

LEGAL ADVICE

CLINIC

HANDBOOK

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FAMILY LAW

FAMILY LAW

I. Jurisdiction for Divorce

–to begin a divorce proceeding:

- a. Either Petitioner or Respondent must have been:
 - i. A domiciliary of Texas for the preceding six-month period AND
 - ii. A resident of the county for 90 days
- b. Acquiring Jurisdiction over Nonresident Respondent (“Long Arm Jurisdiction”) – if Petitioner meets above residency requirement but Respondent does not, the court may still exercise personal jurisdiction over the Respondent IF:
 - i. Texas is the last marital residence of couple, and the suit is filed before the second anniversary of date on which marital residence ended (i.e., applicant’s spouse left the state of Texas less than two years ago); OR
 - ii. Any basis consistent with constitutions of Texas and US for exercise of personal jurisdiction (“minimum contacts”) – e.g., spouse still visits state regularly
- c. Pregnancy – NO DIVORCE will be granted if the wife is pregnant; the court must wait for the pregnancy to terminate (through birth, miscarriage, or abortion) to determine if paternity, custody, child support, and visitation are needed

II. Address for Service of Citation on Respondent

– Applicants MUST have a physical address for respondent and any co-respondents. Service of process is routinely executed by a constable at the respondent’s home address.

- a. *While the rules allow for Citation by Publication (and Substituted Service), these files can provide added difficulty for attorney and expense for client (which can quickly become prohibitive).*

III. Common Law vs. Ceremonial Marriage

- a. Common-Law Marriage requires (1, 2, AND 3 together OR 4 alone):
 - i. An “agreement” to be married; AND
 - ii. “Cohabitation” in Texas; AND
 - iii. “Holding Out” to others that they are married (introducing each other as husband and wife, adopting the man’s last name, etc); OR
 - iv. Executing declaration of informal marriage and filing with the county clerk
- b. There is no minimum length of time to qualify as common-law marriage
- c. Common-Law Marriage carries all same rights and responsibilities as ceremonial marriage
- d. Divorce from common-law marriage
 - i. “Common Law Divorce” – parties separate and live apart for period of two years and there is no reason for court proceedings (there are no children of the relationship, no community property except personal effects, and no significant community debt) – statute provides that if a marriage is not asserted within two years of date that parties stopped living together, there is a presumption that no marriage ever existed.
 - ii. Judicial Divorce
 1. Necessary when there are issues of children of the marriage, community property, and/or community debt that must be settled
 2. Proving a common-law marriage (in the absence of a declaration of informal marriage) may include: proof of joint accounts, joint debts, filing of joint tax returns, children with husband’s last name, husband supporting

children as his own, property purchased together, wife adopting husbands last name, signatures as “Mr. and Mrs.”

- e. Ceremonial Marriage – marriage ceremony performed by a justice of the peace or pastor, minister, priest, rabbi, etc.
- f. Judicial Divorce necessary to dissolve ceremonial marriage to settle issues of children, and both community property and debt, which are assumed to exist
- g. Court-ordered Maintenance – “alimony” may be ordered ONLY if:
 - i. The spouse from whom maintenance is requested has been convicted of family violence within two years of filing of divorce petition or while divorce is pending; OR
 - ii. The duration of the marriage is at least ten years and the spouse seeking support lacks sufficient property to provide for minimum reasonable needs; AND
 - 1. Is unable to support him/herself because of disability; OR
 - 2. Is custodian of child who requires substantial care because of disability; OR
 - 3. Clearly lacks earning ability in labor market to support his/her minimum reasonable needs.
 - iii. Court will consider many factors including: financial resources of spouse seeking maintenance; education and employment skills; duration of marriage; age and employment history; ability of other spouse to meet obligation of spousal maintenance and child support; excessive or abnormal expenditures by either spouse; comparative financial resources; marital misconduct; contribution of spouse as homemaker
 - iv. Presumption that spousal maintenance will remain in effect not more than three years
 - v. Amount may not be more than lesser of \$2500 or 20% of monthly income.

IV. Children of the Marriage

--parties will be required to attend a parenting class and provide proof of attendance.

- a. Presumption of Paternity for the Husband – Any child born to the wife during a marriage is presumed to be the offspring of her husband – even if everybody knows its not true
 - i. If the children are in fact the children of the husband, conservatorship (“custody”), possession and access (“visitation”), and child support between husband and wife
 - ii. If the children are not the children of the husband, paternity of the children must be established either before the divorce is granted (in a Suit Affecting the Parent-Child Relationship) or during the divorce with the alleged father named as a co-respondent
- b. No Presumption Before the Marriage – Any child of the husband before the date of marriage is not presumed to be of the marriage and paternity must be established (either in a Suit Affecting the Parent-Child Relationship or during the divorce)
- c. Children with a Co-Respondent – A man (other than the husband) who is alleged to be the father of any of child born during the marriage is known as an alleged father and is referred to as a co-respondent in the divorce proceeding
- d. ALL Children Born During the Marriage – in a divorce proceeding, paternity, custody, visitation, and child support of any children born during the marriage must be addressed. So, either:
 - i. Co-Respondent is a party to the divorce, OR

- ii. Paternity must have been established in a Suit Affecting the Parent-Child Relationship (SAPCR), usually through the office of the Attorney General’s Child Support Division, OR
 - iii. Paternity can be established by properly executing an Acknowledgment of Paternity (AOP) – this requires the mother, the husband, and the alleged biological father to sign.
- V. **Conservatorship, aka “Custody”** – there are sections upon sections in the family code about conservatorship but the “best interest of the child” shall always be primary consideration in determining conservatorship (“custody”) and possession and access (“visitation”).
 - a. Conservatorship – rights and duties allocated to parties regarding their children and can be part of divorce or can be stand-alone cases as Suit Affecting Parent Child Relationship (SAPCR)
 - b. ** Joint-managing Conservatorship is rebuttably presumed* to be in the best interest of the child unless the court finds that the appointment would significantly impair the child’s physical health or emotional development (A very high burden) – 95% or custody arrangements are joint managing conservatorships.
 - c. **** ANY PARENT NOT SEEKING JOINT-MANAGING CONSERVATORSHIP SHOULD BE PREPARED TO PROVIDE SUPPORT FOR THE ALLEGATION THAT IT WOULD “SIGNIFICANTLY IMPAIR THE CHILD’S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT.” THIS MAY INCLUDE DOCTORS’ REPORTS, PSYCHIATRISTS’ OR PSYCHOLOGISTS’ REPORTS, SCHOOL TEACHERS’/ PRINCIPALS’/ COUNSELORS’ REPORTS/ EMERGENCY ROOM REPORTS/ PROTECTIVE ORDERS THAT INCLUDE THE CHILDREN, OR OTHER SIMILAR SUPPORTING DOCUMENTATION. APPLICANT REQUESTS WILL ALSO BE CONSIDERED IF THE OTHER PARENT IS CURRENTLY INCARCERATED.***
 - d. Generally, the Court:
 - i. Designates the conservator who has the exclusive right to determine the primary residence of the child (“custody” of the child)
 - ii. The Standard Possession Order delineates when each parent has the right to have possession of the child(ren) and when that possession will occur – “visitation” schedule
 - iii. The parent who does not have the right to determine the child’s primary residence is ordered to pay child support
 - e. Standard Possession Order – rebuttably presumed to provide reasonable minimum possession of a child and is in best interest
 - f. Exceptions:
 - i. Special Circumstances of managing conservator or the child make the standard possession order unworkable, e.g. parent s firefighter with rotating schedule or child is in year-round school
 - ii. Child less than three years old – the court shall enter an “order appropriate under the circumstances” for a child less than three years old.
 - g. Standard Possession Order, generally:
 - i. Mutual Agreement – parties may have possession of child at times mutually agreed to in advance by parties, and, in absence of agreement, shall have possession according to terms specified in standard order.

- ii. Standard Order orders visitation on first, third, and fifth weekends, and every Thursday evening (with Thursday overnight stays permissible to create extended weekend on first, third, and fifth weekends)
- iii. Summer visitation of 30 days, from July 1 to July 31, with notice, unless otherwise agreed upon
- iv. Holidays and child's birthdays in alternate years
- v. Holiday Mondays extends visitation through holiday
- h. Child's Choice of Managing Conservator – a child who is at least 12 years old may file a written affidavit indicating his choice of managing conservator (and the court will consider it but it is not dispositive).

VI. Child Support

– based on statutory formula and is based on net resources of obligor – very little leeway

- a. Guidelines – For obligor with no other child support orders and resources of \$6,000/month or less:
 - i. One Child = 20% of net resources; two children = 25%; and so on up to 6+ children = not less than amount for 5 children
 - ii. If petitioner does not have spouses check stubs or last year's tax return and spouse does not provide information, child support may based on minimum wage
 - iii. Amounts can be adjusted down if other court ordered duties to support exist (percentages are in Family Code)
- b. Retroactive Child Support can be ordered
 - i. Considerations in calculating amount include: net resources of obligor, attempts to notify obligor of paternity, knowledge of paternity or probable paternity, and actual support provided by obligor
 - ii. Presumption limiting amount of retroactive child support to amount not to exceed what would be due for four years preceding date of petition
 - iii. Child support will be ordered in almost all cases (notable exception is when spouse is incarcerated and even then the order generally states that support begins on the first month after his/her release)
- c. Receipt of Public Benefits – Applicants who apply for and/or receive TANF (Temporary Assistance to Needy Families) or Medicare/Medicaid may have their child support files begun without their knowledge or consent in order to recover the value of the benefits from the father
 - i. ****WHILE CHILD SUPPORT WILL BE ORDERED IN ALMOST ALL CASES, CHILD SUPPORT WILL ONLY BE PAID IN SOME OF THESE CASES. NO JUDGE OR ATTORNEY CAN MAKE SOMEONE PAY CHILD SUPPORT IF S/HE CHOOSES TO BE DELIBERATELY UNEMPLOYED, WORKS FOR CASH, REGULARLY SWITCHES JOBS, ETC. THE JUDICIAL PROCESS CAN ONLY DO SO MUCH. EVEN THREATS WITH CONTEMPT MAY FALL ON DEAF EARS.***

VII. Community Property

- a. A Court shall order a “just and right” division of community property; there is no pre-set formula for “just and right”
- b. Community property consists of any property acquired by either party during the marriage (even during the period of separation). Community property always exists – everything purchased from date of marriage is community property

- c. Usually consists of:
 - i. Personal Property – clothes, vehicles, furnishings
 - ii. Real Property – houses, land
 - iii. Savings and checking accounts, 401Ks, retirement plans
- d. ****401Ks AND RETIREMENT PLANS MUST BE CONSIDERED IN DIVISION OF PROPERTY BUT CAN MAKE AN OTHERWISE EASY DIVORCE DIFFICULT, SINCE DIVISION OF THE ACCOUNT MUST HAVE APPROVAL OF PLAN ADMINISTRATOR AND IS NOT ACCESSIBLE TO DIVORCING SPOUSE UNTIL THE OTHER (OWNER) SPOUSE BEGINS RECEIVING BENEFITS – THE QUALIFIED DOMESTIC RELATIONS ORDER (QDRO).***

VIII. Community Debt

- a. Community debt consists of any debt incurred by either party during the marriage (even during the period of separation)
- b. Court shall order a “just and right” division of community debt; there is no pre-set formula for “just and right.”
- c. Although all debt incurred during marriage is community debt, creditors will still look to the person whose name is on the account for payment – bad news for good credit spouse who may be left with either paying off debt or having a decree that orders ex to pay off debt (which may never happen).

IX. Grounds for Divorce

– the following are recognized grounds for divorce in Texas

- a. Insupportability – Texas “no-fault” divorce; most common and easiest grounds
- b. Other grounds which are occasionally used strategically to support requests for unequal divisions of property or in disputes over custody of a child (not routinely used in cases when both parties are low-income)
 - i. Cruelty
 - ii. Adultery
- c. Other grounds used if spouses have lived apart under various circumstances (not routinely used)
 - i. Conviction of a felony
 - ii. Abandonment
 - iii. Living apart
 - iv. Confinement in Mental Hospital
- d. ****ADVISE APPLICANTS THAT DIVORCES BASED ON GROUNDS OTHER THAN INSUPPORTABILITY VERY RARELY SERVE A VALID PUPOSE WHERE THERE IS NO SIGNIFICANT PROPERTY TO DIVIDE. BESIDES, NO ONE IN THE COURTROOM WANTS TO HEAR DIRTY LAUNDRY AIRED!***
- e. Annulment –grounds for annulment are limited to:
 - i. Marriage of a Person under age 14 (parent, conservator, or guardian must file)
 - ii. Marriage of a Person under age 18 if marriage occurred without parental consent
 - iii. Petitioner was under the influence of alcohol or narcotics and as a result did not have capacity to consent and did not cohabit after effects wore off
 - iv. Either party at time of marriage was permanently impotent, petitioner unaware, and do not cohabit after discovery of impotence
 - v. Fraud, duress, or force was used in induce petitioner into marriage and no cohabitation

- vi. Mental incapacity at the time of marriage
- vii. Concealed divorce – the other party had been divorced from 3rd party within 30 day period before current marriage
- viii. Marriage less than 72 hours after issuance of license – may only be brought within 30 days.
- ix. ****ANNULMENT IS RARELY USED BECAUSE THE GROUNDS ARE SO LIMITED AND THE DIFFICULTY OF PROOF – PERMANENT IMPOTENCE, FRAUD OR DURESS, UNDER INFLUENCE. DIVORCE IS AN ADEQUATE REMEDY FOR ALMOST EVERYONE.***

X. Enforcement of Child Support – Either visitation or child support.

- a. A Motion to Enforce Child Support can call the obligor into court to explain why s/he is not paying child support as ordered.
 - i. Threat of jail can be used to attempt to force obligor to pay – jail time is a fairly extreme remedy and should not be expected the first time or each time.
 - ii. Generally, hearing will serve to remind parties of their responsibilities
 - iii. Being unemployed, having been downsized, having been hospitalized, having too many other bills are NOT valid excuses for not paying child support but may be enough to allow request to modify amount of child support.
 - iv. ****ADVISE OBLIGOR TO FIND ANOTHER JOB QUICKLY, CUT EXPENSES, OR REQUEST MODIFICATION OF CHILD SUPPORT AMOUNT. EVEN IF S/HE LEGITIMATELY LOST A JOB THROUGH DOWNSIZING, ETC., THE OBLIGATION TO SUPPORT HIS/HER CHILD CONTINUES BUT CAN BE REVISITED. REFER APPLICANT TO A DOMESTIC RELATIONS OFFICE.***
- b. A Motion to Enforce Visitation can call managing conservator into court to explain why s/he is not allowing other parent to visit as ordered
 - i. A documented history of refusal to allow possessory conservator (visitor parent) to exercise his/her visitation is absolutely required (advise to keep a calendar of when and why visitation was refused)
 - ii. Possessory conservator (visitor parent) must attempt to exercise visitation and be refused in order to claim it was denied.
 - iii. Managing conservator can decline to allow the specific visit if the other parent is unreasonably late, especially without notice (e.g. if ex calls and has flat tire and will be an hour late – best to consider allowing visit to proceed; ex shows up at 10pm with no call and kids are asleep – okay to tell ex to pick up the kids the next morning at a reasonable hour)
 - iv. *Managing conservator cannot refuse to allow visitation based on non-payment of child support* (a bitter pill for most moms – visitation must be allowed even if dad is a deadbeat! And her only remedy is a Motion to Enforce Child Support that is addressed above.)

XI. Modification of Conservatorship

– REFER APPLICANT TO DRO

- a. Modification of an order requires that the change be in the best interest of the child AND
 - i. A MATERIAL AND SUBSTANTIAL change in the circumstances of the child, a conservator, other party affected by order (high standard); OR

- ii. Conservator who has exclusive right to establish primary residence of child has voluntarily relinquished primary care and possession of child to another person for at least six months.
- b. Modification within one year of order – extremely difficult with high burden – MUST show one of the following:
 - i. Present environment may endanger child’s physical health or significantly impair child’s emotional development; OR
 - ii. Person with right to determine primary residence is the person seeking modification or consents to it AND best interest of child; OR
 - iii. Person with right to determine primary residence voluntarily relinquished possession for at least six months AND best interest
- c. Conviction or deferred adjudication for an offense involving abuse of a child is a material and substantial change in circumstances
- d. Conviction or deferred adjudication for an offense involving family violence is a material and substantial change in circumstances.
- e. **** ANY PARENT SEEKING MODIFICATION SHOULD BE PREPARED TO PROVIDE SUPPORT FOR THE ALLEGATION THAT A “MATERIAL AND SUBSTANTIAL CHANGE” HAS OCCURRED OR THAT THE PRESENT ENVIRONMENT ENDANGERS THE CHILD’S “PHYSICAL HEALTH OR SIGNIFICANTLY IMPAIRS THE CHILD’S EMOTIONAL DEVELOPMENT.”***
 - i. This may include doctors’ reports, psychiatrists’ or psychologists’ reports, school teachers’ / principals’ / counselors’ reports, emergency room reports, protective orders that include the children, or other similar supporting documentation.
 - ii. Applicants requests will also be considered if the other parent is currently incarcerated.

XII. Modification of Child Support

- a. Grounds for Modification:
 - i. Circumstances of child or person affected by order materially and substantially changed since date of order; OR
 - ii. Three years since last modification and monthly child support under the order differs by either 20% or \$100 from amount that would be awarded under guidelines.
- b. Release of obligor from incarceration is a material and substantial change in circumstances
- c. New resources of New Spouse – court may not add any portion of net resources of new spouse to net resources of obligor or oblige to calculate child support amount
- d. Change in Lifestyle – increase in needs, standard of living, or lifestyle of the oblige does not warrant increase in child support.
- e. If obligor has duty to support children in more than one household (signed orders), the court shall apply percentage guidelines in family code
- f. Change in Physical Possession – if person who has right to determine primary residence voluntarily relinquishes possession of child for at least six months, court may modify order to give person with actual possession of child right to receive child support.

XIII. Paternity, or Who’s Your Daddy?

- a. Pros and Cons to establishing paternity (depending on your perspective)
 - i. Establishes parent-child relationship between father and child
 - ii. Usually allows mom to receive child support

- iii. Usually allows dad to establish visitation
 - iv. Allows child to inherit from dad
 - v. Allows child to possibly receive social security benefits in event of either death or disability of the father
 - vi. Allows dad to have child's last name changed to dad's (must request amended birth certification with State of Texas) but this is part of the order when paternity is established whether mom wants it or not
 - vii. Allows dad to challenge mom's "custody" of the child if she is incarcerated or abandons the child to another or if he believes it to be the best interest of child
 - viii. Generally allows dad to have access and input into his child's life and upbringing
 - ix. Requires a termination of parental rights for a step-parent adoption later on
 - x. Removes responsibilities from a non-father husband so that he will not have to pay child support for a child that is not his or have the child inherit from him
 - xi. If paternity is not established during father's lifetime, it is much more difficult to establish post-mortem since it requires clear and convincing evidence.
- b. Voluntary Acknowledgments and Denials of Paternity
- i. Acknowledgment – signed record by mother and man seeking to establish paternity – often done in hospitals where a child is born with no presumed father (mom is not married).
 - ii. Denial of Paternity – a signed record by presumed father (husband of mom) denying he is dad
 - iii. Acknowledgement of Paternity and/or Denial of Paternity properly filed with bureau of vital statistics is the equivalent of adjudication (i.e., the same as a court order)
 - iv. Rescissions and Challenges
 - 1. Signatories to either Acknowledgement or Denial of Paternity can rescind before 60th day after effective date of acknowledgement or denial
 - 2. Challenge after Rescission Period – Only on basis of fraud, duress, or material mistake of fact and must be before fourth anniversary of date of filing with bureau of vital statistics
- c. "Involuntary" acknowledgement of Paternity – if alleged father does not sign Acknowledgement of Paternity, a Suit Affecting Parent Child Relationship will establish his paternity
- i. Requires service of process and allows alleged father time to obtain representation
 - ii. Can still be agreed to in court (often happens with Attorney General's office that an agreed order is signed)
 - iii. *Genetic Testing*
 - 1. Alleged father may request genetic testing but may be required to pay (court can allocate costs between parties)
 - 2. Court may adjudicate parentage contrary to man's position if he declines to submit to testing as ordered
 - 3. Testing is now routinely done by a swab of the mouth
 - 4. ***GENERALLY, WHEN FATHER IS SEEKING TO ESTABLISH PATERNITY, REFER TO ATTORNEY GENERAL TO ESTABLISH HIS PATERNITY TO BE DESIGNATED THE CUSTODIAL PARENT. WHEN MOTHER IS SEEKING TO ESTABLISH PATERNITY/CHILD**

***SUPPORT, REFER TO ATTORNEY GENERAL TO BEGIN
COLLECTING CHILD SUPPORT UNLESS SHE IS NOT IN
POSSESSION OF THE CHILD.***

XIV. Termination of Parent-Child Relationship

– “Death Penalty” to parental rights and accordingly extremely difficult but Involuntary Termination of Parent-Child Relationship may be ordered if court finds by clear and convincing evidence that a parent has abused, neglected, or abandoned the child, specifically:

- a. Voluntarily left the child alone or in possession of another and expressed intent not to return OR without expressing intent to return without providing for adequate support and remained away for period of at least three months OR without providing for adequate support for at least six months; OR
- b. Knowingly placing or knowingly allowing child to remain in conditions or surroundings or with persons engaged in conduct which endanger physical or emotional well-being of child; OR
- c. Failure to support period of one year; OR
- d. Executed unrevoked or irrevocable affidavit of relinquishment of parental rights; OR
- e. Convicted or placed on community supervision for death or serious injury to a child under a litany of sections of Penal Code too numerous to list; OR
- f. Previous termination with respect to another child under specific circumstance; OR
- g. Constructively abandoned child who has been in permanent or temporary managing conservatorship of Dept. of Protective and Regulatory Services; OR
- h. Failure to comply with order that specifically established actions necessary for parent to obtain return of child; OR
- i. Used controlled substance that endangered child under certain circumstances; OR
- j. Knowingly engaged in criminal conduct that resulted in parent’s conviction of an offense and confinement for not less than two years; OR
- k. Been the cause of child being born addicted to alcohol or controlled substance; OR
- l. Voluntarily delivered child to designated emergency infant care provider; AND
- m. Best interest of the child.
- n. Parents in a suit to terminate parental rights can request court-appointed attorney.
- o. Current address for service of process or parent whose rights are to be terminated must be known, and applicant must be seeking to be adjudicated parent (i.e., step-parent adoption).

XV. Adoption

– best interests of child paramount

- a. Requires TERMINATION OF PARENTAL RIGHTS OF LIVING PARENT, so it is very difficult to obtain (see previous section)
- b. Only Step-parent adoptions will be considered
- c. Pre-adoptive home screening and post-placement report must be conducted (there is a fee for these that cannot be waived)
- d. Criminal history report required of person seeking to adopt

XVI. Non-Parents’ Rights

- a. A non-parent (e.g. grandmother, aunt, or neighbor) may seek conservatorship of a child if the child has lived with the non-parent for a period of six months (the six months cannot have ended more than ninety days before the date of filing)

- i. * The six month period of possession is generally defined as exclusive possession of the minor child, i.e., only the minor child and not the adult parent should live with the non-parent seeking conservatorship
- b. A grandparent may request managing conservatorship if:
 - i. The order requested is necessary because the child’s “present circumstances would significantly impair the child’s physical health or emotional development,” or
 - ii. Both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.
 - iii. * *Any grandparent seeking conservatorship under this section should be prepared to provide support for the allegation that the order is necessary because the child’s “present circumstances would significantly impair the child’s physical health or emotional development.” This may include doctors reports, psychiatrists or psychologists reports, school teacher/ principal/ counselor reports, emergency room reports, protective orders that include the children, or other similar supporting documentation.*
 - 1. *Grandparents requests will also be considered if the parent is currently incarcerated.*
- c. A grandparent may request access (visitation) and the court shall order reasonable access if:
 - i. At least one of the child’s parents has not had rights terminated; AND
 - ii. In the best interest of child; AND
 - 1. the grandparent is the parent of the parent who is incarcerated or has been found by court to be incompetent or is dead; OR
 - 2. Parents of child are divorced or living apart; OR
 - 3. Child abused or neglected by parent; OR
 - 4. Child has been adjudicated delinquent; OR
 - 5. Grandparent requesting access is parent of person whose rights have been terminated; OR
 - 6. Child has lived with grandparent for six months within past two years.

XVII. Applicant is the Respondent, or “He Beat Me to the Courthouse!”

- a. Applicant has been served by constable or private process server
 - i. Time period for applicant to file a written response is until “Monday after the expiration of twenty days”
 - ii. Advise applicant to file response – a general denial – as soon as possible or risk losing – refer to law library or courthouse booth for specifics on denial
 - iii. If temporary orders hearing is scheduled, advise applicant to show up in court on day of hearing and be prepared to advocate for him/herself
 - iv. If time period for response has elapsed, advise to call courthouse and find out status of case
 - 1. if too much time has elapsed and court has entered orders, advise applicant to obey order and consider going back to court later if orders are not being followed – usually wait at least a year before can revisit
 - 2. in case still pending, may still be able to file response and be heard
- b. Applicant has been told that spouse or ex has gotten a lawyer and is going back to court – advise applicant not to sign anything that spouse, ex or his/her lawyer asks to be signed; review any documents that attorney, spouse, or ex has given to/mailed to applicant.

XVIII. Other Family Law Issues

a. Name Change of Child

– best interests of the child and surprisingly difficult to do because of the following:

- i. Parent, managing conservator, or guardian may file request for name change
- ii. Notice must be given to parent, managing conservator, or guardian
 1. The father, alleged father, or unknown father has to be given proper notice that mom is requesting name change
 - a. If the fathers or alleged fathers whereabouts are unknown, the court will appoint an attorney ad litem to find him at the applicant's expense
 - b. An unknown father **MUST** have an attorney ad litem appointed to find him and notify him at the applicant's expense
 2. Dad can object and the court will not allow
 3. It does not matter if the father, alleged father, or unknown father has never contributed to the welfare of the child and doesn't visit the child – he still has to be given notice

b. "Emancipation" of a Minor

- i. Requires
 1. Minor is resident of this state;
 2. At least 16 years of age and living separate from parents, managing conservator, or guarding; AND
 3. minor is self-supporting and managing his/her own financial affairs
- ii. Guardian Ad Litem shall be appointed to represent petitioner

ACKNOWLEDGMENT OF PATERNITY

ACKNOWLEDGEMENT OF PATERNITY

WHEN YOU NEED ONE

- If a woman gives birth while unmarried (divorced at least 300 days prior to giving birth), no father is legally presumed and must be added to the birth certificate. The biological father must sign an “Acknowledgement of Paternity” (AOP).
- In Texas, if a woman gives birth child while she is married, the husband is automatically presumed to be the father. If your husband is not the child’s father, you need your husband to sign the denial portion of the AOP and the biological father to sign the AOP. The correction to the child’s birth certificate cannot be made without both of these signatures.

PURPOSE

- Legally establishing paternity of a child can help provide social, economic, and emotional ties between a father and his child.
- Paternity must be established in order to enforce child support payments. Even if the father volunteers to support your child, if the father someday changes his mind, he must be established as the child’s legal father before the courts will order him to pay child support.
- The father does not have legal rights to visitation or custody unless he is established as the legal father.
- You can ensure that your child receives the same rights and privileges as every other child, including inheritance rights, access to the father's medical and life insurance benefits, and access to Social Security and veterans' benefits.
- It may be important for your child to know the father's medical history, particularly if the father’s family has a history of specific medical conditions.

HOW TO FILE

- The AOP may be signed while at the hospital, either before or after the child’s birth. Ask the hospital staff about getting an AOP form.
- After you have left the hospital, you must go to an “entity” who is authorized by the Paternity Opportunity Program to explain the rights gained and lost by signing an AOP. The form is in triplicate, photocopied forms are not accepted for filing, and only authorized entities have the form. You cannot get a form by mail.
- To find an authorized entity near you, call the Paternity Opportunity Program at 1-866-255-2006.
- Both the mother and father must sign the AOP, and if the mother’s husband’s name needs to be removed, the husband must additionally sign the denial section of the AOP.
- A father who is of minor age or who is in the country illegally may still sign an AOP.
- Even if the biological father is incarcerated, he may still sign an AOP. Call the Paternity Opportunity Program at 1-866-255-2006 for more information.
- If the child’s birth certificate has already been filed (this is unlikely if you have left the hospital), there is no fee to amend it with the AOP. If the birth certificate has been filed, the fee to add or change the father’s name with an AOP is \$25 plus \$22 for each certified copy. Normally, the fee will be \$47.
- Fill out the “Application for New Birth Certificate Based on Parentage” (a copy follows) available at www.dshs.state.tx.us/vs/reqproc/amendparentage.shtm. Send the completed application, AOP and/or DOP, and payment for the appropriate fees to:

Texas Vital Statistics
1100 West 49th Street
Austin, Texas 78756

- There is no time limit for acknowledging paternity. This form may be filed at anytime during the child's minor or adult life.

IF THE BIOLOGICAL FATHER REFUSES TO SIGN THE AOP

- If the father refuses to sign the AOP, the mother should contact the Attorney General's Office (AGO). The AGO will open a child support case, and the mother will not have to pay for any services.
- If the mother is receiving TANF or Medicaid benefits, she will automatically get child support and paternity establishment services through the AGO.
- The AGO will order the biological father to take a paternity test, and if the test is positive, may ask the father to repay the cost of the test. The mother will owe nothing.

I NEED AN ACKNOWLEDGMENT OF PATERNITY FORM SENT TO ME. WHERE CAN I GET ONE?

- Texas Vital Statistics cannot send out Acknowledgement of Paternity forms to applicants. Instead, the forms can only be obtained from someone certified by the Attorney's General Office to verbally explain to all the parties the rights and responsibilities that come with signing the form.
- Please call the Paternity Opportunity Program to find such a person or "entity," who is located nearest you, or to learn about your options if you do not live in Texas. The program's telephone number is 1-866-255-2006. Please listen to all the options carefully. You must complete the most current Acknowledgement of Paternity form, and all forms must have a valid entity code before they can be accepted. The person who is certified to explain your rights and responsibilities is a "certified entity." The certified entity will provide the entity code once he or she has explained the rights and responsibilities to all parties. There is no other way to obtain the form except from a certified entity.



**ACKNOWLEDGMENT OF PATERNITY
INQUIRY REQUEST FORM**

Budget: ZZ712
Fee Received: _____
____ Positive Search
____ Negative Search
Date Mailed/ Fax: _____

The AOP Registry only includes Acknowledgments of Paternity filed from September 1, 1999 to the present.

Name of Child: _____ Date of Birth: _____

City or County of Birth: _____

Mother's complete name: _____ Date of Birth: _____

Biological Father's name: _____ Date of Birth: _____

Name and address of Person making the Inquiry:

First	Middle	Last	
Address ()	City	State ()	Zip Code
Daytime Telephone Number		Fax number	

Family Code §160.313 limits access to AOP's to the following individuals/agencies:

Relationship: ___ Mother ___ Father ___ Presumed Father ___ Court Ordered for Attorney

Release: I authorize you to give the copy of the above-identified Acknowledgment of Paternity form to:

SIGNATURE OF REQUESTOR

DATE

This inquiry request requires a search fee. A copy of government issued identification is required. If paying by credit card, the fee is \$12.25. If paying by check or money order, the fee is \$10.00. Make check or money order payable to Texas Department of State Health Services (DSHS) -ZZ712. Mail completed form and fee to the address below. This inquiry may also be faxed to 512-458-7164 and paid with a MasterCard, Visa, Discover, or American Express.

If faxed: ___ M/C ___ VISA ___ DISCOVER ACCT # _____ EXP DATE _____
___ American Express

NAME OF CARDHOLDER _____

Mail To:
AOP Registry
Vital Statistics Unit, MC 1966
P.O. BOX 12040
Austin, Texas 78711-2040

CARDHOLDER ADDRESS _____

3 - DIGIT SECURITY CODE _____ (Found on back of card)
CARDHOLDER PHONE NUMBER,

INCLUDING AREA CODE _____

**CORRECTING SPELLING
ON A BIRTH
CERTIFICATE**

CORRECTING SPELLING ON A BIRTH CERTIFICATE

- This applies only to **first and middle names**.
- **Changing a last name requires a court order.**
- Complete the form (a copy follows) available at www.dshs.state.tx.us/vs/reqproc/forms/vs170.pdf.
- To change a minor's birth certificate, **both parents must** sign in the presence of a notary republic.
- To change an adult's birth certificate, an older relative such as a parent or sibling must sign in the presence of a notary republic.
- There is a \$15 fee to file the amendment and a \$22 fee to receive a certified copy of the corrected birth certificate (which you should get). Include a check or money order for \$37 with the application.
- Mail your application and payment to:

Texas Vital Statistics
Department of State Health Services
PO Box 12040
Austin, TX 78711-2040

APPLICATION FOR A NEW BIRTH CERTIFICATE BASED ON PARENTAGE

BUDGET ZZ 708-153

This form is used to **ADD, REMOVE, or REPLACE** information regarding the **father and/or mother** listed on the original birth certificate according to an establishment of **PATERNITY** or a **COURT ORDER**.

Child's original birth information: Type or Print in Blue/Black Ink

Full name of child as registered at birth _____ Date of Birth: ____/____/____ Place of Birth: _____, Texas
month day year city
Father's name: _____ Mother's full maiden name: _____

We/I hereby request a new birth certificate be filed as evidenced by:

PLEASE CHECK ONE OF THE FOLLOWING:

- Attached** certified copy of court decree (must send all pages of the court order) **OR**
- A properly completed Acknowledgment of Paternity (form VS-159.1) (**Date form was faxed to Vital Statistics or signed before a certified entity: _____**) **OR**
- Attached** certified copy of the **BIOLOGICAL** parents' marriage license

INFORMATION TO BE PLACED ON NEW BIRTH CERTIFICATE:

FULL NEW NAME OF CHILD (may require a court order): _____
First Middle Last
Father's Name: _____ Date of Birth: ____/____/____ Place of Birth: _____
First Middle Last month day year State or Foreign Country
Mother's Full Maiden Name: _____ Date of Birth: ____/____/____ Place of Birth: _____
First Middle Maiden month day year State or Foreign Country

WARNING: The Penalty for knowingly making a false statement in this form can be 2-10 years in prison and a fine of up to \$10,000. (Texas Health and Safety Code, Chapter 195).

Signature of **FATHER** or **Legal Guardian** swearing to this affidavit

Father's address _____ city _____ state _____ zip code _____
(_____) _____
Daytime telephone number
Sworn to and subscribed before me, this _____ day of _____, 20_____.

Signature of Notary Public, County Clerk, or other person authorized to administer oaths

Printed name and title

Signature of **MOTHER** or **Legal Guardian** swearing to this affidavit

Mother's address _____ city _____ state _____ zip code _____
(_____) _____
Daytime telephone number
Sworn to and subscribed before me, this _____ day of _____, 20_____.

Signature of Notary Public, County Clerk, or other person authorized to administer oaths

Printed name and title

SEE REVERSE SIDE FOR INSTRUCTIONS

- The fee for filing a new birth certificate is \$25.00 An additional fee of \$22.00 must be included for a certified copy of the new birth certificate.

Mail this completed and **NOTARIZED** application with either the attached evidence (certified copy of court order/ marriage license), or filed an **Acknowledgment of Paternity**, and the required fee to:

TEXAS VITAL STATISTICS
PO BOX 12040
AUSTIN TX 78711-2040



THIS FORM (with an attached court order or marriage license, or a filed Acknowledgment of Paternity in the AOP Registry) MAY BE USED TO:

- **Add the biological father's name** and information to the birth certificate when the father's information is blank on the original birth certificate. **Evidence needed:** a certified copy of a court order establishing the paternity of the child, OR a filed Acknowledgment of Paternity in the AOP Registry if the biological parents are not married to each other, OR the marriage license of the biological parents if they are now married to each other,
- **Change the name and information of the father** listed on a child's birth certificate to the **biological father's** name and information. This requires a certified copy of a court order OR an Acknowledgment of Paternity signed by all three parties (the biological mother, the biological father, and the father presently listed on the birth certificate) and filed in the Acknowledgment of Paternity Registry.
- **Remove the father or mother's information.** This requires a certified copy of a court order. **Please Note:** A Termination of Parental Rights will not remove a biological parent's information from the birth certificate unless the court order specifically states the biological parent's name and information are to be removed.
- **Substitute the Intended Parents' names** on the birth certificate based on a **gestational agreement.** This requires a certified copy of a court order.

SPECIAL INSTRUCTIONS:

- ◆ If a **marriage license** or an **Acknowledgment of Paternity** is being used as evidence, **BOTH** parents must sign the application before a notary public.
- ◆ If a **certified copy of a court order** is being used as evidence to change the birth certificate, only **one** parent is required to sign the application before a notary public.
- ◆ If you are the **father listed** and you are having your name **removed**, a certified copy of a court order is required to make any change to the child's name. You are no longer a qualified applicant to receive a copy of the child's new birth certificate. **Please submit only the \$25.00 filing fee.** You will receive notification when the change is made.
- ◆ A **legal guardian** or the **father listed on the birth certificate** may sign the application before a notary public if a **certified copy of a court order establishing or removing paternity** is presented as evidence with this application.
- ◆ If **one or both parents are deceased**, a court order is required to file a new birth certificate to add the biological father's name and information.
- ◆ If a **birth certificate has previously been changed** based on paternity or a court order, a court order is needed to file a new birth certificate with different information.

NO CHANGES WILL BE MADE TO A BIRTH CERTIFICATE WITHOUT THE FILING FEE

The fee to file a new birth certificate based on paternity, removal of a father or mother's information, or a gestational agreement is \$25.00. The additional fee for a certified copy of the new birth record is \$22.00. If you have any questions, please call (888) 963-7111.

