipient to find a job.

Spousal support may include payment of existing debts, costs of relocating, and continuation of insurance or other benefits.

The Temporary Injunction

The temporary injunction is simply an extension of the TRO for the duration of the divorce case.

In counties with standing orders, this will happen automatically unless someone objects.

The Inventory and Appraisement

In most cases the parties will agree that they will each prepare and exchange an Inventory and Appraisement within 30-45 days after the court signs Temporary Orders.

An Inventory and Appraisement lists all of the assets and liabilities of the parties and characterizes each as community or separate.

It is similar to a personal financial statement.

The Inventory and Appraisement is the most important document you and your attorney will prepare unless you are in conflict over your children.

Ask your attorney for an Inventory and Appraisement form.

Spouses who have accumulated even a modest estate during their marriage will have to do this to get through the divorce process.

The sooner you complete yours, the sooner you can divest yourself of your lawyer.

Temporary Conservatorship/Custody Evaluations

In 1995, Texas adopted a law requiring courts to presume that appointing parents as "joint managing conservators" of their children is in their best interests, except in cases involving a pattern or history of abuse.

For that reason, people do not fight over conservatorship of their children, as they once did.

Exceptions arise.

In addition to cases involving abuse allegations, we still see cases where one parent has not been involved in raising the children and those where the parents have so much trouble getting along, the prospects of their reaching any joint decisions about the children are slim.

In such cases, *sole* managing conservatorship may rear its ugly head and become an issue.

Keep in mind that "conservatorship" is just a label; you can call a parent a "joint managing conservator" and still give all of the parental rights that matter to another parent (more about parental rights below).

When parents fight over conservatorship or possession of their children, many courts will require that they participate in a "custody evaluation."

Until recently, we had "social studies" and "psychological evaluations" and variations about which Bach would have been proud.

The Texas Legislature has clarified that alphabet soup with uniformed guidelines for "custody evaluations" in Chapter 107 of the Texas Family Code.

Custody evaluations can save the parties a lot of money in a custody case and provide an intelligent and professional alternative to the typical parental dynamic of "I want" versus "I want."

Exclusive Use of Property

The court may award temporary possession of certain property to one spouse, excluding the other spouse from it, until the divorce is final.

This prevents interference with residences, vehicles, and other property while the case is pending.

Standing Orders may provide that neither spouse can restrict the other party's access to the house.

If you want to make sure that your soon-to-be ex does not surprise you, get a specific order.

Interim Attorney's Fees

What if you're broke, but your spouse has plenty of money?

How do you pay your lawyer?

This happens in families where one spouse controls the finances and gives the other spouse an "allowance."

To level the playing field, a court can order the spouse in control of the funds to turn some over to the spouse who is doing without so s/he can pay his or her lawyer.

Enforcing an order to pay interim fees can be tricky; if the order is not drafted properly, a court's award of interim fees can be a Pyrrhic victory.

Motivating an attorney to take a case where his only prospects of getting paid are collecting the fee from an embittered spouse may also present a challenge.

If you are anticipating divorce, try to plan for this: build up a war chest!

Or make new friends.

Debts

The court may order that one spouse or another pay certain debts during the pendency of the divorce.

This can be important when mortgage payments loom or wolves are at the door.

On the other hand, many courts will not order payment of unsecured debts, theorizing that they are concerned with you and your children - not your creditors.

The best thing you can do is to make sure that you do not put debts in your name to the exclusion of your spouse.

Contested Hearings

Divorcing spouses who need Temporary Orders have several choices. They can:

(1) negotiate an agreement,
(2) proceed immediately to mediation (an often overlooked option that can be very effective), or
(3) go to court, and let a judge resolve their disputes.

In metropolitan areas, going to court usually means a delay of several weeks.[20]

On the day of the hearing, whether your case is heard right away or not at all can be unpredictable unless you have a "special setting."

Many of the issues that come up early in the divorce process are mundane and easily resolved with a minimum of effort.

If your lawyer does not act motivated to resolve issues before going to court, question that approach.

More often than not, I counsel people to stay away from court, where mudslingers hone their skills.

Sometimes, however, going to court for a hearing is an attractive option[21].

It is an opportunity for information gathering (and confrontation has its own rewards – and costs).

If you do not know very much about your spouse's financial situation, and your spouse is not cooperative, consider going to court for a temporary hearing.

Your attorney can learn a lot about your case by doing this.

When making this decision, also consider that a contested temporary hearing sets an adversarial tone for your divorce, which can make it more emotionally and financially draining.

You may win the battle and lose the war.

Of course, sometimes your spouse has already set an adversarial tone; your challenge is to decide whether to meet it (him or her) head on or try to defuse it.

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[20] The Tarrant County courts can be a fast track.

[21] Which is one reason to object to collaborative law; this option becomes unavailable, which can be a disadvantage to one party or another.

Let's face it; some of you are married to bullies; you have avoided him or her for years for the sake of keeping the peace (i.e. appeasement); and, procrastination has led you here.

I find confronting bullies much more effective than appeasing them.

It's unpleasant, but not as unpleasant as the long-term effects of appeasement.

If your temporary hearing involves support, be prepared to summarize and justify your normal monthly income and expenses.

Go through your canceled checks and credit card statements for the past six months.

Take an average of your normal income and expenses.

If you have extraordinary spending habits, be prepared to justify them.

Associate Judges often expect lawyers to complete contested hearings in 30 minutes to an hour; some counties have policies limiting each side to 20 minutes.

Getting a fair hearing over custody of children can be a real challenge in such a limited time.

If you think your case will take longer than that, your attorney may need to request a "special setting."

If you do not like the Associate Judge's ruling in your case, you have the right to appeal to the District Judge.

If that occurs, the Associate Judge's rulings are in effect until the District Judge overrules them.

Violations

Theoretically, a court can enforce Temporary Orders by contempt, assessing a fine of $500.00 against the violating party or incarcerating him for up to six (6) months.

Temporary Orders are a good deterrent to bad behavior during the divorce process.

As a practical matter, however, do not expect much relief for minor infractions of Temporary Orders.

Defining Issues

Your attorney should define the issues of your case early on.

Too often (a sad comment on my profession), however, s/he doesn't.

