
# LEGAL ADVICE CLINIC HANDBOOK

**NOTE**

This Handbook has not been updated with 2017 legislative updates.
See specific chapters for last edited dates.

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# §1. BANKRUPTCY

## I. General Matters in Bankruptcy Cases.

**A. Commencing the Voluntary Case**. The filing of a bankruptcy petition commences the case. Because a voluntary case is not a contested matter, the filing of a petition automatically constitutes an order for relief under the Bankruptcy Code. 11 U.S.C. § 301.

1. Pre-Petition Counseling. To be eligible to file a bankruptcy petition, a debtor who is an individual must have received from an approved, nonprofit budget and counseling service a briefing that outlines her opportunities for credit counseling and assists her in performing a budget analysis. This must occur less than 180 days prior to filing the petition. The counseling may be done over the internet or telephone. § 109(h). Counseling is available for as little as $10 or free if a fee waiver will be requested in the Bankruptcy case. For cases filed in Houston, the debtor should get a certificate indicating the Southern District of Texas.

**B. Commencing the Involuntary Case**. Under certain circumstances, creditors may commence either a Chapter 7 or 11 (but not Chapter 13) case against a debtor. § 303.

1. Requisite Number of Creditors. If the debtor has less than 12 creditors with non-contingent claims, any ***one*** or more of such creditors whose non-contingent, undisputed, unsecured claims aggregate at $15,325 must join in the petition. If the debtor has 12 or more creditors, then ***three*** or more such creditors must join in the petition.

2. Grounds. When an involuntary petition is filed, the debtor has the right to file an answer to contest the petition. If an answer is not filed, the court will order the liquidation. If an answer is filed, a trial will be held, and liquidation will be ordered if the debtor is ***generally*** not paying debts as they become due (i.e., must regularly miss a significant number of payments or regularly miss payments significant in amount in relation to the size of debtor's operation).

**C. The Automatic Stay**. The "automatic stay" halts collection activities for the duration of the case from the time of the bankruptcy filing and applies to creditors whether they know of its existence or not. In effect, it enjoins any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the bankruptcy case (subject to several exceptions). § 362. For example, if a creditor requests that the stay be lifted and the court fails to act, the stay will be lifted 30 days after the request. In addition, if the debtor filed for bankruptcy more than once in the preceding year, the stay lasts 30 days at most.

## II. Chapter 13 Bankruptcy: Adjustment of Debt for Individuals with Regular Income

**A. In General.** Chapter 13 is a voluntary bankruptcy instituted by an individual who wants to propose a plan to repay his or her creditors over time. Most debt is repaid in 3 – 5 years under the plan. Chapter 13 basically involves paying the debts off (or a fraction of the debts off)

with installments paid over time. Chapter 13 allows a debtor to keep his assets that otherwise might be sold in a Chapter 7 bankruptcy.

**B. Test.** A plan can only be approved if it meets the "best interest of the creditors" test, meaning that each creditor must receive, in present value terms, at least as much as that creditor would receive if the debtor were liquidated under Chapter 7. § 1325.

**C. Eligibility**. Only individuals with non-contingent, liquidated, unsecured debts of less than $383,175, and secured debts of less than $1,149,525 are eligible for this relief. § 109.

## III. Chapter 7 Bankruptcy: Liquidations

**A. Effect of Liquidation**. The debtor's non-exempt assets are liquidated and, for an individual debtor, his or her debts are discharged.

**B. Dismissal for "Abuse."** A Chapter 7 petition filed by an individual debtor with primarily consumer debts may be dismissed (or with the debtor's consent converted to a case under Chapters 11 or 13) upon a finding that granting relief would constitute an abuse. § 707(b)(1). There are two ways of establishing abuse:

1. By showing that the debtor filed in bad faith or by establishing lack of good faith under the "totality of the circumstances of the debtor's financial situation;" OR

2. Through the "means test," where the court will look at the debtor's income for the 6 months prior to filing for bankruptcy and compare it to the median family income for families of similar size. If the debtor's income is not over the median, the debtor can proceed. If the income is above the median, the court will employ a "means test," which will require the debtor to file under Chapter 13 if, over a five-year plan, the debtor's monthly income would allow it to pay the lesser of (a) 25% of unsecured claims or $7,475, whichever is greater, or (b) $12,475.

**C.** The Bankruptcy Estate.

1. Generally, all property of the debtor acquired prior to bankruptcy, including exempt property, becomes property of the bankruptcy estate. § 541(a)(1).

2. In a Chapter 7 bankruptcy, all post-petition property remains the property of the debtor (such as post-petition wages), except for inherited property, life insurance, and property received in divorce if received within 180 days of filing the petition. § 541(a)(5).

**D. Exemptions**. The Bankruptcy Code and Texas law permit an individual debtor to choose between state or federal exemptions. The Texas exemptions are more favorable to debtors.

1. Federal Exemptions. 11 U.S.C. § 522. The following exemption amounts double for a married couple filing jointly. § 522(m).

(a) Homestead. The debtor's residence, up to $22,975 in value.

(b) Wildcard. $1,125 of any property, and unused portion of the homestead up to $11,500.

2. State Exemptions.

(a) Personal Property. If the debtor has a family, he may exempt up to $100,000 in personal property. If the debtor is single, he may exempt up to $50,000. Tex. Prop. § 42.001. This includes also includes a motor vehicle exemption, which allows a debtor to exempt the entire value of one motor vehicle per licensed household member. § 42.002.

(b) Homestead. Texas offers an unlimited homestead exemption for a residence up to 10 acres or less in an urban area, or 100 acres or less in a rural area (200 acres for a family homestead in a rural area). § 41.001-002.

(c) Other Exemptions. *See* § 41.001-005.

3. Exemption Limitations.

(a) Residence Requirement. If a debtor wants to claim the Texas exemptions, the debtor must be a resident of Texas for two years before the bankruptcy filing. 11 U.S.C. § 522(b)(3). In addition, if the debtor acquired his Texas homestead within 40 months prior to filing for bankruptcy, the homestead exemption is capped at $155,675 (unless the homestead was purchased with proceeds from selling another home in Texas). § 522(p)(1).

(b) "Bad Acts" Limitation. The debtor's homestead exemption is limited to $155,675 if: (i) the debtor has been convicted of a felony which, under the circumstances, demonstrates that the filing of the case was an abuse of the Bankruptcy Code; OR (ii) the debtor owes a debt arising from, among other things, any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the five-year period before the bankruptcy filing.

(c) Secured Creditors. A secured creditor with a perfected security interest will still be able to obtain the property (i.e., the collateral), even though it may be covered by the exemption provisions.

**E. Discharge**. Under usual circumstances, the debtor will be discharged of its obligations and be given a fresh start. Discharge relieves a debtor of personal liability for any debts that are discharged and serves as a permanent injunction against creditors, prohibiting them from taking any action to recover a discharged debt from the debtor.

1. Objections to Discharge. There are a number of grounds for the denial of a discharge under Chapter 7. If such an objection is made and one of the grounds is established, all of the debtor's obligations will survive bankruptcy. A few notable objections include: (i) fraudulent transfers or concealment of property; (ii) failure to keep books or records; (iii) commission of a

bankruptcy crime; (iv) refusal to obey court orders or answer questions; (v) prior discharge within 8 years; and (vi) failure to complete a financial management course. *See* 11 U.S.C. § 727(a).

2. Exceptions to Discharge. The following debts, among others, are not discharged: (i) tax claims entitled to priority; (ii) luxury goods obtained with over $650 in aggregate debts owed to a single creditor and incurred within 90 days of filing; (iii) domestic support obligations (alimony, maintenance, and child support); (iv) liability for willful and malicious injury to property or person; (v) liability for injury caused by debtor's operation of a motor vehicle while intoxicated; (vi) student loans; and (vii) fines and penalties owed to a governmental unit. § 523.

3. Discharging Federal Taxes. To do so, the following rules must be satisfied:

(a) The 3-Year Rule. The back income taxes must become due at least 3 years before filing for bankruptcy. §507(a)(8)(A)(i).

(b) The 240-Day Rule. Taxes must be assessed at least 240 days before filing for bankruptcy or not assessed at all. The date of assessment is typically on or near the date the income tax form was filed. However, if a correction or a change results from an IRS audit, the assessment date may be substantially later. §507(a)(8)(A)(ii).

(c) The 2-Year Rule. Income tax returns must have been filed at least 2 years before filing the bankruptcy petition. This requirement allows you to discharge your taxes, even if you filed your tax forms late, as long as you file them at least two years before filing for bankruptcy. §523(a)(1)(B)(ii).

> ***NOTE***: If you did not file a tax return, or did not satisfy all requirements (e.g., deadlines) for filing the tax return, any taxes assessed by the IRS for that year are NOT dischargeable. The Fifth Circuit interprets this rule very literally, so a tax return filed even a day late cannot be discharged. *In re McCoy*, 666 F.3d 924, 932 (5th Cir. 2012).

# §2. CRIMINAL EXPUNCTIONS AND NON-DISCLOSURE

## I. Expunctions.

**A. Eligibility**. Tex. Crim. Proc. art. 55.01. The following individuals are eligible to obtain an expunction of all records and files relating to an arrest:

1. IF the individual is arrested, tried, AND (i) acquitted for an offense ***or*** (ii) convicted but subsequently pardoned for an offense, (***except*** if the offense was part of another offense stemming from the same criminal episode); OR

2. IF the individual was arrested and released, but ***not*** acquitted or pardoned, then the individual must meet the following requirements:

(a) *The individual must not have been convicted for the offense for which s/he was arrested, AND

(b) The individual did not intentionally or knowingly flee after being released on bail, AND

(c) The arrest did not arise out of a warrant issued for a violation of community supervision, AND

(d) *No community supervision was ordered for the crime, AND:

(e) One of the following:

(i) The requisite time period has passed (Class C misdemeanor: 180 days; Class A or B misdemeanor: 1 year; felony: 3 years), OR

(ii) The prosecutor certifies the arrest records are no longer needed, OR

(iii) The charge was dismissed because the individual completed a pretrial intervention program, OR

(iv) The charge was void or based on a mistake or false information, OR

(v) The prosecution of the offense is no longer possible because the statute of limitations has expired.

***NOTE***: for Class C misdemeanors, the "no conviction" requirement in (a) and the "no community supervision" requirement in (d) do not apply. However, the other requirements do apply, so the individual must wait 180 days after the arrest date before apply for an expunction.

**B. Time to Obtain an Expunction and Effect**.[1] Once an expunction request is filed, it takes approximately 6-8 weeks for the court to rule on it. If the request is granted, the court orders all city, state and federal agencies to destroy the arrest records. This normally takes about 4 months, but has been known to take up to one year. The applicant should check on the status with the DPS headquarters located in Austin if there are any concerns.

## II. Non-Disclosure Order.

**A. Availability.** Depending on the nature of the offense, an Order of Non-Disclosure may be available to individuals who successfully complete deferred adjudication for a Class B or above criminal offense. Tex. Gov't § 411.081.

1. Misdemeanor Offenses. An individual is eligible for an Order immediately upon successful completion of deferred adjudication, except for misdemeanors described in (2), below. § 411.081(d)(1).

2. Misdemeanors Requiring a Two-Year Waiting Period. The individual will have to wait two years after completion of deferred adjudication for the following misdemeanors:

(a) Kidnapping, unlawful restraint, and smuggling of persons;

(b) Sexual offenses;

(c) Assaultive offenses;

(d) Offenses against the family;

(e) Disorderly conduct and related offenses; and

(f) Offenses involving weapons. § 411.081(d)(2).

3. Felony Offenses. In the case of felony arrests, the individual will have to wait 5 years after completion of deferred adjudication before applying for the order. § 411.081(d)(3).

**B. When Unavailable**. An Order of Non-Disclosure is unavailable for the following:

1. Individuals who were convicted of, or placed on deferred adjudication for, any offense (other than a traffic offense punishable by fine only) during the period of the deferred adjudication for which the Order is requested and any applicable waiting period; OR

[1] See http://deanofstudents.utexas.edu/lss/handbook/criminal.php#Expunction.

2. Individuals placed on deferred adjudication for, or previously convicted or placed on any other deferred adjudication for:

(a) Any offense requiring registration as a sex offender;

(b) Aggravated kidnapping;

(c) Murder or capital murder;

(d) Abandonment or endangerment of a child;

(e) Injury to a child, the elderly, or disabled;

(f) Violation of a protective order; and

(g) Stalking or crimes involving family violence. § 411.081(e).

**C. Effect of Order of Non-Disclosure**. Once granted, the Order prevents law enforcement agencies, jails, courts and other public information agencies from releasing arrest information to private third parties. However, the Order does not prevent law enforcement agencies from sharing the information with one another or with certain authorized agencies, such as school districts. The arrest information may also be revealed in the case of subsequent criminal prosecutions. § 411.081(a).

# §3. PROBATE AND ESTATE ADMINISTRATION

## A. Methods to Administer the Estate

### I. Introduction and Non-Probate Assets.

**A.** "Probate" refers to the judicial proceeding in which: (i) if there is a will, the will is determined to be the duly executed last will of the decedent, or, (ii) if there is no will (the decedent died ***intestate***), the decedent's heirs are judicially determined. At the probate proceeding, a ***personal representative*** (called an ***executor*** if named in the decedent's will or an ***administrator*** if named by the court) is appointed to carry out the estate administration. The personal representative's authority to act on behalf of the estate is evidenced by ***letters testamentary*** or ***letters of administration*** issued by the probate court. Tex. Est. Code § 22.001 et seq.

**B.** **Non-Probate Assets**. These are interests that pass at death other than by will or intestacy, and are not part of the probate estate for administration purposes. § 111.001-054.

- Property Passing by Right of Survivorship (e.g., joint bank account, etc.).
- Property Passing by Contract (e.g., life insurance, employee death benefits).
- Property Held in Trust (e.g., revocable trust). Terms of trust govern.
- Property over Which Decedent Held a Power of Appointment.

**C.** **Effect of Dissolution of Marriage on Payable on Death (POD) Accounts**. If a decedent's marriage is dissolved after the decedent designates a spouse or relative of a spouse (who is not the decedent's relative) as a POD payee or beneficiary, the designation is void. The multi-party account is then payable to the alternate POD payee or, if none, the decedent's estate. § 123.151.

### II. The Personal Representative.

**A.** **Priority for Appointment**. If the decedent left a will: (1) executor named in will; (2) surviving spouse; (3) principal beneficiary named in will; (4) any other beneficiary named in will; and (5) next of kin. If the decedent died intestate: (1) surviving spouse, then (2) next of kin.

**B.** Required Actions for Personal Representative After Appointment.

- Post fiduciary bond within 20 days. §305.002.
- File inventory (or affidavit in lieu of inventory) within 90 days. § 309.051.
- Notice and copy of will to named beneficiaries within 60 days. § 308.002.
- File certificate that notice given to beneficiaries within 90 days. § 308.004.

### III. Independent Administration.

**A.** **Introduction**. Independent administration means that the estate is administered without court supervision or involvement. This is a central feature of Texas estate administration.

**B. When Authorized**. Independent administration is authorized when: (1) provided for in the will, or (2) all distributees agree (in cases of intestacy or where the will does not provide for independent administration). §§ 401.001-003.

**C. Accounting**. Interested parties are entitled to an accounting, upon demand, 15 months after the will is admitted to probate and successive accountings 60 days after each anniversary of qualifications. § 404.001; 359.001.

**D. Removal**.

1. Without Notice and Hearing if (i) executor cannot be served with process because his whereabouts are unknown, is eluding service, or is a non-resident without a designated agent; or (ii) there are sufficient grounds to believe that he has misapplied or embezzled estate funds, or is about to do so. § 404.003.

2. With Notice and Hearing if executor (i) fails to qualify by posting bond; (ii) fails to file inventory within 90 days; (iii) fails to make an accounting on demand; (iv) fails to give notice to beneficiaries within 60 days or affidavit thereon within 90 days; (v) is guilty of gross misconduct or mismanagement; (vi) becomes incompetent or is sentenced to penitentiary; or (vii) a material conflict of interest prevents him from properly performing his duties. § 404.0035.

## IV. Other Procedures for Simplified Administration.

**A.** Probate Will as a "Muniment of Title." § 257.001-054.

1. Situation. Suppose the only asset in the decedent's estate requiring administration is a tract of real property. All creditors have been satisfied, estate taxes either were not due or have been paid, and there is no reason to formally administer the estate except to put the records in order as to this tract of land. The decedent is named grantee on the last deed in the chain of title. The records must now show that title to this land passed to the decedent's successors, the devisees under the will.

2. Requirements. There must be no unpaid debts, other than those secured by real estate, or if the court "finds for another reason that there is no necessity for administration of the estate."

3. Procedure. The only thing that is done is to admit the will to probate. No personal representative is appointed, and no letters of administration are issued even though the will names an independent executor. The will (which names the devisees, and thus the new owners) and the order admitting the will to probate, now part of the county records, constitute a "muniment of title," i.e., a link in the chain of title.

**B. Statutory Heirship Proceeding**. Identical to the procedure for muniment of title, only this applies where the decedent died intestate. § 202.001-206.

**C. Small Estate Administration**. Where a decedent died intestate leaving a probate asset whose value, not including the homestead and exempt personal property, does not exceed $75,000, the heirs are entitled to the estate without the need for the appointment of a personal representative or any kind of administration. § 205.001.

1. Procedure. The heirs file an affidavit (sworn to by two disinterested witnesses) with the court showing the basis upon which they are entitled to distribution and which property is exempt. If approved, any actions that need to be taken with respect to the estate are done under the authority of the affidavit, which serves the same function as letters of administration.

**D. Affidavit of Heirship**.

1. Situation. ***WHERE***: (1) the decedent died intestate; (2) the heirs have access to funds to satisfy the decedent's debts and other obligations; (3) there is no other apparent need for the appointment of a personal representative to administer the estate; and (4) there is no need for a judicial determination of heirship to establish the heirs' title in, or to place the heirs in possession of, the decedent's probate estate, ***THEN*** the heirs can provide third parties with an affidavit of heirship to evidence their authority over the decedent's assets.

2. Legal Effect. After the affidavit has been of record for five or more years, it serves as prima facie evidence of the facts stated in the affidavit. § 203.001(a)(2).

3. Place of Filing. The affidavit may be filed in the deed records of any county where the decedent owned real or personal property or where the decedent resided. § 203.001(a)(2).

## V. Homestead, Exempt Personal Property, and Family Allowance.

**A. Homestead**. Land qualifies as a "homestead" if it is used as a principal residence, and a person may only have one homestead at a time. Up to 200 ***rural*** acres (or 100 acres for a single person) or up to 10 ***urban*** acres can qualify as a homestead. Tex. Const. art. XVI, §§ 51, 52.

1. Both Spouses Must Join In Conveyance or Mortgage of Homestead.

2. Free From Creditors' Claims, EXCEPT for: (i) purchase money mortgage lien; (ii) property taxes; (iii) federal tax liens; (iv) mechanic's or materialman's lien for improvements on the homestead; (v) loan to enable parties to divide the homestead on divorce; and (vi) equity loan (second mortgage loan) for up to 80% of the value of the equity. Tex. Const. art. XVI, § 50.

3. Passes at Death Free of Creditors' Claims (subject to above exceptions) ***if*** the owner is survived by a spouse or minor child, even if owner bequeathed the homestead to another.

4. Surviving Spouse's Right of Occupancy. If the decedent was survived by a spouse or by minor children, the spouse is entitled to occupy the homestead as long as he or she chooses to occupy it. A minor can occupy it until age 18. § 102.005.

**B. Exempt Personal Property Set-Aside**. The Texas Constitution and statutes also provide for exemption of tangible personal property from creditors' claims, limited to assets worth $100,000 per family or $60,000 per individual. Tex. Prop. Code § 42.001.

**C. Allowance in Lieu of Homestead or Exempt Personal Property**. If the decedent did not own all of the objects which his surviving spouse and minor children are entitled to have set apart for them, the probate judge may award an allowance in lieu of such property: $45,000 in lieu of homestead and $30,000 in lieu of exempt personal property. Tex. Est. Code § 353.053.

**D. Family Allowance**. The surviving spouse and minor children are entitled to a family allowance sufficient for their support and maintenance for one year. §§ 353.101, 102.

**E. Cannot Deprive Spouse of Rights**. These rights apply regardless of whether the decedent died intestate or testate, and the decedent cannot deprive his or her surviving spouse (and dependents) from the homestead exemption and right to an allowance.

1. Election. The decedent can, however, put them to an election on the allowance: if a will specifically provides for support payments to the surviving spouse and dependents, they must either take under the will or claim the statutory allowance (they cannot do both). *Miller v. Miller*, 235 S.W.2d 624 (1951).

# B. Wills: Requirements and Probate Issues

## I. Duly Executed Will or Codicil.

**A. Requirements.** Tex. Est. Code §§ 251.001, 251.051.

1. Age. Testator must be at least 18 years old (or married, or in armed forces).

2. Testator's Signature. The will must be signed by Testator OR by proxy signature (by someone at Testator's direction and in her presence). Any mark intended as the testator's mark is sufficient for a signature (such as an "X").

3. Must Be Attested by Two Witnesses. Witness must be over 14 years old.

4. Witnesses Must Sign in Testator's Presence.

(a) "Conscious Presence" Test. Witnesses are in the testator's "presence" whenever they are so near to him that he is conscious of where they are and what they are doing, and where he could see them by some slight physical exertion on his part. *Nichols v. Rowan*, 422 S.W.2d 21 (Tex. Civ. App. 1967).

(b) Order of Signing. The order of signing is not critical as long as the signing is done as part of one contemporaneous transaction. *James v. Haupt*, 573 S.W.2d 285 (Tex. Civ. App. 1978).

**B. Proof of Wills in Probate**.

1. Testimony of One Attesting Witness. § 256.153.

2. Testimony as to Handwriting. A will may be proved by the testimony of one person as to the handwriting of the testator or either one of the attesting witnesses. § 256.153.

3. Self-Proving Affidavit. A will may be proved with an affidavit that contains statements of which the witnesses would testify in open court (i.e., testator was over 18; witnesses signed in testator's presence; etc.). §§ 251.101, .103, .107.

(a) Two-Step Execution Ceremony. Testator and witnesses sign the will, then (after being sworn in by a notary) they sign the affidavit.

(b) One-Step Execution Ceremony. The will's attestation clause recites all elements of due execution, and testator and witnesses sign only once.

## II. Holographic Wills.

**A. Requirements**. A holographic will must be "wholly in the handwriting of the testator" and signed by him. § 251.052.

**B. Testamentary Intent Must Be Shown**. There must be a clear indication that the testator intended for the document to be a will. Extrinsic evidence is admissible to show testamentary intent.

## III. Texas Anti-Lapse Statute.

**A.** A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will establishes a different survival period (either longer or shorter than the statutory 120 hours). § 121.101.

## IV. Restrictions on the Power of Disposition.

**A. Persons.** Testator may leave his property to whomever he wishes – family, friend, significant other, charity, etc. Also, testator may specifically disinherit any person in the family.

**B. Property**.

1. Separate Property. Testator may gift any of his separate property without restriction. (Note: see Homestead, Exempt Personal Property, and Family Allowance, above).

2. Community Property. Testator may gift only his portion of community property. The testator should be aware that surviving spouse will have a continued interest in his/her half of the community property. If a testator's will purports to devise the entire interest in a community asset and not just his one-half share, this gives rise to the "widow's election," where the spouse can elect to either:

(a) Take "against" the will by asserting the one-half interest, but relinquishing any gifts in the will in his/her favor; OR

(b) Take "under" the will (i.e., according to the will's terms).

3. Life Estate. If it is real property and testator wants an individual other than spouse to inherit his portion of the community property, testator should consider granting a life estate in the community property to surviving spouse, to avoid potential conflicts of possession and financial obligations on the property.

## V. Changes in Family after Will Executed

**A. Pretermitted Child Statute**. Under this statute, if a child born or adopted after the will is executed is (i) not provided for or mentioned in the will AND (ii) not provided for by any non-probate transfers taking effect at the testator's death, the child shares in the estate as described below. §§ 255.053, .054.

1. No Other Children When Will Was Executed. Pretermitted child takes intestate share of all property not bequeathed to other parent of the child.

2. Other Children When Will Was Executed…

(a) And such other children are NOT provided for – Pretermitted child takes intestate share of all property not bequeathed to other parent of child.

(b) And such other children are provided for – Pretermitted child's share is limited to the gifts to such other children (nobody else's gift is reduced).

**B. Testator Marries after Will Executed**. Has no effect on disposition of will.

**C. Testator Divorces after Will Executed**. Divorce or annulment of a marriage revokes all gifts and fiduciary appointments in favor of former spouse and relatives of the former spouse (who are not relatives of the testator). The will is read as though the former spouse (and relatives) predeceased the testator. § 123.001(b).

1. In addition, any provision in the will that disposes of property to an irrevocable trust in which the former spouse (or relatives) is a beneficiary or is nominated to serve as trustee or in another fiduciary capacity or that confers a general or special power of appointment shall be disregarded.

## VI. Revocation of Wills.

**A. In General**. A will can be revoked by (1) a subsequent testamentary instrument that expressly revokes earlier wills, or (2) by physical act (destroying or canceling will). § 253.002.

**B. Presumptions as to Revocation**. If the will was last seen in the testator's possession or control and cannot be found after his death, or is found in a torn or mutilated condition, the presumption is that the testator intended to revoke the will by physical act.

**C. Proof of Lost Wills**. Three-point test to probate a lost will:

1. Due Execution must be proved (as with any other will);

2. Cause of Non-production must be proved (to overcome presumption); AND

3. Contents must be substantially proved by one who has read the will, heard it read, or can identify a copy of the will. § 256.156.

## VII. Will Contests.

**A. Standing**. Only interested parties can bring a will contest, i.e., those with an economic interest that would be adversely affected. *Logan v. Thomason*, 202 S.W.2d (Tex. 1947).

**B. Testamentary Capacity.** At the time of executing the will, the testator must have sufficient capacity to:

1. Understand the nature of the act he was doing;

2. Know the nature and character of his property;

3. Know the objects of his bounty;

4. Understand the disposition he was making. *Rich v. Rich*, 615 S.W.2d 795 (Tex. Civ. App. 1980).

**C. Undue Influence**. To establish undue influence, the contestant must prove:

1. Existence and exertion of an influence (note: mere opportunity insufficient);

2. Effect of the influence was to overpower mind and free will of testator (note: mere susceptibility to influence insufficient);

3. The will would not have been executed "but for" the influence (note: mere fact of unnatural disposition insufficient). *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex. 1963).

## VIII. Judicial Modification or Reformation of Wills. Effective September 1, 2015.

**A. Actions by Court**. On petition of a personal representative, a court may order that:

1. The terms of a will be modified or reformed;

2. The personal representative be directed or permitted to perform acts that are not authorized by the terms of the will; OR

3. The personal representative be prohibited from performing acts that are required by the terms of the will. Tex. Est. Code § 255.451(a).

**B.** Circumstances under Which Court May Take Above Actions.

1. Modification of administrative, non-dispositive terms of the will is necessary or appropriate to prevent waste or impairment of the estate's administration;

2. The order is necessary or appropriate to achieve the testator's tax objectives or to qualify a distributee for government benefits and is not contrary to the testator's intent; OR

3. The order is necessary to correct a scrivener's (i.e., scribe's) error in the terms of the will, even if unambiguous, to conform with the testator's intent.

> ***NOTE***: Testator's intent must be established by clear and convincing evidence to correct a scrivener's error.

## C. Intestate Succession

### I. Introduction. (See CHART below).

**A.** The intestate succession rules apply when (1) the decedent ***left no will*** (or will was not validly executed); (2) the will does not make a complete disposition of the estate ("***partial intestacy***"); or (3) an heir successfully contests the will, and ***will is denied probate***. Texas has different distribution schemes for separate property and community property.

### II. Community Property.

**A.** Not Survived by Descendants—All to Surviving Spouse. § 201.103(b).

**B. Survived by Descendants, All of Whom Are Descendants of Surviving Spouse—All to Spouse**. The surviving spouse retains her one-half community interest and inherits the decedent's one-half interest. § 201.103(b).

**C. Survived by Descendants, Some of Whom Are Not Descendants of Surviving Spouse—One-Half to Spouse and One-Half to Descendants**. The surviving spouse retains her one-half community interest. The decedent's one-half community interest passes to his descendants, who take per capita with representation. § 201.003(c).

### III. Separate Property.

**A. Survived by Spouse and Descendants**. When the decedent is survived by a spouse and by children (or descendants of deceased children), the spouse's share depends on whether the property is real or personal. It is irrelevant whether the decedent's descendants were from this marriage or an earlier marriage. § 201.002.

1. Separate Personal Property—One-Third to Spouse.

2. Separate Real Property—Life Estate in One-Third to Spouse, Remainder in Fee Simple to Descendants.

**B. Survived by Spouse But Not by Descendants**. The spouse's share again depends on whether the property is real or personal.

1. Separate Personal Property—All to Surviving Spouse.

2. Separate Real Property—One-Half to Surviving Spouse, One-Half to Parents or Descendants of Parents.

**C. Not Survived by Spouse**. § 201.001.

1. All to Children or Descendants of Deceased Children.

2. No Descendants But Parents—One-Half to Each Parent. If only one parent, then the other one-half passes to the decedent's siblings and their descendants.

3. No Descendants or Parents—To Siblings or Their Descendants.

**4.** No Parents or Descendants of Parents—One-Half to Maternal Kin and One-Half to Paternal Kin.

## IV. Descendants Take Per Capita with Representation.

**A. Definition**. This means that property is divided equally at the first generational level. Each living person at that level takes a share, and the share of each deceased person at that level passes to her descendants by right of representation.

**B. Example**. H dies intestate survived by W, two children (A and B), and two grandchildren (X and Y) of a deceased child (C). As to H's separate personal property, the distribution is one-third to W, two-ninths each to A and B, and one-ninth each to X and Y.

## V. Paternity Issues. *See* § 4. FAMILY LAW.

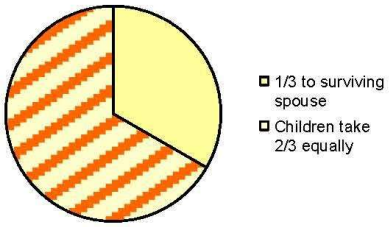
# Texas Descent and Distribution[1]

The Legal Effect of Not Having a Will (for decedents dying after 9/1/1993)

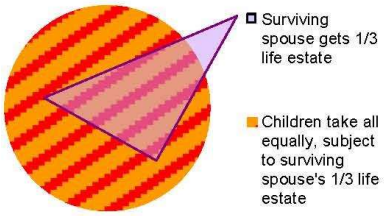
**Compliments of Judge Guy Herman, Travis County Probate Court No. 1**

## 1. Married Person with Child[ren] or Other Descendants

### A. Decedent's separate personal property (all that is not real property) (EC § 201.002(b))



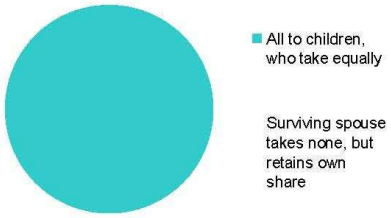

### B. Decedent's separate real property (EC § 201.002(b))




All separate real property will be owned outright by decedent's child[ren] or other descendants when surviving spouse dies.

### C. Decedent's share of community property when all surviving children and descendants of deceased are also children or descendants of surviving spouse. (EC § 201.003(b)(2))


### C. Decedent's share of community property when there are children or other descendants from outside of the existing marriage on the date of decedent's death (or if decedent died before September 1, 1993) (EC § 201.003(c))



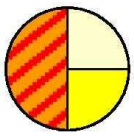

[1] The charts in this handout illustrate the general rules of descent and distribution under Texas law. In addition to the statutory references noted throughout, see the following Texas Estates Code (EC) provisions, among others: § 201.101, Determination of Per Capita with Representation Distribution (fka per stirpes); § 201.051 et seq., Matters Affecting Inheritance (including Adoption [§ 201.054] and Collateral Kindred of Whole and Half Blood [§ 201.057]); Advancements, §§ 201.151 & 201.152; and Requirement of Survival by 120 Hours, §§ 121.052 & 121.053 (see also §§ 121.151-121.153).

## 2. Married Person with No Child or Descendant

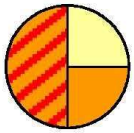
### A. Decedent's separate personal property (all that is not real property) (EC § 201.002(c)(1))


### B. Decedent's separate real property (EC § 201.002)

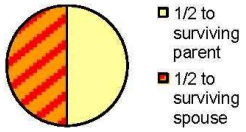
If decedent is survived by **both** mother and father. EC §§ 201.001(c) & 201.002(c)(2) & (3).



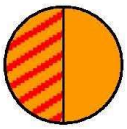

If decedent is survived (1) by mother **or** father **and** (2) by sibling(s) or their descendants. EC §§ 201.001(d)(1) & 201.002(c)(2) & (3).



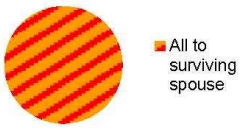

If decedent is survived by mother **or** father, **but is not** survived by any sibling(s) or their descendants. EC §§ 201.001(d)(2) & 201.002(c)(2) & (3).



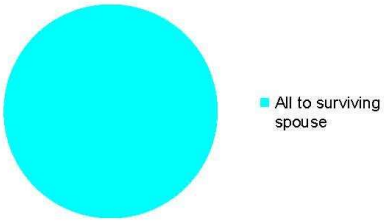

If decedent is survived by neither parent, but **is** survived by sibling(s) or their descendants. EC §§ 201.001(e) & 201.002(c)(2) & (3).



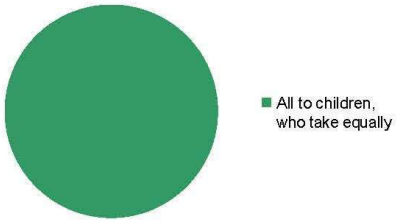

If decedent is survived by no parent, no sibling, and no descendant of a sibling. EC § 201.002(d).




### C. Decedent's share of community property (EC § 201.003(b)(1))



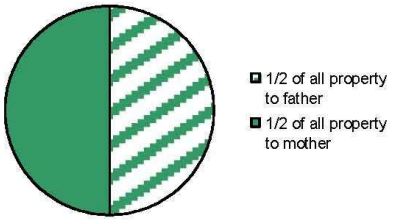
## 3. Unmarried Person with Child[ren] or Other Descendants (EC § 201.001(b))



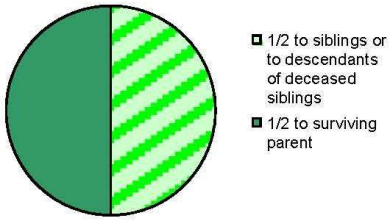

## 4. Unmarried Person with No Child or Descendant

**All property passes depending on who survived the decedent:**[1]

If decedent is survived by **both** mother and father. EC § 201.001(c).




If decedent is survived (1) by mother **or** father **and** (2) by sibling(s) or their descendants. EC § 201.001(d)(1).




If decedent is survived by mother **or** father, **but is not** survived by any sibling(s) or their descendants. EC § 201.001(d)(2).


If decedent is survived by **neither parent**, but **is** survived by sibling(s) or their descendants. EC § 201.001(e).


[1] If none of the four situations above applies, see EC § 201.001(f)-(h).

# §4. FAMILY LAW

## A. Marriage

**I. Common Law – Informal Marriage.** Tex. Fam. Code § 2.401.

**A. Requirements.** Both parties must be over 18 years old AND either:

1. Declaration of informal marriage signed and filed with the county clerk; OR

2. They "agreed" to be married, AND "cohabited" in Texas after the agreement, AND "held out" to others that they are married.

(a) Proof. E.g., joint accounts or debts, filing joint tax returns, children with husband's last name, husband supporting children as own, property purchased together, wife adopting husband's last name, signatures as "Mr." and "Mrs."

(b) Court Involvement. Required to prove non-registered informal marriage.

**B. No Minimum Time Required**.

**C. Divorce**.

1. Registered Informal Marriage. Same as divorce for formal marriage.

2. Non-registered Informal Marriage. If the parties separated and ceased living together for two years without bringing a proceeding to establish informal marriage, there is a rebuttable presumption of no agreement to be married. § 2.401(b).

(a) Presumption not Overcome. A legal divorce, and the protection of property and rights that divorce laws afford former spouses, becomes unavailable (but may petition the court for orders concerning child support and visitation).

(b) Presumption Overcome. Same as divorce for formal marriage.

**II. Ceremonial – Formal Marriage. Tex. Fam. Code § 2.001.**

**A.** A marriage license issued by the county clerk.

**B.** A sworn application that establishes the facts required to show that you are legally eligible to enter into a marital relationship.

**C.** Marriage ceremony must not be conducted within 72 hours of the license issuance.

# B. Validity of Marriage

## I. Jurisdiction. Tex. Fam. Code §§ 6.306, 6.307.

**A.** A suit to declare a marriage void or to annul a voidable marriage may be maintained only if (1) the parties were married in Texas; OR (2) either party is domiciled in Texas.

## II. Void Marriages. Tex. Fam. Code §§ 6.201-6.206.

**A. Age.** A person under 16 years of age cannot marry, unless court order (parental consent is insufficient). §§ 6.203, 2.101.

**B. Bigamy**. Persons seeking to marry cannot be currently married. § 6.202.

**C. Consanguinity.** Persons with a blood relationship of first cousin or closer cannot marry. Also, Persons who are currently or formerly related as stepparent and stepchild may not marry. §§ 6.201, 6.206.

## III. Voidable Marriages (Annulment).

**A. Compared to Divorce.** An annulment is a proceeding to have a marriage declared void as if it never took place, whereas a divorce is the proceeding to end a valid marriage.