VS-166 revised 12/2005

**IF YOU SUSPECT CHILD
ABUSE**

CHILD ABUSE

IF YOU SUSPECT YOUR CHILD IS BEING ABUSED

- Take your child to a doctor and explain why you suspect abuse. Professionals such as school teachers, policemen, therapists, and doctors are required by law to report suspected cases of child abuse.
- Keep thorough documentation of anything related to the abuse. This could include copies of medical records, pictures of physical signs of abuse with dates either time-stamped or written on the back, copies of CPS reports, your own notation of dates, times, and places of suspected abuse, documented suspicions of any professionals with an opinion about the abuse, etc. Professionals include but are not limited to teachers, policemen, therapists, and doctors. Document any professionals' suspicions, preferably by having them fill out an affidavit.
- Report reasonable suspicions of child abuse or neglect to the Texas Department of Family and Protective Services hotline at 1-800-252-5400 or at www.txabusehotline.org.
- Be calm and cooperative with the child protection authorities investigating your case. If your suspicions of child abuse are reasonable, these authorities will follow-up on your case. If your allegations of child abuse are merely an attempt to gain sole custody, the authorities will not do follow-up and your case will be unsuccessful.
- If the abuser has parental rights, consult an attorney about gaining sole custody of your child.

RESOURCES

- Texas Lawyers for Children; texaslawyersforchildren.org; 1-800-993-5852; Provides statewide assistance to judges and attorneys who handle child abuse and neglect cases.
- TexasCASA; www.texascasa.org; 1-877-TX4-CASA; TexasCASA advocates for abused and neglected children in the court system through local CASA programs.
- Texas Advocacy Project; www.texasadvocacyproject.org; 1-800-374-HOPE (Family Violence Legal Line); Provides free legal services statewide to victims of domestic violence, sexual assault, and stalking.

IF YOU SUSPECT CHILD ABUSE (NOT YOUR CHILD)

- Any person who suspects an incident of child abuse is **legally required to report it within 48 hours**. This time period is critical so that investigators may be able to find proof, such as cuts and bruises, which will fade over time.
- The sooner you make a report, the better for the child.
- In Texas, call 1-800-252-5400, or visit <https://www.txabusehotline.org> to file a report
- Or call the National Child Abuse Hotline at 1-800-422-4453
- **CONFIDENTIAL**. You will never be required to give your name. If you do choose to give your name, neither the abuser nor anyone else will ever be told the identity of the caller.
- Do not expect the child to be immediately removed from the home immediately. It may take a few days to complete an investigation and for Child Protective Services to remove the child. Rest assured that reports of suspected child abuse are taken very seriously.

SIGNS

Physical Abuse:

- Unexplained bruises or welts
 - on face, lips, mouth, torso, back, buttocks, thighs
 - in various stages of healing
- Unexplained burns
 - cigar or cigarette (especially on soles of feet, palms, back, or buttocks)
 - immersion burns (sock-like, glove-like on buttocks or genitalia)

- pattern burns (electrical burner, iron, etc.)
- Internal injuries
- Unexplained fractures/dislocations
- Unexplained lacerations or abrasions
- Head injuries
- Absence of hair (due to hair pulling)
- Obvious attempts to hide bruises or injuries
- Inappropriate clothing relative to the weather
- Excessive school absenteeism
- Fear of parents or adults
- Appearing frightened and apprehensive of caretakers
- Running away
- Arriving to school early/leaving late
- Behavioral extremes (extremely aggressive, oppositional, demanding, OR overly compliant, passive, withdrawn)
- Academic/Behavioral problems at school
- Cognitive impairment
- Deficits in speech and language
- Hyperactivity, impulsivity
- Lack of basic trust in others
- Depression, low self esteem
- Destructive behavior
- Suicidal tendencies
- Fatigue, consistently tired

Sexual Abuse:

- Difficulty walking/sitting
- Torn, stained, or bloody underclothing
- Pain, swelling, or itching in genital area
- Bruises, bleeding, or lacerations in external genitalia, vaginal or anal areas
- Painful urination
- Vaginal/penile discharge
- Venereal disease
- Swollen or red near genitalia
- Simulation of sexual activity with younger or same age children
- Excessive masturbation
- Seductive behavior or sexual acting out toward adults
- Knowledge of sexual matters inappropriate to age or developmental level
- Lack of trust, particularly with significant others
- Poor peer relationships social withdrawal
- Sudden drop in academic performance
- Unwillingness to undress for physical education class
- Inability to concentrate
- Arriving to school early/leaving late
- Depression, guilt, shame
- Suicidal thoughts
- Behavioral extremes (overly aggressive or overly compliant)
- Behavior regression (infantile behavior in older children)
- Nightmares/won't sleep alone
- Over/under eating

PHYSICAL NEGLECT

- Underweight
- Poor growth pattern (small in stature, etc.)
- Consistent hunger
- Poor hygiene
- Inappropriate dress
- Consistent lack of supervision
- Wasting of subcutaneous tissue
- Unattended physical problems or medical needs
- Abandonment
- Abdominal swelling
- Bald patches on the scalp
- Developmental lags (toilet training, motor skills, language, socialization developments)
- Frequent absenteeism at school
- Reports of being left alone, unsupervised or abandoned
- Anti-social tendencies, delinquency, alcohol or drug abuse
- Chronically dirty
- Bring poor lunch (only candy, sweets, chips, soda, etc.)
- Frequently inappropriately dressed for the weather

EMOTIONAL ABUSE

- Speech disorders
- Lags in physical development
- Hyperactive/disruptive behavior
- Empty facial expression
- Anxiety and unrealistic fears
- Sleep problems, nightmares
- Developmental lags
- Behavioral and academic problems at school
- Poor peer relationships
- Behavioral extremes (overly aggressive or overly compliant)
- Depress, withdrawn, isolated
- Apathetic, indifferent
- Habit disorder (biting, rocking, head banging, or thumb sucking in older children)

ESTATE AND INCAPACITY PLANNING

Basics of Estate and Incapacity Planning Documents

- I. **Will** – document prepared to express a person’s wishes about his property after his death
 - a. Testator may leave his property to whomever he wishes – family, friend, significant other, charity – or spend all his money before death
 - b. Wills do have suggested sections to prevent problems with distribution of property
 - i. Testator must identify all family members – even children he doesn’t like or wife he’s separated from – to show that he in fact is competent and does know who his family members are
 - ii. Testator’s estate must first pay the testator’s debts before distribution of property
 - iii. Testator may specifically disinherit any of his family members
 - c. Property **MUST** be in existence at the time of testator’s death for will to control – i.e., a beneficiary whose inheritance is a car that has been sold/totalled/stolen takes nothing from the decedent’s estate.
 - d. Testator must have “**Testamentary Capacity**” to properly execute a will – five part test: the testator must possess the following:
 - i. Sufficient ability to understand the business in which he is engaged
 - ii. Sufficient ability to understand the effect of his act in making the will
 - iii. Capacity to know the objects of his bounty
 - iv. Capacity to understand the general nature and extent of his property, and
 - v. “Memory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least their obvious relation to each other, and to be able to form a reasonable judgment as to them.”
- II. **Power of Attorney** – document prepared by person giving another person (his “agent”) power to act for the person in matters relating to money and property (taxes, bills, bank accounts, etc.) during person’s lifetime.
 - a. An **EXTREMELY** powerful document – the agent can sell the person’s house/land, raid his/her bank accounts,
 - b. Can begin immediately or upon person’s incapacity
 - c. May be limited and terminate on a date certain (if planning for an expected surgical procedure, for instance)
 - d. Agent must present properly executed Power of Attorney to act in person’s stead
 - e. A written revocation is required to stop an agent from acting – this must be presented to anyone with whom the agent has been transacting business
- III. **Medical Power of Attorney** – document naming an agent with whom doctors may confer regarding medical treatment when declarant is declared by a doctor to be incapacitated
 - a. The agent is obligated to follow the declarant’s wishes – so declarant should ensure that the agent is willing to do so
 - b. Unless specifically limited, the agent has the ability to “make decisions about your health care as you would have had” – agent can make life-ending decisions
 - c. May be limited and terminate on a date certain (if planning for an expected surgical procedure, for instance)
 - d. Alternate agents may be named in the event that first agent cannot or will not act.
- IV. **Declaration of Guardian in the Event of Later Incapacity**
 - a. Document stating what person the declarant would like to have appointed as his guardian, should the declarant ever need a guardian.
 - b. Two types of Guardianship can be granted over a person – may or may not be one person

- i. Guardian of the Person – guardian over the ward’s physical person – where he lives, what he eats, what doctors he visits
 - ii. Guardian of the Estate of the Person – guardian over the money and property of the ward
 - c. Declarant can specifically exclude person as a guardian – a sibling the declarant doesn’t trust, a spouse that declarant is separated from, etc.
 - d. Appointments of guardians are still subject to rules of disqualification – people who cannot serve as a guardian:
 - i. A Minor
 - ii. A person whose conduct is notoriously bad (courts read this as “a felon”)
 - iii. An incapacitated person
 - iv. A person who is a party to a lawsuit concerning the proposed ward, is indebted to the proposed ward, or is asserting a claim adverse to proposed ward
 - v. A person who, because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the ward or the ward’s estate.
- V. **Declaration of Guardian for Minor Child** – designates who declarant would want to be named guardian of minor children in event of his death
 - a. Document DOES NOT trump other surviving parent’s rights – surviving parent can trump almost any other person in guardianship for his children
 - b. Two types of Guardianship can be granted over a minor child – may or may not be one person
 - i. Guardian of the Person – guardian over the ward’s physical person – where he lives, what he eats, what doctors he visits, what schools he goes to
 - ii. Guardian of the Estate of the Person – guardian over the money and property of the ward – especially important if parents’ death led to settlement funds
 - c. Appointments of guardians for minor child are still subject to rules of disqualification
- VI. **Directive to Physicians** – “Living Will” – document giving directions to declarant’s doctors about whether he would or would not want life support if he was expected to die within six months even if all available treatments were provided
 - a. Declarant should discuss their concerns with doctor and family members
 - b. Declarant may provide specific instructions regarding specific treatments
 - c. Takes effect **ONLY** if the declarant has a diagnosis that the declarant suffers from either:
 - i. Terminal Condition
 - ii. Irreversible Condition
 - d. Declarant can direct his/her doctor to either:
 - i. Discontinue or withhold all treatments other than those to keep the declarant comfortable and that the declarant be allowed to die as gently as possible.
 - ii. Keep the declarant alive in the terminal or irreversible condition using available life-sustaining treatment
- VII. **Appointment of Agent to Control Disposition of Remains** – appoints agent for funeral arrangements
 - a. Agent must be willing to be financially responsible for funeral arrangements of deceased declarant
 - b. Document may be filed with a funeral director to help ensure declarant’s wishes are honored
 - c. Document may specifically request cremation, internment, or mausoleum burial
- VIII. **HIPAA (Health Insurance Portability and Accountability Act of 1996) Release**
 - a. Additional release which may be appended to the Medical Power of Attorney or may be a stand-alone document
 - b. Specifically releases doctors from liability for releasing information regarding declarant and HIV status, sexually transmitted diseases, or drug and alcohol treatment information.

EXAMPLE ESTATE PLANNING DOCUMENTS

LAST WILL AND TESTAMENT

of

[Testator's name in CAPS]

I, _____, of the County of _____ and the State of _____, being in good health, of sound and disposing mind and memory, do make and declare this instrument to be my Last Will and Testament, hereby expressly revoking all former Wills and Codicils made by me at any time heretofore, and intending hereby to dispose of all the property of whatever kind and wherever situated which I own, or in which I have any kind of interest at the time of my death.

I.

IDENTITY OF THE FAMILY

*[My wife's name is _____. All references in this Will to my "spouse" or to my "wife" are to her.]*At the time of the execution of this Will,*[I am not married and]* I have [no children/number of children]*[, namely, _____]*. *[If subsequent to the execution of this Will there shall be a child or children of mine born, or a child adopted by me on or before the child is eighteen (18) years of age, and if such child or children, or issue thereof, shall survive me, then in such event, such child or children, or issue thereof, shall share in the benefits of my estate equally*] and to the same extent as my children hereinabove named and their issue]*; and the provisions of this Will shall be deemed modified to the extent necessary to effectuate such intention.]*

II.

PAYMENT OF EXPENSES

I direct that all the expenses of my last illness, my funeral expenses, and my just personal debts, including any inheritance taxes, transfer taxes, and estate taxes which may be levied by the United States Government or by any state by reason of my death, shall be paid by my Independent [Executrix/Executor] out of the residue of my estate as soon as conveniently may be done; provided that my Independent [Executrix/Executor], in such [Executrix's/Executor's] sole discretion, may distribute from time to time any real or personal property in my estate which at my death is subject to a lien securing an indebtedness upon it without discharging said indebtedness, if in my Independent [Executrix's/Executor's] judgment, the condition of my estate so requires. The distributee shall then be considered as having received my estate's equity in the property.

III.

DISPOSITION OF ESTATE

*[A. I give, devise and bequeath _____ to _____.

*[B. I give, devise and bequeath _____ to _____.

*[C. I give, devise and bequeath _____ to _____.

*[D. I give, devise and bequeath _____ to _____.

**[E. I give, devise and bequeath all[of the rest] of my estate to the Trustee of [THE name LIVING TRUST/ THE name REVOCABLE LIVING TRUST] established on _____, to be administered according to the terms and conditions of the Trust Agreement governing that trust, as amended or restated from time to time. If [THE name LIVING TRUST/ THE name REVOCABLE LIVING

TRUST] is not in existence at the time of my death, I give, devise and bequeath all[of the rest] of my estate of whatsoever kind and wheresoever situated as hereinafter provided in this Article.

] * F. * [If [THE name LIVING TRUST/ THE name REVOCABLE LIVING TRUST] is not in existence at the time of my death and if] [If] my wife, _____, survives me, I give, devise and bequeath all[of the rest] of my estate of whatsoever kind and wheresoever situated to my wife, _____. If my wife, _____, does not survive me, I give, devise and bequeath all[of the rest] of my estate to my [child/children], _____[, in equal shares]; provided, however, that if[the/a] child of mine shall not then survive me, but should leave issue then surviving me, such then surviving issue shall take, per stirpes, the share that such deceased child would have taken by surviving me*[, or if none is then living, then said share shall be distributed, in equal shares, to my then living children or their issue per stirpes, or if none of my descendants is then living, then said share shall be distributed as provided in the paragraph below]**[, or if none is then living, then said share shall be distributed to my then living child or his or her issue, per stirpes, or if none of my descendants is then living, then said share shall be distributed as provided in the paragraph below]*.]** [If [THE name LIVING TRUST/ THE name REVOCABLE LIVING TRUST] is not in existence at the time of my death and if] [If] my wife, _____, survives me, I give, devise and bequeath all[of the rest] of my estate of whatsoever kind and wheresoever situated to my wife, _____. If my wife, _____, does not survive me, I give, devise and bequeath all[of the rest] of my estate to _____, or _____'s issue per stirpes.]** [If [THE name LIVING TRUST/ THE name REVOCABLE LIVING TRUST] is not in existence at the time of my death and if] [If] my wife, _____, survives me, I give, devise and bequeath all[of the rest] of my estate of whatsoever kind and wheresoever situated to my wife, _____.] ** [If [THE name LIVING TRUST/ THE name REVOCABLE LIVING TRUST] is not in existence at the time of my death,] * I give, devise and bequeath all[of the rest] of my estate to my [child/children], _____[, in equal shares]; provided, however, that if[the/a] child of mine shall not then survive me, but should leave issue then surviving me, such then surviving issue shall take, per stirpes, the share that such deceased child would have taken by surviving me*[, or if none is then living, then said share shall be distributed, in equal shares, to my then living children or their issue per stirpes, or if none of my descendants is then living, then said share shall be distributed as provided in the paragraph below]**[, or if none is then living, then said share shall be distributed to my then living child or his or her issue, per stirpes, or if none of my descendants is then living, then said share shall be distributed as provided in the paragraph below]*.]** [If [THE name LIVING TRUST/ THE name REVOCABLE LIVING TRUST] is not in existence at the time of my death,] * I give, devise and bequeath all[of the rest] of my estate of whatsoever kind and wheresoever situated as follows: _____.] *

G. Any other property of mine that has not been disposed of under any other provision of this Will shall go and be distributed to my heirs-at-law. Their identity and respective shares shall be determined in all respects as if my death had occurred immediately following the happening of the event requiring such distribution, and according to the laws of Texas then in force governing the distribution of the estate of an intestate.

IV. DEFINITION OF SURVIVAL

Any legatee, devisee, donee, person or beneficiary with respect to all or any part of my estate who shall not survive until [number] (_____) days after the date of my death, or until this Will is probated, whichever occurs earlier, shall be deemed to have predeceased me, and shall be treated for all purposes herein as though such person had predeceased me. Any person who is prohibited by law from inheriting property from my estate shall be treated as having failed to survive me.

*[

V.

CONTINGENT TRUST

In the event that any beneficiary*[other than my wife]* has not reached the age of [number] (_____) years, then in such event I give, devise and bequeath the share or shares of such beneficiary to my Trustee, IN TRUST NEVERTHELESS, for the uses and purposes hereinafter set forth.

A. My Trustee, in such Trustee's discretion, shall distribute to or for the benefit of each beneficiary, as much of the income, and in addition, so much of the corpus of each separate per stirpes share or trust created for that particular beneficiary as my Trustee shall consider necessary or advisable for his or her health, support, education, and maintenance.

*[B. Any income or corpus not so distributed or used shall be separately accumulated for each of my beneficiaries or their issue, and the separate per stirpes share or trust turned over to said beneficiary when he or she reaches the age of [number] (_____) years, at which time my Trustee shall transfer, convey, deliver and pay over to said beneficiary, FREE FROM TRUST, all of the property then constituting his or her share of the trust estate.

]**[B. Any income or corpus not so distributed or used shall be separately accumulated for each beneficiary. Upon attaining the age of [number] (_____) years, each beneficiary shall have the option of withdrawing for his or her separate share one-third (1/3) of the property then constituting his or her separate trust estate. Upon attaining the age of [number] (_____) years or any time thereafter, each beneficiary shall have the option of withdrawing one-half (1/2) of the remaining property then constituting his or her separate trust estate. Upon attaining the age of [number] (_____) years or any time thereafter, each beneficiary shall have the option of withdrawing the remaining balance of the property then constituting his or her separate trust estate. Each beneficiary shall be advised of his or her options ninety (90) days prior to his or her respective birthdays when such options shall arise. Furthermore, any beneficiary intending to exercise any of his or her options to withdraw, shall give the Trustee at least sixty (60) days' written notice of such intent. The Trustee may, in the Trustee's sole discretion, waive all or any portion of such sixty (60) days' notice. In the meantime, during the pendency of each trust, the Trustee shall have the same powers, discretions, duties and responsibilities that the Trustee has generally with respect to this trust as to administration and distributions.

] * C. If any beneficiary of the trust shall die before complete distribution of his or her share, then upon the death of such beneficiary the share of such beneficiary as then constituted shall be distributed equally to said deceased beneficiary's children or his or her issue, per stirpes, as provided in Sections A and B above*]; or if none is then living, then said share shall be distributed, in equal shares, to my then living children or their issue, per stirpes; or if none of my descendants is then living, then said share shall be distributed as provided in the paragraph below]**]; or if none is then living, then said share shall be distributed to my then living child or his or her issue, per stirpes; or if none of my descendants is then living, then said share shall be distributed as provided in the paragraph below]*.

D. Any share or portion of a share of any trust created hereunder or any other property of mine that has not been disposed of under any other provision of this Will shall go and be distributed to my heirs-at-law. Their identity and respective shares shall be determined in all respects as if my death had occurred immediately following the happening of the event requiring such distribution, and according to the laws of the State of Texas then in force governing the distribution of the estate of an intestate.

]**[

VI.

APPOINTMENT OF TRUSTEE

I nominate, constitute and appoint[relationship and name] to act as Trustee of the trust created in Article [reference to trust] herein. *[In the event that[relationship and name] shall predecease me or fail or

refuse to qualify, or die, resign, or become unable to serve as Trustee during the administration of such trust, I hereby nominate, constitute and appoint[relationship and name] to act as Trustee, and all of the powers, duties and responsibilities granted and imposed upon _____ shall devolve upon and be exercised by _____.]**[In the event that[relationship and name] shall predecease me or fail or refuse to qualify, or die, resign, or become unable to serve as Trustee during the administration of such trust, I hereby nominate, constitute and appoint[relationship and name] to act as Trustee, and all of the powers, duties and responsibilities granted and imposed upon _____ shall devolve upon and be exercised by _____.]**[In the event that[relationship and name] shall predecease me or fail or refuse to qualify, or die, resign, or become unable to serve as Trustee during the administration of such trust, I hereby nominate, constitute and appoint[relationship and name] to act as Trustee, and all of the powers, duties and responsibilities granted and imposed upon _____ shall devolve upon and be exercised by _____.]*

]**[

VII. TRUSTEE POWERS

The trusts created or arising by virtue of this, my Last Will and Testament, shall be governed by and administered in accordance with the following provisions:

A. The Trustee during the continuation of each trust shall have the sole and complete right to possess, control, manage, and dispose of each trust estate and the said Trustee shall have the powers, rights, responsibilities and duties given to or imposed upon trustees by the Texas Trust Code as such Code now exists.

B. The Trustee shall at all times keep proper records and books of accounts which shall be open to the inspection of the beneficiaries at all reasonable times.

C. The Trustee shall act without bond of any kind, and shall be liable only for gross negligence, fraud or defalcation.

D. The Trustee shall have full power, in the Trustee's discretion, to litigate, compromise, adjust and settle all claims arising out of or in connection with the trust and property of the trust, and the Trustee may employ counsel and other agents in the discharge of duties and determine and pay them a reasonable compensation.

E. The Trustee shall be entitled to pay out of the trust estate or to be reimbursed for any and all legitimate expenses incurred in the management of the trust estate.

F. The Trustee shall have the sole discretion to determine what is income or corpus of each respective trust, and shall apportion and allocate all receipts, credits, disbursements, expenses, and charges to income or corpus as the Trustee shall deem proper.

G. The Trustee may resign by sending an acknowledged written notice to the trust beneficiaries thirty (30) days prior to resignation.

H. As compensation for[his/ her/its] services hereunder, my Trustee or[his/ her/its] successor shall be entitled to charge the same fees customarily charged for similar services in other trusts at the time the services are rendered.

]**[

VIII.
APPOINTMENT OF EXECUTOR

A. I hereby nominate, constitute and appoint[executor's name/relationship and name] as Independent [Executrix/Executor] of my estate. *[In the event that[executor's name/relationship and name] shall predecease me or fail or refuse to qualify, or die, resign, or become unable to serve during the administration of my estate, I hereby nominate, constitute and appoint[executor's name/relationship and name] as Independent [Executrix/Executor], and all the powers, duties and responsibilities granted and imposed upon _____ shall devolve upon and be exercised by _____.]**[In the event that[executor's name/relationship and name] shall predecease me or fail or refuse to qualify, or die, resign, or become unable to serve during the administration of my estate, I hereby nominate, constitute and appoint[executor's name/relationship and name] as Independent [Executrix/Executor], and all the powers, duties and responsibilities granted and imposed upon _____ shall devolve upon and be exercised by _____.]**[In the event that[executor's name/relationship and name] shall predecease me or fail or refuse to qualify, or die, resign, or become unable to serve during the administration of my estate, I hereby nominate, constitute and appoint[executor's name/relationship and name] as Independent [Executrix/Executor], and all the powers, duties and responsibilities granted and imposed upon _____ shall devolve upon and be exercised by _____.]**[

B. If any individual Independent Executor or Executrix becomes unable to discharge his or her duties under this Will because of accident, physical or mental illness or deterioration, or other cause and does not resign, then upon certification in a form sufficient for the recording of a deed in the State of Texas by two medical doctors (neither of whom is a beneficiary under this Will) affirming that each has examined the Independent Executor or Executrix and that each has concluded, based on such examination, that the Independent Executor or Executrix is unable to discharge his or her duties under this Will, the Independent Executor or Executrix shall cease to serve, as if he or she had resigned, effective the date of the certification.]*

C. It is my will and desire and I hereby direct that in the administration of my estate, my Independent [Executrix/Executor] or any successor shall not be required to furnish any bond of any kind and that no action shall be had in any court in the administration of my estate other than the probating of this, my Last Will and Testament, and the filing of any Inventory, Appraisalment and List of Claims of my estate that may be required.

IX.
POWERS OF EXECUTOR

The estate created or arising by virtue of my death and this instrument, my Last Will and Testament, shall be governed by and administered in accordance with the following provisions:

A. I hereby grant unto my Independent [Executrix/Executor] or any successor named above, full power and authority over any and all of my estate and they are hereby authorized to sell, manage, and dispose of the same or any part thereof, and in connection with any such sale or transaction, make, execute and deliver proper deeds, assignments and other written instruments and to do any and all things proper or necessary in the orderly handling and management of my estate.

B. My Independent [Executrix/Executor] or any successor named above, shall have full power and authority to compromise, settle and adjust any and all debts, claims and taxes which may be due from or owing by my estate.

C. My Independent [Executrix/Executor] or any successor named above, shall have full power and authority to deal with any person, firm, or corporation*[including any trusts or trust estate created by this, my Last Will and Testament]*.

D. My Independent [Executrix/Executor] or any successor named above, shall have full power to borrow money at any time and in any amount from time to time for the benefit of my estate, from any person, firm, or corporation or from any bank or trust company and to secure the loan or loans by pledge, deed of trust, mortgage or other encumbrances on the assets of the estate and from time to time to renew such loans and give additional security.

E. *[As compensation for[his/her/its] services hereunder, my Independent [Executrix/Executor] or any successor named above shall be entitled to charge the same fees customarily charged for similar services in other estates at the time the services are rendered.]**[The Independent [Executrix/Executor] shall serve without compensation.]*

*[

X.

APPOINTMENT OF GUARDIANS

In the event that any child of mine is incapacitated, as defined in Section 601(14)(B), Texas Probate Code, or has not reached the age of eighteen (18) years at the date of my death,[and my wife is not then alive,] then in such event, I nominate and appoint[relationship and name] to act as Guardian of the [person and the estate/person only/estate only] of said child or children*[, and I direct that no bond or other security shall be required of the Guardian]*.*[In the event that[relationship and name] shall be unable to serve as Guardian, I nominate and appoint[relationship and name] to act as the Guardian of the [person and the estate/person only/estate only] of said child or children*[, and I direct that no bond or other security shall be required of the Guardian]*.]**[In the event that[relationship and name] shall be unable to serve as Guardian, I nominate and appoint[relationship and name] to act as the Guardian of the [person and the estate/person only/estate only] of said child or children*[, and I direct that no bond or other security shall be required of the Guardian]*.]**[In the event that[relationship and name] shall be unable to serve as Guardian, I nominate and appoint[relationship and name] to act as the Guardian of the [person and the estate/person only/estate only] of said child or children*[, and I direct that no bond or other security shall be required of the Guardian]*.]*

]*

XI.

SPENDTHRIFT PROVISION

No interest of any beneficiary in the corpus or income of my estate*[or of any trust created herein]* shall be subject to assignment, alienation, pledge, attachment, or claims of creditors of such beneficiary and may not otherwise be alienated or encumbered by such beneficiary, except as may be otherwise expressly provided herein.

*[

XII.

MAXIMUM TERM OF TRUST

If any trust created hereunder shall violate any applicable Rule Against Perpetuities or any similar rule or law, my Trustee is hereby directed to terminate said trust on the date limited by such rule or law and thereupon the property held in such trust shall be distributed to the persons then entitled to share such income, notwithstanding any provision of this Will to the contrary.

]**[

**XIII.
FUNERAL ARRANGEMENTS**

]**[

**XIV.
IN TERROREM CLAUSE**

If any beneficiary under this Will shall in any manner contest or attack this Will or any of its provisions, any share or interest in my estate given to such contesting beneficiary under this Will is hereby revoked and shall be disposed of as part of the residue of my estate.

]**[

**XV.
WILLS NOT CONTRACTUAL**

My spouse and I are executing Wills at approximately the same time in which each of us may be a primary beneficiary of the Will of the other. These Wills are not executed because of any agreement between my spouse and myself. Either Will may be revoked at any time in the sole discretion of the maker thereof.

]*

**XVI.
DEFINITIONS AND INTERPRETATIONS**

For purposes of interpretation of this, my Last Will and Testament, and the administration of the estate*[and any trusts]* established herein, the following provisions shall apply:

A. The words "child, children, descendants, issue," and similar terms shall be deemed only to include children born to, or adopted (on or before eighteen years of age) by me or my descendants.

B. When a distribution is directed to be made to any person's descendants "per stirpes," the division into stirpes shall begin at the generation nearest to such person that has a living member.

C. The use of the masculine, feminine or neuter genders shall be interpreted to include the other genders, and the use of either the singular or the plural number shall be interpreted to include the other number, unless such an interpretation in a particular case is inconsistent with the general tenor of this instrument. Any references herein relating to my Independent [Executrix/Executor] shall include[his/her/its] successors regardless of the gender of the successors.

D. This Will shall be probated in accordance with the laws of Texas, and should any provisions of the same be held unenforceable or invalid for any reason, the unenforceability or invalidity of said provision shall not affect the enforceability or validity of any other part of this Will.

IN WITNESS WHEREOF, I, _____, hereby sign my name to this, my last Will,*[on each page of which I have*[placed my initials]**[signed my name]*,]* on this ____ day of _____, _____, at _____, _____.

_____, Testator

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, _____, of _____, _____, _____ County, _____, appoint _____ of _____, _____, _____ County, _____, as my agent to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out below.

TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD.

Real property transactions;

Tangible personal property transactions;

Stock and bond transactions;

Commodity and option transactions;

Banking and other financial institution transactions;

Business operating transactions;

Insurance and annuity transactions;

Estate, trust, and other beneficiary transactions;

Claims and litigation;

Personal and family maintenance;

Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;

Retirement plan transactions;

Tax matters.

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY AND MY AGENT (ATTORNEY IN FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT.

SPECIAL INSTRUCTIONS:

Special instructions are applicable to gifts (initial in front of the following sentence to have it apply):

I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

*[None.]**[_____]**

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney is effective immediately and is not affected by my subsequent disability or incapacity.

]**[This power of attorney becomes effective upon my disability or incapacity.

*[If a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

]**] I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify and hold harmless the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following*[(each to act alone and successively, in the order named)]* as successor[s] to that agent: *{*[

1.]* _____

}**[None.]*

Signed on _____, _____.

THE STATE OF _____

§
§
§

COUNTY OF _____

This document was acknowledged before me by _____ on _____, _____.

Notary Public, State of _____
Notary's Printed Name:

My Commission Expires:

THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

DECLARATION OF GUARDIAN IN THE EVENT OF LATER INCAPACITY OR NEED OF GUARDIAN

I, _____, make this Declaration of Guardian, to operate if the need for a guardian for me later arises.

1. I designate [relationship and name] to serve as guardian of my person*[[and/,] [relationship and name] as first alternate guardian of my person]**[[and/,] [relationship and name] as second alternate guardian of my person]**[[and] [relationship and name] as third alternate guardian of my person]*.

2. I designate [relationship and name] to serve as guardian of my estate*[[and/,] [relationship and name] as first alternate guardian of my estate]**[[and/,] [relationship and name] as second alternate guardian of my estate]**[[and] [relationship and name] as third alternate guardian of my estate]*.

3. If any guardian or alternate guardian dies, fails, or refuses to qualify, or resigns, the next named alternate guardian succeeds the prior named guardian and becomes my guardian.

[4. I expressly disqualify [relationship and name] from serving as guardian of my person[[and/,] [relationship and name] from serving as guardian of my person]**[[and/,] [relationship and name] from serving as guardian of my person]**[[and] [relationship and name] from serving as guardian of my person]*.

[5. I expressly disqualify [relationship and name] from serving as guardian of my estate*[[and/,] [relationship and name] from serving as guardian of my estate][[and/,] [relationship and name] from serving as guardian of my estate]**[[and] [relationship and name] from serving as guardian of my estate]*.

] * **SIGNED** on _____, _____.

_____, Declarant

APPOINTMENT OF AGENT TO CONTROL DISPOSITION OF REMAINS

I, _____, _____, _____, _____, _____, being of sound mind, willfully and voluntarily make known my desire that, upon my death, the disposition of my remains shall be controlled by _____ in accordance with Section 711.002 of the Health and Safety Code and, with respect to that subject only, I hereby appoint such person as my agent (attorney-in-fact).

All decisions made by my agent with respect to the disposition of my remains, including cremation, shall be binding.

SPECIAL DIRECTIONS

Set forth below are any special directions limiting the power granted to my agent:

_____.

AGENT:

_____, _____, _____, _____

Acceptance of Appointment:

Signature

Date: _____

***[SUCCESSOR[S]**

If my agent dies, becomes legally disabled, resigns, or refuses to act, I hereby appoint the following person[s] [(each to act alone and successively, in the order named)] to serve as my agent (attorney-in-fact) to control the disposition of my remains as authorized by this document:

* {{A. [ordinal] Successor Agent

_____, _____, _____, _____

Acceptance of Appointment:

Signature

Date: _____

}}]*DURATION

This appointment becomes effective upon my death.

PRIOR APPOINTMENTS REVOKED

I hereby revoke any prior appointment of any person to control the disposition of my remains.

RELIANCE

I hereby agree that any cemetery organization, business operating a crematory or columbarium or both, funeral director or embalmer, or funeral establishment who receives a copy of this document may act under it. Any modification or revocation of this document is not effective as to any such party until that party receives actual notice of the modification or revocation. No such party shall be liable because of reliance on a copy of this document.

ASSUMPTION

THE AGENT*[, AND EACH SUCCESSOR AGENT,]* BY ACCEPTING THIS APPOINTMENT, ASSUMES THE OBLIGATIONS PROVIDED IN, AND IS BOUND BY THE PROVISIONS OF, SECTION 711.002 OF THE HEALTH AND SAFETY COD

HIPAA RELEASE

I, _____, intend for any agent named in this release to be treated as I would be treated with respect to my rights regarding the use and disclosure of my individually identifiable health information and other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. 1320d and 45 C.F.R. 160-164.

I authorize the disclosure of any information governed by HIPAA to be provided to the following:

_____.

Accordingly, I hereby authorize any physician, health-care professional, dentist, health plan, hospital, clinic, laboratory, pharmacy or other covered health-care provider, any insurance company and the Medical Information Bureau Inc. or other health-care clearinghouse that has provided treatment or services to me, or that has paid for or is seeking payment from me for such services, to give, disclose and release to any agent who is named herein and who is currently serving as such, without restriction, all of my individually identifiable health information and medical records regarding any past, present or future medical or mental health condition, including all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness, and drug or alcohol abuse.

This authority given to any named agent shall supersede any prior agreement that I may have made with my health-care providers to restrict access to or disclosure of my individually identifiable health information. The individually identifiable health information and other medical records given, disclosed, or released to any named agent may be subject to redisclosure by a named agent and may no longer be protected by HIPAA. The authority given to any named agent herein has no expiration date and shall expire only in the event that I revoke this HIPAA Release in writing and deliver it to my health-care provider. There are no exceptions to my right to revoke this HIPAA Release.

MEDICAL POWER OF ATTORNEY

THE STATE OF _____

COUNTY OF _____

§
§
§

KNOW ALL MEN BY THESE PRESENTS

I, _____, appoint:

Name: _____

Address: _____

Phone: _____

as my agent to make any and all health care decisions for me, except to the extent I state otherwise in this document. This medical power of attorney takes effect if I become unable to make my own health care decisions and this fact is certified in writing by my physician.

LIMITATIONS ON THE DECISION MAKING AUTHORITY OF MY AGENT ARE AS FOLLOWS:

_____.

*[DESIGNATION OF ALTERNATE AGENT

If the person designated as my agent is unable or unwilling to make health care decisions for me, I designate the following persons to serve as my agent to make health care decisions for me as authorized by this document, who serve in the following order:

A. First Alternate Agent

Name: _____

Address: _____

Phone: _____

B. Second Alternate Agent

Name: _____

Address: _____

Phone: _____

] * The original of this document is kept with:

Name: _____

Address: _____

The following individuals or institutions have signed copies:

Name: [name of first custodian]

Address: [address of first custodian]

Name: [name of second custodian]

Address: [address of second custodian]

DURATION.

I understand that this power of attorney exists indefinitely from the date I execute this document unless I establish a shorter time or revoke the power of attorney. If I am unable to make health care decisions for myself when this power of attorney expires, the authority I have granted my agent continues to exist until the time I become able to make health care decisions for myself.

*[This power of attorney ends on the following date: _____.

] *PRIOR DESIGNATIONS REVOKED.

I revoke any prior medical power of attorney.

ACKNOWLEDGMENT OF DISCLOSURE STATEMENT.

I have been provided with a disclosure statement explaining the effect of this document. I have read and understand that information contained in the disclosure statement.

I sign my name to this medical power of attorney on the ____ day of _____, _____ at _____, _____ County, _____.

STATEMENT OF FIRST WITNESS.

I am not the person appointed as agent by this document. I am not related to the principal by blood or marriage. I would not be entitled to any portion of the principal's estate on the principal's death. I am not the attending physician of the principal or an employee of the attending physician. I have no claim against any portion of the principal's estate on the principal's death. Furthermore, if I am an employee of a health care facility in which the principal is a patient, I am not involved in providing direct patient care to the principal and am not an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility.

Signature: _____
Print Name: [name of first witness]
Address: [address of first witness]
Date: [date of first witness' signature]

STATEMENT OF SECOND WITNESS.