Instead, s/he gathers information and more information and piddles around and harasses the other side and does everything but define the issues and talk about resolving them.

In cases where the parties cannot agree on how to divide the estate, common issues include:

a. valuation of assets,
b. tracing,
c. reimbursement, and
d. whether one spouse is entitled to more than 50% of the estate ("disproportionate division").

In cases where the parties cannot agree on what to do with their children, common issues include:

a. parental rights,
b. periods of possession, and
c. child support.

In cases where one of the parents is challenged by, say, drug, alcohol abuse physical abuse problems, issues may include how to supervise them or test them.

Once you and your attorney have defined the unresolved issues, you need to evaluate your goals and the prospects of attaining those goals given the constraints involved in the situation.

You may want "sole custody," but custody fights can be expensive, and you have to consider your financial constraints in developing a realistic plan.

More Information?

I have business cards that say "professional problem solver."

To me, that is a more accurate description of what I do and what I offer the community than "attorney-at-law" or "attorney-mediator" or "Certified Financial Planner."

I could go on, but, then, you might take me to be a boaster.

I have discovered that one of the most effective strategies for solving problems is gathering more information.

This is how science, for example, moves forward.

Sometimes we actually cure diseases by gathering more information.

If you and your spouse have a dispute about what your house is worth, an appraisal is a form of "more information" commonly employed to resolve the dispute.

The question of more information may also arise in cases where one spouse has all of the information (e.g. a closely held business), and the other is in the dark.

The problem is that gathering more information usually costs money, so spend your information dollars wisely.

Good lawyers do not spend their clients' money discovering every detail of a case; many times they settle cases based upon partial information because of financial constraints or because whatever is in controversy does not justify the costs of discovery.

Let me repeat: people resolve their divorce cases every day based upon incomplete information.

An attorney cannot, and usually will not, for fear of malpractice, give you an opinion or a recommendation based upon insufficient information.

That does not mean that you have to spend your last dollar on the elusive and illusive goal of "complete discovery."

In many marriages one spouse has a lot more information than the other does.

The classic example is the marriage in which the husband is self-employed and the wife is not involved in the business.

In these marriages, the wife may have a consistent problem of acquiring information and determining whether she has enough information to make an intelligent decision about dividing the estate.

Described below are common methods attorneys use to investigate the facts of your case.

Request for Production of Documents

In contested cases, attorneys routinely send one another a request for production of documents.

They review all legal documents regarding your estates[22], including tax returns, stock certificates, bank statements, credit card statements, financial statements, and so on.

Requests for documents are often lengthy.

The Texas Rules of Civil Procedure require that a party must respond to a request for production of documents within 30 days after service.

Interrogatories

[22] Most married people in Texas have 3 estates: his separate estate, her separate estate, and the community estate.

Interrogatories are written questions a lawyer may "propound" upon your spouse in order to gather relevant facts.

A person receiving interrogatories must answer them under oath within 30 days after service.

Interrogatories are useful to establish basic facts about your case, such as when a retirement program began, or who the officers of a corporation are.

Don't be too optimistic about receiving candid answers from your spouse.

Good lawyers often "sanitize" answers and state objections to make sure that they give up as little damaging information as possible.

Don't instruct your attorney to send interrogatories to your spouse unless you want to answer the same questions.

Divorce is often a game of tit-for-tat.

Depositions

A deposition is a spontaneous, out-of-court interrogation.

Typically, you, your attorney, your spouse, his or her attorney, and a court reporter meet at one of the attorney's offices.[23]

The court reporter will place the witness (who may be you, your spouse, or a witness) under oath, and the attorneys may ask questions.

Depositions are relatively expensive.

Get an estimate before deciding on depositions.

You only pay for the reporter's time for depositions that you have requested.

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[23] There are different variations of the deposition process, including videotaping it or doing it by tape recording instead of using a court reporter ("non-stenographically").

If your spouse requests that your deposition be taken, s/he pays the reporter.

Remember, however, if s/he is spending community funds, who actually pays may not be material because, regardless who writes the check, the community estate will still be reduced.

You cannot refuse to give your deposition.

You are entitled to reasonable notice, but you cannot refuse to answer questions if they are relevant or may lead to the discovery of admissible evidence.

You and your attorney should rehearse to some extent before you testify in deposition.

Like interrogatories, if you request your spouse's deposition, rest assured that s/he will ask for yours.

If you are faced with a deposition in your divorce case, consider the following 10 rules.

10 Rules for Giving a Deposition

1. Make your answers brief. Less is more.
2. If you do not remember, say so.
3. If you do not know, say so.
4. Do not speculate.
5. Listen carefully to the question.
6. Take your time.
7. Stop and think before answering a question.

8. Give your lawyer time to state an objection or instruct you not to answer.

9. Tell the truth.

10. Be humble, never combative.

Appraisers/Expert Witnesses

Spouses who cannot agree to what their property is worth often hire appraisers to assist them.

They may hire other experts to assist them with other issues.

Psychologists, mental health professionals, or counselors who are already working with children, for example, may have valuable input concerning possession schedules or custody arrangements.

Accountants can give invaluable (albeit tedious) input in cases relating to the tracing of separate property.

Inventories

The Inventory and Appraisement ("Inventory" for short), as discussed above, is a fundamental tool for investigating your case and is routinely requested, even in cases where the community estate is relatively modest.

By simply requesting an Inventory, your spouse must provide you with full and verified disclosure of all assets, liabilities, claims, and his contentions concerning whether property is community or separate.

In fact, many lawyers will not settle a case without requiring the other party to provide an Inventory.

It is frequently the starting point in investigating the property division (as opposed to the parent-child) issues in your case.

Witnesses

Family members, friends who have witnessed family violence, doctors, psychologists, teachers, and experts familiar with your case are all potential witnesses.

You can help your lawyer by making a list of all potential witnesses, stating each witness' name, address and telephone number and a summary of what the witness knows that may be germane to your case.

See Appendix "D" below.

Most people do not like getting involved in a divorce case.

You may think that someone will come to court and testify for you only to learn at the last minute that s/he is not willing.

Try to get friendly witnesses to sign a statement or affidavit as soon as you think that you will need them.

If you need testimony from a “hostile witness,” budget for his or her deposition.