**B. Grounds.** Tex. Fam. Code §§ 6.102-6.111.

1. Underage. Marriage of a person 16 years old or older but under 18 years old and without parental consent or court order.

2. Under the Influence. Petitioner was under the influence of alcohol or narcotics; as a result, petitioner did not have capacity to consent; and petitioner did not cohabitate after the effects wore off.

3. Impotency. Either party was permanently impotent at time of marriage; petitioner was unaware at the time of marriage; and petitioner did not cohabitate after discovery.

4. Fraud/Duress/Force. Fraud, duress, or force was used to induce petitioner into marriage, and no voluntary cohabitation.

5. Mental Incapacity. At the time of marriage, and no voluntary cohabitation.

6. Concealed Divorce. One party was divorced from third party within 30 days before current marriage; the other party did not know of divorce; and no voluntary cohabitation.

7. Marriage less than 72 Hours after Issuance of License. May only be brought within 30 days.

# C. Divorce – Generally

## I. Jurisdiction

**A. Residency.** Petitioner or Respondent must be:

1. A domiciliary of Texas for the preceding 6 months AND

2. A resident of the county in which suit is filed for preceding 90 days. § 6.301.

**B. Suit by Nonresident Spouse**. If one party has been a domiciliary of Texas for at least 6 months, a nonresident spouse may sue for divorce in the county where the other spouse resides at the time the petition is filed (no county residence time period). § 6.302.

**C. Nonresident Respondent.** If petitioner meets residency requirements, but respondent does not, court will have personal jurisdiction over respondent IF:

1. Texas is the last marital residence of the couple, and the suit is filed before the second anniversary of the date on which marital residence ended (i.e., the respondent left less than two years ago); OR

2. Minimum Contacts (i.e., the respondent visits state regularly). § 6.305.

## II. Grounds for Divorce. Tex. Fam. Code §§ 6.001-6.007.

**A. The "No-Fault" Divorce.** A divorce may be decreed without regard to fault if the marriage "has become insupportable because of a discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation." § 6.001.

1. The most common ground used. The other "fault" grounds might be alleged to secure an advantage for purposes of property division or child custody.

**B. Cruel Treatment.** A divorce may be decreed if the other spouse is guilty of cruel treatment (mental or physical) toward the complaining spouse of a nature that renders further living together insupportable. § 6.002.

**C. Rarely Alleged Grounds.** (1) adultery; (2) conviction of a felony with imprisonment for at least one without pardon; (3) abandonment for more than one year; (4) living apart for at least three years; and (5) confinement in mental hospital for at least three years. §§ 6.003-6.007.

## III. Procedure.

**A. Petition**. The petition must: (1) contain allegations of the grounds relied on, and must not contain a detailed statement of evidentiary facts; AND (2) state whether a protective order for family violence is in effect. Tex. Fam. Code §§ 6.402, 6.405.

**B. Waiver**. After the petition is filed, the party may request his/her spouse to waive service of process. The waiver must be sworn and contain the spouse's mailing address. If the spouse waives service, the court acquires personal jurisdiction and may enter judgment on the divorce. § 6.4035. After judgment is entered, the clerk must mail a notice of the signing of the final decree of dissolution of a marriage to the spouse's address. § 6.710.

**C. Filing an Answer**. Alternatively, the non-filing spouse may answer the petition. The spouse is not required to answer on oath or affirmation. Without pleading, the spouse may introduce testimony alleging that the evidence already introduced shows, or tends to show, that the filing spouse is not entitled to divorce. § 6.403.

**D. 60-Day Waiting Period**. The court may not grant a divorce before the 60th day after the date the suit was filed, unless the respondent has been convicted of, received deferred adjudication for, or is the subject of an active protective order relating to family violence. § 6.702.

**E. Court May Order Counselling**. The court may order the parties to submit to counseling while a divorce action is pending. The counselor submits a written report to the court giving "only his opinion as to whether there exists a reasonable expectation of reconciliation of the parties and, if so, whether further counseling would be beneficial." § 6.505.

**F. Custody and Support of Minor Children**. If the parties are parents of a minor child, the suit must include a "suit affecting the parent-child relationship (SAPCR). §§ 6.406, 6.407.

**G. Final Order**. After the court renders judgment granting a divorce and dividing the marital property, the court must issue a final order in which it states (i) the characterization of each party's assets, liabilities, claims, and offsets; and (ii) the value or amount of the community's assets, liabilities, claims, and offsets. § 6.711.

## IV. Temporary Orders.

**A. Temporary Restraining Order (TRO)**. A TRO or other ex parte temporary order is issued upon the application of one party against the other party without notice, a hearing, or other opportunity to object to the order. TROs are granted generally for the purpose of instituting immediate order in a potentially volatile situation which requires immediate protection for a party, children, or property pending a hearing on an application for a temporary injunction or other relief which can be granted only after a hearing. § 6.501

1. Duration. A TRO provides relief for a period not to exceed 14 days and until such time as a hearing can be had. Tex. R. Civ. Pro. 680. Once notice and a hearing can be had, the court may issue more detailed temporary injunctions.

2. Purposes. A court is specifically authorized to enter an order prohibiting one or both parties from doing the following. However, A court is not limited to the provisions enumerated in the statute, and may generally make an order it deems equitable and necessary for the protection of the parties or the preservation of property. § 6.501.

(a) Intentionally communicating by telephone or in writing with the other party by use of vulgar, profane, obscene, or indecent language or in a coarse or offensive manner, with intent to annoy or alarm the other;

(b) Threatening the other, by phone or in writing, to take unlawful action against any person, intending by this action to annoy or alarm the other;

(c) Placing a telephone call, anonymously, at an unreasonable hour, in an offensive and repetitious manner, or without a legitimate purpose of communication with the intent to annoy or alarm the other;

(d) Intentionally, knowingly, or recklessly causing bodily injury to the other or to a child of either party;

(e) Threatening the other or a child of either with imminent bodily harm;

(f) Intentionally, knowingly, or recklessly destroying, removing, concealing, encumbering, transferring, or otherwise harming or reducing the value of the property of the parties or either party with intent to obstruct the authority of the court to order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage;

(g) Intentionally falsifying a writing or record relating to the property of either party;

(h) Intentionally misrepresenting or refusing to disclose to the other party or to the court, on proper request, the existence, amount, or location of any property of the parties or either party;

(i) Intentionally or knowingly damaging or destroying the tangible property of the parties or either party; or

(j) Intentionally or knowingly tampering with the tangible property of the parties or either party and causing pecuniary loss or substantial inconvenience to the other.

3. Prohibitions. An ex parte temporary order cannot:

(a) Contain a provision concerning the use of the marital estate to supply certain necessities [referring to Tex. Civ. Prac. & Rem. Code § 64.104];

(b) Exclude a party from occupancy of a residence where the party is living, except as provided in a protective order;

(c) Prohibit a party from spending funds for reasonable and necessary living expenses; or

(d) Prohibit a party from engaging in acts reasonable and necessary to the conduct of that party's usual business and occupation. § 6.501.

**B. Temporary Injunction**. After notice and hearing, a court can grant forms of relief which it cannot grant in an order issued without a hearing. Tex. R. Civ. Pro. 681.

1. Types of Orders. § 6.502. The following are expressly authorized:

(a) Requiring a sworn inventory and appraisement of the real and personal property owned or claimed by the parties and specifying the form, manner, and substance of the inventory and appraisal and list of debts and liabilities;

(b) Requiring payments to be made for the support of either spouse;

(c) Requiring the production of books, papers, documents, and tangible things by a party;

(d) Ordering payment of reasonable attorney's fees and expenses;

(e) Appointing a receiver for the preservation and protection of the property of the parties;

(f) Awarding one spouse exclusive occupancy of the residence during the pendency of the case;

(g) Prohibiting a party from spending funds beyond an amount the court determines to be for reasonable and necessary living expenses;

(h) Awarding one spouse exclusive control of a party's usual business or occupation; or

(i) Prohibiting an act that may be prohibited by an ex parte order.

2. Procedure. Either party can apply for a temporary injunction or other temporary order by:

(a) Including an application in the original pleadings and requesting the court to issue an order setting a date for a hearing on the application;

(b) Moving for an ex parte TRO and for a temporary injunction or other temporary order; or

(c) Making a motion on notice for a temporary injunction.

3. Note that facts relied on in pleadings for temporary relief which are stated in short and plain terms are not subject to special exceptions because of form or sufficiency. § 6.402.

**C. Protective Order (PO)**. POs are especially helpful where the circumstances creating the need for protection will be dissipated by keeping the violent or threatening party away from his or her potential victims. In addition, the PO may also include provisions regarding physical possession of minor children, payment of child support, and marital property. § 6.504.

1. Standard. A court shall render a PO if the court finds that family violence has occurred and is likely to occur in the future. § 81.001.

2. Family Violence. § 71.004. The term "family violence" means:

(a) An act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of such, but does not include defensive measures to protect oneself;

(b) Abuse by a member of a family or household toward a child of the family or household; or

(c) Dating violence (same definition applied to dating relationships).

3. No Fees for Applicant. § 81.002. The fees and costs are paid by the party found to have committed family violence. § 81.003.

**4.** Who May File. An adult member of the family or household may file an application to protect to the applicant or any other member of the applicant's family or household. For dating violence, an adult member of the dating relationship may file. Any adult may apply for a PO to protect a child from family violence. § 82.002.

**D. Temporary Ex Parte Order**. If the court finds from the information contained in an application for a PO that there is a clear and present danger of family violence, the court, without further notice to the individual alleged to have committed family violence and without a hearing, may enter a temporary ex parte order for the protection of the applicant or any other member of the family or household of the applicant. § 83.001.

1. Procedure. The court may recess the hearing on a temporary ex parte order to contact the respondent by telephone and provide the respondent the opportunity to be present when the court resumes the hearing. Without regard to whether the respondent is able to be present at the hearing, the court must resume the hearing before the end of the working day. § 83.007.

2. Duration. In a temporary ex parte order, the court may direct a respondent to do or refrain from doing specified acts. A temporary ex parte order is valid for the period specified in the order, not to exceed 20 days. On the request of an applicant or on the court's own motion, a temporary ex parte order may be extended for additional 20-day periods. § 83.002.

3. Vacating a Temporary Ex Parte Order. Any individual affected by a temporary ex parte order may file a motion at any time to vacate the order. On the filing of the motion to vacate, the court sets a date for hearing the motion as soon as possible. § 83.004.

4. Versus SAPCR. During the time the order is valid, a temporary ex parte order prevails over any other court order made in a suit affecting the parent-child relationship to the extent of any conflict between the orders. § 83.005.

# D. Divorce – Property

## I. Community Property.

**A. Definition.** It is presumed that all property acquired, and debt incurred, by the parties during marriage is community property. Tex. Fam. Code § 7.002. It generally includes: (1) personal property (clothes, vehicles, furnishing); (2) real property (houses, lands); (3) income from employment; (4) savings and checking accounts; (5) disability and worker's compensation (except for military disability benefits); and (6) 401K and retirement accounts.

**B. 401K and Retirement Plans**. The other spouse is usually entitled to a percentage of the account equal to the years employed during the marriage divided by the total years employed. To split many retirement plans, a Qualified Domestic Relations Order will be necessary.

## II. Separate Property.

**A. Definition.** Property owned before marriage or acquired during marriage by way of inheritance, gift, or personal injury recovery. Tex. Fam. Code § 7.002.

**B. Tracing.** Assets purchased with separate property funds (or with the proceeds from the sale of separate assets) are separate property.

## III. Dividing the Marital Estate.

**A. Just & Right Division.** A court shall order a "just & right" division of community property (both assets and liabilities), but there is no formula. Tex. Fam. Code § 7.001.

1. A court may consider any relevant factor, including: fault in the break-up of the marriage; length of the marriage; differences in earning capacities and education; age and health of the parties; any special needs of the parties; and separate property available to either spouse.

**B. Court-Ordered Maintenance.** Tex. Fam. Code §§ 8.051-8.055.

1. When Allowed. Maintenance or "alimony" can be ordered *only* if:

(a) The spouse from whom maintenance is requested has been convicted of a crime or received deferred adjudication for a crime that can also be considered an act of family violence and this occurred within two years of filing of the suit or while divorce is pending; OR

(b) The marriage was for at least 10 years and the spouse seeking support lacks sufficient property to provide for minimum reasonable needs; AND

(i) Is unable to support him/herself because of a disability;

(ii) Is custodian of child who requires substantial care because of disability and this prevents the parent from earning enough income to provide for his/her minimum reasonable needs; or

(iii) Clearly lacks earning ability in labor market to support his/her minimum needs.

> ***NOTE***: If the spouse seeking maintenance does not exercise diligence in earning sufficient income or developing necessary skills, there is a presumption against maintenance.

2. Factors Considered: 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.

3. Duration. It depends on the length of the marriage:

(a) Between 10 and 20 years – cannot exceed 5 years.

(b) Between 20 and 30 years – cannot exceed 7 years.

(c) Over 30 years – cannot exceed 10 years.

> ***NOTE***: if maintenance is awarded to a spouse for his/her own disability or that of a child in his/her care, it continues for as long as the spouse remains eligible.

4. Amount. Amount may not be more than the lessor of $5,000 or 20% of gross monthly income (includes all sources of income except returns on principal or capital, accounts receivable, government assistance, workers' compensation, social security, etc.).

**C. Reimbursement Claims**. The purpose of a reimbursement claim is to provide a spouse with a remedy when one marital estate (community, husband's separate, or wife's separate property) has been used to either contribute to or improve another marital estate. §§ 3.401-3.402.

1. Types of Claims: (1) reductions in secured debt (e.g., mortgage) or unsecured debt (e.g., credit card); (2) capital improvements (e.g., to real property); (3) payment of life insurance premiums; and (4) time, toil, and effort in running a business without adequate compensation.

# E. Divorce, Child Custody, and the Suit Affecting the Parent-Child Relationship (SAPCR)

## I. The Office of the Attorney General.

**A. The Role of the OAG**. As the official child support enforcement agency for the State of Texas, the Office of the Attorney General (OAG) provides services for parents who wish to obtain or provide support for their children.

**B. Services Offered**. The Child Support Division determines, on a case-by-case basis, which of the child support services listed below are appropriate:

1. Locating the absent parent;
2. Establishing paternity;
3. Establishing and enforcing child support orders;
4. Establishing and enforcing medical support orders;
5. Reviewing and adjusting child support payments; and
6. Collecting and distributing child support payments.

**C. No Cost for Services**. The OAG provides parents with a full range of child support services at no cost. The services are required by federal law and funded by the federal government and the State of Texas.

## II. Establishment of Paternity. Tex. Fam. Code §§ 160.001-160.637.

**A. Standing**. A paternity suit may be brought by: the child; the child's mother; a relative of the child's mother if the mother is deceased; the alleged father; or an authorized government entity. § 160.602.

**B. Venue**. Venue is in the county where the child resides or is found, or, if the child does not reside in Texas, the county in which the alleged father resides or is found. § 160.605.

**C. Personal Jurisdiction Required**. A man may not be adjudicated to be a child's father unless the court has personal jurisdiction over him. However, personal jurisdiction over a nonresident may be derived under the Texas long arm statute, i.e., if the man engaged in sexual intercourse in Texas and the child may have been conceived by that act. § 102.011.

**D. Types of Fathers:**

1. Presumed Fathers. A man is presumed to be the father if:

(a) The child was born within 300 days of marriage or attempted (but void) marriage; OR

(b) During the first two years of the child's life, he resided with the child AND represented to others that the child was his; OR

(c) He married the mother after the child's birth AND (1) acknowledged paternity with the Bureau of Vital Statistics; OR (2) promised in a record to support the child; OR (3) was voluntarily named on the birth certificate. § 160.204.

2. Acknowledged Fathers. The mother and alleged father (and any presumed father if one exists) signed an Acknowledgement of Paternity (AOP) with the intent to establish the alleged father's paternity. § 160.301. A valid AOP filed with the Bureau of Vital Statistics is the equivalent of an adjudication of paternity by genetic testing and confers on the acknowledged father all rights and duties of a parent. § 160.305.

(a) An AOP may be rescinded before the earlier of (i) the 60th day after the effective date of the AOP, or (ii) the date that the person seeking to rescind becomes a party to a proceeding relating to the child (e.g., establishing child support). § 160.307.

(b) After this time period has expired, an AOP may only be rescinded on the basis of fraud, duress or material mistake of fact, and must be commenced before the issuance of an order affecting the child (e.g., child support). § 160.308.

3. Adjudicated Fathers. Paternity is determined by DNA (genetic) testing. A court may order an individual to submit to genetic testing. § 160.501. The test must determine paternity by 99% and may only be rebutted by the results of another genetic test. § 160.505.

4. Alleged Fathers. A man who claims, or is claimed to be, the genetic father or possible genetic father of the child.

**E. Paternity by Estoppel**. In appropriate circumstances, the court may deny genetic testing and issue an order adjudicating the presumed father to be the father of the child, if the court determines (i) the conduct of the mother or presumed father estops that party from denying parentage, and (ii) it would be inequitable and against the best interest of the child to disprove the father-child relationship. For example, the father knew that the child may not be his child, but accepted the role as father and the mother relied on that acceptance. § 160.608.

## III. Parenting Plan. Tex. Fam. Code §§ 153.602-153.607.

**A. Required**. A final order in a SAPCR tied to a dissolution proceeding must incorporate a parenting plan that: (a) sets out the rights and duties of each party; (b) provides for periods of possession and access; (c) provides for child support; and (d) optimizes the development of a close and continuing relationship between the child and each parent. § 153.603.

**B. Agreed Parenting Plan**. Parties are encouraged to agree on a parenting plan. If they have not agreed on one at least 30 days before the date set for trial, either party may file a proposed parenting plan for the court's consideration. § 153.603.

**C. Appointment of Parenting Coordinator**. In high conflict cases, the court may appoint a parenting coordinator, an impartial third party who assists the parties in resolving parenting issues. § 153.605.

**D. Appointment of Parenting Facilitator**. The court may also appoint a parenting facilitator, who serves the same function as a coordinator but also monitors compliance with court orders. § 153.6051.

**IV. Conservatorship ("Custody").** Tex. Fam. Code §§ 153.002-153.611.

**A. Best Interest of Child**. The best interest of the child is always the primary consideration in child custody determinations. § 153.002.

1. The *Holley* Factors (to determine "best interests"): desires of the child; emotional and physical needs of the child now and in the future; emotional and physical danger to the child now and in the future; parenting abilities of the individuals seeking custody; programs available to assist those individuals to promote the best interest of the child; plans for the child by these individuals or by the agency seeking custody; stability of the home or proposed placement; acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and any excuse for the acts or omissions of the parent.

2. Other Required Factors: family violence for determining possession and access; false reports of child abuse; intentional use of force within two years against spouse, child's parent, or any child; and whether a protective order has been issued within the past two years.

3. Desires of Children. The court must interview children 12 years of age or older, and may also interview children under 12 years old.

4. Prohibited Factors: gender; marital status; race; and religion (unless harmful).

**B. Joint-Managing Conservatorship (JMC).** Tex. Fam. Code §§ 153.131-153.138. JMC means the sharing of the rights, privileges, duties, and powers of a parent by two parties, ordinarily (but not necessarily) the child's parents, even if the exclusive power to make certain decisions may be given to one party. § 101.016.

1. Does Not Require Equal Possession. One parent must be given the exclusive right to determine the child's primary residence. §153.135.

2. Presumption of JMC. There is a rebuttable presumption that a JMC is in the child's best interests. In determining whether to order JMC, the court will consider:

(a) Whether the parents have the ability to reach shared decisions;

(b) Whether parents can encourage and accept a positive relationship between the child and the other parent;

(c) Whether both parents participated in child-rearing before suit; AND

(d) Geographical proximity of the parents' homes. § 153.131.

3. When Court Cannot Appoint JMCs. The court cannot appoint JMCs if there is evidence of a history or pattern of child neglect or physical or sexual abuse directed against the other parent, a spouse, or a child. § 153.004.

**C. Sole Managing and Possessory Conservators**. Tex. Fam. Code §§ 153.

1. Sole Managing Conservator (MC). The MC has "custody" of the child, the right to make major decisions, and the right to determine the primary residence. § 153.132.

2. Possessory Conservator (PC). The PC has "visitation" rights to the child.

3. Parental Preference. A court must appoint a parent as MC or both parents as JMCs, unless the court finds that this would not be in the best interests of the child because it would significantly impair the child's physical health or emotional development. § 153.131.

(a) The parental preference is rebutted if the parent has voluntarily relinquished actual care, control, and possession of the child to a non-parent for one year, a portion of which was 90 days preceding the filing of the suit.

(b) Does Not Apply to Modification Proceedings.

**D. Possession and Access**. Tex. Fam. Code §§ 153.312-153.313.

1. Standard Possession Order. If parents live within 100 miles, the non-custodial parent (PC or JMC without right to determine residence) gets possession: (a) From 6 p.m. Friday through 6 p.m. Sunday starting on the first, third, and fifth Fridays; (b) From 6 p.m. – 8 p.m. on Thursday nights during the school year; (c) 30 days over the summer; and (d) alternating spring breaks.

2. More Flexible Standards. If a child is under 3 years old or the parents live more than 100 miles apart, the court will apply more flexible standards.

**E. Enforcement of Custody Order.**

1. Habeas Corpus. The MC can file an application for a writ of habeas corpus against a PC who withholds possession of the child in violation of a valid court order of custody. Habeas corpus can be used to enforce a valid court order granted in any jurisdiction. § 157.372.

2. Tort Liability for Interference with Child Custody. Tort liability may be imposed against a person who "takes or retains possession of a child or conceals the whereabouts of a child" in violation of a court order that gives custody or possession to the plaintiff. § 42.002.

3. Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") (INTERSTATE only). The purposes of the UCCJEA are to avoid jurisdictional disputes with courts of other states in matters of child custody and visitation, to promote interstate cooperation, and to facilitate the interstate enforcement of custody and visitation orders. § 152.201.

4. Contempt (TEXAS only). Contempt is available for violations of Texas custody orders. Because it can result in jail time, all criminal due process rules apply. § 157.001.

**F. Modification.**

1. Grounds for Modification. The modification must be in the best interests of the child AND (a) there is a material and substantial change of circumstances; OR (b) a child aged 12 or order requests the change; OR (c) possession of the child has been voluntarily relinquished for at least six months. § 156.101.

2. Material and Substantial Change in Circumstances. The circumstances of the child, a conservator, or other party affected by the order must have materially and substantially changed since the earlier of the date the order was rendered or the date that a settlement agreement was signed. This requires the trial court to compare the circumstances of the parents and minor child at the time of the initial order with the circumstances existing at the time modification is sought. Examples include family violence or frequent moving.

## V. Child Support

**A. Statutory Guidelines.** The statutory guidelines apply to the first $8,550 per month of the obligor's net resources [note: amount changes yearly]. § 154.125-154.126.

1. Presumption for Guidelines. The court must presumptively follow the guidelines. § 154.125. Under the guidelines, the amount owed by the obligor depends on (i) the number of children involved in the case before the court, and (ii) the number of other children the obligor has a duty to support (see chart below). For example, if there were 3 children involved in the case, but the obligor had no duty to support other children, then he would owe 30% of his net monthly resources in child support. If, however, the same obligor had a duty to support two other children not involved in the case, then he would owe 25.20% of his net monthly resources.

**Multiple Family Adjusted Guidelines**
**(% of Net Resources)**

**Number of Children before the Court**

| Number of other children for whom the obligor has a duty to support | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|---|---|---|---|---|---|---|---|
| 0 | 20.00 | 25.00 | 30.00 | 35.00 | 40.00 | 40.00 | 40.00 |
| 1 | 17.50 | 22.50 | 27.38 | 32.20 | 37.33 | 37.71 | 38.00 |
| 2 | 16.00 | 20.63 | 25.20 | 30.33 | 35.43 | 36.00 | 36.44 |
| 3 | 14.75 | 19.00 | 24.00 | 29.00 | 34.00 | 34.67 | 35.20 |
| 4 | 13.60 | 18.33 | 23.14 | 28.00 | 32.89 | 33.60 | 34.18 |
| 5 | 13.33 | 17.86 | 22.50 | 27.22 | 32.00 | 32.73 | 33.33 |
| 6 | 13.14 | 17.50 | 22.00 | 26.60 | 31.27 | 32.00 | 32.62 |
| 7 | 13.00 | 17.22 | 21.60 | 26.09 | 30.67 | 31.38 | 32.00 |

2. Deviation from Guidelines. Court may do so by looking to any relevant factor (i.e., special needs, ability to pay, amount of visitation, cost to travel to visit, etc.). However, the court must specifically state the reasons for varying from the guidelines, state why the guidelines amount is unjust or inappropriate, provide the net resources of obligor and obligee, and provide the percentage applied to obligor's net resources. § 154.130.

**B. Intentional Unemployment**. If the obligor is intentionally unemployed or underemployed, the guidelines are applied to the amount the court determines that the obligor could earn if employed consistent with his skills and earning potential. § 154.066.

**C. Enforcing Child Support.**

1. Mandatory Withholding. All final orders for periodic child support must provide for mandatory withholding (usually not done until a violation of child support order has occurred). § 158.001.

2. License Suspension. A court can suspend the obligor's license (driver's, hunting, fishing, professional) if the obligor is 3 months in arrears and has been given an opportunity but has failed to make a payment under an agreed repayment schedule. § 232.003.

3. State Grants, Loans, Contracts. An obligor who is more than 30 days delinquent may not obtain state grants, loans, or contracts. § 231.006.

4. Liens. A statutory lien arises by operation of the law for all amounts of overdue support, even if the arrearages have not been reduced to a judgment. § 157.312.

5. Money Judgment. Periodic child support payments not timely made automatically become money judgments for the amount due. § 157.263.

6. Freezing Assets. If a judgment for arrearages has been rendered, the claimant can deliver a notice of levy to the financial institution holding obligor's assets. § 157.327.

7. Contempt. A court can hold an obligor in contempt if he is behind on his child support at the time of the relevant hearing, and jail the obligor for up to 6 months and/or fine the obligor a maximum of $500. § 157.001.

**D. Modifying Child Support.**

1. Grounds.

(a) The circumstances of the child or an affected party have materially and substantially changed since the date of the order; OR

(b) Three years have elapsed, and the current child support deviates from the guidelines by the greater of $100 or 20%. § 156.401.

2. Material and Substantial Change. Examples include the birth or adoption of additional children, illness or injury to the obligor affecting his earning capacity, illness or injury to the child that results in a special need, and release of the obligor from prison.

## VI. Grandparents and Family.

**A. When Grandparent or Relative May Be Appointed MC.** §§ 102.004, 153.431. A grandparent or other relative has standing to bring a SAPCR seeking appointment as managing conservator (MC) if ***one*** of the following circumstances is established:

1. Both parents are deceased;

2. Both parents, the surviving parent, or the MC consents; OR

3. The grandparent provides satisfactory proof that the child's present circumstances significantly impair the child's physical health or emotional development.

**B. When Grandparent May Petition for Possession or Access**. § 153.433. A biological or adoptive grandparent may request possession of or access to a grandchild by filing an original suit or a suit for modification. A grandparent may file the suit for the sole purpose of requesting the relief, without regard to whether the appointment of a MC is an issue in the suit.

1. Grandparent overcame the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being;

(a) Sadness is not sufficient. The requisite level of impairment might be present if the child lived with the grandparent for some time.

(b) Grandparent must attach an AFFIDAVIT to the petition setting forth the facts supporting the claim of significant impairment. § 153.432.

2. At least one of the child's parents hasn't had their parental rights terminated;

3. Grandparent is the biological or adoptive parent (not a step-parent) of one of the child's parents;

4. Grandparent's son or daughter: (i) has been incarcerated for 3 months before the petition is filed, (ii) is incompetent; (iii) is dead, OR (iv) does not have actual or court-ordered possession of the child; AND

5. Child's remaining parent intends to deny grandparent possession and access.

## F. Kidnapping and Habeas Corpus

In addition to bringing habeas corpus to enforce a custody order (discussed above), a parent may bring habeas corpus against a nonparent even if there has not been a court order regarding custody. A parent asserting her general right of possession of the child can compel return of the child by a nonparent (e.g., a grandmother or aunt) who is withholding possession. § 157.376(a).

## G. Nonparent Authorization Agreements

### I. Background.

**A.** The Texas Family Code allows a parent to authorize certain relatives or voluntary caregiver in a Parental Child Safety Placement to take specified actions and obtain services on behalf of a child if the parent is unable to for some reason.

### II. The Agreement.

**A. Applicability**. The agreement is only authorized between a parent of the child and a person who is the child's (i) grandparent, (ii) adult sibling, or (iii) adult aunt or uncle. § 34.001.

**B. Authorization**. The parent may enter into an agreement with a relative specified above to authorize the relative to perform the following acts regarding the child:

1. Medical or psychological treatment and immunization of the child;

2. Obtain and maintain health insurance coverage for the child and automobile insurance coverage for the child, if appropriate;

3. Enroll the child in a day-care program or in school;

4. Participation in age-appropriate extracurricular activities;

5. Obtain a learner's permit, driver's license, or state-issued identification card;

6. Authorize employment of the child; AND

7. Apply for and receive public benefits on behalf of the child.

# H. Name Changes

## I. Minor Child.

**A. Who May File**. A parent, a managing conservator, or a guardian of the child may file a petition requesting that the name of the child be changed. Tex. Fam. Code § 45.001.

**B. Where to File**. The petition must be filed in the district court of the county where the child resides. § 45.001. However, if the child has been the subject of a previous lawsuit in a certain court, then the petition must be filed in that same court.

**C. Standard**. The court may order that the name of the child be changed IF the change is in the best interest of the child. § 45.004. The court may consider the following factors, among others, in determining best interest:

1. Would the name change avoid embarrassment or confusion?

2. Would it be more convenient for the child to have the same name as the custodial parent?

3. Would the name change help the child identify as part of a family?

4. How long has the name been used?

5. How would the name change affect the parental bond?

*In re H.S.B.*, 401 S.W.3d 77, 84 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

**D. Notice and Service**. The following persons are entitled to notice and service of citation when the petition is filed:

1. A parent of the child (whose rights have not been terminated);

2. Any managing conservator of the child; AND

3. Any guardian of the child.

**E. Requirements for Petition**. § 45.002. A petition to change the name of the child must be verified (sworn before a notary public) and include:

1. The current name and address of the child;

2. The reason a name change is being requested;

3. The full name requested for the child;

4. Whether the child has previously been before the court before; AND

5. If the child is 10 years of age or older, the child's written consent to the name change must be attached to the petition.

**II. Adult.**

**A. Where to File**. The adult should file the petition requesting a name change in the civil district court or a family district court in his/her county of residence. §45.101. If a divorce is pending, the adult may request a name change within that lawsuit, without paying any extra fee.

**B. Requirements for Petition**. § 45.102. A petition to change the name of an adult must be verified and must include, among other things:

1. The adult's name and address;

2. The full name requested;

3. The reason for the name change;

4. Whether you have been convicted of a felony;

5. Whether you are required to be registered as a sex offender;

6. A complete set of your fingerprints on a fingerprint card approved by the Texas Department of Public Safety and the FBI; and

7. A state and FBI background check completed in connection with the fingerprint card submitted to the Texas Department of Public Safety.

**C. Standard**. The court must order the name change IF: (1) the adult does not have a final felony conviction and is not subject to the Texas sex offender registration requirements; (2) the change is in the interest or to the benefit of the adult; and (3) the change is in the interest of the public. § 45.103(a).

1. Under some circumstances, the court may order a name change for persons with a felony conviction or subject to the sex offender registration requirements. § 45.103(b)-(c).

# §5. GUARDIANSHIP AND ESTATE PLANNING

**I. Guardian of the Person vs. Guardian of the Estate.** Tex. Est. Code §§ 1151.051, .151.

**A. Guardian of the Person**. Guardian has the right to physical possession of the ward and is charged with the duty of the ward's care. § 1151.051.

**B. Guardian of the Estate**. Guardian is charged with the duty of possession and management of the ward's property. § 1151.151.

**II. When is Guardianship Needed?** § 1002.012.

**A. Minor.** By operation of law, a minor is considered to be an incapacitated person. § 1002.017. A minor is a person under 18 years old who has never been married and has not had the disabilities of minority removed by court action. § 1002.019.

**B. Incapacitated Adult.** Adult individual who, due to a physical or mental condition, is substantially unable to: (1) provide food, clothing, or shelter for himself; (2) care for the person's own physical health; OR (3) manage the person's own financial affairs. §1002.017.

1. Physician's Report. The applicant must present a written letter from a physician based on an examination of the proposed ward within the preceding 120 days. The report must describe ***in detail*** the nature and severity of the ward's mental and physical health, and whether improvement in the proposed ward's physical and mental condition is possible. § 1101.103.

**C. Clear and Convincing Evidence Required** to establish that the proposed ward is incapacitated; it is in the proposed ward's best interest to have a court-appointed guardian; and the proposed ward's rights or property will be protected by a guardian. § 1101.101.

**III. Eligible Persons to be Appointed Guardian**.

**A. Minor**.

1. If Parent of Minor is Living. A guardian of the person for a minor does not have to be appointed if either parent is living. However, the parent has no power to manage the minor's estate without being appointed by the court as guardian of the estate. *Kaplan v. Kaplan*, 373 S.W.2d 271 (Tex. Civ. App. 1963).

2. If Both Parents Deceased.

(a) Designation of Guardian. The last surviving parent may, by will or written declaration, appoint a guardian for minor children. The court must appoint the designated individual unless she is disqualified, dead, refuses, or wouldn't serve ward's best interests. § 1104.053.

(b) Order of Eligibility. If no guardian is designated, the child's grandparent is entitled to guardianship. If the child has no living grandparents, then the nearest of kin shall be appointed. § 1104.052.

(c) Minor Age 12 or Older May Choose Guardian. However, the court must still determine that it is in the child's best interests. § 1104.054.

**B. Incapacitated Adult.**

1. Designation of Guardian Before Need Arises. A person may designate by a written declaration persons to serve as guardian of his person or estate in the event he becomes incapacitated. Unless the court finds that the person designated as guardian in the declaration is disqualified or would not serve the best interests of the ward, the court ***shall*** appoint the person as guardian in preference to those otherwise entitled to serve as guardian under the statute. § 1104.202. The declaration must be accompanied by a sworn affidavit and must be witnessed by two persons, neither of whom is named guardian or alternate guardian. § 1104.203.

2. Designation by Last Surviving Parent. Same as for minors. §1104.103.

3. Order of Eligibility. The ward's spouse is preferred over all other persons. If the ward is not married or spouse is disqualified, then ward's nearest kin. § 1104.102.

4. Proposed Ward's Preference to Be Considered. The court must make a reasonable effort to consider the incapacitated person's preference for guardian. § 1104.002.

**C. Disqualified Persons for Guardianship**. The following persons are disqualified:

1. Lack of Capacity (i.e., minor or incapacitated person). §1104.351.

2. Lack of Experience. A person who is incapable of properly and prudently managing and controlling the ward or the ward's estate because of inexperience, lack of education, or other good reason. §1104.351.

3. Unsuitability. Any person the court finds to be unsuitable. § 1104.352.

4. Notoriously Bad Conduct (i.e., criminal). Just a presumption. § 1104.353.

5. Conflict of Interest. A person who's a party to a suit concerning the proposed ward, is indebted to him/her, or is asserting a claim adverse to him/her. § 1104.354.

## IV. Court Appointments

**A. Court Investigator** (Mandatory). The investigator's primary duty is to investigate the circumstances alleged in the application, and to determine whether a less restrictive alternative to full guardianship is appropriate. § 1054.151.

**B. Attorney Ad Litem** (Mandatory and Automatic). Attorney ad litem is responsible for advocating for the proposed ward's wants and interest and must discuss alternatives. § 1054.001.

**C. Guardian Ad Litem** (Discretionary). Guardian ad litem is responsible for advising the court on the interests of the proposed ward. § 1054.051.

**D. Language or Sign Language Interpreter.**

**V. Alternatives to Guardianship and Support & Services.** Effective September 1, 2015.

**A. Statutory List**. § 1002.0015. Alternatives to guardianships include the:

1. Execution of a medical power of attorney;
2. Appointment of an attorney-in-fact/agent under a durable power of attorney;
3. Execution of a declaration for mental health treatment;
4. Appointment of a representative payee to manage public benefits;
5. Establishment of a joint bank account;
6. Creation of a management trust under Chapter 1301;
7. Creation of a special needs trust;
8. Designation of a guardian before the need arises; AND
9. Establishment of alternate forms of decision-making based on person-centered planning.

**B. Support and Services**. § 1002.031. "Supports and services" means available formal and informal resources and assistance that enable an individual to:

1. Meet the individual's needs for food, clothing, or shelter;
2. Care for the individual's physical or mental health;
3. Manage the individual's financial affairs; OR
4. Make personal decisions re: residence, voting, driving a car, and marriage.

**C. Role of Attorney Ad Litem**. An attorney ad litem appointed to represent a proposed ward is required to investigate and discuss whether the above alternatives to guardianship would meet the needs of the proposed ward and avoid the need for appointment of a guardian. If a guardianship is necessary, the attorney must also discuss the specific powers and duties of the guardian that should be limited if the proposed ward receives support and services. § 1054.004.

**D. Role of Guardian Ad Litem**. A guardian ad litem is required to investigate whether a guardianship is necessary for the proposed ward and evaluate whether the above alternatives to guardianship and support and services available to the proposed ward that would avoid the need for appointment of a guardian. § 1054.054(c).

