FAMILY LAW FOR THE NON-FAMILY SPECIALIST:
How to Master Conversations on Family Law

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McCLURE
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LITIGATION ▲ COLLABORATION ▲ FAMILY LAW

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TABLE OF CONTENTS

Cases

Statutes

FAMILY LAW FOR THE NON-FAMILY SPECIALIST: A How-To on Mastering Family Law Conversations

INTRODUCTION

As attorneys, we are often solicited for legal advice on areas of the law which we do not practice. We all attend the cocktail parties or dinners, where, in the midst of conversation, someone asks, "What is it you do for a living?" And the response "I'm a lawyer" somehow certifies the questioner, or anyone else within earshot, to be a member of the Board of Law Examiners. Some of the most commonly asked questions of attorneys are those regarding family law, and what follows is advice for the non-family law specialist on how to answer frequently asked family law questions. Whether you are looking to help clients with family law issues or you just want something more to talk about at your next cocktail party, this article is sure to make any lawyer look like The Most Interesting Non-Family Lawyer in the World.

I. What if she's only after my money?: Pre-Marital and Post-Marital Agreements

A well-dressed man approaches you as you sip a drink at Al Biernats. You make small talk for a while, and he finally asks the question: "What is it you do for a living?" After telling him you are an attorney, his eyes light up and he tells you this must be his lucky day. The man goes on to explain that he has been contemplating a marriage proposal to a young woman; however, he is nervous that she may be only after his money. He turns to you and asks for advice on how to protect his large estate, which is comprised mostly of property he inherited from his late mother. Although your practice is primarily focused on work related injuries at gold mines, you are able to confidently advise the man of the following.

Article XVI, § 15 of the Texas Constitution provides:

> ". . .persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse. . ."

Under the Texas Family Code, an agreement between prospective spouses, made in contemplation of marriage and to be effective on marriage, is called a premarital agreement. Tex. Fam. Code § 4.001.

A pre-marital agreement becomes effective on marriage and is enforceable without consideration; however, for an agreement to valid, it must be in writing and signed by both parties. Tex. Fam. Code § 4.002.

Within a pre-marital agreement, future spouses may contract regarding the following:

(1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
(2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
(3) the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
(4) the modification or elimination of spousal support;
(5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
(6) the ownership rights in and disposition of the death benefit from a life insurance policy;
(7) the choice of law governing the construction of the agreement; and
(8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty. Tex. Fam. Code § 4.003.

However, the parties may not agree to any terms which adversely affect the rights of a child to support. *Id.*

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is also enforceable without consideration. Tex. Fam. Code § 4.005.

It is important that you also advise your wealthy acquaintance that both he and his potential bride each seek the advice of individual counsel during the drafting process. A premarital agreement is not enforceable if a party proves that the agreement was not signed voluntarily or that the agreement was unconscionable when it was signed and, before signing the agreement, a party:

(A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
(B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
(C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party. Tex. Fam. Code § 4.006

Therefore, it is crucial that each party is equally represented in order to avoid potential pitfalls if one party attempts to later challenge the enforceability of a pre-marital agreement.

At any time after marriage, parties may also partition or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouses may desire. Tex. Fam. Code § 4.102; Tex. Const. Art. XVI, § 15. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. *Id.* The partition or exchange of property may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse. *Id.*

Additionally, at any time, spouses may agree that income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner. Tex. Fam. Code § 4.103.

Similar to pre-marital agreements, a partition or exchange agreement after marriage must be in writing and signed by both parties, and either agreement is enforceable without consideration. Tex. Fam. Code § 4.104 (West)

Spouses may also agree after marriage to convert separate property owned by either or both spouses to community property, and such an agreement is also enforceable without consideration. Tex. Fam. Code § 4.202. The formalities for such an agreement are more extensive than pre-marital agreements or partition and exchange agreements in that an agreement to convert separate property to community property must be in writing and:

(A) be signed by the spouses;
(B) identify the property being converted; and
(C) specify that the property is being converted to the spouses' community property. Tex. Fam. Code § 4.203.

Finally, it is important to remember also that the mere transfer of a spouse's separate property to the name of the other spouse or to the name of both spouses is not sufficient to convert the property to community property under this subchapter. *Id.*

II. "But I'm not ready for divorce.": Legal Separation

You approach a table of hors d'oeuvres at a friend's dinner party and notice a fidgety woman trying to decide which vegetable to pick from the spread. She turns to ask which you would choose, but before you are able to respond, she wants to know your profession, in order to better determine your creditability as an authority on appetizers. You tell her you are a lawyer, and she forgets all about her previous dilemma and begins telling you about another problem she is facing. She and her husband are going through a rough time in their marriage; however, they are not sure if they are ready to go through the potentially lengthy and expensive divorce process. She asks you if it is possible for her and her husband to legally separate and remain in the marital residence, instead of filing for divorce. Luckily, you just finished reading an article on the benefits of carrots over celery, as well as this CLE, so you inform her that:

Generally, Texas does not recognize legal separation. In Texas, it is held that if a separation agreement is made at a time when the parties are living together as husband and wife and said agreement is entered into for the purpose of effectuating a separation and divorce, then the agreement is contrary to public policy and is therefore void and ineffectual. *Rodriguez v. Rodriguez*, 233 S.W.2d 916, 918 (Tex. Civ. App. 1950).

On the other hand, if a separation agreement is made at a time when the parties have already separated with the intention of remaining permanently apart then, under such circumstances, an agreement is not contrary to public policy and will be upheld (provided the agreement has been entered into without coercion or other undue influence and the provisions thereof are just and equitable). *Id.*

Additionally, where an executed separation agreement evidences a fair and equitable division of the spouses' joint property and there is a mutual understanding that the division is to be permanent, or such an agreement is subsequently made by the parties

while they are living apart, reconciliation and resumption of marital relations will not ordinarily vacate the agreement. *Standard v. Standard*, 199 S.W.2d 180 (Tex. Civ. App. Austin 1947).

The so-called rule that a separation agreement between husband and wife regarding property rights is annulled by a subsequent reconciliation, followed by a resumption of marital relations, is generally limited to agreements that provide for living expenses and maintenance, and applies only if there is no stipulation to the contrary in the separation contract, or between the parties while they are living apart. *Id*.