Tracing assets

If you own or have owned separate property (property owned before marriage, or acquired after marriage by gift or inheritance), and wish to claim it as yours at the time of divorce so that it will not be divided with your spouse, it must either be intact or traced.

For example, if you had $10,000 in a bank account before marriage, and that same $10,000 is in the same account, you have no problem.

If, however, you spent some or all of those funds, you have no claim for it as separate property unless you can "trace" the funds into a particular asset or assets.

If you need to trace separate property, start now.

Hire a CPA to help you with a complex tracing problem.

To trace separate property, you need to be familiar with the "community-out first rule."

Please discuss this with your attorney if you have a tracing problem.

Family businesses

Closely held businesses can be very difficult to value.

If you think a family business has any significant value, consider hiring an appraiser.

Negotiating a Settlement

What Are You Entitled To?

A common myth is that community property is divided equally at the time of divorce.

This is not true.

A divorce court has the discretion to award up to 100% of the community estate to one spouse to the exclusion of the other.

You, or your spouse, may be entitled to *more than* 50% of the community estate for various "equitable reasons" including:

- fault in the breakup of the marriage, (e.g., cruelty, adultery);
- lesser earning ability; or
- smaller separate estate.

One of the unwritten laws of family law is that the larger the estate, the more likely the court will divide it 50/50.

I am not sure that I can justify it, but there it is.

Which Assets Will You Get?

A court will usually award you your personal effects and the automobile that you drive at the time of the divorce.

That much is predictable.

If you and your spouse own a business, and one of you has been more involved than the other, the court will probably award the business to the more involved spouse (although the court may order him or her to "buy you out").

Otherwise, there are not too many hard and fast rules in this area.

Who Pays the Bills?

In my opinion, this is one of the most confusing areas of family law in a community property state.

In many families, one spouse incurs debt in his name only; then, at the time of divorce, he expects his spouse to share in the responsibility to pay that debt.

S/He reasons that debts incurred during marriage are "community debts" (akin to community assets), and that they should be accounted for, if not netted out, when dividing the estate.

In fact, Texas marital property law views debts differently than assets.

An asset's "characterization" (i.e., whether it is community or separate) depends upon when and how the spouses acquire it.

But, for some reason, Texas law views debts, not from the perspective of the *spouses*, but from the perspective of their *creditors*.

If, for example, you incur a debt during marriage in your name only, the *creditor* can look only to: (1) your separate assets, (2) your sole-management community property, and (3) joint management community property to satisfy the debt.

Complicated enough?

The creditor cannot look to: (1) your spouse's sole management community property or (2) his or her separate assets.

All of that is relatively clear when a creditor sues to collect an unpaid debt, but it can be very confusing within the context of a divorce proceeding.

To make it more confusing, each judge has his own way of viewing debts.

Some subtract debts from assets and divide the net estate.

Others ignore debts entirely!

To complicate the issue further, many people carry credit card debt for years, rolling balances from one card to another, chasing the best interest rates.

By the time they get to the divorce proceeding, they cannot recall why they incurred the debts to begin with, and they no longer have any statements to show why.

If you have a case where one or the other of you are carrying a significant amount of credit card debt, I recommend that you make a diligent effort to track down the credit card statements that show the nature of the charges, especially if you are the only one liable to the credit card company for the debt.

If you incurred the debt for the benefit of you and your spouse or children, as opposed to for your exclusive benefit, you can make a very persuasive argument that the court should order your spouse to pay part of that debt or share in it at the time of divorce.

If, on the other hand, you incurred it for a hunting trip in which your spouse and children did not take part, or for electronic equipment that you will receive upon divorce, you are probably going to get stuck with it.

A divorce court can order you to pay debts incurred by your spouse, but it cannot affect the rights of creditors.

So, if you incurred the debt, you are liable to the creditor. Period!

If the divorce court orders your spouse to pay part of the debt, and s/he doesn't, the creditor will look to only you to pay 100% of it.

You may have a legal remedy against your spouse, but you owe it all to the creditor no matter what the divorce court orders.

If your spouse assumes a debt for which both of you are liable as part of your divorce settlement, and he fails to pay it, or fails to pay it timely, that can adversely affect your credit.

Many people have houses at the time of divorce, and, in many cases, one spouse wants to continue to live in the house after the divorce.

This is especially common in cases involving minor children.

When that occurs, if both spouses are liable on the mortgage note before the divorce, they will still be liable after the divorce.

The divorce court cannot affect the rights of the mortgage company.

What usually happens in these cases is that the divorce decree will provide that one spouse is solely liable for the mortgage payments and will indemnify and the hold the other harmless for failure to pay.

The spouse who does not get the house should get a "Deed of Trust to Secure Assumption," which is like a lien on the house.

If the spouse who assumes the mortgage fails to pay it, the other spouse can step up, pay it, and foreclose on the other spouse.

That is some consolation to the spouse who stays on the mortgage but gets no part of the house, but, as a practical matter, it can be a tough remedy to apply.

If, for example, your wife and three small children stay in the house, and she fails to make the payments, are you really going to foreclose on her and kick her and the kids out?

Even in cases where the kids are out of the nest, exes balk at pulling the trigger on this one.

The only way to really really get off of the mortgage is for your ex to re-finance (not always possible) or sell the house.

The "Buy-Out"

In cases where the parties have grown a business during marriage, it doesn't usually make sense to liquidate the business because of the divorce.

So, one spouse may buy out the other by making installment payments secured by stock in the business.

Buy-outs also occur in cases involving real estate to avoid the costs of liquidation.

QDROs

"QDRO" is an acronym for "Qualified Domestic Relations Order."

This is a relatively new legal document.

Not too many years ago, when a couple divorced, and one of them had participated in a qualified retirement plan during the marriage, the court appointed the "participant spouse" as a "constructive trustee" of the benefits for the other spouse.

This meant that when the participant became entitled to benefits, the plan administrator paid them to the participant, and he was supposed to act as the trustee for his ex-spouse, sending her portion of the payments to her promptly.

To no one's surprise, the participant did not always find the motivation to forward those payments.

So, the feds passed a law, which allows the non-participant spouse to collect her benefits directly from the plan administrator.

There's only one catch: you gotta have a QDRO.

Do not be surprised if you have to pay another lawyer to draft a QDRO for you.