## VI. Guardianship Administration.

**A. Qualification of Guardian**. A guardianship administration commences with qualification of the guardian. A court may not appoint an individual as a guardian until the individual has been trained, unless the training is waived by the court. The proposed guardian must complete the training at least 10 days prior to any hearing appointing the guardian. § 1104.003-.004. A guardian qualifies by, within 20 days after the appointment, taking an oath to faithfully discharge guardianship duties and posting the required bond. §§ 1105.003, .151.

1. Letters of Guardianship. After giving oath and making bond, the guardian is issued letters of guardianship, which serve the same function as letters testamentary or letters of administration in an estate administration proceeding (i.e., they authorize the guardian to enter into transaction on behalf of the guardianship estate). § 1106.001.

**B. Guardian's Bond.**

1. Guardian of the Person. The guardian must give bond to secure faithful performance of her duties. The type of bond and amount of penalty on the bond is determined by the court. The bond may be waived in a parent's will or written declaration. §§ 1105.101, .102.

2. Guardian of the Estate. The guardian must post bond, and this requirement cannot be waived. § 1105.101. The amount of the penalty on the bond is equal to (i) the value of all personal property belonging to the ward, plus (ii) the revenues (other than Social Security benefits) anticipated to be received from the ward's property during the next 12 months. § 1105.154.

**C. Inventory**. The guardian must file an inventory and list claims of the estate within 30 days after the guardian qualifies. § 1154.051.

**D. Sums Allowable for Education and Maintenance of Ward**. The guardian must file an application for a monthly allowance to be expended on the ward's behalf from the income and principal of the ward's estate. The application must be filed within 30 days after qualification and must specify the amount requested for the ward's education and maintenance and a separate amount requested for maintenance of the wards property. § 1156.001.

**E. Accountings and Reports.**

1. Guardian of the Person. The guardian must file an annual sworn report that shows, among other things, receipts and disbursements for the ward's support, maintenance, and education. § 1163.101.

2. Guardian of the Estate. After 12 months from the date of qualification, and successively at 12-month intervals, the guardian must file an accounting, verified by affidavit, that shows the claims that have been paid or rejected, all receipts and disbursements, a complete description of the property being administered, and property now on hand. § 1163.001.

**F. Compensation.**

1. Guardian of the Person. The court determines compensation, which cannot exceed 5% of the ward's gross income. § 1155.002. Wards are exempt from filing fees and fees for any services rendered by the court regarding the administration of the guardianship if the incapacity arose as a result of a personal injury sustained while in active service as a member of the armed forces in a combat zone. A similar exemption applies to certain law enforcement officers and firefighters injured in the line of duty. § 1053.053-.054

2. Guardian of the Estate. The guardian of the estate is entitled to "reasonable" compensation, such as 5% of the ward's gross income ***plus*** 5% of all money paid out of the estate. § 1155.008.

**G. Role of Guardian of the Person.** Guardian has the right to take charge of the ward and to establish the ward's domicile, as well as the power to consent to medical, psychiatric and surgical treatment. Guardian has the duty to provide care, supervision, and protection for the ward. Guardian also has the duty to provide clothing, food, medical care, and shelter. § 1151.051.

1. Residential Care. Guardian may apply for residential care and services on behalf of ward, if the ward agrees. § 1151.052.

2. In-Patient Psychiatric Facility. Guardian may not voluntarily admit ward into an in-patient psychiatric facility. Guardian must obtain court permission. There are two exceptions: (i) ward is under 16 years old and (ii) mentally-retarded individual for emergency or respite care. § 1151.053. A guardian of a the person of a ward who files an application for transport of a ward to an inpatient mental facility for preliminary examination pursuant to an emergency detention must immediately provide written notice of the application to the court supervising the guardianship. § 1151.051.

**H. Role of Guardian of the Estate**. The guardian has the right and duty to possess and manage the ward's property, to enforce all obligations in favor of the ward, and to bring and defend suits by or against the ward. The guardian has the duty to take care of and manage the ward's estate as a prudent person would manage his own property, and must account for all rents, profits, and revenues earned by the estate. § 1151.151.

1. Duty to Invest. The guardian has a duty to invest all funds and assets that are available for investment and that are not immediately needed for the education, support, or maintenance of the ward. § 1161.001.

2. Powers Exercisable Without Court Order. The guardian may rent property of the estate for up to one year; insure the estate; pay taxes, court costs, and bond premiums; release a lien on payment of the debt; and vote stocks in the estate. §§ 1159.001, .002, .051.

3. Powers Exercisable Only With Court Order. Most powers are only exercisable with court order, including: the purchase or sale of real or personal property; renewal or extension of an obligation owed by or to the ward; taking property in payment of debt; compromising or settling a dispute or litigation; paying a secured claim by conveying the property securing the claim; and abandoning property. §§ 1151.012, 1158.001.

## VII. Resignation or Removal of Guardian.

**A. Annual Review.** The court must make an annual review of whether guardianship should be continued, modified, or terminated. § 1201.052.

**B. Death or Resignation of Guardian.** A guardian may resign upon written application to the court. § 1203.001.

**C. Removal of Guardian.**

1. Without Notice or Hearing (§ 1203.151):

   (a) Failure to comply with required actions after appointment;

   (b) Leaves the state or cannot be located; OR

   (c) Clear and convincing evidence of mistreatment or misfeasance.

2. After Notice and Hearing (§ 1203.152):

   (a) Grounds to believe guardian is guilty of mistreatment or misfeasance;

   (b) Gross misconduct or mismanagement;

   (c) Failure to file accounting or comply with court order; OR

   (d) No longer capable of serving.

## VIII. Intervention by Interested Person. Effective September 1, 2015.

**A. Method**. An interested person may intervene in a guardianship proceeding only by filing a timely motion to intervene that is served on all parties. § 1055.003(a). The motion must state the grounds for intervention and must be accompanied by a pleading that sets out the purpose for which intervention is sought. § 1055.003(b). These requirements do not apply to any person entitled to notice of the filing of the guardianship application. § 1055.003.

**B. Granting or Denying the Motion**. The court has the discretion to grant or deny the motion and, in exercising that discretion, must consider whether:

1. The intervention will unduly delay or prejudice the adjudication of the original parties' rights; OR

2. The proposed intervenor has such an adverse relationship with the ward that the intervention would unduly prejudice adjudication of the original parties' rights. § 1055.003(c).

## IX. Avoiding Guardianships.

**A.** Estate planning for clients often includes planning arrangements to cover the possibility that the client may suffer a disabling illness or injury. The objective of such planning is to avoid the trouble and expense of a guardianship administration should the client become incapacitated.

# § 6. ESTATE PLANNING

## I. Power of Attorney.

**A. Introduction**. A power of attorney is an instrument executed by a party (the "principal") that gives another party (the "attorney-in-fact") an agency authority to handle transactions on the principal's behalf. Tex. Est. Code § 751.002. There is a statutory form that is available for use.

**B. How It Avoids Guardianships**. Sometimes called "the poor man's revocable trust," the durable power of attorney is a useful, less complicated, and less expensive arrangement than a trust that can be employed to handle various legal transactions on behalf of an incapacitated person. Hence, it eliminates the need for a guardian to be appointed for a person who later becomes disabled or incapacitated.

**C. Validity**. To be valid, a durable power of attorney must be in writing or other record, and signed by the principal, or another in the conscious prescense and at the direction of the prinicipal. Finally, the writing must be acknowledged before a notary public. § 751.002. For real estate transactions, the durable power must be recorded. § 751.151.

**D. Durable Power of Attorney**. A power of attorney can be made "durable," i.e., it will not terminate on the disability or incapacity of the principal, if the instrument states, "This power of attorney is not affected by subsequent disability or incapacity of the principal."

**E. Springing Durable Power**. The principal may create a "springing" power by stating, "This power of attorney becomes effective on the disability or incapacity of the principal."

## II. Special Needs Trust (SNT).

**A. Introduction**. A SNT is a broad term encompassing self-settled and third-party funded trusts. The beneficiary of a SNT is a person with disabilities who is receiving, or could receive in the future, governmental "needs based" benefits, such as Medicaid or SSI. A SNT is designed to provide services and personal items above and beyond what is provided with government benefits with the intent of maintaining the beneficiary's eligibility for governmental "needs based" benefits in the form of SSI and Medicaid.

**B. Self-Settled SNT**. A self-settled SNT is a trust funded with funds belonging to the grantor or the grantor's spouse. This is permitted due to federal legislation creating exceptions to the general rule that one cannot put money aside in a trust and subsequently obtain need-based government assistance. 42 U.S.C. § 1396p(d)(4)(A), (d)(4)(C).

1. Under Age 65. To create a (d)(4)(A) trust, the individual must be under 65 and disabled at the time the trust is established. After the individual reaches the age of 65, the trust's "exception" status continues as to the assets transferred into it before age 65, but assets cannot be added after the individual turns 65. *See* § 1396p(d)(4)(A).

2. Age 65 or Older (Pooled Trust). There is no age requirement for a pooled SNT. A separate trust account is maintained for each beneficiary, but the funds are pooled together and managed by a charitable organization. Upon the beneficiary's death, if there are amounts remaining in his or her account that are not retained by the trust, the trust pays to the state an amount equal to the total amount of medical assistance paid under the state Medicaid plan on behalf of the primary beneficiary. *See* § 1396p(d)(4)(C).

**C. Third-Party Funded SNT**. A third-party funded SNT is not generally counted as an asset for SSI and Medicaid eligibility purposes, provided that the beneficiary has no access to the funds. This SNT does not require reimbursement to the state. Hence, when the disabled beneficiary dies, the remaining trust corpus can be directed to other named beneficiaries or remaindermen.

**III. Transfer on Death Deed (a.k.a. Lady Bird Deed, Enhanced Life Estate**). Effective September 1, 2015.

**A. Introduction**. A Transfer on Death (TOD) Deed allows owners of real property to transfer title to real property upon their death outside the probate process. The deed works much like a beneficiary designation on a bank account or insurance policy, and allows the grantor to name primary and contingent beneficiaries. The deed should be considered for persons with modest estates whose only probate asset is their home.

**B. Requirements**. Tex. Est. Code § 114.055.

1. Contain all the essential elements and formalities of a recordable deed (i.e., writing, signed by grantor, describe property, identify of beneficiary);

2. State that the transfer will not occur until the grantor's death; and

3. Be recorded before the grantor's death in the deed records in the county clerk's office of the county where the real property is located.

**C. Revocable During Life**. A TOD deed is completely revocable during the life of the grantor. § 114.057. The deed can be revoked in one of the following ways:

1. By instrument, if the instrument is (i) a subsequent TOD deed that revokes all or part of the preceding TOD deed expressly or by inconsistency, or by an instrument of revocation that expressly revokes the deed; (ii) acknowledged by grantor; and (iii) recorded before grantor's death; OR

2. By dissolution of marriage, if the beneficiary was a spouse and the final judgment dissolving the marriage is recorded before the grantor's death.

**D. Notice, Delivery, Acceptance, or Consideration Not Required**. § 114.056.

**E. Effect of Subsequent Conveyance**. An otherwise valid TOD deed is void as to any interest in real property that is conveyed by the grantor during the grantor's lifetime after the

TOD deed is executed and recorded IF the instrument conveying the property is recorded before the grantor's death. § 114.102.

**F. Wills**. A will may not revoke or supersede a TOD deed. § 114.057(b).

**G. Acquiring Title**. After the grantor dies, a certified copy of the grantor's death certificate should be filed in the clerk's office of the county where the TOD deed was recorded. Filing the death certificate serves as a link in the chain of title. § 114.103. Title is transferred to the beneficiary subject to all mortgages, liens, judgments, and other encumbrances. §114.104.

## IV. Medical Power of Attorney.

**A. Introduction**. A medical power of attorney authorizes the agent to make "body" decisions on behalf of the principal, including the power to grant or withhold consent to medical treatment; employ and discharge doctors, nurses, or other medical personnel; and to arrange for care and lodging in a hospital or nursing home. Tex. Health & Safety Code § 166.152.

**B. Effectiveness**. The power of attorney becomes effective upon certification by the attending physician that the principal lacks capacity to make health care decisions. § 166.152.

**C. Liability**. Neither the agent nor the health care provider is liable for health care decisions made in good faith under the terms of the power of attorney. § 166.160.

**D. Must Be Witnesses or Notarized**. A medical power of attorney must be witnessed by two persons, at least one of whom is not: (i) an attorney-in-fact; (ii) a relative of the principal; (iii) an heir or beneficiary of the principal; (iv) the attending physician; (v) an employee of the attending physician or health care facility; or (vi) a creditor of the principal's estate. Alternatively, the power of attorney for the principal (not for children) may be notarized in lieu of witnesses if the declaration does not expressly disqualify anyone from serving as a guardian. § 166.154.

## V. Consent by a Non-Parent.

**A. Applicability**. These provisions authorize non-parent consent when (i) the person having the right to consent as otherwise provided by law cannot be contacted and (ii) that person has not given actual notice to the contrary. Tex. Fam. Code § 32.001.

**B. Who May Consent**. § 32.001. The following persons may consent to medical, dental, psychological, and surgical treatment of a child:

1. A grandparent of the child;

2. An adult brother or sister of the child;

3. An adult aunt or uncle of the child;

4. An educational institution in which the child is enrolled that has received written authorization to consent from a person having the right to consent;

5. An adult who has actual care, control, and possession of the child and has written authorization to consent from a person having the right to consent;

6. A court having jurisdiction over a suit affecting the parent-child relationship of which the child is the subject;

7. An adult responsible for the actual care, control, and possession of a child under the jurisdiction of a juvenile court or committed by a juvenile court to the care of an agency of the state or county; or

8. A peace officer who has lawfully taken custody of a minor, if the peace officer has reasonable grounds to believe the minor is in need of immediate medical treatment.

**C. Requirements**. § 32.002. Consent to medical treatment must:

1. Be in writing, signed by the person giving consent;

2. Given to the doctor, hospital, or medical facility that administers the treatment; AND

3. Include: (i) name of the child, (ii) name of child's parents or guardian, (iii) name of person giving consent and that person's relationship to child; (iv) statement of medical treatment to be given; and (v) date of treatment.

## VI. Directive to Physicians.

**A.** This gives directions to declarant's doctors about whether he would or would not want life support if he were diagnosed with (i) a terminal condition (expected to die within six months even if all available treatments were provided) or (ii) an irreversible condition (one that cannot be cured). Tex. Health & Safety Code § 166.031, .032, .002.

## VII. Out of Hospital Do Not Resuscitate Order ("DNR").

**A.** An Out of Hospital Do Not Resuscitate Order allows people to decide that they do not want to be resuscitated (specifically, that certain measures will not be used on them). Those measures include CPR, advanced airway management, defibrillation, artificial ventilations, and transcutaneous cardiac pacing. Tex. Health & Safety Code § 166.081 et seq. Like Directives to Physicians, it is not effective unless the treating professionals are made aware of the document.

## VIII. Consent to Medical Treatment Act.

**A. Introduction**. An individual ("surrogate decision-maker") is given the authority to consent to medical treatment on behalf of an already incapacitated person. Tex. Health & Safety Code § 313.002.

**B. Applies to** (i) an adult patient of home and community support services agency or in a hospital or nursing home, or an adult inmate of prison, (ii) who does not have a formal guardian or health care agent under a medical power of attorney, AND (iii) who is comatose, incapacitated, or otherwise mentally or physically incapable of communication. § 313.004.

**C. Priority for Surrogate Decision-Maker**: (a) Patient's Spouse; (b) Adult child of the patient who has the waiver and consent of all other qualified adult children of the patient to act as the sole decision-maker; (c) Majority of the patient's reasonably available children; (d) Patient's Parents; and (e) Individual clearly identified to act for the patient by the patient before the patient became incapacitated, the patient's nearest living relative, or a member of the clergy. § 313.004.

**D. Patient's Desire**. Any medical treatment consented to must be based on knowledge of what patient would desire, if known. § 313.004.

**E. Surrogate Decision-Maker CANNOT Make the Following Decisions**: (i) voluntary inpatient mental health services; (ii) electro-convulsive treatment; (iii) appointment of another surrogate decision-maker. § 313.004.

**F. Act Does NOT Apply to**: (i) a decision to withhold or withdraw life-sustaining treatment from qualified terminal or irreversible patients; (ii) healthcare decision made under a medical power of attorney; (iii) consent to medical treatment of minors; (iv) consent for emergency care; (v) hospital patient transfers; and (vi) patient's legal guardian who has the authority to make a decision regarding patient's medical treatment. § 313.004.

## IX. Supported Decision-Making Agreements. Effective September 1, 2015.

**A. Purpose**. The purpose of supported decision-making agreements is to provide a less restrictive alternative to guardianship for adults with disabilities who need assistance with decisions regarding daily living but who are not considered incapacitated persons. Tex. Est. Code § 1357.003.

**B. Scope of Agreement**. § 1357.051. An adult with a disability may voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with a supporter under which the adult with a disability authorizes the supporter to do any or all of the following:

1. Provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult 's life decisions, without making those decisions on behalf of the adult with a disability;

2. Assist the adult in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person, but only to the extent that it is relevant to an authorized decision;

3. Assist the adult with a disability in understanding the information described by Subdivision (2); and

4. Assist the adult in communicating his/her decisions to appropriate persons.

**C. Term of Agreement**. The agreement extends until terminated by either party or by the terms of the agreement. The agreement is also terminated if Texas DFPS finds that the adult has been abused, neglected, or exploited by the supporter. § 1357.053.

**D. Requirements of a Valid Agreement**. The Agreement must be signed voluntarily, without coercion or undue influence, by the adult with the disability and the supporter in the presence of two or more witnesses (over 14 years old) or a notary public. § 1357.055. In addition, the agreement is valid only if it is in substantially the same form as that given in § 1357.056.

# §7. IMMIGRATION

## I. Deferred Action for Childhood Arrivals (DACA).[2]

### A. What is DACA?

1. Defers removal/deportation of people who qualify, and permits "lawful presence" (NOT lawful status) and employment for two years, during which no unlawful presence accrues (but does NOT excuse prior unlawful presence).

2. Can obtain SSN and, in most states, valid driver's license or state ID.

3. Can be renewed in two years.

### B. Eligibility Requirements.

1. The applicant must show that on June 15, 2012, he/she was:

(a) Under the age of 31; AND

(b) Physically present in the United States; AND

(c) Had no lawful status.

[2] USCIS, Consideration of DACA, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

2. The applicant must show that on the date the request is filed, he/she:

(a) Has resided continuously in the US since June 15, 2007; AND

(b) Had come to the US before his/her 16th birthday; AND

(c) Was physically present in the US; AND

(d) Was at least 15 years old, unless currently in removal proceedings or have a final removal or voluntary departure order; AND

(e) Currently in school, graduated or obtained a certificate of completion from high school, obtained a GED certificate, or are an honorably discharged veteran.

**C. Disqualifier**. In order to be eligible for DACA, the applicant must not be convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and not otherwise pose a threat to national security or public safety.

**D. How to Prove Eligibility.**

1. Proof of identity: passport or national identity document from country of origin; birth certificate with photo identification; school or military ID with photo; any U.S. government immigration or other document bearing your name and photo.

2. Proof of coming to U.S. before 16th birthday: passport with admission stamp; Form I-94/I-95/I-94W; school records from U.S. schools attended; any INS or DHS document stating date of entry (Form I-862, Notice to Appear); travel, hospital or medical records; employment records (pay stubs, W-2 Forms); official records from a religious entity confirming participation in a religious ceremony; copies of money order receipts for money sent in/out of U.S.; birth certificates of children born in U.S.; dated bank transactions; automobile license receipts or registration; deeds, mortgages, rental agreement contracts; tax receipts, insurance policies.

3. Proof of immigration status: Form I-94/I-95/I-94W with authorized stay expiration date; final order of exclusion, deportation, or removal issued as of June 15, 2012; a charging document placing you into removal proceedings.

4. Proof of presence in U.S. on June 15, 2012, and Proof of continuous residence in U.S. since June 15, 2007: rent receipts or utility bills; employment records (pay stubs, W-2 Forms, etc.); school records (letters, report cards, etc.); military records (Form DD-214 or NGB Form 22); official records from a religious entity confirming participation in a religious ceremony; copies of money order receipts for money sent in or out of the country; passport entries; birth certificates of children born in the U.S.; dated bank transactions; automobile license receipts or registration; deeds, mortgages, rental agreement contracts tax receipts, insurance policies.

5. Proof of student status at the time of requesting DACA: official records (transcripts, report cards, etc.) from the school that he/she is currently attending in U.S.; U.S. high school diploma or certificate of completion; U.S. GED certificate.

6. Proof of honorable discharge from Coast Guard or Armed Forces: Form DD-214, Certificate of Release or Discharge from Active Duty; NGB Form 22, National Guard Report of Separation and Record of Service; military personnel or health records.

**E. DACA Application Process.**

1. Collect documents as evidence that you meet the guidelines (See above).

2. Complete the three required forms. (i) I-821D, Consideration of Deferred Action for Childhood Arrivals; (ii) I-765, Application for Employment Authorization; and (iii) I-765WS, Worksheet.

3. Gather the required fee of $465, or seek exemption ($380 fee plus $85 fee for biometric services). The fees cannot be waived, but limited fee exemptions if the applicant is:

(a) Under 18 and either (i) homeless, OR (ii) under 150% of the poverty level and in foster care or lacking familial support; OR

(b) Unable to care for himself/herself because of a serious, chronic disability and income is under 150% of the poverty level; OR

(c) In debt of $10,000 or more, which accumulated in the past 12 months, from unreimbursed medical expenses for himself or immediate family member, and income under 150% of the poverty level.

***NOTE***: Must wait for ruling on exemption before filing DACA request.

4. Mail forms to the appropriate U.S. Citizenship and Immigration Services (USCIS) Lockbox. Include the required forms, fees, and supporting documentation.

5. Visit an Application Support Center (ASC) for biometric services. After USCIS receives the complete request with fees, it will send a notice scheduling a visit to ASC for biometric services. If the applicant fails to attend, USCIS may deny the DACA request.

6. Check the status of the DACA request online.[3]

(a) Adjudication time is 4 - 6 months, and often takes that long.

(b) If application denied, no appeals or motions to reopen/reconsider.

[3] USCIS, Case Status Online, https://egov.uscis.gov/casestatus/landing.do.

(c) If granted, applicant will receive a written notice of that decision, and an Employment Authorization Document will arrive in the mail.

**F. DACA and Removal.**

1. Fraud. If USCIS uncovers fraud in the DACA application process, that applicant will become an "enforcement priority."

2. Referral to ICE. USCIS will "apply its policy guidance" regarding the referral of cases to ICE. If the applicant's case does not involve a criminal offense, fraud, or a threat to national security or public safety, USCIS will not refer the case to ICE for purposes of removal proceedings except where DHS determines there are exceptional circumstances.

## II. Individual Taxpayer Identification Number (ITIN).[4]

**A.** What is ITIN?

1. A tax processing number issued by the IRS to individuals (i) who are required to file taxes with the IRS, but (ii) who do not have, and are not eligible to obtain, a Social Security Number (SSN).

2. ITINs are issued regardless of immigration status because both resident and nonresident aliens may have a U.S. filing or reporting requirement under the Internal Revenue Code.

3. An ITIN does not authorize work in the U.S. or provide eligibility for Social Security benefits or the Earned Income Tax Credit.

**B.** Who needs an ITIN?

1. Individuals who: (i) do not have a SSN, (ii) are not eligible to obtain a SSN, and (iii) need to file a federal income tax return or need a federal tax identification number.

NOTE: ITIN not needed if application for a SSN is pending.

2. Examples:

(a) A nonresident alien required to file a U.S. tax return;

(b) A U.S. resident alien filing a U.S. tax return;

(c) A dependent or spouse of a U.S. citizen/resident alien; and

(d) A dependent or spouse of a nonresident alien visa holder.

**C.** Applying for an ITIN.

[4] IRS, General ITIN Information, http://www.irs.gov/Individuals/General-ITIN-Information.

1. Fill out the ITIN application (Form W-7).

2. Gather required documents and attach to application. Attach a valid federal income tax return (unless an exception applies), and include original proof of identity (or copies certified by issuing agency) and foreign status documents.

3. Mail application and documents. DO NOT mail the return to the address listed on the Form 1040, 1040A, or 1040EZ. Instead, mail the application and all documents to:

Internal Revenue Service
Austin Service Center
ITIN Operation
P.O. Box 149342
Austin, TX 78714-9342

4. Wait 7 weeks for the IRS to mail a response.

**D.** When to Apply for an ITIN.

1. If a tax income tax return must be filed, then at that time.

2. If an exception to the tax filing requirement applies, then submit the application, the documents to prove identity and foreign status, and supplemental documents to substantiate the individual's qualification for an exception. Note: exceptions to the tax filing requirement depend on the individual's filing status (single, married, etc.) and income level.

## III. Violence Against Women Act (VAWA).[5]

**A. About VAWA**. The VAWA provisions in the Immigration and Nationality Act (INA) allow certain spouses, children, and parents of U.S. citizens and certain spouses and children of permanent residents (Green Card holders) to file a petition for themselves, without the abuser's knowledge. This allows victims to seek both safety and independence from their abuser, who is not notified about the filing. The VAWA provisions, which apply equally to women and men, are permanent and do not require congressional reauthorization.

**B. Eligibility Requirements for a Spouse.**

1. Qualifying spousal relationship:

(a) You are married to a U.S. citizen or permanent resident abuser; OR

(b) Your marriage to the abuser was terminated by death or a divorce (related to the abuse) within the 2 years prior to filing your petition; OR

[5] USCIS, Battered Spouse, Children & Parents, http://www.uscis.gov/humanitarian/battered-spouse-children-parents.

(c) Your spouse lost or renounced citizenship or permanent resident status within the 2 years prior to filing your petition due to an incident of domestic violence; OR

(d) You believed that you were legally married to your abusive U.S. citizen or permanent resident spouse but the marriage was not legitimate solely because of the bigamy of your abusive spouse.

2. You or your child has suffered battery/extreme cruelty by your U.S. citizen or permanent resident spouse; AND

3. You entered into marriage in good faith, not solely for immigration benefits; AND

4. You have resided with your spouse; AND

5. You are a person of good moral character.

**C.** Eligibility Requirements for a Child.

1. You are the child of a U.S. citizen or permanent resident abuser; AND

Note: The child still qualifies if the parent-abuser lost citizenship or lawful permanent resident status due to an incident of domestic violence.

2. You have suffered battery/extreme cruelty by the parent in (1); AND

3. You have resided with your abusive parent; AND

4. You are a person of good moral character (a child less than 14 years of age is presumed to be a person of good moral character).

**D. Eligibility Requirements for a Parent.**

1. You are the parent of a US citizen son or daughter who: (i) is at least 21 years of age when the self-petition is filed; or (ii) lost or renounced citizenship status related to an incident of domestic violence; or (iii) was at least 21 years of age and who died within 2 years prior to filing the self-petition; AND

2. You have suffered battery/extreme cruelty by your US citizen son/daughter; AND

3. You have resided with the abusive son or daughter; AND

4. You are a person of good moral character.

**E. Filing Process.**

1. You must complete the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, including all supporting documentation.

2. You must file the form with the Vermont Service Center (VSC).

3. If you are living abroad at the time of filing the self-petition, you may file Form I-360 if: (i) the abuser is an employee of the U.S. government; (ii) the abuser is a member of the uniformed services; or (iii) you were subjected to battery or extreme cruelty in the U.S.

4. If you are a self-petitioning spouse or child and you meet all requirements, you will receive a notice (Prima Facie Determination Notice) valid for 150 days that you can present to government agencies that provide certain public benefits to certain victims of domestic violence.

5. If your Form I-360 is approved and you don't have legal immigration status, we may place you in deferred action, which allows you to remain in the U.S.

**F. Working in the United States**. If you have an approved Form I-360, you are eligible to apply to work in the U.S. In addition, if you have an approved Form I-360 and have been placed in deferred action, you are eligible to apply to work in the U.S. To apply to work in the U.S., you must file the Form I-765, Application for Employment Authorization, with the Vermont Service Center. Your children listed on your approved Form I-360 may also apply for work.

**G. Permanent Residence (Green Card)**. If you have an approved Form I-360, you may be eligible to file for a green card. If you are a self-petitioning spouse or child, your children listed on your approved Form I-360 may also be eligible to apply for a green card.

**H. Additional Help**. Help is also available from the National Domestic Violence Hotline at 1-800-799-7233 or 1-800-787-3224. The hotline has information about shelters, mental health care, legal advice and other types of assistance, including information about filing for immigration status. For more information, visit the National Domestic Violence website (www.thehotline.org).

## IV. Victims of Criminal Activity: U Nonimmigrant Status (U-Visa).[6]

**A. About U-Visa**. The U nonimmigrant status (U visa) is set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity.

**B. Eligibility**. You may be eligible for a U nonimmigrant visa if:

1. You are the victim of qualifying criminal activity;

[6] USCIS, Victims of Criminal Activity: U Nonimmigrant Status, http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#U Nonimmigrant Eligibility.

2. You have suffered substantial physical or mental abuse as a result of having been a victim of criminal activity;

3. You have information about the criminal activity;

(a) If you are under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may possess the information about the crime on your behalf.

4. You were helpful, are helpful, or are likely to be helpful to law enforcement in the investigation or prosecution of the crime;

(a) If you are under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may assist law enforcement on your behalf.

5. The crime occurred in the United States or violated U.S. laws; AND

6. You are admissible to the United States.

(a) If you are not admissible, you may apply for a waiver on a Form I-192, Application for Advance Permission to Enter as a Nonimmigrant.

**C.** Qualifying Criminal Activities

- Abduction
- Abusive Sexual Contact
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Female Genital Mutilation
- Felonious Assault
- Fraud in Foreign Labor Contracting
- Hostage
- Incest
- Involuntary Servitude
- Kidnapping
- Manslaughter
- Murder
- Obstruction of Justice
- Peonage
- Perjury
- Prostitution
- Rape
- Sexual Assault
- Sexual Exploitation
- Slave Trade
- Stalking
- Torture
- Trafficking
- Witness Tampering
- Unlawful Criminal Restraint
- Other Related Crimes – includes similar crimes as well as attempt, conspiracy or solicitation

**D.** **Applying for a U-Visa**. To apply (petition) for a U nonimmigrant status, submit:

1. Form I-918, Petition for U Nonimmigrant Status;

2. Form I-918, Supplement B, U Nonimmigrant Status Certification.

(a) This must be signed by an authorized official of the law enforcement agency, who must confirm that you were helpful, and currently being helpful, or will likely be helpful in the investigation or prosecution of the case.

3. If any inadmissibility issues are present, you must file a Form I-192, Application for Advance Permission to Enter as Nonimmigrant, to request a waiver;

4. A personal statement describing the criminal activity at issue; AND

5. Evidence to establish each eligibility requirement.

**E. Filing for Qualifying Family Members**. Certain qualifying family members are eligible for a derivative U visa based on their relationship to you, the principal, filing for the U visa. The principal petitioner must have their petition for a U visa approved before their family members can be eligible for their own derivative U visa. File Form I-918, Supplement A.

| If you, the principal, are… | Then… |
|---|---|
| Under 21 years old | You may petition on behalf of your spouse, children, parents and unmarried siblings under age 18 |
| 21 years old or older | You may petition on behalf of your spouse and children. |

**F. U Visa Extensions**. When U nonimmigrant status is granted, it is valid for four years. However, extensions are available in certain, limited circumstances.

**G. Applying for a Green Card**. You may be eligible to apply for a Green Card (adjustment of status/permanent residence) if you meet certain requirements.

## V. Asylum.[7]

**A. Who May Apply**. Apply for Asylum with Form I-589 (no fee required).

1. Must be arriving in or already physically present in the US, regardless of your immigration status (legal or illegal);

2. Ask for asylum within one year of last arrival in US, unless you can demonstrate that there are changed circumstances that materially affect your eligibility for asylum or extraordinary circumstances directly related to your failure to file within one year;

3. Have not been previously denied asylum by the Immigration Judge or Board of Immigration appeals, unless you demonstrate that there are changed circumstances which materially affect your eligibility for asylum; AND

4. Cannot be removed to a safe third country pursuant to a bilateral or multilateral agreement.

[7] USCIS, Form I-589 Instructions, http://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf.

**B. Basis of Eligibility**. In order to qualify for asylum, you must establish that:

1. You are a refugee who is unable or unwilling to return to your country of nationality, or last habitual residence in the case of a person having no nationality; AND

2. You cannot return because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

**C. Bars to Eligibility**. You will be barred from being granted asylum under INA § 208(b)(2) if you:

1. Ordered, incited, assisted, or participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

2. Were convicted of a particularly serious crime (includes aggravated felonies);

3. Committed a serious nonpolitical crime outside the United States;

4. Pose a danger to the security of the United States;

5. Were firmly resettled in another country prior to arriving in the United States (see 8 CFR § 208.15 for a definition of "firm resettlement"); OR

6. Are described in any of the terrorism or security-related inadmissibility grounds at INA § 212(a)(3)(B) or (F).

**D.** Spouse and Children.

1. You must list your spouse and all your children on your Form I-589, regardless of their age, marital status, whether they are in the US, or whether they are included in your application or filing a separate asylum application.

2. You may ask to have your spouse and/or any children who are under the age of 21 and unmarried included in your asylum decision if they are in the US.

(a) You should bring these individuals with you to the asylum interview. If you are granted asylum, they will also be granted asylum status (unless they are barred from such status) and will be allowed to remain in the US.

(b) However, if you are referred to the Immigration Court, they will also be referred to court for removal proceedings if they are not in legal status.

3. Children who are married and children who are 21 years of age or older at the time you file your asylum application must file for asylum independently.

4. If you are granted asylum, you may petition using the I-730 to bring to the US your spouse and/or children who are unmarried and under the age of 21 as of the date you filed the asylum application.

# §8. CONSUMER LAW

## A. The Deceptive Trade Practices Act (DTPA)

### I. Construction, Application, and Waiver.

**A. Construction and Application**. The DTPA is liberally construed and applied to promote its underlying purposes which are to "protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." Tex. Bus. & Com. Code § 17.44.

**B. Waiver**. With only a few exceptions, any waiver of the DTPA is contrary to public policy and unenforceable and void. The DTPA may be waived only if:

1. Waiver is in writing and signed by consumer; AND

2. Consumer is not in a significantly disparate bargaining position; AND

3. Consumer is represented by counsel in seeking/acquiring the goods/services.

### II. Applicability.

**A. Proper Party Plaintiff: Consumer**. A consumer is any entity who (1) seeks or acquires (2) by purchase or lease (3) any goods or services. § 17.45(4)

**B. Seek or Acquire.**

1. Seek. An entity is a consumer if it seeks in good faith to purchase goods. Consideration is not required.

2. Acquire. Any entity that purchases something and takes possession of it has "acquired" it, as does any ***intended beneficiary*** of the transaction (but not incidental beneficiaries).

**C. Purchase or Lease.**

1. Gratuitous Goods or Services. An individual who receives services gratuitously is not a consumer.

2. Gifts Purchased for Another. Goods received as a "gift" may still be acquired by purchase. Although a consumer must acquire the goods or services by purchase, one other than the consumer may make the purchase.

**D. Goods or Services.**

1. Goods. Defined to mean "tangible chattels or real property purchased or leased for use." § 17.45(1). This excludes money and intangibles, but includes inventory purchased for resale.

2. Services. Defined to mean "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods." § 17.45(2). This excludes merely lending money.

## III. Exemptions.

**A. Business Consumer**. The DTPA excludes certain business consumers from the definition of consumer. A "business consumer" is "an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use." § 17.45(10). Business consumers with assets of $25 million or more, or one that is controlled or owned by an entity with assets of $25 million or more, is not a consumer under the DTPA. The defendant has the burden to prove the exemption as an affirmative defense.

**B. Statutory Exemptions**. The DTPA provides a list of exempt conduct. § 17.49.

1. Professional Services. The DTPA does not apply to "a claim for damages based on the rendering of a professional service, ***the essence of which*** is the providing of advice, judgment, opinion, or similar professional skill." § 14.49(c). The exemption is ***service-specific***, not profession-specific. It focuses on what was done, not on who was doing it (e.g., lawyers giving legal advice, doctors giving medical opinions, etc.). However, there are ***exceptions to the exemption***:

(a) An express misrepresentation of material fact that cannot be characterized as advice, judgment, or opinion;

(b) A failure to disclose information in violation of Section 17.46(b)(24);

(c) An unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;

(d) Breach of an express warranty that cannot be characterized as advice, judgment, or opinion; OR

(e) A violation of Section 17.46(b)(26) [regarding annuity contracts].

2. Personal Injury Claims. This provision does not exempt all claims involving personal injury from the DTPA. It simply provides that unless a claim for personal injury is within the provisions of either § 17.50(b) [the general damage provision of the DTPA] or § 17.50(h) [the damage provision for "tie-in statutes"], it is exempt from the act. § 17.49(e).

3. Large Transactions. The DTPA does not apply to a claim arising out of a written contract if the contract relates to a "a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000." § 17.49(f). The DTPA also does not apply to a cause of action arising out of such a transaction or project if the total consideration by the consumer is more than $500,000. § 17.49(g). Neither of these exemptions apply to transactions involving the consumer's residence.

## IV. Who May Be Sued.

**A. Basis of the Complaint**. The goods or services purchased or acquired must form the basis of the consumer's complaint. Although the defendant does not have to be in privity with the consumer, the defendant's wrongful conduct must be committed "in connection with" the consumer's transaction.

**B. Assignee Liability**. The liability of an assignee for a violation of the DTPA is the same as the liability for any assignee.

**C. Agent Liability**. The DTPA permits a suit against "any person" and makes no distinction between agents and principals.