However, where a divorce is never obtained and the parties disregard the settlement agreement and never carry it into effect, a property settlement agreement in contemplation of divorce is annulled by the parties resuming marital relations. *Ellis v. Ellis*, 225 S.W.2d 216 (Tex. Civ. App. San Antonio 1949).

Ultimately, the best advice to give someone contemplating a "legal separation agreement" is "don't do it." The parties would run the risk of entering into an agreement that a court could determine as being void. Therefore, the best thing for a person considering separating from a spouse and wants to divide marital and/or separate property is to enter into a marital property agreement, as described above.

III. "We can still be friends, right?": Collaborative Divorce

At your weekly "Attorneys/Doctors: Coming Together to Succeed" support group, you run into an acquaintance of yours who is an orthopedic surgeon. He tells you that he and his wife are thinking about divorce just because the spark in their marriage is not there anymore. The couple are still friendly with one another, he tells you, and they understand that they need to work together to raise their three young children. Although your firm specializes in medical malpractice, the good doctor trusts you enough to ask your advice on how he should proceed. You tell him that you just heard an amazing presentation on "collaborative divorce," and you relay to him the following.

(Most of the following can also be found online at the Collaborative Law Institute of Texas' website at www.collablawtexas.com.)

Chapter 15 of the Texas Family Code provides the statutory basis and procedural outline for the Collaborative Law process. The overarching policy of the Chapter is to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including disputes involving the conservatorship of, possession of or access to, and support of a child, and the early settlement of pending litigation through voluntary settlement procedures. Tex. Fam. Code § 15.001.

Collaborative Law is used in divorce suits in which both spouses retain separate lawyers whose only job is to help the parties reach a settlement. The parties will often also retain neutral professionals to assist them. Routinely, a mental health professional and a financial professional are added to the "team" to help develop a parenting plan and division of property.

The parties in a Collaborative divorce must sign a participation agreement. The participation agreement must: (1) be in a record; (2) be signed by the parties; (3) state the parties' intent to resolve a collaborative family law matter through a collaborative family law process under this chapter; (4) describe the nature and scope of the collaborative family law matter; (5) identify the collaborative lawyer who represents each party in the collaborative family law process; and (6) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative family law process. Tex. Fam. Code § 15.101.

The Collaborative Law participation agreement must also include provisions for: (1) suspending tribunal intervention in the collaborative family law matter while the parties are using the collaborative family law process; and (2) unless otherwise agreed in writing, jointly engaging any professionals, experts, or advisors serving in a neutral capacity. *Id.*

The Collaborative Law process begins when the parties sign a collaborative family law participation agreement. Tex. Fam. Code § 15.102. The process is made up of conferences called "joint sessions" for purposes of settling the issues. It is a process of open communication between the parties, their respective lawyers and the neutral professionals. The process utilizes informal discovery, such as the voluntary exchange of documents, and the lawyers assist the clients in determining the information both parties need in order to reach a settlement.

Collaborative law uses problem-solving negotiations that do not include adversarial techniques or tactics. Although the lawyers advocate for their clients in the collaborative process, their primary role is to help the clients understand the legal consequences of the various settlement options. Given the opportunity to craft more creative property and possession arrangements than in litigation, the parties can address methods of resolving disputes as they arise that will keep them out of the court system and minimize the possibility of future conflicts.

If the lawyers are not successful in helping the clients resolve the disputes, the lawyers must withdraw and cannot participate in court proceedings. This

agreement requires the lawyers and the parties to look at the dissolution process in a different way.

One of the most attractive aspects of collaborative law for many clients is the fact that it is conducted in private, with the exception of the final "prove-up" of the divorce. In the privacy of the lawyer's offices, the parties can discuss issues of importance to them and their children that they might prefer not to air in the public arena of the courtroom.

Another appealing aspect of collaborative law is its flexibility in scheduling. In collaborative law, the parties and their lawyers schedule everything themselves. Also, the parties are not under pressure to dispose of their case pursuant to a court's docket guidelines.

Some clients may ask if the collaborative law process costs less than litigation. There are two ways to look at "cost." If the client is concerned about costs such as a damaged relationship with the other party, trauma to the children, loss of privacy, etc., the collaborative process is definitely less expensive. If the concern is the amount of lawyer's fees, collaborative law probably is less expensive although collaborative law is not bargain-basement law. Since the information gathering process in collaborative law is informal, there is no need to deal with the elaborate rules governing the discovery process in litigation (which often fails to produce the needed information). And since gathering information is one of the major activities in the litigation process, if the parties are unable to settle in collaborative law, very little of the time and money expended in the collaborative law information gathering process is wasted.

Collaborative should be considered if some of these statements are true:

1. The client wants a civilized and dignified resolution of the disputes.
2. The client would like to retain the possibility of friendship with the other party.
3. The client wants the best co-parenting relationship if the parties have children together.
4. The client wants to minimize or eliminate the damage often done to children in litigation.
5. The client and the other party have friends and extended family in common with whom they both wish to remain connected.
6. The client recognizes the limited range of outcomes generally available in the court system and wants a more creative and individualized range of choices.
7. The client values honesty and integrity, dignity, privacy and discretion.
8. The client would like to control the proceedings rather than leaving the outcome in the hands of a third party (the court).
9. The client wants a process that is designed to achieve his/her best possible outcome.
10. The client understands that resolving conflicts with dignity involves meeting not only the client's goals but finding ways to meet the reasonable goals of the other party.

The Collaborative Law process is not for every couple. However, if the parties can work together amicably and understand the concept that families continue even after divorce, the Collaborative process can be an outstanding tool in the divorce process.