Because of the technicalities of many retirement plans, and the risk of liability to a lawyer who screws it up, many family lawyers hire employee benefit specialists to draft their QDROs.

Sole Managing Conservators and Possessory Conservators

Traditionally, Texas courts appointed the primary caretaker – usually Mom - as the “sole managing conservator" of the children, and Dad as a "possessory conservator."

A sole managing conservator had most of the parental rights, including the important right to determine where the children live.

This meant that a sole managing conservator could take the children and move to another location, and the possessory conservator could not prevent it.

A possessory conservator had the right to visit with the children and consent to emergency medical care.

Today, most parents qualify as “joint managing conservators,” which sounds more equal.

They negotiate parental rights, which are unbundled, as discussed below.

Parental Rights and Duties

In 1993, the Texas legislature expanded the rights of possessory conservators by amending the Texas Family Code to provide that all parents who are conservators have certain rights at all times and other rights during periods of possession.

Unless limited by court order, the rights to which parents are currently entitled at all times are as follows:

- to receive information from any other conservator of the child concerning the health, education, and welfare of the child;

- to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child;

- of access to medical, dental, psychological, and educational records of the child;

- to consult with any physician, dentist, or psychologist of the child;

- to consult with school officials concerning the child's welfare and educational status, including school activities;

- to attend school activities;

- to be designated on the child's records as a person to be notified in case of an emergency;

- to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and,

- to manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

The rights and duties to which parents/conservators are currently entitled during their respective periods of possession are as follows:

- the duty of care, control, protection, and reasonable discipline of the child;

- the duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

- the right to consent for the child to medical and dental care not involving an invasive procedure; and,

- the right to direct the moral and religious training of the child.

The sole managing conservator is entitled to the following rights:

- to designate the primary residence of the child;
- to consent to medical, dental, and surgical treatment involving invasive procedures, and to consent to psychiatric and psychological treatment;
- to receive and give receipt for periodic payments for the support of the child and to hold and disburse these payments for the benefit of the child;
- to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- to consent to marriage and to enlistment in the armed forces of the United States;
- to make decisions concerning the child's education;
- to the services and earnings of the child; and,
- except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

Joint Managing Conservatorship

The days of sole managing conservators and possessory conservators are largely behind us.

Effective September 1, 1995, Texas law *presumes* that joint managing conservatorship is in the best interest of the children - unless *there has been a history or pattern of family violence during the marriage*.

This means that most divorcing parents will become joint managing conservators.

Some judges will still appoint a sole managing conservator, however, in cases where one parent has done the lion's share of the parenting and the parents do not agree on how to exercise parental rights.

With the presumption in favor of appointing both parents as joint managing conservators, the battlefield for parents in conflict has moved from conservatorship labels to parental rights and possession orders.

This is still an improvement.

Parents used to fight over who would be sole managing conservator.

Now they fight over who can establish the primary residence of the child, who can make medical decisions, who can make educational decisions, and how days, hours, and minutes are allocated.

Custody litigation can be detrimental to children.

No experts contend that children benefit from conflict between parents.

Parents often spend an amount equivalent to a college education on attorneys in a custody battle.

Joint managing conservatorship solves a lot of problems and should be seriously considered by anyone concerned about a fight over custody.

Making peace may be the best gift a parent can give a child.

How to Act In a Custody Case

We all know how to be super-parents.

We go to every soccer game.

We make every PTA meeting.

We take our children to religious services every Sunday.

We avoid “social kryptonite,” like friends who love to party with us and post our drunken mug shots on Facebook.

In the July, 1994 ABA Journal, Fred Silverberg, a family law specialist from Los Angeles, described "the ten worst things" parents can do to hurt their custody case.

Timeless advice of *what not to do*:

- Make derogatory remarks about the other parent.
- Make derogatory remarks about the other parent's family.
- Use the child as a messenger.
- Refuse to talk by telephone with the other parent.
- Leave the child with a baby sitter during visitation periods.
- Fail to communicate with the child's educators and health care providers.
- Keep the child involved in activities from dawn until bedtime.
- Be inflexible regarding visitation schedules.
- Provide a negative profile of the other parent to a custody evaluator.[24]
- Have the "significant other" get involved in the custody dispute.

Child Support Revisited

Child support will normally be determined by a simple formula as shown above.

[24] I do not fully agree with this one.

Texas requires that all child support payors send their checks to the Texas Child Support Disbursement Unit in San Antonio.

If you are paying, don't pay your ex directly; it will throw off Big Brother's books, and that means TROUBLE!

Child support must be paid until a child is 18 or has graduated from high school, whichever occurs later.

That includes just about any program leading to a high school diploma, including joint junior college/high school credit programs.

Child support may be increased or decreased after divorce upon proof of a material change in circumstances.

Child support can be also be modified every three years if the amount being paid is out of synch with the guidelines by 20% or $100.

Battles over "above-guideline support" are not unusual in high-dollar cases and cases with special needs kids.

Child support is not tax deductible unless you are real creative.

There are ways to do it, but the situation must allow for it.

For example, if you can afford to buy your ex a house for the kids to live in, you may be able to deduct the interest portion of the mortgage payment because the house may be considered your second home.[25]

Periods of Possession

I hate the way we lawyers refer to time spent with children as the "right to possession of the child" or "periods of possession," but we do.

So, you might as well get used to it.

I discuss the Standard Possession Order above.

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[25] See, e.g. *Estate of Dickerson*, TC Memo. 1997-165.

If that does not work for you, in order to settle your case, you will need to agree upon when each parent is entitled to see the children.

My advice is: keep it *simple and flexible*.

Don't get hung up on playing "What if?" for every conceivable scenario.

"What if she wants to play the piano but doesn't like to practice and feels ambivalent about her teacher and then she gets depressed and won't get out of bed in the morning and is chronically tardy …?"

See what I mean?

There are simply too many what-ifs, especially if you have young children.

You are better off working on procedures for meeting and discussing the children and cooperating with one another than trying to come up with a rigid schedule that attempts to address every conceivable eventuality.

Alimony

There are two types of alimony in Texas: (1) court-ordered (a/k/a "maintenance" – more politically correct than "alimony," especially in Texas)[26], and (2) contractual.