## V. Claims under the DTPA.

**A. Four Claims**. §17.50(a). The DTPA provides that a consumer may maintain an action where any of the following constitute a "producing cause" of damages:

1. The Laundry List. The use or employment by any person of a false, misleading, or deceptive act or practice that is:

   (a) Specifically enumerated in § 17.46(b); AND

   (b) Relied on by a consumer to the consumer's detriment;

2. Breach of Warranty, express or implied;

3. Unconscionability. An unconscionable act by any person; OR

4. Violation of Chapter 541 of the Insurance Code.

**B. The Laundry List**. The DTPA includes a list ("the laundry list") of 27 acts or practices that are deemed to be false, deceptive, or misleading. § 17.46(b).

1. Reliance Required. The act must be relied on by ***A*** consumer to ***THE*** consumer's detriment (e.g., husband buys something for wife, making both husband and wife consumers; husband relies on a misrepresentation; wife may recover as a consumer).

2. Prohibited Practices. Most common are misrepresentations regarding goods or services. Others include misrepresenting being an attorney, legal rights and failure to disclose.

3. No Requirement of Privity, Knowledge, or Intent. Unless otherwise required by the specific provision.

4. General Misrepresentations. To constitute a violation, it is only necessary that the actor makes a representation of fact regarding goods or services that is inaccurate or false, whether oral or written. Statements that are mere opinion or puffing are not actionable.

5. Failure to Disclose. The consumer must establish (i) the defendant knew information regarding the goods or services; (ii) the information was not disclosed; (ii) there was an intent to induce the consumer to enter the transaction; and (iv) the consumer would not have entered the transaction had the information been disclosed. § 17.46(b)(24).

**C. Unconscionability**. The DTPA defines unconscionability as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." § 17.45(5).

1. Objective Standard, Determined at the Time of Sale. No intent requirement.

2. Grossly Unfair. Defined by the Supreme Court of Texas to mean "glaringly noticeable, flagrant, complete, and unmitigated."

**D. Breach of Warranty**. The DTPA does not create any warranties. It only provides a vehicle through which a breach of warranty claim may be brought. Law outside of the DTPA must establish the warranty itself, as well as the validity of any disclaimers or waivers. § 17.50(a)(2).

**E. Chapter 541 of the Insurance Code**. See Below.

## VI. Remedies.

**A. Producing Cause**. The consumer must show that the defendant's violation of § 17.50 was a producing cause of damages. The Texas Supreme Court defined it as "a substantial factor which brings about the injury and without which the injury would not have occurred."

1. Do NOT Confuse With Proximate Cause.

2. As Is. The defendant may negate producing cause if a contract says that the consumer is purchasing the goods "as is" and is not relying on anything represented by the seller.

**B. Damages In General**. The DTPA provides that a consumer who prevails may obtain economic damages and, in an appropriate case, damages for mental anguish and total damages of not more than 3 times the damages awarded. § 17.50(b)(1).

1. Economic Damages. Defined as "compensatory damages for pecuniary loss, including costs of repair and replacement," and "does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society." § 17.45(11). This is the general DTPA damages standard.

2. Mental Anguish Damages. If the trier of fact finds that the conduct of the defendant was committed knowingly or intentionally, the consumer may also recover damages for mental anguish. § 17.50(b)(1).

3. Knowingly Defined. Defined as "actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the

consumer's claim or, in an action brought under [§ 17.50(a)(2)], actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness."

**C. Additional Damages**. §17.50(b).

1. Knowingly. If the defendant acted knowingly, then the jury may award additional damages of up to twice the economic damages [a total of 3 times economic damages], as well as damages for mental anguish.

2. Intentionally. If the defendant acted intentionally, then the jury may award additional damages of up to twice the economic damages and twice the mental anguish damages [a total of 3 times economic and mental anguish damages].

**D. Attorneys' Fees**.

1. Consumer's Fees—Required. "Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees." § 17.50(d).

2. Defendant's Fees. "On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs." § 17.50(c).

**E. Actual Damages**. Actual damages, meaning all damages recoverable at common law, may still be recovered in cases brought through "tie-in statutes." § 17.50(h). The Legislature has chosen to incorporate ("tie-in") the DTPA provisions into many other statutes dealing with consumer-related issues. A violation of those statutes is actionable under the DTPA.

1. Examples of Tie-In Statutes: Business Opportunity Act; Contest and Giveaway Act; Debt Collection Act; Health Spa Act; Home Solicitation Act; Manufactured Housing Standards Act; Motor Vehicle Commission Code (lemon law); Timeshare Act; etc.

# B. Federal Fair Debt Collection Practices Act (FDCPA)

## I. Applicability.

**A. Limited to Consumers**. The FDCPA uses the term "consumer" (instead of "debtor"), which is defined to mean "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3).

1. Definition of Debt. "[A]ny obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." § 1692a(5).

**B. Debt Collector**. Application of the law is limited to conduct engaged in by a "Debt Collector," which is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who ***regularly*** collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." § 1692a(6).

1. Does Not Apply to Entity Collecting Its Own Debts. Unless the creditor is not using its own name to collect the debt.

2. Applies to Attorneys who regularly collect debts on behalf of their clients.

## II. Prohibited Communication with Debtor. § 1692c(a).

**A. Time and Place**. Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer at any unusual time or place, or place known to be inconvenient to the consumer. It should be assumed that between 8 a.m. and 9 p.m. is convenient.

**B. Represented by an Attorney**. A debt collector may not communicate with the consumer if the debt collector knows the consumer is represented by an attorney and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time or the attorney consents to the communication.

**C. Place of Employment**. A debt collector may not communicate with a consumer at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

## III. Communication with Third Parties. § 1692c(b), 1692b.

**A. General Rule**. A debt collector may not communicate with third parties.

**B. Exceptions**. A debt collector may communicate with third parties only:

1. To obtain location information;

2. With the prior consent of the consumer given directly to the debt collector;

3. With the express permission of the court; OR

4. As reasonably necessary to effectuate a post-judgement judicial remedy.

## IV. Validation of Debts. § 1692g(a).

**A. Goal**. In order to insure that consumers are not misled or deceived regarding the amount or existence of a debt, the FDCPA requires that consumers be provided notice about the amount and existence of the debt.

**B. Requirements**. In its initial communication OR within 5 days thereof, the debt collector must tell the consumer the amount of debt, who it is owed to, and a statement that the consumer has 30 days to dispute the debt.

**C. Disputed Debts**. If the consumer disputes the debt or any portion thereof within the 30-day period, the debt collector must cease all collection efforts until the debt is verified.

**V. Prohibited Conduct.**

**A.** The FDCPA prohibits debt collectors from engaging in harassment or abuse, making false or misleading representations, or engaging in unfair practices (non-exclusive). The categories are very broad and are meant to apply to all kinds of conduct. §§ 1692d-1692j.

**VI. Liability.**

**A. Administrative Enforcement**. The FTC may enforce the FDCPA. § 1692l.

**B. Private Enforcement**. Any person who has been damaged as a result of a debt collector's failure to comply with the FDCPA may bring an action, but it must be brought within the one year limitations period. § 1692k.

**C. Liability**. The FDCPA damages standard is actual damages. The court may award additional damages of not more than $1,000. § 1692k(a).

**D. Attorneys' Fees**. § 1692k(a)(3).

1. Consumer. Same as DTPA.

2. Defendant. If the action was brought in bad faith and for harassment.

**E. Relation to State Laws**. Conduct that violates the FDCPA may also violate the DTPA through the TDCA.

## C. Texas Debt Collection Act (TDCA)

**I. Applicability.** Tex. Fin. Code §§ 392.001 *et seq.*

**A. Tie-In Statute**. A violation of the TDCA may be brought under the DTPA and actual damages may be recovered.

**B. Debt Collectors**. Like the FDCPA, the TDCA applies to consumer debts. Unlike the FDCPA, the TDCA applies to anyone collecting a consumer debt (not just third parties).

1. Consumer Debt. Defined as "an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction." § 392.001(2).

**II. Prohibited Conduct.**

**A. List is Exclusive.** Unlike the FDCPA, unlisted actions do not violate the TDCA.

**B. Threats or Coercion.** A debt collector may not use threats, coercion, or attempts to coerce that employ any of the following: (1) criminal or violent threats; (2) false accusations that consumer has committed a crime; (3) representing that the consumer is refusing to pay a nondisputed debt when it is disputed; (4) threats regarding legal rights; (5) threats of arrest; (6) threats that exempt property will be taken; and (7) threats that wages will be garnished. § 392.301.

**C. Harassment or Abuse.** A debt collector may not engage in conduct that is oppressive, harassing, or abusive to any person, including making annoying phone calls and using profanity. § 392.302.

**D. Unfair or Unconscionable Conduct.** A debt collector may not attempt to collect amounts that are unauthorized. § 392.303.

**E. Fraudulent, Deceptive, or Misleading Representations.** Among others, a debt collector may not (1) use misleading or deceptive names; (2) deceive consumers to get information; (3) misrepresent what can happen (i.e., legal action); or (4) misrepresenting that the collector is an attorney. § 392.304.

**III. Enforcement.**

**A. Civil Remedies.**

1. Remedies. A person may sue for: (i) injunctive relief to prevent or restrain a violation of the TDCA; and (ii) actual damages. § 392.402.

2. Attorneys' Fees. Same as DTPA for the consumer. The defendant may recover for bad faith OR harassment. § 392.403.

3. Minimum Recovery. A person who successfully maintains an action under the TDCA is entitled to not less than $100 for each violation. § 392.403.

**B. Remedies under Other Laws.** A violation of the TDCA is a violation of the DTPA and may be brought under that law as well. § 392.404.

## D. Payday Loans

**I. Payday Loan Defined.**

**A. Payday Loan or Deferred Presentment Transaction.** A transaction in which:

1. A cash advance in whole or in part is made in exchange for a personal check or authorization to debit a deposit account;

2. The amount of the check or authorized debit equals the amount of the advance plus a fee; AND

3. The person making the advance agrees that the check will not be cashed or deposited or the authorized debit will not be made until a designated future date. 7 Tex. Admin. Code § 83.604(a).

**B. How it Works**. Say you need to borrow $100 for two weeks. You write a personal check for $115, with $15 the fee to borrow the money. The check casher or payday lender agrees to hold your check until your next payday. When that day comes around, either the lender deposits the check and you redeem it by paying the $115 in cash, or you roll-over the loan and are charged $15 more to extend the financing for 14 more days. If you agree to electronic payments instead of a check, here's what would happen on your next payday: the company would debit the full amount of the loan from your checking account electronically, or extend the loan for an additional $15. The cost of the initial $100 loan is a $15 finance charge and an annual percentage rate of 391 percent. If you roll-over the loan three times, the finance charge would climb to $60 to borrow the $100.

## II. Alternatives to Payday Loans.[8]

**A. Consider a small loan from your credit union or a small loan company**. Some banks may offer short-term loans for small amounts at competitive rates. A local community-based organization may make small business loans to people. A cash advance on a credit card also may be possible, but it may have a higher interest rate than other sources of funds: find out the terms before you decide. In any case, shop first and compare all available offers.

**B. Shop for the credit offer with the lowest cost**. Compare the APR and the finance charge, which includes loan fees, interest and other credit costs. You are looking for the lowest APR. Military personnel have special protections against super-high fees or rates, and all consumers in some states and the District of Columbia have some protections dealing with limits on rates. Even with these protections, payday loans can be expensive, particularly if you roll-over the loan and are responsible for paying additional fees. Other credit offers may come with lower rates and costs.

**C. Contact your creditors or loan servicer** as quickly as possible if you are having trouble with your payments, and ask for more time. Many may be willing to work with consumers who they believe are acting in good faith. They may offer an extension on your bills; make sure to find out what the charges would be for that service — a late charge, an additional finance charge, or a higher interest rate.

**D. Contact your local consumer credit counseling service** if you need help working out a debt repayment plan with creditors or developing a budget. Non-profit groups in every state offer credit guidance to consumers for no or low cost. You may want to check with your employer, credit union, or housing authority for no- or low-cost credit counseling programs, too.

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[8] FTC, Payday Loans, http://www.consumer.ftc.gov/articles/0097-payday-loans.

**E. Make a realistic budget**, including your monthly and daily expenditures, and plan, plan, plan. Try to avoid unnecessary purchases: the costs of small, every-day items like a cup of coffee add up. At the same time, try to build some savings: small deposits do help. A savings plan — however modest — can help you avoid borrowing for emergencies. Saving the fee on a $300 payday loan for six months, for example, can help you create a buffer against financial emergencies.

**F. Find out if you have — or if your bank will offer you — overdraft protection on your checking account**. If you are using most or all the funds in your account regularly and you make a mistake in your account records, overdraft protection can help protect you from further credit problems. Find out the terms of the overdraft protection available to you — both what it costs and what it covers. Some banks offer "bounce protection," which may cover individual overdrafts from checks or electronic withdrawals, generally for a fee. It can be costly, and may not guarantee that the bank automatically will pay the overdraft.

## III. Authorization, Maximum Charge, Minimum Term.

**A. Authorization**. A person who negotiates, arranges, or acts as an agent for an authorized lender in a payday loan or deferred presentment transaction that has an effective annual rate of greater than 10% is required to be licensed. § 83.604(b)

**B. Maximum Charge**. A licensee may not charge more than the rates authorized by the Texas Finance Code, §§ 342.251 – 259. § 83.604(c). The chart below provides examples of the maximum authorized rates for loans made under those sections of the Finance Code:

**Figure: 7 TAC §83.604(c)**

| Amount Financed: | $100.00 | | $150.00 | | $200.00 | | $250.00 | | $300.00 | | $350.00 | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Term - days | Finance Charge | APR | Finance Charge | APR | Finance Charge | APR | Finance Charge | APR | Finance Charge | APR | Finance Charge | APR |
| 7 | $10.93 | 569.92% | $16.40 | 570.10% | $21.87 | 570.18% | $27.33 | 570.03% | $32.80 | 570.10% | $38.27 | 570.14% |
| 8 | $11.07 | 505.07% | $16.60 | 504.92% | $22.13 | 504.84% | $27.67 | 504.98% | $33.20 | 504.92% | $38.73 | 504.87% |
| 9 | $11.20 | 454.22% | $16.80 | 454.22% | $22.40 | 454.22% | $28.00 | 454.22% | $33.60 | 454.22% | $39.20 | 454.22% |
| 10 | $11.33 | 413.55% | $17.00 | 413.67% | $22.67 | 413.73% | $28.33 | 413.62% | $34.00 | 413.67% | $39.67 | 413.70% |
| 11 | $11.47 | 380.60% | $17.20 | 380.48% | $22.93 | 380.43% | $28.67 | 380.53% | $34.40 | 380.48% | $40.13 | 380.45% |
| 12 | $11.60 | 352.83% | $17.40 | 352.83% | $23.20 | 352.83% | $29.00 | 352.83% | $34.80 | 352.83% | $40.60 | 352.83% |
| 13 | $11.73 | 329.34% | $17.60 | 329.44% | $23.47 | 329.48% | $29.33 | 329.40% | $35.20 | 329.44% | $41.07 | 329.46% |
| 14 | $11.87 | 309.47% | $17.80 | 309.38% | $23.73 | 309.34% | $29.67 | 309.42% | $35.60 | 309.38% | $41.53 | 309.36% |
| 15 | $12.00 | 292.00% | $18.00 | 292.00% | $24.00 | 292.00% | $30.00 | 292.00% | $36.00 | 292.00% | $42.00 | 292.00% |
| 16 | $12.13 | 276.72% | $18.20 | 276.79% | $24.27 | 276.83% | $30.33 | 276.76% | $36.40 | 276.79% | $42.47 | 276.81% |
| 17 | $12.27 | 263.44% | $18.40 | 263.37% | $24.53 | 263.34% | $30.67 | 263.40% | $36.80 | 263.37% | $42.93 | 263.35% |
| 18 | $12.40 | 251.44% | $18.60 | 251.44% | $24.80 | 251.44% | $31.00 | 251.44% | $37.20 | 251.44% | $43.40 | 251.44% |
| 19 | $12.53 | 240.71% | $18.80 | 240.77% | $25.07 | 240.80% | $31.33 | 240.75% | $37.60 | 240.77% | $43.87 | 240.79% |
| 20 | $12.67 | 231.23% | $19.00 | 231.17% | $25.33 | 231.14% | $31.67 | 231.19% | $38.00 | 231.17% | $44.33 | 231.15% |
| 21 | $12.80 | 222.48% | $19.20 | 222.48% | $25.60 | 222.48% | $32.00 | 222.48% | $38.40 | 222.48% | $44.80 | 222.48% |
| 22 | $12.93 | 214.52% | $19.40 | 214.58% | $25.87 | 214.60% | $32.33 | 214.55% | $38.80 | 214.58% | $45.27 | 214.59% |
| 23 | $13.07 | 207.42% | $19.60 | 207.36% | $26.13 | 207.34% | $32.67 | 207.38% | $39.20 | 207.36% | $45.73 | 207.35% |
| 24 | $13.20 | 200.75% | $19.80 | 200.75% | $26.40 | 200.75% | $33.00 | 200.75% | $39.60 | 200.75% | $46.20 | 200.75% |
| 25 | $13.33 | 194.62% | $20.00 | 194.67% | $26.67 | 194.69% | $33.33 | 194.65% | $40.00 | 194.67% | $46.67 | 194.68% |
| 26 | $13.47 | 189.10% | $20.20 | 189.05% | $26.93 | 189.03% | $33.67 | 189.07% | $40.40 | 189.05% | $47.13 | 189.04% |
| 27 | $13.60 | 183.85% | $20.40 | 183.85% | $27.20 | 183.85% | $34.00 | 183.85% | $40.80 | 183.85% | $47.60 | 183.85% |
| 28 | $13.73 | 178.98% | $20.60 | 179.02% | $27.47 | 179.05% | $34.33 | 179.01% | $41.20 | 179.02% | $48.07 | 179.04% |
| 29 | $13.87 | 174.57% | $20.80 | 174.53% | $27.73 | 174.51% | $34.67 | 174.55% | $41.60 | 174.53% | $48.53 | 174.52% |
| 30 | $14.00 | 170.33% | $21.00 | 170.33% | $28.00 | 170.33% | $35.00 | 170.33% | $42.00 | 170.33% | $49.00 | 170.33% |

**C. Minimum Term**. A licensee may engage in a payday loan or deferred presentment transaction with a term of not less than 7 days. § 83.604(d).

## IV. Procedures. § 83.604(e).

**A. Check Accepted**. If accepted, the licensee must require that the check be made payable to the actual name of the company printed on the license and have the date of the loan.

**B. Written Agreement**. The transaction must be documented by a written agreement signed by the borrower and the licensee.

1. The agreement must contain: (i) the name of the licensee; (ii) the transaction date; (iii) the amount of the check; (iv) a statement of the total amount charged, expressed both as a dollar amount and as an annual percentage rate (APR); and (v) the earliest date on which the check may be deposited.

**C. Required Notices**. The agreement must also contain a notice of the name and address of the Office of Consumer Credit Commissioner and the telephone number of the consumer helpline. Additionally, the lender must provide a notice to the consumer that reads:

> "This cash advance is not intended to meet long-term financial needs. This loan should only be used to meet immediate short-term cash needs. Renewing the loan rather than paying the debt in full when due will require the payment of additional charges."

**D. Prepayment**. The borrower must have a right to prepay the loan and redeem the check at any time prior to the due date. If the loan is prepaid in full, the lender must refund any unearned finance charges.

**E. Check Presentation to Depository Institution**. A check may not be held for more than 31 days and then subsequently presented to the depository institution for payment.

**F. Fee Schedule Notice Required**. The licensee must post a notice of the fee schedule for engaging in a payday or deferred presentment loan.

## V. Conditions.

**A.** A lender may accept a check to secure payment of a payday loan if the lender complies with the paragraphs. § 83.604(f).

**B. Duplicate and Multiple Loans**. The provisions of Texas Finance Code relating to Duplication of Loans (§ 342.501 and § 83.851) apply to loans made under this section.

1. In accordance with Finance Code § 342.501, a lender and a borrower may renew a loan, but the loan must be converted from a single payment balloon loan to a declining balance installment note.

2. Alternatively, the payday loan or deferred presentment transaction may be renewed without limitation to the number of renewals where the effect of the total amount of the interest charge would not exceed the total amount authorized by Finance Code §§ 342.252 and 259, having due regard for the amount of the cash advance and the time the cash advance is outstanding.

3. The result is that the acquisition charge may only be earned once in a month and the installment account handling charge may continue to be earned on a equivalent daily charge basis in accordance with the limitations of the Finance Code §§ 342.251-260.

4. In lieu of a renewal, a lender and a borrower may agree to extend the maturity date of the existing payday loan or deferred presentment transaction.

**C. Collection Practices**. A payday loan constitutes a credit relationship for all purposes, including collection. If a borrower defaults, including the return of the check to the licensee from a financial institution due to insufficient funds, closed account, or stop payment order, the licensee may pursue all legally available civil means to collect the debt.

1. Texas Debt Collect Act Applies. Collection practices must be in accordance with this chapter and the Texas Debt Collection Practices Act (Tex. Fin. Code §§ 392 *et seq.*).

**D. Fair Lending**. A lender must make a good faith effort to assess the borrower's ability to repay the payday loan or deferred presentment transaction under the loan terms.

# E. Credit Counseling and Credit Reports

## I. Importance of Good Credit.[9]

**A.** A good credit standing provides consumers with the ability to obtain competitive interest rates and loans for major purchases such as cars and homes. Having a poor credit rating can be costly to consumers. A poor credit rating could be an obstacle to major purchases such as appliances, cars and houses. If you have a poor credit rating, you will find it hard to obtain a good credit card with a reasonable interest rate.

**B.** Thus, consumers have an interest in obtaining and maintaining a good credit rating. Of course, the best way to have good credit is to start out in that manner and continue. However, circumstances can sometimes play havoc with our best intentions and you may find yourself behind on credit card or loan payments or even in default.

**C.** Repairing bad credit takes time but it will be worth the effort. However, be aware that no one can legally remove accurate and timely negative information from a credit report. Only the passage of time can assure removal of a negative item. A consumer reporting company can report most accurate negative information for seven years and bankruptcy information for ten years. Other items such as criminal convictions have no time limits.

## II. In Over Your Head?–Ask for Help.

**A. Contact Creditors**. If you feel in over your head in debt, contact your creditors. Explain your circumstances, and ask for reduced payments or to reschedule your payments–for

[9] Texas Attorney General, Credit Repair, https://www.texasattorneygeneral.gov/cpd/credit-repair.

example if you are paid on the first and fifteenth and must pay your rent or mortgage on the first, ask that credit card payments or car loans be reset so you can pay it on the fifteen. This will save you interest and keep your payments timely. You could ask to waive payment for several months if you are having a temporary setback but expect to be earning at your same capacity in a short while.

1. Note: you are the customer of your creditor and should be treated with respect even if you do owe money or are overdue on a payment. Report rude personnel to their superiors and make complaints to our office. Do not let the rudeness and overzealous collections efforts stop you from seeking help.

**B. Consumer Credit Counseling Service**. Consider going to a consumer credit counseling service or seeking credit counseling over the internet. A reputable credit counselor can advise you on managing your money and debts, help you develop a budget and offer free educational material and workshops.

**C. Debt Management Plans**. Sometimes credit counseling results in a referral to debt management plans. There are some companies that promise to lower your monthly payments for a fee. They negotiate on your behalf with your creditors to lower your interest rates, waive penalties and set up a payment plan of your debt.

1. These companies offer debt management plans and must be registered with the state pursuant to Chapter 394 of the Texas Finance Code.

**D. Bankruptcy**. Bankruptcy is an option, but not one to be considered lightly. Bankruptcies stay on your credit report for ten years. Moreover, with the new laws, that became effective October 17, 2005, you may be required to undergo credit counseling from a government-approved organization within six months before you file for bankruptcy relief.

**E. Government Approved Services**. You can find a state-by-state list of government-approved organizations at www.usdoj.gov/ust/eo/bapcpa/ccde/de_approved.htm.

## III. Steps To Repair Your Credit.

Once you have found a way to manage your current debt, you can start taking steps to repair your credit:

**A. First: Make timely payments**. This will began establishing your new payment history, which a creditor should take into account.

**B. Second: Get a copy of your credit report**. Under the Federal Credit Reporting Act (FCRA) consumers are entitled to receive a free credit report each year. You can request it for free at www.annualcreditreport.com . You get one report per credit reporting bureau per year.

**C. Third: Carefully review your report**. Are items in your report accurate? or are they incomplete? Are they untimely [over 7 years for debts, 10 for bankruptcy]?

**D. Fourth: If your answer to any item in step three is yes, dispute it.**

**E. Fifth: Even if you find no inaccurate, incomplete or untimely items**, order your free credit reports annually to stay on top of any changes that may appear.

**F. Sixth: Whether or not you can or do dispute an item**, consider closing unused charge accounts, (starting with the most recent), limit credit inquiries, and rebuild your credit by starting small and building up gradually, making sure to pay on a timely basis.

## IV. Easy Credit Loan Scams.

**A.** "Guaranteed Credit Approval" "Bad Credit Okay" are classic bait used by predatory lenders. Legitimate lenders require you to apply and pass a credit check. A "guaranteed" approval should be a red flag.

**B.** These "easy credit" scams can cost you in different ways. Your guaranteed credit approval may come with a hefty interest rate, or with a low initial interest rate that can be adjusted exponentially as we have seen in the subprime mortgage industry. Read the fine print carefully for any such easy credit loans. Know the interest rate you will be charged. The scam could also hit you with hefty initiation or funding fees. In most loans other than home loans, there should be no funding fees and you should not have to pay any fees in advance of the loan being funded.

# §9. BENEFITS FOR LOW-INCOME INDIVIDUALS

## I. Social Security Disability Insurance Benefits (SSDI).[10]

**A. Eligibility**. To be eligible for SSDI, the client must: (i) ***be disabled***, and (ii) ***meet two different earnings tests***:

1. Recent work test, based on age at the time of disability; and

| Recent Work Test: Rules for Work Needed | |
|---|---|
| ***If you became disabled…*** | ***Then, you generally need:*** |
| In or before the quarter you turn age 24 | 1.5 years of work during the three-year period ending with the quarter your disability began. |
| In the quarter after you turn age 24 but before the quarter you turn age 31 | Work during half the time for the period beginning with the quarter after you turned 21 and ending with the quarter you became disabled. E.g., If you become disabled in the quarter you turned age 27, then you would need 3 years of work out of the 6-year period ending with the quarter you became disabled. |
| In the quarter you turn age 31 or later | Work during five years out of the 10-year period ending with the quarter your disability began. |

2. Duration of work test, to show client worked enough under Social Security.

| Duration of Work Test: Examples of Work Needed | | | |
|---|---|---|---|
| ***If you became disabled…*** | ***Then, you generally need:*** | ***If you became disabled…*** | ***Then, you generally need:*** |
| Before age 28 | 1.5 years of work | Age 48 | 6.5 years |
| Age 30 | 2 years | Age 50 | 7 years |
| Age 34 | 3 years | Age 52 | 7.5 years |
| Age 38 | 4 years | Age 54 | 8 years |
| Age 42 | 5 years | Age 56 | 8.5 years |
| Age 44 | 5.5 years | Age 58 | 9 years |
| Age 46 | 6 years | Age 60 | 9.5 years |

[10] Social Security Administration, Disability Benefits (May 2015), http://www.ssa.gov/pubs/EN-05-10029.pdf.

**B. Benefits**.

1. Amount. The amount of benefits the client receives depends on the amount of work reported to Social Security on which taxes were paid. If the client was paid in cash and the work income was not reported to the IRS no credit is given for the work history.

2. Start Date. The benefits may start up to one year before the application date if it is determined that the disability goes back that far. Benefits cannot start earlier than 5 months after the date the person became disabled.

3. Dependents. Benefits may be available for a spouse, child, widow or widower, or parent who was dependent on the deceased or disabled worker when the worker became disabled. A separate application must be filed for these benefits.

**C. Medicare**. Persons receiving SSDI get Medicare coverage automatically after they have received disability benefits for two years, or upon turn 65 years old. This means that a client may receive SSDI but not receive Medicare coverage for a period of time. Generally, a small monthly premium will be taken directly out of the SSDI benefits to pay for Medicare coverage. If the client is eligible for retroactive Medicare, he or she will have to decide whether to purchase that coverage. Note: Medicare will pay for unpaid medical bills incurred during the retroactive period.

## II. Supplemental Security Income (SSI).[11]

**A. Eligibility**. To be eligible for SSI, the client must:

1. Be disabled, blind, or aged 65 or older; AND

2. Have limited income (see below); AND

3. Have limited resources (see below); AND

4. Live in the US or the Northern Marina Islands; AND

5. Be a US citizen or national; AND

(a) Except for certain categories of aliens: (i) lawfully resided in US on 8/22/1996 and are blind/disabled; (ii) received SSI on 8/22/1996 and are lawfully residing in US; or (iii) active duty members of armed forces.

6. Not be in an institution (i.e., hospital/prison) at government's expense.

(a) Except if the person lives in a public (i) community residence that serves 16 people or less; (ii) public institution mainly to attend approved educational or job training; or (iii) public emergency shelter for the homeless.

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[11] SSA, Supplemental Security Income (SSI) (Jan. 2015), http://www.ssa.gov/pubs/EN-05-11000.pdf.

**B. Limited Income**. For individuals, income must be under $1,551 per month, if income is from wages, or $753 per month if not. For couples, income must be under $2,285 per month, if income is from wages, or $1,120 per month if not (based on 2015 limits).

1. Income includes: (i) money you receive, i.e., wages, Social Security benefits and pensions; and (ii) money received from someone else as assistance, i.e., for food and shelter.

(a) If married, part of spouse's income and resources is included.

(b) If younger than 18, part of parents' income and resources is included.

2. Income does not include: (i) the first $20 a month of most income you receive; (ii) the first $65 a month you earn from working and half the amount over $65; (iii) supplemental Nutrition Assistance Program (SNAP) benefits; (iv) shelter you get from private nonprofit organizations; and (v) most home energy assistance.

(a) If student, some wages or scholarships received may not count.

(b) If blind or disabled, but working, wages used to pay for items or services that assist in working do not count.

**C. Resources**. Resources must be worth less than $2000 for an individual or $3000 for a couple, at any time in a month, to be eligible for SSI (based on 2015 limits).

1. Resources include: real estate, bank accounts, cash, stocks and bonds.

2. Resources do not include: (i) the person's home and land it's on; (ii) life insurance policies with a face value of $1,5000 or less; (iii) the person's car (usually); (iv) burial plots for the person and immediate family; and (v) up to $1,500 in burial funds for the person and spouse.

**D. Benefits**.

1. Start Date. SSI benefits can start as soon as the client applies, is found to be disabled, and meets the income and resource requirements. In 2015, the Federal Benefit Rate for SSI benefits was $733 for an individual and $1,100 for a couple. The amount increases by a few dollars each year depending on a cost of living adjustment formula (COLA) determined by the government.

2. Dependents. Only the disabled person is eligible to receive SSI benefits; family members cannot receive SSI benefits based on the individual's disability.

**E. Medicaid**. Clients receiving SSI benefits will automatically receive Medicaid coverage, including retroactive coverage. The effect of getting Medicaid retroactively is that it will pay most unpaid medical bill for the covered months.

## III. SSI for Children with Disabilities.

### A. SSI for Children Under 18 Years Old.

1. Eligibility. A child younger than 18 can qualify if

(a) He/she meets SSA's definition of disability for children, AND

(b) His/her income and resources fall within the eligibility limits.

2. Definition of Disability. SSA has a strict definition of disability:

(a) The child must have a physical or mental condition(s) that very seriously limits his or her activities; AND

(b) The condition(s) must have lasted, or be expected to last, at least 1 year or result in death.

3. Income and Resources Eligibility Limits. The limits for a disabled child are the same as that for a disabled adult. However, for a child who is under 18 and lives at home with his/her natural or adopted parents, some of the parents' income and resources will be counted.

4. Timetable. SSA will send a letter with a decision in 3 – 5 months. However, for some medical conditions, SSA makes SSI payments right away and for up to 6 months while the state agency decides if the child is disabled.

(a) Such conditions include HIV; total blindness; total deafness; cerebral palsy; down syndrome; muscular dystrophy; severe intellectual disorder (child age 7 or older); and birth weight below 2 pounds, 10 ounces.

**B. When Disabled Child Turns 18 Years Old.**

1. SSA Must Review Eligibility within One Year of 18th Birthday.

2. Definition of Disability for Adults Applies. See above.

3. Family Income and Resources No Longer Count. Therefore, if the child was not eligible for SSI for that reason, he or she may become eligible after turning 18.

## IV. Receiving Both SSDI and SSI.

**A. Monthly Payments**. SSDI counts as income for SSI purposes. If the amount of SSDI benefits plus other income is less than the Federal Benefit Rate (FBR) for SSI benefits, the SSI program exempts the first $20 of SSDI and then subtracts the total income (including SSDI benefits) from the SSI benefits.

1. Example. A client is eligible for $733 in SSI benefits (the FBR in 2015), receives $300 in SSDI benefits, and has no other income. The SSI program exempts the first $20 of SSDI benefits and then counts the remaining balance ($280) as income. Thus, the client will receive $453 ($733 - $280) in SSI benefits.

**B. Health Insurance**. If the client receives both SSDI and SSI, then Medicare will be the primary payer and Medicaid will be the secondary payer.

## V. Applying for Social Security Benefits.

**A.** Initial Application.

1. When? Apply for benefits as soon as the disability occurs. Processing an application can take 3 – 5 months.

2. How? There are two ways to apply: (i) online at www.socialsecurity.gov; or (ii) in person at a local Social Security office.

3. What information is needed?

(a) Social Security number;

(b) Birth or baptismal certificate;

(c) Names, addresses and phone numbers of the doctors, caseworkers, hospitals and clinics that took care of you, and dates of your visits;

(d) Names and dosage of all the medicine you take;

(e) Medical records from your doctors, therapists, hospitals, clinics, and caseworkers that you already have in your possession;

(f) Laboratory and test results;

(g) A summary of where you worked and the kind of work you did;

(h) A copy of your most recent W-2 Form (Wage and Tax Statement) or, if you're self-employed, your federal tax returns for the past year;

(i) Information about your home;

(j) Information about your income and resources;

(k) Proof of US citizenship; and

(l) Checkbook or other papers that show bank account numbers.

**B. Proving Disability.**

1. The most important part of any disability case is medical records. For this reason, the client should be diligent about seeking medical treatment, keeping doctor's appointments and following the medical instructions provided, including taking medication as prescribed.

2. The judge deciding the case will look at all medical records submitted, including doctor's notes, x-rays lab tests, MRIs, CT scans, and/or psychological records.

3. Generally, a one page letter from a doctor will not be sufficient to convince the judge that a person is disabled. The judge's decision must be based on the medical records.

4. The most convincing records are those that document a severe, long-term (more than 1 year), physical/mental problem that affects the client's ability to work.

5. Other records that may be helpful include the client's records of impairment. For example if the client has a seizure disorder, a record of when the seizures occurred and a description of what occurred is helpful.

**C. Disability Determination: Five-Step Process.**

1. Are you working? "Working" generally means earning more than $1,090 per month. If a client is working and earning more than this, disability will be automatically denied.

(a) There are some exceptions for people who have worked for short periods and for people applying for SSDI and working for nine months or less starting more than a year after the onset of a disability.

(b) Note: the exact figure changes every year.

2. Is your medical condition "severe"? For you to be considered to have a disability by SSA's definition, your medical condition must significantly limit your ability to do basic work activities—such as lifting, standing, walking, sitting, and remembering—for at least 12 months. If your medical condition isn't severe, SSA won't consider you to be disabled.

3. Does your impairment(s) meet or medically equal a listing? SSA's list of impairments describes medical conditions that they consider severe enough to prevent a person from completing substantial gainful activity, regardless of age, education, or work experience. If your medical condition (or combination of medical conditions) isn't on this list, the state agency looks to see if your condition is as severe as a condition on the list.

(a) If the severity of your medical condition meets or equals the severity of a listed one, the agency will decide that you have a qualifying disability.

(b) If the severity of your condition doesn't meet or equal the severity level of a listed impairment, the agency goes on to step four.

4. Can you do the work you did before? At this step, SSA will decide if your medical impairment(s) prevents you from performing any of your past work. If it doesn't, SSA will decide you don't have a qualifying disability. If it does, they will proceed to step five.

5. Can you do any other type of work? If you can't do the work you did in the past, SAA will look to see if there's other work you can do despite your impairment(s). SSA will consider your age, education, past work experience, and any skills you may have.

(a) If you can't do other work, SSA will decide that you're disabled.

(b) If you can do other work, SSA will decide that you aren't disabled.

**D. Appealing a Decision**.

1. When? If Social Security denies an application, the client has 60 days from the date the client received the denial letter (assumed to be 5 days after date on the letter).

2. How? The only thing clients need to do to file the appeal is to sign the appeal form. The appeal may be filed by telephone; however, it is strongly recommended that the client go to a local SSA office and file the appeal called the "Request for Reconsideration" in person. The client may be given additional paperwork to fill out.

(a) After completing the forms the client should keep a copy for themselves and submit the originals to a local Social Security office.

3. Appeal Levels.

(a) Reconsideration. You may request a review of your case if you disagree with our first decision. Then, a person who did not make the first decision will decide your case again. You will be notified by mail.

(b) Hearing before Administrative Law Judge. At the hearing, the ALJ will question you and your witnesses. Other witnesses (i.e., medical or vocational experts) also may give SSA information at the hearing. You may question witnesses. After the hearing, the judge will make a decision based on all the information in the case. You will be notified by mail.

