



Spring 2018 Enews

An overview of children's issues in a divorce

By Trey Yates

It is the policy of the State of Texas to assure children will have frequent and continuing contact with both parents who have shown the ability to act in the best interest of the child. The courts in Texas also favor *joint managing conservatorships* in which both parents share decisions about the child's upbringing. The court may consider the following factors in determining custody*:



- Whether a parent can provide a safe, stable and nonviolent environment for the child;
- Whether a parent has participated in child rearing before the filing of the suit;
- The geographical proximity of the parents' residences once separated;
- The physical and mental health, stability and moral character of both parents;
- If the child is 12 years of age or older, the child's preference, if any, regarding the person who will have the exclusive right to designate the primary residence of the child;
- Evidence of abuse or domestic violence; and
- Any other relevant factor.

**Based on Texas Statutes; Family Code, Chapter 153*

Texas also encourages every parent going through a divorce to submit a detailed parenting plan to the court before the judge issues a temporary or final custody order. The court will intervene only if the parents cannot reach an agreement on this plan. Most divorces involving children name one parent as the primary Joint Managing Conservator and will grant the other parent (also a Joint Managing Conservator) a

“Standard Possession Order” for visitation. The visitation is written out in great detail in the statute (Texas Family Code Section 153.312) and should also be detailed in the Final Decree of Divorce for each couple.

Here is a snapshot of a typical visitation order (assuming both spouses reside within 100 miles of each other):

The 1st, 3rd, and 5th Friday of every month from Friday (beginning at either school dismissal or 6:00p.m.) until the following Sunday at 6:00p.m., every Thursday beginning at either school dismissal or 6:00p.m. and ending either at 8:00p.m. that night or when school resumes the following morning), as well as 30 days in the summer, and additional visitation periods for Spring Break, Thanksgiving, and Christmas, depending on whether it is an odd or even numbered year. While Standard Possession Order is the most common visitation schedule, it may be inappropriate depending on the particular case.

Either or both parents may be ordered to make periodic, lump sum, or both types of child support payments. There are official child support guidelines set out in the statute and these are presumed to be reasonable and in the best interests of the child. The factors for consideration are:

1. the age and needs of the child;
2. the ability of the parents to contribute to the support of the child;
3. any financial resources available for the support of the child;
4. the amount of possession and access to the child;
5. the net resources of the parent to pay support, including the earning potential of the parent to pay support if the actual income of that parent is significantly less than what that parent could earn, if intentionally unemployed or underemployed;
6. any childcare expenses necessary for the employment of either parent;
7. whether a parent has custody of another child and any child support expenses being paid or received for the care of another child;
8. the amount of alimony being currently paid or received;
9. provisions for healthcare;
10. any educational or healthcare needs of the child, including college expenses;
11. any benefits a parent receives from an employer;
12. any debts or obligations of a parent;
13. any wage or salary deductions of the parents;
14. the cost of traveling to visit a child;
15. any positive or negative cash flow from any assets, including a business or investments;
16. any provisions for healthcare or insurance;
17. any special or extraordinary educational, healthcare, or other expenses of the parents or the child;

18. whether either parent has a car or housing furnished by an employer or other person or business; and
19. any other relevant factor. The court may order health insurance coverage to be provided for the child. In addition, the court may order income withholding to secure the payment of child support. [Texas Codes Annotated; Family Code, Chapters 154.001 to 154.309].

Any divorce or child custody lawsuit can have the potential of resulting in lasting harm to both the children and their parents. Most Texas family law judges are willing to accept a parenting plan that has been crafted by the parents with the guidance of their respective legal counsel, to fit that family's unique traditions and cultures influences once the court has been shown that the parenting plan is in the best interest of the children.

Mediation is almost always mandatory when children's issues are in dispute and before a custody fight escalates to court. The goal of any child custody or visitation dispute should be to reach a fair resolution so that the children in question can resume a stable and positive routine as quickly as possible. An experienced, knowledgeable Board Certified Family Law attorney is essential to obtaining that goal. For further information on children's issues in a divorce, or to schedule a consultation, contact the Law Office of Trey Yates at 713-932-7177.

Using "tracing" to distinguish separate from community property

By Patricia Barrett, CFP, CDFIA

In the state of Texas, an inheritance or a gift of money is considered separate property. Yet, if one "mingles" these funds with community funds, the issue gets complicated in a divorce.

Let's say you were gifted money from your mother over several years and you put it in the bank or invested it while you were married. It is likely the entire amount may not be your separate property today. Despite your best efforts, Mom's gifts have probably been mingled with community funds.