I am not the person appointed as agent by this document. I am not related to the principal by blood or marriage. I would not be entitled to any portion of the principal's estate on the principal's death. I am not the attending physician of the principal or an employee of the attending physician. I have no claim against any portion of the principal's estate on the principal's death. Furthermore, if I am an employee of a health care facility in which the principal is a patient, I am not involved in providing direct patient care to the principal and am not an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility.

Signature: _____
Print Name: [name of second witness]
Address: [address of second witness]
Date: [date of second witness' signature]

*[

SUBSCRIBED AND SWORN TO BEFORE ME by the said _____, Principal, and by the said [name of first witness] and [name of second witness], Witnesses, this _____ day of _____, _____.

DIRECTIVE TO PHYSICIANS AND FAMILY OR SURROGATES

Instructions for completing this document:

This is an important legal document known as an Advance Directive. It is designed to help you communicate your wishes about medical treatment at some time in the future when you are unable to make your wishes known because of illness or injury. These wishes are usually based on personal values. In particular, you may want to consider what burdens or hardships of treatment you would be willing to accept for a particular amount of benefit obtained if you were seriously ill.

You are encouraged to discuss your values and wishes with your family or chosen spokesperson, as well as your physician. Your physician, other health care provider, or medical institution may provide you with various resources to assist you in completing your advance directive. Brief definitions are listed below and may aid you in your discussions and advance planning. *[Initial the treatment choices that best reflect your personal preferences.]*Provide a copy of your directive to your physician, usual hospital, and family or spokesperson. Consider a periodic review of this document. By periodic review, you can best assure that the directive reflects your preferences.

In addition to this advance directive, Texas law provides for two other types of directives that can be important during a serious illness. These are the Medical Power of Attorney and the Out-of-Hospital Do-Not-Resuscitate Order. You may wish to discuss these with your physician, family, hospital representative, or other advisers. You may also wish to complete a directive related to the donation of organs and tissues.

DIRECTIVE

I, _____, recognize that the best health care is based upon a partnership of trust and communication with my physician. My physician and I will make health care decisions together as long as I am of sound mind and able to make my wishes known. If there comes a time that I am unable to make medical decisions about myself because of illness or injury, I direct that the following treatment preferences be honored:

If, in the judgment of my physician, I am suffering with a terminal condition from which I am expected to die within six months, even with available life-sustaining treatment provided in accordance with prevailing standards of medical care*[:

____ I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible; OR

____ I request that I be kept alive in this terminal condition using available life-sustaining treatment. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

]**[: I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible.

]**[: I request that I be kept alive in this terminal condition using available life-sustaining treatment. (THIS REQUEST DOES NOT APPLY TO HOSPICE CARE).

] * If, in the judgment of my physician, I am suffering with an irreversible condition so that I cannot care for myself or make decisions for myself and am expected to die without life-sustaining treatment provided in accordance with prevailing standards of care*[:

___ I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible; OR

___ I request that I be kept alive in this irreversible condition using available life-sustaining treatment. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

] **[; I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible.

] **[; I request that I be kept alive in this irreversible condition using available life-sustaining treatment. (THIS REQUEST DOES NOT APPLY TO HOSPICE CARE.)

] **[Additional requests: (After discussion with your physician, you may wish to consider listing particular treatments in this space that you do or do not want in specific circumstances, such as artificial nutrition and fluids, intravenous antibiotics, etc. Be sure to state whether you do or do not want the particular treatment.)

] * After signing this directive, if my representative or I elect hospice care, I understand and agree that only those treatments needed to keep me comfortable would be provided and I would not be given available life-sustaining treatments.

*[If I do not have a Medical Power of Attorney, and I am unable to make my wishes known, I designate the following person[s] to make treatment decisions with my physician compatible with my personal values:

*{{1. _____

}}*

] * If the*[above]* person[s]*[named as agent in my Medical Power of Attorney]* [is/are] not available, or if I have not designated a spokesperson, I understand that a spokesperson will be chosen for me following standards specified in the laws of Texas. If, in the judgment of my physician, my death is imminent within minutes to hours, even with the use of all available medical treatment provided within the prevailing standard of care, I acknowledge that all treatments may be withheld or removed except those needed to maintain my comfort. This directive will remain in effect until I revoke it. No other person may do so.

My residence address is _____, _____, _____ County, _____.

SIGNED on _____, _____.

PROBATE

PROBATE

I. **Probating the Estate of a Person who Died Intestate – without a will**

- a. Estate automatically passes to “heirs at law”
- b. Paternal inheritance – “When is a child not a child?” – a child is the child of decedent male and may inherit if and only if:
 - i. There is an un rebutted presumption of paternity (the child was born to mom while dad was married to her – even if the mother believes that her husband is not the father of her child)
 - ii. Adjudication of paternity – e.g., child support order
 - iii. Adoption – legal adoption through the judicial process
 - iv. Acknowledgment of paternity – specific form signed by mother, father (and husband if necessary) and sent to Austin (see Acknowledgment of Paternity section of Family Law section).
 - v. Others must prove by clear and convincing evidence – privately performed DNA tests with intact chains-of-custody, long history of documentation indicating that deceased accepted the child as his own – difficult to prove.
- c. Other considerations before accepting a file for referral:
 - i. Property taxes – are property taxes past due? By how much? Are payments being made now? Will settling the estate leave the applicant with property and a tax bill that can’t be paid?
 - ii. Mortgage – is the mortgage current? How far behind is the note? Has foreclosure process already begun?
 - iii. Contest – does the applicant believe that any other beneficiary or heir will contest the probate of the will? Does another alleged will exist?
 - iv. How long ago did the deceased die?
 - v. Is the applicant currently living in the house and maintaining it?
 - vi. Other people with interests in the property – are there others, now long-deceased, who have an interest in the property? If several people have died and no estates have been settled, all estates must be settled to clear title (and all the heirs of all the deceased parties must agree to transfer property to applicant)
- d. Who may seek to settle a deceased person’s estate – in order to settle a deceased person’s estate, the applicant must be one of the following people:
 - i. Executor
 - ii. Surviving Spouse
 - iii. Principal legatee or devisee
 - iv. Next of kin
- e. Persons Disqualified to serve as administrator – the court WILL NOT APPOINT any of the following people as executor/administrator of a deceased person’s estate:
 - i. Incapacitated person
 - ii. Convicted felon
 - iii. Non-resident of state who has not been appointed as resident agent
 - iv. Corporation not authorized to act as fiduciary in this state
 - v. Any person the court finds unsuitable – this may be for conflicts of interest (parties were in a financial dispute before death of deceased, etc.) or misconduct as a fiduciary (for instance, in serving as a guardian before the deceased’s death).
 - vi. *** EXECUTOR SHOULD SETTLE THE ESTATE IF A WILL EXISTS. OTHERWISE, PREFERENCE IS GIVEN TO NEXT OF KIN. AT MINIMUM,**

THE APPLICANT MUST BE ABLE TO IDENTIFY THE OTHER HEIRS WITH SUPERIOR RIGHTS AND HAVE GOOD FAITH BELIEF THAT ALL OF THEM WILL AGREE TO APPLICANT PROBATING ESTATE AND RECEIVING PROPERTY. NO FILES ACCEPTED FOR REFERRAL IF CONTEST IS EXPECTED.

II. Types of Wills

- a. Formal Will
 - i. In writing and signed by testator or by another person at testator's direction and in his presence
 - ii. Attested by two disinterested witnesses at least 14 years of age
 - iii. May be self-proved by affidavit – can then be admitted to probate without testimony of witnesses
- b. Holographic Will – must be wholly in the handwriting of the testator
 - i. Anything pre-printed on pre-printed forms (can be purchased at bookstores) “disappears” and the court must read only the handwritten part of the will
 - ii. After “disappeared” language falls away, the remaining writing must still express testamentary intent and provide clear instructions regarding property and disposition
 - iii. Holographic wills need not be witnessed
- c. Nuncupative Will – extremely limited
 - i. Oral will made at time of last sickness of deceased, at home or where he resided for ten days next preceding date of such will (with minor exceptions)
 - ii. Value of property willed via this technique cannot exceed thirty dollars (\$30) unless witnessed by three credible witnesses
- d. Lost will – can be probated but requires establishing that:
 - i. Testator had requisite capacity to make will
 - ii. That will was duly executed
 - iii. The cause of will's nonproduction – must overcome presumption of revocation
 - iv. The contents of the will – must be substantially proved by credible witness who has read the will or heard it read.

III. Probating the Estate of a Person who Died with a Will – Applicant must provide copy of will

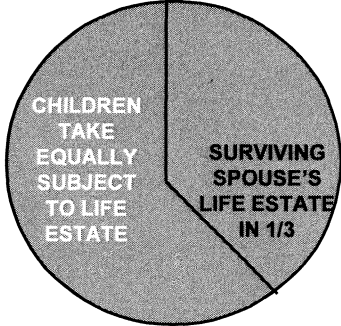
- a. Period of Probate
 - i. No will shall be admitted to probate after the lapse of four years from death of testator unless shown by proof that party applying for such probate was not in default
 - ii. “Default” – failure due to the absence of reasonable diligence on part of proponent – beneficiaries cannot slumber on their rights, or the deceased's estate will pass as if through intestacy
 - iii. Other alternatives to settle estate must be used after this four year period but usually require all family members to agree to distribution
- b. Who may make application to settle estate – in order to settle a deceased person's estate, the applicant must be one of the following people:
 - i. Executor named in the will
 - ii. Surviving spouse
 - iii. Principal devisee or legatee
 - iv. Next of kin of deceased
 - v. Creditors, or any person of good character, or any person not disqualified
- c. Persons Disqualified from being appointed as executor – the court **WILL NOT APPOINT** any of the following people as executor/administrator of a deceased person's estate:
 - i. Incapacitated person
 - ii. Convicted felon

- iii. Non-resident of state who has not been appointed as resident agent
- iv. Corporation not authorized to act as fiduciary in this state
- v. Any person the court finds unsuitable – this may be for conflicts of interest (parties were in a financial dispute before death of deceased, etc) or misconduct as a fiduciary (for instance, in serving as a guardian before the deceased's death)
- d. Notice – notice via personal service or waiver must be given to all parties interested in the estate
- e. Where suit may be brought – generally, in county where decedent resided.
- f. Other considerations before accepting a file for referral:
 - i. Property taxes – are property taxes past due? By how much? Are payments being made now? Will settling the estate leave the applicant with property and a tax bill that can't be paid?
 - ii. Mortgage – is the mortgage current? How far behind is the note? Has foreclosure process already begun?
 - iii. Contest – does the applicant believe that any other beneficiary or heir will contest the probate of the will? Does another alleged will exist?
 - iv. How long ago did the deceased die?
 - v. Is the applicant currently living in the house and maintaining it?
 - vi. Other people with Interests in the Property – are there others, no long-deceased, who have an interest in the property? If several people have died and no estates have been settled, all estates must be settled to clear title (and all the heirs of all the deceased parties must agree to transfer property to applicant)

**TEXAS DESCENT AND DISTRIBUTION
(THE LEGAL EFFECT OF NOT HAVING A WILL)
MARRIED PERSON WITH CHILDREN**

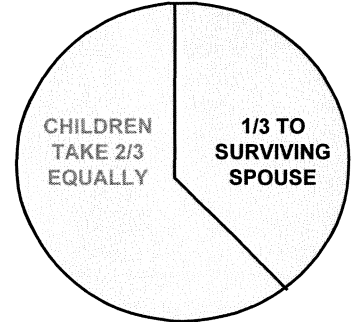
A. SEPARATE PROPERTY

REAL ESTATE



ALL REALTY IS OWNED BY DECEDENT'S CHILD[REN] WHEN SURVIVING SPOUSE DIES.

ALL OTHER PROPERTY



B. COMMUNITY PROPERTY

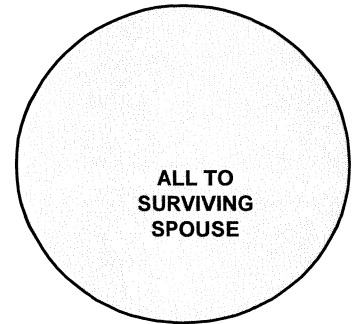
REAL ESTATE



ONLY APPLIES IF

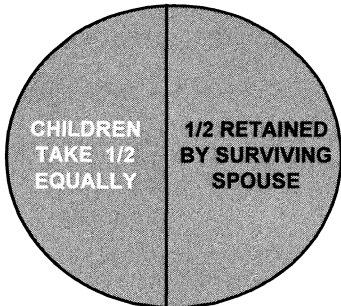
ALL SURVIVING CHILD[REN] AND DESCENDANTS OF DECEDENT ARE ALSO CHILD[REN] OR DESCENDANTS OF SURVIVING SPOUSE.

ALL OTHER PROPERTY



B. COMMUNITY PROPERTY

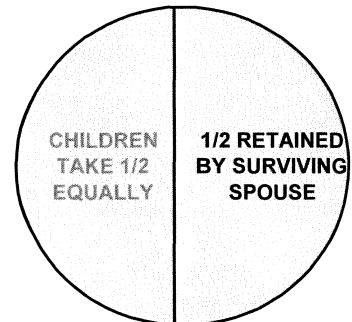
REAL ESTATE



ONLY APPLIES IF

THERE ARE CHILDREN FROM OUTSIDE OF THE EXISTING MARRIAGE ON THE DATE OF DEATH OF THE DECEASED. CHILD[REN] OF DECEASED CHILD[REN] TAKE THEIR PARENT'S SHARE SUBJECT TO ADVANCEMENTS.

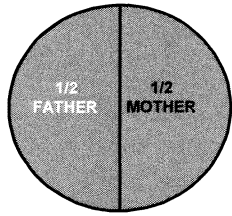
ALL OTHER PROPERTY



COMPLIMENTS OF JUDGE KATHLEEN S. STONE
HARRIS COUNTY PROBATE COURT 1

SINGLE OR WIDOWED PERSON

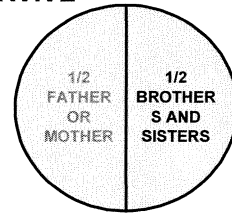
FATHER AND MOTHER SURVIVING ONLY



WITH NO CHILD[REN]

ENTIRE ESTATE GOES TO PARENT IF NO SIBLINGS OR THEIR DESCENDANTS SURVIVE DECEDENT.

PARENT AND SIBLINGS SURVIVE



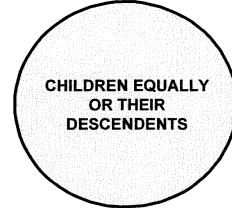
REAL ESTATE



WIDOW[ER] WITH CHILD[REN]

ANY CHILD[REN] TAKE THEIR SHARE SUBJECT TO ADVANCEMENTS.

ALL OTHER PROPERTY

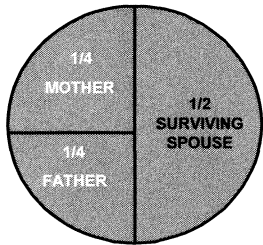


A. SEPARATE PROPERTY

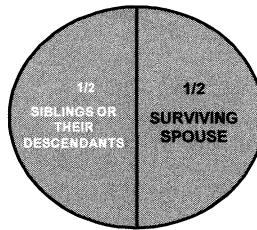
MARRIED PERSON WITH NO CHILD[REN]

REAL ESTATE

1. PARENTS SURVIVE



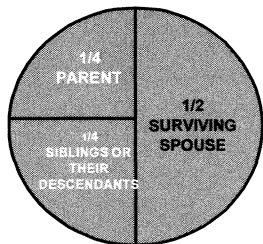
4. NO SURVIVING PARENT



ALL OTHER PROPERTY



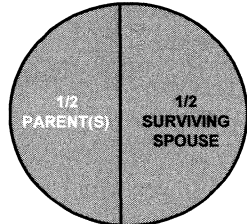
2. ONE PARENT SURVIVES



5. NO SIBLINGS [DESCENDANTS] OR PARENTS



3. NO SIBLINGS OR THEIR DESCENDANTS



COMMUNITY PROPERTY

ALL REAL AND PERSONAL PROPERTY IS TAKEN BY SURVIVING SPOUSE

aveat: See, Texas

Probate Code §42, Inheritance Rights of Illegitimate Children; and, §47(a), Heirs Required Survival by 120 Hours.

GUARDIANSHIP

GUARDIANSHIP

I. When is guardianship needed?

- a. Guardianship of Minor
 - i. Frequently requested when minor inherits money
 - ii. * GENERALLY REFER TO PRIVATE ATTORNEYS BECAUSE FEES MAY BE TAKEN FROM MINOR'S ESTATE TO PAY FOR ATTORNEY.
 - iii. Frequently requested when parents are both deceased
- b. Incapacitated Person – adult individual who because of physical or mental condition is substantially unable to provide food, clothing, shelter for him/herself, to care for him/herself, or to manage hi/her own financial affairs

II. What is required?

- a. Doctor's Letter – a form letter from the proposed ward's treating physician indicating that the proposed ward in fact is unable to car for him/herself; cannot be more than 120 days old at time of filing (see attached sample letter)
- b. Application must detail the nature and degree of incapacity; areas of protection, assistance; and allowances that ward will receive
- c. Notice and citation
 - i. Personal service – the following people must either be served personally or sign a waiver or service
 1. proposed ward who is age 12 or older
 2. proposed ward's parents, if whereabouts known or can be reasonably ascertained
 3. any court-appointed conservator
 4. proposed ward's spouse if whereabouts known or can be reasonably ascertained
 5. person named in application to be named as guardian, if that person is not applicant
 - ii. Registered or certified mail, return receipt requested – the following people must be served via registered mail or certified mail, return receipt requested, or sign a waiver of service
 1. all adult children of proposed ward
 2. all adult siblings of proposed ward
 3. administrator of nursing home or facility where ward resides
 4. person known to hold power of attorney signed by proposed ward
 5. any person designated to serve as guardian of proposed ward in Declaration of Guardian
 6. any person designated guardian under will of surviving parent
 7. any person designated to serve as guardian in written declaration by proposed ward's last surviving parent
 8. * ADDRESSES FOR ALL THE ABOVE PEOPLE ARE "MUST-HAVES," GENERALLY.
- d. Court Investigator – court must appoint investigator to determine whether a less restrictive alternative to guardianship is appropriate – a home visit will be made and a conversation/attempt at conversation will be had with the proposed ward to evaluate the general need for a guardianship
- e. Attorney Ad Litem
 - i. The Court shall appoint attorney ad litem to represent interests of proposed ward

- ii. This is done automatically and without any action by the proposed ward
- iii. The task of the attorney ad litem is to advocate for what the proposed ward wants.
- f. Language interpreter or sign language interpreter shall be appointed if necessary to ensure effective communication between proposed ward and attorney
- g. Guardian Ad Litem
 - i. The court MAY appoint guardian ad litem to represent the interests of incapacitated person
 - ii. The task of the guardian ad litem is to advise the court – not to represent any party
 - iii. * ***Attorney’s fees, court fees, interpreter fees – applicant may be expected to pay. Court fees and interpreter fees may be waived by paupers affidavit, and attorneys and guardian’s ad litem fees may be paid by county. An unsuccessful applicant for guardianship will be responsible for these fees.***

III. Who is Disqualified to Serve as Guardian?

- a. A minor
- b. A person whose conduct is notoriously bad (a felon)
- c. An incapacitated person
- d. A person who is a party to a lawsuit concerning the proposed ward, is indebted to the proposed ward, or is asserting a claim adverse to proposed ward
- e. A person who, because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the ward or the ward’s estate.
- f. * ***POLITELY ASK ABOUT APPLICANT’S CRIMINAL HISTORY, EXPLAINING THAT, BY STATUTE, FELONY CONVICTION WILL PRECLUDE HIS/HER APPOINTMENT.***

IV. Bond - \$\$\$

- a. Required of Guardian of Person or Estate, except under narrow circumstances
- b. Types of Bond Acceptable for Guardian of Person
 - i. Used to ensure performance of guardian’s duties
 - ii. Determining amount of bond – factors include:
 - 1. Familial relationship
 - 2. Guardian’s ties to community
 - 3. Guardian’s financial situation
 - 4. Guardian’s past history of compliance with court
 - 5. Reason guardian may have been previously denied a corporate surety bond
- c. Bond of Guardian of Estate
 - i. Court will set bond in amount equal to estimated value of all personal property, including income in twelve month period
 - ii. Must be sufficient to protect guardianship and creditors
 - iii. * ***AN INABILITY TO BE APPROVED FOR A BOND WILL PRECLUDE THE APPLICANT BEING APPOINTED AS GUARDIAN OF THE ESTATE OF THE PROPOSED WARD.***

V. Guardian’s Powers and Duties

- a. Guardian of the Person – decisions regarding the ward’s body
 - i. Right to physical possession and to establish domicile
 - ii. Duty to care, control, and protect the ward
 - iii. Duty to provide clothing, food, medical care, and shelter
 - iv. Power to Consent to Medical, Psychiatric, and Surgical treatment
- b. Care of Ward and Commitment
 - i. Residential Care – guardian may apply for residential care and services on behalf of ward
 - ii. Guardian may not voluntarily admit ward to in-patient psychiatric facility but must seek court permission
 - iii. Exceptions to Commitment Prohibition

1. Guardian of person under sixteen may voluntarily admit incapacitated person for care and treatment
 2. Guardian of person of mentally retarded incapacitated person for emergency care of respite care
- c. Guardian of the Estate – decisions regarding the ward’s money and property
- i. *Duties*
 1. possess and manage all properties belonging to ward
 2. collect debts, rents, or claims due to ward
 3. enforce all obligations in ward’s favor
 4. bring or defend suits by or against ward
 5. general duty to manage the ward’s estate as s/he would his/her own estate
 6. account for all rents, profits, revenues that the estate would have produced by prudent management
 - ii. Guardian is not liable to third person for ward’s conduct just by being appointed guardian but may be held if s/he negligently permits ward to cause injury to another
 - iii. Notice to Creditors – guardian must publish notice in a local newspaper that guardianship has been granted, requesting that general creditors file claims against ward’s estate
 - iv. Inventory, Appraisal, and List of Claims – guardian must file with the court a verified inventory and appraisal of all property of estate
 - v. *Maintenance and Education of Ward*
 1. Parent who is guardian of person of a ward under age seventeen may NOT use income or corpus of ward’s estate for ward’s support, education, or maintenance
 - a. Parent has the duty to support
 - b. Court may make exception if it finds that parent is unable to provide without unreasonable hardship
 2. Family Members – upon application, court may order guardian of estate to expend funds from ward’s estate for education and maintenance of ward’s spouse of dependents; court will consider:
 - a. Circumstances of ward, spouse, and dependents
 - b. Ability and duty of spouse to support him/herself and dependents
 - c. Size of ward’s estate
 - d. Any beneficial interest that ward, spouse, or dependents may have in trust
 - e. Any existing estate plan that provides benefit to ward’s spouse or dependents
 - vi. Compensation for Guardians – with some exceptions, compensation may not be more than five percent of ward’s gross income plus five percent of all money paid out of estate; “gross income” does NOT include VA or Social Security benefits
 - vii. * ***REVIEW DUTIES AND ENSURE THAT APPLICANT UNDERSTANDS THAT GUARDIANSHIP IS HARD WORK AND THAT GUARDIANS ARE HELD TO FIDUCIARY STANDARD.***

VI. Management of Assets – sales of real property, hiring and renting of property, sales of personal property, investments, power to make tax-motivated gifts – all are addressed in probate code

- a. * ***REFER APPLICANT TO PRIVATE ATTORNEY IF ANY OF THESE ISSUES OF MANAGEMENT OF SIGNIFICANT PROPERTY ARISE.***

VII. Annual and Final Accounting

- a. Guardian of Estate shall file an annual sworn account, including information regarding all claims against estate, all property not previously inventoried, changes to property not previously reported, account of disbursements, etc.

- b. Guardian of Person is required to file annual report, including information on guardian's current address and phone, ward's current address, description of where ward resides, length of time ward has resided at present location, date guardian most recently saw ward, etc.
- c. ****REITERATE THAT GUARDIAN MUST KEEP RECORDS OF ALL EXPENDITURES. COURTS WILL REMOVE GUARDIANS WHO DO NOT FILE REPORTS, WHO DO NOT APPROPRIATELY CARE FOR THE WARD, OR WHO MISAPPROPRIATE, MISMANAGE, OR WASTE THE WARD'S ESTATE, AND THESE GUARDIANS CAN BE SUED TO RECOVER THESE DAMAGES.***

VIII. Death, Resignation, Removal, and Restoration – guardianship ends

- a. Death of either Ward or Guardian – family member may ask to be appointed to replace the deceased guardian or the court may appoint an attorney
- b. Resignation of Guardian – family member may ask to be appointed to replace the deceased guardian or the court may appoint an attorney
- c. Removal of Guardian
 - i. May be removed for failure to file annual reports; for failure to provide adequate housing or appropriate medical care; for squandering the ward's property
 - ii. The court may attempt to recover any of ward's assets
 - iii. Family member or attorney may be appointed to replace
- d. Restoration of Ward to Capacity – no guardian needed any longer

**EXAMPLE PHYSICIAN'S
LETTER AS TO DEGREE OF
INCAPACITY**

To The Honorable Judge of the [insert type of court]:

My name is Dr. _____. I am a physician currently licensed in the State of Texas. I have been the doctor for _____ for the past _____, and [he/she] was last examined by me on _____. Based upon that examination and my observations, it is my opinion that _____ is ___ mentally incapacitated, ___ physically incapacitated, or ___ both mentally and physically incapacitated. (Please check **ONE** box.)

The answers to the following questions are my opinion about _____'s incapacitation.

*[1. What is the general nature and degree of the incapacity?

2. What is _____'s medical history as it is related to the incapacity?

3. What is the prognosis, including the estimated severity, of the incapacity?

4. How, and in what manner, does _____'s physical or mental health affect [his/her] ability to make or communicate responsible decisions?

5. Is _____ on any medication which affects [his/her] demeanor or ability to participate in court proceedings? If so, what medications is [he/she] on and how is [his/her] demeanor or ability to participate in court proceedings affected?

6. If the underlying diagnosis of the incapacity is that of "senility," please describe the precise physical and mental condition underlying the diagnosis of senility.

7. Is _____ capable of safely operating a motor vehicle?

8. Does _____ have the mental capacity to vote in an election?

9. The following information further substantiates my diagnosis that _____ is incapacitated:

]**[1. What is the general nature, degree, and severity of the incapacity?

2. What are _____'s functional deficits as they are related to _____'s ability to handle business and managerial matters, manage financial matters, make personal decisions regarding residence and marriage, and consent to medical, dental, psychological, or psychiatric treatment?

3. What is _____'s physical condition, mental function, and medical history, if any?

4. How, and in what manner, does _____'s physical or mental health affect [his/her] ability to make or communicate responsible decisions? Please include _____'s ability to understand or communicate, recognize familiar objects and individuals, perform simple calculations, reason logically, and administer daily life activities.

5. Is _____ on any medication which affects [his/her] demeanor or ability to participate in court proceedings? If so, what medications is [he/she] on and how is [his/her] demeanor or ability to participate in court proceedings affected?

6. Please describe the precise physical and mental condition underlying the diagnosis of mental disability, and state whether _____ would benefit from supports and services that would allow [him/her] to live in the least restrictive setting.

7. Considering the nature, degree, and severity of _____'s incapacity, is _____ capable of safely operating a motor vehicle?

8. Considering the nature, degree, and severity of _____'s incapacity, does _____ have the mental capacity to vote in an election?

9. The following information further substantiates my diagnosis that _____ is incapacitated:

] *Respectfully submitted,

_____, M.D.

_____, Texas _____

(Answer the following ONLY if this Person is NOT fully Incapacitated.)

10. It is my opinion that _____ is incapable of making a decision concerning matters in the following areas, and I believe a Guardian should be appointed and given the following powers and authority as indicated by a mark before the appropriate letter:

- a. The power and authority to manage all of the proposed ward's financial affairs;
- b. The power and authority to collect and to file suit on debts, rentals, wages, and other claims due the proposed ward;
- c. The power and authority to pay, compromise, and defend claims against the proposed ward;
- d. The power and authority to contract and to incur other obligations in the proposed ward's behalf in excess of \$ _____ ;
- e. The power and authority to enter into all obligations and purchases in the proposed ward's behalf valued in excess of \$ _____ ;
- f. The power and authority to apply for, and to receive, funds from governmental sources for the proposed ward; or, in the alternative, to execute a binding waiver of funds to be received from governmental sources on behalf of the proposed ward;
- g. The power and authority to make all health care decisions for the proposed ward;
- h. The power and authority to apply for, and to consent to, governmental services in the proposed ward's behalf;
- i. The power and authority to apply for, to consent to, and to enroll the proposed ward in non-residential programs and services which are reasonably required and needed by the proposed ward and which are operated by public and private agencies and facilities;
- j. The power and authority to make application for, to consent to and to enroll proposed ward in public and private residential care facilities;
- k. The power and authority to make employment decisions;
- l. The power and authority to apply for, arrange for, and consent to any and all psychological and psychiatric tests and evaluations for the proposed ward, including, but not limited to, a comprehensive diagnosis and evaluation;
- m. The power and authority to consent to the disclosure of the proposed ward's psychological records, and medical records;
- n. The power and authority to consent to major medical and dental treatment and testing for the proposed ward, including surgery, psychotropic drugs and including the choice of physician or dentist, except that the limited guardians shall not have the power or authority to consent to a sterilization for the proposed ward, and except minor medical problems such as cuts, bruises, colds, etc;
- o. The power and authority to apply, to consent to, and to enroll the proposed ward in appropriate educational services;

- p. The power and authority to make decisions related to military service;
- q. The power and authority to enter or procure insurance contracts of every nature;
- r. The power to propose or to contest a proposed transfer or discharge of the proposed ward from a state school, state human development center, community Department of State Health Services (DSHS) center, or any other placement;
- s. The following power and authority concerning the proposed ward, and not listed above, should be given to the Guardian:

Respectfully submitted,

_____, M.D.
_____, Texas _____

**PHYSICIAN'S AFFIDAVIT SUPPORTING MENTAL STATUS
EXAMINATION**

STATE OF TEXAS

§
§
§

COUNTY OF _____

On this day _____, M.D., personally appeared before me, the
(Physician's name)
undersigned notary public, and after I administered an Oath to him/her, upon his/her Oath stated as
follows:

“I have personally examined _____ and completed the mental status
(Proposed Ward's Name)
examination form. The facts in it are within my personal knowledge and are true and correct.”

Physician Signature

Physician's printed name

SWORN TO and SUBSCRIBED before me by _____ on this the
(Physician name)
____ day of _____, 20____.
(date) (month)

Notary Public in and for the State of Texas

LANDLORD/ TENANT

BASIC OUTLINE

Landlord / Tenant Basics

- I. **Section 8 Housing or Public Housing?** – Refer to Legal Aid Provider – different set of rules apply when applicant is living in public housing; applicant has agreed to more stringent rule in order to have low rent; especially stringent regarding illegal substances and exactly who is inhabiting the rented apartment
- II. **Lease** – always look to the lease first for terms
- III. **Provisions Generally Applicable to Landlords and Tenants**
 - a. Notice Required for Terminating Tenancies
 - i. Monthly tenancy or month-to-month may be terminated by either Landlord or Tenant by giving notice of termination to other
 - ii. If notice is given and rent-paying period is at least one month, tenancy terminates on later of:
 - 1. Date given in notice
 - 2. Once Month after date on which notice is given
 - iii. Landlord and Tenant may agree in writing to different period of notice or no notice at all
 - b. Subletting – tenant may not rent to another person without prior consent of landlord
 - c. Landlord has duty to mitigate damages if tenant abandons leased premises in violation of lease.
- IV. **Residential Tenancies**
 - a. Interruption of Utilities – Landlord may interrupt if:
 - i. Bona Fide Repairs
 - ii. If electric bill is included in rent (“bills paid” lease), and tenant is at least seven days late with rent, and landlord have given written notice at least five days before disconnection date
 - iii. Landlord may NOT disconnect water, wastewater, or gas
 - b. Removal of Property and Exclusion of Residential Tenant
 - i. Landlord may remove doors, windows, etc. for bona fide repairs, construction, or emergency
 - ii. Landlord may change lock of tenant who is delinquent in paying rent
 - 1. Tenant is delinquent in paying all or part of rent
 - 2. Landlord mailed (with five days notice) or hand-delivered or posed on door (with three days notice)
 - 3. Notice must state location to obtain new key, landlord must provide new key (whether delinquent rent is paid or not)
 - iii. Remedy for landlord violation: generally, tenant may recover premises, one month’s rent plus \$500, actual damages, court costs, and reasonable attorney’s fees.
 - c. Occupancy Limits – maximum number of adults = three times the number of bedrooms, except when landlord is required by fair housing laws or allow more OR adult who causes violation is seeking temporary sanctuary from family violence (not to exceed one month).
- V. **Repair or Closing of Leasehold**
 - a. Landlord’s Duty to Repair or Remedy
 - i. Landlord shall make diligent effort to repair
 - 1. Tenant specifies condition in notice
 - 2. Tenant is not delinquent in payment of rent at time of notice, AND
 - 3. Condition materially affects physical health or safety of ordinary tenant
 - ii. Except normal wear and tear, Landlord does not have duty to repair if condition caused by tenant, lawful occupant, family member, or guest
 - b. Notice and Time for Repair – in writing!!
 - i. Landlord liable if:
 - 1. Tenant gave notice to person to whom or place where rent is normally paid

2. Condition materially affects physical health or safety of ordinary tenant
 3. subsequent written notice given after reasonable time to repair OR first notice was given by certified mail, return receipt requested or registered mail
 4. Landlord has NOT made diligent effort to repair
 5. Tenant was NOT delinquent in payment of rent at time of notice
- ii. Reasonable time – rebuttable presumption that seven days is reasonable
- c. Tenant’s Remedies
- i. Tenant may terminate lease, have condition repaired, “repair and deduct,” or obtain judicial remedies
 - ii. Repair and Deduct – under very specific circumstances, tenant may repair condition and deduct amount spent from rent
 1. Requires written notice by tenant of intent to repair
 2. Must involve one of the following:
 - a. Backup or overflow of raw sewage into dwelling
 - b. Complete lack of potable water
 - c. Lack of heating or cooling and notice to Landlord by appropriate housing or health agency that lack of heating or cooling materially affects health or safety of ordinary tenancy
 - iii. Deduction cannot be more than amount of one months rent of \$500, which is greater.