(c) Review by Appeals Council. The Appeals Council looks at all requests for review, but it may deny a request if it believes the hearing decision was correct. If the Appeals Council decides to review your case, it will either decide your case itself or return it to an administrative law judge for further review. You will be notified by mail.

(d) Federal Court review. If you disagree with the Appeals Council's decision or if the Council decides not to review your case, you may file a lawsuit in a federal district court. The letter sent you about the Appeals Council's action also will tell you how to ask a court to look at your case.

## VI. Overpayments.[12]

[12] Social Security Administration, Overpayments, http://www.ssa.gov/ssi/text-overpay-ussi.htm.

**A. What is an Overpayment?** An overpayment is when the disabled person receives more money for a month than the amount that he or she should have been paid. The amount of your overpayment is the difference between the amount you received and the amount due.

**B. What Can Cause an Overpayment?**

1. Your income is more than you estimated.

2. Your living situation changes.

3. Your marital status changes.

4. You have more resources than the allowable limit.

5. You is no longer disabled and continued to receive benefits.

6. You did not report a change to SSA (on time or at all) as required.

7. SSA erred in figuring your benefits due to incorrect/incomplete information.

**C. What Will SSA Do If There Is an Overpayment?** SSA will send you a notice explaining the overpayment and asking for a full refund within 30 days. If you are currently getting checks and do not make a full refund, the notice will:

1. Propose to withhold the overpayment at 10% of your total monthly income;

2. State the month the proposed withholding will start;

3. Fully explain your appeal rights;

4. Explain how you can ask SSA to have the overpayment reviewed and waived, so you may not have to pay it back; and

5. Explain how you can appeal the SSA's decision.

**D.** Options after Receiving an Overpayment Notice.

1. <u>If you believe you were not overpaid</u>, you may request a reconsideration.

(a) If you ask for an appeal within 10 days of the date on the notice, any payment SSA is currently making will continue until SSA makes a determination. The appeals process is the same as explained above.

2. <u>If you believe that you may have been overpaid</u>, but feel it was not your fault: (i) ask for a waiver of overpayment; and (ii) ask for and complete form SSA-632 (request for waiver).

**E. Waiver**. You can ask for a waiver at any time.

1. If SSA grants you a waiver, you will not have to repay all or part of the overpayment. Generally, for SSA to grant you a waiver, you must show that:

(a) It was not your fault that you were overpaid; and

(b) You cannot pay back the overpayment because you need the money to meet your ordinary living expenses (may have to submit bills to show monthly expenses use up all income and it would be a hardship to repay).

2. If you are unsure what caused the overpayment, you may ask for reconsideration, waiver, or both. You may ask to see your file to see the information the SSA used in figuring the overpayment. You may have SSA explain the reason for the overpayment while you are examining your file.

3. If your request for waiver is denied: (i) you can request a reconsideration; or (ii) you can ask SSA to withhold less than the proposed amount each month, or arrange monthly payments if you no longer receive SSI benefits.

**F. Failure to Repay the SSA.**

1. The overpayment will be deducted from your benefits (10% per month).

2. If you no longer receive SSI, SSA may withhold your overpayment from a Federal Income Tax refund and/or from any future Social Security benefits you may receive.

3. If you become eligible for SSI in the future, SSA will withhold your overpayment from future SSI payments.

## VII. Supplemental Nutrition Assistance Program (SNAP) (Food Stamps).[13]

**A. What It Offers**. SNAP helps people buy the food they need for good health. People can also buy garden seeds with SNAP benefits. The food benefits are put on a Lone Star Card and can be used just like a credit card at any store that accepts SNAP. SNAP can't be used: to buy tobacco, alcoholic drinks or things you can't eat or drink, or to pay for food bills you owe.

**B. Requirements**.

1. Must be within Income Limits:

| Family Size | Monthly Income |
|---|---|
| 1 | $1,605 |
| 2 | $2,163 |
| 3 | $2,722 |
| 4 | $3,280 |

[13] Texas Health and Human Services, SNAP Food Benefits, http://yourtexasbenefits.hhsc.texas.gov/programs/snap/.

| | |
|---|---|
| 5 | $3,838 |
| For each additional person, add: | $559 |

2. Satisfy Employment Requirements (if applicable). Generally, able bodied adults without dependents between the ages of 18 and 50 can get SNAP benefits only for 3 months in a 3-year period. The work period might be longer if the person works at least 20 hours a week or is in a job or training program. If a person has a job, they cannot quit without good reason. Some adults might not have to work to get benefits, such as those who are disabled, blind, or pregnant.

**C.** Maximum Monthly SNAP Amount.

| Family Size | Monthly SNAP Amount |
|---|---|
| 1 | $194 |
| 2 | $357 |
| 3 | $511 |
| 4 | $649 |
| 5 | $771 |

**D.** **How to Apply**. Apply for SNAP benefits:

1. 1. Online at www.yourtexasbenefits.com;

2. Over the phone by calling 2-1-1 or 1-877-541-7905;

3. At a local benefits office (HHSC Benefits Office, 2110 Telephone Road, Houston, TX, 77023). Find more locations at www.yourtexasbenefits.com.

# §10. FEDERAL TAXES

## I. Filing Requirements—Is A Tax Return Required?

**A. 2015 Filing Requirements for Most Taxpayers.**[14] A taxpayer is required to file a tax return when his/her gross income exceeds a certain amount based on the person's filing status. Gross income does not include social security benefits unless one half of the social benefits plus other gross income is more than $25,000. For tax year 2015, a taxpayer is not required to file a tax return with the IRS if his/her gross income was below the following amount:

| IF filing status is… | AND at the end of 2015 taxpayer is … | THEN file a return if gross income was at least… |
|---|---|---|
| Single | Under 65 | $10,300 |
| | 65 or older | $11,850 |
| Married filing jointly | Under 65 (both spouses) | $20,600 |
| | 65 or older (one spouse) | $21,850 |
| | 65 or older (both spouses) | $22,700 |
| Married filing separately | Any age | $4,000 |
| Head of household | Under 65 | $13,250 |
| | 65 or older | $14,800 |
| Qualifying widow(er) with dependent child | Under 65 | $16,600 |
| | 65 or older | $17,850 |

**B. Exceptions**. Even a person's income is under the amount, he/she may still have to file for tax return in the following situations:

1. If the person can be claimed as a dependent by another taxpayer, the income requirement for filing a tax return is generally lower than the chart above.

2. If the person is self-employed and net earnings (income minus expenses) are more than $400, the person must file a tax return and pay self-employment tax.

**C. When to Still File if Not Required to File**. Even if a person is not required to file, he/she may want to file anyways to:

1. Get a refund for any overpayment of taxes withheld from wages; or

2. Take advantage of the Earned Income Tax Credit; or

3. Take advantage of any other refundable credits.

**D. Deadline**. The deadline for filing a federal income tax return or an extension is April 15 or the next business day if April 15 falls on a weekend or holiday. If an extension is filed, the deadline for filing is October 15 or the next business day if October 15 falls on a weekend or

[14] IRS Pub 17, Your Federal Income Tax for Individuals (Feb. 6, 2015), http://www.irs.gov/pub/irs-pdf/p17.pdf.

holiday. The IRS may choose to provide local extensions when the area was affected by a natural disaster. The extension is for *filing* only; any tax amount owed is still due on April 15.

## II. Earned Income Tax Credit (EITC).[15]

**A. What is the EITC?** The Earned Income Tax Credit (EITC) is a tax credit for certain people who work and have low or moderate wages. It reduces the amount of taxes owed and any remaining amount is refunded to the taxpayer.

**B. Eligibility**. To claim the EITC, the taxpayer must:

1. Have a valid social security number (as well as spouse and qualifying child);

2. Be a U.S. citizen or resident alien all year, OR a non-resident alien married to a U.S. citizen or resident alien and filing a joint return;

3. Not have a filing status of married, filing separately;

4. Have earned income from employment or self-employment;

5. Have earned income and adjusted gross income within certain limits (below);

6. Not file Form 2555 or 2555-EZ (related to foreign earned income); AND

7. Must meet one of the following:

(a) Have a qualifying child (below); OR

(b) If no qualifying child: (i) be age 25 but under 65 by the end of the year; (ii) live in the United States for more than half the year; and (iii) not be claimed as a dependent or qualifying child of another person.

**C.** Income and Adjusted Gross Income (AGI) Limits.

1. Tax year investment income must be $3,350 or less;

2. Earned income must be at least $1; AND

3. 3. Both earned income and AGI must be no more than:

| Filing Status | Qualifying Children Claimed | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Zero | | One | | Two | | Three or more | |
| | 2015 | 2016 | 2015 | 2016 | 2015 | 2016 | 2015 | 2016 |
| **Single, Head of Household, Widowed** | $14,820 | $14,880 | $39,131 | $39,296 | $44,454 | $44,648 | $47,747 | $47,955 |

[15] IRS, Do I Qualify for EITC?, http://www.irs.gov/Credits-&-Deductions/Individuals/Earned-Income-Tax-Credit/Do-I-Qualify-for-Earned-Income-Tax-Credit-EITC.

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| **Married Filing Jointly** | $20,330 | $20,430 | $44,651 | $44,846 | $49,974 | $50,198 | $53,267 | $53,505 |

**D. Qualifying Child**. The child must have a Social Security Number that is valid for employment and must pass all of the following tests to be a qualifying child for EITC purposes:

1. Relationship.

(a) Child: son, daughter, adopted child, stepchild, foster child, or a descendent of any of them (e.g., grandchild).

(b) Sibling: Brother, sister, half-brother, half-sister, step-brother, step-sister or a descendant of any of them (e.g., niece or nephew).

2. Age. At the end of the filing year, the child must be:

(a) Younger than the taxpayer (or spouse if filing jointly) and under 19;

(b) Younger than the taxpayer (or spouse if filing jointly), younger than 24, and a full-time student; OR

(c) Any age and permanently and totally disabled.

3. Residency. The child must live with the taxpayer (or spouse if filing jointly) in the United States for more than half of the year.

4. Joint Return. The child cannot file a joint return for the tax year unless the child and the child's spouse did not have a separate filing requirement and filed the joint return only to claim a refund.

5. No Support Test. The child is not required to pass the support test (providing less than 50% of his/her own support) for EITC purposes.

**E. Definitions**.

1. Adopted Child. An adopted child is treated as a natural-born child. It also includes a child lawfully placed with the taxpayer for adoption.

2. Foster Child. For EITC, the child is a foster child if the child is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction. An authorized placement agency includes a state or local government agency or an Indian tribal government. It also includes a tax-exempt organization licensed by a state or an Indian tribal government.

3. Permanently and totally disabled. The child is permanently and totally disabled if both of the following apply: (a) the child cannot engage in any substantial gainful activity because of a physical or mental condition and (b) a doctor determines the condition has lasted or can be expected to last at least a year or lead to death.

**F. Maximum Credit Amounts**.[16] The amount of the EITC is phased based on the amount of earned income – as income increases, the amount of the credit decreases.

| Year | Qualifying Children Claimed | | | |
|---|---|---|---|---|
| | Zero | One | Two | Three or more |
| 2015 | $503 | $3,359 | $5,548 | $6,242 |
| 2016 | $506 | $3,373 | $5,572 | $6,269 |

**G. Wrongfully Claiming EITC**. If the taxpayer claims the EITC and is not entitled to do so, the taxpayer will be required to pay back the EITC plus any additional taxes owed plus interest and penalties, which accrue from the date of the original assessment (tax return filing)

1. 2 Year Ban. If the IRS determines that the claim for the EITC was due to reckless or intentional disregard of the EITC rules, the taxpayer will not be allowed to take the credit for 2 years even if otherwise eligible to do so.

2. 10 Year Ban. If the IRS determines that the claim for the EITC was fraudulent, the taxpayer will not be allowed to take the credit for 10 years even if otherwise eligible to do so. There also be additional penalties.

**H. Claiming the Same Child**. Only one person can claim the same child. Two persons claiming the same child will automatically result in an audit. The IRS has Tie-Breaker Rules[17] to determine who can claim the Qualifying Child. If the qualifying child is claimed by two persons, then the child is treated as a qualifying child only by:

1. The parents if they file a joint return;

2. The parent, if only one of the persons is the child's parent;

3. The parent with whom the child lived the longest during the tax year, if 2 of them are the child's parent and they do not file a joint return together;

4. The parent with the highest AGI if the child lived with each parent for the same amount of time during the tax year, and they do not file a joint return together;

5. The person with the highest AGI if no parent can claim the child as a qualifying child; OR

6. A person with the higher AGI than any parent who can also claim the child as a qualifying child but does not.

## III. Income Tax Audits.

[16] IRS, 2015 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates, http://www.irs.gov/Credits-&-Deductions/Individuals/Earned-Income-Tax-Credit/EITC-Income-Limits-Maximum-Credit-Amounts-Next-Year.

[17] IRS, Qualifying Child or More Than One Person, http://www.irs.gov/Credits-&-Deductions/Individuals/Earned-Income-Tax-Credit/Qualifying-Child-of-More-Than-One-Person.

**A. What is an Audit?** An income tax audit is an examination by the IRS of a taxpayer's return to verify its accuracy. During the examination, an IRS examiner makes a line-by-line review of the taxpayer's return. If something does not add up correctly or the return contains something unusual, the examiner will point out the mistake or ask the taxpayer to substantiate or verify the claim.

**B. Responding to the Audit**. The taxpayer will respond to the audit by providing requested documents. The type of documents requested will depend on the type of issue the IRS is auditing. There are three types of income tax audits:

1. Correspondence Audit. If the IRS examines a return, the examination will likely take place via mail. The IRS uses correspondence audits to take care of the most common tax return problems, such as missing forms and schedules, illegible entries, and mathematical errors. The IRS will send the taxpayer a notice of examination indicating what issues it found in the tax return and request documentation and explanation from the taxpayer, which the taxpayer will mail to the IRS. This is the most common type of audit for an individual taxpayer.

2. Field Audit. In a field audit, the examiner visits the taxpayer's home or business to verify the information on the tax return.

3. Office Audit. In an office audit, the taxpayer goes to the examiner's office. The examiner requires the taxpayer or the representative—such as the tax return preparer or lawyer—to bring the requested documentation and information for an in-person review.

**C. After the Audit**. After the audit, the examiner will mail a 30-day letter containing the examination report, an explanation of how the IRS wants to change the tax return, any additional tax owed, and an explanation of your right to appeal.[18] The taxpayer has 30 days to respond.

1. Agree with Findings. The taxpayer will sign the examination report and make any required tax payments.

2. Does Not Agree with Findings (All or Partial). The taxpayer files for an appeal for another review of the findings.

3. No Response or Does Not Agree with Appeals Finding. If the taxpayer does not respond to the 30-day letter or disagrees with the Appeals findings, the IRS will issue a Statutory Notice of Deficiency. The taxpayer will have 90 days from the date of this letter to file a petition in U.S. Tax Court. If the case has not already gone through Appeals, the case will be transferred to Appeals for another review of the initial audit findings.

[18] IRS, Your Appeal Rights and How To Prepare a Protest If You Don't Agree, http://www.irs.gov/pub/irs-pdf/p5.pdf.

**D. Failing to Respond to the Initial Notice Audit**. If the taxpayer never responds to an audit or exam notice, the IRS will assess the taxes owed based on its findings, and it will begin the collections process.

## IV. Billing and Collection.[19]

### A. What Happens After Filing Taxes?

1. Assessment. An assessment occurs when an IRS officer signs a certificate stating the amount owed by the taxpayer.

(a) 3 Years. Generally, the IRS must assess taxes on a taxpayer ***within 3 years*** from the later of: (i) the due date of the return (April 15), or (ii) the date on which it was filed. A return is considered to be filed on the due date if it is filed on or before its original due date. IRC § 6501(a).

(b) 6 Years. If the tax return substantially omits more than 25% of the taxpayer's gross income, the IRS can assess taxes on a taxpayer within 6 years from the later of: (i) the due date of the return (April), or (ii) the date on which it was filed. § 6501(e)(1).

(c) No Limit. If the tax return is false or fraudulent, the taxpayer willfully attempted to evade taxes, or the taxpayer does not file a tax return, there is no time limit on when the IRS can assess taxes on a taxpayer. § 6501(c).

2. Billing. Once the IRS assesses the tax, it will send a bill for the amount due, including any penalties and interest.

(a) Taxpayer Accepts the Liability. The taxpayer must pay the full amount. If the taxpayer is unable to pay the full amount due, the taxpayer may qualify for a Collections Alternate (below).

(b) Taxpayer Does Not Accept the Liability. If the taxpayer received a bill and it was the first time the taxpayer learned of the liability or did not have a meaningful opportunity to challenge the IRS' position, the taxpayer may qualify for an Audit Reconsideration or an Offer in Compromise – Doubt to Liability.

3. IRS Collections Action. If the taxpayer does not pay the liability or enter into a collections alternate, the IRS can bring collection actions. The IRS must bring collection actions against a taxpayer ***within 10 years*** from the date of the assessment. § 6502(a).

(a) Federal Tax Lien. A legal claim against all of the taxpayer's current and future property, such as a house or car, and rights to property, such as wages and bank accounts. The lien automatically comes into existence when the tax is assessed. The IRS may choose to file a public notice of the lien.

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[19] IRS, Pub 594, The IRS Collection Process, http://www.irs.gov/pub/irs-pdf/p594.pdf.

(b) Levy. A legal seizure of property or rights to property to satisfy a tax debt. The IRS primarily utilizes money levies: certain government benefits including social security and railroad retirement pension; wages; and bank accounts. If the IRS levies government benefits, it is only allowed to levy up to 15% of the benefit amount. The IRS can also use multiple types of levies. When property is levied, it will be sold to help pay your tax debt. The IRS will not levy a homestead nor a vehicle required for transportation to and from work. For low income taxpayers, the IRS rarely levies property. The IRS must send written notice before levying property, and the taxpayer may request a Collections Due Process or equivalent hearing.

(c) Tax Refund Offsets. Any future federal tax refunds that a taxpayer may be entitled to receive, including those from refundable credits such as the EITC, will be seized and applied to any back-owed federal liability. NOTE: other government agencies are able to request an offset of federal refunds for debts owed to that agency. Examples include back-owed child support, student loan or other government loan default. The IRS cannot stop this levy/offset -- the taxpayer must contact the other agency to prevent any future offset.

(d) Economic Hardship. The IRS may release a levy or a tax refund offset if it causes an economic hardship on the taxpayer. An economic hardship occurs when the taxpayer is unable to pay his/her necessary, reasonable living expenses while paying the tax liability. For collections actions, this is Currently Not Collectible status (below). For offsets, the taxpayer must contact the Taxpayer Advocate Service for assistance *before or immediately after* filing the tax return. Once the offset has been processed, the refund cannot be issued.

**B. Options for Paying in Full.**

1. Electronic Payments. Direct Pay (www.irs.gov/Payments/Direct-Pay) (no fees), or the Electronic Federal Tax Payment System (www.eftps.com).

2. Pay with Credit or Debit Card. www.irs.gov/e-pay (fees apply).

3. Pay by Mail or In Person.

**C. Options If The Taxpayer Cannot Pay in Full.**

1. Installment Agreement. An Installment Agreement is a payment plan with the IRS. An Installment Agreement is guaranteed if the total tax liability including penalties and interest does not exceed $50,000 and the taxpayer is able to pay the full amount within 72 months or less. There is a one time application fee, which is reduced for a low-income taxpayer.[20] During the Installment Agreement, the taxpayer must remain in tax compliance, including paying all taxes owed during the year and timely filing tax returns.

2. Offer in Compromise. See below.

[20] Income threshold in 2015 was $28,725 for a family of one (add $10,050 for each additional person). IRS, Form 13844, Application for Reduced User Fee For Installment Agreements, http://www.irs.gov/pub/irs-pdf/f13844.pdf.

3. Currently Not Collectable. Currently Not Collectible (CNC) status is based on economic hardship, which is when the taxpayer is unable to pay his/her necessary, reasonable living expenses and the tax liability. The IRS may require substantiation through Form 433; however, for many low-income taxpayers, a phone call to the IRS is sufficient. In CNC status, the IRS temporarily stops all collections action. The liability remains, and penalties and interest will continue to accrue. CNC status, however, is a useful, temporary remedy. If the statute of limitations for collections is nearing, it may be strategic for the taxpayer to stay in CNC status for the remainder of the collections period. NOTE: the taxpayer is NOT required to be tax compliance to obtain CNC status. If the taxpayer requested CNC status and denied because there are tax returns that have not been filed, the taxpayer should request a Collections Due Process or Equivalent Hearing.

**D. Collection Due Process and Appeals**. You have the right to appeal most collection actions to the IRS Office of Appeals, which is separate from and independent of the IRS Collection office that initiates collection actions. The two offices cannot communicate about the strengths or weaknesses of your case without you present. There are two main options for appeals:

1. Hearing. The purpose of a hearing is to review collection actions that were taken or have been proposed. A taxpayer can request a hearing when he/she receive a notice of federal tax lien or levy. To request a hearing, the taxpayer files Form 12153.

(a) Collections Due Process. The taxpayer must request the Collections Due Process hearing with 30 days of the letter, giving the authority to request the hearing. If the taxpayer disagrees with the determination of the hearing, the taxpayer will be able to file a petition in U.S. Tax Court.

(b) Equivalent Hearing. If 30 days has passed and the taxpayer cannot request a Collections Due Process hearing, the taxpayer can request an Equivalent hearing. An Equivalent hearing is functionally the same as a Collections Due Process hearing. The primary difference is that if the taxpayer disagrees with the determination of the hearing, the taxpayer has only administrative appeals available, and cannot file a petition in the U.S. Tax Court.

2. Collection Appeals Program. Under the Program, if you disagree with an IRS employee's decision regarding any levy, seizure, or Notice of Federal Tax Lien filing and want to appeal it, you can ask to have a conference with the employee's manager.

(a) Deadline. If the IRS seizes your house, car, or other property in order to sell the property and apply it to your tax debt, you must make the request within 10 business days after the Notice of Seizure is given to you or left at your home or business. There is no deadline to request a conference when a levy is served for other property (e.g., wages or bank accounts) or a levy or seizure or lien filing is proposed. The collection action may go forward if a conference is not requested within a reasonable time period.

(b) Process. If you then disagree with the manager's decision after the conference, you may request the IRS Office of Appeals review your case under the Collection

Appeals Program. If your case is assigned to a Revenue Officer, you must submit your request for consideration in writing on Form 9423. If your case is not assigned to a Revenue Officer, you can appeal the manager's decision in writing or orally. Your request for should be made within 3 business days of the conference or collection actions may resume.

## V. Offer in Compromise (OIC).[21]

**A. What is an OIC?** An OIC is an agreement between a taxpayer and the IRS that settles a taxpayer's tax liabilities for an amount less than the liability owed (in some cases, significantly less than the amount owed).

**B. Eligibility**. Before the IRS can consider a taxpayer's offer, the taxpayer must be in tax compliance:

1. File all legally required tax returns;
2. Make all estimated tax payments for the current year; and
3. Make all required federal tax deposits for current quarter (if business owner).

**C. Bankruptcy**. If the client or the client's business is currently in an open bankruptcy proceeding, the IRS will not consider an OIC due to the automatic stay. Any older outstanding tax debts are generally resolved within the bankruptcy proceeding. If any tax liabilities remain after the bankruptcy, the taxpayer may pursue any collections alternatives, including an OIC for which the bankruptcy will be taken into consideration.

**D. Ability to Pay in Full**. Absent equitable factors, an offer will not be accepted if the IRS believes that liability can be paid in a full or through an Installment Agreement with available assets.

**E. Grounds for IRS to Accept an OIC.**

1. Doubt as to Collectability. Doubt exists that the taxpayer will be able to pay the full amount of tax liability owed within the remainder of the statutory period for collection.

2. Doubt as to Liability. Doubt as to liability exists when there is a genuine dispute as to the existence or amount of the correct tax debt under the law. NOTE: if the taxpayer has new evidence and the liability is recent, the taxpayer should consider filing an audit reconsideration.

3. Effective Tax Administration. There is no doubt that the tax is correct and there is potential to collect the full amount, but an exceptional circumstance exists (i.e., collection of the tax would create an economic hardship or would be unfair and inequitable).

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[21] IRS, Form 656, Offer in Compromise, http://www.irs.gov/pub/irs-pdf/f656b.pdf.

**F. Applying for an OIC**. The application must include:

1. Form 656, Offer in Compromise.

2. Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, if applicable.

3. Form 433-B, Collection Information Statement for Businesses, if applicable.

4. $186 application fee, unless you meet Low Income Certification.

5. Initial offer payment, unless you meet Low Income Certification.

## VI. United States Tax Court.[22]

**A. What is the United States Tax Court**? The U.S. Tax Court is a federal trial court. Because it is a court of record, a record is made of all its proceedings. It is an independent judicial forum, and is controlled by or connected with the IRS. Congress created the Tax Court as an independent judicial authority for taxpayers disputing certain IRS determinations. Generally, a taxpayer may file a petition in the Tax Court in response to certain IRS determinations. The court is a circuit court and does not meet on a regular basis. Trial dates will often be set several months in advance to allow for parties to go to IRS Appeals if that has not yet happened and also to seek a settlement with the IRS Chief Counsels Office.

**B. Starting a Case.**

1. Seek Advice or Counsel at a Tax Clinic. A taxpayer may represent himself before the U.S. Tax Court; however, the taxpayer has the right to retain representation. If a taxpayer cannot afford an attorney, eligible taxpayers may obtain pro bono assistance through a low income taxpayer clinic. In some tax courts, the local or state bar will have volunteer attorneys available during the Calendar Call to provide limited advice and counsel.

2. Elect Regular or Small Tax Procedures. The taxpayer may qualify for a small tax case if the tax liability is $50,000 or less (including penalties). Small tax cases are more relaxed in procedure and in the rules of evidence than regular tax cases; however, there is no right to appeal.

3. File a Petition. A taxpayer can file a petition in U.S. Tax Court when he/she receives a Statutory Notice of Deficiency, a Notice of Determination Concerning a Request for Relief from Joint and Several Liability (Innocent Spouse, see below), Notice of Determination Concerning Collection Action (CDP hearing, see above), or a Notice of Determination Concerning Worker Classification.

4. Filing fee. The filing fee is $60. A low-income taxpayer can file for a waiver of the filing fees.

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[22] US Tax Court, Taxpayer information, https://www.ustaxcourt.gov/taxpayer_info_intro.htm.

**C. Before Trial**. The IRS Counsel will file an answer. If the taxpayer did not have meaningful Appeals opportunity – that is, the taxpayer did not go through Appeals or the Appeals agent was unresponsive – the IRS Counsel may transfer the case to the Office of Appeals in an effort to settle the case. If the case is not settled during Appeals, the case will transferred back to IRS Counsel, who will also set up conferences in an effort to settle the case. If a settlement is reached, the IRS Appeals Agent or Counsel will prepare all the documents to settle the court case. If no settlement is reached, the case will proceed to trial. If the taxpayer is representing himself, he must file a pre-trial memo.

## VII. Innocent and Injured Spouse Tax Relief.

### A. Injured Spouse Tax Relief.[23]

1. Eligibility. A taxpayer may be an injured spouse if (i) the taxpayer and spouse file a joint tax return, AND (ii) all or part of the taxpayer's portion of the overpayment was, or is expected to be, applied (offset) to spouse's legally enforceable past-due federal tax, state income tax, state unemployment compensation debts, child or spousal support, or a federal or state non-tax debt, such as a student loan.

2. Request Injured Spouse Relief. The taxpayer should file Form 8379 with the joint tax return, if not already filed, or independently, if the tax return has already been filed. The form must be filed for each year as long as spouse's liability remains. The couple does not have to file a Form 1040X unless the couple is amending the original return.

(a) If filed with joint return, attach it to return in the order of the attachment sequence number (in the upper right corner of the tax form). Enter "Injured Spouse" in the upper left corner of page 1 of the joint return.

(b) If filed separately, attach a copy of all Forms W-2 and W-2G for both spouses, and any Forms 1099 showing federal income tax withholding, to Form 8379. Processing may be delayed if they are not attached, if the form is incomplete when filed, or if you attach a copy of your joint tax return.

3. Effect of Filing. By filing Form 8379, the injured spouse may be able to get back his or her share of the joint refund.

4. Time Needed to Process. If filed with a joint return, about 14 weeks (if on paper) or 11 weeks (if electronically). If filed by itself after the return was processed, about 8 weeks.

### B. Innocent Spouse Tax Relief.[24]

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[23] IRS, Instructions for Form 8379, Injured Spouse Allocation, http://www.irs.gov/pub/irs-pdf/i8379.pdf.
[24] IRC § 6015; IRS, Pub 971, Innocent Spouse Relief, http://www.irs.gov/pub/irs-pdf/p971.pdf.

1. Joint and Several Liability. When married couples file a joint tax return, the law makes them jointly and severally liable for any taxes owed. This applies not only to the tax liability you show on the return, but also to any additional tax liability the IRS determines to be due, even if the additional tax is due to income, deductions, or credits of spouse or former spouse. The taxpayers remain jointly and severally liable for the taxes, and the IRS can collect from either spouse, even if the couple later divorces.

2. Relief from Liability. In some cases, a spouse (or former spouse) will be relieved of the tax, interest, and penalties on a joint tax return. Three types of relief are available to married persons who filed joint returns.

3. Innocent Spouse Relief provides a taxpayer relief from additional tax if spouse or former spouse failed to report income, reported income improperly or claimed improper deductions or credits. ***To qualify***, the taxpayer must meet all of the following conditions:

(a) The taxpayer filed a joint return that has an understatement of tax (deficiency) that is solely attributable to spouse's erroneous item, including (1) income received by spouse but omitted from the joint return; and (2) deductions, credits, and property basis if they are incorrectly reported on the joint return.

(b) The taxpayer shows that, at the time he/she signed the return, he/she did not know, and had no reason to know, that there was an understatement of tax; AND

(c) Taking into account all the facts and circumstances, it would be unfair to hold the taxpayer liable for the understatement of tax.

4. Separation of Liability Relief provides for the allocation of additional tax owed between the taxpayer and former or current spouse from whom the taxpayer is separated when an item was not reported properly on a joint return. ***To qualify***, the taxpayer must meet all of the following conditions:

(a) The taxpayer filed a joint return.

(b) The taxpayer did not have actual knowledge of the item that gave rise to the understatement of tax, AND

(c) The taxpayer meets one of the following requirements at the time he/she requests relief: (1) the taxpayer is divorced or legally separated from the spouse with whom a joint return was filed; (2) the taxpayer is widowed; OR (3) the taxpayer has not been a member of the same household as the spouse with the joint return was filed at any time during the 12-month period ending on the date the taxpayer requested relief.

5. Equitable Relief may apply when the taxpayer does not qualify for innocent spouse relief or separation of liability relief for something not reported properly on a joint return and generally attributable to spouse. ***To qualify***, the taxpayer must:

(a) Establish that under all the facts and circumstances, it would be unfair to hold the taxpayer liable for the understatement or underpayment of tax; and

(b) Meet the 7 conditions[25] below:

(i) The requesting spouse filed a joint return for the taxable year.

(ii) Innocent Spouse Relief or Separation of Liability Relief is not available.

(iii) The claim for relief must be timely filed: (i) before the collection statute has expired and (ii) claims for credit or refund are subject to the same limitations as deficiency cases.

(iv) No assets were transferred between the spouses as part of a fraudulent scheme.

(v) The nonrequesting spouse did not transfer disqualified assets to the requesting spouse.

(vi) The requesting spouse did not knowingly participate in the filing of a fraudulent joint return.

(vii) Generally, the income tax liability for which the requesting spouse seeks relief must be attributable to an item of the nonrequesting spouse or an underpayment resulting from the nonrequesting spouse's income. There are a number of exceptions:

- If the attribution of income is solely due to the operation of community property laws, the item is considered attributable to the nonrequesting spouse
- If the property is titled in the name of the requesting spouse, there is a rebuttable assumption that the item is attributable to the requesting spouse.
- If the funds intended for the payment of the tax was misappropriated by the nonrequesting spouse, the requesting spouse can be granted relief to the extent of the misappropriation.
- If there was spousal abuse prior to the time the return was filed and the requesting spouse was not able to challenge the treatment of an item on the return, relief can still be granted for an item attributable to the requesting spouse.

6. Seeking Relief. To seek relief, the taxpayer should submit to the IRS a completed Form 8857, Request for Innocent Spouse Relief, or a written statement containing the same information required on Form 8857, which is signed under penalties of perjury. The IRS is

[25] Rev. Proc. 2013-34, www.irs.gov/pub/irs-drop/rp-13-34.pdf

required to notify the spouse with whom that taxpayer filed the joint return of the relief request and allow him or her to provide information for consideration regarding your claim.

## VIII. Tax Return Preparer Misconduct or Fraud

NOTE: It should be noted that the IRS does not have strong procedures in place for tax return preparer fraud.

**A. When Can You Make a Complaint About a Tax Return Preparer?** The IRS will investigate a tax return preparer who acts improperly. Tax preparers can take advantage of taxpayers in many ways. Low income, elderly, ESL, and disabled taxpayers are more likely to be victims.

1. Improper Tax Return Preparation. When the tax return and/or refund has not been impacted, the taxpayer can report a tax return preparer for improper tax preparation practices, including:

- Failing to enter a Preparer Tax Identification Number (PTIN) on a tax return or improperly using a PTIN belonging to another individual.
- Refusing to provide clients with a copy of their tax return.
- Failing to sign tax returns they prepare and file. (Note: If electronically filed, your copy may not contain a signature)
- Neglecting to return a client's records or holding the records until the preparation fee is paid.
- Preparing client returns using off-the-shelf tax software or IRS Free File, both of which are intended for use by individuals.
- Falsely claiming to be an attorney, certified public accountant, enrolled agent, enrolled retirement plan agent, or enrolled actuary.
- If you are a tax return preparer and discover that another tax return preparer is committing any of the practices mentioned above.

2. Misconduct. When the tax return and/or refund has been impacted, the taxpayer can report a tax return preparer for misconduct, including:

- Embezzling the refund.
- Altering tax return documents.
- Filing a return without the taxpayer's consent.
- Creating or omitting income to generate a larger refund
- Creating false exemptions or dependents to generate a larger refund.
- Creating false expenses, deductions, or credits to generate a larger refund
- Using an incorrect filing status to generate a larger refund.
- After creating facts to generate a larger refund, also splitting the refund using Form 8888, Allocation of Refund, so that taxpayer is unaware of the larger refund.

**B. Filing a Complaint**.

1. Forms to Complete. To report any tax return preparer, complete Form 14157, Complaint: Tax Return Preparer. For misconduct, also complete Form 14157-A, Tax Return Preparer Fraud or Misconduct Affidavit. When submitting the complaint, include all supporting documents.

2. Where to File. The place to file is based on whether or not the tax return and/or refund was affected and whether the taxpayer received a notice or letter from the IRS.

(a) Return and/or Refund Not Affected.

Internal Revenue Service
Attn: Return Preparer Office
401 W. Peachtree Street NW
Mail Stop 421-D
Atlanta, GA 30308
Fax: 855-889-7957

(b) Return and/or Refund Affected and Taxpayer Received a Notice or Letter from the IRS. To the address contained in the notice or letter.

(c) Return and/or Refund Affected and Taxpayer id Not Receive a Notice or Letter from the IRS. To the address when the taxpayer would normally mail the Form 1040.

**C. File Valid Return.** When the tax return preparer commits misconduct, the taxpayer will need to prepare and file a valid tax return. The return filed by the tax return preparer was a fraudulent return, and therefore, it is invalid. The taxpayer does not need to prepare an amended tax return, but rather a new tax return. The return must be filed by mail.

**D. Corrective Steps.** What happens next will depend on whether the IRS issued a refund based on the fraudulent return.

1. No Refund Issued by IRS

(a) Taxes Owed. If the taxpayer owes a tax liability in the valid return, the taxpayer is still responsible for paying the tax, even though the tax return preparer originally prepared a fraudulent return.

(b) Refund Owed. The IRS will issue the refund to the taxpayer as stated in the valid return.

**2.** Refund Issued by IRS. When a refund is issued, the remedy becomes more complicated to obtain. The taxpayer must file a police report against the tax return preparer. The police department may choose not to take the report, stating it is a civil, contract matter or an issue

for the IRS. In these situations, the taxpayer should contact the Taxpayer Advocate Service for assistance.

(a) Excessive Refund to Taxpayer. If the taxpayer received a refund for which he is not entitled to receive, the taxpayer will need to repay the refund. This will also be in addition to any taxes he actually owes. The taxpayer may request an abatement on penalties and interest based on the tax preparer fraud, but the underlying liability must be paid.

(b) Correct Refund to Taxpayer. If the taxpayer received the correct amount of his refund (for example, the tax preparer split the refund so that the taxpayer received what he expected and the excess amount went to the tax return preparer), the taxpayer is not entitled to an additional refund and the taxpayer is not liability for the stolen refund. The complaint should be sufficient to correct the account.

(c) No or Underpayment of Refund to Taxpayer. If the taxpayer did not receive the refund or did not receive his full refund, the taxpayer is entitled to his refund, even though it was already paid to the tax return preparer. If the IRS does not issue the refund after the taxpayer filed the valid return, the taxpayer should file an administrative claim for refund, by filing Form 843. If the IRS does not timely respond, the taxpayer should seek assistance from the Taxpayer Advocate Service. Finally, if the IRS does not issue the refund and before 2 years has passed from when the tax return was filed, the taxpayer may seek out legal counsel to assist with filing a Suit for Refund in the Federal District Court.

