

# DEMYSTIFYING FAMILY LAW CASES: A PRIMER ON THE TYPES OF CASES IN THE GREATEST NEED OF PRO BONO ATTENTION

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## Most Common Types of Cases

The most common types of pro bono family law cases are divorce cases and suits affecting the parent child relationship (SAPCR). A SAPCR is typically any case involving custody and possession of a minor child between parties that are not married. Many pro bono family law cases involve domestic violence. Some clients may be in need of a Protective Order, while others may already have a Protective Order in place through the local County or District Attorney's office. In non-legal terms, domestic violence is a pattern of coercive behavior used by a competent adult to establish and maintain power and control over another. See Lynn Barkley Burnett, *Domestic Violence*, Medscape (July 30, 2018) available at <https://emedicine.medscape.com/article/805546-differential>. In legal terms, dating violence and/or family violence are defined by the Texas Family Code as acts intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the victim in fear of imminent physical harm, bodily injury, assault or sexual assault. TEX. FAM. CODE §§ 71.0021 and 71.004. See also TEX. FAM. CODE § 261.001(1).

## Affidavit of Inability to Pay Costs

If you are handling a family law case pro bono, then your client most likely cannot afford to pay legal fees and costs. As such, you should have your client complete an Affidavit of Inability to Pay Costs, in which he or she swears to monthly income and expenses to prove their inability to pay legal costs. Upon receipt of a completed, signed, and filed affidavit, the county clerk will waive filing fees and copy costs for your client.

## Filing the Divorce Petition

In order to file for divorce in Texas, one of the spouses must have been a resident of Texas for six months prior to filing the petition and a resident of the county where the suit is filed for 90 days prior to filing the petition. TEX. FAM. CODE § 6.301. A petition for divorce must be on file for 61 days before a divorce can be granted—which means even if the

Respondent is properly served and does not timely file an Answer, you cannot obtain a default divorce until the 61st day after the divorce petition was filed. TEX. FAM. CODE § 6.702(a). However, a petition for a SAPCR has no minimum timeline for which it must be on file and must be filed in the county in which the child resides. TEX. FAM. CODE § 103.001.

Please note that many counties, including Bexar, Dallas, Travis, Hays, and Williamson Counties, have a Standing Order that must be attached to the petition and is effective against the Petitioner upon the filing of the divorce petition (or SAPCR petition) and is effective against the Respondent upon being served with the petition and Standing Order or signing a Waiver of Citation. The purpose of the Standing Order is to maintain the status quo as to the children and marital property. If a party violates the Standing Order, he or she may be held in contempt. Unless modified by temporary orders, the Standing Order will be in effect until the case is final. If your county does not have a Standing Order, Section 6.501 of the Texas Family Code provides a list of injunctions that may be granted in a Temporary Restraining Order in a divorce case.

## Temporary Orders

A temporary orders hearing is a hearing to determine any temporary issues that need to be temporarily decided prior to the final trial. Temporary Orders can be heard in either a divorce or a SAPCR. Temporary issues that need to be decided prior to final trial can include the following in a SAPCR: (1) which parent has specific rights, powers and duties pertaining to the children; (2) who will pay child support to whom and how much; (3) the possession schedule on which each parent will have visitation with the children. If it is a divorce case, the Court can determine any or all of the above issues for children as well as: (1) which party shall have the right to exclusive use and possession of marital property such as the marital residence, vehicles, personal property; and (2) if either party will pay temporary support to the other party

while the divorce is pending. For other issues that can be decided on temporary orders, see TEX. FAM. CODE § 6.502. It is important to note that temporary orders, while only a temporary order, can set a precedent for final orders. As such, sometimes temporary orders are more important than the final trial.

### Conservatorship

Conservatorship is the legal term used to describe the relationship between the parents and the children and determines the rights, powers and duties each parent has to the children. In Texas, you can be named a Sole Managing Conservator, a Joint Managing Conservator, or a Possessory Conservator. Texas law presumes that naming parents as Joint Managing Conservators in an original divorce or SAPCR is in the best interest of the children. TEX. FAM. CODE § 153.131. To be named a Sole Managing Conservator, that parent must prove that it is not in the best interest of the children for the other parent to be named a Joint Managing Conservator. Such a situation might be proved in cases involving domestic violence, child abuse, or drug and alcohol addiction. Possessory Conservators may have significantly more limited rights, powers and duties than Joint Managing Conservators or Sole Managing Conservators. See TEX. FAM. CODE § 153.192.

Either the Sole Managing Conservator or one of the Joint Managing Conservators will typically have the right to determine the primary residence of the children and the right to receive child support. Unless the parties agree otherwise, it is fairly common for courts to impose a geographic restriction on the parent who has the right to designate the primary residence of the children (provided that the other parent maintains a residence in that same geographic area). Typical geographic restrictions include the current county of residence or that current county and surrounding counties. For instance, if the parties resided in Travis County, Texas, a typical restriction on the primary parent might be: Travis County and surrounding counties.