VI. Security Deposits

- a. Security Deposit – advance of money that is intended to secure performance under lease
- b. Obligation of Refund – Landlord shall return security deposit to tenant on or before 30th day after date tenant surrenders premises
- c. Accounting – Retention of Security Deposit – Landlord may deduct charges or damages for which tenant is liable or as a result of breaching lease but must give accounting (itemized list of all deductions) unless tenant owes rent when he surrenders the premises and there is no dispute about amount owed
- d. Tenant’s Forwarding Address
 - i. Landlord is NOT obligated to return tenant’s deposit or give accounting UNTIL tenant gives landlord a written statement of tenants forwarding address.
 - ii. Tenant does not forfeit right to refund merely for failing to give forwarding address
- e. Liability of Landlord – landlord in bad faith is liable for amount equal to sum of \$100, three times the portion of deposit wrongfully withheld, and tenants reasonable attorney’s fees

VII. Security Devices

- a. Without Necessity of Tenant Request – dwelling must be equipped with:
 - i. Window latch on each exterior window
 - ii. Doorknob lock or keyed dead bolt on each exterior door
 - iii. Sliding door lock on each exterior sliding glass door
 - iv. Sliding door handle latch or security bar on each exterior sliding glass door
 - v. Keyless bolting device and door viewer on each exterior door
 - vi. French doors have other requirements
- b. Height Requirements – security devices must meet specific height requirements.
- c. Landlords duty to Repair or Replace – Landlord shall repair or replace security device on notification that device is inoperable or in need of replacement within reasonable time (presumed not to be later than 7th day after request received)
- d. Payment of Charges and Limits – Landlord may not require tenant to pay for repair or replacement of a security device due to normal wear and tear
- e. Removal or Alteration of Security Device by Tenant – device that is installed, changed, or rekeyed becomes a fixture and may not be remove, change, etc without permission of Landlord.
- f. Tenants remedies – some of tenant’s remedies:
 - i. “Install and deduct” reasonable expenses

- ii. Serve written request for compliance and unilaterally terminate lease if landlord does not comply
- iii. File suit for compliance or if tenant already moved out for actual damages, court costs, and attorney's fees

VIII. Smoke Detectors

- a. Smoke detectors must be located in same corridor as bedrooms
- b. Must be on ceiling or on the wall between six and twelve inches from the ceiling
- c. Tenant is liable if he removes battery without replacing immediately or knowingly disconnects or intentionally damages
- d. Tenant Remedies
 - i. Court order directing landlord to comply
 - ii. Judgment against Landlord for damages
 - iii. Court Costs
 - iv. Attorney's Fees

IX. Retaliation

- a. Landlord may not retaliate against tenant because tenant:
 - i. In good faith exercises right or remedy granted by lease, ordinance, or statute
 - ii. Gives notice to repair
 - iii. Complains in good faith to governmental entity either code violation or utility problem
- b. Landlord may not retaliate within six months after action described above by:
 - i. Filing eviction, except as listed in VII © below
 - ii. Depriving tenant of use of premises except for reasons allowed by law
 - iii. Decreasing services to tenant
 - iv. Increasing rent or terminating lease
 - v. Engaging in bad faith in course of conduct that materially interferes with tenants rights under the lease.
- c. Nonretaliation – Landlord is NOT liable for retaliation for:
 - i. Increasing rent under escalation clause in written lease for utilities, taxes, or insurance;
 - ii. Increasing rent or reducing services as part of pattern for entire multi-dwelling unit
 - iii. Tenant eviction for delinquency in rent
 - iv. Tenant eviction if tenant, family member, guest or invitee intentionally damages property or by word or conduct threatens personal safety of landlord, employees, or another tenant
 - v. Tenant eviction for tenants material breach of lease other than holding over
 - vi. Tenant eviction when tenant holds over after giving notice of intent to vacate
 - vii. Tenant eviction after landlord gives notice of termination at end of rental term and tenant holds over
 - viii. Tenant eviction after tenant holds over and landlord has given notice of termination based on good faith belief that tenant, family member, or guest or invitee might
 - 1. adversely affects quiet enjoyment of other tenants or neighbors
 - 2. materially affects health and safety of landlord, tenant, neighbors, or
 - 3. damage the property of landlord, other tenants, or neighbors

X. Forcible Entry and Detainer (“FED”) Suits – Evictions

- a. Forcible Entry and Detainer – person commits forcible entry and detainer if the person enters the real property of another without legal authority or by force and refuses to surrender the possession on demand (living in an apartment without timely paying rent)
- b. Notice to Vacate Prior to Filing Eviction Suit – “request” that the tenant leave before landlord files eviction suit
 - i. Landlord must give tenant at least three days’ written notice to vacate the premises before landlord files FED
 - ii. Notice to vacate shall be given in person or by mail at the premises in question

- iii. Notice in person may be by personal delivery to tenant or any person residing at premises who is 16 yrs old
- iv. Notice may be affixed to inside of main entry door
- v. Notice by mail may be regular mail or cert mail return receipt requested
- c. Procedures – personal service, service to any person over age 16 residing at premises, or substituted service procedurally sufficient for FED – citation will include appearance date not more than ten nor less than six days from date of service of citation
- d. Hearing – most hearings held on appearance date; very informal
 - i. *As a practical matter – if the renter is behind on rent and knows that there is no way to pay, this period (service, answer, and hearing) is when she/he should be looking for alternative housing arrangements.*
- e. Writ of possession – at least five days after loss at hearing
 - i. Orders officer executing writ to post a written warning on exterior front door notifying tenant that writ will be executed on or after a specific date
 - ii. Deliver possession of premises to landlord
 - iii. Instruct tenants to leave immediately and, if they fail to comply, physically remove them
 - iv. Instruct tenant to remove or allow landlord to remove all personal property from rental unit
 - v. Place the removed property outside the rental unit at nearby location by not blocking public sidewalk or street and not while raining, sleeting, or snowing
- f. Warehouseman's Lien
 - i. If personal property is removed and stored in warehouse, warehouseman has lien on property to extent of any reasonable storage and moving charges
 - ii. First class mail notice within 72 hours after execution of writ to tenants last known address with information about location where property can be redeemed and stating that:
 1. wearing apparel – including watches and rings
 2. tools, apparatus, and books of trade or profession
 3. school books
 4. family library
 5. family portraits and pictures
 6. one couch, two living room chairs, and a dining room table and chairs
 7. beds and bedding
 8. kitchen furniture and utensils – including microwaves
 9. food and foodstuffs
 10. medicine and medical supplies
 11. one automobile and one truck
 12. agricultural implements
 13. children's toys not commonly used by adults
 14. goods that warehouseman knows are owned by person other than tenant
 15. goods that warehouseman knows are subject to recorded chattel mortgage or financing agreement
 16. Cash
 17. **Landlords rarely seize all available property but only those with relatively high resale value – stereos, TVs, etc.*

TENANTS RIGHTS

TENANT RIGHTS

PERSONAL PROPERTY

- **Removing Property:** A landlord may not remove the landlord's property (door, refrigerator, window, etc.) from the premises as retaliation for unpaid rent.
 - If the landlord improperly removes such property, you may send the landlord a demand letter for the property (a copy of which follows), obtain a court order to have the property returned, or terminate the lease.
 - In the latter two cases, you may also recover actual damages, one month's rent and \$1000, plus reasonable attorney's fees and court costs, less any past due rent you owe. (A petition form follows.)
- **Unpaid Rent:** If rent is unpaid, a landlord may take the tenant's non-exempt personal property from inside (not in the yard of) the dwelling and only if such a provision exists in **bold** or underlined in the lease.
 - (Exempt personal property includes clothing including jewelry; tools, equipment, and book of the tenant's trade; school books; one automobile and one truck; family portraits and pictures and the family library; one couch, two living room chairs, and one dining table and chairs; all beds and bedding; all kitchen furniture and utensils, including refrigerator; food and food stuffs; medicine and medical supplies; children's toys not used by adults; all agricultural equipment; anything the landlord knows is owned by someone other than the tenant; and anything the landlord knows was bought on credit and still being paid off.)
 - The landlord must leave a list of all items taken along with the amount of unpaid rent.
 - To reclaim your property, simply pay the rent due.
 - If the lease states the landlord may also sell the property, then the landlord can charge you packing and storage fees only after sending you at least thirty days' notice of sale by certified and regular mail. Pay these fees and unpaid rent to reclaim your property. You have the right to buy your property at auction. The landlord must return to you any auction proceeds in excess of unpaid rent due.
 - If the landlord willfully violates the law on liens, you may recover the greater of one month's rent or \$500, return of any property not sold and proceeds from the sale, plus actual damages, plus reasonable attorney's fees, less any past due rent you owe. (A petition form follows.)
- **Abandoned Property:** A landlord may enter the premises, remove personal property, and change the locks if the premises are abandoned.
 - The premises may not be considered abandoned as long as rent is paid, but there is no clear definition of abandonment unless specified in your lease.
 - If you did not intend to abandon the premises but your landlord removed and disposed of your personal property, you may send your landlord a demand letter for the property and/or sue for the property's value. (A petition form follows.)

CHANGING LOCKS

- **Unpaid Rent:** A landlord may change the door locks or prevent entry when a tenant's rent is not completely paid, in an emergency or for repair, or when the tenant has abandoned the premises.
 - If the landlord wants to change the door locks because the tenant is behind on paying all or part of the rent, the landlord must first send a notice stating the earliest date the landlord will change the locks. This notice must be mailed at least five days before the locks are changed. The notice may be hand-delivered only three days beforehand if it is posted to the inside of the main entry door.

- The notice must also state the amount of the rent the tenant must pay to prevent changing of the locks and the name and address of the person to whom, or the location of the on-site management office at which, the late rent may be paid during normal business hours.
- **Notice of Intent:** If the tenant still does not pay all the rent owed after the landlord properly informs the tenant of his intent to change the locks, the landlord can change the locks. (The landlord should never change the locks with someone in the dwelling.)
 - Afterwards the landlord must post another notice on the front of the tenant's door that gives an on-site location or telephone number where the tenant can go or call 24 hours a day to obtain the new key.
 - The key must be provided within two hours of the request. The notice must also state the amount of rent and other charges for which the tenant is late and that the new key will be provided immediately, regardless of whether or not the tenant pays the landlord any of the money owed.
- **Failure to Provide Required Notices:** If the landlord changes the door locks without leaving the required notices or without providing a new key, or removes a door or other item improperly, you may terminate the lease or recover possession of the premises. In either case, you may also recover actual damages, two month's rent plus \$500, reasonable attorney's fees and court costs, less any past due rent owed by the tenant. (A petition form follows.)

SECURITY

- **Security Devices:** A landlord must install the following security devices:
 - a window latch on each exterior window;
 - a doorknob lock or keyed deadbolt on each exterior door;
 - a sliding door pin lock on each exterior sliding glass door,
 - a sliding door handle latch, or sliding door security bar on each exterior sliding glass door, and
 - a keyless bolting device (that only can be locked and unlocked from the inside) and a door viewer on each exterior door.
- **Re-Keying Locks:**
 - A landlord must re-key or change all the key-operated locks (or other combination locks) on the exterior doors between each tenancy at his expense not later than the seventh day after you move in. You may request the locks to be changed during your tenancy but at your expense.
 - The landlord must install, repair, or re-key devices within seven days of the request, or within three days if you notify the landlord of a break-in or attempted break-in at any unit in the complex within the past two months.
 - File all requests in writing (a form follows) and keep a copy.
 - The landlord may not charge you if the damage resulted from normal wear and tear but may charge you if you or your guests caused the damage.
- **Timely Repairs:** If the landlord does not make the repairs within the time limit, send the landlord a signed and dated written notice stating that the repairs have not been made and requesting compliance.
 - If repairs are not made seven days after sending the written notice, you may unilaterally terminate the lease; install/repair the security device and deduct the cost from the rent; or file suit (a form follows) for a court order requiring the landlord to bring all of his dwellings into compliance, and for actual damages, punitive damages, civil penalty of \$500 and one month's rent, court costs, and attorney's fees.
 - The simplest solution, especially if you want to remain in your apartment, is to have the repairs done yourself and deduct the costs of material and installation/labor from your rent.
- **Vandalism/Burglary:** If your apartment is vandalized/burglarized because your landlord was not in compliance with the security requirements listed above, talk to your landlord about reimbursement for damages. If you reach an agreement, get it signed and in writing. If you cannot reach an agreement but you can show that your landlord was not in compliance, you may sue for your damages (a form follows).

REPAIRS

- **Health and Safety:** The landlord is required to make repairs that could affect the physical health and safety of a tenant.
 - The landlord must repair problems resulting from normal wear and tear but not from misuse by you or your guests.
 - Non-functional smoke detectors, leaking plumbing, rodents, broken air-conditioning in extremely hot temperatures, sewage leaks, shattered sliding glass doors, and caved ceilings all affect health and safety, but leaking faucets or broken garbage disposals may not.
 - Check your lease for any provisions specifying additional repairs the landlord must make.
- **Notice in Writing:** Notify the landlord of the problem in writing (including the date, the type of problem, and your name and address) and keep a copy. (A copy of a notice form follows.)
 - You can deliver the notice in person to the manager or other person who collects the rent, but sending the notice certified mail, return receipt requested, is the best choice for two reasons: first, you will have solid proof that the landlord got your notice; and second, you only have to give a landlord one notice of a problem if it is sent certified.
 - If you deliver the written notice in person or regular mail, then you must send the landlord two notices.
 - You must not be behind in the rent when these notices are sent.
- **Timely Repair:**
 - If your landlord does not make the repairs within a reasonable time (usually seven days), you may sue for damages plus a month's rent, \$500, court costs, and a reduced rent until the problem is repaired (a form follows), terminate your lease (a form follows), or have the repairs done yourself and deduct the cost from your rent (this requires the city inspector to certify to your landlord in writing that the condition materially affects your health and safety).
 - In this case, filing suit is the best option since the landlord will cause problems if you try to terminate your lease and force you to court anyway, and many landlords will attempt to evict you, claiming the repairs deduction is actually unpaid rent.

SAMPLE LETTERS AND PETITIONS

Date: _____

Certified Mail Return Receipt Requested

(Landlord)

(Landlord Address)

(Landlord city, State Zip)

Re: Removal of Property

Greetings:

You recently removed the following property from the premises:

I request an explanation at your earliest convenience. If you fail to offer a reasonable explanation I will consider filing suit in court.

Please note that you may not remove a door, window, lock, latch, doorknob, furniture, fixtures or appliances that you furnish, fixtures or appliances that you furnish unless you are repairing and immediately replacing the item. If you violate this law you are liable for an amount equal to one month's rent plus \$1000, and my actual damages, attorney fees and court costs. See Texas Property Code Section 92.0081(a). (This is not intended to be legal advice to you; consult your own attorney.)

Thanks for your prompt attention.

(Your Signature)

(Your Printed Name)

(Your Address, City, State, Zip)

(Your Phone Number)

NO. _____
(filed by court)

_____,
PLAINTIFF (Your Name),

vs.

_____,
DEFENDANT (Landlord),

) IN THE JUSTICE COURT
)
)
)
) PRECINCT ____, PLACE ____
)
)
) _____ COUNTY, TEXAS

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE COURT:

Plaintiff files this original petition in the above-styled and numbered cause, and in support, shows the Court as follows:

I. DISCOVERY

1. Plaintiff intends to conduct discovery under Level 1.

II. PARTIES

2. _____, Plaintiff, is a resident of the county of this Court, within Texas.

3. _____, Defendant, may be served at the following address:
_____.

III. JURISDICTION AND VENUE

4. The amount in controversy is within the jurisdictional limits of this Court, and venue is proper as the cause of action arose in the county of this Court within Texas.

IV. FACTS

5. Plaintiff leased premises from Defendant.

6. Defendant removed the following item from the premises: _____.

7. Defendant did not remove the item for a bona fide repair, replacement or emergency.

8. Any provision of the lease which purports to waive or diminish Plaintiff’s right is void pursuant to Section 92.0081(j) of the Texas Property Code.

V. CAUSE OF ACTION

9. Defendant is liable to Plaintiff for removing item. Pursuant to Section 92.0081(a,h) of the Texas Property Code, Plaintiff is entitled to one month's rent, a civil penalty of \$500, actual damages, and court costs from Defendant.

VI. REQUEST FOR RELIEF

Plaintiff requests this Court grant the following relief:

- a. one month's rent, plus actual damages;
- b. a civil penalty of \$1000;
- c. court costs; and
- d. any other relief to which Plaintiff is entitled.

Respectfully submitted,

(Your Signature)

(Your Printed Name)

(Your Address)

(Your City, State, Zip)

(Your Phone Number)

Date: _____

Certified Mail Return Receipt Requested

(Landlord)

(Landlord Address)

(Landlord city, State Zip)

Re: Demand for Security Devices

Greetings:

I request that you provide or repair the following security device(s) to the premises:

- window latch on all exterior windows
- doorknob lock or keyed dead bolt on all exterior doors
- a sliding door pin lock on all exterior sliding glass doors
- a keyless bolting device on all exterior doors (that cannot be unlocked from the outside)
- a door viewer on all exterior doors

Section 92.153 of the Texas Property Code requires each of these devices to be installed and maintained in operable condition at all times at your expense. If you fail to provide or repair these devices or offer a reasonable explanation I will consider filing suit in court.

Please note that if you fail to provide or repair these security devices, you could be liable for a civil penalty of one month's rent plus \$500, punitive damages and my actual damages, court costs and attorney fees. See Texas Property Code Section 92.164/. (This is not intended to legal advice to you; consult your own attorney.)

Thanks for your prompt attention:

(Your Signature)

(Your Printed Name)

(Your Address, City, State, Zip)

(Your Phone Number)

NO. _____
(filed by court)

_____,) IN THE JUSTICE COURT
PLAINTIFF (Your Name),)
)
vs.)
) PRECINCT____, PLACE____
)
_____,)
DEFENDANT (Landlord),)
) _____ COUNTY, TEXAS

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE COURT:

Plaintiff files this original petition in the above-styled and numbered cause, and in support, shows the Court as follows:

I. DISCOVERY

1. Plaintiff intends to conduct discovery under Level 1.

II. PARTIES

2. _____, Plaintiff, is a resident of the county of this Court, within Texas.

3. _____, Defendant, may be served at the following address:

_____.

III. JURISDICTION AND VENUE

4. The amount in controversy is within the jurisdictional limits of this Court, and venue is proper as the cause of action arose in the county of this Court within Texas.

IV. FACTS

5. Plaintiff leased premises from Defendant.

6. Defendant failed to provide or maintain the following devices (mark all that apply):

- window latch on all exterior windows
- doorknob lock or keyed deadbolt on all exterior doors
- a sliding door pin lock on all exterior sliding glass doors
- a sliding door handle latch or security bar on all sliding glass doors

- – a keyless bolting device on all exterior doors (that cannot be unlocked from outside)
- – a door viewer on all exterior doors

7. Any provision of the lease which purports to waive or diminish Plaintiff’s rights is void pursuant to Section 92.006(a) of the Texas Property Code.

V. CAUSES OF ACTION

8. Defendant is liable to Plaintiff for failing to provide or maintain the security devices to the premises based upon one or more grounds. Pursuant to Section 92.164 of the Texas Property Code, Plaintiff requests the following relief for EACH violation noted above:

- a. Civil penalties of one month’s rent plus \$1000,
- b. Actual damages, and
- c. Court costs from Defendant.

VI. REQUEST FOR RELIEF

Plaintiff requests this Court grant the following relief:

- e. Civil penalties as requested herein;
- f. Actual damages;
- g. court costs; and
- h. any other relief to which Plaintiff is entitled.

Respectfully submitted,

(Your Signature)

(Your Printed Name)

(Your Address)

(Your City, State, Zip)

(Your Phone Number)

Date: _____

Certified Mail Return Receipt Requested

(Landlord)

(Landlord Address)

(Landlord city, State Zip)

Re: Demand for Re-keying of Security Devices

Greetings:

I request that you immediately re-key or change the security device(s) to the premises (including any devices having a key, card or combination, but excluding devices on closets or interior doors):

Select One:

- Re-key at Landlord's Expense: Section 92.156 of the Texas Property Code requires each of these devices to be re-keyed or changed between tenancies at your expense within seven days of my move. I have reason to believe this was not performed.
- Re-key at Tenant's Expense: Section 92.156 of the Texas Property Code requires you to re-key or change these devices et my expense as many times as I request.

If you fail to re-key or change these devices, or offer a reasonable explanation I will consider filing suit in court. If you fail to timely comply, you could be liable for a civil penalty of one month's rent plus \$500, punitive damages and my actual damages, court costs and attorney fees. See Texas Property Code Section 92.164. (This is not intended to be legal advice to you; consult your own attorney.)

Thanks for your prompt attention:

(Your Signature)

(Your Printed Name)

(Your Address, City, State, Zip)

(Your Phone Number)

NO. _____
(filed by court)

_____,) IN THE JUSTICE COURT
PLAINTIFF (Your Name),)
vs.)
) PRECINCT ____, PLACE _____
)
_____,)
DEFENDANT (Landlord),)
) _____ COUNTY, TEXAS

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE COURT:

Plaintiff files this original petition in the above-styled and numbered cause, and in support, shows the Court as follows:

I. DISCOVERY

1. Plaintiff intends to conduct discovery under Level 1.

II. PARTIES

2. _____, Plaintiff, is a resident of the county of this Court, within Texas.

3. _____, Defendant, may be served at the following address:

_____.

III. JURISDICTION AND VENUE

4. The amount in controversy is within the jurisdictional limits of this Court, and venue is proper as the cause of action arose in the county of this Court within Texas.

IV. FACTS

5. Plaintiff leased premises from Defendant.

6. Defendant failed to timely re-key or change security device(s) to the premises.

Select One:

- Re-key at Landlord’s Expense: Section 92.156 of the Texas Property Code requires each of these devices to be re-keyed or changed between tenancies at Defendant’s expense within seven days of the move. This was not performed.
- Re-key at Tenant’s Expense: Section 92.156 of the Texas Property Code requires Defendant to re-key or change these devices at Plaintiff’s expense as many times as requested.

- Any provision of a lease that purports to waive or diminish Plaintiff's rights is void pursuant to Section 92.006(a) of the Texas Property Code.

V. CAUSE OF ACTION

8. Defendant is liable to Plaintiff for failing to rekey or change the security devices to the premises. Pursuant to Section 92.164 of the Texas Property Code, Plaintiff requests the following relief:

- d. Civil penalties of one month's rent plus \$1000,
- e. Actual damages, and
- f. Court costs from Defendant.

VI. REQUEST FOR RELIEF

Plaintiff requests this Court grant the following relief:

- i. Civil penalties as requested herein;
- j. Actual damages;
- k. court costs; and
- l. any other relief to which Plaintiff is entitled.

Respectfully submitted,

(Your Signature)

(Your Printed Name)

(Your Address)

(Your City, State, Zip)

(Your Phone Number)

EVICTION HOLD OFF AGREEMENT

I, _____, a tenant at
(Your Name)

_____, have received a notice to vacate for
(Your Address)

nonpayment of rent, late fees and/or other sums owed. I agree to pay a total amount of \$_____ according to the schedule below which will fully settle all amounts owed as of the date of this agreement. No additional late charges will be added if I am late with a scheduled payment. In return for timely payments according to this agreement, an eviction suit will not be filed, or if an eviction suit has already been filed it will be dismissed. The signatures below confirm our agreement. Each payment will be recorded below by the person receiving the payment.

Payment Schedule and Progress Report:

Future date: _____ Amount \$ _____ Date paid: _____ Received by: _____

Future date: _____ Amount \$ _____ Date paid: _____ Received by: _____

Future date: _____ Amount \$ _____ Date paid: _____ Received by: _____

Future date: _____ Amount \$ _____ Date paid: _____ Received by: _____

Landlord _____ Date: _____

(Your Signature) Date: _____

How-To Exercise Your Right as a Tenant to Repairs

Information compiled by Houston Volunteer Lawyers Program (HVLP) from:
The State Bar of Texas (<http://www.texasbar.com>), Austin Tenant's Council (<http://www.housing-rights.org>) and Tenants' Council of
Houston (<http://www.houstontenants.org>)

Texas law requires landlords to make a reasonable effort to repair problems that materially affect the physical health or safety of an ordinary tenant. Examples of things that materially affect the health and safety of an ordinary tenant are sewage backups, roaches, rats, no hot water, faulty wiring, roof leaks, and, sometimes, a lack of heat or air conditioning. If the problem violates a provision of your city's building, health, or fire code, then it is more likely to be considered a health or safety risk.

Step 1: MAKE SURE YOU ARE UP TO DATE ON YOUR RENT

Your rent must be current at the time of your first notice to your landlord; otherwise, your landlord will not have to perform his duty to repair.

Step 2: GIVE NOTICE TO YOUR LANDLORD OF THE REPAIRS NEEDED

You must give notice of the problem to the person to whom you pay rent. You should give the notice in writing and keep a copy for yourself as proof. Be sure to date the notice. Sending the notice by certified mail provides the best proof that it has been received. In fact, if you send your first notice requesting repairs by certified mail, return receipt requested, then you are not required to send a second written notice.

Step 3: GIVE YOUR LANDLORD REASONABLE TIME TO MAKE REPAIRS

Your landlord has a "reasonable time" to fix the problem after receiving your initial notice. The length of time considered reasonable will depend on the circumstances, although the law assumes that seven days is a reasonable time.

Step 4: CALL A CITY INSPECTOR (NOT REQUIRED)

If the landlord has had a reasonable time to fix the problem and has not done so, you may decide to call the appropriate city or county inspector (housing, health, or fire). This may put additional pressure on the landlord if the condition violates local ordinances. The inspector may also help you decide if the problem affects your health or safety. Be sure to get a written report and the name of your inspector.

Step 5: GIVE A SECOND NOTICE REQUESTING REPAIRS

Once the landlord has had a reasonable time to fix the condition after your first notice, you must send a second written notice requesting repairs. Remember, you do not have to send a second notice if you sent the first notice by certified mail, return receipt requested. It is a good idea to send this notice by certified mail to prove the landlord received it. Remember to save a copy of your notice. The notice should say that it is your second written notice, that you are requesting an explanation, and it MUST explain what you plan to do if the landlord does not repair the condition. You have three basic alternatives: (1) terminate the lease; (2) repair and deduct the amount from your rent (this is a tricky alternative, see below); or (3) file a lawsuit seeking an order directing repairs, damages, etc. It may be a good idea to list all the alternatives in your second notice and decide later which ones you will use. If you don't have to send a second notice, because your first notice was sent by certified mail, return receipt requested, then make sure it includes what you plan to do if the landlord does not respond to your request for repairs.

Step 6: EXERCISE YOUR TENANT REMEDIES

1. Terminate the lease and move.

The tenant should give the landlord a written notice that the tenant is terminating the lease. The notice should give a date by which the tenant will move. The tenant will be entitled to a refund of the security deposit in accordance with the law and to a refund of the rent for the remainder of the month after the tenant leaves. The tenant may also deduct the security deposit from the rent. A tenant who moves is also entitled to the other remedies listed below, except the court order directing repairs and the court-ordered partial rent reduction when taking the landlord to court.

2. Take the landlord to Justice of the Peace (JP), County, or District court where an order may be issued:

- Directing the landlord to make repairs (available only in county and district courts);
- Granting partial rent reduction back to the date of the first request for repair
- Awarding the tenant one month's rent plus \$500;
- Awarding the tenant money for actual damages, reasonable attorney's fees and court costs
- **Important Note:** While JP court is a cheaper alternative, you can only possibly get a money award up to \$5,000 plus court costs

3. Repair and Deduct from Next Month's Rental Payments

This remedy involves many procedures and conditions, and it is strongly recommended that you consult with an attorney or tenants association before you attempt to use your right to repair and deduct.

'Repair and Deduct' can be used ONLY if one of the following occurs:

- The landlord has failed to remedy the backup or overflow of raw sewage inside the dwelling, or flooding from broken pipes or natural drainage inside the dwelling; the landlord has agreed to furnish water and the water has stopped;
- the landlord has agreed to furnish heating or cooling and the equipment is not working adequately, and the landlord has been notified in writing by a local health, housing, or building official that the lack of heating or cooling materially affects health or safety of an ordinary tenant; or
- the landlord has been notified in writing by a local health, housing, or building official that the condition materially affects health or safety of an ordinary tenant.

CERTIFIED LETTER REQUESTING REPAIRS

Date: _____

Attention: _____
(Landlord)

(Landlord Address)

(Landlord City, State, Zip)

I, _____, am a tenant living at _____

Please make the following repairs:

I believe these condition(s) constitute a threat to my health and/or safety and I would like them repaired or remedied within a reasonable amount of time. Tex. Prop. Code § 92.056(d) presumes that (7) days is a reasonable amount of time for repairs.

Should you be unable to resolve the repair problem(s) within a reasonable amount of time, I request a written explanation of the reasons for the delay within five (5) days after you receive this notice.

Should you fail to comply with this request by certified mail, I will exercise my rights under Chapter 92, Subchapter B of the Texas Property Code. I will terminate my lease and move, pursue judicial remedies, or exercise the right to repair and deduct.

Thank you for your prompt attention in this matter.

(Tenant's signature)

(Tenant's printed name)

(Tenant's address)

(Tenant's City, State, Zip)

(Tenant's Phone Number)

RETALIATION

- A landlord may not wrongfully terminate the lease, file for eviction, deprive you of the use of the premises, decrease services, or increase the rent because you try to exercise your rights (such as requesting a repair).
- If the landlord illegally retaliates, send your landlord a letter (a form copy follows) demanding that the retaliation cease, and keep a copy for yourself. If this fails, you may sue your landlord (a form follows) for one month's rent plus \$500, the reasonable costs to move to another place (if you were forced out), and attorney's fees and court costs. Keep in mind that if your landlord has any valid reason (like being behind in rent) for the action he or she has taken against you (like eviction), it will be almost impossible to show that the retaliation is illegal.

ROOMMATES

- **Each Tenant:**
 - Most landlords require each and every tenant living in a unit to sign a lease.
 - Additionally, landlords typically require tenants to get permission for guests to stay in the unit for an extended period of time (sometimes just three days or more) or for tenants to sublet.
 - Check your lease for specific requirements, and always get any agreement between you and your landlord in writing.
- **Paying Rent among Roommates:**
 - Landlords do not care that you and your roommate agreed to split the rent. If some of the rent is unpaid, the landlord will hold all tenants responsible.
 - You can be evicted along with your roommate if your roommate has not paid his or her share.
 - It is best to get in writing any agreement between you and your roommate concerning payment of rent and utilities; in the event that your roommate stops paying, you can sue him or her in small claims court with proof of the financial agreement.
- **If Your Roommate Moves Out:**
 - If your roommate moves out before the end of your lease period, inform your roommate that he or she is still contractually responsible for splitting the rent.
 - If your roommate refuses to pay, try to find a replacement roommate.
 - Talk to your landlord immediately to inform him or her of the situation.
 - Change all utilities into your name to avoid their disconnection.
 - Pay the rent in full if you are able, or try to negotiate a temporary payment schedule with your landlord, with any agreement in writing.
 - If you find a replacement roommate, be sure that he or she signs a lease.
 - You may sue your former roommate for any losses you suffered because of his or her early move-out.

SECURITY DEPOSIT

- **Last Month's Rent:** You may not use the security deposit as the last month's rent. If you do, the landlord can sue you for three times the amount of unpaid rent, so it is in your best interest to pay the rent as usual.
- **Giving Notice:**
 - Provide written notice of intent not to renew your lease within the time requirement set forth in your lease. Either include in this notice or in a later written notice a forwarding address.
 - Until a landlord receives this address, the landlord cannot return your security deposit. This forwarding address does not have to belong to you- it may be that of a friend or family member. It is never too late to give your landlord a forwarding address and get your security deposit back.

- **Documenting Flaws in the Unit:**
 - Take pictures of any flaws in the unit (holes in the wall, stains on the carpet, etc.) when you move in so that you can later prove that you did not cause them. Including that day's paper in the picture is an easy way to date the pictures.
 - Take pictures of the entire unit when you move out so that your landlord cannot falsely accuse you of damages.
 - If at all possible, have your landlord walk through the unit with you and ask if any cleaning or repair should be done.
 - If your landlord agrees not to make deductions from your security deposit if you correct certain damages, get this agreement in writing.
- **Amount to be Returned:**
 - Your landlord must send you either your security deposit in full or an itemized list of deductions within 30 days of the date you moved out and provided a forwarding address. (If you left the unit owing rent, your landlord does not have to send you an itemized list.)
 - If you have not received these after 30 days, send your landlord a demand letter (a copy follows).
 - If your landlord sends you an itemized list of deductions that you believe is partially or wholly fraudulent, send a demand letter for amount you believe should be refunded and requesting proof of these expenses (pictures of damage and repair, receipts, etc.).
 - Courts disagree on whether you may sue for the remainder of your deposit when you have cashed a partial refund check from your landlord. It is safest to hold the partial refund check until the dispute over the remainder of your security deposit is settled.
- **Suing for the Deposit:** If your landlord fails to respond to your demand letter in a reasonable time (about ten days) or if your landlord refuses your request, consider suing for the deposit (a form follows).
 - Check your lease to see if you must sue in a specific jurisdiction, but otherwise it is best to sue in the jurisdiction of the rental unit. Bring all pictures, videos, correspondence, etc., along with a copy of your lease and the itemized list of deductions, if your landlord sent one, with you to the hearing.
 - If you can show that your landlord withheld part of your deposit in bad faith (which includes failing to send you a refund or itemized list within 30 days), the landlord is no longer entitled to any of the security deposit and must pay \$100, three times the full deposit amount, plus court costs and attorney fees.

UTILITIES

- If a utility is in your landlord's name (whether this utility is included in your monthly rent or your landlord receives the bill and submits to you for payment) and you receive notice that the utility has been or will soon be disconnected, you may either terminate the lease or pay the bill yourself.
 - You may terminate immediately, or within 30 days of receiving the first notice unless your landlord has provided evidence of the utility's payment, by sending written notice to your landlord. In this case, you may use your security deposit to pay for your last month's rent. You may then sue for actual damages (such as moving costs and additional monthly rent under a new lease), court costs and attorney fees.
 - You can keep the utility connected by changing the utility into your name and deducting the utility bills from your rent.

EVICITION

- **A landlord may evict you for:**
 - nonpayment of rent
 - staying past the agreed lease term
 - any violations of terms in your lease

- **Process for Eviction:**

1. **Written Notice:** The landlord must give you written notice to vacate at least three days (the time requirement may vary from 1-30 days if specified in your lease) before filing for eviction.
 - The notice to vacate must plainly and clearly state the reason for eviction (“Failure to leave the premises after the lease date,” etc.).
 - A notice to “pay rent or vacate” is improper notice unless the landlord has previously given you notice that unpaid rent is due.
 - If you are a month-to-month tenant (meaning that you pay rent monthly but there is no contractual time period), your landlord must provide thirty days’ written notice of non-renewal. After that thirty-day period, the landlord must provide at least three days’ written notice to vacate.
2. **Negotiate:** Talk to your landlord after receiving notice to vacate. Try to reach an agreement so that you come back into compliance with the lease (pay overdue rent, remove animals from the premises, etc.). It is best to get any agreement between you and the landlord in writing. A form agreement for payment of overdue rent (a copy of which follows) is available at www.texasenant.org/rights/eviction/forms/holdoff/holdoff.html. For any other agreement, put the terms in writing and both you and your landlord should sign and date. Be sure to keep a copy of any paperwork for your own records.
3. **Petition to Evict – Forcible Entry and Detainer (FED):** The landlord may formally file for eviction. Only a sheriff or constable can legally serve you with a copy of the eviction papers. After two unsuccessful attempts to hand deliver the papers, the sheriff or constable may slip the papers under your door or post them on your door.
4. **Showing Up in Court:** You must show up for the eviction hearing on the date given in the citation.
 - The date set for your hearing must be 6-10 days after the date you are served, but it is typically set at exactly one week.
 - You do not need to file an answer. You must appear at the Justice of the Peace (J.P.) court listed in the citation at the specified date and time. Do not be late!
 - Within five days of the date on the petition, you have the right to request a trial by jury. You must go to the J.P. court listed in the petition and pay the \$5 jury fee.
 - You may represent yourself or have someone else represent you, whether that other person is an attorney or not.
 - Be prepared to present your side of the story along with a copy of your lease and any pictures, documents, receipts, etc. that support you. The judge will not consider statements or affidavits from witnesses. You will need to bring any witnesses there in person for the hearing. You may compel the attendance of a witness by going to the J.P. court listed in the petition and requesting a subpoena. The charge for serving a subpoena is \$50.
 - If you lose your case, the landlord will be able to recover attorney’s fees from you if attorney’s fees were specified in the petition. If you win and used an attorney, you may request attorney’s fees from the landlord. The winning party may always recover court costs.
 - If you do not appear for your hearing, the landlord will win automatically.
5. **Possible defenses:**
 - Improper notice (oral notice, unclear, etc.)
 - Eviction suit filed too soon after written notice
 - Discrimination
 - Retaliation for requesting repairs or for reporting a problem to a government agency or nonprofit organization
 - Landlord’s refusal to accept late payment along with applicable late fee even though this is outlined by your lease or landlord has a pattern of accepting late payments and gave no notice of policy change
 - Loss of income (laid off, time in hospital, etc.) will usually NOT be considered as a valid defense

6. **Decision of the Court:** The judge will make a decision. If the landlord wins, you have five days to appeal the decision or move out. (Weekends and holidays do count toward this five-day limit, though the fifth day will extend to Monday if it falls on a weekend.) If you win, the landlord has five days to appeal.
 - *Filing an Appeal:* You may file for appeal by completing an “Appeal Bond” (a copy of which follows), available at the courthouse, with the J.P. court at which your eviction hearing was held. Think carefully before appealing, and be sure that your case has a better chance for success at county court than it did in J.P. court. You will need to contact an attorney about your appeal, and you must additionally either post a bond for payment if you lose your appeal or an “Affidavit of Inability to Pay” (a copy of which follows). Contact the J.P. court at which your hearing was held for more information on appeals requirements.
 - *Moving Out:* If you choose to move out, you must clean the apartment, remove all your personal property, and should take pictures to document the apartment’s final condition to avoid additional fees. Try to make arrangements with your landlord (signed and in writing) to pay any unpaid rent or fees in exchange for the landlord removing this debt from your credit report.
7. **Writ of Possession:** After five days, if you have not moved or appealed, the landlord may post a notice of writ of possession on your door with a date and time (no sooner than 24 hours from posting) that the writ will be executed.
 - If you have not left by the specified time, an officer will forcibly remove all people from the premises along with your personal property, which may be placed outside or placed in storage at your cost.
 - Your personal property will meet the same fate if you vacate and leave any property behind. Save yourself time and money by vacating within five days of the judgment if you do not appeal!
- **Public Records:** The downside to forcing your landlord to evict you is that court records are public information. Whether you win or lose your eviction hearing, other landlords will be able to see that your landlord filed for eviction against you and may choose not to rent to you. If you know that you have violated the terms of your lease, it is in your best interest to vacate, to negotiate with your landlord to pay any debts owed (for a clean credit report), and be able to rent elsewhere without a formal eviction following you.

FILING SUIT

- **Where to File:** You may file a civil suit in small claims court if the total amount you are requesting is \$10,000 or less. You may represent yourself in small claims court. If a specific jurisdiction is specified in your lease, you must file in that court. Otherwise, file in the precinct that contains the rental property in dispute.
- **The Petition and Filing Fees:** Use the petitions that follow or go to the courthouse and request a petition from the clerk. You must file the petition at the courthouse.
- **Courtroom Decorum:** Do not be late to your hearing! Be polite and respectful to the judge, and never interrupt a speaking party during the hearing. Bring with you any and all documents, pictures, lease agreements, correspondence, etc. If any witnesses could strengthen your position, ask them to speak at the trial; if they refuse, you may go to the court and request that the witnesses be subpoenaed, with a \$50 per witness service of process charge.
- **Appealing the Decision:** The losing party has the right to appeal the decision to county court within ten days. To appeal or to defend your position in an appeal, consult an attorney.

Eviction Case Appeal Bond (Surety)

The State of Texas

County of _____

A judgment was rendered in Case No. _____, entitled " _____ "
Landlord, as Plaintiff, vs. _____,
Tenant, as Defendant, in the Justice Court of _____ County, Texas, Precinct _____ Place _____, as follows:
Date of Judgment: _____
Judgment in Favor of: _____
Judgment Against: _____
Right to Possession: _____
Amount of Rent: \$ _____ Court Costs: \$ _____ Interest: _____ % from date of Judgment until paid.
From this Judgment, _____ (Landlord, Plaintiff or Tenant, Defendant) has appealed to the county court.

Appeal by Defendant (Tenant):

To appeal the Judgment, _____ Tenant, Appellant,
and _____
Surety, covenant that this appeal will be prosecuted with effect and all costs and damages which may be adjudged against
Appellant will be paid by Appellant, provided that the Surety shall not be liable in an amount greater than \$ _____, the amount
of this Bond.

Appeal by Plaintiff (Landlord):

To appeal the Judgment, _____ Landlord, Appellant, and
_____,
Surety, covenant that this appeal will be prosecuted with effect and all costs and damages which may be adjudged against
Appellant will be paid by Appellant, provided that the Surety shall not be liable in an amount greater than \$ _____, the
amount of this Bond.