## IX. Resources.

**A. Taxpayer Advocate Service (TAS)**. Consider talking to TAS for issues involving billing and collection (i.e., if your problem is causing financial difficulties)

1. Main Line: 1-877-777-4778 or http://www.taxpayeradvocate.irs.gov.

2. Houston Office: (713) 209-3660 or 1919 Smith St., Houston, TX 77002.

# § 11. IDENTITY THEFT

## I. What is Tax-Related Identity Theft? [26]

**A. Employment-Related**. Tax-related identity theft occurs when someone uses your stolen Social Security number to file a tax return claiming a fraudulent refund.

1. Generally, an identity thief will use your SSN to file a false return early in the year. You may be unaware you are a victim until you try to file your taxes and learn one already has been filed using your SSN.

**B. Tax Preparer**. Tax preparer manipulates tax return to fraudulently report income. See §10 Federal Tax, VIII. Tax Preparer Fraud.

## II. The Warning Signs. IRS notice or letter that states that:

**A.** More than one tax return was filed using your SSN;

**B.** You owe additional tax, refund offset or have had collection actions taken against you for a year you did not file a tax return;

**C.** IRS records indicate you received wages from an employer unknown to you.

## III. Steps to Take for Victims.[27]

**A. What To Do Right Away**. Take the following steps to limit the damage:

1. Call the companies where you know fraud occurred, ask to close or freeze the accounts, and change logins/passwords/PINs for your accounts.

2. Contact one of the three major credit bureaus to place a 'fraud alert' on your credit records:

   (a) Equifax, www.Equifax.com, 1-800-525-6285

   (b) Experian, www.Experian.com, 1-888-397-3742

   (c) TransUnion, www.TransUnion.com, 1-800-680-7289

3. Report identity theft to the FTC at www.ftc.gov.

4. File a report with your law local police department.

**B. What To Do Next.**

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[26] IRS, Taxpayer Guide to Identity Theft, http://www.irs.gov/uac/Taxpayer-Guide-to-Identity-Theft.
[27] FTC, Identity Theft, https://www.identitytheft.gov/.

1. Close new accounts opened in your name.

2. Remove bogus charges from your accounts.

3. Correct your credit report by writing a letter to each of the three credit bureaus and include a copy of your Identity Theft Report.

4. Consider adding an extended fraud alert or credit freeze.

**C. Other Steps**. Depending on your situation, you may need to:

1. Respond immediately to any IRS notice; call the number provided.

2. Complete IRS Form 14039, Identity Theft Affidavit. Use a fillable form at IRS.gov, print, then mail or fax according to instructions.

3. Report a misused Social Security number.

## IV. How to Reduce Risk.

**A.** Don't routinely carry Social Security card or documents with SSN on it.

**B.** Don't give a business your SSN just because they ask—only when necessary.

**C.** Protect your personal financial information at home and on your computer.

**D.** Check your credit report annually.

**E.** Check your Social Security Administration earnings statement annually.

**F.** Protect your personal computers by using firewalls, anti-spam/virus software, update security patches and change passwords for Internet accounts.

**G.** Don't give personal information over the phone, through the mail or the Internet unless you have either initiated the contact or are sure you know who is asking.

# §12. VA BENEFITS

## A. Discharge Upgrade

### I. Introduction.[28]

**A.** Upgrade available for anything other than an Honorable Discharge.

**B. Legal Foundation**. To get your discharge upgraded or your character of service changed, you will have to show that your discharge was "improper" or "inequitable."

1. Improper. There was an error of fact, law, procedure, or prejudice.

2. Inequitable. The discharge was "unfair" because it was too severe for the offenses that you committed. The Board can determine that under "current standards" you shouldn't have been given a bad discharge.

**C. Disadvantages**. The veteran carries the burden of proof, and the original discharge is presumed to be correct (a "close" case is unlikely to win for the veteran).

**D. Advantages**. Not limited by civil rules of evidence, and almost any evidence is admissible for consideration, including: (a) impropriety during discharge process; (b) discharge's unfair impact on the veteran's life; (c) educational, work, and philanthropic achievements; (d) employment history; (e) financial hardship; (f) character; and (g) marriage and dependents.

### II. Choosing the Venue.

**A. Discharge Review Board** (DRB). Usually the first board to apply to.

1. 15 year statute of limitations to apply to DRB that cannot be waived.

2. Proceedings are informal and non-adversarial.

3. Guarantees a personal appearance before the board in Washington, D.C. which can be used to get a second chance at a favorable ruling.

(a) By requesting a review of the records at the first application (instead of a personal appearance), the veteran reserves the right to a personal appearance.

(b) If the DRB decision is not satisfactory, the veteran may then apply for a personal appearance and get a second chance at the DRB.

4. Considers fairness as well as the legal and technical sufficiency of the decision for the discharge

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[28] See http://www.law.yale.edu/documents/pdf/Clinics/wirac_CTdischargeUpgradeManual.pdf

5. Offers relatively weaker remedies than the BCMR; (i) cannot upgrade a discharge issued by a general court-martial; (ii) cannot change a re-enlistment code; and (iii) cannot modify a veteran's record beyond upgrading a discharge.

**B. Board of Corrections for Military Records** (BCMR). Available to veterans who have exhausted all other options.

1. BCMR is subject to a three year statute of limitations that tolls upon discovery of error (actual, not constructive, knowledge). This statute of limitations can be, and frequently is, waived in the interest of justice.

2. BCMR can review decisions made by the DRB

3. A veteran may request a personal appearance, but it is rarely granted and cannot be used for a second chance at a favorable ruling.

4. The BCMR will consider unfairness and legal error by evaluating the all facts presented to it, not just single events or the advisory opinion.

5. BCMR has broad powers; (i) can review the decision of a general court-martial, but can only provide clemency, not removal of the conviction; (ii) remove effect of conviction (e.g. negative discharge), but not conviction; (iii) reinstate veteran to service; (iv) remove disciplinary actions from personnel records; (v) credit veteran with service time; (vi) qualify a veteran for VA benefits; (vii) upgrade a negative discharge; (viii) modify reason for discharge; and (ix) correct any other error on service record.

## III. Preparing a Case.

**A. Gather Records**. The veteran should immediately obtain his/her military personnel and medical records by submitting a Standard Form 180 (SF 180) to the National Personnel Records Center, the VA records center in St. Louis, and to any VA Regional Offices or Medical Centers that the veteran has been treated at.

1. The Board might also obtain the FBI criminal record sheet of the veteran, so it is important for an applicant to acquire any criminal records.

**B. Applying for a Discharge Upgrade**. After receiving and reviewing the records, applicants should submit the appropriate form (DD Form 293 for the DRB, or DD Form 149 for the BCMR) to the appropriate military branch's DRB or BCMR as indicated on the form.

1. Applications take several months to be reviewed, and supporting documents can be submitted for weeks after the application has been filed as long as the Board has not yet reviewed the application.

**C. Additional Materials**. Although the only document required for the DRB or BCMR review is the DD Form 293 or 149, applicants increase their chances of obtaining a discharge upgrade if they submit additional materials, such as:

1. A brief that emphasizes favorable aspects of the applicant's military service, highlights factors that may mitigate disciplinary records, and explains the reasons why an upgrade should be given. The brief should be submitted at least one month before the hearing date, and the applicant should submit as many copies of the brief as there are Board members (5 for the DRBs, 3 for the BCMRs). The applicant should request in a cover letter that one copy be given to each Board member before review.

2. A Statement of Material Contentions, which lays out the issues that the applicant wants the DRB or BCMR to address. The Board must respond to all issues raised by the applicant, so it is very important to clearly separate and explain all material issues. The Statement of Material Contentions may double as the Table of Contents for the brief.

3. A statement by the veteran, which should be sworn or notarized if possible, to be used as evidence before the Board. The statement should explain discrepancies in the record, add or reaffirm facts supported by other evidence in the application, and dispute errors or prejudices in the record. If the veteran has criminal convictions, the personal declaration is a good place for the veteran to express remorse for their actions, explain how they have changed, and ask for clemency from the board.

4. Evidence of in-service conduct, including: (i) witness statements from fellow service members or other persons; (ii) good performance reviews; and (iii) any evidence of misinformation from command officials that caused the service members to waive important rights in disciplinary or discharge proceedings. For example, veterans might be able to obtain letters from others in command, or they might have email records, diary records, or friends or family who can attest to the fact that the service member waived important rights.

5. Evidence of good post-service conduct, in the form of: (i) character references from members of the community, which should always be submitted with an application; (ii) employment documents (letters from employers); (iii) educational documents (diplomas and transcripts); (iv) police clearance showing the absence of a criminal record (if applicable); (v) rehabilitation documents (if applicable); (vi) family responsibility documents (birth and marriage certificates); (vii) awards and other documentation of personal and professional achievements (newspaper articles, announcements in church bulletins, and letters recognizing achievements); and (viii) similar evidence of involvement in charitable or civic activities (useful in all cases but particularly important in punitive discharge cases).

## IV. Reconsideration and Appeal.

**A. Appealing a DRB Decision**. Applicants have the right to an entirely new DRB review if any of the conditions listed in 32 C.F.R. § 70.8(8) are met.

1. May appeal to the BCMR, which is unlikely to be successful.

2. May appeal to federal district court under the Administrative Procedures Act (APA), which carries a 6 year statute of limitations from the date of the decision. Although there is no Fifth Circuit case addressing the question, most circuits require a veteran to exhaust administrative remedies, including appeal to the BCMR, before appealing to federal court. *See, e.g., Ortiz v. Sec'y of Def.*, 41 F.3d 738, 743 (D.C. Cir. 1994).

**B. Appealing a BCMR Decision**. A veteran may re-file with new material evidence to the BCMR, and may appeal to federal district court under the APA (6 year limitations).

# B. Disability Compensation

## I. Types of Claims.

**A. Formal Claim**. A complete claim filed according to the required rules and forms. Letters, memorandums, or other communications from claimants or their representatives may be considered formal claims if they (i) request increased benefits; (ii) reopen previously denied claims, or (iii) open a new claim. Note: If the claimant has already completed a prior formal application, he/she does not need to complete another.

**B. Informal Claim**. Any statement in writing indicating an intent to apply for VA benefits resulting from (i) hospital, medical or surgical treatment by VA, (ii) examination by VA, or (iii) pursuit of a course of vocational rehabilitation. 38 CFR § 3.154. This also includes any claim that is not substantially complete. Must be followed up with a formal claim, but allows veteran to "lock-in" application date for start of benefits.

**C. Fully Developed Claim**. An optional program that offers veterans and survivors faster decisions from the VA on compensation, pension, and survivor benefit claims. Applicants simply submit all relevant records in their possession, and those records which are easily obtainable (e.g., private medical records) at the time they make their claim and certify that they have no further evidence to submit. The VA can then review and process the claim more quickly.

## II. Requirements for VA Disability Compensation.

**A. Qualifying Military Service**. 38 U.S.C. § 1110.

1. Active Service. Veteran must have served in the active military, including:

(a) Full-time in the Army, Navy, Marines, Air Force or Coast Guard;

(b) Service in the Reserve or Air or Army National Guard when service is activated by the federal government, or

(c) Cadets at the U.S. Military, Air Force, and Coast Guard academies and midshipmen at the U.S. Naval Academy. 38 C.F.R. § 3.1(a)-(d), 3.7(f).

2. Minimum Active-Duty. Veteran must have served two years of continuous active duty, or the full period for which the veteran was called to active duty. *Id.* § 3.12a.

(a) Does not apply to veterans who were discharged or retired early due to a service-connected disability.

(b) Veterans discharged early for reasons other than injury or disability do not meet the length of service requirement.

3. Discharged Under Conditions Other than Dishonorable. § 3.1(d).

(a) Qualifying discharges include: (i) honorable discharges; (ii) discharges under honorable conditions; and (iii) general discharges.

(b) Veterans discharged under other than honorable conditions, with undesirable discharges, or with bad conduct discharges may or may not be eligible for benefits, depending on the particular benefit.

(c) Veterans with dishonorable discharges cannot receive any benefits.

4. Disability Not a Result of Willful Misconduct. If the disability resulted from the veteran's own willful misconduct or abuse of alcohol or drugs, the veteran will not be entitled to benefits. Willful misconduct is defined as involving "deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n).

**B. Qualifying Service-Connected Injury.**

1. Direct Service Connection. You have a direct service connection if an incident that occurred in service directly caused a disability that you now suffer from. A direct service connection requires proof that the incident occurred, medical evidence of your disability, and medical evidence that the current disability was caused by the incident in service. 38 C.F.R. § 3.304.

(a) It's easiest to prove this if the veteran was diagnosed with the condition during service or there is medical evidence in the service medical records of related symptoms. Without such evidence, a medical opinion from a doctor will often be critical to establishing direct service connection.

(b) It is important to be able to show that the incident actually occurred. If the event was not recorded in the veteran's records, statements from servicemen the veteran served with will likely be needed to confirm it.

(c) Examples of direct service connection include a veteran who served in combat who suffers from post-traumatic stress disorder, shrapnel wounds that led to physical problems, or heavy lifting that caused back pain.

2. Aggravated Service Connection. Aggravated service connection can be established when a veteran suffered from a medical condition before entering service, the entrance medical exam records the existence of this condition, and there is evidence that an event during service worsened the condition. *Id.* § 3.306.

(a) If the pre-existing condition isn't mentioned in the entrance exam, you must submit medical evidence of a pre-service diagnosis and treatment.

(b) Also, there must be proof of an incident or event in service that made the disability worse. The fact that the symptoms worsened will be assumed to be a natural progression of an illness or injury unless a veteran can link an in-service event to this progression. This may require a medical opinion from your doctor.

3. Presumptive Service Connection. Certain medical conditions are established by law as being presumptively service-connected for veterans who have served at least 90 days. You will need to submit medical evidence that the medical condition has been diagnosed and that it appeared to a certain degree of severity within what is called the "presumptive time period." The law establishes a time period after your service ends during which the disability must arise in order to qualify for presumptive service connection, which varies based on the condition. *Id.* § 3.307-309.

(a) Presumptive service connection is available for certain illnesses to POWs confined more than 30 days, certain cancers caused by chemical and hazardous exposure (such as Agent Orange), and some chronic health issues, brain injuries and infectious diseases arising from service in the Gulf War. *See id.* § 3.307-309.

4. Secondary Service Connection. If you are eligible for service-connected disability compensation for an illness or injury that has caused another medical condition, you may be eligible for additional compensation. Or, if you had a pre-existing condition and the service-connected disability made it worse, you can receive additional compensation for the aggravation of that condition. *Id.* § 3.310.

(a) You will need to have medical evidence of the existence of the secondary condition, as well as a medical opinion supporting your claim that it was caused or worsened by the service-connected disability.

(b) E.g., depression caused by chronic pain, a leg injury that leads to problems with your knees, or diabetes leading to a heart condition.

5. Special Rules for Post-Traumatic Stress Disorder (PTSD). To establish service connection for PTSD, veterans will need to: (i) provide a statement about the "stressor" (traumatic event) that occurred during service; (ii) have a diagnosis of PTSD; and (iii) get an opinion from a VA psychologist or psychiatrist that the stressor was sufficient to cause PTSD. *Id.* § 3.304(f).

## III. The Application Process.

**A. Submit an Application**. Veterans can apply for VA benefits online (www.ebenefits.va.gov), by calling or visiting their local VA office, or by completing an Application for Veterans Compensation and/or Pension (VA Form 21-526).

1. The veteran must provide a DD214 (separation or discharge paperwork) for all periods of service along with copies of medical records, evidence of the claimed disability, and evidence showing the disability or disease was caused by active service.

2. The veteran must submit copies of marriage certificates and divorce records, birth or adoption records for all dependent children, and, if applicable, nursing home records.

**B. Claims Officer**. After the veteran applies, the application goes to a claims officer. Claims are considered in the order in which they are submitted. The claims officer will collect the medial and service records that the VA will use in examining a claim. The VA may request that the applicant undergo further examination. Until the VA makes a decision, the veteran can continue to submit new evidence for the VA to consider.

**C. Receiving a Rating**. The office must determine whether the veteran has a qualifying disability and, if so, the veteran's disability rating. Each disability is rated on a scale of 0% to 100% in 10% increments. The percentage rating directly correlates to a pre-determined monthly payment amount laid by law, which also depends on the veteran's marital status and dependents.[29]

1. If the VA determines that the veteran is unable to secure gainful employment as a result of service-connected disabilities, then the veteran will receive a total disability rating (of 100%), ***provided that***: (i) if the veteran has one disability, that disability is rated at 60% or more; or (ii) if the veteran has more than one disability, one such disability is rated at 40% or more, and the other disabilities bring the combined rating up to 70% or more. 38 C.F.R. § 4.16-4.17.

**D. Decision**. The veteran's claim may be approved, denied, or approved with a lower rating. In each case, the VA must explain what evidence they considered to make the decision, and the veteran may appeal.

**E. Appeal**. Veterans must appeal the VA's decision within one year. Appeals may be handled by an attorney, a veterans' service organization, or a personal representative.

1. The first appeal goes to a different claims review officer who will review the first decision for accuracy. New evidence may be submitted for consideration.

2. The next appeal goes to the Claims Review Board (CRB), an administrative proceeding. Veterans may request a personal appearance before the board.

3. Subsequent appeals are brought through the federal courts, starting in district court and ending with the United States Supreme Court.

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[29] http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp.

### IV. Special Monthly Payments.

**A.** Veterans who are unable to perform the activities of daily living (such as bathing, dressing, toileting, etc. …) without assistance are entitled to receive additional aid and attendance benefits. It is not required that a veteran be 100% disabled to receive aid and attendance benefits. 38 U.S.C.A. § 1114(r). However, nearly all veterans who do receive aid and attendance are 100% disabled. The additional amount the veteran will receive for aid and attendance can be computed based on the dollar amounts needed by the veteran.

## C. VA Pension

### I. Purpose.

**A.** The VA Pension is designed to supplement the income of elderly and/or disabled veterans to ensure that they do not live below the poverty line. The VA may award a pension in two circumstances: (1) when the veteran is disabled but ineligible for disability compensation (Disability Pension); or (2) when the veteran is not disabled but over age 65 (Basic Pension).

### II. Requirements.

**A. Qualifying Military Service**. 38 C.F.R. § 3.3. The veteran was discharged from service under other than dishonorable conditions; AND

1. For service on or before September 7, 1980, the Veteran must have served at least 90 days of active military service, with at least one day during a war time period. For recognized war time periods, see 38 C.F.R. § 3.2.

2. Otherwise, generally he or she must have served at least 24 months or the full period for which called or ordered to active duty with at least one day during a war time period.

**B. Meet the Financial Needs Test**. The veteran must meet a needs test to determine whether he/she has adequate income and net worth to provide for adequate care and maintenance.

1. Income. Unless specifically excluded, payments from any source during the 12-month period are counted as income for purposes of the income analysis. 38 C.F.R. § 3.271(a). For exclusions, see 38 C.F.R. § 3.272.

2. Net Worth. In order to qualify for low-income disability payments, the estate of the veteran, and his or her spouse if he or she is married, must be insufficient to support the veteran. 38 U.S.C.A. § 1522(a). The net worth of the veteran is the fair market value of all real and personal property, except for the veteran's homestead, including a reasonable lot area, and value of personal items within the homestead. 38 C.F.R. § 3.275(b). Note: There is no statutory prescribed limitation on the size of the estate.

**C. Total and Permanent Disability**. The veteran must suffer from a permanent and total disability (i.e., must have a disability rating of 100%) (not required to be service-connected disability). 38 C.F.R. § 3.3.

1. Age 65 and Older. If you are age 65 or over, the VA will, for the purposes of awarding you a Basic Pension, assume that you are permanently and totally disabled. *Id.*

## III. Improved Pension.

**A. Introduction**. The VA also offers two supplemental or improved pension programs: Housebound Benefits and Aid and Attendance (A&A). A&A pays a higher monthly rate than Housebound Benefits. These two benefits are "add-ons" to the pension; you are not eligible for either add-in benefit unless you first qualify for a pension. In addition to the pension, you can receive Housebound Benefits or A&A, but not both.

**B. Aid and Attendance** (A&A). If you require assistance with at least some daily living activities, you may be eligible for this benefit. 38 U.S.C. § 1114(r).

1. Eligibility for A&A requires that a veteran meet one of the following medical criteria: (i) require assistance with some tasks of daily living (i.e., bathing or dressing); (ii) be blind or nearly blind; (iii) live in a nursing home or assisted living facility due to physical and/or mental incapacity; or (iv) be mentally or physically incapacitated such that regular assistance is required for you to be able to remain safe in your home (typically this will mean that you are bedridden).

2. Even if a family member is caring for you and you are not paying for an outside caregiver to come into your home, you can still be eligible for this cash benefit.

3. If your spouse is disabled and you are not, you may be eligible to receive A&A for your spouse.

**C. Housebound Benefits**. This benefit provides some supplemental income when you are substantially confined to your home. Housebound benefits also require that you be substantially and permanently confined to your home because of your disabilities. If you aren't confined to your home, you can show that you have one disability rated at 100% and another at 60% or more to qualify for Housebound Benefits. 38 U.S.C. § 1114(s).

1. To get housebound benefits if you are 65 or older, even though presumed disabled, you still have to show that you are confined to your home or are 60% or more disabled.

## IV. Amount of Benefits.[30] (Rates became effective December 1, 2014).

**A.** Depending on the veteran's martial status, dependents and condition, the veteran will receive the following yearly benefits, minus the veteran's annual income.

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[30] VA, Veterans Pension Rate Table, http://www.benefits.va.gov/pension/current_rates_veteran_pen.asp.

| Veteran's Family Situation and Caretaking Need | Maximum Annual Rate |
|---|---|
| Veteran without any dependents | $12,868 |
| Veteran with one dependent | $16,851 |
| Veteran, permanently housebound, no dependents | $15,725 |
| Veteran, permanently housebound, one dependent | $19,710 |
| Veteran needing permanent aid and attendance, no dependents | $21,466 |
| Veteran needing permanent aid and attendance, one dependent | $25,448 |
| Two veterans married to each other | $16,851 |
| Increase for each additional dependent child | $2,198 |

# D. Death Benefits

## I. Dependency and Indemnity Compensation ("DIC").[31]

**A. Veteran's Requirements**.[32] The veteran's death was not the result of the veteran's own willful misconduct; the veteran was not dishonorably discharged; AND the veteran died:

1. While on active duty, active duty for training, or inactive duty training; OR

2. From an injury or disease deemed to be related to military service; OR

3. From a non-service-related injury or disease, but was receiving, or was entitled to receive, VA Disability Compensation for service-connected disability that was rated as totally disabling (100% disability); AND

(a) For at least 10 years immediately before death; OR

(b) Since the Veteran's release from active duty and for at least five years immediately preceding death; OR

(c) For at least one year before death if the Veteran was a former prisoner of war who died after September 30, 1999.

**B. Eligibility of Surviving Spouse**.[33] The surviving spouse was:

[31] http://benefits.va.gov/COMPENSATION/types-dependency_and_indemnity.asp
[32] 38 U.S.C. § 1311, 1312, 1318; 38 C.F.R. § 3.22.
[33] 38 U.S.C. § 1304, 1311, 1318; 38 C.F.R. § 3.22.

1. Married to a service-member who died on active duty, active duty for training, or inactive duty training; OR

2. Validly married the veteran before January 1, 1957; OR

3. Married the veteran within 15 years of discharge from the period of military service in which the disease or injury that caused the veteran's death began or was aggravated; OR

4. Was married to the veteran for at least one year; OR

5. Had a child with the veteran; AND

(a) Cohabited with the veteran continuously until the veteran's death or, if separated, was not at fault for the separation; AND

(b) Is not currently remarried. (Note: A surviving spouse who remarries on or after December 16, 2003, and on or after attaining age 57, is entitled to continue to receive DIC.)

**C. Eligibility of Surviving Child**. 38 U.S.C. § 1313-14.

1. Not included on the surviving spouse's DIC; AND

2. Unmarried; AND

3. Under age 18, or between the ages of 18 and 23 and attending school.

**D. Eligibility of Parents**. 38 U.S.C. § 1315.

1. Must be the parent of a military service-member who died in the line of duty or a veteran who died of a service-related injury or disease; AND

(a) The term "parent" includes biological, adoptive, and foster parents.

(b) A foster parent is a person who stood in the relationship of a parent to the veteran for at least one year before his last entry into active service.

2. Must have an income below a limit established by law.[34] Maximum monthly rate is $621 for a single surviving parent with less than $800 in monthly income.

**E. Entitlements**. Additional payments may be awarded.

1. Aid and Attendance shall be awarded to a surviving spouse or parent, if either is (1) a patient in a nursing home or (2) blind/nearly blind or significantly disabled as to need or require the regular aid and attendance of another person. 38 U.S.C. § 1311, 1315.

[34] For income limits, see http://benefits.va.gov/Pension/current_rates_Parents_DIC_pen.asp.

2. Housebound Benefits shall be awarded to surviving spouses that, by reason of disability, are permanently housebound. 38 U.S.C. § 1311.

**II. Death Pension.**[35]

**A. Veteran's Requirements**. Same as for "Qualifying Military Service" under VA Pension, above. 38 U.S.C. § 1541.

**B. Eligibility of Survivors**. Eligibility for the Survivors Pension is based on yearly family income, which must be less than the amount set by Congress to qualify.

1. Surviving Spouse. Same as for DIC. 38 U.S.C. § 1541.

2. Surviving Child. Same as for DIC, except that (a) children may be eligible in their own right; (b) remarriage of surviving spouse does not affect child's entitlement; and (iii) child's custodian's income is considered in determining entitlement. 38 U.S.C. § 1542.

3. Parents. Parents are not eligible for the Death Pension.

# E. Housing (HUD-VASH) Program

**I. The Program.**[36]

**A.** The Department of Housing and Urban Development–VA Supportive Housing (HUD-VASH) Program is a joint effort between HUD and VA to move Veterans and their families out of homelessness and into permanent housing. HUD provides housing assistance through its Housing Choice Voucher Program that allows homeless Veterans to rent privately owned housing. VA offers eligible homeless Veterans clinical/supportive services through its health care system across the US.

**II. Eligibility**.

**A. Homeless Status**. HUD-VASH "screens in" the most vulnerable homeless, many of whom meet HUD's definition of chronically homeless. All veterans must meet the definition of "homelessness" as defined in the McKinney-Vento Act:[37]

1. An individual or family who: (i) lacks a fixed, regular, and adequate nighttime residence; (ii) with a primary nighttime residence that is not designed for or ordinarily used as a regular sleeping accommodation (i.e., car, park, abandoned building, etc.); (iii) lives in a supervised

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[35] See http://www.benefits.va.gov/pension/spousepen.asp.
[36] VA, HUD-VASH Eligibility Criteria, http://www.va.gov/homeless/hud-vash_eligibility.asp.
[37] See https://www.hudexchange.info/resources/documents/HomelessAssistanceActAmendedbyHEARTH.pdf.

publicly or privately operated shelter; or (iv) has a residence, but will immediately lose that residence (e.g., due to eviction, foreclosure, etc.) and does not have a subsequent residence; OR

2. An individual who resided in a shelter or place not meant for human habitation and who is exiting an institution where he or she temporarily resided; OR

3. Unaccompanied youth and homeless families with children and youth defined as homeless under other Federal statutes who (i) have been without a permanent residence for a long period; (ii) have consistently moved over such period; and (iii) are expected to continue to live in such a condition. 42 U.S.C. § 11302.

**B. Family Status**. HUD-VASH serves individual veterans and their dependent family.

**C. VA Status**. Veterans must have eligible discharge status, be eligible for VA medical services, and be willing to meet regularly with a case manager.

1. Case Management. Eligible veterans must need case management services in order to obtain and sustain independent community housing, such as those with serious mental illness, substance use disorder history, or physical disability.

**D. PHA Status**. HUD-VASH eliminates all Public Housing Authority screening except for the prohibition on veterans or family members who are lifetime registered sexual offenders.

## III. Housing and Service Needs.

**A.** The following chart assists in determining which veterans truly need HUD-VASH and which would be better served through other housing options.

| *Targeting Veterans for HUD-VASH vs. other VA programs should involve a consideration of housing needs and service needs as two separate but interrelated domains.* | | | HOUSING NEEDS | | |
|---|---|---|---|---|---|
| | | | **Low**<br>Veteran is currently and stably housed (rents or owns home or resides in with family members), though may have occasional problems paying housing costs | **Moderate**<br>Veteran is currently housed, at imminent risk of housing loss due to eviction, has had history of housing crises/ homelessness, or is housed in a temporary setting | **High**<br>Veteran is currently homeless and has had history of housing instability and homelessness |
| SERVICE NEEDS | **Low** | Veteran is able-bodied, connected to workforce, and few barriers to employment, self-sufficiency, and activities of daily living | Standard VA Services/Benefits | Supportive Services for Veteran Families | Supportive Services for Veteran Families |
| | **Moderate** | Veteran has some barriers to employment, self-sufficiency, or activities of daily living, which can be overcome or attenuated through services and treatment | VA Treatment Services | Supportive Services for Veteran Families or Grant and Per Diem | Supportive Services for Veteran Families or Grant and Per Diem |
| | **High** | Veteran has multiple and complex barriers to employment, self-sufficiency, and activities of daily living, such that services are needed on an ongoing basis | VA Patient-Centered Health Home | HUD-VASH | HUD-VASH |

# §13. LANDLORD-TENANT

## I. Evictions.

### A. Tenant Defaults on Lease or Holds Over—Forcible Detainer Action.

1. When Tenant is in Default. A tenant is in default when the tenant breaches a condition of this lease. This includes failure to pay rent, damage to the property (including by alteration), breach of permitted use (e.g., using the property for illegal purposes), subleasing, etc. If the tenant fails to pay rent, the tenant is considered to be in default the very day after rent is due.

2. Notice Requirement. After a tenant under a written lease defaults or holds over, the landlord must give at least 3 days' written notice to vacate before the landlord files a forcible detainer suit (unless otherwise agreed). Tex. Prop. Code § 24.005(a).

3. No Duty to Accept Late Rent. A landlord has no duty to accept late rent. After rent is delinquent, the landlord may immediate give a notice to vacate. § 92.332.

4. Pay Rent or Vacate. If before the notice to vacate is given, the landlord has given a written notice to the tenant that rent is due and unpaid, the landlord may include in the notice to vacate a demand that the tenant pay the delinquent rent or vacate the premises. § 24.005(i). If the tenant then pays the delinquent rent by the specified date, then the landlord cannot proceed with an eviction suit.

**B. Tenant on Premises but Fails to Pay Rent—Lockout**. A residential landlord has the right to change the locks of a tenant's rental unit ***ONLY IF*** it is ***expressly provided for*** in the lease ***and*** the tenant is delinquent in paying all or part of the rent. § 92.0081.

1. Notice. At least 3 days before changing the locks, the landlord must provide the tenant with notice of (i) the earliest date that the landlord proposes to change the locks; (ii) the amount of rent the tenant must pay to prevent changing of the door locks; (iii) the name and address of the individual to whom, or the company at which, the delinquent rent may be discussed or paid during the landlord's normal business hours; and (iv) in underlined or bold print, the tenant's right to receive a new key at any hour, regardless of whether the tenant pays the delinquent rent.

2. The landlord does not have the right to change the locks or otherwise prevent a tenant from entering the common areas.

**C. Tenant Abandons—Repossess and Mitigate**. If a tenant abandons the premises in violation of the lease, the landlord must mitigate damages, which may not be waived. § 91.006.

**D. Forcible Detainer Suit**. A landlord may bring a forcible detainer suit to evict a tenant. The sole issue in a forcible detainer suit is the right to actual possession. TRCP 510.3. However, if the eviction is based on unpaid rent, a claim for rent may also be asserted. *Id.*

**E. Appeals**. A party may appeal a judgment in an eviction case by filing a bond, making a cash deposit, or filing a sworn statement of inability to pay with the justice court within five days after the judgment is signed. TRCP 510.9. An appeal is perfected when a bond, cash deposit, or statement of inability to pay is filed in accordance with Rule 510.9. An appeal in Harris County is to County Court at Law. Because there is no record in justice of the peace court, the case must be tried de novo in county court on appeal. TRCP 510.10.

1. Amount of Security. The justice court judge will set the amount of the bond or cash deposit to include, among other things, the loss of rent during the period of appeal and potentially attorneys' fees. The bond or cash deposit must be payable to the adverse party and must be conditioned on the appellant's prosecution of its appeal, or pay all costs and damages which pay be rendered against it on appeal. 510.9.

2. Statement of Inability to Pay. An appellant who cannot furnish a bond or pay a cash deposit in the amount required may instead file a sworn statement of inability to pay. The statement must list all the appellant's income and assets (among other things).

## II. Repairs.

**A. Tenant's Duty to Repair (Doctrine of Waste)**. A tenant cannot damage (commit waste on) the leased premises. The rules are similar to those governing life tenancy.

1. Voluntary (Affirmative) Waste. A tenant is liable to the landlord for voluntary waste, which results when the tenant intentionally or negligently damages the premises.

2. Permissive Waste. Unless the lease provides otherwise, the tenant has no duty to the landlord to make ***substantial*** repairs. However, the tenant has the duty to make ***ordinary*** repairs to keep the property in the same condition as at the commencement of the lease term, excluding ordinary wear and tear.

3. Ameliorative Waste. A tenant is under an obligation to return the premises in the same nature and character as which it was received. Hence, a tenant is not permitted to make substantial alterations to leased structures even if the alteration increases the value of the property.

(a) Liability—Cost of Restoration. The tenant is liable for the cost of restoration should he commit ameliorative waste.

**B. Property Damage by Flood, Fire or other cause without Tenant's Fault**. If the leased premises are destroyed (e.g., by fire) without the fault of either the landlord or the tenant, no waste is involve. The period for repair of a condition on the premises resulting from an insured casualty loss does not begin until the landlord receives the insurance proceeds. § 92.054(a).

1. Totally Untenantable. If the premises are totally untenantable and the casualty did not result from tenant's negligence, either the landlord or the tenant may terminate the lease by giving written notice to the other any time prior to completion of the repairs. Termination

of the lease entitles the tenant only to a pro rata refund of rent from the date the tenant moves out and to a full refund of any security deposit. § 92.054(b).

2. Partially Untenantable. If the premises are partially untenantable and the casualty did not result from the tenant's negligence, absent an express agreement to the contrary in the lease, a county or district court may award the tenant a reduction in rent to the extent the premises are unusable because of the casualty. § 92.054(c).

**C. Implied Warranty of Habitability**. Landlords in residential rental agreements have a statutory duty to repair certain conditions that materially affect the physical health or safety of an ordinary tenant. However, the landlord's duty to repair only arises if the tenant (i) has notified the landlord of the condition in a notice to the person to whom, or to the place where, rent is normally paid, and (ii) is not delinquent in rent at the time of the notice. § 92.052(a). Notice must be in writing only if the tenant's lease is in writing and requires written notice. § 92.052(d). A residential tenant to whom a landlord is liable under this statute may:

1. Terminate the lease, in which case the tenant is entitled to (i) a pro rata refund of rent from the date of termination or the date the tenant moves out, whichever is later; and (ii) deduct the tenant's security deposit from the rent without the necessity of a lawsuit or obtain a refund of the security deposit according to law. The tenant is not entitled to the other remedies of repair and deduct, or a judicial order. § 92.056(f).

2. Repair the condition and deduct the cost from subsequent rent payment, but only if (i) the landlord's statutory duty to repair ***was not waived*** in the lease, (ii) the tenant has given ***descriptive notice*** of her intention to repair or remedy the condition, AND (iii) ***either***

(a) the condition involves the backup of raw sewage;

(b) the landlord expressly agreed to furnish potable water, and the water service has totally ceased; OR

(c) the landlord has been notified that the condition materially affects the tenant's health or safety. § 92.0561.

3. If not repaired or remedied within 7 days of notice of intent to repair, the tenant may seek judicial remedies and obtain:

(a) An order directing the landlord to make the repair;

(b) An order reducing the tenant's rent; OR

(c) A judgment for one month's rent plus $500, actual damages, and court costs and attorneys' fees. § 92.0563.

**D. Security Devices**. Residential dwellings must be equipped with security devices such as window latches, door locks, and door viewers (peepholes) at the landlord's expense, without

waiting for the tenant's request. The landlord also must, within a reasonable time after the tenant's request, repair and replace security devices that are broken or in need of replacement. The tenant is not required to pay for repair or replacement unless this is caused by damage or misuse during the tenancy. Once installed, security devices become fixtures, which the tenant cannot alter (remove, replace, or rekey) without the landlord's permission. §§ 92.151-163.

**E. Smoke Alarms and Fire Extinguishers**. Landlords must ensure that every bedroom and every floor of their dwelling units contain functioning smoke alarms. The landlord must determine that each alarm is in good working order at the beginning of the tenancy, and must ***inspect or repair*** an alarm within a reasonable time after the tenant's request. The same rule applies if the landlord has chosen to install a fire extinguisher on the premises. §§ 92.251-264.

## III. Security Deposits.

**A. Rent Deposits**. §§ 92.104.

1. Deductions. A landlord may deduct from his tenant's security deposit any damages and charges: (i) for which she is liable under the lease; OR (ii) resulting from her breach.

2. Returns. The landlord must return the balance to the tenant and may NOT deduct any amount for ordinary wear and tear.

3. Accounting. The landlord must provide a written description and itemized list of all deductions if (i) the tenant does not owe rent when she surrenders the premises, OR (ii) if there is a controversy regarding the amount still owed.

**B. Timing of Refund or Accounting**. A residential landlord must return the security deposit of provide the description and list of deductions to the tenant within 30 days after the tenant (i) surrenders the premises, and (ii) provides a written statement of her forwarding address. § 92.107.