Statutory Maintenance. Effective September 1, 1995, Texas courts can order maintenance payments in the following types of cases:

- Domestic Violence Cases: The applicant's spouse has been convicted, or received deferred adjudication, for an act of family violence within 2 years prior to the date the divorce petition was filed or during the pendency of the divorce.

[26] I will use the terms "court-ordered alimony" and "maintenance" interchangeably.

- 10 Year Marriage and Applicant Can't Make It on What She Has. In a marriage of at least 10 years, the applicant ("she") cannot support herself because she lacks sufficient property, including what she will receive as a result of the divorce proceeding, to provide for the applicant's "minimum reasonable needs" and (a) she cannot support herself because she is *disabled*; (b) she has custody of a *disabled child*; or (c) she *lacks the earning ability* to provide for her minimum needs even though she has used diligence in seeking employment or developing job skills.

Except in cases where the applicant or a child is disabled, the purpose of court-ordered alimony is to provide financial support to a spouse until she can find a job.

In disability cases, a court may order that alimony be paid indefinitely.

Court-ordered alimony terminates when one of the parties dies or when the applicant remarries or cohabits with another adult "in a permanent place of abode on a continuing conjugal basis."

Court-ordered alimony, like child support, is enforceable by contempt.

In other words, if he who is supposed to pay fails to pay, the court may put his butt in jail.

For many years, unless you became permanently disabled in a marriage of over ten years, a woman had a serious challenge persuading a court to order that her spouse pay her post-divorce maintenance, and, in cases where the court did, she didn't get much - $2,500 per month for three years, tops.

The Texas Legislature recently increased benefits in two ways: (1) amount to be paid, and (2) length of payments.

The rationale is: the longer the marriage, the more you pay.

Now, for starters, the court can award up to $5,000 per month.

For 10-20 year marriages, the amount of maintenance has increased from $2,500 to $5,000.

Contractual alimony. Even if you do not meet the criteria for court-ordered alimony, you may agree to "contractual alimony."

Why would anyone agree to pay alimony when he[27] does not have to?

Alimony is tax deductible by him who pays and reportable as ordinary income by she who receives.

In cases where the anticipated tax brackets of the spouses will be *disparate* after divorce (e.g. he will be in a high bracket, and she will be in a lower bracket), it may make sense for the spouse in the upper bracket to pay alimony to the spouse in the lower bracket.

Why?

Because the benefit to her is worth more than the cost to him.

If I have lost you, this is a good time to consult a forensic accountant; otherwise, trust me, sometimes this makes good sense – if the numbers work.

Alimony, whether it be statutory or contractual, is *not dischargeable in bankruptcy* unless a bankruptcy court determines that "alimony" is just a disguised property settlement.

To be tax-deductible, alimony must terminate on the death of the recipient.

Contractual alimony cannot be "front loaded."

That means that he cannot pay large amounts in early years and take big deductions.

In prior years, the Internal Revenue Code required that contractual alimony be paid for 10 years in order for it to be deductible.

It later reduced that to 6 years, and then to 3 years.

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[27] The careful reader may be starting to detect some degree of gender bias. My response: just keeping it real!

Then, they gave up.

No requirement now exists that contractual alimony payments be paid for a specific time period.

Lump sum payments, however, are not allowed.

Make sense out of that.

Income Taxes in Year of Divorce

You have to be married on December 31st to be eligible for filing a joint return.

That means that you cannot file a joint return in the year of your divorce.

For that reason, some people, especially those who find themselves ready to divorce late in the calendar year, wait until just after the first of the year to finalize their divorce proceeding.

Divorcing during the year can create a problem for spouses divorcing in a community property state because the Internal Revenue Code requires that they each report half of the income during the months of marriage and half of the deductions for that period.

This can be a problem because, believe it or not, some people who divorce are not wild about cooperating with one another several months after the divorce.

Exception to this rule: You can file and report your income and deductions just like a single person if, during the entire prior tax year (a) you and your spouse did not support one another; and (b) you did not live with one another.

Even though you and your spouse have to report your income in a certain way, you can still agree to whatever way you want to pay it.

Enter into such agreements with full recognition that the agreement is only between you and your spouse; the IRS still has its full range of Draconian powers.

The Texas Family Code has tried to take some of the fun out of this by allowing you to *partition* your income for the year of divorce.

Tax Exemptions and Credits

The Internal Revenue Code provides that the party who has custody of a child for the majority of the year is entitled to the tax exemption for the child.

Lots of people think s/he who spends the most gets the exemption – not so.

An exemption is worth $4,050 per child in 2016.

High-income earners may lose all or part of this benefit.

The "phaseout" of the benefit begins at around $150,000 of income but changes depending on your tax payer status and filing status (i.e., whether you are single married filing separately, head-of-household, and so on).

When the phaseout kicks in changes frequently, so my best advice is that if you believe that this may affect you, seek the advice of a good accountant.

irs.gov is also a good resource, Publication 17 to be more precise.

Under the 1997 Tax Act, the taxpayer entitled to the tax exemption for the child is also entitled to a tax credit in the amount of $1,000 per child for each child under 17.

Rules for qualifying are a bit complex, so, again – irs.gov.

Like dependency exemptions, high-income earners need to be aware of phaseout rules.

Decrees

The state regulates marriages.

It decides when you are married and when you are divorced.

When you marry, you get a license.[28]

When you divorce, you get a decree.

A decree of divorce is a document reflecting a court's order that a marriage is dissolved.

Typically, a decree will also address the division of the parties' estates, and, if the parties have minor children, it will include provisions for conservatorship, child support, parental rights, and periods of possession.

Many times the decree will be "agreed," meaning that the parties have reached an agreement concerning all of the terms of the decree.

An agreed decree is both a court order and a contract. That may not be important – unless you have to enforce it.

Agreements

The Texas Family Code authorizes divorcing parties to enter into several different types of agreements, including:

Agreements Incident to Divorce (AID),
Mediated Settlement Agreements (MSA),
Informal Settlement Agreements (ISA), and
Agreed Decrees.

AIDs are, basically, the dinosaurs of this group.

For whatever reason, the Texas Legislature decided years ago that divorcing parties could enter into agreements about dividing their estates, but either party could repudiate the agreement before the judge actually renders (declares, orders, whatever you want to call it) the divorce.