IV. "How long is this all going to take?": Waiting Periods

It's Monday night, and the Cowboys are playing the Redskins on Monday Night Football, so you head down to the local pub to watch the game with some colleagues after another day of defending the innocent. While bellying up to the bar to order a round for the table, you notice a woman next to you flirting with a young man. You casually observe that the woman is wearing a wedding band and the young man is not. Your sly attempts at eavesdropping are spoiled, however, when the woman catches you taking another glance at her wedding band. She confronts you saying; "What makes you think you can judge what I do?" Panicked, you can think of nothing else but to say, "Well, I'm a lawyer." The woman's tone immediately changes, and she begins asking you questions about how long it would take for her to divorce her "deadbeat husband" and runoff with her new man. Thankfully, in preparation for diffusing such conflicts, you read this CLE before kickoff, and you are able to advise her of the following.

"When will I be divorced" is perhaps the most frequently asked question about the divorce process (other than "how much is this going to cost?"). Of course, as in any litigation, one can never say with certainty how long a case will take. However, the Texas Family Code does provide statutory waiting periods that limits parties' ability to immediately divorce and/or remarry, unless certain exceptions apply.

Section 6.702 of the Texas Family Code provides that a court may not grant a divorce before the 60th day after the date the suit for divorce was filed. However, a waiting period is not required if a court finds that:

(1) the respondent has been finally convicted of or received deferred adjudication for an offense involving family violence as defined

by Section 71.004 against the petitioner or a member of the petitioner's household; or

(2) the petitioner has an active protective order under Title 4 or an active magistrate's order for emergency protection under Article 17.292, Code of Criminal Procedure, based on a finding of family violence, against the respondent because of family violence committed during the marriage. *Id.*

In computing the time, the day on which the petition is filed and the last day should be excluded. If a local rule of court requires a longer notice period before a case may be set for trial, the 60-day period established by the Family Code prevails. *Campsey v. Campsey*, 111 S.W.3d 767 (Tex. App. Fort Worth 2003)

The purpose of the waiting period is to give time for deliberate consideration by each party involved before the action of the court is invoked. If a judgment in a divorce action is procured before the expiration of the required number of days from the filing of the suit for divorce, it may generally be set aside. *Snow v. Snow*, 223 S.W. 240 (Tex. Civ. App. San Antonio 1920). The waiting period requirement is procedural, not jurisdictional; therefore, noncompliance with it does not render a judgment of divorce void in the sense that it is subject to collateral attack.

A. "When is my divorce final?"

A divorce decree is rendered when it is completely announced. *Ex parte Mikeska*, 608 S.W.2d 290 (Tex. Civ. App. Houston 1st Dist. 1980); *Corder v. Corder*, 189 S.W.2d 100 (Tex. Civ. App. El Paso 1945), writ refused. A judgment or decree in a divorce action may be rendered either orally from the bench or by the signing of a written memorandum filed with the clerk. Thus, a judgment is rendered when the trial judge announces the decision in open court, whether orally or by written memorandum, *Bakali v. Bakali*, 830 S.W.2d 251 (Tex. App. Dallas 1992), and the court's pronouncement is a valid judgment as long as it is not set aside. *Ex parte Tarpley*, 636 S.W.2d 21 (Tex. App. Eastland 1982) (oral pronouncement); Louwien v. Dowell, 534 S.W.2d 421 (Tex. Civ. App. Dallas 1976). However, if a judgment rendered in open court does not show the court's intent to render a full, final, and complete judgment, it does not amount to a final judgment. *James v. Hubbard*, 21 S.W.3d 558 (Tex. App. San Antonio 2000).

The date of the signing of the divorce decree is controlling as the date of its rendition, rather than the date the cause came on to be heard. *Johnson v. Bond*, 540 S.W.2d 516, 519 (Tex. Civ. App. Fort Worth 1976), writ refused n.r.e. (Dec. 31, 1976). However, a written divorce judgment signed by the trial judge is not a prerequisite to the finality of a judgment.

B. "When can I marry my new boyfriend?"

Neither party to a divorce may marry a third party before the 31st day after the date the divorce is decreed; however, former spouses may marry each other at any time. Tex. Fam. Code § 6.801(a).

When a divorce is granted by an oral pronouncement, the 30-day period begins to run from the time of the pronouncement, rather than from the later date on which the written decree is signed. *Galbraith v. Galbraith*, 619 S.W.2d 238 (Tex. Civ. App. Texarkana 1981).

The prohibition of remarriage for 30 days is similar to the 60-day waiting period for divorce, in that it is an attempt by the legislature to stop impulsive remarriage The statute does not, however, have out-of-state application; therefore, a party may go to a neighboring state for a quick marriage following divorce in Texas.

However, for good cause shown, the court may waive the prohibition against remarriage provided by Section 6.801, and even if a party to a recent divorce remarries within the 30-day waiting period following divorce, such a marriage will not likely be voidable if the new spouse knew of the divorcee's divorce at time of the new marriage and the parties cohabited thereafter. Tex. Fam. Code § 6.802; *Galbraith v. Galbraith* 619 S.W.2d 238 (Civ.App. 1981). Nevertheless, to avoid the risk of a potential annulment of the new marriage, parties should always follow the statutory 30-day waiting period.

V. "I want to make him pay for what he did to me!": Fault Grounds for Divorce

At your annual family holiday party, one of your distant cousins pulls you aside to tell you she caught her husband cheating on her. She goes on to tell you that she did a Google search on adultery, and she saw something about fault ground divorce. At first, the only thing you are able to think is, "How is she related again?" But after you recall that her husband is the one who always brings the worst presents for the gift exchange, you feel that you have a family obligation to tell her about Texas fault ground divorce law.

Texas is considered a no-fault divorce state, meaning that on the petition of either party, the court may grant a divorce without regard to fault if the marriage has "become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation." Tex. Fam. Code § 6.001.

Because congress believes society is considered better served by the termination of a marriage that has ceased to exist in fact, a decree of divorce is mandatory when a party to the marriage alleges insupportability and the conditions of the statute are met, regardless of who is at fault. *Phillips v. Phillips*, 75 S.W.3d 564 (Tex. App. Beaumont 2002); *Baxla v. Baxla*, 522 S.W.2d 736 (Tex. Civ. App. Dallas 1975) (disapproved of on other grounds by, *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977). The spouse bringing a divorce action upon the ground of insupportability does not need to show any misconduct on the part of the other spouse, but need only show that insupportability exists. *Wahlenmaier v. Wahlenmaier*, 750 S.W.2d 837 (Tex. App. El Paso 1988), writ denied with per curiam opinion, 762 S.W.2d 575 (Tex. 1988).