# §14. HOMEOWNERSHIP

## I. Contract for Deed (a.k.a. Installment Land Contract, Rent-to-Own).

**A. Description**. The debtor signs a contract promising to make payments on the home, and the seller keeps title until the loan is paid off. Once the loan is paid off, then a deed transferring legal title will be given to the debtor.

**B. Default and Forfeiture Clauses**. If default occurs, the contract will usually contain a forfeiture clause, which allows the seller/creditor to cancel the contract, keep all the money that has been paid, and take possession of the land. These are enforceable in Texas.

**C. Statutory Protections for Buyers**. The statute is limited to transactions involving real property to be used as a residence by the purchaser or his relatives. Tex. Prop. Code § 5.062(a).

1. The statute provides for:

(a) Delivery of default notices by certified or registered mail (§ 5.064);

(b) A minimum period of 30 days for purchasers to cure their defaults, regardless of the number of payments made (see below) (§ 5.065);

(c) The seller furnishing tax certificates to prospective purchasers from all taxing authorities (§ 5.070);

(d) The seller furnishing to prospective purchasers evidence of insurance coverage (§ 5.072); and

(e) The insured party notifying its insurer of the executory contract (§ 5.078).

2. Tie-In Statute with DTPA. Failure to comply with the last three statutory requirements is a deceptive trade practice, actionable under the DTPA (see CONSUMER LAW).

3. Period to Cure Default . If either 48 monthly payments or 40% of the principal have been paid, then buyers have a 60 day period to cure the default and there is no forfeiture or rescission allowed. The seller will have to proceed under a statutory power of sale through a trustee designated by the seller. § 5.066.

**D. Equity of Redemption**. Texas law allows for redemption, but there is no schedule. However, the time allowed for curing delinquent payments depends on the percentage of the purchase price already paid at the time of default. §§ 5.064 - .066.

**E. Restitution**. A seller may rescind the contract for deed even where there is no forfeiture clause. When rescinding the contract, the seller is required to refund the payments received less the reasonable rental value of the property and the value of the buyer's improvements.

1. Certain statutory notice requirements that were formerly applied only to the remedies of forfeiture and acceleration must now be observed for rescission of the contract.

2. Texas does not follow the rule that a defaulting buyer is not permitted to recover any part of the payments made on a contract for deed. Rather, the seller in Texas must make restitution to the buyer if the principles of equity so require.

**F. Treat as a Mortgage**. As an alternative to forfeiture, Texas will allow a seller to enforce the vendor's lien by a foreclosure sale of the property and application of the proceeds to the unpaid purchase price.

**G. Waiver**. Texas recognizes the waiver of the right to declare a forfeiture.

**H. Election of Remedies**. It is commonly held that the vendor who elects to pursue a forfeiture cannot also bring an action for damages or for specific performance. The vendor must choose only one remedy and forgo all others.

## II. Foreclosure.

### A. Foreclosure by Homeowners Association (HOA).

1. When HOA May Foreclose. A HOA may foreclose on person's homestead for the nonpayment of fee assessments (i.e., HOA fees for maintenance of common areas in subdivision) as long as deed restrictions contain a covenant to pay such assessments, provide for a vendor's lien, and were placed on the land before it became a homestead. *Inwood Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 635–36 (Tex.1987).

**2.** When HOA May NOT Foreclose. A HOA may not foreclose on a lot owner for an assessment consisting solely of fines (including late fees for the failure to timely pay fee assessments) if those fines were not specifically mentioned in the deed restrictions. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004).

**B. Consumer Protection Defenses to Foreclosure**. The Dodd-Frank Act requires residential mortgage lenders to determine a mortgagor's ability to repay before extending a loan. The terms of the loan must be understandable and not unfair, deceptive, or abusive.

1. The Act also prohibits a lender from steering mortgagors to transactions not in their interest in an effort to increase the lender's compensation. 15 U.S.C. §§ 1639b, 1639c.

2. The mortgagor can assert violations of the ability to repay or anti-steering provisions as a defense in a foreclosure proceeding. § 1640(k).

**C. Possession before Foreclosure**. Texas follows a "lien theory" of mortgages and deeds of trust, meaning that the creditor is regarded as only have a security interest in the property rather than having title. Therefore, the creditor may not take possession or dispose of the property until it has been foreclosed upon.

**D. Redemption**.

1. Redemption in Equity. At any time prior to the foreclosure sale, the mortgagor has the right to redeem the land or free it of the mortgage by paying off the amount due, together with any accrued interest.

(a) If the mortgagor has defaulted on the mortgage or note that contains an "acceleration clause" permitting the mortgagee to declare the full balance due in the event of default, the full balance must be paid in order to redeem.

(b) A mortgagor's right to redeem her own mortgage cannot be waived in the mortgage itself (this is known as "clogging the mortgage" and is prohibited). However, the right can be waived later for consideration.

2. Statutory Redemption. Generally speaking, Texas does not have a statutory right to redeem the land being foreclosed (i.e., pay off the amount due).

**E. Deficiency Judgments**. If the proceeds of the sale are insufficient to satisfy the mortgage debt, the mortgagee can bring a personal action against the mortgagor/debtor for the deficiency. However, the deficiency that can be recovered is limited to the difference between the debt and the property's fair market value. § 51.005.

**F. Nonjudicial Foreclosure by Power of Sale**. A power of sale provision in a deed of trust or mortgage gives the trustee the right to sell the property without resorting to court action if the debtor fails to remedy a default. This power emanates from the instrument itself. The remedy is viewed as a harsh one and can only be exercised by strict compliance with the promissory note and conditions of sale. The trustee must strictly follow the terms of the instrument, the provisions of law governing the sale, and the details as prescribed as to the manner of the sale. She must also act with absolute impartiality and fairness to all concerned.

1. Procedure. Compliance with these statutory requirements, as well as those contained in the deed of trust, is a prerequisite to the right of the trustee to make a sale. § 51.002.

(a) The sale under a power of sale must be by public auction sale held between 10 a.m. and 4 p.m. on the first Tuesday of a month, at the county courthouse in the county in which the land is located. If the land is located in more than one county, either county's courthouse is proper.

(b) Notice of sale must be given at least 21 days before the sale date, both to (1) the public, by positing a notice at the courthouse door and by filling a copy with the county clerk, for each county where the property is location; and (2) each debtor, by certified mail.

(c) If used as the debtor's residence, the debt holder must give the debtor at least 20 days to cure the default before giving notice of sale.

2. Property Sold "As Is". A purchaser at a foreclosure sale governed by § 51.002 takes the property as is. No express or implied warranties are included. § 51.009.

3. No Self-Help Repossession. Texas law does not recognized self-help repossession of real estate. Nonjudicial foreclosure transfers of title to the property to the purchaser at the foreclosure sale but does not deliver possession. If the debtor remains on the property, the new owner must ordinarily file a forcible detainer suit to remove the debtor.

## III. Methods to Stop or Delay Foreclosures.

**A. Contact Your Lender**. If you are experiencing difficulties making your mortgage payments, you are encouraged to contact your lender or loan servicer directly to inquire about foreclosure prevention options that are available. If you are experiencing difficulty communicating with your mortgage lender or servicer about your need for mortgage relief, there are organizations that can help by contacting lenders and servicers on your behalf.

1. Conventional Loans. U.S. Department of Housing and Urban Development (HUD)-approved housing counseling agencies are available to provide you with the information and assistance you need to avoid foreclosure free of charge. To view a list of counselors, see http://www.hud.gov/offices/hsg/sfh/hcc/fc/.

2. FHA-Insured Loan. Your lender has to follow FHA servicing guidelines and regulations for FHA-insured loans. If your lender is not cooperative, contact FHA's National Servicing Center toll free at (877) 622-8525 or by email. Whether by phone or email, be prepared to provide the full name(s) of all persons listed on the mortgage loan and the full address of the property including city, state and zip. They may be able to help you more quickly if you can also provide your 13-digit FHA case number from the loan settlement statement.

3. VA-Insured Loan. When your loan defaults, your servicer is responsible for contacting you to determine the reason for the default and attempt to make arrangements to cure it. If the problem cannot be resolved by the time you are two payments past due, the servicer/holder is required to notify VA that your loan is in default. For assistance, call 1-877-827-3702.

**B. Making Home Affordable (MHA) Program**.[38] This HUD program provides several options to help homeowners avoid foreclosure, depending on your particular situation.

1. Modify or Refinance Your Loan for Lower Payments.

(a) Home Affordable Modification Program (HAMP): HAMP lowers your monthly mortgage payment to 31% of your verified monthly gross (pre-tax) income to make your payments more affordable. The typical HAMP modification results in a 40% drop in a monthly

[38] U.S. HUD, Avoiding Foreclosure, http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure.

mortgage payment. Eighteen percent of HAMP homeowners reduce their payments by $1,000 or more.

(b) Principal Reduction Alternative (PRA): PRA was designed to help homeowners whose homes are worth significantly less than they owe by encouraging servicers and investors to reduce the amount you owe.

(c) Second Lien Modification Program (2MP): If your first mortgage was permanently modified under HAMP SM and you have a second mortgage on the same property, you may be eligible for a modification or principal reduction on your second mortgage under 2MP. Likewise, If you have a home equity loan, HELOC, or some other second lien that is making it difficult for you to keep up with your mortgage payments, learn more about this MHA program.

(d) Home Affordable Refinance Program (HARP): If you are current on your mortgage and have been unable to obtain a traditional refinance because the value of your home has declined, you may be eligible to refinance through HARP. HARP is designed to help you refinance into a new affordable, more stable mortgage.

2. "Underwater" Mortgages. In today's housing market, many homeowners have experienced a decrease in their home's value. Learn about these MHA programs to address this concern for homeowners.

(a) Home Affordable Refinance Program (HARP): If you are current on your mortgage and have been unable to obtain a traditional refinance because the value of your home has declined, you may be eligible to refinance through HARP. HARP is designed to help you refinance into a new affordable, more stable mortgage.

(b) Principal Reduction Alternative: PRA was designed to help homeowners whose homes are worth significantly less than they owe by encouraging servicers and investors to reduce the amount you owe.

(c) Treasury/FHA Second Lien Program (FHA2LP): If you have a second mortgage and the mortgage servicer of your first mortgage agrees to participate in FHA Short Refinance, you may qualify to have your second mortgage on the same home reduced or eliminated through FHA2LP. If the servicer of your second mortgage agrees to participate, the total amount of your mortgage debt after the refinance cannot exceed 115% of your home's current value.

3. Assistance for Unemployed Homeowners.

(a) Home Affordable Unemployment Program (UP): If you are having a tough time making your mortgage payments because you are unemployed, you may be eligible for UP. UP provides a temporary reduction or suspension of mortgage payments for at least twelve months while you seek re-employment.

(b) FHA Special Forbearance: If you are having difficulty making mortgage payments because you are unemployed and have no other sources of income, you may be eligible for FHA's Special Forbearance. FHA now requires servicers to extend the forbearance period, by offering a reduced or suspended mortgage payment for up to twelve months, for FHA borrowers who qualify for the program.

4. Managed Exit for Borrowers.

(a) Home Affordable Foreclosure Alternatives (HAFA): If your mortgage payment is unaffordable and you are interested in transitioning to more affordable housing, you may be eligible for a short sale or deed-in-lieu of foreclosure through HAFA SM.

(b) "Redemption" is a period after your home has already been sold at a foreclosure sale when you can still reclaim your home. You will need to pay the outstanding mortgage balance and all costs incurred during the foreclosure process.

**C. Delay Tax Foreclosure if Elderly or Disabled**.[39] An elderly or disabled person has the right to defer payment of property taxes if the property is his/her homestead and he/she has an ownership interest in it. This deferral does not wipe out tax debts; it only postpones the requirement that it be paid right away so you don't lose your property to foreclosure.

**D. Options if You Cannot Keep Your Home**. If your income or expenses have changed so much that you are not able to continue paying the mortgage even under a workout plan offered by your lender, you should consider the options below.

1. Pre-Foreclosure Sale. With your lender's permission you can offer your house for sale and sell it at fair market value even if the amount you receive from the sale is less than the amount you owe. If you meet certain conditions, you may be eligible to receive relocation expenses.

2. Deed-in-Lieu of Foreclosure. As a last resort, you may be able to voluntarily give your property back to your lender. If you leave the property clean and undamaged you may be eligible to receive relocation expenses.

[39] See http://texaslawhelp.org/resource/avoid-tax-foreclosure-if-elderly-or-disabled?ref=KBauH.

# §15. CIVIL SUITS AND DEADLINES

## I. Amended and Supplemental Pleadings.

**A. Pretrial Amendments**. May be made without leave of court if it is made more than 7 days prior to trial. Otherwise, leave of court is required. TCRP Rule 63.

**B. Trial Amendments**. Must always seek leave to file a trial amendment. Opposing party must object to the amendment. Rule 66.

**C. Continuance**. If the court grants leave to file an amendment, the opposing party should ask the court for a continuance to preserve error.

## II. The Defendant's Due Order of Pleadings.

**A.** The defendant will waive any of the following pleadings if they are done out of order or are not raised in a consolidated response:

1. Special Appearance.

2. Motion to Transfer Venue.

3. Special Exception.

4. The Answer (or Consolidated Answer). The answer must be filed by 10:00 a.m. on the first Monday after the expiration of 20 days from the date the defendant was served with process. This rule applies to corporate as well as individual defendants. Rule 99(b).

## III. Discovery.

**A. Responses to Written Discovery**. Responses are due within 30 days after service of the request. If the defendant is served with a request before the answer is due, then the defendant has 50 days after service to respond.

**B. Production of Documents Self-Authenticating**. A party's production of a document authenticates the document for use against that arty in any pretrial proceeding or at trial unless the party objects to the authenticity of the document within 10 days after that party has notice that the document will be used.

**C. Supplementing Discovery**. A party has the duty to supplement written discovery when the party has responded and knowns that the response was incorrect or incomplete when made. This should be done reasonably promptly, but not less than 30 days before trial.

## IV. Disposing of the Case Without Trial.

**A. Default Judgments**. The plaintiff may move for a default judgment any time after the day the answer is due if, among other things, the citation with the officer's return on it has been on file with the clerk 10 days, excluding the day of filing and the day judgment. Rule 237a.

1. Setting the Judgment Aside. A motion for new trial must be filed within 30 days after the date the judgment is signed. A restricted appeal must be filed within 6 months. An equitable bill of review must be filed within 4 years.

**B. Motion for Summary Judgment**.

1. Except on leave of court, the motion and any supporting affidavits must be filed and served at least 21 days before the time specified for the hearing.

2. The adverse party, not later than 7 days prior to the hearing, may file and serve opposing affidavits or other written response to the motion. Rule 166a.

## V. Right to a Jury Trial.

**A.** To perfect the right to a jury trial, civil litigants must file a written request for a jury trial with the clerk and pay the fee no later than 30 days before the trial date. Rule 216.

## VI. Setting Aside the Verdict or Judgment.

**A. Judgment Notwithstanding the Verdict**. Although the rules do not have a time limit for its filing, case law provides that it may be filed after the court has entered judgment, but before it becomes final.

**B. Motion for New Trial**. The original and any amended motions for new trial must be filed within 30 days after the judgment is signed.

**C. Appeals.**

1. No Motion for New Trial. The notice of appeal must be filed within 30 days from the date the judgment is signed.

2. Motion for New Trial. The motion must be filed within 90 days from the date the judgment is signed.

# §16. EMPLOYMENT

## A. Discrimination

### I. Types of Employment Discrimination.[40]

**A. Age**. Texas Labor Code Chapter 21 and the Age Discrimination in Employment Act (ADEA) forbid discrimination against people who are age 40 or older.

1. Job Notices & Ads. It is unlawful for an employer to include age requirements or limitations in job notices or advertisements. An employer may specify an age limit only when age is shown to be reasonably necessary to the operation of the business.

2. Pre-Employment Questions. State and federal laws do not specifically prohibit an employer from asking an applicant's age or date of birth. However, asking for that information could indicate possible intent to discriminate based on age or may keep older workers from applying for employment. If the age information is needed for a lawful purpose, an employer can ask after the employee is hired.

**B. Sex**. Texas Labor Code Chapter 21 and Title VII of the Civil Rights Act protect employees from employment discrimination based on sex or sexual harassment.

1. Definition. Sex discrimination is when you are treated differently than other employees because you are a male or female (including pregnancy) and includes stereotypes and assumptions based on sex. Examples of unlawful actions are denial of hiring, termination, promotion or any other term, condition or privilege of employment.

2. Sexual Harassment. Sexual harassment can be unwelcome advances, requests for sexual favors, or physical touching of a sexual nature. If you are subjected to any such behaviors and they unreasonably interfere with your work performance or create an intimidating, hostile or offensive work environment, then that may be sexual harassment. If you are subjected to an adverse employment action because you rejected any of those behaviors, that may be sexual harassment. Simple teasing, offhand comments or isolated incidents may not be considered sexual harassment.

**C. Color**. Texas Labor Code Chapter 21 (Chapter 21) and Title VII of the Civil Rights Act protect individuals against employment discrimination on the basis of color. An employer may not discriminate against any employee or applicant in hiring, termination, promotion, compensation, job training or any other term, condition or privilege of employment. Employers also may not legally base employment decisions on stereotypes and assumptions about abilities, traits or the performance of individuals based on color.

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[40] Texas Workforce Commission, Employee Rights & Laws, http://www.twc.state.tx.us/jobseekers/employee-rights-laws.

1. Harassment. Ethnic slurs, jokes, offensive or derogatory comments, or other verbal or physical conduct based on a person's color constitute unlawful harassment if the conduct creates an intimidating, hostile or offensive working environment, or interferes with the individual's work performance.

**D. Racial**. Texas Labor Code Chapter 21 and Title VII of the Civil Rights Act protect individuals against employment discrimination on the basis of race. An employer may not discriminate against any employee or applicant in hiring, termination, promotion, compensation, job training or any other term, condition or privilege of employment. Employers may not legally base employment decisions on stereotypes and assumptions about abilities, traits or the performance of individuals of certain racial groups. Employers cannot make employment decisions based on issues involving race.

1. Harassment. Ethnic slurs, racial jokes, offensive or derogatory comments, or other verbal or physical conduct based on a person's race constitute unlawful harassment if the conduct creates an intimidating, hostile or offensive working environment, or interferes with the individual's work performance.

2. Segregation & Classification of Employees. Employers may not legally do any of the following:

(a) Segregate minority employees by physically isolating them from other employees or customer contact;

(b) Assign primarily minorities to predominantly minority establishments or geographic areas;

(c) Exclude minorities from certain positions, or group or categorize employees or jobs so that certain jobs are generally held by minorities; OR

(d) Code applications or resumes to designate an applicant's race to exclude them from employment or from certain positions.

**E. National Origin**. Texas Labor Code Chapter 21 and Title VII protect individuals against employment discrimination on the basis of national origin. National origin is identified as the birthplace, ancestry, culture or linguistic characteristics common to a specific ethnic group.

1. English-Only Rule. An employer may require employees to speak only English at all times on the job if the employer meets all of these requirements: (i) shows that speaking only English is necessary for conducting business; (ii) tells all employees when they must speak English; AND (iii) tells all employees the consequences for violating the rule.

(a) If an employer makes negative employment decisions based on an employee breaking an English-only rule, it may be discrimination unless all of three conditions are met.

2. Accent or Manner of Speaking. If an employer denies an employment opportunity because of an individual's accent or manner of speaking, the employer must show a legitimate, nondiscriminatory reason. A discrimination complaint investigation will focus on the qualifications of the person and whether his or her accent or manner of speaking had a negative effect on job performance. Requiring employees or applicants to be fluent in English may violate the law if the requirement is adopted to exclude individuals of a particular national origin and is not related to job performance.

3. Harassment. Employers have a responsibility to maintain a workplace free of national origin harassment. An ethnic slur or other verbal or physical conduct because of an individual's nationality constitute harassment if they have any of these effects: (i) create an intimidating, hostile or offensive working environment; (ii) unreasonably interfere with work performance; or (iii) negatively affect an individual's employment opportunities.

(a) Employers may be responsible for any on-the-job harassment by their agents and supervisory employees, regardless of whether the acts were authorized or specifically forbidden by the employer.

(b) Under certain circumstances, an employer may be responsible for the acts of non-employees who harass their employees at work.

**F. Religious**. Texas Labor Code Chapter 21 and Title VII prohibit employers from discriminating against individuals because of their religion in hiring, termination and other terms and conditions of employment.

1. Undue Hardship. An employer can claim undue hardship when asked to accommodate an employee's religious practices if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work.

2. Reasonable Accommodation. Employers are required to reasonably accommodate the religious practices of an employee or prospective employee. Examples of reasonable accommodations for religion are flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers (among others).

**G. Disability**. Texas Labor Code Chapter 21 and the Americans with Disabilities Act (ADA) prohibit employers from discriminating against applicants or employees with disabilities in job application, procedures, conditions and privileges of employment.

1. Qualified Individual. A qualified individual under Chapter 21 and ADA meets one or more of these requirements: (i) has a physical or mental disability that substantially limits one or more major life activities; (ii) has a record of having a disability; or (iv) is regarded as having a disability.

2. Reasonable Accommodation. An employee with a disability must be able to perform the essential functions of their job with or without a reasonable accommodation. If you need an accommodation due to a disability, you must request it from your employer. A reasonable accommodation is a requested item or action that would enable you to perform the required functions of your job.

(a) An employer is required to make a reasonable accommodation unless the request causes significant difficulty or expense to the employer.

(b) An employer is not required to lower quality or production standards for disabled applicants or employees.

3. Medical Examination & Questions. When you apply for a job, the employer may not ask you if you have a disability. The employer can ask you about your ability to perform specific job functions. A job offer can be based on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the business' needs.

## II. How to Submit an Employment Discrimination Complaint.

**A. Overview**. If you believe you may have been discriminated against in employment and meet the complaint requirements listed on this page, you may submit a discrimination complaint through the TWC Civil Rights Division. The Civil Rights Division conducts neutral investigations and gathers information to determine if discrimination has occurred under the Texas Labor Code. It works in cooperation with the federal Equal Employment Opportunity Commission (EEOC) to resolve employment discrimination allegations.

1. When you submit an employment discrimination complaint with the Civil Rights Division, it is automatically submitted with EEOC through their Worksharing Agreement. You cannot submit with both the Civil Rights Division and the EEOC.

**B. Complaint Requirements**. To submit an employment discrimination complaint to us, all of these requirements must be met:

1. The physical address you worked at must be within the state of Texas;

2. The company must have 15 or more employees;

3. The date of discrimination must have occurred within the last 180 days from the date you are submitting the complaint;

4. Your discrimination allegation must specify one or more of the following types: race, color, national origin, religion, sex, age or disability; AND

5. Your complaint must identify employment harm such as demotion, denial of promotion or termination.

**C. How to Submit a Complaint**. You can submit an employment discrimination complaint by e-mail, by postal mail or in person (not by phone). You must submit your complaint ***within 180 days from the date of the discrimination***. When you submit a complaint, you will be required to sign a Confidentiality Statement agreeing that all documentation of the investigation will not be shared with anyone except your attorney.

1. The TWC will send you an invitation to mediation or alternative dispute resolution in an effort to resolve your complaint. If you choose mediation (also known as alternative dispute resolution), you and the company representative will meet with a mediator. If your complaint is settled through mediation, it will be closed and our process concluded. If you decline mediation or the mediation fails, then your complaint will be assigned to an investigator.

2. Submit Complaint in Writing. Download and print the Employment Discrimination Complaint form, complete the form, and mail it to:

Texas Workforce Commission
Civil Rights Division
101 E 15th St, Rm 144-T
Austin, TX 78778-0001

3. Submit Complaint in Person. You may submit a complaint in person at the TWC office during business hours.

Texas Workforce Commission
Civil Rights Division
1117 Trinity St, Rm 144-T
Austin, TX 78701

# B. Workers' Compensation

## I. Determining if the Injured Employee is Entitled to Compensation.

**A. Does the Employer Have Workers' Compensation**? In Texas, employers are not required to obtain workers' compensation insurance, but they have the right to. Tex. Lab. Code §§ 406.001-003.

1. The Workers' Compensation Act provides that, except for public employers and as otherwise provided by law, any employer, defined for this purpose as a person who employs one or more employees, may elect to obtain workers' compensation insurance coverage, and an employer who elects to obtain coverage is subject to the Texas Workers' Compensation Act. Such coverage may be obtained through a licensed insurance company or though self-insurance as provided by the Act.

2. If the employer elects to obtain workers' compensation insurance coverage, then workers' compensation is the injured employee's exclusive remedy.

**B. Is the Injured Person Considered an "Employee"**? As a general rule, workers' compensation laws extend benefits only to employees. ***Independent contractors are not covered by workers' compensation laws***. The claimant must, at the time of injury, be subject to the workers' compensation laws. § 406.031.

1. "Employee" means a person in the service of another under a contract of hire, whether express or implied, or oral or written. § 401.012.

2. Test. The test to determine whether a worker is an employee or an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the employee's work. This same test applies whether the claim arises at common law or under workers' compensation. The employer must control not merely the end sought to be accomplished, but also the means and details of its accomplishment as well. *Thompson v. Travelers Indem. Co. of Rhode Island*, 789 S.W.2d 277, 278-79 (Tex. 1990). Examples of the type of control normally exercised by an employer include:

(a) When and where to begin and stop work,

(b) The regularity of hours,

(c) The amount of time spent on particular aspects of the work,

(d) The tools and appliances used to perform the work, and

(e) The physical method or manner of accomplishing the end result.

**C. Was the Employee's Injury a Compensable Injury**? The term "compensable injury" means an injury that arises out of and in the course and scope of employment for which compensation is payable under the Act. § 401.011(10).

1. "Injury" means damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease. § 401.011(26).

2. "Occupational disease" means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease. § 401.011(34).

**D. If So, the Employee is Covered, Unless an Exception Applies**. § 406.032. An insurance carrier is not liable for compensation if (i) the employee's horseplay was a producing cause of the injury; or (ii) the injury:

1. Occurred while the employee was in a state of intoxication; OR

2. Was caused by the employee's willful attempt to injure himself or to unlawfully injure another person; OR

3. Arose out of an act of a third person intended to injure the employee because of a personal reason and not directed at the employee because of the employment; OR

4. Arose out of voluntary participation in an off-duty recreational, social, or athletic activity that did not constitute part of the employee's work-related duties, unless the activity is a reasonable expectancy of or is expressly or impliedly required by the employment; OR

5. Arose out of an act of God, unless the employment exposes the employee to a greater risk of injury from an act of God than ordinarily applies to the general public.

## II. Workers' Compensation Procedure.

**A.** Notify Employer of the Injury. This must be done within 30 days after the injury occurred or after the employee learned of the injury. § 409.001. Failure to do so relieves the employer and the employer's insurer of liability unless they actually knew of the injury or there is good cause. § 409.002.

**B. File a Claim**. A claim must be filed with the Division of Workers' Compensation (DWC) within one year after the injury occurred or after it was learned of. § 409.003. Failure to do so relieves the employer and employer's insurer from liability unless there is good cause. § 409.004.

## III. How to File a Claim.

**A.** There are three different ways for you to provide the DWC information about a Claim for Compensation for a Work Related Injury or Occupational Disease (DWC Form-041):

1. Complete an interactive form and send it to the DWC.

2. Use the web-enabled form at: www.txcomp.tdi.state.tx.us/TXCOMPWeb/notice/iec/SelectLanguage.jsp

3. Call the DWC at 1-800-252-7031 to have a paper copy of the DWC Form-041 mailed to you.

**B.** Beneficiaries of an employee who died from a work-related injury or illness or occupational illness may file a DWC Form-042, Beneficiary Claim for Death Benefits, with DWC.

1. This form is available on the TDI website at: www.tdi.texas.gov/forms/dwc/dwc042benclm.pdf

2. Call the DWC at 1-800-252-7031 to have a paper copy mailed to you.

# §17. EDUCATION

## A. Admission, Review, and Dismissal (ARD) Process[41]

### I. Talk to Child's Teacher or Principal.

**A. The First Step**. If you have concerns about your school-aged child's learning or behavior, the first step is to talk to your child's teacher or the school principal about your concerns. If this step is unsuccessful, you should ask school personnel about making a referral to the campus-based student support team, which is a team of teachers, and other personnel who meet regularly to address any learning or behavioral concerns that children are having.

**B. Response to Intervention (RtI)**. Before a child who is experiencing difficulty in the general education classroom is referred for an initial special education evaluation, the child should be considered for all support services available to all children. These services may include, but are not limited to: tutoring; remedial services; compensatory services; response to scientific, research-based intervention; and other academic or behavior support services.

### II. The Initial Evaluation.

**A. Referral for an Initial Evaluation**. A child does not need to advance through each tier of the RtI system before a referral for special education is made. Once it is apparent that general education interventions are not sufficient, school personnel should suspect that the child has a disability and should initiate a referral. Parents can also request a referral at any time, regardless of whether the child is receiving interventions through an RtI system.

**B. Prior Written Notice**. If you make a written request, the school must, not later than the 15th school day after the date the school receives the request, either give you:

1. Prior written notice of its proposal to conduct an evaluation, a copy of the Notice of Procedural Safeguards, and the opportunity to give written consent for the evaluation; OR

2. Prior written notice of its refusal to evaluate your child and a copy of the Notice of Procedural Safeguards.

> ***NOTE***: prior written notice is also required any time the school proposes or refuses to initiate or change the identification, evaluation, educational program, or educational placement of your child or the provision of a FAPE (free appropriate public education) to your child.

[41] TEA, Parent's Guide to the ARD Process, https://framework.esc18.net/Documents/ARD_Guide_ENG.pdf.

**C. Parental Consent**. There are certain activities in the special education process that cannot take place unless the school obtains your consent. The school must fully inform you of all the information needed to be able to make a good decision, including a description of the proposed activity. The information must be in your native language or other mode of communication. If there are records to be released, the school must list the records and to whom they will be released.

1. Effect of Consent. When you give consent, it means that you understand and agree in writing for the school to carry out the activity for which consent is sought. It is important that you understand that the consent is voluntary and may be revoked at any time before the activity taking place. However, if you revoke consent for an activity, it is not retroactive.

2. The following are examples of activities that require your consent:

(a) Evaluating your child for the first time;

(b) Reevaluating your child if more information is needed;

(c) Providing special education/related services for the first time;

(d) Excusing an ARD committee member from attending an ARD committee meeting; AND

(e) Inviting a representative of any participating agency that's likely to be responsible for providing/paying for secondary transition services.

**D. The Evaluation**. If you give your consent for an initial evaluation, the school will conduct an evaluation of your child in all areas of suspected disability to determine if your child has a disability and to determine his or her educational needs.

1. The evaluation process for your child must:

(a) Include information about your child's academic, developmental and functional performance;

(b) Be administered by trained and knowledgeable personnel;

(c) Be administered in your child's native language or other mode of communication; and

(d) Be unbiased, or given in such a way so as not to discriminate against your child, regardless of his or her cultural background, race, or disability.

2. Timeframe. The initial evaluation must be completed no later than 45 days after the school receives your written consent.

3. Refusal of Consent. If you do not consent to the initial evaluation, the school may, but is not required to, pursue the evaluation by asking for mediation or requesting a due

process hearing. If the school decides not to pursue the evaluation, the school does not violate the requirement under IDEA to identify, locate, and evaluate all children with disabilities who are in need of special education and related services. This requirement is referred to as the child find duty.

## III. The ARD Committee Meetings.

**A. The Committee**. After the initial evaluation report is completed, an ARD committee must be formed to review the report and determine whether your child is eligible for special education and related services.

1. The ARD committee members include the following:

(a) You, the parent;

(b) At least one regular education teacher of the child;

(c) At least one special education teacher or provider of the child;

(d) A representative of the school;

(e) A person who can interpret the instructional implications of the evaluation results;

(f) Other individuals who have knowledge or special expertise regarding the child and are invited by either you or the school;

(g) Whenever appropriate, the child;

(h) To the extent appropriate, with your written consent or with that of the adult student, a representative of any participating agency that is likely to be responsible for providing/paying for transition services;

(i) A representative from career and technical education, preferably the teacher, if the child is being considered for initial or continued placement in career or technical education; and

(j) A staff member who is on the language proficiency assessment committee, if the child is identified as an English language learner.

2. The ARD committee also includes, as applicable, a teacher who is certified in the education of students with:

(a) Auditory impairments, if the child has a suspected or documented auditory impairment;

(b) Visual impairments, if the child has a suspected or documented visual impairment; or

(c) Visual and auditory impairments, if the child has suspected or documented deaf-blindness.

3. Written Notice must be given to you at least 5 school days in advance of the committee meeting, and must include the purpose, time, location, and a list of who will be attending.

## IV. Eligibility.

**A. The Test**. There is a two-part test for determining whether your child is eligible for special education and related services:

1. Your child must have a disability; AND

2. As a result of the disability, your child must need special education and related services to benefit from education.

**B. Meaning of "Disability"**. To meet the first part of the two-part test for eligibility, a child between the ages of 3 through 21, except as noted, must meet the criteria for one or more of the disability categories listed below:

1. Auditory impairment (from birth);
2. Autism;
3. Deaf-blindness (from birth);
4. Emotional disturbance;
5. Intellectual disability;
6. Multiple disabilities;
7. Non-categorical early childhood (ages three through five);
8. Orthopedic impairment;
9. Other health impairment;
10. Specific learning disability;
11. Speech or language impairment;
12. Traumatic brain injury; or
13. Visual impairment (including blindness from birth).

**C. Timeframe**. The ARD committee must make the eligibility determination within 30 calendar days from the date of completion of the initial evaluation report. If the 30th day falls during the summer, then the committee has until the first day of classes.

**D. Limits**. If your child's problems are primarily from a lack of appropriate instruction in reading or math or due to the fact that your child has limited English proficiency, your child is not eligible for special education services. If the evaluation reflects that your child does not have a disability, the campus-based support team may meet and recommend other services or programs in general education to help your child.

## V. Individualized Education Program (IEP).

**A. When Required**. If your child qualifies for special education services, the school is required to provide a FAPE (free appropriate public education) in the least restrictive environment. This is accomplished through the ARD committee's development of an IEP and the school's implementation of the IEP.

1. Consent Required. Before the school can provide any initial special education and related services; however, it must obtain your consent for services. The school must make reasonable efforts to obtain your consent for the initial provision of services. If you do not consent to the initial provision of services, the school may not ask for mediation or request a due process hearing to override your refusal to consent to services. No special education and related services will be provided if you refuse consent.

**B. Components of IEP**. The major components of the IEP include:

1. Your child's PLAAFP (present levels of academic achievement and functional performance);

(a) Includes how the disability affects involvement and progress in the general curriculum. If your child is in preschool, the statement must explain how the disability affects participation in age-appropriate activities.

2. Annual goals designed to meet your child's needs resulting from the disability so that he or she can be involved and progress in the general curriculum;

(a) These goals must also address other educational needs that result from your child's disability. The IEP must describe how your child's progress toward the annual goals will be measured as well as when the progress reports will be provided to you.

3. A description of the special education, related services, and supplementary aids and services that will be provided;

(a) The ARD committee decides what services are needed to: (i) enable the child to advance appropriately toward attaining the annual goals; (ii) be involved and make

progress in the general curriculum (including participation in extracurricular and nonacademic activities); and (iii) be educated and participate with children without disabilities.

(b) Services must be based on peer-reviewed research, as practicable. The IEP must also contain a statement of any needed program modifications and supports for school personnel that will be provided, and must include the projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of services and modifications.

4. Information regarding participation in state and districtwide assessments;

(a) Under federal law, state assessments must be given to all children to determine if schools have been successful in teaching children the state academic content standards. Children receiving special education services will take the appropriate state assessments based on grade-level content.

(b) If the ARD committee determines that accommodations are necessary for your child to participate in assessments, the IEP must contain a statement of the appropriate accommodations.

(c) If the ARD committee determines that your child must take an alternate assessment instead of a particular state or districtwide assessment, statements must be provided regarding why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate. In addition, your child's IEP must contain a description of benchmarks or short-term objectives as part of the child's annual goals.

(d) If your child does not perform satisfactorily on a state assessment, the ARD committee must address the manner in which the child will participate in an accelerated or intensive program of instruction.

5. Transition services, when age-appropriate; and

(a) Transition services are a coordinated set of activities designed to help the child move from school to post-school activities.

(b) State transition planning must begin by age 14 (e.g., appropriate student/parent involvement in the transition to life outside the school system, postsecondary education options, functional vocational evaluation, employment goals/objectives, independent living goals/objectives, and appropriate circumstances to consult a governmental agency for services).

(c) Federal law requires that beginning not later than the first IEP to be in effect when the child turns 16, the IEP must include appropriate measurable post-secondary goals based upon age-appropriate transition assessments related to training, education, employment and,

where appropriate, independent living skills. The IEP must include transition services needed to assist the child in reaching those goals.

6. Other areas that must be addressed for children with certain disabilities, needs, or circumstances.

**C. Considerations**. In developing the IEP, there are several things the ARD committee must consider, including:

1. The strengths of your child;

2. Your concerns for enhancing the education of your child;

3. The results of the most recent evaluation of your child; and

4. The academic, developmental, and functional needs of your child.

**D. Special Factors**. In addition, the ARD committee must address special factors for some children, as follows:

1. Consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior when a child's behavior impedes learning;

2. Consider the language needs of the child as those needs relate to the child's IEP when the child qualifies as a child with limited English proficiency;

3. Provide for instruction in braille and the use of braille, unless the committee determines that instruction in braille or the use of braille is not appropriate for the child when the child is blind or visually impaired;

4. Consider the communication needs of the child, and for the child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

5. Consider whether the child needs assistive technology devices and services.

**E. Extended School Year Services**. The ARD committee must consider whether your child qualifies for ESY services. Your child qualifies for ESY services if, in one or more critical areas addressed in your child's current IEP, your child has exhibited, or reasonably may be expected to exhibit, severe or substantial regression that cannot be regained within a reasonable period of time. The term severe or substantial regression means that the child has been, or will be, unable to maintain one or more acquired critical skills in the absence of ESY services.

