

TOP 10 THINGS EVERY WOMAN (AND HER HUSBAND) SHOULD KNOW BEFORE FILING FOR DIVORCE

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DIVORCE IS A TOPIC THAT HAS MANY MYTHS and misconceptions, which often affect people once they are in the divorce process. Many people believe that men file for divorce more often than women; however, researchers have found that, across America, at least two-thirds of divorces are filed by women.¹ One researcher even reported that in 25% of marriage breakdowns, men have “no clue” there is a problem until the woman says she wants a divorce.² After divorce, women are typically happier than their exes.³ Studies show that, although men experience an increase in financial well-being following divorce, divorced women undergo less depression.⁴ Nationwide, more American women are living without a husband than with one.⁵ This is because women are marrying later, are more likely than men to delay remarriage, and are living longer as widows.⁶

This article, however, will address and focus on some of the most common misconceptions about divorce and provide information that everyone should know before filing for divorce.

1. There Is A Wrong Way To Catch Your Spouse In The Act

Divorcing spouses are often tempted to obtain “proof” of a spouse’s infidelity or misconduct by reading email, installing spyware, recording telephone calls, or setting up hidden cameras. These actions can expose both parties and attorneys to civil liability and criminal penalties. For example, under Texas law, it is a crime to install a tracking device on a vehicle owned by another person.⁷ Both federal and state wiretapping laws apply to divorcing spouses, and a spouse may sue for invasion of privacy.⁸

Federal law regulates electronic surveillance of conversations and access to emails, faxes, and voicemail.⁹ The law imposes civil and criminal sanctions for intentional interceptions of electronic communications. However, accessing emails after they have been transmitted, for example downloading them from the hard drive of the family computer, is not an offense under the Federal Act.¹⁰ Texas has similar laws prohibiting interception of communications.¹¹ Attorneys are also liable under these laws if they disclose information from the intercepted communications provided by their clients.¹²

Both federal and Texas laws permit recording of telephone calls and other electronic communications with the consent of at least one party to the communication.¹³ Under these “one-party consent” statutes, a spouse may record conversations in which he or she is participating. This has been extended to mean that parental recording of a child’s conversations with a third party, including the other parent, is permitted.¹⁴ Since the child is a minor, the parent is able to consent to the recording on the child’s behalf as long as the parent has a good faith, objectively reasonable belief that it is in the best interest of the child to consent on behalf of him or her,¹⁵ even if the child is unaware of the recording.¹⁶

Obtaining information illegally, however, can expose that person, even if he or she is a spouse, to civil liabilities as well as criminal prosecution.¹⁷ Texas recognizes a right to privacy that is violated if someone intentionally intrudes upon the private affairs of another person by offensive means.¹⁸ Accessing stored email or secretly recording a spouse can be a violation of a spouse’s right to privacy. If the spouse sues, the suing spouse can recover money damages, including punitive damages.¹⁹

2. Courts Do Not Necessarily Divide Property 50/50

Although couples assume that all property will be divided 50/50, an equal division is not the standard used by Texas courts. First, only community property may be divided in a divorce.²⁰ The court may not award the separate property of one spouse to the other.²¹ Second, the law requires that a division of the community estate be “just and right.”²² Although 50/50 can be a starting point, courts have wide discretion when it comes to defining a just and right division. In the case of *Murff v. Murff*, the Supreme Court of Texas set out the most important factors to consider in a just and right division of the community property:

1. The disparity of incomes or earning capacities of the spouses,
2. The spouses’ capacities and abilities,
3. Benefits which the party not at fault would have derived from a continuation of the marriage,
4. Business opportunities of the spouses,
5. Education of the spouses,

6. Relative physical conditions of the spouses,
7. Relative financial conditions of the spouses,
8. Differences in the size of each spouse's separate estate,
9. The nature of the property to be divided,
10. Fault in the break-up of the marriage, and
11. Attorney fees of the parties.²³

Courts recognize that mathematical precision in dividing property in a divorce is usually not possible.²⁴ Since larger estates have more property to apportion between spouses, courts usually reach a division closer to 50/50. When there is less property to divide, an uneven division is more likely.

A spouse can be entitled to more than 50% of the community estate. Courts consider several additional factors to determine this, including: fraud, adultery, cruelty, dissipation or waste of a community asset, gifts by a spouse to someone outside the marriage, community debts and liabilities, credit for temporary spousal support paid, investment of separate property in the community estate, increase of separate property due to the other spouse's efforts, and the tax implications of a proposed division.²⁵ If these or similar factors are present, a spouse should advocate for an uneven division of property is just and right.