A. "What are the fault grounds for divorce?"

Although Texans can divorce obtain a divorce on due to insupportability, Texas does recognize fault grounds. The following is an exhaustive listing of the Texas Family Code fault grounds, which may be pled by a spouse seeking a divorce.

§ 6.002. Cruelty: The court may grant a divorce in favor of one spouse if the other spouse is guilty of cruel treatment toward the complaining spouse of a nature that renders further living together insupportable.

§ 6.003. Adultery: The court may grant a divorce in favor of one spouse if the other spouse has committed adultery.

§ 6.004. Conviction of Felony: (a) The court may grant a divorce in favor of one spouse if during the marriage the other spouse:

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

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

§ 6.005. Abandonment: The court may grant a divorce in favor of one spouse if the other spouse:

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

§ 6.006. Living Apart: The court may grant a divorce in favor of either spouse if the spouses have lived apart without cohabitation for at least three years.

§ 6.007. Confinement in Mental Hospital: The court may grant a divorce in favor of one spouse if at the time the suit is filed:

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

In effect, there are no defenses to a divorce action. The defenses of recrimination and adultery have been abolished by statute. Tex. Fam. Code § 6.008(a). Consequently, adultery is no longer a bar to the granting of a divorce, and adultery is not a defense in a divorce action where insupportability is alleged as a ground for divorce. *Cusack v. Cusack*, 491 S.W.2d 714 (Tex. Civ. App. Corpus Christi 1973), dismissed, (July 11, 1973). Nor does proof of adultery bar a divorce on the ground of cruel treatment. *Harvel v. Harvel*, 466 S.W.2d 39 (Tex. Civ. App. Houston 1st Dist. 1971).

However, condonation is a defense to a suit for divorce but only if the court finds that there is a reasonable expectation of reconciliation. Tex. Fam. Code § 6.008(b).

B. "How do fault grounds affect property division?"

The court may consider the conduct of an errant spouse in making a disproportionate distribution of the marital estate, whether a divorce is granted on fault grounds or no-fault grounds. *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981); *Wells v. Wells*, 251 S.W.3d 834 (Tex. App. Eastland 2008). Additionally, a spouse's misuse of community property may also be considered by the court when dividing parties' property. *See* Tex. Fam. Code § 7.001. *In re S.A.A.*, 279 S.W.3d 853 (Tex. App. Dallas 2009). Factors such as fraud on the community, wasting of community assets, and fault in the breakup of the marriage are all factors a court may consider in awarding a disproportionate share of the community estate. *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981).

However, an unequal property division may not be used to punish the party at fault in the divorce. *Chacon v. Chacon*, 222 S.W.3d 909 (Tex. App. El Paso 2007).

C. "How do I prove a fault ground?"

The party raising a fault ground for divorce has the burden of establishing the cause of action by a preponderance of the evidence. *Quarles v. Quarles*, 386 S.W.2d 337 (Tex. Civ. App. Dallas 1965), writ dismissed, 388 S.W.2d 926 (Tex. 1965); *Gray v. Gray*, 286 S.W.2d 223 (Tex. Civ. App. Austin 1955). This burden does not shift from the petitioner or counterpetitioner to establish the affirmative facts necessary to establish his or her cause. *Powell v. Powell*, 170 S.W. 111 (Tex. Civ. App. Dallas 1914). Even if the respondent fails to file an answer, the party alleging a fault ground must adduce proof to support the material allegations in the petition. *Osteen v. Osteen*, 38 S.W.3d 809 (Tex. App. Houston 14th Dist. 2001).

VI. "What's going to stop her from taking all our money?": Standing Orders and TROs

Your first vacation in months has finally come, and you find yourself sipping a rum runner at a small beach bar in Grand Cayman. A man sits next to you with a large steel brief case. He nervously wipes his brow and orders a stiff drink. Since you are in such a good state of mind, knowing you have five more days of sun and sand ahead of you, you tell the bartender to put the drink on your tab. The man thanks you, and you ask him what is troubling him. He tells you that his wife filed for divorce, and he has come to Grand Cayman to open a bank account to move his life's savings into because he's afraid his wife is going to run off with all of their money. Oddly enough, this man lives in Texas, the state you practice commercial banking law in. You advise him of the benefits of an offshore account, but also tell him not to fret because you just learned about TROs and standing orders in divorce.

After the filing of a suit for dissolution of a marriage, on the motion of a party or on the court's own motion, the court may grant a temporary restraining order without notice to the adverse party for the preservation of the property and for the protection of the parties as necessary, including an order prohibiting one or both parties from:

(1) intentionally communicating by telephone or in writing with the other party by use of vulgar, profane, obscene, or indecent language or in a coarse or offensive manner, with intent to annoy or alarm the other;
(2) threatening the other, by telephone or in writing, to take unlawful action against any person, intending by this action to annoy or alarm the other;
(3) placing a telephone call, anonymously, at an unreasonable hour, in an offensive and repetitious manner, or without a legitimate purpose of communication with the intent to annoy or alarm the other;
(4) intentionally, knowingly, or recklessly causing bodily injury to the other or to a child of either party;
(5) threatening the other or a child of either party with imminent bodily injury;
(6) intentionally, knowingly, or recklessly destroying, removing, concealing, encumbering, transferring, or otherwise harming or reducing the value of the property of the parties or either party with intent to obstruct the authority of the court to order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage;
(7) intentionally falsifying a writing or record relating to the property of either party;
(8) intentionally misrepresenting or refusing to disclose to the other party or to the court, on proper request, the existence, amount, or location of any property of the parties or either party;
(9) intentionally or knowingly damaging or destroying the tangible property of the parties or either party; or
(10) intentionally or knowingly tampering with the tangible property of the parties or either party and causing pecuniary loss or substantial inconvenience to the other. Tex. Fam. Code § 6.501.