So, for years lawyers had people sign these agreements, and someone raced to the courthouse to get a judge to bang her gavel before buyer's remorse set in.

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[28] Except in cases of informal marriages.

Then, mediation came along.

Who wanted to suffer through a day of intense negotiations with a nagging mediator, reach an agreement, and find out later that his or her soon-to-be-ex had changed his or her evil mind?

After experimenting with mediation for a few years, family lawyers decided that they were tired of waffling clients and passed legislation stating that agreements reached at mediation, MSAs, would be *irrevocable* if the lawyers were present when their clients signed the agreement (more or less).

Unlike mediation agreements for other types of cases (e.g. civil disputes), a trial judge *must* enter a final judgment based upon the terms of an MSA.

Sometimes we humans solve one problem and cause another.

Being THAT BINDING makes an MSA a dangerous document.

People are tired and just want to get it over with and go home.

They will sign anything.

Drafting gets sloppy.

Do I need to mention the "M" word: malpractice?

Another problem lawyers discovered is that in order to have an MSA, you have to have a mediator.

Some lawyers, including myself, once called just about every agreement an MSA, even if there had been no mediation, because we liked the fact that it was a binding agreement and could not be repudiated.

Unfortunately, someone repudiated one anyway and claimed that if you had no mediator, you could not have an MSA, and an appellate court bought that argument and set the darned thing aside.

So, what to do?

Divorcing parties (and probably a lot of judges who got tired of seeing people try to back out of agreements) wanted agreements to be (really) binding, but they did not want to pay mediators.[29]

So, in order to fix that problem, the legislature passed some statutes authorizing "informal settlement agreements," which allow divorcing parties to sign binding agreements, if they jump through a few small hoops.

Seems to me that it would have been more efficient to do all this right the first time.

But, what can I say?

That's the way law is sometimes; it evolves in layers and is cobbled together into a pastiche that sometime makes sense and sometimes not so much.

The Trial

An old legal bromide goes something like this: "Good lawyers know the law; great lawyers know the judge."

Ideally, once you discover who your trial judge is, you want your lawyer to be something along the lines of "golfing buddy."

Unfortunately, some judges don't play golf, or, if they do, the lawyers with whom they tend to play, for some strange reason, charge fees over and above your financial stratosphere.

We all cannot be so lucky as to have a lawyer who sits next to your judge every Sunday morning at church.

All is not lost.

[29] There was a time when I (serving as a mediator) got paid to simply preside over a closing of a divorce agreement so that the parties could avoid these silly problems.

If you think your case may go to trial, find out as much as you can about your judge.

Trial judges in divorce cases have considerable discretion.

Many have been working in the family law system for many years and have definite opinions about most issues, which may affect your case.

Others are inscrutable, and no one (including they) know what they will do with any given case before they actually do something, which may take awhile because many judges are masters of avoidance behavior (if you don't rule, you can't get reversed!).

But, try!

See what you can find out.

It may save you (or make you) a lot of money.

I once represented a man whose wife cheated on him and left him for another man.

He adamantly believed that he was entitled to more than 50% of the estate (more than 100 would still have not been enough!).

I filed a motion and used that as an excuse to bring up the issue.

The trial judge let us know that he rarely awarded anyone more than 50% of an estate, believed that there were two sides to every morality play, and there it was: not good news for my client but much better to find out before spending another $25-50,000 on a trial.

Consider visiting the courtroom before your trial date to observe the judge.

Get used to the courtroom.

If you cannot resolve your problems without a judge, you better make sure that you are not squeamish about witness stands, loud lawyers, waiting, and

spending your life in a room with no windows with the spouse you are divorcing and his or her obnoxious lawyer.

Jury or Non-Jury? Jury trials are more expensive than non-jury trials.

In addition to slowing down the trial, lawyers have to prepare a "charge" for the jury, which consists of the instructions to the jury and the questions they must answer after the lawyers present all of the evidence.

Juries are the exception to the rule in family law cases.

Non-jury trials are much more common.

Payment of a jury fee in a family law case usually means: (1) there are "damage claims" for abuse or other wrongful conduct during the marriage; (2) custody is at issue; or, (3) the judge has indicated some bias against you or your attorney.

If you want to go to trial, you have to get on the court's "trial docket."

Why we don't just call it a "list" I find somewhat curious, but that's what we call it.

How do you do that?

Each court sets its own policies about how to run a docket, but, in my locale, there are basically three systems: (1) docket-call system, (2) pre-trial conference, or (3) email and ask.

Under the *docket-call system*, the lawyers contact the court and ask that their case be put on the docket, and the clerk will set that case, along with a number of other cases.

The lawyers for all of the cases show up at a given time, and the judge calls each of the lawyers up to the bench (or into chambers), they discuss the case, and she sets it for trial or doesn't.[30]

[30] In earlier years, District Court judges used this system; now, in my locale, District Court judges have evolved into more of the pre-trial conference system and the Associate Judges use the docket call system.

Judges who use the docket-call system may have one-week or two-week dockets.

That means that they will either hear your case during that time frame or, if they are too stacked up, they will simply and politely ask you to reset your case for another docket call.

As you might imagine, not everyone likes the docket-call system.

Lawyers can burn a lot of time waiting their turn for a docket call.

They may have to prepare their case for trial without having much assurance about whether the judge will have time to hear them.

Do that several times and you will know what FRUSTRATION is like (just in case a bad marriage wasn't enough).

The alternative to the docket-call system, which I am happy to report is being implemented widely in Dallas County, where I practice (a divorce lawyer from Dallas: I'm a living cliché!) is the pretrial conference system.

Under this system, if a lawyer wants to set his case for trial, he schedules a pretrial conference with the judge, they discuss the case, and, usually, the judge gives the lawyers (or parties, as the case may be) a firm date when the case will be tried.

If the lawyers don't have to wait for hours for their conference, this system is much more efficient.

If you have a lawyer, he or she will appear for you at either a docket call or a pretrial conference.

You can use that time worrying about the outcome (just kidding!).

Witnesses.

Witnesses are more important than lawyers!

There I said it!

And, they charge a lot less.

Lawyers, however, are more accessible.

Trials are won or lost based upon the quality of the witnesses.

Take O.J., for example.

Do you think the quality of Mark Furman's testimony had anything to do with O.J.'s (original) acquittal?