3. Do Not Let Emotions Rule The Property Settlement

While other areas of a divorce decree may be modified, such as child support or parenting time, the property division is final. Even though property can have emotional significance, a divorcing woman should think wisely about how it should be divided. For example, the family home is a hotly-contested subject in many divorces. Women may want to hang onto the house for emotional reasons or to benefit the children, but sometimes it can be smarter to let it go. Where the woman is the lower-earning spouse, paying the mortgage on her income alone may be difficult, if not impossible. Additionally, she will need to budget for maintenance, repairs and increasing property taxes. Lastly, in order to keep the house, she may have to trade away other assets. A woman can find herself in a much worse financial position if, in order to keep the equity in the house, she trades away cash accounts or retirement benefits. She can find herself facing both increased housing costs and fewer liquid assets to pay for them. The lower-earning spouse also does not have the same ability to replenish retirement and investment assets as the higher-earning spouse. This is one reason why men are typically financially better-off after a divorce. In negotiating a property settlement, a woman should not give up her financial security for a house that she may not be able to afford in the long run.

4. You May Be Responsible For Debt You Did Not Know About

Debts, like assets, are part of the community estate and are divided in a divorce. Texas has some surprising rules regarding who is responsible for debt incurred during the marriage. Texas law establishes a "community presumption," meaning that debt acquired during a marriage is presumed to be community debt.²⁶ Even if a husband signed up for a separate credit card and ran up debt, the wife can still be held responsible because the husband is presumed to have signed on behalf of the community estate.

Some divorce decrees will divide debt and assign responsibility to one spouse or the other. However, a second surprising rule about divorce debt is that, even if the decree assigns a debt to the husband, a creditor may be able to come after the wife for payment. The divorce decree cannot alter the original agreement between the spouses and the creditor.²⁷ If the debt was community debt, each spouse will continue to be responsible to the creditor for payment.

Although the wife cannot use the divorce decree to force the husband to pay the creditor, it is not without value. The divorce decree is a binding contract with the other spouse. The wife may have a cause of action for breach of contract/motion for enforcement to recover the amounts paid for debts assigned to the husband. This option, however, is only worthwhile if the husband has any assets with which to pay a judgment.

To avoid this problem, spouses should attempt to separate debts and establish them solely in one spouse's name, closing all joint accounts. For assets secured by debt, such as automobiles or houses, the spouse keeping the asset should refinance the debt into his or her own name. If this is not possible, it might be better to sell the asset. For unsecured debts, such as credit cards, spouses should pay off or transfer the balance and then close the account.

If spouses filed joint tax returns during the marriage, each is liable to the Internal Revenue Service for any tax liabilities resulting from those returns. Therefore the divorce decree should also address who is responsible for future tax problems unless the spouses agree otherwise. While this will not bind the Internal Revenue Service, it will provide the same enforcement options to recover money paid on behalf of a spouse.

5. Do Not Give Away Benefits That May Belong To You

Employee benefits and retirement plans can be divisible in a divorce to the extent that the benefits accrued during the mar-

riage.²⁸ Such benefits may include pensions, 401(k) accounts, stock options (both vested and unvested), and bonuses. These benefits can be especially valuable to a spouse who has earned less during the marriage and has fewer opportunities to build retirement savings.

The tool for dividing a retirement plan is called a “Qualified Domestic Relations Order” (“QDRO”) and should be prepared in addition to the divorce decree. It is an order to the administrator of the retirement plan giving an alternate payee the right to receive a portion of the benefits payable to the employee under the plan.²⁹ This document secures a wife’s right to receive her community share of the retirement benefits, even if her ex-husband does not begin receiving benefits until many years in the future, without any tax consequences.

Stock options are also divisible. The Texas legislature recently passed a new law that modified how separate property interests in stock options are calculated.³⁰ The new law gives a specific formula for determining the fraction belonging to the separate estate. This formula accounts for stock options that were awarded during the marriage, but are not vested or are not exercisable until after the date of divorce.

Retirement benefits earned prior to and after the marriage are separate property, while benefits that accrue during the marriage are community assets.³¹ It is necessary to determine the percentage of the account or benefit that was acquired during the marriage because that is the only portion divisible in the divorce. Valuing and apportioning these benefits is complicated, and a lawyer or financial specialist would be able to analyze how much a spouse could be entitled to receive.