A temporary restraining order may not include a provision that: (1) excludes a spouse from occupancy of the residence where that spouse is living except as provided in a protective order made in accordance with Title 4; (2) prohibits a party from spending funds for reasonable and necessary living expenses; or (3) prohibits a party from engaging in acts reasonable and necessary to conduct that party's usual business and occupation. *Id.*

Many counties have standing orders which are similar to the temporary restraining order statutes described above. However, if your county does not have a standing order or if the standing order does not cover all of the provisions listed above, it is advisable to file an application for temporary restraining order with the Court.

VII. "Do I really have to get a job now?": Spousal Maintenance

You're waiting in a never-ending line at the grocery store on a Saturday afternoon, and in front of

you, a young couple is flipping through a Texas entertainment news magazine. The two stop on an article about a highly publicized divorce of reality TV stars who live in Texas. The young man reading the magazine comments that the soon to be celebrity divorcee must be the luckiest guy in the world because with the amount of spousal maintenance he's going to get in the divorce, he'll never have to work again. The couple goes back-and-forth on whether the celebrity marriage was all about the money to begin with, and after 15 minutes of listening to the conversation with no signs of movement from the checkout line, you can't take it anymore. You butt into the conversation and inform the two that under Texas law, neither of the celebrities would be eligible for spousal maintenance because:

In a suit for dissolution of a marriage, the court may order maintenance for either spouse only if the spouse seeking maintenance will lack sufficient property, including the spouse's separate property, on dissolution of the marriage to provide for the spouse's minimum reasonable needs and:

(1) the spouse from whom maintenance is requested was convicted of or received deferred adjudication for a criminal offense that also constitutes an act of family violence, as defined by Section 71.004, committed during the marriage against the other spouse or the other spouse's child and the offense occurred:

(A) within two years before the date on which a suit for dissolution of the marriage is filed; or
(B) while the suit is pending; or

(2) the spouse seeking maintenance:

(A) is unable to earn sufficient income to provide for the spouse's minimum reasonable needs because of an incapacitating physical or mental disability;
(B) has been married to the other spouse for 10 years or longer and lacks the ability to earn sufficient income to provide for the spouse's minimum reasonable needs; or
(C) is the custodian of a child of the marriage of any age who requires substantial care and personal supervision because of a physical or mental disability that prevents the spouse from earning sufficient income to provide for the spouse's minimum reasonable needs .Tex. Fam. Code § 8.051.

A court that determines that a spouse is eligible to receive maintenance under this chapter shall determine the nature, amount, duration, and manner of periodic payments by considering all relevant factors, including:

(1) each spouse's ability to provide for that spouse's minimum reasonable needs independently, considering that spouse's financial resources on dissolution of the marriage;
(2) the education and employment skills of the spouses, the time necessary to acquire sufficient education or training to enable the spouse seeking maintenance to earn sufficient income, and the availability and feasibility of that education or training;
(3) the duration of the marriage;
(4) the age, employment history, earning ability, and physical and emotional condition of the spouse seeking maintenance;
(5) the effect on each spouse's ability to provide for that spouse's minimum reasonable needs while providing periodic child support payments or maintenance, if applicable;
(6) acts by either spouse resulting in excessive or abnormal expenditures or destruction, concealment, or fraudulent disposition of community property, joint tenancy, or other property held in common;
(7) the contribution by one spouse to the education, training, or increased earning power of the other spouse;
(8) the property brought to the marriage by either spouse;
(9) the contribution of a spouse as homemaker;
(10) marital misconduct, including adultery and cruel treatment, by either spouse during the marriage ; and
(11) any history or pattern of family violence, as defined by Section 71.004 .

Tex. Fam. Code § 8.051.

It is a rebuttable presumption that maintenance under Section 8.051(2)(B) of the Texas Family Code is not warranted unless the spouse seeking maintenance has exercised diligence in:

(1) earning sufficient income to provide for the spouse's minimum reasonable needs ; or

(2) developing the necessary skills to provide for the spouse's minimum reasonable needs during a period of separation and during the time the suit for dissolution of the marriage is pending. Tex. Fam. Code § 8.053.

A court may not order maintenance that remains in effect for more than:

(1) five years after the date of the order, if:
(A) the spouses were married to each other for less than 10 years and the eligibility of the spouse for whom maintenance is ordered is established under Section 8.051(1) of the Texas Family Code; or
(B) the spouses were married to each other for at least 10 years but not more than 20 years;
(2) seven years after the date of the order, if the spouses were married to each other for at least 20 years but not more than 30 years; or
(3) 10 years after the date of the order, if the spouses were married to each other for 30 years or more. Tex. Fam. Code § 8.054.

A court shall limit the duration of a maintenance order to the shortest reasonable period that allows the spouse seeking maintenance to earn sufficient income to provide for the spouse's minimum reasonable needs , unless the ability of the spouse to provide for the spouse's minimum reasonable needs is substantially or totally diminished because of:

(1) physical or mental disability of the spouse seeking maintenance;
(2) duties as the custodian of an infant or young child of the marriage; or
(3) another compelling impediment to earning sufficient income to provide for the spouse's minimum reasonable needs. *Id.*

The court may order maintenance for a spouse to whom Section 8.051(2)(A) or (C) of the Texas Family Code applies for as long as the spouse continues to satisfy the eligibility criteria prescribed by the applicable provision. *Id.* Furthermore, on the request of either party or on the court's own motion, the court may order the periodic review of its order for maintenance under Subsection, and any continuation of maintenance ordered is subject to a motion to modify as provided by Section 8.057 of the Texas Family Code. Tex. Fam. Code § 8.054.

A court may not order maintenance that requires an obligor to pay monthly more than the lesser of:

(1) $5,000 ; or
(2) 20 percent of the spouse's average monthly gross income. Tex. Fam. Code § 8.055.

For purposes of calculating a maintenance obligation, gross income includes:

(1) 100 percent of all wage and salary income and other compensation for personal services (including commissions, overtime pay, tips, and bonuses);
(2) interest, dividends, and royalty income;
(3) self-employment income;
(4) net rental income (defined as rent after deducting operating expenses and mortgage payments, but not including noncash items such as depreciation); and
(5) all other income actually being received, including severance pay, retirement benefits, pensions, trust income, annuities, capital gains, unemployment benefits, interest income from notes regardless of the source, gifts and prizes, maintenance, and alimony. *Id.*

For determining maintenance, income does not include:

(1) return of principal or capital;
(2) accounts receivable;
(3) benefits paid in accordance with federal public assistance programs;
(4) benefits paid in accordance with the Temporary Assistance for Needy Families program;
(5) payments for foster care of a child;
(6) Department of Veterans Affairs service-connected disability compensation;
(7) supplemental security income (SSI), social security benefits, and disability benefits; or
(8) workers' compensation benefits. Tex. Fam. Code § 8.055.