If you gave me the choice between a good trial lawyer and really good witness, I would take the witness every time.

A bad lawyer can win a case with great witnesses.

A good lawyer is going to have a heck of a time winning a case if his primary witness gets caught in a lie.

On the other hand, the best witnesses are people who have nothing at stake.

Husband-crap versus wife-crap ("he said – she said") is just one more version of "there are two sides to every story" (even though one side may be more credible than the other).

If that's all there is to a case, it can be tough to gain an advantage.

But, add a corroborating witness who has no dog in the fight, and you can tip the scales of justice in your favor.

So much for Trial Strategy 101.

The problem is usually how to get people to testify (willingly).

If you are fortunate enough or popular enough to know people who will come to court and stand up and swear for you (or against him or her), you may want to "pin them down" by getting their testimony in writing and having them sign off on it.

Lawyers, creative creatures that we are, call this a “witness statement.”

Witness statements are bittersweet.

On one hand, you have pinned the witness down to his or her version of the facts; on the other, you will probably have to disclose the witness statement to the other party.

Believe it or not but some witnesses will change their stories – at the courthouse.

I have had the joy of that experience – no fun at all!

On balance, you are probably better off with a witness statement.

Demeanor.

Never speak out in court unless on the witness stand.

Bad behavior in the courtroom may reinforce the allegations of opposing counsel.

If you want to communicate with your attorney, pass him a note.

He cannot listen to you, the judge, the witness, and opposing counsel, all at the same time.

Dress conservatively.

Do not wear flashy jewelry.

Do not get ruffled or combative during cross-examination.

Always be polite and cordial to opposing counsel.

Your Testimony.

On direct examination by your lawyer, elaborate as much as you want when you answer a question, as long as detail and description are relevant to your answer.

On cross-examination, be as brief as possible.

Do not give opposing counsel voluntary information with which he or she can examine you further.

Be honest and sincere.

There are several rules that everyone needs to know about testifying:

Hearsay: You cannot testify to hearsay.

That means that you cannot go to court and talk about what someone who is not in court said.

After all, they're not there.

So, how could anyone challenge them about whether they said what you say they said?

Make sense?

Authentication of Documents: This is a no-brainer!

In order to get a judge to actually read a document about your case, your lawyer must get it "admitted into evidence."

There are certain steps he has to go through to do that, the first of which is usually "authentication."

When you are sitting on the witness stand, trying to look calm (even though all you can think about is, "How long is this going to last?"), and your lawyer wants to *authenticate* a document supporting your case, he will "mark it" (a fancy way

of saying "stick a sticker on it"), hand it to you, and say, "Can you identify this document, Mrs. Peabody?"

If your answer is anything other than "Yes," we have a problem.

So, he hands it to you with a flourish (actually, be careful of a lawyer who flourishes too much, it could indicate that he is trying to cover up a basic insecurity), you say "Yes" with emphasis (but not too much), and then he says, "What is it?"

This is the tricky part.

Let's say it's your 2006 joint federal income tax return.

In that case you say, "It's my 2006 joint federal income tax return," preferably with a smile.

That's it.

The title of the document is your answer.

He will then "offer" it, and the judge will decide whether to admit it or not.

Objections: Lawyers make objections for all sorts of reasons, right during your testimony: how rude!

Sometimes a lawyer will object because he really really really believes that your lawyer has asked an improper question or is trying to get the court to admit a document improperly.

Or, sometimes a lawyer will object because things are not sounding good to him, and he is trying to break the flow, just like a basketball coach will call time-out when the other team is on a scoring run.

It's going to happen.

When it does, that is when you are testifying and feeling good about yourself, and opposing counsel stands up and bellows, "OBJECTION: blah, blah, blah!!!" your job is easy: shut up.

That's right.

In fact, as soon as that sucker stands up, you shut up.

Let him make his objection.

Let your lawyer respond.

Then, go from there.

Non-responsive answers: Lawyers are great at this little word game.

Let's say I ask you where you live and you say, "I have lived at 111 Lovers Lane since Valentine's Day, 1945."

What's next?

"Objection – non-responsive."

Why?

Because he didn't ask you how long you lived there.

Get it?

If you are consistently non-responsive, embellishing your answers, you will consistently irritate the judge, which is, well, not a good thing.

Helping Your Lawyer.

When you are in court, be sensitive to the fact that your lawyer is multi-tasking most of the time: he's listening to each question; he's watching the body language of the witness; he's watching the body language of the judge; he's trying to determine whether a question is objectionable; he's dealing with surprises; and, he's wondering when this judge usually breaks for lunch.

If you want to tell him something during a trial, pass him a note.

If you use the "whisper method," you run the risk that you will distract him during crucial testimony, and you may be overheard.

Listen carefully to the testimony of the witnesses and to the judge's comments.

Take notes.

Make note of inaccuracies or discrepancies in the testimony.

Adverse Rulings

Post-trial motions. The law almost always allows you reconsideration, although getting a judge to change her mind can be a much bigger challenge than convincing her the first time.

If you get an adverse ruling, your attorney may have many ways to attack it.

Don't lose hope.

Sometimes justice moves at its own pace.

Post-trial settlement. If your trial does not go the way you expected, consider going back to the negotiating table and adjusting your settlement position.

Appeal. You must decide within thirty (30) days after a Decree of Divorce is signed if you want to appeal.

This period may be extended if your attorney files certain motions with the court.

Appeals can be costly and protracted, but in many cases, an appeal is essential in order that a just decision be reached.

Appealing family law cases can be especially challenging because appellate courts rely to large extent on the discretion of the trial judges.

Chapter V: The Aftermath

A Positive Approach

Divorce does not have to be a negative experience, although this is a strong preconception most people bring into the divorce experience.

Typically, we program ourselves that "this is going to be painful."

It does not have to be that way.

If you are confident at the outset that a divorce is the necessary solution to your marital problems, the divorce process can be experienced in a positive manner, as a healthy step in your development as an individual.

Even if you do not want a divorce, you can make lemonade out of these lemons!

How you approach the divorce process and life as a single person is all in how you frame it.

If this is a challenge for you, let me suggest that you read *Mindset*: *The New Psychology of Success* by Carol S. Dweck.