6. Do Not Fail To File Just Because You Think You Cannot Afford It

Even if one party controls the finances, the other party can still obtain money for the divorce. Once the divorce is filed, a spouse can request temporary orders from the court requiring the other spouse to pay temporary spousal support, child support, community bills, and/or interim attorney fees during the divorce process.³² The temporary orders can also determine living arrangements, schedule parental possession of children, prevent the sale or transfer of assets, and require a spouse to provide financial information to the other spouse. Some counties have standing orders which implement some of these

terms as soon as the divorce is filed. Accordingly, a spouse seeking a divorce should talk to a lawyer who is familiar with the local rules and orders in his or her county.³³

7. Courts Have Broad Powers To Intervene In Cases of Family Violence

A protective order can be issued by the divorce court if a divorce is pending, or it can be obtained independently if a divorce has not been filed. Protective orders are available to: (1) family members, whether or not they live together; (2) people who live in the same household, even if they are

unrelated; or (3) people in a dating relationship.³⁴ A protective order can restrict a party in a variety of ways, including but not limited to preventing a party from committing family violence; communicating with family members, household members, or the other party in a dating relationship; going near a residence or place of employment;

and possessing a firearm.³⁵ An ex parte protective order may even evict and exclude a party from a residence without a full evidentiary hearing on the matter.³⁶ The court may also order a party to attend counseling or a battering intervention and prevention program.³⁷ Consequences for violating a protective order include fines, imprisonment for contempt, and even criminal penalties.³⁸

A final protective order is granted after notice to the other party and a hearing. If there is a clear and present danger of family violence, a court can grant an immediate temporary protective order without prior notice to the other party.³⁹ A detailed description of the facts and circumstances concerning the alleged family violence and the need for the immediate protective order must be attached to the application, and the detailed description must be signed by the applicant under oath that the facts and circumstances contained in the application are true to his or her best knowledge and belief.⁴⁰ The temporary protective order is effective for 20 days, and will cover the period until a hearing can be held on extending the protective order.⁴¹

A self-help kit for victims of domestic violence is available at www.TexasLawHelp.org. The kit was developed by a task force of experienced family law practitioners, judges, and prosecutors, and it includes detailed instructions for obtaining a protective order.

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Restraining orders can also be a useful tool. A temporary restraining order can be granted *ex parte* if a party is committing unreasonable acts such as making vulgar telephone calls or threats.⁴² This temporary restraining order can also prevent the other party from removing or hiding property if there is no standing order in the county where the suit is filed.

8. There Is No Rule That Children Get To Pick A Parent When They Are Twelve Years of Age

Everyone seems to believe that when children are 12, they are allowed to choose the parent with whom they want to live. Although children are permitted to express a preference at age 12, the court will ultimately decide what is in the child's best interest.⁴³ Until recently, a child was able to state his or her preference by filing a statement of preference with the court. Out of concern about the "dueling affidavits" that resulted and a desire to keep children from being involved in adult disputes, the legislature repealed this feature of the Texas Family Code.⁴⁴ A new law, effective Sept. 1, 2009, removes the authorization for courts to consider these statements of preference. Instead, the law permits a child 12 years of age or older to express his or her preference only through an interview with the judge in chambers.⁴⁵

Since the law has only recently been passed, there are unanswered questions as to how courts will handle the new system. Judges have expressed concern over whether they must grant in-chambers meetings with every child over 12 years of age who wishes to express a preference and whether the other side would be entitled to notice or if it would be an *ex parte* communication.⁴⁶

9. You Cannot Get Court-Ordered Alimony In Texas

The statutes and public policy of Texas prohibit a court from ordering alimony, which Texas courts have defined as judicially imposed allowance, whether periodical or in gross.⁴⁷ However, limited "spousal maintenance" may be awarded in certain circumstances. The parties must have been married for ten years or longer, and the spouse seeking support must show that he or she lacks sufficient property to provide for her minimum reasonable needs and that he or she is either disabled, caring for a disabled child, or lacks earning capacity.⁴⁸ In cases of disability, the court may order maintenance to continue as long as the disability lasts.⁴⁹ Additionally, if a spouse has been convicted of family violence within two years before the divorce being filed, or during the proceedings, the court may order the spouse to pay maintenance.⁵⁰