The obligation to pay future maintenance terminates on the death of either party or on the remarriage of the obligee. Tex. Fam. Code § 8.056. Additionally, after a hearing, the court shall order the termination of the maintenance obligation if the court finds that the obligee cohabits with another person with whom the obligee has a dating or romantic relationship in a permanent place of abode on a continuing basis. *Id.* However, termination of the maintenance obligation does not terminate the obligation to pay any maintenance that accrued before the date of termination, whether as a result of death, remarriage or cohabitation. *Id.*

An order for maintenance is not authorized between unmarried cohabitants under any circumstances. Tex. Fam. Code § 8.061.

VIII. "Will the kids be all right?": Child Support and Possession

At your local gym, you run into an old friend from college. She's in the eleventh mile of an inclined run, which she tells you is part of her daily 3-hour workout routine. You ask her why she is pushing herself so hard these days, for as you remember, she was always up for a beer and a burger when you knew her. She tells you that her marriage is on the rocks, and the uncertainty of how she will be able to support her three children and what type of custody arrangement a court would order if she and her husband divorced has led to her tenacious exercise schedule. In between gasps for air, she asks for your advice. After a few unsuccessful attempts at wielding the medicine ball, you inform her of the following:

A. Support

The primary consideration in a child support case is the best interest of the child. Tex.Fam.Code § 154.122; *See Lide v. Lide*, 116 S.W.3d 147, 152 (Tex.App.-El Paso 2003). The trial court has broad discretion in setting child support, and a trial court's order of child support will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion. *See Worford. v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

The court may order either or both parents to support a child in the manner specified by the order:

(1) until the child is 18 years of age or until graduation from high school, whichever occurs later;

(2) until the child is emancipated through marriage, through removal of the disabilities of minority by court order, or by other operation of law;

(3) until the death of the child; or

(4) if the child is disabled…for an indefinite period. Tex. Fam. Code §154.001.

A request for child support may be included in a divorce, in a suit for paternity, in a suit for conservatorship, for possession and access or any other suit affecting the parent child relationship. In determining whether application of the guidelines would be unjust or inappropriate, the court considers evidence of all relevant factors, including the initial determination of how much an obligor should be required to pay in child support is calculated by using the child support guidelines set out in Chapter 154 of the Texas Family Code. *See* Tex. Fam. Code § 154.123.

The child support guidelines are viewed as a presumption for indicating the amount of child support an obligor should pay, and the calculation is based on a percentage of the obligor's net resources. Tex.Fam.Code §§ 154.122(a) and 154.062. In determining the amount the resources available for the payment of child support, the court may consider a party's wage and salary income including commissions and overtime, interest income, rental income, income from retirement, trusts, annuities, unemployment benefits or other income regardless of the source. Tex. Fam. Code § 154.062. Those items which do not constitute resources for child support purposes include the return of principal payments, accounts receivables or AFDC benefits. *Id.*

The Court must also deduct from an obligor's gross income social security taxes, federal income tax based on a single person claiming one personal exemption and deduct state income tax, union dues and expenses for health insurance coverage in order to determine the net monthly resources. Tex. Fam. Code § 154.062.

Once the net resources of an obligor are determined, the percentage to be applied to net resources for determining the amount of the monthly child support obligation is:

20% for 1 child
25% for 2 children
30% for 3 children
35 % for 4 children
40 % for 5 or more children.

Tex. Fam. Code §154.125.

When an obligor has children to whom he owes a duty of support, which are not the subject of the current lawsuit, the guidelines provide a formula to be used to adjust the calculation of net resources for obligors that have children in more than one household. Tex.Fam.Code § 154.128.

Proof of intentional unemployment or intentional underemployment may result in a deviation from the guidelines in determining the amount of child support an obligor should pay. A showing of unemployment or underemployment is used to rebut the presumption that the guidelines are appropriate and can be used as a

defense to an obligor's request to reduce the child support obligation. Tex. Fam. Code § 154.066.

Parties have the ability to seek a modification of a support order under the Family Code, as well. The court may modify an order that provides for child support if one of the following exists:

> (1) the circumstances of the child or a person affected by the order have materially and substantially changed since the earlier of:
>
> (A) the date of the order's rendition; or
>
> (B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based; or
>
> (2) it has been three years since the order was rendered or last modified and the monthly amount of the child support award under the order differs by either 20 percent or $100 from the amount that would be awarded in accordance with the child support guidelines. Tex.Fam.Code § 156.401.

A child support order may only be modified for obligations accruing after the earlier of the date of the service of citation of the action or the date of appearance of the obligor in the motion to modify. Tex.Fam.Code §156.401. A party shows proof of a material and substantial change in circumstance by comparing the financial condition at the time of rendition of the prior order and the financial condition at the time of the modification hearing. *Hammond v. Hammond*, 898 S.W.2d 406, 407-08 (Tex.App.-Ft. Worth 1995, no writ); *Tucker v. Tucker*, 908 S.W.2d 530, 532 (Tex.App.-San Antonio 1995, writ denied).

The moving party has the burden of showing the requisite change in circumstances since the entry of the original order. *Hammond v. Hammond*, 898 S.W.2d 406 (Tex.App.-Fort Worth 1995, no writ).

Small changes in a parent's net resources and assertions of change without proof will not support a child support modification. *Payne v. Dial*, 831 S.W.2d 457, 459 (Tex.App.-Houston [14th Dist.] 1992, no writ).

Courts are also authorized to award retroactive support in divorces, paternity and child support modification cases. The determination of whether to award retroactive child support is within the sound discretion of the court.