An Improved Estate

Although you may end up with less total property after the partition of your community estate, what is left should be better organized.

Many people leave the divorce process with a clearer understanding of finances and legal relationships.

Self-Knowledge

A divorce can also make you better aware of aspects of your personality that you might have previously preferred to ignore.

It may cause you to become more introspective or to reflect more carefully about your relationships with the opposite sex.

Divorcing spouses who find themselves angry, hurt, or confused, will profit from those emotions if they use them as motivators for self-awareness instead of obsessing and blaming.

Don't Forget the Children

Dr. Barry Coakley, a Dallas psychologist who works with post-divorce couples, has developed the following "Top Ten List" to help divorced parents of minor children avoid conflict:

1. *The responsibility of both parents to effectively communicate and "co-parent" their children does not end with divorce.*

2. *Continuing conflict between their parents constitutes the single greatest source of damage to children of divorce.*

3. *The <u>most</u> important task of a divorced co-parent is to work actively toward personal health, happiness, and satisfaction with life.*

4. *The <u>second most</u> important task of a divorced co-parent is to work actively on becoming the best parent he/she can be.*

5. *The <u>third most</u> important task of a divorced co-parent is to actively support the healthiest possible relationship between the child and <u>all</u> of his/her parenting figures.*

6. *Children know how parents feel about important things, and learn from what parents say and do.*

7. *Standing up for self is important, but it <u>can and must</u> be accomplished without attacking or putting the other parent down.*

8. *A child's self-esteem comes from both parents; any form of attack on either parent by the other is <u>always</u> devastating to the child.*

9. *The best message a divorced co-parent can send to a child regarding his/her "other parent" is acceptance; the second best is neutrality; there is no third best, and the worst is criticism.*

10. *The relationship between the natural or primary parents of a child, divorced or not, lasts the lifetime of all three.*

Into the Future - Goal Setting

Set some post-divorce goals for yourself.

Focus on the future rather than the past.

Consider each area of your life: mental, physical, spiritual, career, financial, family and social.

Write down specific quantifiable goals.

Give yourself deadlines for accomplishing your goals.

Conclusion

That's it.

That's the quick, down and dirty tour of the family law system in North Texas.

After reading this, you should be reasonably prepared for the divorce process.

Hopefully, this information will save you some pain, anguish, and, of course, money.

Good luck in solving your marital problems.

Please see www.tnoblelaw.com for future updates and related postings.

For those who are interested in specific tips for negotiating, please visit www.negotiatewithwisdom.com.

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Appendix "A"

PERSONAL FINANCIAL STATEMENT
AS OF _____

ASSETS

Real Estate

Personal Property

Jewelry, Furs, Personal Effects

Furniture, Furnishings, Appliances

Bank Accounts

Checking

Savings

Other

Retirement Accounts

IRA's

Profit Sharing

Other

Investments, Stocks, Bonds

Insurance Policies

Other

TOTAL ASSETS

LIABILITIES

Secured

Mortgage on property at _____

Car loan

Other

Unsecured

Credit card bills

Other

TOTAL LIABILITIES

NET WORTH

Appendix "B"

FINANCIAL INFORMATION STATEMENT

CASE NO. _____ _____ DISTRICT COURT

_____ _____

PETITIONER **RESPONDENT**

_____ _____

PETITIONER'S ATTORNEY RESPONDENT'S ATTORNEY

DATE OF MARRIAGE: _____

CHILDREN OF THIS MARRIAGE AND THEIR AGES: _____

_____

AVERAGE MONTHLY EXPENSES

HOUSING **AMOUNT**

House Payment
Utilities (Gas, Water, etc.)

Telephone

TRANSPORTATION

Car Payment
Gas, oil, and car maintenance

INSURANCE

Life
Health
Homeowner's
Auto

GROCERIES

PERSONAL

Uninsured Medical
Cleaning and laundry
Grooming
Entertainment (includes eating out)

CHILD'S EXPENSES

Uninsured Medical
Tuition
Clothing
Entertainment
Transportation
Grooming
Misc.

OTHER EXPENSES

Credit card payments

Total Monthly Expenses $_____

AVERAGE MONTHLY INCOME

Gross Monthly Income from employment
Other Income

Less: taxes

Total Monthly Net Income $_____

Net Monthly Income (after expenses) $_____

I certify that the above answers to the questions as listed are true and correct.

_____

Appendix "C"

Chronology

7/22/73	Date of marriage
6/3/82	Date of birth: Betty Lou Clinton
1/2/85	Billy leaves his employment at the chicken ranch.
1986	Billy reports $149,122 of gross income.
1988	Billy reports $206,835 of gross income.
1989	Billy reports $119,401 of gross income.
2/21/89	Sale of home in Tennessee for $235,000
3/31/89	Purchase of home in Dallas for $451,649 (deferred gain of $58,912; adjusted basis in new home was then $392,737).
1990	Billy reports $243,282 of gross income.
1991	Billy reports $239,722 of gross income; Hillary's income was $2,756.
1992	Billy reports $179,547 of gross income; Hillary's income was $11,926.
1993	Billy reports $209,609 of gross income; Hillary's income was $8,374 (Schedule C).
	Billy loses his job; remains unemployed for 3 months; gets a new job at Church's.
1994	Billy reports $31,745 of gross wages; Hillary's income was $23,163; taxable IRA distributions = $62,409; other pension distributions = $128,222 ($5,000 taxable).

7/1/94	Billy leaves.
1995	Billy files for divorce because Hillary refuses to list the house.
	Billy's gross wages = $65,201; Hillary's gross wages = $41,730; taxable IRA distributions = $58,890.

Appendix "D"

Witnesses

1. Marcia Blasingame. 11456 Horsey Drive, Los Angeles, California; phone: 213-887-0098. This witness is my mother. She has seen bruises on me. She has seen my husband act cruelly to our children.

2. Bobby Thornton. 2158 Boontown Road, Harper, Texas; phone: 817-256-9976. This witness was Billy Jr.'s camp counselor last year.

3. Maggie Thong. 6678 Arapaho, Dallas, Texas; phone 214-998-0023. This witness has been our accountant for the last 12 years.

4. Bill Hoard. 2784 Ringer Drive, Dallas, Texas; phone 972-3345. This witness is my spouse's business partner.