Notice of the filing of this Bond will be given to all parties to the suit within five (5) days following the filing of the bond.

Signature of Appellant

Mailing Address
Date of Birth: _____ TDL _____

Given under (my) (our) hand(s) on _____

Signature of Surety

Mailing Address

Signature of Surety

Mailing Address

NOTARY PUBLIC, State of Texas
Printed Name: _____
My Commission Expires: _____

CONSUMER / BANKRUPTCY BASICS

Consumer Basics

I. Consumer

a. Common Issues Regarding Debts

- i. **Look at the Contract** – review the terms of the contract for consequences of non-performance
- ii. **No Contract Exists** – counsel the applicant regarding proof problems
- iii. **No Debtor’s Prison** – debtor cannot go to prison for not paying his debts but creditors can hire collection agents or attorneys to pursue collection of debts and can sue for debt, exceptions are not paying child support, spousal support, or other court ordered support.
- iv. **Collection Agents and Attorneys** – a creditor may hire others to collect a debt
 1. Federal Fair Debt Collection Practices Act – protects consumers from harassment from debt collectors (but not the original creditor)
 2. Texas Fair Debt Collection Practices Act – protects consumers from harassment from both debt collectors and the original creditor
 3. Debt collector may contact debtor’s employer for the limited purpose of trying to locate debtor
- v. **Creditor Harassment** – only the following meet the definition of creditor harassment
 1. use or threat of use of violence or other criminal means to harm the person, reputation, or property of person
 2. use of obscene or profane language
 3. publication of list of consumers who allegedly refuse to pay debts, except to consumer reporting agencies
 4. advertisement for sale of any debt to coerce payment of debt
 5. causing telephone to ring or engaging any person in telephone conversation repeatedly or continuously to annoy, abuse, or harass
 6. placement of telephone calls without meaningful disclosure of caller’s identity
- vi. **Stopping Collection Activities**
 1. Consumer may notify debt collector that consumer wants collector to cease contacting the consumer about the debt
 2. “Cease-and Desist letters” should be in writing and sent certified mail, return receipt requested, to debt collector
 3. debt collector may only contact consumer once after receiving notice – to inform consumer what the collector intends to do about the debt
 4. original creditor can still file suit to collect debt
- vii. **Wage Garnishment** – generally, wage garnishment limited to child support, IRS income taxes, and guaranteed student loans. Once wage garnishment starts, however, there is NO ESCAPING the debt.
- viii. **Repossessions of property not paid for**
 1. secured creditors may repossess items from debtor – must be done only if it can be done without breaching the peace
 2. creditor may re-sell the reposed property and debtor then owes any balance and may be sued for the balance
 3. debtor not required to allow “repo man” access to property without court order and may order repossessing agent to leave property
- ix. **Lawsuits to collect debts**
 1. Petition filed alleging debt exists (“suit on sworn account”)
 2. Depending on among in controversy, lawsuit may be brought in either JP or District or County Court

- a. JP Court – amount in controversy under \$5000 and time for answer is Monday after expiration of ten days
 - b. County or District Court – amount \$5000+ and answer time is Monday after expiration of twenty days
 - 3. How to Respond to the lawsuit – appear in court to plead your case?
 - a. Appear in Court to plead your case – the contract controls how the payments for property should be made and debtor will be responsible unless he can show that he is not the alleged debtor, he did not incur the debt, or he did in fact pay the debt
 - b. Don't appear and lose
 - c. It is probably too late to attempt to negotiate at this point.
- x. **Judgments** – after you lose in court – the next steps the creditor takes
 - 1. Writ of Execution – allows constable to seize non-exempt property of debtor
 - 2. Abstract of Judgment – legal document filed with the real property deed records to reflect that a person owes a debt (making it difficult to sell property until debt is paid)
 - 3. Turnover Application – process that forces debtor to appear at court to state what non-exempt property, if any, the debtor has to turn over toward collection of judgment
 - 4. Judgments may be listed on credit reports, making it difficult to obtain credit in future
 - 5. Judgment stays “alive” for ten years, but can be renewed
- xi. **Exempt and Non-Exempt Property**
 - 1. Generally, homestead is exempt from seizure – a mortgage holder, bank, purchase money lien holder can seize property
 - 2. Personal Property
 - a. Exempt Property
 - i. Home furnishings, including family heirlooms
 - ii. Provisions for consumption
 - iii. Farming or ranching vehicles and implements
 - iv. Tools, equipment, books, and apparatus, including boats and motor vehicles used in trade or profession
 - v. Wearing apparel
 - vi. Jewelry not to exceed 25% of aggregate limitation
 - vii. Two firearms
 - viii. Athletic and sporting equipment, including bicycles
 - ix. A two-wheeled, three-wheeled, or four-wheeled vehicle for each member of a family or for a single adult who holds a drivers license
 - x. Two horses, mules, donkeys, and a saddle, blanket, and bridle for each; 12 head of cattle; 60 head of other types of livestock; and 120 waterfowl
 - xi. Household pets
 - xii. Unpaid commissions for personal services not to exceed 25% of aggregate limitations
 - xiii. Cash is NOT exempt
 - xiv. Other Exempt Property
 - 1. current wages for personal services, except for enforcement of court-ordered child support payments
 - 2. professionally prescribed health aids of debtor or dependent of debtor

3. alimony, child support, or separate maintenance received or to be received by debtor for support of debtor or dependent of debtor
4. retirement plans that meet IRS qualification guidelines

b. Debt Relief Strategies

- i. Direct Negotiation with Creditors
 1. Debtors may ask for lower interest rate, decreased monthly payment, or decrease in principal balance – but this **MUST** be done early in the process
 2. If requested early (before overdue) and not requested often, some creditors are willing to allow a debtor to “skip” a payment while extending payment period, i.e., 36 month car loan becomes a 37 month car loan
 - ii. Credit Counseling Services
 1. May be able to assist with financial planning and budgeting
 2. may be able to assist in negotiation with creditors
 3. may be free or fee-based services – look for free services
 - iii. Bankruptcy – for debtors who find that there is not possibility of entering into agreement to repay debts
 1. Bankruptcy leads to “fresh start” by discharging debtor’s obligation to pay debts
 - a. Many debtors are being forced into Chapter 13 and are forced to enter into a payment plan for up to five years in order to obtain a “fresh start.”
 - b. Fees are involved for debtor education class, credit counseling, filing fees
 2. Judgment proof debtor may choose to do nothing, knowing that his/her property is exempt
- c. **Debtors who understand the concepts of exempt property and being judgment proof may use this knowledge to their advantage in negotiation with creditors, reminding creditors that accepting an offer by debtor may mean getting something versus suing debtor and getting nothing (or incurring additional expenses. Texas is a very “debtor-friendly” state.*

Bankruptcy Basics
CHAPTER 7

Income Guidelines determine whether Chapter 7 or 13 are filed.

Background: A bankruptcy trustee gathers and sells non-exempt assets and uses the proceeds to pay creditors according to the Bankruptcy Code. The debtor may keep exempt property either under federal or state exemptions.

- a. Debtor files documents revealing complete financial situation – **ALL debts, all property, and all income MUST be disclosed.**
- b. Debtor may keep exempt property and may choose either federal or state exemptions to protect his/her property to the maximum extent possible but may have to relinquish some property to satisfy creditors
- c. Bankruptcy will remain on credit report for ten years
- d. Bankruptcy may be filed only once every eight years
- e. **Current fees are \$274 and must be paid – no waivers**
- f. Both **credit counseling and debtor education classes are required** as of October 2005, at additional expense to debtor
- g. Upon filing, and “automatic stay” goes into effect, and all creditors must cease collection efforts, but failure to follow through with the bankruptcy process will allow creditors to restart collection process

h. CHAPTER 7 BANKRUPTCIES SHOULD NOT BE ACCEPTED WHILE APPLICANT IS DIVORCING SPOUSE – COMMUNITY PROPERTY ISSUES IMPACT BOTH CASES.

Purpose: The purpose of filing a Chapter 7 case is to give debtors a “fresh start.”

Discharge: The debtor is not liable for discharged debts. Discharge is only available to individuals. The debtor must complete an approved instructional course concerning financial management. However, secured creditor’s liens survive discharge and certain debts are not dischargeable such as:

- most taxes;
- domestic support obligations;
- most student loans
- court fines and criminal restitution; and
- personal injury resulting from DWI.

Reaffirmation: The debtor may reaffirm [assume personal liability] a debt, for example, a mortgage or auto loan, if the intent is to keep the house or auto.

Automatic Stay: The filing of a Chapter 7 petition automatically stays (stops) most collection efforts against the debtor and his property. Thus, so long as the stay is in effect, creditors may not prosecute or file lawsuits against the debtor or contact the debtor.

Eligibility to file:

- The debtor may be an individual or a business entity.
- The debtor is ineligible if
 - During the preceding 180 days, a prior case was dismissed due to failure to appear before the court or comply its orders; or
 - The case was voluntarily dismissed by the debtor after creditors sought relief from the automatic stay.
 - He fails to take a credit counseling course approved by the U.S. Trustee within six (6) months prior to the filing date.

Typical Scenario: Debtor has credit card debt that he is unable to pay and is either current on his mortgage and auto loans, if any.

THIS INFORMATION (I) IS NOT COMPLETE ; (II) DOES NOT CONSTITUTE LEGAL ADVICE; AND (III) WAS PREPARED WITH REFERENCE TO THE U.S. COURTS’ ARTICLE, “BANKRUPTCY BASICS.” U.S.Courts.gov, Bankruptcy Basics.
<http://www.uscourts.gov/bankruptcycourts/bankruptcybasics.html>

CHAPTER 13

Background: A chapter 13 case involves a plan under which a debtor proposes to pay all or part of his debts. The term of the plan may be from three (3) to five (5) years. However, if the debtor’s income is above the average median, the plan generally must be for five (5) years.

- a. **CHAPTER 13 BANKRUPTCIES ARE GENERALLY NOT ACCEPTED FOR REFERRAL BECAUSE OF THREE TO FIVE YEAR COMMITMENT.**
- b. Commonalities with Ch. 7 – full disclosure of debts, income, and property; exempt property choice; automatic stay

- c. Repayment Plan – debtor must have regular income in an amount sufficient to pay off delinquent debts over an extended period of time – the court must approve the pay-off plan
 - i. Plan can be between 36 and 60 months (3-5 years)
 - ii. Plan must be approved by bankruptcy trustee
 - iii. Debtor pays back all or a portion of debt to creditor

Purpose: To offer the debtor an opportunity to consolidate his debt and make one monthly payment to a trustee who distributes the funds to creditors. One of the main purposes of filing a Chapter 13 is to prevent foreclosure of a home or repossession of a vehicle or to pay priority tax claims.

Discharge: The debtor is entitled to a discharge upon completion of all payments called for under the plan if certain requirements are met and completes an approved instructional course concerning financial management. The debtor is not liable for discharged debts. Discharge is only available to individuals. However, secured creditor's liens survive discharge and certain debts are not dischargeable such as

- most taxes;
- domestic support obligations;
- most student loans
- court fines and criminal restitution; and
- personal injury resulting from DWI.

Automatic Stay: The filing of a Chapter 13 petition automatically stays (stops) most collection efforts against the debtor and his property. Thus, so long as the stay is in effect, creditors may not prosecute or file lawsuits against the debtor or contact the debtor. (All debt collection and foreclosure proceedings must stop.) However, if the debtor defaults on payments on a mortgage or auto loan, for example, or fails to make the monthly payments called for under the plan, the creditor may ask the court for relief from the automatic stay to proceed with repossession or foreclosure of its collateral.

Eligibility to file:

- Any individual may file a Chapter 13 case if his unsecured debts are less than \$336,900.00 and secured debts are less than \$1,010,650.00.
- The debtor is ineligible if:
 - During the preceding 180 days a prior case was dismissed due to failure to appear before the court or comply its orders; or
 - The case was voluntarily dismissed by the debtor after creditors sought relief from the automatic stay.
 - He fails to take a credit counseling course approved by the U.S. Trustee within six (6) months prior to the filing date.

Typical Scenario: The debtor has regular income and is facing foreclosure of his home or repossession of his vehicle or has tax liability.

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<http://www.uscourts.gov/bankruptcycourts/bankruptcybasics.html>

II. Types of Debt

- a. Secured Debts – creditor provided property directly to debtor and debtor made promise to pay – houses, cars, store charge cards; items are generally “repossessable”
 - i. Surrender the collateral (allow a repossession) – give back the property and let creditor re-sell it; balance may still exist

- ii. Redeem the collateral by paying fair market value of the item
- iii. Reaffirm the debt and continue making payments
- b. Unsecured Debts – credit cards, “quickie” loans, medical bills
- c. Other non-dischargeable debts – money owed to the US government (student loans and IRS debt) and child/spousal support generally not dischargeable

III. Debt Relief Strategies

- a. Direct negotiation with creditors
 - i. Debtor may ask for lower interest rate, decreased monthly payment, or decrease in principal balance
 - ii. If requested early (before payment is overdue) and not requested often, some creditors are willing to allow debtors to “skip” a payment while extending the loan period, i.e., 36-month car loan becomes a 37-month car loan
- b. Credit Counseling Services – investigate to ensure that agency is non-profit and check the fees that are charged
 - i. May be able to assist with financial planning and budgeting
 - ii. May be able to assist in negotiation with creditors
- c. Other alternatives
 - i. Cut expenses now – get a smaller apartment, get a roommate, buy a cheaper car, ride Metro, cut off cable service, eliminate other extras, stop using credit cards (any debt from these can then be included in bankruptcy)
 - ii. Increase income – get a (second) job
 - iii. Send creditor letters
- d. Creditor letters
 - i. Debtor can send letter, certified mail, return receipt requested, advising creditor that the debtor cannot pay the debt and asking that the creditor cease collection efforts (forms are available in many books)
 - ii. Creditor must cease collection efforts but can make one last contact to inform debtor of creditors intention (whether the creditor will write off the debt or sue)
 - iii. If creditor violates this law (state and federal versions), the creditor may be liable for damages
- e. Do Nothing – judgment-proof debtors

IV. Common Issues

- a. Both credit counseling and debtor education classes are required as of October 17, 2005
- b. **Stop using credit cards NOW!!** Continued use of credit cards after a debtor is aware of inability to pay his bills can lead to a judge to deny a discharge
- c. Judgment-proof debtor – a debtor is considered judgment-proof if all of debtor’s property is exempt (protected), i.e. creditor can sue but even if creditor obtains a judgment, it cannot be satisfied because debtor has no “extra” (non-exempt) property
- d. Monthly budget – are monthly expenses more than monthly income? Bankruptcy will not solve the problem of living beyond means and will only dissolve existing debt (and if expenses are greater than income, debtor will immediately be in debt again)
- e. Does the debtor’s situation pass the “smell test?” Other considerations:
 - i. Payment and spending history – were the bills paid regularly and on time with regular purchases until the loss of job or the onset of illness? Did debtor go on spending sprees or have lots of cash advances? Did this start before or after job loss or illness?
 - ii. “Robbing Peter to Pay Paul?” – cash-advancing from Credit Card A to pay Credit Card B, incurring not only more debt but also more interest? Depending on amounts and dates, this can be viewed as frauds and can prevent discharge.
- f. Medical Bills – is debtor likely to incur ongoing bills due to same or related medical problem? It’s better to wait to file if medical bills will be a continuing source of debt or to be sure that

debtor will qualify for Medicare/Medicaid/Gold Card, etc. Medical provider can refuse to provide services to a debtor if debt is discharged.

- g. Creditor Harassment – creditors have a right to attempt to collect the money that is owed to them and may send letters or call to have collection agents send letters or call
 - i. Caller ID – ignore phone calls from “unknown,” “out of area,” or “private” numbers
 - ii. No Caller ID – either everyone leaves a message and debtor returns the calls or debtor picks up when she recognizes caller as a non-creditor
 - iii. Don’t attempt to negotiate with creditors/collection agents or try to explain why payment is impossible – they don’t care; their job is to get debtor to send money
 - iv. Send creditor letters, especially if callers become abusive
- h. Debtor is sued for debt – what’s next?
 - i. Unless debtor can prove account is inaccurate, debtor will LOSE in court
 - ii. Judgment for creditor will be “executed” constable/sheriff will go to debtor’s address to attempt to collect debt (look for non-exempt property to sell to satisfy judgment)
 - iii. Judgment will be entered in county records
 - 1. Creates a lien against any real property (house and/or land) owned by debtor
 - 2. Makes sale of property impossible without settling judgment debt
 - 3. Judgment debt accumulates interest at court-approved rate
 - iv. Judgment must be re-executed every ten years to remain valid
 - v. Judgment-proof debtors
 - 1. Debtor has no non-exempt property
 - 2. Creditor can execute a judgment and find nothing that he can collect
 - 3. The judgment stays in place and affects debtor’s ability to get further credit, rent apartments, get jobs, buy a house or car
- i. How old are the debts?
 - i. Statute of limitations for most consumer debt is four years, after which most creditors cannot sue for the debt
 - ii. Most consumer debts remain on credit report for seven years

CONSUMER FLOW CHART

Determine number of months behind on mortgage and amount of monthly mortgage Payment.



Determine the approximate value of home and approximate remaining principal due for equity spread.



Determine number of creditors and total amount of debt.



Determine net monthly income and monthly necessary expenses.



Determine if non-exempt assets exist.

If any of the following exist, send to credit counseling and for bankruptcy follow-up.

1. Mortgage two months or more past due.
2. 7-10 or more creditors and \$35-\$50,000.00 or more in unsecured debts.
3. More than \$25,000.00 equity in house.
4. Disposable income of over \$500.00 per month.

If any of the following exist, counsel on abandonment and deficiency.

1. Mortgage past due (4 months or more).
2. No regular income.
3. No equity and property.

If no hope of payment but large equity, counsel on sale of home and move out, bankruptcy issues separate and later.

STOP HARASSING PHONE CALLS

Stop Harassing Phone Calls

FEDERAL FAIR DEBT COLLECTION ACT

- Applies to a “debt collector” that is someone in the business of collecting debts for another. FDCA doesn’t apply to a creditor collecting his own debts.
- Debt collectors may not harass, oppress, or abuse you in connection with the collection of a debt.
- It is illegal to cause a phone to ring repeatedly with intent to annoy, abuse, or harass; or to call without giving the caller’s identity; or to call after 9 p.m. or before 8 a.m.
- You can stop a debt collector from contacting you by writing a letter to the debt collector telling them to stop.
- Once you notify the debt collector in writing that you want them to stop communication with you, the debt collector must stop all communication except advising you of his next step.

TEXAS DEBT COLLECTION ACT

- Applies to anyone trying to collect a debt, including the store that sold you the goods and any agency it hires to collect the debt.
- It is illegal to oppress, harass, or abuse.
- Violators of the TDCA are subject to criminal and civil penalties. Consumers who think they have been harassed or deceived may seek injunctions and damages against debt collectors. These actions are also violations of the Texas Deceptive Trade Practices/ Consumer Protection Act, which gives the Attorney General the authority to take action in the public interest.
- A debtor-plaintiff can recover statutory damages but must produce proof of actual damages. A statutory recovery of \$100 for each violation of this Act is conditioned on the successful maintenance of a suit. See *Elson v. Resolution Services, Inc.*, 950 S.W.2d, 180 (Tex. App. 1997).

REMEDIES

- The Federal Trade Commission enforces the FDCA.
- You have the right to sue a collector in a state or federal court within one year from the date the law was violated. If you win, you may recover money for the damages you suffered plus an additional amount up to \$1,000. Court costs and attorney’s fees also can be recovered.
- A debtor-plaintiff can recover statutory damages absent proof of actual damages. Therefore, a plaintiff may not be awarded statutory damages in an amount exceeding \$1000. In computing the damage award courts will consider the frequency, persistence, and nature of noncompliance by the debt collector, and the extent to which such noncompliance was intentional. See *Dixon v. United Adjusters*, No. 79-179, 1981 U.S. Dist. LEXIS 18392 (D. Or. Feb. 19, 1981).

- Violators of the TDCA are subject to criminal and civil penalties. Consumers who think they have been harassed or deceived may seek injunctions and damages against debt collectors. These actions are also violations of the Texas Deceptive Trade Practices/Consumer Protection Act, which gives the Attorney General the authority to take action in the public interest.
- A debtor-plaintiff can recover statutory damages but must produce proof of actual damages. A statutory recovery of \$100 for each violation of this Act is condition on the successful maintenance of a suit. See *Elton v. Resolution Services, Inc.*, 950 S.W.2d, 180 (Tex.App.1997).

The above information was obtained from the Texas Attorney General’s website at http://www.oag.state.tx.us/consumer/debt_collection.shtml#fed and Know Your Rights!, 6th Edition, by Richard Alderman.

Sample Cease Communication Letter

- Send the letter by certified mail with a return receipt requested to each collection agency.
- Keep a copy of what you send.
- When you receive the green card receipt back, put it with the copy of the letter you sent.
- Include a reference to both state and federal statutes to ensure original creditor is included in demand to “cease and desist.”

Date
Your Name
Your Address
City, State, Zip

Their Name
Their Address
Their City, State, Zip

RE: File #...Creditor Name...Creditor Acct. #...Amount \$...
(Include all information that will assist bill collector identify which account you are writing about.)

Dear Bill Collector:

This letter is your notice to cease all communication with me, pursuant to both the federal and state Fair Debt Collection Practices Act, in regard to the above referenced debt. Failure to comply with this notice and to immediately **cease and desist** will result in legal action under these statutes.

Sincerely,

<Your Name>

The above information was obtained from the Texas Attorney General's website at http://www.oag.state.tx.us/consumer/debt_collection.shtml#fed and Know Your Rights!, 6th Edition, by Richard Alderman.

CREDIT CARDS

CREDIT CARDS

FEES

- Every credit card has associated fees, but not all cards come with the same fees or with the same rates. Typical fees include:
 - Over-the limit fee. This fee is charged each time you exceed the credit limit set by your creditor. This means that if you make three consecutive purchases, each of which results in your total balance being above your credit limit, you can be charged three separate fees.
 - Late fee. This fee is charged when your payment does not reach your creditor within the specified due date, or when you fail to submit the minimum payment required for that period.
 - Annual/Monthly fee. These fees are typically imposed on credit card holders with either no credit or bad credit.

INTEREST RATES

- Interest rates can easily increase without your noticing.
 - Read everything your creditor sends to you because the company can change your interest rate with just fifteen days' notice.
 - Almost all credit card agreements include a clause allowing the creditor to significantly increase your rate if you go over your credit limit or have a late payment. In fact, your interest rate could increase again upon your second transgression.
 - All of your creditors have access to your credit report. (See GETTING A COPY OF YOUR CREDIT REPORT.) If you are late on a payment or exceed your credit limit just once on one credit card, your other creditors may raise the interest rates on other credit cards you have.

NEGOTIATING RATES WITH YOUR CREDITOR

1. Collect better offers. If you have received pre-approved offers through the mail offering a 0% introductory rate, a lower interest rate, or a lower or non-existent annual/monthly fee, keep it. If not, go to www.bankrate.com and make note of creditors with lower fees and interest rates than yours.
2. Call your creditor and let the customer service agent know that you are considering switching to another credit card with better rates and fees. Ask if your creditor can match the better offer. If the agent says "no," ask to speak to a supervisor, and continue to make this request until the agent actually puts you in contact with a supervisor. If that supervisor also says "no," continue to climb the hierarchy. Along the way, you may be offered rates and fees that are reduced but not to the level of your example offer, and it is up to you when to settle for the compromise and when to keep negotiating. Generally, you should consider any reduction in rates and fees to be a victory.
3. If you are unable to reduce the rates and fees on your current credit card, consider applying for any pre-approved offer you have received. Be sure to carefully read the fine print, noting especially any fees or higher interest rates associated with balances transferred from other credit cards. Also, be aware that cards with introductory periods of lower or even 0% interest will increase their rates the moment you default. For example, if the card advertises 12 months at 0% interest with a 19% annual interest rate thereafter, but after just two months, you are either late with a payment or go over your spending limit, the card will automatically jump to the 19% interest rate.

STEPS TO ESCAPING DEBT

1. Do It Yourself

- Call your creditors. Try to get the interest rates and annual/monthly fees reduced. If you have missed payments or have reason to think a card may be turned over to a debt collection agency, talk to your creditor about a modified payment plan that could reduce your monthly payments.
- List your income from all sources. This includes net wages, social security, alimony, child support, food stamps, etc.

- List your expenses that are the same each month, like mortgage payments or rent, car payments, insurance premiums, child support, alimony, etc.
- List the expenses that vary, like entertainment, recreation, clothing, etc. Record even the most insignificant expenses.
- Add up all of your monthly income and all of your monthly expenditures. If your expenses are greater than your income, you will never escape debt.
- Identify necessary expenses, which includes housing, food, health care, insurance, and education. Then prioritize the rest. Anything that you can eliminate, do it.
- Easy ways to save money include carpooling or using public transportation in order to save gas money, eating at home rather than at fast food joints or restaurants, and cutting off nonessential shopping trips. Save on utilities by keeping your refrigerator and freezer below the coldest setting, raising the thermostat in the summer and lowering it in the winter when you are out of the house, turning off unused lights, and canceling or reducing any cable or satellite television packages you may have. Explain the situation and the rules to everyone who lives with you.
- Stop using your credit cards!!!
- If you have many credit cards (ten or more), especially those with annual/monthly fees, which need to be paid off, apply any excess money to the card with the lowest balance and do this until the card is paid. Your credit score will be higher if you retain the card, but if you cannot resist the urge to make purchases with it, or if the card has annual/monthly fees, cancel the card. After one card is paid off, choose the card with the lowest balance to pay off. If cards have similar balances, first pay off the card with the higher interest rate or with higher annual/monthly fees. Be sure to continue making the minimum payments on all your other cards on time. (The theory behind this method is that it quickly eliminates cards, doing away with more monthly minimum payments than would paying off the cards in the order of highest interest. This prevents defaulting on any one card, which would result in fees and higher interest rates, because of not being able to afford the cumulative total of so many minimum payments.)
- If you simply have high balances on a few cards, choose the card with the highest interest rate to pay off first. This means that you continue paying the minimum due on the other cards but pay all excess money toward the card with the highest rate. If a card has a slightly lower rate but has annual/monthly fees, consider this when deciding which card to pay off first. The goal is to eliminate the card costing you the most money. However, if a card could potentially be paid off in a month or two, pay off that card first simply so that you can have one less card to worry about. Again, your credit score will be higher if you retain the card, but if you cannot resist the urge to make purchases with it, or if the card has annual/monthly fees, cancel the card.

2. Credit Counseling

- If you are unable to devise your own plan, consider talking to a credit counselor. You may do this over the phone or in person, and either way, the consultation should be free of charge. Also, ask about any free educational materials or free workshops the credit counseling agency may offer.
- Money Management International (MMI) is an agency that offers these free services, and in almost any language. Call 866-889-9347 for more information or to schedule an appointment.

3. Debt Management Plan

- A credit counseling agency such as MMI may offer to enroll you in a debt management plan. This suggestion should only come after a certified credit counselor has thoroughly reviewed your financial information, provided you with personalized advice, and worked with you to create a budget.
- A debt management plan (DMP) has fees which vary between credit counseling agencies. Depending on your household income, MMI may waive these fees. Be sure that you understand any fees involved with a DMP and decide for yourself whether this is the best course of action.
- A DMP may or may not be right for you. A DMP requires you to make one monthly payment into an account from which the agency will pay your creditors. Creditors usually reduce their rates and waive certain fees. Call your creditors yourself to make sure they offer any such benefits the credit

counselor describes to you. Do not make payments into the DMP account until you know your creditors have accepted you into this program.

- You will not be able to use these credit cards while the DMP is in effect, and you will have to agree not to open any other lines of credit. Ask the credit counselor to estimate how long the DMP will last because it will likely take several years to complete.

4. Bankruptcy

- This is your absolute last resort. Bankruptcy information stays on your credit report for ten years and can make it difficult to obtain credit, buy a home, get life insurance, or sometimes get a job.
- You must get credit counseling from a government-approved organization within six months before you file for any bankruptcy relief. MMI is among the approved organizations, along with others that may be found at http://www.justice.gov/ust/eo/bapcpa/ccde/cc_approved.htm
- The following debts may NOT be discharged through bankruptcy:
 - Back child support, alimony obligations and other debts dedicated to family support.
 - Debts for personal injury or death caused by driving while intoxicated.
 - Student loans, unless it would be an undue hardship for you to repay.
 - Fines and penalties for violating the law, including traffic tickets and criminal restitution.
 - Recent income tax debts (within 3 years) and all other tax debts.
 - Debts you forget to list in your bankruptcy papers, unless the creditor learns of your bankruptcy case.
- Certain property is exempt from being taken and liquidated in order to pay your creditors. (See attached list.)
- Chapter 13 allows people with a steady income to keep property, like a mortgaged house or a car, that they might otherwise lose through the bankruptcy process. In Chapter 13, the court approves a repayment plan that allows you to use your future income to pay off your debts during a three-to-five-year period, rather than surrender any property. After you have made all the payments under the plan, you receive a discharge of your debts. You can again file under Chapter 13 in as little as two years after your last filing.
- Chapter 7 involves liquidation of all assets that are not exempt (see attached list). Some of your property may be sold by a court-appointed official or turned over to your creditors. You must wait eight years after receiving a discharge in Chapter 7 before you can file again under that chapter.
- If you are considering filing for bankruptcy, consult an attorney.

FAIR CREDIT REPORTING ACT

There are several laws that govern credit reporting: the federal Fair Credit Reporting Act (15 U.S.C. § 1681), the Texas Finance Code, Chapter 391, and Texas Finance Code, § 392.201 and 392.202. In general, these acts prohibit reporting of false information to a credit reporting bureau about a consumer's credit. These acts also provide certain requirements of the credit reporting bureaus in terms of reporting information provided, responding to disputed items, and providing information reported to the consumer. Consumers typically have three problems:

1. Getting a copy of their credit report to see exactly what is reported.
2. Generally cleaning up items that are being reported on their credit report with which they take issue.
3. Determining what should be on their credit report and for how long.

The Fair Credit Reporting Act requires a credit reporting bureau to disclose all of the information in the consumer's file upon request. 15 U.S.C. § 1681g. The consumer is entitled to a free report upon request once a year and additionally whenever the consumer receives an adverse action on the basis of a credit report. 15 U.S.C. § 1681h. A consumer may dispute with the credit bureau information that is reported about their credit. If a consumer sends a written dispute to the bureau, it must reinvestigate the disputed inaccuracies. The credit bureau has five business days to notify the provider of the information of the dispute and note the current status of the dispute in the consumer's file. If the credit bureau determines that the item disputed is inaccurate, it must promptly delete the information. If the credit bureau receives no response to the dispute from the person who reported the information within 30 days, the credit bureau must delete the information. The credit bureau cannot reinsert the disputed information into the consumer's credit report unless the person who provided the information certifies that the information is complete and accurate. The credit bureau is required to notify the consumer of the results of the reinvestigation within 5 days after its completion. If the reinvestigation does not resolve the consumer's dispute, the consumer may then write a summary of the dispute that the credit bureau must include in the file along with the disputed information being reported. If the credit bureau assists the consumer in writing the summary, it can limit the length of the dispute to 100 words. 15 U.S.C. § 1681i.

The Fair Credit Reporting Act also prohibits providers of information from reporting credit information about a consumer if the provider knows or has reasonable cause to believe that the information is inaccurate. 15 U.S.C. § 1681s-2. The provider is prohibited from providing information to the credit bureau if the consumer has given the provider written notice that the item is inaccurate and in fact the item is inaccurate. "Reasonable cause to believe that the information is inaccurate" is more than just the consumer's dispute. It is information that would make that would cause a reasonable person to have substantial doubts about the accuracy of the information. If a consumer submits an identity theft report to a person who reports information, that person cannot report the information about the consumer unless the person knows the information is correct or is informed by the consumer that the information is correct.

The Texas Finance Code makes it a misdemeanor offense for a person to report false information on a consumer's credit report. Tex. Fin. Code, § 391.002. It also provides a dispute process very similar to that provided under the Fair Credit Reporting Act, but for resolving items reported by a collection agency. Tex. Fin. Code, § 392.202.

There are some amendments that were made to the Fair Credit Reporting Act in 2003 that require credit reporting bureaus to take certain actions to try to prevent and correct credit reporting problems related to identity theft.

THIS INFORMATION IS NOT COMPLETE AND DOES NOT CONSTITUTE LEGAL ADVICE. Summary provided by Matthew Probus, Wauson-Probus 11-2-09

GETTING A COPY OF YOUR CREDIT REPORT

GETTING A COPY OF YOUR CREDIT REPORT

PURPOSE

Reviewing your credit report is important for catching identity fraud or any potential mistakes in your report, both of which could affect your eligibility for loans.

CONTENTS

Credit reports are divided into five major sections:

1. Header with information such as name, date of birth, address, SSN, and possibly yearly income
2. Accounts that have been open within the last seven years. Compare the account numbers with those in your records to verify that the accounts are valid.
3. Inquiries into your credit by both creditors to which you have applied and creditors with which you already have accounts.
4. Companies that have acquired your information to send you pre-approved offers.
5. Previous addresses.

FREE ANNUAL COPY

You may obtain an annual free copy of your credit report from each of the three credit bureaus. Your credit report is available immediately for viewing through the website below, but requests by phone or by mail through a form available on the website (a copy of this form follows) may take up to 15 days for processing. 1-877-322-8228

www.annualcreditreport.com

Additional Free Copies

- You are entitled to a free report if a company takes adverse action against you, such as denying your application for credit, insurance, or employment, based on information in your report. You must ask for your report within 60 days of receiving notice of the action. The notice will give you the name, address, and phone number of the consumer reporting company.
- You are also entitled to one free report a year if you're unemployed and plan to look for a job within 60 days; if you're on welfare; or if your report is inaccurate because of fraud, including identity theft.

Credit Reports for a Fee

Additional reports are available but may cost up to \$10.00 each.

Equifax: 1-800-685-1111; www.equifax.com

Experian: 1-888-397-3742; www.experian.com

TransUnion: 1-800-916-8800; www.transunion.com

BAD CREDIT

Negative but correct information (such as non-payment, slow payments, accounts sent to collection agencies, etc.) may remain on your credit report for 7 years and bankruptcy for 10 years. After this time, the information should automatically be removed from your credit report. Some information, like criminal convictions, has no time limits and will remain on your credit report.

CORRECTING MISTAKES

- Write to the reporting company, telling them what information seems inaccurate.
- Include copies (NOT originals) of documents that support your position.
- Provide your complete name and address, identify each item in your report that you dispute, state the facts and explain why you dispute the information, and request that it be removed or corrected. You may want to enclose a copy of your report with the items in question circled.

- Send your letter by certified mail, “return receipt requested,” so you can document what the consumer reporting company received. Keep copies of your dispute letter and enclosures.
- The credit bureau will usually launch an investigation within 30 days. If the bureau finds the disputed information is inaccurate, it must notify the other two consumer reporting bureaus so they can correct the information in your file. When the investigation is complete, the consumer reporting company will give you the results in writing and a free copy of your report if the dispute results in a change. If you ask, the consumer reporting company must send notices of any corrections to anyone who received your report in the past six months. You can have a corrected copy of your report sent to anyone who received a copy during the past two years for employment purposes. If the report is not corrected after the investigation, you may file a statement of up to 100 words with the bureau explaining your side of the story. This will remain with your credit file.

Experian
P. O. Box 9595
Allen, TX 75013-9595

Equifax
P. O. Box 740241
Atlanta, GA 30374

Trans Union
P. O. Box 1000
Chester, PA 19022

- Also, write to the creditor (the company that reported incorrect information) to let them know you dispute an item. Be sure to include copies (NOT originals) of documents that support your position. Many providers specify an address for disputes. If the provider reports the item to a consumer reporting company, it must include a notice of your dispute. If the information is found to be inaccurate, the creditor may not report it again.

FORECLOSURE PREVENTION COUNSELING BASICS

This document is designed to provide a basic understanding of Foreclosure Prevention Counseling. It does not include every issue that may arise in a particular case. Each case will have specific issues that must be treated on an individual basis.

Texas has a quick non-judicial foreclosure process for non-home equity loans (**Home equity loans must be foreclosed judicially**). The process is conducted by the trustee designated by the lender in the deed of trust (the mortgage instrument) without any court involvement.

The process may take as little as 41 days, depending on the timing between mailing the required notices and the actual foreclosure date. In most cases it takes about 60 to 90 days.

All foreclosure sales in Texas take place on the first Tuesday of the month between 10 a.m. and 4 p.m. and are conducted at the county courthouse.

Contents

- I. Understanding the Homeowner's Wants
- II. Texas Foreclosure Process Timeline
- III. Reason for Delinquency
- IV. Prepare a Current Budget
- V. Homeowner's Income
- VI. Understanding the Workout Options
- VII. Lender's Required Documentation
- VIII. Communicating with the Lender
- IX. HUD Approved Housing Counseling Agencies

I. UNDERSTANDING THE HOMEOWNER'S WANTS

Does the Homeowner want to keep their home?

Don't assume that all Homeowners want to keep their homes.

Some Homeowners have already faced the fact that they cannot keep their homes because of their current circumstances (loss or reduction of income, divorce, illness, death)

If the Homeowner doesn't want to keep their home provide them with information regarding

Selling the Property – If the Homeowner has enough equity in the property to cover the cost of the sale it may be good idea for them to sell their home. This gives the Homeowner a way to save their credit and possibly walk away with some money to start over.

Short Sale – If the Homeowner doesn't have any equity in the home they could sell their home for less than what they owe. Short sales should be handled by a realtor who has experience handling these types of transactions. A short sale must be approved by the servicer and can be difficult to complete.