The amount of retroactive support can also be determined by use of the child support guidelines. Consideration of the net resources of the obligor during the relevant time period as well as consideration of whether the obligee made previous attempts to notify the obligor of his probable paternity, financial hardship of the obligor, payment of actual support or other necessaries by the obligor and whether the obligor knew about his probable paternity are factors to consider in assessing the amount of retroactive support. Tex.Fam.Code § 154.131(b).

B. Possession

Texas Family Code § 153.002 provides that the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.

It is the public policy of Texas to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child. Tex. Fam. Code § 153.001(a)(1). The guidelines established in the standard possession order are intended to guide the courts in ordering the terms and conditions for possession of a child by a parent named as a possessory conservator or as the minimum possession for a joint managing conservator.

The Texas legislature has determined that frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and child. Texas Family Code § 153.252 provides that in a suit affecting the parent-child relationship, there is a rebuttable presumption that the standard possession order provides reasonable minimum possession of a child for a parent named as a possessory conservator or joint managing conservator and is in the best interest of the child.

Texas Family Code § 153.256 provides in ordering the terms of possession of a child under an order other than a standard possession order, the court shall be guided by the guidelines established by the standard possession order and may consider:

> (1) the age, developmental status, circumstances, needs, and best interest of the child;
>
> (2) the circumstances of the managing conservator and the parent named as a possessory conservator; and
>
> (3) any other relevant factor.

C. Geographical Restriction

If parents are unable to agree on a parenting plan, the Court may appoint one of the parents as the parent with the right to designate the primary residence of the child. If the Court appoints a sole managing conservator, the sole managing conservator shall have the exclusive right to designate the primary residence. Tex. Fam. C. §153.132. However, this right may be limited, as the Court may order the sole managing conservator to reside within a certain geographic area. In re A.S., 298 S.W.3d 834, 836 (Tex.App. - Amarillo 2009, no pet.).

If the Court renders an order appointing joint managing conservators (absent agreement of the parents), the Court must establish, until modified by further order, a geographic area within which the conservator shall maintain the child's primary residence, or specify that the conservator may determine the child's primary residence without regard to geographic location. Tex. Fam. C. §153.134 (b)(1)(A)-(B). Even though the parties are named joint managing conservators, this has the effect of giving one parent slightly greater powers. Albrecht v. Albrecht, 974 S.W.2d 262, 265 (Tex.App. - San Antonio 1998, no pet.). However, the parents may agree not to designate one of them as the joint managing conservator with the right to designate the primary residence of the child by filing a parenting plan otherwise complying with Section 153.133 of the Texas Family Code with the Court specifying a geographic area in which the child's primary residence shall be located. Tex. Fam. C. §153.133(c).

D. Child's Preference

In 2009, Texas Family Code Section 153.008, which allowed a child at least 12 years of age to file in writing with the Court the name of the person the child preferred to have the exclusive right to designate the primary residence of the child, was repealed. However, although affidavits can no longer be used, children the subject of a Suit Affecting Parent-Child Relationship can still have their preferences made known to the Court. If the child is 12 years of age or older and an application is made by (1) a party, (2) amicus attorney, or, (3) attorney ad litem, or on the court's own motion, the court must interview the child in chambers. Tex. Fam. C. §153.009 (a). If the child is younger than 12 years of age, the Court has the discretion as to whether to interview the child. Id. The purpose is to determine the child's wishes as to conservatorship, the person who shall have the exclusive right to determine the child's primary residence, possession or access, or any other issue in the suit affecting parent-child relationship. Tex. Fam. C. §153.009 (a)-(b). However, this interview does not diminish the Court's discretion in determining the best interests of the child. Tex. Fam. C. §153.009 (c)

On the motion of a party, the Court shall order a record of the interview to be made as part of the record in a case, as long as the child is 12 years of age or older. Tex. Fam. C. §153.009(f).

IX. Same-Sex Divorce

Your best friend from Massachusetts is looking to move to Texas for a job opportunity; however, she has just married her partner of ten years, and she is worried about Texas' same-sex marriage laws. She knows that you do not practice family law, but she wants to know if you have any input on whether or not Texas would recognize her marriage or allow her to get divorced, should the unexpected occur. Although you'd want nothing more than to have your best friend move close-by, you inform her of the current status of Texas law on the subject.

In 2005, Article I, Section 32 of the Texas Constitution was amended to limit the definition of marriage to the union of one man and one woman. Under the Texas Constitution, the state, or a political subdivision of the state, may not create or recognize any legal status identical or similar to marriage. Tex. Const. art. 1, § 32(b). This policy was further codified in the Texas Family Code as Section 6.204, which states that a marriage between persons of the same sex or a civil union is contrary to public policy and is therefore void. Moreover, the state may not give effect to a:

> (a) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or
> (b) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction. Tex. Fam. Code § 6.204(b)-(c).

Thus, the Texas Court of Appeals has held that Texas courts lack subject-matter jurisdiction to entertain a suit for divorce that is brought by a party to a same-sex marriage, even if the marriage was entered in another state that recognizes the validity of same-sex marriages. *In re Marriage of J.B. & H.B.,* 326 S.W.3d 654, 670 (Tex. App. – Dallas 2010).

For instance, in the case of *In re Marriage of J.B. & H.B*, an action was brought by individual to dissolve his same-sex marriage from another state. The State of Texas filed a petition to intervene and sought to dismiss the action based on the Constitutional and statutory grounds described above. *Id.* The trial court entered an order finding that it had subject matter jurisdiction and struck the State's petition for intervention; however, the State appealed, and on appeal the Court of Appeals of Dallas held that Texas courts do not have subject-matter jurisdiction to adjudicate same-sex divorces, and the right to legal recognition of same-sex marriage was not fundamental. *Id.* Therefore, the Texas law prohibiting recognition of same-sex marriages did not violate Equal Protection Clause. *Id.*

The issue of same-sex marriage is one that will likely continue to evolve as the political climate changes; however, as the law currently stands in Texas, courts of this state do not have the ability to entertain divorce suits involving same-sex marriage and/or dissolutions of same-sex civil unions, even if these marriages and/or civil unions were entered into out-of-state.