1. If the ARD committee determines that your child is in need of ESY services, then the IEP must identify which of the goals and objectives in the IEP will be addressed during ESY services. If your school does not propose to discuss ESY services at your child's annual ARD committee meeting, you may request that your child's committee discuss eligibility for ESY services.

**F. ARD Committee Decision**. A decision of the ARD committee concerning the required elements of the IEP must be made by mutual agreement of the members, if possible (a "consensus"). The ARD committee should work toward consensus, but the school has the ultimate responsibility to ensure that the IEP includes the services that your child needs in order to receive a FAPE. It is not appropriate to make ARD committee decisions based upon a majority vote.

1. If you disagree with the decisions of the ARD committee, you will be offered a single opportunity to have the committee recess for a period of time not to exceed 10 school days, unless otherwise agreed. If you accept the offer to recess and reconvene, the ARD committee must schedule the reconvened meeting at a mutually-agreed-upon time and place.

(a) However, if your child's presence on the campus presents a danger of physical harm to your child or others, or if your child has committed an expellable offense or an offense which may lead to a placement in a disciplinary alternative education program, the ARD committee does not have to recess even if you disagree with the decisions of the ARD committee.

2. During a recess, the members must consider alternatives, gather additional information, prepare further documentation, and/or obtain additional resource persons who may assist in enabling the committee to reach mutual agreement. If the committee meets again and you continue to disagree, unless the disagreement involves the initial provision of services for which consent is required, the school must implement the IEP that the school has decided is appropriate.

3. When mutual agreement is not reached, a written statement of the basis for the disagreement must be included in the IEP. If you disagree with an ARD committee decision, you must be offered the opportunity to write your own statement of disagreement. The school must provide you with prior written notice at least five school days before implementation of the IEP, unless you agree to a shorter timeframe.

4. The ARD committee may also choose to recess for reasons other than failure to reach agreement about all required elements of the IEP.

## VI. Review of the Individualized Education Program.

**A. Purpose**. The ARD committee must meet at least once a year to review your child's IEP and determine whether the annual goals are being met. The ARD committee may meet more often than annually to revise your child's IEP, as appropriate, to address (among others):

1. Any lack of expected progress toward annual goals and in general curriculum;

2. The results of any reevaluation;

3. Information about the child provided to, or by, the parents; or

4. Anticipated needs of the child.

**B. Requesting**. You may request an ARD committee meeting to discuss educational concerns about your child. The school must either grant your request or, within five school days, provide you with written notice explaining why the school refuses to convene a meeting.

**C. Changes without Meeting**. You and the school may agree to make changes to the IEP without holding an ARD committee meeting. However, changes to eligibility determination, placement, and manifestation determinations must be made in an ARD committee meeting.

## VII. Reevaluation.

**A. Required**. Once your child begins receiving special education and related services, periodic reevaluations are required. A reevaluation is similar to the initial evaluation. The reevaluation must be comprehensive enough to determine whether your child continues to be a child with a disability and needs special education services. Unless you and the school agree otherwise, a reevaluation of your child's needs must be done at least every three years. No more than one reevaluation may occur within a year unless you and the school agree.

**B. Parental Consent**. The school must make reasonable efforts to obtain your consent. If you fail to respond despite reasonable efforts, the school may conduct a reevaluation without your consent. If you refuse consent for reevaluation of your child, the school may, but is not required to, ask for mediation or request a due process hearing to override your lack of consent. The school does not violate its child find duty or its obligation to evaluate your child if the school does not seek to override your refusal to consent to the reevaluation.

## VIII. Independent Educational Evaluation (IEE).

**A. Overview**. If you disagree with an evaluation or reevaluation by the school, you may request an IEE at school expense. The school must give you information about where an IEE may be obtained and must give you a copy of the school's criteria for obtaining an IEE. The IEE must meet school criteria.

**B. Once Requested**. If you request an IEE, the school must either pay for the IEE or request a due process hearing to show that its evaluation is appropriate. You are entitled to only one IEE at public expense each time the school conducts an evaluation. If the school requests a hearing and the hearing officer decides that the school's evaluation is appropriate, you still have the right to an IEE, but not at the school's expense. Information obtained from an IEE that meets school criteria must be considered by the ARD committee with respect to the provision of a FAPE regardless of whether the school pays for the IEE.

## IX. Discipline.

**A. Short-Term Removals**. School officials may remove your child from his or her current educational placement if your child violates the code of student conduct. This removal can be to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 consecutive school days (to the extent that the disciplinary measure is applied to children without disabilities); and, for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change in placement). This is often referred to as the 10-day rule.

1. Disciplinary removals for 10 consecutive school days or less do not trigger the requirement to hold an ARD committee meeting. The school is only required to provide services to your child during a short-term removal if it provides services to a child without a disability who is similarly removed.

**B. Change of Placement**. A removal of a child with a disability from his or her current educational placement is a "change of placement" if the removal is for more than 10 consecutive school days or the child has had a series of removals that constitute a pattern. The school will determine on a case-by-case basis whether a pattern of removals amounts to a change of placement. You may challenge the school's decision about this through a due process hearing or judicial proceeding. A pattern of removals occurs when:

1. The removals total more than 10 school days in a school year;

2. The child's behavior is largely similar to the child's behavior in past incidents that resulted in the series of removals; and

3. Other factors like the length of removals, the total amount of time the child has been removed, and the proximity of removals to one another.

**C. Manifestation Determination.**

1. When conducting a manifestation determination, the ARD committee must review all relevant information in your child's file, including the IEP, any teacher observations, and any relevant information provided by you to determine:

(a) If the conduct in question caused by, or had a direct and substantial relationship to, your child's disability; or

(b) If the conduct in question was the direct result of the school's failure to implement the IEP.

2. If the ARD committee determines that either of these conditions is met, then the conduct is a manifestation of the child's disability. If the ARD committee determines that neither condition is met, then the conduct is not a manifestation of the child's disability.

**D. When Conduct is a Manifestation.**

1. If the conduct is a manifestation of your child's disability, the ARD committee must either:

(a) Conduct a functional behavioral assessment (FBA), unless the school had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a BIP; or

(b) If a BIP is already in place, review the BIP and modify it as necessary to address the behavior.

2. In addition, the ARD committee must return your child to the placement from which your child was removed unless: (i) you and the school agree to a change of placement as part of the modification of your child's BIP; OR (ii) your child's violation of the code of student conduct involves one of the special circumstances described below.

3. If it concludes that your child's conduct was caused by the school's failure to implement the IEP, the school must take immediate steps to remedy the deficiencies.

**E. When Conduct is Not a Manifestation**. If the conduct was not a manifestation of your child's disability, school personnel may discipline your child in the same manner as other children, except appropriate educational services must continue. The child's ARD committee will determine the IAES in which the child will be served.

**F. Special Circumstances**. School personnel may remove your child to an IAES for up to 45 school days without regard to whether the behavior is a manifestation of his or her disability in cases where your child:

1. Carries/possesses a weapon on school premises or at a school function;

2. Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function; or

3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function.

# B. Truancy (Failure to Attend School)

**I. Persons Required to Attend School.** Tex. Educ. Code § 25.085.

**A. Children**. A child is required to attend school:

1. If the child is: (i) at least 6 years of age; OR (ii) younger than 6 years of age, has previously been enrolled in first grade, AND who has not yet reached the 19th birthday.

2. On enrollment in prekindergarten or kindergarten.

**B. Over 18 Years Old**. A person who voluntarily enrolls in or attends school after the person's 19th birthday shall attend school each school day for the entire period of the program. Enrollment may be revoked after the person has more than 5 unexcused absences in a semester.

1. The board of trustees may adopt a policy requiring a person who voluntarily enrolls in school or voluntarily attends school after the person's 19th birthday, but who is under 21 years of age, to attend school until the end of the school year.

2. A parent of a student 19 years of age or older may not be charged with "parent contributing to nonattendance." The school district does not need to notify a parent of the consequences of failing to attend school.

**C. Additional Requirements**. A student enrolled in a school district must attend:

1. An extended year program for which the student is eligible that is provided by the district for students identified as likely not to be promoted to the next grade level, or tutorial classes required by the district under § 29.084 (if the student's grade in a subject is below 70/100);

2. An accelerated reading instruction program assigned to which the student is assigned under § 28.006(g) (if the student is at risk for dyslexia or another reading difficulty);

3. An accelerated instruction program to which the student is assigned under § 28.0211 (if the student fails to perform satisfactorily on an assessment);

4. A basic skills program assigned under § 29.086 (for 9th grade students lacking the basic skills to graduate high school); OR

5. A summer program provided under §§ 37.008(l) (when necessary to graduate) or 37.021 (if the student failed to complete a course to due suspension).

**D. Exemptions from Compulsory Attendance**. Tex. Educ. Code § 25.086. A child is exempt from the requirements of compulsory school attendance if the child:

1. Attends private or parochial school with a course in good citizenship;

2. Is eligible to participate in a school district's special education program under § 29.003 who cannot be appropriately served by the resident district;

3. Has a physical or mental condition of a temporary and remediable nature that makes attendance infeasible, holding a certificate from a qualified physician;

4. Is expelled in a district without a mandatory juvenile justice alternative education program;

5. Is at least 17 years old and attending a course in preparation for the high school equivalency examination, and: (i) has the permission of the child's parent; (ii) is under court order; (iii) has established a separate residence; or (iv) is homeless;

6. Is at least 17 years old with a high school diploma or equivalency certificate;

7. Is at least 16 years old and is attending a course in preparation for the high school equivalency examination if: (i) a public agency with supervision or custody of the child under court order has recommended it; or (ii) the child is enrolled in a Job Corps training program;

8. Is at least 16 years of age and is enrolled in a high school diploma program;

9. Is enrolled in the Texas Academy of Mathematics and Science;

10. Is enrolled in the Texas Academy of Leadership in the Humanities;

11. Is enrolled in the Texas Academy of International Studies;

12. Is enrolled in the Texas Academy of Mathematics and Science at the University of Texas at Brownsville; or

13. Is specifically exempted under another law.

**II. Truant Conduct.** Tex. Educ. Code § 65.003.

**A. The Definition**. A child engages in truant conduct if:

1. The child is required to attend school under § 25.085 (above); AND

2. Fails to attend school on 10 or more days or parts of days within a six-month period in the same school year.

**B. Civil Case**. Truant conduct may be prosecuted ***only*** as a civil case in truancy court. Prior to September 2015, truancy was a criminal offense that could result in jail time. Now, it is only a civil offense for the child-student. However, it remains a misdemeanor criminal offense for parents that contribute to the nonattendance (see below).

**C. Defense**. It is an affirmative defense to an allegation of truant conduct that one or more of the absences required to be proven (i) have been excused by a school official or by the court; OR (ii) were involuntary. However, the defense only counts if there are an insufficient number of unexcused or voluntary absences remaining to constitute truant conduct.

1. The burden is on the child to show by a preponderance of the evidence that the absence has been or should be excused or that the absence was involuntary.

2. A decision by the court to excuse an absence does not affect the ability of the school district to determine whether to excuse the absence for another purpose.

**III. Excused Absences.** § 25.087.

**A. Generally**. A student may be excused for temporary absence resulting from any cause acceptable to the teacher, principal, or superintendent of the school.

**B. When Mandatory**. A school district must excuse an absence for:

1. Observing religious holy days (including travel);

2. Attending a required court appearance (including travel);

3. Appearing at a governmental office to complete paperwork required in connection with the student's application for US citizenship (including travel);

4. Taking part in a US naturalization oath ceremony (including travel);

5. Serving as an election clerk (including travel);

6. If the student is in the conservatorship of the DFPS, participating, as determined and documented by the department, in an activity (including travel):

(a) Ordered by a court under Ch. 262 or 263, Fan. Code, provided that it is not practicable to schedule the participation outside of school hours; or

(b) Required under a service plan under Ch. 263B, Fam. Code; OR

7. A temporary absence resulting from an appointment with health care professionals for the student or the student's child if the student commences classes or returns to school on the same day of the appointment.

**IV. Truancy Court.** § 25.0951.

**A. Referral to Truancy Court**. If a student fails to attend school without excuse on 10 or more days or parts of days within a six-month period in the same school year, a school district shall, within 10 school days of the student's 10th absence, refer the student to a truancy court for truant conduct under § 65.003(a) , Family Code. § 25.0951.

**B. Parent Contributing to Nonattendance**. A school district may also file a complaint against the student's parent in a county, justice, or municipal court for an offense under § 25.093 if the school district provides evidence of the parent's criminal negligence. The term "parent" includes a person standing in parental relation. § 25.0951.

1. The parent commits the offense of contributing to nonattendance if (i) the parent receives a notice of the child's nonattendance and (ii) acts with criminal in failing to require the child to attend school. § 25.093(a).

2. ***Each day*** that the child remains out of school may constitute a ***separate offense***. § 25.093(c-1). The offense is a misdemeanor, punishable by fine only, in an amount not to exceed $100 for the 1st offense, $200 for the 2nd, $300 for the 3rd, $400 for the 4th, and $500 for the 5th or subsequent offense. § 25.093(c).

3. A person acts with ***criminal negligence*** when he ought to be aware of a substantial and unjustifiable risk that the circumstances surrounding his conduct exist or the result of his conduct will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint. Tex. Penal Code § 6.03.

**C. Delaying Referral**. A school district may delay a referral of a student for truant conduct, or may choose to not refer a student for truant conduct, if the school district:

1. Is applying truancy prevention measures to the student under § 25.0915; and

2. Determines that the truancy prevention measures are succeeding and it is in the best interest of the student that a referral be delayed or not be made.

# §18. Flood Resources

## A. Landlord Tenant[42]

### I. Property Damage

**A. Property Damage by Flood, Fire or other cause without Tenant's Fault**. If the leased premises are destroyed (e.g., by fire or flood) without the fault of either the landlord or the tenant, no waste is involve. The period for repair of a condition on the premises resulting from an insured casualty loss does not begin until the landlord receives the insurance proceeds. § 92.054(a).

1. Totally Untenantable. If the premises are totally untenantable and the casualty did not result from tenant's negligence, either the landlord or the tenant may terminate the lease by giving written notice to the other any time prior to completion of the repairs. Termination of the lease entitles the tenant only to a pro rata refund of rent from the date the tenant moves out and to a full refund of any security deposit. § 92.054(b). Rules regarding the need for a forwarding address still apply for a security deposit refund. Release from the lease will not include release from separate utilities until the utility companies have been informed.

(a) Landlord termination. If your landlord terminates the lease on this basis, you must move out. Otherwise you may be evicted so that the landlord can properly repair the property. The landlord cannot move someone else into the apartment after the lease termination, it must be so that repairs can be made.

2. Partially Untenantable. If the premises are partially untenantable and the casualty did not result from the tenant's negligence, absent an express agreement to the contrary in the lease, a county or district court may award the tenant a reduction in rent to the extent the premises are unusable because of the casualty. § 92.054(c). Partially untenantable includes reduced access to both individual spaces and public spaces such as parking, laundry rooms, pools, etc.

### II. Personal Belongings

**A. Personal Belongings**. Your landlord is not responsible for loss or damage to your personal belongings. If you have renter's insurance, call your insurance company. If there is a disaster declaration, apply to the Federal Emergency Management Agency (FEMA) within 60 days of the declaration. Call 800.621-FEMA; go to www.fema.gov, or go to a FEMA Disaster Assistance Center. FEMA might be able to help replace damaged personal property, such as clothing, household items, furnishings, appliances, tools, and computers. FEMA may also cover your moving and storage expenses related to the disaster. If you misuse FEMA funds, you may have to pay FEMA back. Be sure to keep your purchase and expense receipts for at least 3 years to prove that you spent FEMA money according to FEMA rules.

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[42] *Renters' Rights*, Texas Rio Grande Legal Aid, http://www.trla.org/press/docs/disaster/renters.pdf

# B. Homeowners

## I. Remediation

**A. Remediation**. Steps should be taken to ensure the damage does not increase – removing sheetrock, damaged furniture, etc. Do not make any permanent repairs until your insurance adjuster has had a chance to inspect your car or property.

**B. Records**. Take photos of everything to show damage. Keep a running list of all items that needed to be thrown out or cleaned. Keep all receipts.

**C. Reporting**. Report flood damage to 311.

**D. Flood Insurance.**[43] Building Property and Contents are separate items. Know your policy. Read over the declarations completely. If necessary, you can request an advance on your insurance payments, however be certain that it states in writing it is an advance, not a final settlement. Also, if water came in through the ceiling or other damage to the structure (i.e., a fallen tree), then that is likely covered by homeowners insurance, not flood insurance.

1. Contents. Contents coverage is optional and can cover up to $100,000 of the actual cash value at the time of loss (depreciated value, not replacement value). This covers personal belongings, washers/dryers, art, etc. The maximum amount covered per item is $2,500

2. Building. Building Coverage has a federal maximum of $250,000 in coverage. This covers the building, fixtures, built-in appliances (including refrigerators and ovens), blinds and carpeting, built-in paneling/bookcases/cabinets, and debris removal.

3. Increased Cost of Compliance: NFIP coverage usually includes Increased Cost of Compliance (ICC) coverage which helps policyholders in special flood hazard areas to get up to $30,000 to bring their home into compliance with the community's floodplain ordinance. ICC covers the cost of elevation, relocation, demolition or floodproofing your home. Building Property and ICC claims together can't exceed the maximum coverage limit stated in your policy.

4. Not Covered. Living expenses, moisture/mold/mildew damage that the owner could have prevented, cash, metals, valuable papers, outdoor furniture and property (cars, trees, decks, pools), areas lower than the general foundation of the property (i.e., if the garage is lower than the main foundation of the house, then the garage would not be covered by Flood Insurance).

5. Process. File a claim as soon as possible to get an adjuster to the property to assess damage. FEMA may send multiple adjusters in addition to your insurance adjuster. You can hire an independent adjuster as well to advocate on your behalf, but they get a cut of your insurance recovery. There are time limits here either by regulation or contract. You have until 240 days after

[43] *Flood Insurance*, Texas Rio Grande Legal Aid, http://www.trla.org/press/docs/disaster/floodinsurance.pdf

the flood to finalize your proof of loss form. The flood adjuster will send an initial Proof of Loss, but you can dispute it with supplemental documentation. You can also amend a Proof of Loss. If something is denied, you can litigate as well, but there is a 1 year SOL from the date of the denial.

6. You are not required to accept the first estimate or offer of payment from your insurance company. Do not rush the process. It is important to make sure that you will be paid enough to adequately cover your losses. Ask your insurer to reconsider the offer. Include written estimates to show the real cost of repairs, and negotiate the best deal.

**E. Mortgage.** Homeowners are still responsible for paying their mortgage while their house is unlivable or in repairs. You can discuss options with your lender if you cannot afford to pay it. Loan modifications and forbearances may affect your credit, but not as much as defaulting or foreclosure would affect your credit.

**F. Repair Permits.** For cleanup, there is no permit required. For repair, if the property lies within a flood plain, then a flood plain development permit is required with additional limits beyond just a building permit: Good contractors will know about these permits or be willing to work with you and the city to get them issued.

1. Total Repair Costs. Total repair costs must be under 50% of the value of the structure before the flood damage or the property will be considered "Substantially Damaged." Donated or discounted labor and/or materials will not remove the determination of substantial damage.

2. Substantially Damaged Properties. These require additional steps:

(a) Elevation compliance – must be 12 inches above the flood elevation in the 100-year floodplain or 18 inches above Flood Elevation in a floodway.

(b) Cost of Compliance. Flood Insurance includes an increased cost of Compliance that may cover up to $30,000 to get the foundation elevation acceptable. Raising a foundation may be more expensive than that.

(c) Proof of new appraisals and elevation certificates may be necessary.

3. Damage and Improvements. It is not uncommon for a homeowner who has sustained damage to his/her structure to decide to simultaneously improve the structure while repairs are being made. For example, the owner of a building which was 30% damaged in a flood will, while repairing the damage, have an additional room (30% improvement) constructed. Under circumstances where two types of improvements (e.g., an addition and repair due to damage as given above) are made to a structure, and the combined total of these improvements is equal to or greater than 50% of the structure's pre-damage market value, the structure is considered a substantial improvement.

**G. Home Repair Scams.**[44] There will be unscrupulous individuals out there looking to make money off of victims. Make sure you get a free estimate. Find out if they are local. Get references from past customers. Get more than one estimate. Don't be pushed into signing a repair contract right away.

1. Warning signs:

- Provides an estimate that is lower than others, or pressures you to sign a contract right away.
- Has no business card, physical address, or drives an unmarked vehicle.
- Doesn't give you a written, itemized estimate with the total cost of repairs.
- Wants to be paid the total cost up front, or be paid only in cash.
- Offers to cover your insurance deductible.
- Offers a loan through a lender to cover the cost of repairs. Your contractor should not be selling you a loan.
- Wants your personal information (like your social security number), to start a loan or "speed up" repairs.
- Offers to do the job for less with leftover materials

2. Written Contract: You need to have a written contract to protect your rights. Never sign one with blanks in it and if there are, draw lines through them so they can't be filled in later. Under federal law, you have THREE DAYS to cancel a contract for repairs after you sign it. To cancel, send a letter of cancellation by certified mail, return receipt requested. The contract should include:

- Total cost of the project, including a guaranteed maximum price.
- Starting and completion dates, followed by the phrase, "time is of the essence."
- A schedule of payments with each payment tied to completion of specific part of the work.
- A statement that the contractor is responsible for getting all required building permits and inspections.
- A statement that any change orders and price adjustments must be in writing and signed.
- A statement that the final payment and certificate of completion will be provided only after an outside inspector or insurance adjuster confirms that the work is up to building standards.
- A statement that says "final payment will be withheld until the contractor presents releases or proof of payment from major suppliers and all subcontractors." This means that the workers and suppliers cannot ask you for money once you have paid the contractor.

[44] *Home Repair Scams,* Texas Rio Grande Legal Aid, http://www.trla.org/press/docs/disaster/homerepair.pdf

- A statement that the contractor will provide a Certificate of Insurance covering workers' compensation, property damage and personal liability so you won't be liable for worker injuries.
- Any other agreements or promises about the work to be done.

3. Contractor Liens: When you sign a contract for home improvements on your homestead, the contractor can legally fix a lien on your property. If the work is on your homestead, the contract must contain the following WARNING next to the space for your signature: "Important Notice: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW." If you sign a contract with this language and you fail to make the payments, the company can take away your home.

## C. Vehicle Owners[45]

**A. Missing vehicle.** Try to get the Vehicle Identification Number (VIN) and license plate number, which can be part of the title, registration, or insurance policy. Your auto lender or auto mechanic might also have this information in their files. Contact your local police or sheriff's department to report the loss, provide the identifying information and check periodically to see if it has turned up as an unclaimed or abandoned vehicle. The National Motor Vehicle Title Information System (NMVTIS) provides title information on vehicles across the country by VIN; check to see if yours has been sold or salvaged. There is a fee to search the NMVTIS. To search a vehicle, go to www.texasdmv.gov.

**B. Flood Damage.** If your vehicle looks like it was partially or totally submerged at some point, even if it seems to be running normally, do the following:

1. Document the damage: Use your smart phone or camera to take photos inside and outside of the vehicle, preferably before trying to move or start it. Check for water lines or marks that might show the level of the water. Photograph soaked floors, upholstery, the engine, damaged personal belongings inside the car and any other evidence of water damage.

2. Check your Policy: Before making a claim, review your insurance coverage. If you have liability only, your loss isn't covered. The front page of your policy (the "Declarations Page") shows the name of your insurance company, policy number, and the amount of each of your coverages and deductibles. If you don't have a copy of your policy, you might be able to view or download one from your insurance company's website or ask them to send you a copy. : If you are making car payments to a lender, the lender will require you to carry collision and comprehensive insurance coverage. Collison insurance pays for damage to your car as a result of an auto accident.

[45] From *Flooded Vehicle,* Texas Rio Grande Legal Aid.
http://www.trla.org/press/docs/disaster/floodedvehicle.pdf

Comprehensive insurance covers damage for reasons other than an auto accident. If you have comprehensive coverage, the flood damage is probably covered.

3. Making a Claim: Call the number on your insurance card to make a claim. If the repairs are more than the car is worth, the insurance company will pay you (or your lender, if you have a car note) the fair market value of the vehicle minus your deductible. If you think the adjuster's estimate is too low, ask for an explanation of the estimated value. You can compare the value of your vehicle to similar vehicles for sale in your area to come up with an alternative estimate. Kelly Blue Book (www.kbb.com/whats-my-car-worth/) and auto dealers like CarMax (www.carmax.com/enus/car-search/default.html) are a good place to start. If you still can't agree on the value, ask for an appraisal. Check your policy for procedures to challenge the insurance company's estimate. If the insurance settlement is less than what you owe on the car note, you owe the difference to the lender.

4. Problems with your insurance company? contact the Texas Department of Insurance Consumer Help Line at 1-800-252-3439, or go to www.tdi.texas.gov/consumer/complfrm.html.

> **Brief Notes**. Report a claim with your auto insurance company. If your coverage includes comprehensive coverage, you may be able to get a payment for the current value of the car. Flood insurance will not cover vehicle damage or replacement. Should a National Disaster be announced, then FEMA may help with car repairs if your auto insurance can't. You will need to prove that you owned the vehicle (via vehicle registration) and that it was insured.

## D. FEMA

**A. Before Registration**. Steps should be taken to ensure the damage does not increase – removing sheetrock, damaged furniture, etc. Do not make any permanent repairs until your insurance company has evaluated the property and sent an adjuster out. FEMA will also send another adjuster out as well.

**B. File a Claim:** Contact FEMA at 1-800-621-FEMA, www.fema.gov, or www.disasterassistance.gov to make a claim within 60 days of the declared date of the disaster. Only one claim is available per household. Households are defined as pre-disaster households. If your extended family moved in after the disaster, they can still file a separate FEMA claim, however if you were all living together before the disaster, it is only one claim. .

**C. FEMA Assistance.** Through the Individuals and Households Program, FEMA generally offers financial assistance for temporary housing; repairs to make a house safe, sanitary, and functional; replacement housing; replacement personal property; transportation; and moving and storage. The funds are tax-free, not counted as income for other benefit programs, and are exempt from garnishment. Keep receipts for three years as FEMA may audit you to ensure the

funds were properly spent. If you do not use all of the money FEMA provided on FEMA approved expenses, you will be required to repay it.

**D. FEMA Priorities.** FEMA offers its assistance in a hierarchy of needs.[46]

1. Insurance: Insured applicants must file insurance claims first and then may be covered by FEMA if their insurance will not cover it.

2. Temporary Housing Assistance is also available. This includes short term lodging expenses, minimal repairs, rental assistance (up to 18 months), and direct housing assistance (if rental properties are unavailable; i.e., manufactured housing units, multi-family lease and repair).Generally needs to be filed within 60 days of the disaster, unless extended by FEMA.

(a) Lodging Expense Reimbursement: Financial Assistance to reimburse for hotels, motels, or other short-term lodging while an applicant is displaced from his or her primary residence.

(b) Rental Assistance: Financial Assistance to rent alternate housing accommodations while an applicant is displaced from his or her primary residence.

(c) Repair: Financial Assistance to repair an owner-occupied primary residence, utilities, and residential infrastructure, including privately-owned access roads (i.e., driveways, roads, or bridges) to a safe and sanitary living or functioning condition. Not intended to address all of the damages or restore home to pre-disaster condition. This is subject to the Individual Household Program (IHP) max.

(d) Replacement: Financial assistance to help replace an owner-occupied primary residence when the residence is destroyed. This is subject to the IHP max.

(e) Direct Housing Assistance

a. Multi-Family Lease and Repair (MLR): FEMA enters into lease agreements with owners of multi-family rental properties to make repairs and provide temporary housing to disaster survivors

b. Manufactured Housing Units

For more details on Eligibility please see: https://www.fema.gov/media-library-data/1483567080828-1201b6eebf9fbbd7c8a070fddb308971/FEMAIHPUG_CoverEdit_December2016.pdf

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[46] *Disaster Relief Handbook*, Texas Law Help, http://texaslawhelp.org/resource/resource-materials-for-responding-to-legal-qu?ref=5F0ti and FEMA Individual and Household Program Unified Guidance, pg 13 https://www.fema.gov/media-library-data/1483567080828-1201b6eebf9fbbd7c8a070fddb308971/FEMAIHPUG_CoverEdit_December2016.pdf

3. Other Needs Assistance. This requires that it was a federal disaster area, you applied for an SBA loan (even if you do not own a business, you've made any insurance claims you can, and used all those benefits, you did not refuse other assistance, and you are a US Citizen or a household member is (or certain qualified legal immigrants are also eligible). SBA provides disaster loans to individuals and businesses that are able to repay the loans. If your only expenses are disaster-related medical, dental or funeral bills, you do not need to apply for an SBA loan. If you chose not to do so, you might find yourself barred from future recovery programs. If you are denied, you will be referred back to FEMA for consideration for further funding. If you are approved, you do not have to take the money then, it keeps your options open. ONA includes:

(a) Disaster-related medical and dental costs

(b) Disaster-related funeral and burial cost

(c) Clothing; household items (room furnishings, appliances); tools (specialized or protective clothing and equipment) required for your job; necessary educational materials (computers, school books, supplies).

(d) Fuels for primary heat source (heating oil, gas)

(e) Clean-up items (wet/dry vacuum, dehumidifier)

(f) Disaster damaged vehicle

(g) Moving and storage expenses related to the disaster (moving and storing property to avoid additional disaster damage while disaster-related repairs are being made to the home)

(h) Other necessary expenses or serious needs as determined by FEMA

(i) Other expenses that are authorized by law

**E. FEMA Appeals** If you are denied FEMA assistance or the amount of money FEMA paid you is not enough to cover your expenses, you may appeal any decision. You must appeal within 60 days of the date of the denial letter. Explain in writing why you think the amount or type of assistance is not correct. The letter should include: Applicant's full name, Applicant's FEMA registration number, Disaster number, Address of the applicant's pre-disaster primary residence, the applicant's current phone number and address the reason(s) for appeal. Sign and date the letter and mail within 60 days of the date on the letter from FEMA with the decision to FEMA-Individuals & Household Program, National Processing Service Center, P.O. Box 10055, Hyattsville, MD 20782-7055. You can fax your appeal letter to: 1-800-827-8112 ATTN: FEMA.

**Below are a sample appeal letter and common documentation that may be submitted to address common appeal concerns**

**Figure 13: Sample Appeal Letter**

Applicant Name
Registration number
Disaster number
Street Address
City, State, Zip
Phone number

Dear FEMA,

On February 17, 2016, I received a letter from you stating that I am ineligible for assistance because I have insurance. I would like to appeal your decision, as my insurance company will not cover the damage.

Enclosed please find my insurance denial letter showing that I do not have insurance coverage for the damage to my home and personal property located at 123 Main Street, Everytown, Virginia.

Please review the enclosed information and reconsider your decision.

Thank you,

Applicant
[Signature]

**Figure 14: Appeal Documentation**

| Denial Reason | Acceptable Documentation |
|---|---|
| Identity not verified | • Official government document (Social Security statement, etc.)<br>• Driver's License copy |
| Ownership not verified | • Deed, title, or official record<br>• Real estate tax bill or receipt<br>• Will or proof of inheritance<br>• Mortgage statement<br>• Proof of insurance coverage (settlement or denial), or statement from insurance provider |
| Occupancy not verified | • Official government document (Social Security statement, etc.)<br>• Driver's License copy<br>• Landlord's statement or copy of lease<br>• Rent receipts<br>• Utility bill reflecting damaged residence address<br>• Voter registration card or merchant's statement |
| Insufficient damage/Damage not disaster-caused | • Contractor's statement or estimate<br>• Mechanic's statement or estimate<br>• Statement from local official<br>• Receipts for expenses caused by the disaster |
| Insurance may cover losses | • Receipts for expenses caused by the disaster<br>• Proof of insurance coverage (settlement or denial), or statement from insurance provider |

**F. Disaster Unemployment Assistance (DUA).** DUA provides unemployment benefits and re-employment services to people who are otherwise ineligible for regular state unemployment compensation and who have become unemployed because of major disasters. Benefits begin with the date the individual was unemployed due to the disaster incident and can

extend up to 26 weeks after the Presidential declaration date. These benefits are made available to individuals not covered by other unemployment compensation programs, such as self-employed, farmers, migrant and seasonal workers, and those who have insufficient quarters to qualify for other unemployment compensation. DUA is funded 100% by FEMA and administered by the Department of Labor through the Texas Workforce Commission (TWC). All unemployed individuals must register with the State's employment services office (TWC) before they can receive DUA benefits.

1. To apply and for more information please contact the TWC: http://www.twc.state.tx.us/news/hurricane-harvey-disaster-aid-available-18-texas-counties

**G. Immigrants**.[47] If the applicant is a qualified alien, in addition to meeting other FEMA eligibility requirements. A qualified alien includes anyone who has been granted legal permanent residence (green card), refugee or asylee status, withholding of deportation, conditional entry, parole into the US for at least one year, a Cuban-Haitian entrant, or a battered spouse or child(ren) with a pending or approved spousal petition.

1. Eligible minor child: an undocumented parent or guardian may apply on behalf of an eligible minor child who lives in the household and was born in the US. The child's name, age, and social security number are required for the application.

2. Only one applicant per household required: If one household member is eligible, all household members qualify for assistance regardless of the other household members' immigration status. FEMA will not collect or review the immigration status of other members of the applicant's household.

3. Declaration and Release: The applicant must sign a sworn statement called a Declaration and Release stating that the applicant (or eligible minor child) is a qualified alien. The Release authorizes FEMA to verify the immigration status of the applicant or minor child.

4. Not Eligible: Temporary tourist visa holders, student visa holders, temporary resident card holders. Lawful presence and social security number are not enough, other FEMA requirements are still necessary.

5. Affect on residency Application? Acceptance of Emergency disaster relief is not considered public case assistance that would cause you or household members to become ineligible for lawful permanent residence (green card) or citizenship per US Citizenship and Immigration Services (USCIS) guidance.

6. The citizenship, non-citizen national, or qualified alien eligibility requirement does not apply to the following programs: • Emergency Assistance (search and rescue, medical care, shelter, food, and water, and reducing threats to life, property, and public health or safety) • Disaster

[47] *Disaster Relief for Immigrants*, Texas Rio Grande Legal Aid, http://www.trla.org/press/docs/disaster/immigrants.pdf

Legal Services • Crisis Counseling Assistance and Training • Disaster Case Management • Disaster Food Stamps (Disaster Supplemental Nutrition Assistance Program, or DSNAP), which is administered by the U.S. Department of Agriculture; the state, territorial, or tribal government can request the Federal Government to initiate D-SNAP only after a Presidential declaration approving Individual Assistance.[48]

## E. Disaster Loans

**A. Disaster Loans**[49] Following a disaster, FEMA partners with the US Small Business Administration (SBA) to help disaster survivors. The SBA offers low-interest disaster loans to homeowners, renters and businesses of all sizes. The SBA offers low-interest disaster loans to homeowners, renters and businesses of all sizes. These are federal long-term disaster recovery loans designed to help you repair physical damage caused by a disaster that is not fully covered by private insurance or other disaster funds.

1. Coverage. The SBA's programs do not duplicate FEMA or other disaster recovery programs. An SBA loan application may trigger other grant assistance through FEMA's Other Needs Assistance (ONA) program, which is administered by the State of Texas. If you don't apply to the SBA, you may lose out on additional help such as:

- reimbursement for lost personal property,
- vehicle repair or replacement, and
- moving and storage expenses.

2. Eligibility includes businesses, landlords, individual homeowners and renters, private nonprofit organizations, small agricultural cooperatives.

3. Application. Register by phone through FEMA 800.621.FEMA (3362) (TTY 800.462.7585) or online through www.DisasterAssistance.gov. If you are eligible for an SBA loan, the SBA will contact you by an automated callback to complete the SBA application. You can also apply at your local Disaster Relief Center. Deadlines vary depending on the type of loan. Apply immediately. Do not wait to hear back on claims submitted to your insurance company. You do not need to accept the loan once you are offered it.

4. Business Operating Expenses: Economic Injury Disaster Loans (EIDL loans) are available from the SBA for businesses that have "substantial economic injury", meaning the business is unable to meet its obligations and to pay its ordinary and necessary operating

[48]FEMA Individual and Household Program Unified Guidance, pg. 13 https://www.fema.gov/media-library-data/1483567080828-1201b6eebf9fbbd7c8a070fddb308971/FEMAIHPUG_CoverEdit_December2016.pdf

[49] *Disaster Loans*, Texas Rio Grande Legal Aid, http://www.trla.org/press/docs/disaster/disasterloans.pdf

expenses. EIDLs provide working capital to help small businesses survive until normal operations resume after a disaster. A business may qualify for both an EIDL and a physical disaster loan

5. Total Loan Amounts:

(a) Eligibile homeowners – up to $200,000 for home repair or replacement of primary residences

(b) Eligible homeowners and renters – up to $40,000 to replace disaster-damaged or destroyed personal property.

(c) All businesses regardless of size – up to $2 million to cover physical damages.

(d) Small businesses and most private nonprofits – up to $2 million for any combination of property damage or economic injury under SBA's Economic Injury Disaster Loan (EIDL) program.

6. Loan Interest Rates: are as low as

(a) 1.688% for homeowners and renters

(b) 4% for businesses

(c) 2.625% for private nonprofit organizations.