Deed in Lieu of Foreclosure – The Homeowner will need to call their servicer to find out what will be required to begin the process. In some cases they will require that the Homeowner list the property for sale at least 2 months prior to the approval of the Deed in Lieu.

Foreclosure – In some cases the Homeowner will be unable to sell their home for market value, through a short sale, and the Deed in Lieu will be denied by the servicer. At this point the Homeowner will face the foreclosure sale of their property and the eviction process if they haven't moved out of their home. During this time the Homeowner should be saving as much money as possible to move and begin again.

If the Homeowner wants to keep their home

What caused the delinquency? Has it been resolved?

Is the Homeowner committed to the process to save their home?

Can the Homeowner afford their home?

Is there enough time to save the home from Foreclosure?

II. TEXAS FORECLOSURE PROCESS TIMELINE

Has the Homeowner received any mail from the servicer?

If yes, what does it say? It is very important that the homeowner open all mail sent from the servicer. In some cases you will find that the homeowner has been avoiding opening their mail because they are afraid to deal with the situation.

Time is very important when dealing with possible foreclosure. The closer the foreclosure sale date the fewer options are available to the Homeowner.

Texas Timeline

Judicial Process (less common) is available only for Home Equity Loans when no Power of Sale is present in the Deed of Trust. A foreclosure lawsuit must be started to obtain an order to foreclose on the property. If it is approved, the property can be sold in a foreclosure auction.

Non-Judicial Process (most common) is available when the Power of Sale is in the Deed of Trust. It normally takes 60 to 90 days between the Initiation of Foreclosure to the Foreclosure sale.

Required Notices!

20 Day Demand Letter – The servicer will mail out a Demand Letter that gives the Homeowner 20 days to come up with all the overdue mortgage payments. The Demand must include the amount due, the date and place to make the full payment. If the Homeowner pays the amount the loan within the given time it will be reinstated.

21 Day Letter of Acceleration – If the Homeowner does not pay the amount due in the Demand Letter within the given time, the servicer will send the Homeowner Letter of Acceleration. The servicer will also send notice to the Trustee to begin the sale of the property.

The Trustee must send (by certified mail) the Homeowner a **Third notice** of pending foreclosure sale (stating the date, place, and earliest time the sale can be held) at least **21 days before the foreclosure sale**. Notice must be mailed to the Homeowner's last known address in the servicer's records.

The Trustee will also post a copy of the notice at the courthouse and file a copy in the deed records. This notice alerts the debtor and all who read it that the property will be sold on the first Tuesday of the month occurring 21 days after the notice was forwarded, posted and filed.

The Homeowner can stop the foreclosure process prior to the sale by paying the full amount due under the note and any additional interest, late fees and trustee's fee due at the time.

Exception to the 20 day Right to Cure rule:

If the most common FNMA form deed of trust is used, once a default is declared, the lender is required to provide the consumer thirty days to cure the default. If a deed of trust is used which does not specify a right to cure period, Texas law requires that a consumer be provided with 20 days written notice of their right to cure their default. Beyond requiring thirty-days notice, the FNMA deed of trust requires the lender to provide specific notices to the consumer including notifying the consumer of his or her right to reinstate the debt after acceleration. In addition, the Texas Supreme Court requires the mortgagee to give clear and unequivocal notice of its intent to accelerate to the extent that the "the mortgagee "must bring home to the [mortgagor] that failure to cure will result in acceleration of the note and foreclosure under the power of sale." *Ogden v. Gibraltar Sav. Ass'n.*, 640 S.W.2d 232, 233 (Tex. 1982).

Texas does not have a right to Redemption (repurchase) the property from the servicer.

III. REASON FOR THE DELINQUENCY

It is important to document the reasons for the delinquency. The homeowner will need to write a letter of hardship to submit to the servicer. The letter should include all the events that lead to the delinquency. It should also include their desire to keep their home and the ability to pay the mortgage payment. The homeowner should sign and date the letter.

IV. PREPARE A CURRENT BUDGET

The most important document created by the homeowner is a current budget. It will help them decide if they can keep their home. Some homeowners have no idea how their money is spent every month.

The homeowner should list all sources of income for the household (work income, self-employed income, rental income, social security and disability income)

The homeowner should list all monthly expenses for the household as realistically as possible. The homeowner should not underestimate their expenses.

Compare the income and expenses. Is there a deficit?

If there is a deficit the homeowner must make some hard decisions to reduce their expenses. Every expense must be reviewed.

If the homeowner can't reduce their expenses any lower and there is a deficit, they have to decide if they can realistically keep their home. Their first response will be to keep their home no matter what the costs. The counselor should help them face the reality of the situation.

V. HOMEOWNER'S INCOME

The homeowner should look for ways to increase their amount of income by working overtime or part-time if possible. Some homeowners are able to rent a room in their home to bring in extra income.

Self-employed homeowners who are experiencing work reduction should be willing to look for alternative work until their business picks up.

If the homeowner is unemployed the servicer is unlikely to offer any workout options other than a Forbearance (see section VI). A Forbearance may not be available if the homeowner is over 9 months delinquent.

VI. UNDERSTANDING THE WORKOUT OPTIONS

Forbearance – A forbearance plan can temporarily reduce or suspend mortgage payments for a fixed period of time. After the forbearance period the homeowner will have to repay the full suspended/reduced amount or qualify for repayment agreement or modification.

Repayment – A repayment plan is often the first option that the servicer offers the homeowner to cure the delinquency. It normally includes an agreement by the homeowner to make a partial payment of the overdue amount over a 6-month period. This is in addition to the normal mortgage payment. Example: Homeowner's mortgage payment is \$1200 and they are in default for \$2400. Under the repayment agreement they would pay \$1200 plus \$400 that is overdue. Their mortgage payment for 6 months is \$1800. After 6 months the mortgage payment would go back to \$1200.

Modification – A modification is a written agreement that permanently changes the original terms of the loan (interest rate, monthly payment, length of the loan, principle amount). Most

modifications add the overdue amount to the principle due and re-amortize the loan. In some cases the interest is reduced.

Partial Claim (FHA-MI) and Advanced Claim (Private Mortgage Insurance) – Under the FHA Partial Claim, an insurer will advance funds (up to 12 months of mortgage payments) on behalf of a homeowner in an amount necessary to reinstate a delinquent loan. The homeowner will be required to sign a promissory note in the amount of the claim. The note is interest free and is not due until the first loan is paid in full.

A PMI Advance Claim is a loan provided by primary mortgage insurers to bring an insured homeowner's mortgage current. The homeowner is obligated to repay this "advance claim" loan to the primary mortgage insurer directly or through the insurer's designated servicer. In some instances, the mortgage insurer may not require repayment of advances.

Short Sale – If the Homeowner doesn't have any equity in the home they could sell their home for less than what they owe. Short sales should be handled by a realtor who has experience handling these types of transactions. A short sale must be approved by the servicer and can be difficult to complete.

Deed in Lieu of Foreclosure – The Homeowner will need to call their servicer to find out what will be required begin the process. In some cases they will require that the Homeowner list the property for sale at least 2 months prior to the approval of the Deed in Lieu.

VII. SERVICER'S REQUIRED DOCUMENTATION

The homeowner may be able to download a Loss Mitigation Packet from the servicer's website and in some cases the homeowner may be able to complete it online.

Most packets request the following:

A Letter of Authorization which gives the counselor permission to communicate with the servicer on behalf of the homeowner (must include the name of the homeowner, the property address, loan number, last four digits of the homeowner's social security number, counselors name, organization's name and contact information). The letter must be signed and dated by the homeowner.

A Hardship Letter (should include a statement that the homeowner wants to keep their home, show the ability and desire to cure the delinquency and that they currently occupy the home)

Financial Worksheet

Documents that verify all available income (pay stubs, recent tax returns, rental agreements, and Social Security Award letters)

Recent Bank Statements

** All documents should be prepared and submitted to the servicer's specifications. The loan number should appear on the top of each page sent to the servicer. The homeowner should follow-up with the servicer to make sure that the packet is complete.

VIII. COMMUNICATING WITH THE SERVICER

It is important to the foreclosure prevention process that the Homeowner knows who owns their loan. If it is a Fannie Mae or Freddie Mac loan the process and workout options available will be different. The homeowner can check if they have a Fannie or Freddie loan by going online or by calling.

www.FreddieMac.com or 1-800-FREDDIE (8am to 8pm EST)

www.FannieMae.com or 1-800-7FANNIE (8am to 8pm EST)

Or go to http://makinghomeaffordable.gov/loan_lookup.html

If the loan is not a Fannie or Freddie, the loan might be held by a single entity or a group of investors. The servicing company knows who owns the loan and the homeowner can request the information from the servicer.

Servicing companies are paid by the investor to manage the loan. Each investor gives the servicer guidelines on how workouts on their loans are to be handled.

Servicers work for the investors. Their ultimate goal is to minimize the investor's losses.

Counselor's negotiating with the servicer should do all of the following:

1. Have the signed letter of authorization available.
2. Make realistic recommendations
3. Have the homeowner on the phone or in the office if possible. Remind the homeowner that it often takes more than one call to resolve the issue. Instruct the homeowner not to offer information to the servicer that you have not discussed prior to the call.
4. Determine if there are any discrepancies between the information given to you by the homeowner and what the servicer is telling you. If you find that the homeowner has given you the wrong information, end the call politely and call back after you discuss issue with the homeowner.

Each servicing company is different and learning how to deal with them is important to the outcome you are able to get for you homeowner.

IX. HUD APPROVED HOUSING COUSELING AGENCIES

HUD sponsors housing counseling agencies throughout the country that can provide advice on buying a home, renting, defaults, foreclosures, credit issues, and reverse mortgages for free!

For a list of agencies in Texas go to www.hud.gov

PAYDAY LOANS

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From *The Poverty Law Handbook*
(reprinted with the Permission of the Poverty Law Section of the Texas State Bar)

A payday loan is largely self-explanatory: A loan until payday. The forms a payday loan can take are as various as there are unscrupulous lenders willing to make them. They prey on those who are so desperate at the moment they are seeking the loan that they will sign anything and agree to anything to get the cash to fix their dire life problem. The consequences are unforgiving. This chapter will address: (1) the industry and the form of loans generally; (2) what you are likely to see when a prospective client first comes to see you; (3) the law that controls payday loans; and (3) some ways you may be able to help a borrower struggling with the consequences of a payday loan.

A. The Industry.

The payday loan industry was virtually non-existent 15 years ago¹ Industry revenues have shot from \$810 million in 1998 to approximately \$45 billion in 2002.² In 2002, payday lenders were making about 65 million annual transactions involving approximately 10 million U.S. households.³ Payday lender can typically turn a 35 percent rate of return-on-equity. In California the payday lending industry has more retail outlets than McDonald's or Burger King.⁴

In Texas and, indeed most of the nation, the payday loan industry surrounds us. It is not confined to the "bad parts of town" or the "other side of the tracks." We can drive by a multitude of payday lenders in new commercial districts and in suburban areas. When online, we can find hundreds of payday lenders by a simple search for "payday loans." Some lenders operate out of storefront locations. Some lenders operate online. Some work both ways. Whether the loan is obtained in a store or online, the paperwork and the structure are almost identical. Let's take a look at a sample online application. As one website advertises, the loan application is in four easy steps.

¹ Creola Johnson, "Payday Loans: Shrewd Business or Predatory Lending", 87 Minn. L. Rev. 1 (2002).

² Sherrie L. Rhine, Maude Toussaint-Comeau, Jeanne M. Hogarth, and William H. Greene. "The Role of Alternative Financial Service Providers in Serving LMI Neighborhoods in Changing Financial Markets and Community Development,"; Federal Reserve Bank of Chicago, 2001. For a wonderful view into the microcosm of the financials and operations of a payday lender, check out the SEC filings of one of the largest, publicly owned payday lenders, World Acceptance Corporation on either the EDGAR service or on their website at www.worldacceptancecorp.com.

³ "Rent-a-Bank Payday Lending: How Banks Help Payday Lenders Evade State Consumer Protections," Consumer Federation of America and U.S. Public Interest Research Group, November 2001.

⁴ Michael A. Stegman, University of North Carolina-Chapel Hill, and Robert Faris, Center for Community Capitalism, University of North Carolina-Chapel Hill. "Payday Lending: A Business Model That Encourages Chronic Borrowing," January 2002.

Get Started

Step 1 of 4

I make at least \$1000 per month after taxes.	<input checked="" type="radio"/> Yes	<input type="radio"/> No			
I am a U.S. Citizen or permanent resident and at least 18 years of age.	<input checked="" type="radio"/> Yes	<input type="radio"/> No			
I currently have an active checking account.	<input checked="" type="radio"/> Yes	<input type="radio"/> No			
Do you use direct deposit?	<input checked="" type="radio"/> Yes	<input type="radio"/> No			
First Name:	<input type="text"/>	Last Name:	<input type="text"/>		
Referred By:	-- select one --				
Best Time To Call:	<input type="radio"/> Morning	<input type="radio"/> Afternoon	<input type="radio"/> Evening		
Best Number To Call:	<input type="text"/>	-	<input type="text"/>	-	<input type="text"/>
Email:	<input type="text"/>	Email Confirm:	<input type="text"/>		

This page is used to get general information about the borrower. Keep in mind that all of the information is also used on the back end during collections to locate and communicate with the borrower.

Personal Information

Step 2 of 4

Address:	<input type="text"/>	Apartment:	<input type="text"/>	
	<input type="text"/>	State:	-- select one --	
	<input type="text"/>			
Phone #:	<input type="text"/>	Issued on:	-- select one --	
	<input type="text"/>			
	<input type="text"/>			
	<input type="text"/>			
Month:	-- month --	Day:	-- day --	<input type="text"/>
Gender:	<input type="radio"/> Male	<input type="radio"/> Female		
Housing Situation:	<input checked="" type="radio"/> Renting	<input type="radio"/> Own		

Date Moved In:

-- month -- / -- day -- /

The second step picks up more detailed personal information that is also used to locate and collect from the borrower in the event payment is not made timely. Notice the field for a cell phone number. (Sadly enough, even desperate people seeking payday loans have cell phones.) It is an effective tool for the collector to be able to catch the borrower on her cell phone, which she typically leaves on even during work. It is also a way the collector can make the borrower feel hopelessly surrounded in the collection process.

Step 3 of 4

Employment & Deposit Information

Occupation:	<input type="text"/>		
Employer:	<input type="text"/>		
Work Phone:	<input type="text"/> - <input type="text"/> - <input type="text"/>		
Monthly Income:	<input type="text"/>	Income Source:	-- select one --
Employment / Benefits Start Date:	<input type="text"/>	<input type="text"/>	
How often do you receive paychecks?:	-- select one --		
Next Pay Date:	<input type="text"/>	Second Pay Date:	<input type="text"/>
Social Security #:	<input type="text"/>		
Bank Name:	<input type="text"/>		
Bank Phone:	<input type="text"/> - <input type="text"/> - <input type="text"/>		
Account #:	<input type="text"/>		
ABA Routing #:	<input type="text"/>	(Find your ABA#)	
Outstanding previous balances?	<input type="radio"/> Yes <input checked="" type="radio"/> No		

Note that this information has little to do with the potential borrower's creditworthiness. It primarily helps the payday lender know how and when to catch the borrower with money in her bank account at the right time. The lender will have the borrower sign an authorization to run electronic checks and debits on the borrower's bank account (or in the case of a store front lender, the lender will obtain a check from the borrower postdated for the borrower's next payday). With the information provided, the lender can time its collection to catch the money when it is there.

Personal References

Note: Your references will not be contacted during the loan approval process.

First Reference:

First Name:	<input type="text"/>	Last Name:	<input type="text"/>
Relationship:	<input type="text" value="-- select one --"/>		
Contact Number:	<input type="text"/>	<input type="text"/>	<input type="text"/>

Second Reference:

First Name:	<input type="text"/>	Last Name:	<input type="text"/>
Relationship:	<input type="text" value="-- select one --"/>		
Contact Number:	<input type="text"/>	<input type="text"/>	<input type="text"/>

Send me details on other offers.

Yes No

I have read & accept the Terms of Use in [Legal](#)

Yes No

My favorite part, saved for last, is the reference information. Notice the note at the top of the form: “Your references will not be contacted during the loan approval process.” Of course not. The lender is not trying to gauge the creditworthiness of the borrower. The lender is obtaining close friends and relatives to call if the borrower fails to pay. The embarrassment to the borrower is huge and it becomes one of the most effective collection tools the payday lender has available.

The borrower need only hit the submit button and he or she is on his or her way to ruin. In some instances, the lender calls the borrower and arranges to fax over a group of forms (or, in the case of a storefront lender, hands the forms over to the borrower), although most lenders conduct the entire process online using electronic signatures.⁵ Once the forms are completed for the loan, the money is wired directly into the borrower’s bank account or, in the case of a storefront location, a check is generated and given to the borrower. The lender will have the borrower execute a promissory note and loan agreement (usually contained in one document), an authorization to draft funds from the borrower’s account by electronic check or by debit, and sometimes a separate waiver of jury/consent to arbitration form (although usually the language is included in the note and loan agreement).

⁵ Electronic signatures are equally enforceable. See 15 U.S.C. § 7001.

The loan plus a loan fee will be paid on the borrower's next payday, which is typically two weeks from the date of the loan. The loan agreement will typically have a provision that if the loan and fee are not paid in full on a timely basis, the borrower can pay the loan fee and either pay interest payments until the loan is paid in full or renew the loan for another two weeks. Often, there is no such written provision, but the lender makes a regular practice of this. The finance charges differ company to company based on what each wants to charge and rarely adheres to the interest rates or fees allowed by the state in which the loan is made. A typical industry loan fee is \$30 per \$100 of loan. As discussed below, this charge would be a violation of the Texas Finance Code, Chapter 342, and the applicable regulations.

The company that the borrower thinks is the "lender" is almost never the real lender. One payday lender includes a provision that reads:

Third Parties

The Services on this Web site act as a system or venue to introduce and refer you to financial service companies and providers of information. Lender uses reasonable efforts to ensure the availability of the information and content, including links, which it makes available through the Services. However, the Services are composed of content not offered by Lender. Lender does not control (i) the quality, safety or legality of items available through or on its advertisers' Web sites or sites of third parties not in privity of contract with Lender, (ii) the truth or accuracy or legality of the content from those advertisers or those third parties (even if such content appears on the Services), or (iii) the availability or technical capabilities of their Web sites or links to those Web sites. Lender is not liable or responsible for content supplied by third parties, or for actions you might take in reliance on that content. This site contains links to other sites Lender is not responsible for the privacy practices or the content of such third party Web sites. We encourage you to read the privacy statement and Terms of Use of these linked Web sites, because their privacy practices may differ from ours.

Things that make you say "hmmmm." Further, the lender's agreement discloses that its services are limited:

Services

The Services on this Web site act as a system or venue to introduce and refer you to financial Service companies and providers of information. Lender uses reasonable efforts to ensure the availability of the information and content, including links, which it makes available through the Services. However, the Services are composed of content not offered by Lender.

* * *

For all of the Services, Lender is not involved in any transactions between you and any of its advertisers, and is not responsible for, and does not guarantee the price or performance of any goods, Services or information provided by advertisers and/or Services.

Finally, the lender often slips into its loan agreement provisions for choice of law, a contractual limitations period, mandatory arbitration, jury trial waiver, and class action waiver. Typical state laws chosen to apply to the loan agreement are Nevada and Utah, which contain no caps in interest rates or finance charges in payday loans.

In any event, the “payday lender” is typically only a loan broker with a relationship to a lender. Finding the lender is no easy trick. It will be listed on the loan agreement or on the promissory note, but most borrowers throw away their paperwork shortly after they get the loan. Even if they don’t throw away their documents and you get them to review, good luck finding the lender.

When payday comes, the borrower will most likely not have the money in his account. Typically he is already overdrawn. The electronic check or debit is returned insufficient and the real fun begins. After the lender runs the check or debit (two or even three or four times), resulting in multiple returned check or debit fees with the lender (added to the balance of the debt) and bank (mounting a negative balance in the borrower’s checking account), the lender sends the account to collections. Many times the lender will perform its own collections, but typically the lender will use a different name as if it is a separate debt collector. The collector often represents (falsely) to the borrower that he has written a hot check, that the matter is a criminal matter, and that if the borrower does not pay within 24 hours, the collector will have the borrower arrested and prosecuted for theft by check. If the borrower does not agree to pay, the collector often also threatens to call the borrower’s human resources department to “put a garnishment” on his wages. If this threat doesn’t work, the collector may even begin calling the borrower’s friends and family listed on the application, telling them that he has committed theft by check and needs to call in to avoid criminal prosecution.

At this point most borrowers either go to another payday lender to take out a larger payday loan to payoff the delinquent payday loan, or agree to make bi-weekly payments of “interest”, usually \$50 every two weeks (it is generally a random figure and is not tied to any specific interest rate much less any provision in the note or loan agreement), until the balance (loan plus charges/interest) is paid off.⁶ At this point you are probably asking yourself: “isn’t this usurious or something?” But before we begin our discussion of the law governing payday loans in Texas, it is helpful to take a typical example of what you will be dealing with when your prospective clients with payday loan problems come in to see you.

To help you understand how the payday loan documents are put together, I have attached a sample form of a payday loan agreement and related documents I recently had to deal with.

B. Your Typical Client

⁶ I once represented a borrower who took out a \$300 loan with a \$60 fee and paid \$50 every two weeks for four months before she fell off her payments and started receiving calls. The collectors were demanding almost \$800 (\$300 loan, \$60 fee, \$50 in returned check fees, and \$350 in “collection fees”).

Borrowers never come to see you when they are thinking about a payday loan or even immediately after they have taken out a payday loan. They only come to see you when they cannot pay the loan and the collectors are calling them with threats. Most of the borrowers will come to you out of fear with questions of whether the collectors can do what they are threatening to do. The borrower probably will not even refer to the loan as a “payday loan.” They will just tell you they took out a loan, they cannot afford to pay it back, and they are getting calls threatening to [insert threat]. Some common questions you will hear are:

- Can they arrest me for not paying?
- Can they prosecute me/put me in jail for not paying?
- Can they “put a judgment against me” if I don’t pay?
- Can they garnish my wages if I don’t pay?
- Can they call my HR department at work/supervisor at work?
- Can they put a lien against my home if I don’t pay?
- Can they come take all of my property if I don’t pay?

Of course the answers are no, no, yes but only after filing suit and going through the correct procedure, no, no, no and no, respectively. You will explain this to the borrower, but the borrower will still have the problem with the loan.

Keeping in mind the discussion about the payday loan industry above, you will have to walk your client through a series of questions to find out:

- How they obtained the loan
- Where they obtained the loan
- How much the loan was for
- What the payment terms of the loan were
- How much the interest/finance charge was
- When the loan went into default or when the next payment is due
- Who the collector(s) is that is calling them
- What collection efforts the collector(s) have taken against them
- What relief they are after

The borrower will almost never have the paperwork on the loan, but he may know what storefront or what Website he went to for the loan. The Website can be particularly helpful, because you can quickly go online and gather much of the information about the lender and the loan. The help you can offer to the borrower depends largely on the information you get about the particulars of the loan and the collection process. We will discuss solutions below. But before getting to solutions, we should look at the law governing the issues that arise with payday loans.

C. The Law Associated with Payday Loans

The law that applies to each payday loan will depend on the law chosen in the loan agreement. Texas law is almost never the chosen law. Nevertheless, if you would like to see Texas’ statutes and regulations governing payday loans, you should look at Chapters 341, 342, and 349 of the Texas Finance Code and Title 7, Part 5 of the Texas Administrative Code. The regulations in particular are clear and

helpful. The regulations can be found on the Texas Secretary of State's website at <http://www.sos.state.tx.us/tac/> under "TAC Viewer."

Although the statutes and regulations create a whole array of restrictions on payday lenders, the most important are the caps on interest rates/finance charges. Section 83.604(c) of Title 7 of the Texas Administrative Code states that a loan cannot exceed the maximum amount stated in Tex. Fin. Code, §§ 342.251 – 342.259. Texas Finance Code section 342.252 describes the maximum rates by loan amount. Most loans will be in excess of \$100, so you will probably be looking at subsection (3), which limits an acquisition charge to \$10 and "an installment account handling charge that is not more than the ratio of \$4 a month for each \$100 of cash advance." Tex. Fin. Code, § 342.252(3)(B). So on a \$500 loan, there would be an acquisition charge of \$10 and a handling charge of \$20 per month.

Section 342.252 is qualified by Tex. Fin. Code, § 342.253 with respect to a loan with a single installment due within one month. The handling charge cannot exceed the amount computed at a daily rate for the term the loan is outstanding. To make this calculation simple, the Consumer Credit Commission has published a table in 7 TAC § 83.604 giving the daily rates for certain dollar figures of loans. If you compare the "finance charge" on day 30 of these loan amounts in the illustrative table with the amount you calculate under section 342.252, you will see it equals the acquisition charge of \$10 plus the handling fee of \$4 for every \$100 of loan.

Under Tex. Fin. Code, 342.254, the lender cannot charge any charges other than those authorized in that subchapter. Section 342.256 prohibits delinquency charges in excess of \$10 or 5 cents for every dollar of the delinquent installment. The TAC regulation states more specifically that a lender may charge no more than 5 percent of the installment amount in default or \$10 once the installment is more than 10 days past due. 7 TAC § 83.602(c).

Texas law will probably not be the applicable law in the loan agreement, however. You will probably not have the time or resources to conduct extensive research into each state's usury laws to determine if the charges are legal or not, and this may not be the best approach to the client's problem in the short term anyway. There are several other legal issues that will probably make it impractical for you to prepare a suit against the lender for usury on the loan agreement. First, almost any loan agreement will have an arbitration agreement making any claims related to the loan subject to binding arbitration before the American Arbitration Association, the National Arbitration Forum or some other arbitration forum. The federal Arbitration Act will almost always apply and there is almost no way out of an arbitration agreement. The United States Supreme Court in *Greentree Financial Services Corp. v. Bazzle*⁷ recently held that where the agreement is silent as to arbitration, the arbitrator – not the district court – must decide whether the matter is subject to arbitration. The Fifth Circuit has followed this and will invariably order the case to arbitration for a determination of whether the agreement is subject to arbitration.⁸ Texas applicable state law may provide that in some instances arbitration agreements are not enforceable on grounds such as adhesion or unconscionability, but the requirements are usually so strict and the instances

⁷ 539 U.S. 444, 451-52, 123 S. Ct. 2402, 2407 (2007).

⁸ *Pedcar Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355, 363 (5th Cir. 2003).

of success so rare, that arbitration is almost always a certainty.⁹ Perhaps the only hope for being able to avoid arbitration is if the newly proposed Arbitration Fairness Act of 2007 is passed.¹⁰

The loan agreement will also typically contain a waiver of the borrower's right to bring, join, or participate in a class action. These are equally difficult provisions to defeat, (although not impossible)¹¹ which means that you will not be able to ask an arbitrator to certify the arbitration as a class action. The end effect of the arbitration agreement and class waiver provision will be to have you making claims against the lender in an arbitration on the borrower's loan only. It is not very economical to learn a different jurisdiction's law and bring a usury challenge just to address relief to one borrower with a \$200 loan. You should also be careful about filing such an arbitration claim, because the lender will almost certainly bring a counterclaim for the amount of the loan plus attorneys' fees, costs of court and post-judgment interest. The lenders' use of a well-drafted loan agreement and the arbitration process essentially ensures that no borrower will challenge her loan.

You should also be aware of the fact that many payday loans in Texas are made through physical storefront locations under the "CSO business model." Under that model, the storefront location, registered under Chapter 393 of the Texas Finance Code as a "Credit Services Organization"¹² or "CSO", acts as a loan broker "finding a loan" for the borrower. The CSO charges a fee for its loan brokering services. Typically, CSOs have one or more lenders they work with to provide the loans to the borrower. The loan itself is at a 10% interest rate, which is within the rate limits of the Finance Code for a consumer loan of this type. However, when the loan brokering fee is added to the interest charged, the effective APR is most often well in excess of 500% and is sometimes in excess of 1,000%. Unfortunately, a CSO's brokering fee is not considered interest.¹³ The CSO model has effectively emasculated the entire regulatory scheme for payday loans under Chapter 342 of the Finance Code and the regulations promulgated under that Chapter.

There has been recent legislation introduced in the Texas Senate to address this loophole in the law. In the 2007 legislative session, Senator Eliot Shapleigh (D. District 29, El Paso) introduced a series of bills aimed at pulling CSOs into the regulatory scheme. Senate Bill 753 would have added sections 342.606 – 342.608 to Chapter 342 of the Finance Code and would have required CSOs to report certain data to the Commissioner of the Office of Consumer Credit Commissioner regarding their transactions with borrowers. Senate Bill 855 would have added a new chapter to the Finance Code to regulate payday loans to military servicemembers and their dependents. Senate Bill 856 would have added section 393.308 to the CSO provisions of the Finance Code. That bill would have prohibited a CSO from

⁹ *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672 (Tex. 2006); *In re Advance PCS Health, L.P.*, 172 S.W.3d 603, 608 (Tex. 2005); *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002); *EZ Pawn Corp. v. Mancias*, 345 S.W.3d 87, 90-91 (Tex. 1996).

¹⁰ S. 1782 introduced July 12, 2007 by Senator Russell Feingold for himself and Senator Richard Durbin. The Act would invalidate predispute arbitration agreements covering consumer disputes.

¹¹ *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (2007); *Casper v. QC Financial Services, Inc.*, 503 F. Supp. 2d 1266 (D. Ariz. 2007); *Cooper v. QC Financial Services, Inc.*, 503 F. Supp. 2d 1266 (D. Ariz. 2007); *Scott v. Cingular Wireless*, 161 F.3d 1000, 160 Wash. 2d 843 (2007); *Muhammad v. County Bank of Rehoboth Beach Delaware*, 912 A.2d 88, 189 N.J. 1 (2006); *Szeteka v. Discover Bank*, 97 Ca. App. 4th 1094, 118 Cal. Repr. 2d 862 (2002).

¹² Tex. Fin. Code, § 393.001.

¹³ Tex. Fin. Code, § 393.302 and 393.303; *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 442 (5th Cir. 2004).

facilitating or assisting in obtaining credit for a lender under certain circumstances, primarily where the CSO is related to the lender in certain ways. Senate Bill 857 would have amended section 342.008 of the Finance Code to make clear that CSOs are subject to the interest regulations contained in Chapter 342 of the Finance Code. The bill would also have included a provision like that included in Senate Bill 856 into the CSO Chapter of the Finance Code. Finally, Senate Bill 858 would have effectively placed a 36% cap on interest rates on payday loans. These bills were all referred to the Senate Business and Commerce Committee, a hearing was held, and they died in committee.¹⁴

So what assistance can you offer to the typical payday loan borrower? The last section offers a checklist for assisting the borrower.

D. Checklist for Assistance

The following should serve as a checklist for assisting the borrower with a payday loan once collections have started on the loan:

1. Gather all information on the loan and the collection process to date, including copies of the borrower's payday loan documents.
2. Interview the borrower about his assets to determine whether the borrower is generally "judgment proof" under Chapter 41 and 42 of the Texas Property Code.
3. If the borrower has a loan agreement governed by Texas law, check the finance charge to determine if it appears to be in violation of the Texas Finance Code and the applicable regulations.
4. If the loan charges violate Texas law, check the loan agreement for arbitration agreement/class waiver to determine where you could file claims and how broad you could make the scope of your suit.
5. If the loan agreement is not governed by Texas law, explain to the borrower that you are only licensed in Texas and do not know the law of the state chosen in the loan agreement to govern the loan transaction. Explain to the borrower what arbitration is and the fact that they have the right to pursue any disputes with the lender in an arbitration.
6. If you or the borrower suspect that the interest rate/finance charge violates a state's law outside of Texas, encourage the borrower to file a written complaint with the agency or department of that state charged with the regulation of financial institutions. Even if you cannot determine

¹⁴ Copies of these bills are attached to this Chapter. The tape of the April 17, 2007, committee hearing can be accessed at <http://www.senate.state.tx.us> under "Archived Broadcasts." The questions and comments of the committee members in the hearing is eye opening. Witnesses were Leslie Pettijohn of the Office of Consumer Credit Commissioner (on SB 856, 857, and 858), Ann Baddour of Texas Appleseed (for SB 753, 856, and 857), Don Baylor of the Center for Public Policy Priorities (for SB 753 and 857), Shiree Sanchez of The Hispanic Alliance for Progress (for SB 753), Dawn White of Goodwill Industries of San Antonio, Texas (for SB 857), Russel Turbeville of the Harris County District Attorney's Office (for SB 858), Scott Sheehan of the Greenberg Traurig, LLP firm on behalf of First Cash Financial Services (against SB 753, 856, 857, and 858), and Charles P. Johnson of the Texas Consumer Finance Association (against SB 858). Registering but not testifying were Daniel Gonzalez of the Texas Association of Realtors (for SB 856) and Brad Shields of Security Finance (against SB 858). Witness List, Senate Bus. & Comm. Comm., April 17, 2007 – 9:00 a.m.

whether the loan is in violation of that state's law, the state agency can and more than likely will.

7. Explain to the borrower the basic rights he enjoys under the federal Fair Debt Collection Practices Act and the Texas Collection Practices Act.
8. Determine if the borrower would benefit from a "cease and desist" letter (See 15 U.S.C. § 1692g), a letter disputing the debt or requesting verification of the debt (See 15 U.S.C. § 1692g), or if you plan on representing the borrower, a representation letter (See 15 U.S.C. § 1692c(b)). These letters may provide relief to the borrower from the collectors on the debt.
9. If the collector is calling the borrower at his job, explain to the borrower that if he is prohibited from receiving those calls at work he should tell the collector and they should then stop. If the borrower has already told the collector this and the calls have not stopped, you could write a letter to the collector demanding the calls stop and pointing out the violation of the FDCPA. (Successful action by the borrower could result in statutory damages and attorney's fees and costs awarded against the collector.)
10. If you and/or the borrower do not plan on challenging the loan as in violation of state usury laws, explain the legal collection process to the borrower so that they will not be surprised by it.
11. Remind the borrower that if the creditor sues him in court, the borrower can insist on the judge staying the case and referring it to arbitration. Most borrowers are more comfortable with this private forum that does not require them to know rules of procedure.
12. Guide the borrower to a credit counselor if the payday loan is not the only debt that the borrower has. Typically, if the borrower needed a payday loan the borrower has many other debts and could benefit from credit counseling.

Probably the best way to help your community avoid this overall problem of predatory lending is to develop proactive educational programs on home finance, budgeting and credit counseling. An educated borrower will have the best chance of avoiding the payday loan trap altogether.

**MY CAR GOT TOWED!
WHAT DO I DO?**

TOWED CARS

RECOVERING YOUR CAR – FIRST STEP

- **Pay the fee to recover your car as quickly as possible**, even if you think your car was wrongfully towed.
 - Towing companies charge an initial towing fee plus additional fees for as long as the car is in storage. The sooner you pay the fee, the cheaper it will be to get your car back.
 - If your car was towed by the city, you may pay by cash, check, or credit card. Many private companies require cash payments and you will have to contact the company about accepted methods of payment.
- **Call the phone number** on the towing sign or ask the owner of the property where you were parked to find out where your car is being stored.
- The storage facility holding your car must send you a **certified notice within 10 days** of receiving your car. If you do not claim your car within 20 days from the date on the notice, your lack of response is considered consent to sell your car at public auction.
- Even if you cannot afford the fees to recover your car, **you have the right to remove any personal belongings from the car.**
- If you plan to later dispute the towing, it will be helpful **to take pictures of the area** where you were parked showing the location of any towing signs.

WHEN A TOW IS LEGAL

- A vehicle is considered "**abandoned**" and may be towed when:
 - it is unattended, and inoperable, more than five years old, and left on city property for more than 48 hours
 - has remained illegally on public property for more than 48 hours
 - has remained on private property without the owner's consent for more than 48 hours
 - or has remained on the right-of-way of a highway for more than 48 hours.
- A private landowner or parking facility can also order a vehicle towed **under certain conditions**. If the owner or operator of the designated area gives the owner of the parked vehicle actual notice that he or she must "move it or it will be towed," the owner of the vehicle must comply, or the vehicle can be removed.
- If a vehicle **is blocking an entrance, exit, fire lane, or aisle** of a parking facility, the owner or operator of the facility can order the vehicle towed.
- A vehicle can be towed from a private lot with "**Designated Parking Only**" signs without any other notice to the vehicle's owner, but only if the signs comply with certain requirements.
 - If signs are posted in each individual space, each sign must be permanently affixed in such a manner that it faces a car parked in its spot. Each sign must also indicate for whom the space is reserved (such as "Handicapped," "Reserved for Building Manager," "Customers Only," etc.).
 - If there are one or more signs placed around the lot restricting access to the entire lot, they must be conspicuously visible; permanently affixed to a pole or wall; contain the international towing symbol; contain a statement describing who may park in the parking facility and prohibiting all others; bear the words "Unauthorized Vehicles Will Be Towed at Owner's or Operator's Expense;" and contain the name and telephone number of the facility to which an unauthorized vehicle will be removed.
 - All of the specifications for these signs must be met for the tow to be legal.

RECOVERING YOUR MONEY

- **If you believe you were overcharged**, first try calling the tow company. Each storage unit is required to post their charges, and your bill may not exceed these posted rates. If unable to resolve here, consider a “tow hearing” (below).
- **If your car was illegally towed**, first try talking with the owner of the property where the car was towed and with the tow company. If the property owner agrees that your car was wrongfully towed, ask him/her to contact the tow company on your behalf. If your car was towed from your apartment complex, check your lease for the conditions in which the complex may tow and then speak to the apartment manager. If you can resolve the dispute outside of court, you will save yourself time and money. If you are unable to resolve the dispute, be aware of the 14 day filing limit to request a “tow hearing.”
- **Tow hearings** are held more quickly and with lower filing fees than cases in small claims court. The court may charge a filing fee of \$20 by cashier’s check or money order for a hearing. The form must be filed within 14 business days from the date of towing. On the hearing date, be sure to bring any and all pictures, receipts, documentation, etc., concerning the incident.