X. Jane Doe Laws

At your weekly poker game, one of your longtime, card playing buddies pulls you aside during a break in the action. He knows you are an attorney, and he tells you he needs your advice regarding a family, legal matter. Last night, he overheard his sixteen-year-old daughter telling one of her friends that she is pregnant, and she wants an abortion. He and his wife are against the idea of their daughter terminating the pregnancy, and they are worried their daughter will get an abortion without their consent. He asks if you know what the current state of the law is on the subject, and you advise him of the following:

A pregnant minor who wants an abortion without notifying either of her parents may file an application for a court order to authorize the minor to consent to the performance of an abortion without notifying either of her parents. Tex. Fam. Code § 33.03(a). In such circumstances, the court is required to appoint a guardian ad litem for the minor, and if the minor has not yet retained an attorney, then the court is also required to appoint an attorney to represent the minor. Tex. Fam. Code § 33.03(e). The guardian ad litem may serve in the role of the child's attorney if the guardian ad litem is a licensed attorney in the State of Texas. *Id.* The hearing on this application is to be given precedence over other pending matters in the court in order to ensure a prompt decision. Tex. Fam. Code § 33.03(h). In fact, the court is required to rule on the application and issue written findings of fact and conclusions of law no later than 5:00 p.m. on the second business day after the application is filed with the Court (unless the minor requests an extension of time for the court to rule on the application). *Id.* If the court fails to rule on the application and issue written findings of fact and conclusions of law within this period of time, then the application is deemed to be granted, and the physician may perform the abortion. *Id.*

The court must determine by a preponderance of the evidence whether the minor is sufficiently well informed and mature enough to make the decision to have an abortion performed without notifying either of her parents. Tex. Fam. Code § 33.03(i). The court also must determine whether notification would not be in the best interest of the pregnant minor, or whether notification may lead to emotional, physical, or sexual abuse of the minor. If the court makes a finding that the minor is sufficiently well informed and mature enough and that notifying the minor's parent(s) would not be in the minor's best interest, or that notifying the minor's parent(s) may lead to emotional, physical, or sexual abuse of the minor, then the court must enter an order authorizing the minor to consent to the abortion without notifying either of her parents. *Id.*

The Supreme Court of Texas has elaborated on the best interest factors for the Court to consider when making such a determination: "(1) the minor's emotional or physical needs; (2) the possibility of emotional or physical danger to the minor; (3) the stability of the minor's home and whether notification would cause serious and lasting harm to the family structure; and (4) the relationship between the parent and the minor and the effect of notification on that relationship." *In re Jane Doe 2*, 19 S.W.3d 278, 282 (Tex.2000) (citing *Holley v. Adams*, 544 S.W.2d 367 (Tex.1976)). The Supreme Court noted, however, that a minor's general fear of telling her parents does not, by itself, establish that notifying a parent would not be in the minor's best interest. *Id.*

The Supreme Court has also clarified how to determine whether a minor is mature and sufficiently well informed as required by the Texas Family Code to make the decision to have an abortion without notifying either of the minor's parents. The Supreme Court has explained that a minor is mature and sufficiently well informed to decide to have an abortion without notifying either of her parents when the evidence demonstrates that she is capable of

reasoned decision-making and that her decision does not stem from impulse, but is instead based upon careful consideration of her various options and the benefits, risks, and consequences of each of those options. *In re Jane Doe 1 (I),* 19 S.W.3d 249, 255 (Tex. 2000). According to the Supreme Court, in order to establish that the minor is sufficiently well informed, the minor must make at least the following three showings:

> First, she must show that she has obtained information from a health-care professional about the health risks associated with an abortion and that she understands those risks. [¶] Second, she must show that she understands the alternatives to abortion and their implications. [¶] Third, she must show that she is also aware of the emotional and psychological aspects of undergoing an abortion, which can be significant if not severe for some women. She must also show that she has considered how this decision might affect her family relations. *Id*. at 256-57.

With respect to the maturity standard, the Supreme Court has stated that such a determination necessarily involves more discretion from the trial court; however, the Court noted that "[a] minor who can show that she is sufficiently well informed may also establish in the process that she is mature." *Id*.

XI. Paternity

On a whim, you attend a speed dating party with a friend. During your first "date," a man asks what you do for a living. You tell him you are an attorney, and he responds that fate must have brought the two of you together because he has a legal question that has been nagging him since the last speed-dating event he attended. He asks you what the current Texas paternity laws are, and since you have another 2 minutes to kill, you entertain him with the following:

A man is presumed to be the father of the child if he is married to the mother of the child and the child is born during the marriage. Tex. Fam. Code § 160.204(a)(1). A presumed father, however, can adjudicate the parentage of the child, but such suit cannot be commenced later than the fourth anniversary of the child's date of birth, unless "(1) the presumed father and the mother of the child did not live together or engage in sexual intercourse with each other during the probable time of conception; or (2) the presumed father was precluded from commencing a proceeding to adjudicate the parentage of the child before the expiration of [four years from the child's date of birth] because of the mistaken belief that he was the child's biological father based on misrepresentations that led him to that conclusion." Tex. Fam. Code § 160.607.

In a divorce suit, the court makes an adjudication of parentage if it has jurisdiction under Family Code § 159.201 and the Decree (1) expressly identifies the child as "a child of the marriage" or as "issue of the marriage" or the Decree uses similar words to suggest that the husband is the father or (2) provides for the husband to make child-support payments, unless the Decree specifically contains provisions disclaiming the husband's paternity. Tex. Fam. Code § 160.637(c). The husband in a prior marriage, however, can challenge the previous adjudication of parentage after the divorce by appeal or bill of review. Tex. Fam. Code § 160.631(b); *In re Office of Atty. Gen.*, 193 S.W.3d 690, 692 (Tex.App.–Beaumont 2006, orig. proceeding). The earlier adjudication of paternity may be disproved only by genetic testing. Tex. Fam. Code § 160.631(b).

Any other party who is not the adjudicated father, however, can bring a suit to challenge the adjudicated father's paternity after the divorce so long as that party was not under the court's personal jurisdiction at the time of the divorce and so long as that party has standing to bring the parentage action. Tex. Fam. Code § 160.637(a)(2).