Maintenance awarded due to a spouse's reduced earning capacity is much more limited. A statutory presumption

against the award of spousal maintenance in such cases must be overcome by evidence that the spouse has diligently sought suitable employment or diligently attempted to develop the skills to become self-supporting.⁵¹ Courts are required to limit maintenance to the shortest reasonable time period and may not order maintenance to last longer than three years,⁵² unless in the case of disability as previously mentioned. A spouse cannot be obligated to pay, on a monthly basis, more than \$2,500 or 20% of his or her income, whichever is less.⁵³ Maintenance ends if either party dies, or if the spouse receiving it remarries or cohabitates.⁵⁴ Court-ordered maintenance can be enforced through wage garnishment or contempt.⁵⁵

The parties, however, can agree to more substantial alimony in a divorce settlement. This "contractual alimony" would be enforceable in the same way as any other contract.⁵⁶ This is often an attractive option for both parties in trying to settle a case as it enables the non-income-earning spouse to have a source of monthly income for a certain period of time after the divorce while at the same allowing the income-earning spouse to receive a tax deduction for such payments.⁵⁷

10. There Can Be A Better Way To Divorce

In 2001, Texas became the first state in the United States to pass statutes authorizing collaborative law.⁵⁸ Collaborative law allows parties to work through a more harmonious process to craft a settlement without court control. Each spouse is represented by an attorney, and they meet together, with neutral experts, to craft an agreement. The meetings are confidential in the same way as mediations.⁵⁹ If the process fails, the attorneys must withdraw and may not represent either party in court.⁶⁰ This system incentivizes parties and attorneys to work together. While judges must follow specific rules and guidelines, parties using the collaborative process can create customized solutions and control the pace of the process.

To pursue a collaborative divorce, both parties and their lawyers enter into a written collaborative agreement. Upon being notified that the parties are using collaborative law, the divorce court must suspend other deadlines for a two-year period.⁶¹ Collaborative divorces follow a team model, including parties, attorneys, and neutral advisors, such as financial professionals and mental health professionals. In a collaborative divorce, parties agree to make a full and candid exchange of information. With the help of a financial professional, parties are often able to divide property in a more satisfying way, taking into account factors such as tax treatment and future benefits. Neutral mental health

professionals can act as communication coaches to encourage parties to behave respectfully and reach new understandings. If there are children, they can also assist the parents with their Parenting Plan. In this way, a collaborative divorce can preserve important relationships and lay the foundation for successful interactions in the future with each other (and their children).

Conclusion

Divorce is complex, both legally and emotionally. Although this article tackles some of the most important things to know before filing, the process is filled with complexity that can trip up the unprepared. To navigate the turbulent waters ahead, divorcing spouses should always seek expert legal advice to guide them through the process.

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¹ John Tierney, *The Big City; A New Look at Realities of Divorce*, N.Y. Times, Jul. 11, 2000.

² Candis McLean, *Look Who Doesn't Want a Divorce*, Alberta Report, Jan. 11, 1999, at 30.

³ John Tierney, *The Big City; A New Look at Realities of Divorce*, N.Y. Times, Jul. 11, 2000.

⁴ Candis McLean, *Look Who Doesn't Want a Divorce*, Alberta Report, Jan. 11, 1999, at 30.

⁵ Sam Roberts, *51% of Women are Now Living Without Spouse*, N.Y. Times, Jan. 16, 2007.

⁶ Sam Roberts, *51% of Women are Now Living Without Spouse*, N.Y. Times, Jan. 16, 2007.

⁷ TEX. PEN. CODE § 16.06.

⁸ *Collins v. Collins* (Tex. App.—Houston [1st Dist.] 1995) 904 S.W.2d 792, rehearing overruled, writ denied 923 S.W.2d 569, rehearing of writ of error overruled.

⁹ Electronic Communication Privacy Act, U.S.C.A. §§ 2510-3127.

¹⁰ *Steve Jackson Games v. United States Secret Serv.*, 36 F.3d 457, 460-462 (5th Cir. 1994).

¹¹ See TEX. CIV. PRAC. & REM. CODE Ch. 123; TEX. PEN. CODE § 16.02; TEX. CODE CRIM. PROC. § 1820.

¹² TEX. CIV. PRAC. & REM. CODE § 123.002; 18 U.S.C. § 2511(d). See also *United States v. Wuliger*, 981 F.2d 1497 (5th Cir. 1992).