SUING IN SMALL CLAIMS COURT

- You may sue in small claims court as long as the total you are requesting is \$5000 or less.
- If the towing company overcharged you or if you can prove that the towing company damaged your car, you may sue to recover those fees or damages.
- If you believe your car was illegally towed, you may sue whoever instructed the car to be towed (whether your landlord, the police department, the towing company, etc.) to recover towing and impound fees or even the cost of your car if you were unable to recover it before auction. Keep in mind that you must be able to PROVE that the tow and/or fees were illegal or you will not be successful.
 - Small claims court charges are \$15 court costs.
 - You are able to represent yourself without a lawyer in small claims court.
 - On the court date, be sure to bring any and all pictures, receipts, documentation, etc., concerning the incident.

Small Claims Petition

Case No. _____

§ In the Small Claims Court of

§ _____ County, Texas

Plaintiff _____

§

vs. _____

§

§ Precinct _____, Place _____

Defendant

THE STATE OF TEXAS
COUNTY OF _____:

Plaintiff: _____

Address: _____

City: _____ State: _____ Zip: _____

Mailing Address: _____

City: _____ State: _____ Zip: _____

Home Phone Number: _____ Work Phone Number: _____

Being duly sworn, on oath, deposes and says that:

Defendant: _____

Address: _____

City: _____ State: _____ Zip: _____

Home Phone Number: _____ Work Phone Number: _____

Driver's License Number: _____ State: _____ Date of Birth: _____

Other: _____

is justly indebted to Plaintiff in the amount of \$ _____ for *(describe the nature of the claim, including all pertinent dates; attach additional page if necessary)*.

and there are no counterclaims existing in favor of the Defendant and against the Plaintiff, except: *(describe any claim the Defendant is making against the plaintiff)*

Respectfully submitted,

Signature of Plaintiff

SUBSCRIBED and SWORN TO BEFORE ME on _____.

Clerk of the Court

Justice of the Peace, Precinct _____, Place _____

***Service of Process:** No judgment may be rendered against a defendant unless the defendant has been properly served with process. Defendants may be natural persons, individuals, or persons doing business in the form of sole proprietorships, or partnerships, or corporations. Any individual doing business under an assumed name, or any business operating in the form of a partnership or corporation, may sue or be sued in the business name, but service of process must be properly accomplished. Service of process directed to individuals is effected by delivery directly to the person. Service of process on business entities is more difficult and must be accomplished by service on an agent or person authorized to accept service.

For example, if a defendant is a partnership, the citation may be directed to one member of the partnership, and service effected on that one member authorizes a judgment against the partnership and the partner actually served. If the defendant is a corporation, citation may be served by serving the corporation's president or any vice-president, or the corporation's registered agent. If the corporation's registered agent cannot be found at the corporation's registered office, then service of process may be made on the Secretary of State.

To determine the exact legal nature of a business entity, the plaintiff may look at the Assumed Name Records maintained by the County Clerk, or contact the Corporation Division of the Office of the Secretary of State, or the Office of the State Comptroller.

IDENTITY THEFT

IDENTITY THEFT

DEFINITION

Identity theft occurs when someone uses your personal information without your permission to commit fraud or other crimes.

EFFECTS

Victims of identity theft may spend extensive time and even money closing fraudulent accounts and correcting their credit reports. If not corrected, the theft could lead to unexpected loan or job denials.

PREVENTION

- Shred any documents with your personal information on it, including credit card offers, book or CD club offers, receipts, etc.
- Avoid giving out your social security number, writing it down, or carrying your social security card on your person.
- Never give out your personal information unless you are certain to whom you are speaking.
- Never click on links in unsolicited emails. Your bank will never ask you to verify your account number or password through an email link. Instead, type in any internet addresses yourself.
- Keep a copy of the front and back of all contents of your wallet. If this is stolen, you will know what is missing and whom to contact.
- Be creative with passwords, and avoid using personal information like your date of birth, social security number, mother's maiden name, etc.
- Keep your personal information in a secure place. A free, safe, secure location can be as simple as a Ziploc bag in your freezer.
- Review your financial and billing statements to catch any suspicious activity on your accounts.
- Review your credit report annually. A free copy may be obtained each year by calling 1-877-322-8228, or you can visit www.annualcreditreport.com.

IF YOU THINK YOUR IDENTITY HAS BEEN STOLEN

1. Contact the fraud departments of the [three consumer reporting companies](#) to place a [fraud alert](#) on your credit report. The fraud alert tells creditors to contact you before opening any new accounts or making any changes to your existing accounts. The first company you contact is supposed to contact the other two, but it is safest to contact all three yourself. The initial fraud alert is good for 90 days, or an extended fraud alert stays with your name for 7 years. A fraud alert will have no affect on your credit. Once you place the fraud alert in your file, you're entitled to order free copies of your credit reports, and, if you ask, only the last four digits of your Social Security number will appear on your credit reports.
Equifax: 1-800-525-6285; www.equifax.com
Experian: 1-888-937-3742; www.experian.com
TransUnion: 1-800-680-7289; www.transunion.com
2. Close the accounts that you know or believe have been tampered with or opened fraudulently. Ask to speak with someone in the fraud or legal department. Use the ID Theft Affidavit, which can be found at <http://www.consumer.gov/idtheft/pdf/affidavit.pdf> (a copy of which follows),

when disputing new unauthorized accounts. Get written verification from the creditor that all fraudulent accounts have been closed and all fraudulent debts dismissed. Keep thorough records of all documents and conversations. Change passwords/PINs on all accounts.

3. File a report by phone or in person with your local police or the police in the community where the identity theft took place. Get a copy of the report or at the very least, the number of the report, to submit to your creditors and others that may require proof of the crime. This will be required if you request an extended (7 year) fraud alert.
4. File your complaint with the Federal Trade Commission. The FTC maintains a database of identity theft cases used by law enforcement agencies for investigations. Call 1-877-438-4338 or go to ftc.gov/idtheft.

TO REMOVE A FRAUD ALERT

Send a written statement requesting that the fraud alert be removed along with your name, current and previous addresses, social security number, date of birth, and copies of two documents verifying your current address (utility bills, driver's license, etc.) to all three of the credit bureaus. Send the information certified mail for your records and for your protection.

Equifax Consumer Fraud Division
PO Box 740256
Atlanta, GA 30374

Experian
P.O. Box 9532
Allen, TX 75013

TransUnion
P.O. Box 6790
Fullerton, Ca. 92834

CHECK FRAUD

To report the fraudulent use of your checks, contact the following:

- CheckRite: (800) 766 2748
- Chexsystems: (800) 428-9623
- CheckCenter/CrossCheck: (800) 843-0760
- Certigy/Equifax: (800) 437 5120
- International Check Services: (800) 526 5380
- SCAN: (800) 262-7771
- TeleCheck: (800) 710 9898

PUNISHING IDENTITY THEFT

- Criminal Charges
Chances are good that you will never know exactly how your identity was stolen. This also means that you probably will not know who stole it. Even if an investigation yields the culprit,

jurisdiction and proof may be difficult to obtain: many times identity thieves are in different states than their victims and use the stolen identities to make fraudulent purchases worldwide.

- **Civil Charges**

Because of the above difficulties, especially in identifying and locating the thieves, civil charges are equally difficult to press. Though becoming a victim of identity theft will cause you many headaches, if you catch the theft in time (and many banks require reporting of fraudulent purchases within 30 days), you should not be responsible for the charges.

Instructions for Completing the ID Theft Affidavit

To make certain that you do not become responsible for any debts incurred by an identity thief, you must prove to each of the companies where accounts were opened or used in your name that you didn't create the debt.

A group of credit grantors, consumer advocates, and attorneys at the Federal Trade Commission (FTC) developed an ID Theft Affidavit to make it easier for fraud victims to report information. While many companies accept this affidavit, others require that you submit more or different forms. Before you send the affidavit, contact each company to find out if they accept it.

It will be necessary to provide the information in this affidavit anywhere a **new** account was opened in your name. The information will enable the companies to investigate the fraud and decide the outcome of your claim. If someone made unauthorized charges to an **existing** account, call the company for instructions.

This affidavit has two parts:

- **Part One** — the ID Theft Affidavit — is where you report general information about yourself and the theft.
- **Part Two** — the Fraudulent Account Statement — is where you describe the fraudulent account(s) opened in your name. Use a separate Fraudulent Account Statement for each company you need to write to.

When you send the affidavit to the companies, attach copies (NOT originals) of any supporting documents (for example, driver's license or police report). Before submitting your affidavit, review the disputed account(s) with family members or friends who may have information about the account(s) or access to them.

Complete this affidavit as soon as possible. Many creditors ask that you send it within two weeks. Delays on your part could slow the investigation.

Be as accurate and complete as possible. You may choose not to provide some of the information requested. However, incorrect or incomplete information will slow the process of investigating your claim and absolving the debt. Print clearly.

When you have finished completing the affidavit, mail a copy to each creditor, bank, or company that provided the thief with the unauthorized credit, goods, or services you describe. Attach a copy of the Fraudulent Account Statement with information only on accounts opened at the institution to which you are sending the packet, as well as any other supporting documentation you are able to provide.

Send the appropriate documents to each company by certified mail, return receipt requested, so you can prove that it was received. The companies will review your claim and send you a written response telling you the outcome of their investigation. Keep a copy of everything you submit.

If you are unable to complete the affidavit, a legal guardian or someone with power of attorney may complete it for you. Except as noted, the information you provide will be used only by the company to process your affidavit, investigate the events you report, and help stop further fraud. If this affidavit is requested in a lawsuit, the company might have to provide it to the requesting party. Completing this affidavit does not guarantee that the identity thief will be prosecuted or that the debt will be cleared.

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER
GOVERNMENT AGENCY

If you haven't already done so, report the fraud to the following organizations:

1. Any one of the nationwide consumer reporting companies to place a fraud alert on your credit report. Fraud alerts can help prevent an identity thief from opening any more accounts in your name. The company you call is required to contact the other two, which will place an alert on their versions of your report, too.

- **Equifax:** 1-800-525-6285; www.equifax.com
- **Experian:** 1-888-EXPERIAN (397-3742); www.experian.com
- **TransUnion:** 1-800-680-7289; www.transunion.com

In addition to placing the fraud alert, the three consumer reporting companies will send you free copies of your credit reports, and, if you ask, they will display only the last four digits of your Social Security number on your credit reports.

2. The security or fraud department of each company where you know, or believe, accounts have been tampered with or opened fraudulently. Close the accounts. Follow up in writing, and include copies (NOT originals) of supporting documents. *It's important to notify credit card companies and banks in writing.* Send your letters by certified mail, return receipt requested, so you can document what the company received and when. Keep a file of your correspondence and enclosures.

When you open new accounts, use new Personal Identification Numbers (PINs) and

passwords. Avoid using easily available information like your mother's maiden name, your birth date, the last four digits of your Social Security number or your phone number, or a series of consecutive numbers.

3. Your local police or the police in the community where the identity theft took place to file a report. Get a copy of the police report or, at the very least, the number of the report. It can help you deal with creditors who need proof of the crime. If the police are reluctant to take your report, ask to file a "Miscellaneous Incidents" report, or try another jurisdiction, like your state police. You also can check with your state Attorney General's office to find out if state law requires the police to take reports for identity theft. Check the Blue Pages of your telephone directory for the phone number or check www.naag.org for a list of state Attorneys General.

4. The Federal Trade Commission. By sharing your identity theft complaint with the FTC, you will provide important information that can help law enforcement officials across the nation track down identity thieves and stop them. The FTC also can refer victims' complaints to other government agencies and companies for further action, as well as investigate companies for violations of laws that the FTC enforces.

You can file a complaint online at www.consumer.gov/idtheft. If you don't have Internet access, call the FTC's Identity Theft Hotline, toll-free: 1-877-IDTHEFT (438-4338); TTY: 1-866-653-4261; or write: Identity Theft Clearinghouse, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER
GOVERNMENT AGENCY

ID Theft Affidavit

Victim Information

- (1) My full legal name is _____
(First) (Middle) (Last) (Jr., Sr., III)
- (2) (If different from above) When the events described in this affidavit took place, I was known as

(First) (Middle) (Last) (Jr., Sr., III)
- (3) My date of birth is _____
(day/month/year)
- (4) My Social Security number is _____
- (5) My driver's license or identification card state and number are _____
- (6) My current address is _____
City _____ State _____ Zip Code _____
- (7) I have lived at this address since _____
(month/year)
- (8) (If different from above) When the events described in this affidavit took place, my address was

City _____ State _____ Zip Code _____
- (9) I lived at the address in Item 8 from _____ until _____
(month/year) (month/year)
- (10) My daytime telephone number is (____) _____
My evening telephone number is (____) _____

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER
GOVERNMENT AGENCY

GOVERNMENT AGENCY

Victim's Law Enforcement Actions

- (17) (check one) I am am not willing to assist in the prosecution of the person(s) who committed this fraud.
- (18) (check one) I am am not authorizing the release of this information to law enforcement for the purpose of assisting them in the investigation and prosecution of the person(s) who committed this fraud.
- (19) (check all that apply) I have have not reported the events described in this affidavit to the police or other law enforcement agency. The police did did not write a report. *In the event you have contacted the police or other law enforcement agency, please complete the following:*

(Agency #1)	(Officer/Agency personnel taking report)
(Date of report)	(Report number, if any)
(Phone number)	(email address, if any)
(Agency #2)	(Officer/Agency personnel taking report)
(Date of report)	(Report number, if any)
(Phone number)	(email address, if any)

Documentation Checklist

Please indicate the supporting documentation you are able to provide to the companies you plan to notify. Attach copies (NOT originals) to the affidavit before sending it to the companies.

- (20) A copy of a valid government-issued photo-identification card (for example, your driver's license, state-issued ID card or your passport). If you are under 16 and don't have a photo-ID, you may submit a copy of your birth certificate or a copy of your official school records showing your enrollment and place of residence.
- (21) Proof of residency during the time the disputed bill occurred, the loan was made or the other event took place (for example, a rental/lease agreement in your name, a copy of a utility bill or a copy of an insurance bill).

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER
GOVERNMENT AGENCY

- (22) A copy of the report you filed with the police or sheriff's department. If you are unable to obtain a report or report number from the police, please indicate that in Item 19. Some companies only need the report number, not a copy of the report. You may want to check with each company.

Signature

I certify that, to the best of my knowledge and belief, all the information on and attached to this affidavit is true, correct, and complete and made in good faith. I also understand that this affidavit or the information it contains may be made available to federal, state, and/or local law enforcement agencies for such action within their jurisdiction as they deem appropriate. I understand that knowingly making any false or fraudulent statement or representation to the government may constitute a violation of 18 U.S.C. §1001 or other federal, state, or local criminal statutes, and may result in imposition of a fine or imprisonment or both.

(signature)

(date signed)

(Notary)

[Check with each company. Creditors sometimes require notarization. If they do not, please have one witness (non-relative) sign below that you completed and signed this affidavit.]

Witness:

(signature)

(printed name)

(date)

(telephone number)

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER GOVERNMENT AGENCY

Fraudulent Account Statement

Completing this Statement

- Make as many copies of this page as you need. **Complete a separate page for each company you're notifying and only send it to that company.** Include a copy of your signed affidavit.
- List only the account(s) you're disputing with the company receiving this form. **See the example below.**
- If a collection agency sent you a statement, letter or notice about the fraudulent account, attach a copy of that document (**NOT** the original).

I declare (check all that apply):

- As a result of the event(s) described in the ID Theft Affidavit, the following account(s) was/were opened at your company in my name without my knowledge, permission or authorization using my personal information or identifying documents:

Creditor Name/Address <i>(the company that opened the account or provided the goods or services)</i>	Account Number	Type of unauthorized credit/goods/services provided by creditor <i>(if known)</i>	Date issued or opened <i>(if known)</i>	Amount/Value provided <i>(the amount charged or the cost of the goods/services)</i>
Example Example National Bank 22 Main Street	01234567-89	auto loan	01/05/2002	\$25,500.00

- During the time of the accounts described above, I had the following account open with your company:

Billing name _____

Billing address _____

Account number _____

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY
OTHER GOVERNMENT AGENCY

OCCUPATIONAL DRIVERS' LICENSE

OCCUPATIONAL DRIVER'S LICENSE

DEFINED

- An occupational license may be granted when a person's driver's license has been suspended for almost any reason. Drivers whose licenses were suspended because of medical reasons or delinquent child support are ineligible for an occupational license.
- The occupational license only allows a person to drive a non-commercial vehicle for essential reasons like transportation to work, school, religious services, the grocery, etc.
- The maximum length of issuance is two years.
- You may not get an occupational license if you have had one within the last ten years.

HOW TO GET ONE

- Requests for such licenses are made to the county or district court in the county of the licensee's residence or to the court of original jurisdiction where the offense occurred. You may want a lawyer to create your petition, but you may also create a petition yourself. The petition should be typed and include your name, driver's license number, date of suspension, and employer; it should state that you request an occupational driver's license, that you need the occupational license to maintain your employment in order to support yourself, and that you have proof of valid insurance.
- Requirements for the occupational license include a certified copy of the petition and a certified copy of the court order granting the occupational license and an original SR-22 certificate of insurance. This is the only proof of insurance acceptable.
- Also required is an occupational license fee for a one-year license or less. The maximum length of issuance is a 2-year license, provided that the court order grants this length of time.
- All required reinstatement fee(s) must be paid prior to the issuance of the occupational license. You will probably be required to pay additional fees, and the amount depends on the reason that your driver's license was suspended.
- An *ex parte* hearing will be set after filing your petition.
- If your occupational driver's license expires before the end of your regular driver's license's suspension, you may apply to extend your occupational license for an additional year. Inquire at the district clerk's office for application instructions if you need this extension.
- To reinstate your regular driver's license after the suspension period, visit your local Texas Department of Public Safety office. Reinstatement fees will apply depending on the reason for suspension.

REAL PROPERTY AND DEEDS

REAL PROPERTY & DEEDS

There are three general deed types that you should be aware of. You may utilize them to assist your client in title disputes, warranty issues, or other real property matters.

1. General Warranty Deed

A general warranty deed contains a covenant by the seller to protect the buyer against being dispossessed due to adverse claims against the land. That is, the general warranty is a guarantee of the title against any and all claims of defects back through the entire chain of title.

The general warranty deed is preferred if your client is the purchaser, rather than the seller. If your client is the seller of property, a general warranty deed will place the most liability on your client since it demands that your client defend the title against any defects, including those brought about prior to your client holding the property. Nevertheless, a general warranty deed is typically used for residential property transfers without unfavorable results.

2. Special Warranty Deed

A special warranty deed contains a covenant whereby the seller agrees to protect the purchaser against any claims created by the seller. Therefore, the special warranty deed does not guarantee the deed against claims of defects created by persons prior to the seller's ownership of the property.

The special warranty deed is typically used in commercial transactions. However, if your client suspects that there may be defects to the title, such as adverse possession claims, prior to his ownership of the property, a special warranty deed is recommended to protect your client. The purchaser may be willing to accept the lesser warranty if it is unlikely that the any claims will actually be brought against the title.

3. Quitclaim Deed

A quitclaim deed is a conveyance by which the grantor transfers whatever interest he or she has in the real estate, without any warranties or obligations.

A quitclaim deed is particularly helpful if your client suspects that there may be an adverse claim against the property. A third party may be willing to quitclaim any interest he or she has to the property to your client, thereby curing any associated defect. A quitclaim deed may also be utilized in the event of a title transfer where a family member has died intestate. For example, if a group of siblings agrees that one should receive a particular parcel of land, the remaining siblings may quitclaim any interest they may have to the property.

REAL PROPERTY

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SCOPE OF ARTICLE: This chapter covers basic real estate, including documents, recording, title insurance, property taxes, plats and surveys, easements, homestead rights, conveyancing out of divorce, reformation, suits to quiet title vs. trespass to try title, reverse mortgages, and home equity loans; foreclosure, including judicial foreclosure, and nonjudicial foreclosure; executory contracts for conveyance, including contract for deed; and warranty deed vs. hybrid vs. contract for deed, with a chart showing the differences.

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I. Basic Real Estate

What follows is a brief description of the basic real estate forms you might encounter in a simple conveyance of real property. Please note that all conveyances of real property must be in writing and must be subscribed and delivered by the conveyor or the conveyor's agent authorized in writing¹⁵.

1. Documents. The basic document for conveyance of fee simple title to real property is the Deed, which is the written instrument transferring ownership of land from one person to another. The basic form of the deed is statutory and is set out in the Texas Property Code.¹⁶ Sample forms can be found in the Texas Transaction Guide, Legal Forms § 73.201 and the Texas Real Estate Forms Manual: A Project of the Real Estate Forms Committee of the State Bar of Texas.

- a. **Warranty Deed:** A general warranty deed warrants that the chain of title is clear and that there are no third party claims or encumbrances against the fee title other than those expressly described or excluded in the deed itself, regardless of whether the claims or encumbrances arose during or prior to the ownership of the grantor.
- b. **Special Warranty Deed:** A special warranty deed limits the warranty of title to encumbrances or defects that arose during the time the grantor was the owner of the property.
- c. **Quitclaim Deed:** A quitclaim deed is distinguished from a deed by the fact that the quitclaim purports to convey only the interest that the grantor has in the real property and not the property itself. For this reason, it is often said that a quitclaim passes to a grantee merely the "chance of title."
- d. **Correction Deed:** When a deed recorded in the chain of title to a property contains some facial imperfection, it may be possible to cure the defect by a "correction deed," meaning another deed repeating the conveyance but without the mistake or flaw. A correction deed can be used to correct errors in property descriptions, mistaken recordation references, misnomers of the grantor or the grantee, and similar typographical errors, or to explain the grantors authority to convey.
- e. **Real Estate Lien Note:** When a purchaser of real property takes a loan to pay the purchase price or owner finances the purchase s/he will be required to sign a Real Estate Lien Note (RELN). This document sets out the terms of the loan such as the interest rate, monthly payment and the length of the loan. This document creates a unilateral promise to pay the purchase price and it is created at the same time as and secured by the Deed of Trust.
- f. **Deed of Trust:** A Deed of Trust (DOT) is simply a mortgage with a power of sale upon default by the purchaser. The purchaser conveys the real property in trust to the trustee to secure the payment of the purchase price. If the purchaser defaults under the RELN, the DOT grants the trustee named in the DOT the power to foreclose on and

¹⁵ See, Tex. Prop. Code § 5.021; Tex. Bus. & Com. Code § 26.01; *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972).

¹⁶ See, Tex. Prop. Code § 5.022.

subdivision, which gives legal descriptions of pieces of property by lot, street and block numbers. There are very specific platting requirements that apply to any owner of land who divides the land in two or more parts whether by conveyance by deed or contract for deed.²³ Where no plat is available a survey of the property that describes the parcel of land and its boundaries through a metes and bounds description is sufficient.

6. **Easements:** An easement is a right granted by the owner of real property to a third party to use the property for a specific purpose, such as a right of ingress and egress over the property to access an adjacent piece of property.²⁴
7. **Homestead Rights:** In Texas, homestead property can only be encumbered as follows: purchase money loan; work and material used in constructing new improvements on the homestead (if contracted for in writing) or to repair or renovate existing improvements; taxes; owelty of partition imposed against the entire property by court order or written agreement; refinance of a tax lien against a homestead resulting from tax debt of both spouses; the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property; a home equity loan that meets the requirements of Section 50 (a) (6), Article XVI, Texas Constitution; and a reverse mortgage that meets the requirements of Section 50 (k) – (p), Article XVI, Texas Constitution.²⁵ Any liens against the property that do not qualify within the above referenced categories are absolutely void and pass no right to the lien holder.
8. **Conveyancing Out of Divorce:** When conveying real property from one spouse to another as part of a divorce it is very important that you: 1) prepare a deed from the conveying spouse to the receiving spouse and 2) include conveyancing language in the decree of divorce as follows: ----- is awarded the following as his/her sole and separate property, and ----- is divested of all right, title, interest, and claim in and to that property.

A title company will usually not accept a divorce decree granting an interest in real property to one spouse as proof of ownership unless it contains conveyancing language that divests one spouse of title and vests title in the other spouse, and unless there is also a deed transferring title from one spouse to another. What this means practically is that if you do not satisfy the above conditions, your client may not be able to sell or mortgage the property through a title company until, at the very least, the four-year bill of review period to reopen the divorce has run.

9. **Reformation:** If a mistake is made in a deed the easiest way to correct the mistake is through the use of a correction deed, as noted above. However, that option may not be available to you if, for example, the grantor is deceased. Reformation is an equitable remedy that a court may grant to correct a written document so that it conforms to the parties' true agreement. Application of the remedy depends 1) on the existence of an actual, enforceable agreement, and 2) on either a mutual mistake of the parties²⁶ or a unilateral mistake by one of the parties,

²³ See, Tex. Local Gov't Code § 212, § 232.001 and § 232.021.

²⁴ See, *Cecola v. Ruley*, 12 S.W.3d 848, 852 (Tex. App.-Texarkana 2000, no pet.).

²⁵ See, Tex. Const. Art. 16, § 50; Tex. Prop. Code § 41.001. See also, *Norris v. Thomas*, 215 S.W.3d 851, 856 (2007).

²⁶ See, *Thalman v. Martin*, 356, 635 S.W.2d 411, 413 (Tex. 1982).

together with fraud or other inequitable conduct by the other party.²⁷ The mistake must have caused the failure of the written document to express the actual understanding reached by the parties.

- 10. Suit to Quiet Title vs. Trespass to Try Title:** A suit to quiet title is an equitable remedy that allows a titleholder to remove a cloud from the title created by an invalid claim. A deed, contract, lien, judgment or other instrument may have created the cloud on the title, whether recorded or not. The disputed claim is said to "cast a shadow" on the title to the property by creating a "cloud" on the title. Successful prosecution of the action will result in a court decree or declaration that the adverse claim is invalid and, thus, clear or "quiet" the title to the property and "remove the cloud." Please note that a suit to quiet title does not directly affirm the plaintiff's claim to title. Rather, it only eliminates the defendant's claim, leaving the validity of the plaintiff's title dependent on the usual examination of remaining public records.²⁸

The action known as trespass to try title is statutory,²⁹ comprising a suit for title and possession of land by a party claiming the legal or equitable title against another party asserting a conflicting possessory right and is governed by special pleading and proof requirements established by the Texas Rules of Civil Procedure.³⁰ Unlike a suit to quiet title, which merely removes a cloud on title, an action in trespass to try title results in an affirmative declaration as to the title of the land. Please note that you can no longer use the Declaratory Judgment Act to get a determination as to title to land.³¹

- 11. Reverse Mortgages:** Reverse mortgages are designed for older homeowners who want to borrow against the equity in their house and have the loan repaid when they die or sell the house.³² The mortgage is considered "reverse" because the borrower receives payments from, rather than makes payments to, the lender.³³
- 12. Home Equity Loans:** As its name indicates, a home equity loan is secured by the equity that a borrower has in a home, i.e., the portion of the home's market value in excess of any outstanding mortgage or secondary loans on the property. An important distinction between home equity loans and other debts that may be secured by a homestead is that the borrower may use the proceeds of a home equity loan for any purpose. A home equity loan, whether a conventional closed-end account or an open-end home equity line of credit, is valid only if it satisfies certain specific conditions as set out in the Texas Constitution.³⁴

²⁷ See, *First Nat. Bank of Andrews v. Jones*, 635 S.W.2d 950, 953 (Civ. App.-Eastland 1982, ref. n.r.e.) (citing *Conn v. Hagan*, 55 S.W. 323, 93 Tex. 334 (1900)).

²⁸ See, *Thomson v. Locke*, 1 S.W. 112, 115, 66 Tex. 383 (1886); see *Bell v. Ott*, 606 S.W.2d 942, 952 (Civ. App.-Waco 1980, ref. n.r.e.) (quoting from *Thomson v. Locke*)).

²⁹ See, Tex. Prop. Code § 22.001-22.004.

³⁰ See, Tex. R. Civ. P. 783-809.

³¹ See, *Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004).

³² See, *Oldham et al., Home Equity Lending Comes to Texas*, 61 Tex. B.J. 639, 641 (1998).

³³ See, 12 C.F.R. § 591.2(n) (federal definition of "reverse mortgage").

³⁴ See, Tex. Const. art. 16 § 50(a)(6)(Q).

II. Foreclosure: Foreclosure is the means by which a creditor can liquidate a security interest on the default of a debtor. There are two types of foreclosure: Judicial, which requires the filing of a lawsuit, and Nonjudicial, which is an expedited foreclosure process. In Texas, the majority of foreclosures are nonjudicial.

1. **Judicial Foreclosure:** Judicial foreclosure is initiated when the creditor files an action alleging the existence of the indebtedness, default by the debtor, and the existence of the deed of trust or vendor's lien. Foreclosure must be requested, along with judgment against the debtor for the amount of the debt. A foreclosure judgment granted by the court will direct any sheriff or constable to seize and sell the land in satisfaction of the judgment.³⁵ The subsequent sale is made in much the same manner as a trustee's sale.³⁶ In Texas, judicial foreclosure is usually only undertaken when problems exist with nonjudicial foreclosure (for example, if the property is not secured by a deed of trust or is undersecured) or with respect to foreclosure of certain property specifically governed by statutory procedures, such as home equity loans.
2. **Nonjudicial Foreclosure:** Nonjudicial foreclosure is the sale of the property without the filing of a lawsuit and the entry of a judgment ordering foreclosure. Nonjudicial foreclosure allows all aspects of foreclosure to proceed without a court order or direct supervision. Chapter 51 of the Property Code defines the minimum statutory procedure that must be satisfied to foreclose properly upon real property. In addition to the minimum statutory requirements, the deed of trust executed by the debtor-mortgagor usually details the agreed contractual terms and conditions for foreclosure of real property.
 - a. **Default:** Preliminary to any action to foreclose is the creditor's determination that a default in the underlying obligation has occurred. The default may involve the debtor's failure to maintain insurance on the property, failure to pay real estate taxes, failure to pay on the real estate lien note secured by the lien, or other breaches of the contractual obligations contained in the note, deed of trust, or other instruments embodying the transaction. In the absence of a default under the note or deed of trust, the creditor may not accelerate the debt or foreclose against the property.³⁷
 - b. **Due on Sale Clause:** A deed of trust may contain, and usually does, a "due-on-sale" clause, providing that if the mortgagor (debtor) sells or transfers all or part of the property subject to the lien before paying the entire mortgage, the mortgagee may declare the entire unpaid balance immediately due and payable. Due-on-sale clauses are generally enforceable as a matter of law³⁸ and are not considered an unreasonable restraint on the alienation of property.³⁹
 - c. **Notice of Acceleration:** The deed of trust or other agreement between a mortgagor and a mortgagee typically provides that in the event of the mortgagor's default, the

³⁵See Tex. R. Civ. P. 309.

³⁶Tex. R. Civ. P. 646a-648.

³⁷See, *Lavigne v. Holder*, 186 S.W.3d 625, 627-628 (Tex. App.-Fort Worth 2006, no pet.).

³⁸See, *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 159, 167, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982) ; see also 12 U.S.C. § 1701j-3(b)(1).

³⁹See, *Sonny Arnold, Inc. v. Sentry Sav. Ass'n*, 633 S.W.2d 811, 814-816 (Tex. 1982) ; *Crestview, Ltd. v. Foremost Ins. Co.*, 621 S.W.2d 816, 823-827 (Civ. App.-Austin 1981, ref. n.r.e.).

mortgagee may accelerate the debt, i.e., declare the unpaid balance of the underlying obligation immediately due and payable. To exercise the power of acceleration, the mortgagee must first make demand on the mortgagor for payment of the past due installment and provide an opportunity for the mortgagor to cure or remedy the default.⁴⁰ If the default is not cured, the mortgagee may then declare that the entire debt is due or take some unequivocal action, such as filing suit or calling for the posting of notice of foreclosure, that indicates that the entire debt is due and unpaid.⁴¹

- d. **Deed in Lieu of Foreclosure:** A creditor holding a debt secured by a deed of trust may elect to accept a deed conveying the secured real property in full satisfaction of the debt and in lieu of foreclosure.
- e. **Statute of Limitation:** A power of sale in a mortgage or deed of trust must be exercised not later than four years after the day the cause of action accrues.⁴²
- f. **Appointment of Trustee:** A typical deed of trust empowers the mortgagee, or the mortgage servicer acting on the mortgagee's behalf, to call on the trustee to sell the mortgaged property nonjudicially if a default has occurred in the payment of the debt secured or under the terms of the deed of trust. The trustee's power of sale derives wholly from the trust instrument.⁴³
- g. **Notice of Sale:** Notice of the trustee's sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale by *all* of the following three methods:⁴⁴
 1. Posting notice at the courthouse door of each county in which the property is located, designating the county in which the property will be sold;⁴⁵
 2. Filing a copy of the notice in the office of the county clerk of each county in which the property is located; and
 3. Serving that notice by certified mail on each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt.
- h. **Right to cure:** In the case of a contractual lien on real property used as the debtor's residence, the debtor is entitled to a 20-day window of opportunity to cure any default before the mortgage servicer may provide notice of sale of the residence. Accordingly, the mortgage servicer must provide written notice by certified mail stating that the

⁴⁰ See, *Allen Sales & Servicer, Inc. v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975).

⁴¹ See, *Joy Corp. v. Nob Hill N. Properties, Ltd.*, 543 S.W.2d 691, 694 (Civ. App.-Tyler 1976, no writ).

⁴² See, Tex. Civ. Prac. & Rem. Code § 16.035(b); *see also* Tex. Civ. Prac. & Rem. Code § 16.035(d) (real property lien and power of sale become void on expiration of limitations period).

⁴³ See, Tex. Prop. Code § 51.0001(8).

⁴⁴ See, Tex. Prop. Code § 51.002(b); *see also* Tex. Prop. Code § 51.0075(e) (notice as to security instrument executed after Sept. 1, 2005 must also provide name and address of trustee or substitute trustee).

⁴⁵ See, Tex. Prop. Code § 51.002(h) (even if commissioners court has designated area outside of courthouse for conduct of foreclosure sale, notice must nevertheless be posted at courthouse door).

debtor is in default under the deed of trust or other contract lien and must give the debtor at least 20 days to cure the default before a subsequent notice of sale can be given.⁴⁶

i. **Conducting the Sale:**

[1] Time and Place of Sale

In conducting a foreclosure sale of real property under a power of sale in a deed of trust or other security instrument, the trustee's sale must take place in a county in which some part of the land is located, and must be a public sale at auction held on the first Tuesday of the month between the hours of 10 a.m. and 4 p.m.⁴⁷ The sale must be held in the area designated by the commissioners' court⁴⁸ and must begin at the time stated in the notice of sale as the earliest hour at which a sale may occur or not later than three hours after that time.⁴⁹

[2] Manner of Sale; Trustee's Conditions

Nonjudicial foreclosure under a power of sale in a deed of trust or other security instrument must be conducted in compliance with the terms of the instrument and the applicable statutory provisions of Chapter 51 of the Property Code. Texas law does not provide a right of self-help repossession of real estate comparable to the self-help remedies available for repossession of personal property under the U.C.C.⁵⁰ The sale should be conducted in a business-like manner, with a view toward obtaining as large a price for the property as is reasonable.⁵¹ However, the trustee need not establish the "commercial reasonableness" of the sale as is required for sales of personal property under the U.C.C.⁵²

- j. **Debtor's Challenge of Foreclosure:** Noncompliance with the procedures surrounding a foreclosure sale is sufficient reason for a court to set aside the sale, even if the sale price was adequate to account for the indebtedness.⁵³ Some common reason for setting aside foreclosure sales are as follows: 1) the purchaser was not in default; 2) no notice to cure was given; 3) no notice of sale was given; and 4) the trustee did not comply with the terms of the deed of trust with regards to the sale. In addition, a purchaser may have an affirmative defense to the foreclosure if 1) the property sought to be sold qualifies as the mortgagor's homestead and is protected from forced sale; 2) the

⁴⁶ See, Tex. Prop. Code § 51.002(d); *Powell v. Stacy*, 117 S.W.3d 70, 73-74 (Tex. App.-Fort Worth 2003, no pet.).

⁴⁷ See, Tex. Prop. Code § 51.002(a).

⁴⁸ See, Tex. Prop. Code § 51.002(a).

⁴⁹ See, Tex. Prop. Code § 51.002(b); *see Sanders v. Shelton*, 970 S.W.2d 721, 725 (Tex. App.-Austin 1998, pet. denied) (noting that 10:00 a.m. may not always be earliest hour at which sale may occur).

⁵⁰ See, *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595, 602-603 (Tex. App.-Houston [14th Dist.] 1994, den.).

⁵¹ See, *First Federal Sav. & Loan Ass'n v. Sharp*, 347 S.W.2d 337, 340 (Civ. App.-Dallas 1961), *aff'd*, 359 S.W.2d 902 (Tex. 1962).

⁵² See, Tex. Bus. & Com. Code § 9.610 (b).

⁵³ See, *Shearer v. Allied Live Oak Bank*, 758 S.W.2d 940, 942 (Tex. App.-Corpus Christi 1988, den.).

mortgagee is estopped from foreclosure by accepting and negotiating a mortgage payment after the notice of foreclosure sale; or 3) the mortgagor is an innocent purchaser for value.