### Possession

Parents can generally agree to any possession schedule to which they both agree, so long as it is in the best interest of the children. However, if they cannot agree, the Texas Family Code presumes that the Standard Possession Order is in the best interest of the children. TEX. FAM. CODE §

153.252. There are two schedules—one for parents that live under 100 miles apart and one for parents that live over 100 miles apart. TEX. FAM. CODE §§ 153.312 and 153.313. The Standard Possession Order applies to children ages three and older and sets out specific days and times when each parent has possession of and access to their children with one parent being the primary parent and the other parent having possession of the children on the 1st, 3rd and 5th weekends of the month from 6 p.m. on Friday to 6 p.m. on Sunday. In addition, the non-primary parent has possession of the children from 6 p.m. to 8 p.m. on Thursdays during the regular school year.

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At the option of the non-primary parent, he or she may elect to pick up the children on Fridays of the 1st, 3rd, and 5th weekends of the month at the time school is dismissed and maintain possession of the children until the following

Monday morning when school resumes. TEX. FAM. CODE § 153.317. Further, the non-primary parent may also elect to pick up the children on Thursdays during the regular school year at the time school is dismissed and maintain possession until the following Friday morning when school resumes. *Id.* The Standard Possession Order also includes summer and holiday possession. The non-primary parent is entitled to up to thirty consecutive days in the summer for 100 mile or less apart schedules and up to forty-two consecutive days in the summer for over 100 miles apart schedules. TEX. FAM. CODE §§ 153.312 and 153.313.

### Child Support

Pursuant to Chapter 154 of the Texas Family Code, guideline child support is presumed to be reasonable and in the best interest of the child. TEX. FAM. CODE § 154.122. Generally speaking, that means that the parent who does not have primary possession of the children will be ordered to pay monthly child support to the parent who does have primary possession of the children. The child support guidelines are located in Texas Family Code Section 154.125. For one child, the guideline child support amount is 20% of the non-custodial parent's monthly net resources. For two children, it is 25%; for three children it is 30%; and for four children it is 35%. The percentage is capped at 40% for five or more children. If a parent has children the subject of this suit and also has children from another relationship, who are not the subject of the current court proceedings, the percentages will be discounted slightly to account for that

parent's support obligations for the other children. See TEX. FAM. CODE §154.129.

Monthly "net resources" is generally defined as gross monthly income less income taxes, social security taxes, and health and dental insurance premiums (or cash medical support) for the children. The full definition of "net resources" is located in TEX. FAM. CODE § 154.062.

It should be noted that child support is payable until the child reaches age eighteen (18) or the child graduates from high school, whichever occurs later. TEX. FAM. CODE § 154.006. However, if a child is disabled, child support can be ordered indefinitely. TEX. FAM. CODE § 154.302. If there is more than one child, the amount required to be paid by the child support order must step down upon each child aging out. TEX. FAM. CODE § 154.006.

### **Dividing Marital Property**

Texas is a "community property" state and there is a presumption that all real and personal property owned at the time of divorce is community property. TEX. FAM. CODE § 3.003(a). The legal standard for division of community property is a "just and right" division—which does not necessarily equate to a 50/50 division—but instead is whatever division, according to the Judge, is a just and right division. TEX. FAM. CODE § 7.001. Separate property is property that either spouse: (1) owned before the marriage; (2) was acquired by gift, devise or descent by the spouse during the marriage; or (3) the recovery for personal injuries sustained by the spouse during marriage (except any recovery for loss of earning capacity during marriage). TEX. FAM. CODE § 3.001. If either spouse asserts that certain property is separate property, that spouse must prove by clear and convincing evidence that it was their separate property. TEX. FAM. CODE § 3.003(b). If a party can prove such by clear and convincing evidence, then the court cannot divest that party of his or her separate property and that separate property must be awarded to that spouse. *Cameron v. Cameron*, 641 S.W.2d 210, 219-20 (Tex. 1982); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 142 (Tex. 1977).

### **Resources**

If you practice in Travis County and are taking a case through *Volunteer Legal Services* (VLS), you may contact VLS for prior articles and seminars. VLS holds an annual day long *Divorce Basics Seminar*, which is free for attorneys who agree to accept two VLS cases. Further, VLS provides volunteer attorneys with access to family law forms through the *Texas Family Law Practice Manual* or ProDoc, etc. In addition,

*Volunteer Legal Services* has a Mentor/Mentee program for attorneys handling family law cases and will pair you up with an experienced family law attorney who can answer questions you may have.

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