What if you kept it in a separate account and never added community earnings? Well, while the initial amount may be considered separate property, any dividends and interest on separate property is considered community property. So, once again, some of what you thought was separate property, may be community property.

Assuming you can clearly demonstrate how much of the account came from portfolio income, then the rest can be claimed as separate. You add only the interest and dividends to community. However, if you purchased other securities with those earnings, things get even more complicated. Now, you have mingled the funds.

If the gift is invested in mutual funds, every dividend is reinvested, buying new shares. These new shares are considered *community* and will subsequently pay dividends too. The capital gains distributions paid at year-end are then partially community and partially separate, and would have to be prorated between separate and community, according to the number of shares. The same principle applies to funds that are inherited and invested in the same way.

A Case in Point

My client, Mary, was blessed over the years by a generous mother, who made yearly gifts directly into mutual funds held jointly with Mary. Over the 34 years of marriage, Mary pulled funds out to support the family as needed to supplement rather meager earnings of her husband. Hundreds of times, dividends were reinvested along with capital gains distributions. Upon mom's death, the accounts became entirely Mary's (and partially her husband's).

Mary and her husband assumed that the accounts were too mingled to ever separate. However, with the help of thousands of pages of historical statements provided by Fidelity, Merrill Lynch, Templeton Funds and others, we solved this puzzle through *tracing*.

Starting in 1987 with the first gift by mom, I did "line-by-line" tracing, entering every transaction, every buy, sell, dividend, capital gain, withdrawal, etc. As the puzzle was assembled, the picture became clear, showing accurately the amount of community shares and separate property shares. We were able to show that over 95 percent of the funds were Mary's.

Why such a high percentage when so much was earned in dividends and interest? The high percentage is the result of a rule in Texas called "community out first." Whenever there are community shares or cash held in the account, and a distribution is made, that distribution comes first from the community portion, then is supplemented by separate funds if needed. Due to the hundreds of thousands of dollars in distributions and liquidations, the remaining mutual funds were almost entirely Mary's.

For the IRAs funded by Mary's mom, the results weren't so one-sided. Since there were penalties and taxes for early withdrawal, the community portion wasn't withdrawn. Based on the continual reinvestment of community dividends into new shares, and the continued capital gains which I divided between community and separate, 24 percent of the account was proven to be community property. So, based on our tracing record of the funds over the years, she had a valid accounting of the details to prove her case.

So, if your sweet mom provided a legacy for you and everyone tells you that the accounts are mingled and thus community property, consider hiring someone to trace the activity and assemble the puzzle. In the end, you will have a clear record of your separate property and the peace of mind that comes along with it.

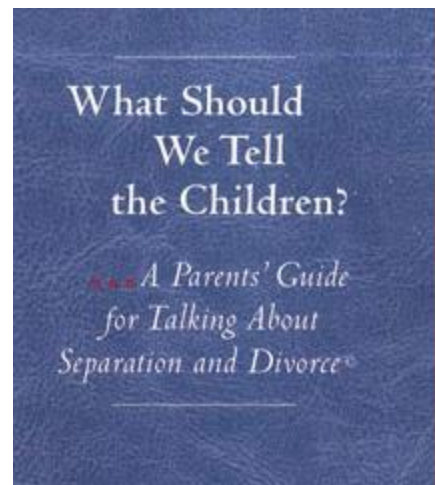
For more information on tracing and other divorce financial topics, visit www.LifetimePlanning.cc, or contact Patricia Barrett at 832-858-0099.

Talk to your kids about divorce

When parents are about to divorce, it is important they tell their children and adolescents what is happening. And more importantly, they need to carefully plan for this discussion.

This free, downloadable [guidebook](#) will help parents think through and accomplish this difficult task. It is published by *the American Academy of Matrimonial Lawyers* and is designed to help make this discussion meaningful and helpful for both parents and their children.

For additional free information on navigating the divorce process, visit <http://www.GuideToGoodDivorce.com/Resources>.

The advertisement features a close-up photograph of a woman's face on the right side. The background is dark. The text is white and positioned on the left side of the image.

Divorce Happens.

The Guide to Good Divorce Seminar

Saturday, April 28, 2018
8:30 a.m. - 2 p.m.
The Houstonian Hotel, Club & Spa
111 N. Post Oak Lane, Houston, TX 77024

Join other women and discover the keys to unlocking your next best life! For details on seminars, upcoming workshops and other events, visit www.GuideToGoodDivorce.com or call 713-932-7177.

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