¹³ 18 U.S.C. § 2511(2)(d); TEX. CIV. PRAC. & REM. CODE § 123.001(2); TEX. PEN. CODE § 16.02(c)(4)(A); see also *Kotrla v. Kotrla*, 718 S.W.2d 853, 855 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

¹⁴ *Allen v. Mancini*, 170 S.W.3d 167, 173 (Tex. App.—Eastland 2005, no pet.).

¹⁵ *Id.* (citing *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998)).

¹⁶ See *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998).

¹⁷ TEX. PEN. CODE § 16.02.

¹⁸ *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993); *Billings v. Atkinson*, 489 S.W.2d 858, 859-861 (Tex. 1973).

¹⁹ *Motor Express, Inc. v. Rodriguez*, 925 S.W.2d 638, 639 (Tex. 1996); *Parker v. Parker*, 897 S.W.2d 918, 929-930 (Tex. App.—Fort Worth 1995, writ denied).

²⁰ *Cameron v. Cameron*, 641 S.W.2d 210, 213 (Tex. 1982).

²¹ *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139 (Tex. 1977).

²² TEX. FAM. CODE § 7.001.

²³ *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Cockerham v. Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975).

²⁷ See *Blake v. Amoco Fed. Credit Union*, 900 S.W.2d 108 (Tex. App.—Houston [14th Dist.] 1995, no writ).

²⁸ See TEX. FAM. CODE § 3.007(d), as modified by S.B. No. 866 (eff. Sept. 1, 2009).

²⁹ See ERISA § 206(d)(3)(B)(i) & IRC § 414(p)(1)(A); see also U.S. Dept. of Labor, Employee Benefits Security Administration, FAQs About Qualified Domestic Relations Orders, available at http://www.dol.gov/ebsa/faqs/faq_qdro.html.

³⁰ See TEX. FAM. CODE § 3.007(d), as modified by S.B. No. 866 (eff. Sept. 1, 2009).

³¹ TEX. FAM. CODE § 3.007.

³² TEX. FAM. CODE § 6.502(a).

³³ See, e.g. Dallas County Standing Order Regarding Children, Pets, Property and Conduct of the Parties, available at <http://www.dallascounty.org/departments/districtclerk/forms/AmendedStandingOrder.pdf>.

³⁴ See generally TEX. FAM. CODE § 71.

³⁵ TEX. FAM. CODE § 85.022(b).

³⁶ *Id.* § 83.006.

³⁷ *Id.* § 85.022(a).

³⁸ *Id.* § 85.026.

³⁹ *Id.* § 83.001.

⁴⁰ *Id.* § 82.009.

⁴¹ *Id.* § 83.002.

⁴² *Id.* § 6.501.

⁴³ *Id.* § 153.009(c).

⁴⁴ Judiciary & Civil Jurisprudence Committee Report (Substituted), Bill Analysis, Tex. H.B. 1151, 81st Leg., C.S. (2009), available at <http://www.legis.state.tx.us/tlodocs/81R/analysis/pdf/HB01151H.pdf>.

⁴⁵ TEX. FAM. CODE §§ 156.006(b)(3), 156.101(2).

⁴⁶ Joan F. Jenkins et al, *Legislative Update*, in State Bar of Texas Advanced Family Law Course, Ch. 2 at 4 (Lynn Kamin & Heather L. King eds., 2009).

⁴⁷ *Reed v. Reed*, 813 S.W.2d 716 (Tex. App.—El Paso 1991).

⁴⁸ TEX. FAM. CODE § 8.051(2).

⁴⁹ *Id.* § 8.054(b).

⁵⁰ *Id.* § 8.051(1).

⁵¹ *Id.* § 8.053(a).

⁵² *Id.* § 8.054(a).

⁵³ *Id.* § 8.055.

⁵⁴ *Id.* § 8.056.

⁵⁵ *Id.* § 8.059.

⁵⁶ *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967).

⁵⁷ 26 U.S.C. § 215 (2009).

⁵⁸ Council of the Family Law Section of the State Bar of Texas, Texas Family Law Practice Manual, Practice Notes § 12.1 (2nd ed. 2008). *See also* TEX. FAM. CODE §§ 6.603(a), 153.0072(a).

⁵⁹ TEX. FAM. CODE §§ 6.603(h), 153.0072(h).

⁶⁰ *Id.* §§ 6.603(b)-(c), 153.0072(b)-(c).

⁶¹ *Id.* §§ 6.603(e), 153.0072(e).