III. Executory Contracts for Conveyance

1. **Contract for Deed:** An *executory contract* (or *contract for deed*) is both an agreement for the sale of real property and a method of financing the sale. Under this type of contract, the buyer pays the purchase price of the property directly to the seller in installments over a considerable period of time (usually 15 to 20 years). The buyer usually takes immediate possession of the property, but does not obtain legal title until all the installments have been paid. Thus, the contract does not convey a legal interest in the real property, but instead specifies the conditions for the future passing of the seller's interest.⁵⁴

- a. **History:** In 1995, the Texas Legislature, in an effort to stop the spread of colonias or unplatted subdivisions along the Texas-Mexico border, amended Chapter 5 of the Texas Property Code to provide special protections for purchasers buying *residential* real property under an executory contract. The new provisions were contained in Subchapter D and E of Chapter 5, respectively. The provisions of Subchapter D, with regard to default, applied statewide, but the provision of Subchapter E, which imposed certain disclosure requirements and penalties on the seller, only applied in certain border counties. In 2001, the Texas legislature repealed Subchapter E, but took all the provision of Subchapter E and placed them in Subchapter D, making all the provisions applicable statewide.
- b. **Applicability:** The provision of Subchapter D, Chapter 5, applies only to an executory contract that covers real property used or to be used as the purchaser's residence or as the residence of a person related to the purchaser within the second degree by consanguinity or affinity.⁵⁵ Please note that a lease with option to purchase is also considered an executory contract for the conveyance of real property and is covered by Subchapter D.⁵⁶
- c. **Oral agreements:** An executory contract is not enforceable unless it is in writing and signed by the party to be bound or by that party's authorized representative.⁵⁷ The parties' rights and obligations are determined solely from the written contract, and any prior oral agreements between the parties are superseded by and merged into the contract.⁵⁸ The seller must include in a separate document, or in a provision of the contract, a statement that the written contract represents the parties' final agreement.⁵⁹
- d. **Foreign Language Requirement:** If the negotiations that precede execution of the contract are conducted primarily in a language other than English, the seller must give the purchaser a copy in that language of all written documents relating to the transaction,

⁵⁴ See, Tex. Prop. Code §§ 5.061-5.085; See also, *Ward v. Malone*, 115 S.W.3d 267, 270-271 (Tex. App.-Corpus Christi 2003, no pet.); *Salinas v. Beaudrie*, 960 S.W.2d 314, 319 (Tex. App.-Corpus Christi 1997, no pet.).

⁵⁵ See, Tex. Prop. Code § 5.062(a).

⁵⁶ See, Tex. Prop. Code §5.062(a)(2).

⁵⁷ See, Tex. Prop. Code § 5.072(a).

⁵⁸ See, Tex. Prop. Code § 5.072(b).

⁵⁹ See, Tex. Prop. Code § 5.072(d); see also, *Bookout Chiropractic Center v. Bookout*, (165 S.W.3d 904 (2005, Texarkana)) (Partial performance of K for Deed is exception to statute of frauds).

including the contract, disclosure notices, annual accounting statements and notice of default.⁶⁰

- e. **Required Disclosures Before Sale:** Before the purchaser signs a contract for deed, the seller is required to provide certain disclosures as outlined below.

1. **Seller's Disclosure of Property Condition:** Requires seller to provide purchaser with:
- Survey completed in last year, or current plat;
 - Copies of all encumbrances, restrictions, easements; and
 - Specific disclosure of condition of property (form specified in code section)

If the property is not in a recorded subdivision, the seller must disclose that utilities may not be available and if the seller advertises the property for sale, the advertisement must disclose information on availability of utilities.⁶¹

2. **Disclosure of Tax Payments and Insurance Coverage:** Before signing, seller shall provide the purchaser with the following: 1) tax certificate from collector of each taxing unit and 2) insurance policy, binder or other document that indicates the insurer; the insured; a description of property insured; and the amount for which the property is insured.⁶²

3. **Seller's Disclosure of Financing Terms:** Before signing, the seller shall provide purchaser with a written statement that sets out the following: 1) purchase price; 2) interest rate charged; 3) dollar amount of interest charged for term of the contract (or estimate if interest rate is variable); 4) total amount of principal and interest to be paid under the contract; and 5) notice that seller may not charge prepayment penalty.⁶³

4. REMEDIES FOR FAILURE TO DISCLOSE: FAILURE TO PROVIDE THE ABOVE DISCLOSURES, WHICH THE EXCEPTION OF THE DISCLOSURE OF FINANCING TERMS, IS A PER SE DECEPTIVE TRADE PRACTICES ACT (DTPA) VIOLATION AND ENTITLES THE PURCHASER TO CANCEL AND RESCIND THE CONTRACT AND RECEIVE A FULL REFUND.⁶⁴

5. **Right to Cancel:** The purchaser has the right to cancel the contract for any reason within 14 days by sending a written notice of cancellation by certified or registered mail. If the purchaser cancels the contract, the seller has 10 days to return to the purchaser the executed contract and any money paid by the purchaser.⁶⁵

6. PROHIBITED TERMS: A SELLER MAY NOT INCLUDE A PROVISION IN THE CONTRACT THAT:

- **REQUIRES A LATE FEE GREATER THAN 8 PERCENT OF THE MONTHLY PAYMENT OR THE ACTUAL COST OF PROCESSING THE LATE PAYMENT (WHICHEVER IS LESS);**
- **PROHIBITS THE PURCHASER FROM PLEDGING THEIR INTEREST IN PROPERTY TO SECURE A LOAN FOR IMPROVEMENTS (INCLUDING UTILITIES); OR**
- **IMPOSES PREPAYMENT PENALTIES.**⁶⁶

⁶⁰ See, Tex. Prop. Code § 5.068.

⁶¹ See, Tex. Prop. Code § 5.069.

⁶² See, Tex. Prop. Code § 5.070.

⁶³ See, Tex. Prop. Code § 5.071.

⁶⁴ See, Tex. Prop. Code § 5.069 (d)(1), (2); § 5.070 (b)(1), (2).

⁶⁵ See, Tex. Prop. Code § 5.074.

⁶⁶ See, Tex. Prop. Code § 5.073.

7. Recording Requirements: The seller is required to record the contract and the disclosure statement required by § 5.069 within 30 days of signing.⁶⁷ In addition, if the contract is terminated for any reason, the seller is required to record the instrument that terminates the contract.

f. **Requirements Imposed on Seller After Sale:** During the term of the executory contract, several obligations are imposed on the seller as outlined below. These provisions apply to any contract that remains executory regardless of when the contract was executed.⁶⁸

1. ANNUAL ACCOUNTING STATEMENT:

a. **REQUIREMENTS: A SELLER IS REQUIRED DURING THE TERM OF THE CONTRACT TO SEND TO THE PURCHASER A STATEMENT EACH JANUARY⁶⁹ THAT SETS OUT THE FOLLOWING:**

- *amount paid by purchaser under contract*
- *remaining amount owed*
- *number of payments remaining under contract*
- *amounts paid to taxing authorities if collected by seller*
- *amounts paid to insure property if collected by seller*
- *if the property has been damaged and the seller obtained proceeds from the insurance company, a disclosure of how the proceeds were applied to the property; and*
- *if the seller has changed insurance coverage, a legible copy of the current policy*

b. **Remedies:** The remedies available to a purchaser under 5.077 depend on how many transactions a seller conducts during a 12-month period.⁷⁰

1. **Less than two in 12 months:** If a seller conducts less than two transactions in a 12-month period and he fails to comply with this section, the seller is liable to the purchaser for liquidated damages of \$100 for each annual accounting statement he failed to provide.
2. **More than two in 12 months:** If a seller conducts more than two transactions in a 12-month period and fails to comply with the section, he is liable to the purchaser for \$250 dollars a day for each day he fails to provide the statement, but not to exceed the fair market value of the property.

⁶⁷ See, Tex. Prop. Code § 5.076.

⁶⁸ So for example, if a seller and a purchaser in Travis County execute a contract for deed on August 31, 2001, the seller is not required to provide the disclosures set out above, they are however required, during the term of the contract or upon completion, to provide an annual accounting statement; to turn over a deed to the purchaser within thirty (30) days; and to comply with all requirements of §§ 5.077, 5.078, 5.079, 5.081, 5.082, 5.083, and 5.084.

⁶⁹ See, Tex. Prop. Code § 5.077; see also, *Henderson v. Love*—181 S.W.3d 810 (Texarkana); *Flores v. Millennium Interests*—2005 Tex. Lexis 733 (Tex.); *Marker v. Garcia*—2005 Tex. App. Lexis 9034 (SA); Tex. Atty. Gen. Op. No. GA-0418 (2006).

⁷⁰ The \$250 penalty under § 5.077 first came into effect on September 1, 2001, and applied to all sellers. Prior to that, purchasers in certain border counties had the right to deduct a certain percentage of the monthly payment under § 5.100, which was subsequently renumbered to § 5.077 in 2001. The section was then amended again in 2005 and now distinguishes between those sellers who conduct less than two transactions in a 12-month period.

2. Notice of any change in the insurance coverage: *A seller is required, within 10 days of signing the contract, to notify the insurance carrier of the executory contract, the term of the contract and the name and address of the buyer.⁷¹ The insurer is required to issue any proceeds from the policy jointly to the seller and purchaser, with the stipulation that the proceeds must be used to repair or improve the condition of the property. Failure, by either the seller or purchaser, to comply with this section is a per se DTPA violation.*

3. TITLE TRANSFER:

a. Requirement: *A seller is required to transfer recorded legal title to*

the property to the purchaser within 30 days of receiving the final payment under the contract.⁷²

b. Remedies: Penalties for noncompliance by the seller include liquidated damages of \$250 a day, from the 31st day to 90th day, and \$500 a day thereafter, as well as attorney fees.⁷³

4. Right to Convert: *A purchaser is entitled, at any time during the term of the executory contract, to convert his interest under the contract into recorded, legal title.⁷⁴ No fees or penalties can be charged to a purchaser who exercises his right to convert. In order to start the process, the purchaser must tender to the seller a promissory note that is equal in amount to the balance owed under the contract and that contains the same interest rate, due date and late fees as the original contract. Once the seller receives the promissory note, the seller has 10 days to either schedule a time and date to execute the deed and deed of trust or provide the purchaser in writing with a legally justified reason for failing to do so. If the seller fails to comply with this section, he is liable to the purchaser in the same manner and amount as a seller who violates § 5.079, Title Transfer.*

5. Request for Balance and Trustee: *In cases where a purchaser is unsure as to the balance owed under the executory contract, the purchaser may request the balance owed from the seller as well as the name of the seller's trustee.⁷⁵ The request to the seller must be in writing. Once the seller receives the request, he has 10 days to provide the information. If the seller does not provide the information within 10 days, the purchaser can determine the amount owed and include that amount in the promissory*

⁷¹ See, Tex. Prop. Code § 5.078.

⁷² See, Tex. Prop. Code § 5.079.

⁷³ This section applies to all executory contracts regardless of date the contract was signed.

note required by the previous section. The buyer can also select a trustee to be included in the deed of trust.⁷⁶ Once the seller receives notice of the amount determined by the purchaser, he has 20 days to object and provide the amount owed so long as it is based on written records, regularly kept and updated during the entire contract

- 6. Right to Deduct.** If a seller is liable to a purchaser under Subchapter D, the purchaser, without taking judicial action, may deduct from the amount they owe the seller under the contract for deed any amounts owed by the seller to the purchaser.⁷⁷
- 7. Fee Simple Title.** A seller may not enter into an executory contract with a purchaser if the seller does not have fee simple title to the property, free of any liens or encumbrances. Violation of this section by the seller is a per se DTPA violation.⁷⁸

G. SELLERS REMEDIES ON DEFAULT: THE SELLER'S REMEDIES ON DEFAULT DEPEND ON HOW MUCH THE PURCHASER HAS PAID UNDER THE CONTRACT.

1. PURCHASER HAS PAID LESS THEN 40 PERCENT OF PURCHASE PRICE OR LESS THAN 48 MONTHLY PAYMENTS. IF THE PURCHASER HAS PAID LESS THAN 40 PERCENT, THE SELLER MAY ENFORCE THE REMEDY OF RESCISSION OR FORFEITURE AND ACCELERATION AGAINST THE PURCHASER.⁷⁹ BUT FIRST THE SELLER MUST NOTIFY THE PURCHASER OF THE INTENT TO ENFORCE THE REMEDY AND NOTIFY THE PURCHASER OF THE RIGHT TO CURE WITHIN 30 DAYS.⁸⁰ IF THE PURCHASER FAILS TO CURE WITHIN 30 DAYS, THEN THE SELLER MAY ENFORCE THE REMEDY OF RESCISSION OR FORFEITURE AND ACCELERATION.

⁷⁴ See, Tex. Prop. Code § 5.081.

⁷⁵ See, Tex. Prop. Code § 5.082.

⁷⁶ See, Koehler v. Pioneer American Ins., 425 S.W.2d 889, 891 (FW 1968) (Seller can be designated as trustee).

⁷⁷ See, Tex. Prop. Code § 5.084.

⁷⁸ See, Tex. Prop. Code § 5.085.

⁷⁹ See, Tex. Prop. Code § 5.064; see also, § 5.063 and § 5.065.

⁸⁰ Please note that if the contract was signed prior to September 1, 2003, and the purchaser has paid less than 40 percent then the cure period is 60 days. If the contract was signed after September 1, 2003, and the purchaser has paid less than 40 percent then the cure period is 30 days.

2. PURCHASER HAS PAID MORE THAN 40 PERCENT OF PURCHASE PRICE OR 48 MONTHLY PAYMENTS. **IF THE PURCHASER HAS PAID MORE THAN 40 PERCENT, THEN SPECIAL EQUITY PROTECTION PROVISIONS APPLY.**⁸¹ **IN THIS CASE, IF A PURCHASER IS IN DEFAULT, A SELLER IS GRANTED THE RIGHT TO SELL THE PURCHASER’S INTEREST IN THE PROPERTY THROUGH A TRUSTEE DESIGNATED BY THE SELLER, BUT CANNOT ENFORCE THE REMEDY OF RESCISSION AND FORFEITURE. BEFORE THE PROPERTY CAN BE SOLD, THE SELLER MUST NOTIFY THE PURCHASER OF THE DEFAULT UNDER THE CONTRACT AND NOTIFY THE PURCHASER OF THE RIGHT TO CURE WITHIN 60 DAYS.**⁸² **ONCE THE CURE PERIOD HAS RUN, THE SELLER IS GRANTED THE POWER TO SELL THE PURCHASER’S INTEREST IN THE PROPERTY IN ACCORDANCE WITH § 51.002 OF THE TEXAS PROPERTY CODE.**

2. Warranty Deed vs. Hybrid vs. Contract for Deed

WARRANTY DEED VS. CONTRACT FOR DEED		
WARRANTY DEED	HYBRID 5.062(c)	CONTRACT FOR DEED (KFD)
You get your deed now.	You do not get your deed for six months.	You do not get your deed until you finish paying for the property.
You begin to build equity from the date of purchase.	You do not begin to build equity for six months.	You do not begin to build equity until you have paid 40% or more than 48 monthly payments.

⁸¹ See, Tex. Prop. Code § 5.066.

⁸² See, Tex. Prop. Code § 5.066(b), § 5.063.

WARRANTY DEED VS. CONTRACT FOR DEED

<p>If you default¹ on your note, the seller can foreclose², after giving you notice, and sell your property at a public auction to recover the amount still owed under the note.</p>	<p>If you default under your contract before the six months have expired the seller can cancel your contract and retain the property and any improvements.</p> <p>If you default after the six months have expired and you have received your deed the seller must go through Foreclosure to recover the amount still owed on the Note.</p>	<p>If you default before you have paid 40% or more of the purchase price under your contract, the seller can enforce the remedy of forfeiture,³ cancel your contract and retain the property and any improvements.</p> <p>If you default after you have paid 40% or more of the purchase price under your contract, the seller must go through foreclosure to recover the amount still owed under the contract.</p>
<p>If you pay the full price of the property up front you will receive a warranty deed.</p> <p>If you finance the amount needed to purchase the property, you will receive a warranty deed, a real estate lien note, and a deed of trust.</p>	<p>Initially, you will sign a contract for deed. Once six months have passed, if you pay the full price of the property you will receive a warranty deed.</p> <p>If, at the end of the six months, you finance the amount needed to purchase the property, you will receive a warranty deed, a real estate lien note, and a deed of trust.</p>	<p>Initially, you will sign a contract for deed, under which you agree to purchase the property by making regular payments over a set period of time. Once you have paid the entire purchase price of the property, you will receive a warranty deed.</p>

TAX

What is an Offer in Compromise?

An offer in compromise (OIC) is an agreement between a taxpayer and the Internal Revenue Service that settles the taxpayer's tax liabilities for less than the full amount owed. Absent special circumstances, an offer will not be accepted if the IRS believes that the liability can be paid in full as a lump sum or through a payment agreement.

In most cases, the IRS will not accept an OIC unless the amount offered by the taxpayer is equal to or greater than the reasonable collection potential (RCP). The RCP is how the IRS measures the taxpayer's ability to pay and includes the value that can be realized from the taxpayer's assets, such as real property, automobiles, bank accounts, and other property. The RCP also includes anticipated future income, less certain amounts allowed for basic living expenses.

Taxpayers should beware of promoters' claims that tax debts can be settled through the offer in compromise program for "pennies on the dollar".

Three Types of OICs

The IRS may accept an offer in compromise based on three grounds:

1. **Doubt as to Collectibility** - Doubt exists that the taxpayer could ever pay the full amount of tax liability owed within the remainder of the statutory period for collection.

Example: A taxpayer owes \$20,000 for unpaid tax liabilities and agrees that the tax she owes is correct. The taxpayer's monthly income does not meet her necessary living expenses. She does not own any real property and does not have the ability to fully pay the liability now or through monthly installment payments.

2. **Doubt as to Liability** - A legitimate doubt exists that the assessed tax liability is correct. Possible reasons to submit a doubt as to liability offer include: (1) the examiner made a mistake interpreting the law, (2) the examiner failed to consider the taxpayer's evidence or (3) the taxpayer has new evidence.

Example: The taxpayer was vice president of a corporation from 2004-2005. In 2006, the corporation accrued unpaid payroll taxes and the taxpayer was assessed a trust fund recovery penalty as a responsible party of the corporation. The taxpayer was no longer a corporate officer and had resigned from the corporation on 12/31/2005. Since the taxpayer had resigned prior to the payroll taxes accruing and was not contacted prior to the assessment, there is legitimate doubt that the assessed tax liability is correct.

3. **Effective Tax Administration** - There is no doubt that the tax is correct and there is potential to collect the full amount of the tax owed, but an exceptional circumstance exists that would allow the IRS to consider an OIC. To be eligible for compromise on this basis, a taxpayer must demonstrate that the collection of the tax would create an economic hardship or would be unfair and inequitable.

Example: Mr. & Mrs. Taxpayer have assets sufficient to satisfy the tax liability and provide full time care and assistance to a dependent child, who has a serious long-term illness. It is expected that Mr. and Mrs.

Taxpayer will need to use the equity in assets to provide for adequate basic living expenses and medical care for the child. There is no doubt that the tax is correct.

OIC Payment Options

In general, a taxpayer must submit a \$150 application fee and initial payment along with the Form 656, Offer in Compromise. Taxpayers may choose to pay their offer in compromise in one of three payment options:

1. **Lump Sum Cash Offer** - Payable in non-refundable installments, the offer amount must be paid in five or fewer installments upon written notice of acceptance. A non-refundable payment of 20 percent of the offer amount along with the \$150 application fee is due upon filing the Form 656.

If the offer will be paid in 5 or fewer installments in 5 months or less, the offer amount must include the realizable value of assets plus the amount that could be collected over 48 months of payments or the time remaining on the statute, whichever is less.

If the offer will be paid in 5 or fewer installments in more than 5 months and within 24 months, the offer amount must include the realizable value of assets plus the amount that could be collected over 60 months of payments, or the time remaining on the statute, whichever is less.

If the offer will be paid in 5 or fewer installments in more than 24 months, the offer amount must include the realizable value of assets plus the amount that could be collected over the time remaining on the statute.

2. **Short Term Periodic Payment Offer** - Payable in non-refundable installments; the offer amount must be paid within 24 months of the date the IRS received the offer. The first payment and the \$150 application fee are due upon filing the Form 656. Regular payments must be made during the offer investigation.

The offer amount must include the realizable value of assets plus the total amount the IRS could collect over 60 months of payments or the remainder of the statutory period for collection, whichever is less.

3. **Deferred Periodic Payment Offer** - Payable in non-refundable installments; the offer amount must be paid over the remaining statutory period for collecting the tax. The first payment and the \$150 application fee are due upon filing the Form 656. Regular payments must be made during the investigation.

The offer amount must include the realizable value of assets plus the total amount the IRS could collect through monthly payments during the remaining life of the statutory period for collection.

The IRS is not bound by either the offer amount or the terms proposed by the taxpayer. The OIC investigator may negotiate a different offer amount and terms, when appropriate. The investigator may determine that the proposed offer amount is too low or the payment terms are too protracted to recommend acceptance. In this situation, the OIC investigator may advise the taxpayer as to what larger amount or different terms would likely be recommended for acceptance.

Payments and Application Fees

When filing an offer in compromise, two separate remittance documents should be sent, one for the application fee and the other for the required offer payment. All payments should be made by check or money order made payable to the United States Treasury. Practitioners who file multiple OICs at the same time should not combine application fees for multiple clients.

The Form 656-PPV, Offer in Compromise Payment Voucher, included in the Form 656, should be completed and attached to any periodic payment(s) that becomes due. Failure to submit any required periodic payments, after the initial payment has been submitted, will result in the offer being declared withdrawn. For offers originally sent to Holtsville, NY, send payments to: P.O. Box 9011, Holtsville, NY 11742. For offers originally sent to Memphis, TN, send payments to: AMC Stop 880, P.O. Box 30834, Memphis, TN 38130-0634.

The OIC application fee reduces the assessed tax or other amounts due. The application fee will be returned if the OIC is deemed not to be processable. Unless the offer in compromise has been submitted under doubt as to liability or a completed Form 656-A is included with the Form 656, the \$150 application fee must be included with the offer or the IRS will return the offer.

Do You Qualify for an Offer in Compromise?

The objective of the Offer in Compromise (OIC) program is to accept an OIC when it is in the best interest of both the taxpayer and the government and promotes voluntary compliance with all future payment and filing requirements.

If you are unable to pay your tax liability in a lump sum or through an installment agreement and you have exhausted your search for other payment arrangements, you may be a candidate for an offer in compromise.

In order for your offer in compromise to be considered, you must meet the following requirements:

- You are not a debtor in an open bankruptcy proceeding
- Include the \$150 application fee, or a signed [Form 656-A, Income Certification for Offer in Compromise Application Fee and Payment](#) (PDF)
- Submit one of the following payments with the offer:
 - Lump Sum Offer- 20 percent payment or a signed Form 656-A, Income Certification for Offer in Compromise Application Fee and Payment
 - Periodic Payment Offer- The first installment or a signed Form 656-A, Income Certification for Offer in Compromise Application Fee and Payment.

Low Income Exemption and Guidelines

The application fee is waived if an individual (not a corporation, partnership or other entity) taxpayer's income falls at or below IRS Low Income Guidelines. The [Form 656-B, Offer in Compromise Booklet \(PDF\)](#), contains a worksheet titled "IRS Monthly Low Income Guidelines Worksheet" designed to assist taxpayers in determining whether they are eligible for the low income exemption. Qualifying taxpayers are also exempt from making any OIC payments while the offer is being investigated.

Once you have determined that you are eligible for the low income exemption, you must submit Form 656-A, Offer Certification for Offer in Compromise Application Fee and Payment. The Form 656-A must be attached to the Form 656 application and mailed to the IRS for consideration.

What You Must Know Before You File an Offer in Compromise

All Taxpayers Do Not Qualify for an Offer in Compromise

Absent special circumstances, if you have the ability to fully pay your tax liability in a lump sum or via an installment agreement, an offer in compromise will not be accepted.

Offer in Compromise Payments are Non-refundable

The IRS considers the 20 percent payment for a lump sum offer and any periodic payments as "payments on tax" and are not refundable, regardless of whether the offer is declared not-processable or is later returned, withdrawn, rejected or terminated by the IRS.

Federal Tax Liens are Not Released

If there is a [Notice of Federal Tax Lien](#) on record prior to acceptance of the offer, the lien is not released until the OIC terms are satisfied or until the liability is paid, whichever comes first. A Notice of Federal Tax Lien may be filed during the course of the OIC investigation.

Payments May be Designated

You may designate in writing how the IRS should apply payments made with the filing of the offer and while an offer is under investigation. Without a written designation, payments will be applied to the tax liability and in the government's best interest. The \$150 application fee cannot be designated, but is applied to the tax liability and in the government's best interest.

Refunds

The IRS will keep any refund, including interest due, because of an overpayment of any tax or other liability, for tax periods extending through the calendar year the IRS accepts the OIC.

Exception: Offers submitted under the basis of doubt as to liability.

Levies

The IRS will keep all payments and credits made, received or applied to the total original tax liability before the OIC was submitted. The IRS may also keep any proceeds from a levy that was served prior to the submission of an OIC, but which were not received at the time the OIC was submitted.

Statutory Period for Collection Suspended

The statutory period for collection is suspended during the period that the OIC is under consideration (pending) and is further suspended if the OIC is rejected by the IRS and you appeal the rejection.

Five-Year Compliance

If your offer is accepted, you must timely file all tax returns and timely pay all tax for five years or until the offered amount is paid in full, whichever period is longer. Failure to adhere to these terms will result in default of the offer and the IRS may then collect the amounts originally owed plus penalties and interest.

OIC Payment and Application Fee Exceptions

If you qualify for a low-income exception waiver or you submit a doubt as to liability offer you are exempt from the \$150 application fee and any OIC payments due upon submission of the OIC or during the course of the investigation. The low income waiver does not apply to businesses.

Appeal

If your OIC is rejected, you will have the opportunity to file an appeal which will be heard by the IRS Office of Appeals. There are no appeal rights associated with offers that are returned, withdrawn or terminated.

Approved Installment Agreement

If you have an approved installment agreement and submit a periodic payment offer, you are not required to continue to make the installment agreement payments while the offer is being investigated. You will, however, be required to make the OIC periodic payments as they become due.

Mandatory Acceptance

Per IRC 7122(f), the IRS will deem an offer “accepted” if it is not withdrawn, returned or rejected within 24 months of the IRS receipt date. If a liability included in the offer amount is disputed in any judicial proceeding, that time period is omitted from calculating the 24-month time frame.

How to File an Offer in Compromise

The [Form 656-B, Offer in Compromise Booklet \(PDF\)](#) contains information about filing an offer in compromise, worksheets, and all forms necessary to file an offer in compromise.

When submitting an offer in compromise (OIC), taxpayers must use the most current version of [Form 656, Offer in Compromise \(PDF\)](#), or [Form 656-L, Offer in Compromise \(Doubt as to Liability\) \(PDF\)](#), depending on the basis of the offer in compromise. Taxpayers should file Form 656 when there is doubt that the liability could be collected in full through a lump sum or an installment agreement and file Form 656-L when it is believed that the tax liability is incorrect. Taxpayers may not file offers concurrently claiming both that the tax liability is incorrect along with an inability to pay the liability.

In most cases, taxpayers must submit Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and/or Form 433-B, Collection Information Statement for Businesses. Neither the Form 433-A nor Form 433-B is required when a taxpayer submits an OIC based solely as to doubt as to liability.

How Many Forms 656 and Application Fees are Required?

The general rule when determining how many offers and application fees are necessary is "one fee and form per entity". The Form 656-B contains an Offer in Compromise Application Fee and Payments matrix to assist you in determining the number of Forms 656 and application fees required.

Examples:

A married couple owing the same joint income tax liability may file only one Form 656 listing the joint liability. One fee of \$150 should be attached to the Form 656. A married couple opting to file separate offers to compromise the same joint liability may do so, but two \$150 application fees will be required.

When a married couple owes a joint liability and one spouse also owes an individual (non-joint) liability, two OICs and two application fees are needed.

A divorced, separated or married couple living apart may still file one Form 656 listing their joint liability and pay only one \$150 fee as long as all the taxes owed are joint liabilities. Taxpayers in these situations that opt to file separate offers must pay a \$150 application fee for each offer that is submitted for consideration.

Note: These examples assume that the taxpayers do not meet one of the exceptions for paying the application fee: the OIC is filed under doubt as to liability or the taxpayer has completed and attached Form 656-A to Form 656.

Keys to Success in the Offer in Compromise Program:

1. Explore all collection options before submitting an offer in compromise
2. Complete the "Is Your Offer in Compromise Processable?" checklist located in the Form 656-B, Offer in Compromise Booklet.

3. Submit all required documentation
4. Complete all items on Form 656, Offer in Compromise
5. Include all required fees and payments
6. Be current with all filing and paying requirements (estimated taxes and federal tax deposits) and remain current
7. Respond promptly to all requests for additional information
8. Complete all items on Form 433-A or Form 433-B

Where to File Form 656

Residents of: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oregon, Tennessee, Texas, Utah, Washington, Wisconsin or Wyoming:

If you are a wage earner, retiree, or a self-employed individual without employees; then mail Form 656 and all attachments to:

Memphis Internal Revenue Service
Center COIC Unit
PO Box 30803 AMC
Memphis, TN 38130-0804

If you are other than a wage earner, retiree, or self-employed individual without employees; then mail Form 656 and all attachments to:

Memphis Internal Revenue Service
Center COIC Unit
PO Box 30804, AMC
Memphis, TN 38130-0804

Residents of: Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, West Virginia, or have a foreign address:

If you are a wage earner, retiree, or a self-employed individual without employees; then mail Form 656 and all attachments to:

Brookhaven Internal Revenue Service
Center COIC Unit
PO Box 9007
Holtsville, NY 11742-9007

If you are other than a wage earner, retiree, or a self-employed individual without employees; then mail form 656 and all attachments to:

Brookhaven Internal Revenue Service
Center COIC Unit
PO Box 9008
Holtsville, NY 11742-9008

Where to File Form 656-L (Doubt as to Liability)

Brookhaven Internal Revenue Service
COIC Unit
PO Box 9008
Holtsville, NY 11742-9008

In addition to accessing the Form 656 and Form 656-L online, you may obtain it by calling the IRS toll free number 1-800-829-3676 or by visiting your local IRS office.

Earned Income Tax Credit – (EITC)

Q1. What is the Earned Income Tax Credit (EITC)?

A1. The earned income credit (EITC) is a tax credit for certain people who work and have low wages. A tax credit usually means more money in your pocket. It reduces the amount of tax you owe. The EITC may also give you a refund.

Q2. Who can claim the credit?

A2. To claim the EITC on your tax return, you must meet all of the following rules:

- Must have a valid social security number
- You must have earned income from employment or from self-employment.
- Your filing status cannot be married, filing separately.
- You must be a U.S. citizen or resident alien all year, or a nonresident alien married to a U.S. citizen or resident alien and filing a joint return.
- You **cannot** be a qualifying child of another person.
- If you do not have a qualifying child, you must:
 - be age 25 but under 65 at the end of the year,
 - live in the United States for more than half the year, and
 - not qualify as a dependent of another person
- Cannot file Form 2555 or 2555-EZ (related to foreign earn income)
- You must meet EITC Thresholds and Limitations

Q3. What if I was denied the EITC last year?

A3. If your EITC for any year after 1996 was denied or reduced for any reason other than a math or clerical error, you must attach a completed Form 8862, Information to Claim Earned Income Credit After Disallowance, to your next tax return to claim the EITC. You must also qualify to claim the EIC by meeting all the rules described in Publication 596.

However, do not file Form 8862 if either (1) or (2) below is true.

1. After your EITC was reduced or disallowed in the earlier year:

- You filed Form 8862 (or other documents) and your EITC was then allowed, and
- Your EITC has not been reduced or disallowed again for any reason other than a math or clerical error.

2. You are taking the EITC without a qualifying child and the only reason your EITC was reduced or disallowed in the earlier year was because the IRS determined that a child listed on Schedule EITC was not your qualifying child.

Also, do not file Form 8862 or take the EITC for:

- 2 years after there was a final determination that your EITC was reduced or disallowed due to reckless or intentional disregard of the EITC rules, or
- 10 years after there was a final determination that your EITC was reduced or disallowed due to fraud.

Q4. Who is a qualifying child?

A4. Your child is a qualifying child if your child meets **all** of the following tests:

1. Relationship
2. Age
3. Residency Joint Return

Relationship

To be your qualifying child, a child must be your:

- Son, daughter, stepchild, eligible foster child, adopted child or a descendant (for example, your grandchild) of any of them, or
- Brother, sister, half brother, half sister, stepbrother, stepsister, or a descendant of any of them (for example, your niece or nephew).

Definitions to clarify the relationship test.

Adopted child. An adopted child is always treated as your own child. The term "adopted child" includes a child who was lawfully placed with you for legal adoption.

Eligible Foster Child. A person is your eligible foster child if the child is placed with you by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction.

Age

Your child must be:

1. Under age 19 at the end of the year and younger than you or your spouse if you file a joint return,
2. A full-time student under age 24 at the end of the year and younger than you or your spouse if you file a joint return, or
3. Permanently and totally disabled at any time during the year, regardless of age.

Residency Test

Your child must have lived with you in the United States for more than half of the year.

See Publications [596](#) and [501](#) for more details

Q5. Who is an eligible foster child?

A5. An eligible foster child is an individual who is placed with you by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction.

Q6. What is Earned Income?

A6. Earned income includes all the taxable income and wages you get from working.

There are two ways to get earned income:

1. You work for someone who pays you, or;
2. You work in a business you own.

Taxable earned income also includes:

- Wages, salaries, and tips;
- Union strike benefits;
- Long-term disability benefits received prior to minimum retirement age;
- Net earnings from self-employment.

Combat Pay:

Nontaxable combat pay election. You can elect to have your nontaxable combat pay included in earned income for the earned income credit. The amount of your nontaxable combat pay should be shown on your Form W-2, in box 12, with code Q.

Q7. How do I figure my credit?

A7. Once you know you qualify for the EITC, you need to know how to figure the amount of the credit. You have two choices of how to figure the credit:

1. Have the IRS figure the credit for you. If you would like the IRS to do this, see Publication 596, or
2. Figure the credit yourself. To do this you must use the Earned Income Credit Worksheet (EIC Worksheet) in the instruction booklet for Form 1040, Form 1040A, or Form 1040EZ, and the Earned Income Credit (EIC) Table in the instruction booklet, or use the [EITC Assistant Tool](#) online.

For more information, see, Figuring and Claiming the EITC, in [Publication 596](#).

Q8. How can I get EITC in my paycheck?

A8. You may prefer to get some of next year's EITC throughout the year, rather than wait and get EITC after you file your tax return. To get EITC, complete [Form W-5](#) and give the lower part of the form to your employer. Keep the top part for your records.

Q9. What if I am prohibited from claiming the EITC for a period of years?

A9. If your EITC for any year after 1996 was denied and it was determined that your error was due to reckless or intentional disregard of the EITC rules, then you cannot claim the EITC for the next 2 years. If your error was due to fraud, then you cannot claim the EITC for the next 10 years. The date on which your EITC was denied and the date on which you file your tax return affects the years for which you are prohibited from claiming the EITC.

EITC Income Limits, Maximum Credit Amounts and Tax Law Updates

2009 Tax Year

New for tax year 2009: The amount of EITC increased for workers with a third qualifying child and the rules changed for determining who is a qualifying child.*

Earned Income and adjusted gross income (AGI) must each be less than:

- \$43,279 (\$48,279 married filing jointly) with three or more qualifying children
 - \$40,295 (\$45,295 married filing jointly) with two qualifying children
 - \$35,463 (\$40,463 married filing jointly) with one qualifying child
 - \$13,440 (\$18,440 married filing jointly) with no qualifying children

Tax Year 2009 maximum credit:

- \$5,657 with three or more qualifying children
 - \$5,028 with two qualifying children
 - \$3,043 with one qualifying child
 - \$457 with no qualifying children

The Fostering Connections to Success and Increasing Adoptions Act of 2008 changed the uniform definition of a child. Now, a "qualifying child" must:

- Be younger than the taxpayer claiming that child unless the child is disabled and
 - Not have filed a joint return except to claim a refund

It also added a new Parent AGI rule. If the same child is a qualifying child of a parent and another relative, the person who is not the parent can claim the child only if their AGI is higher than the AGI of any parent of the child.

*The American Recovery and Reinvestment Act (ARRA) provides a temporary increase in EITC and expands the credit for workers with three or more qualifying children. These changes are temporary and apply to 2009 and 2010 tax years.

For more information on whether a child qualifies you for the EITC, see [Publication 596](#), Chapter 2, Rules If You Have a Qualifying Child.

Investment income must be \$3,100 or less for the year.

The **maximum Advance EITC** workers can receive from their employers is \$1,826.

Haven't Filed an Income Tax Return? Here's What to Do

Filing a past due return may not be as difficult as you think. Taxpayers should file all tax returns that are due, regardless of whether or not full payment can be made with the return. Depending on an individual's circumstances, a taxpayer filing late may qualify for a payment plan. All payment plans require continued compliance with all filing and payment responsibilities after the plan is approved. However, full payment of taxes saves you money.

Payment Options - Ways to Make a Payment

There are several different ways to make a payment on your taxes. Payments can be made by credit card, electronic funds transfer, check, money order, cashier's check, or cash.

Getting Free Help

The IRS offers free assistance by computer, telephone, facsimile and in person. The IRS can assist taxpayers with obtaining forms, publications, and answers to a wide range of tax questions.

What Will Happen If You Don't File Your Past Due Return or Contact the IRS

It's important to understand the ramifications of not filing a past due return and the steps that the IRS will take.

NOTE: Taxpayers who continue to not file a required return and fail to respond to IRS requests for a return may be considered for a variety of enforcement actions. Continued non-compliance by flagrant or repeat nonfilers could result in additional penalties and/or criminal prosecution.

