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## DIVORCE IS DEVASTATING. DON'T GO IT ALONE!

BY: LARRY FRIEDMAN



In the new HBO comedy series, *Divorce*, Sarah Jessica Parker and Thomas Haden Church have a problem—they need a divorce. The decision isn't hard, they need a divorce. They just don't know how.

Parker decides that adults should be able to act like adults and get a simple, mediated divorce, without the involvement of lawyers. Church, more or less, gets dragged along for the ride. When mediation becomes more of a therapy session, where grievances are aired and fingers are pointed, Church decides the next best thing is to find the cheapest, least expensive lawyer possible — with predictably disastrous results. Ultimately, both end up with what they sought to avoid: caricatures of expensive, highly-aggressive divorce attorneys, who would rather inflict pain, than listen to their client's needs.

Whether to divorce is one of the most difficult decisions anyone will ever have to make. Although the process is complicated, and you should not go it alone, this does not mean that you must lose control over the process. A good divorce lawyer will listen, assess your needs, discuss your options, create a plan of action and proceed in accordance with your wishes.

### Dividing the Marital Property

It has been said, in a divorce, there are really only two things to fight about: children and money. If that were true, we wouldn't need psychiatrists. For all the bad behavior, abuse, neglect and anger, eventually attention must turn to property division. Texas is a "community property" state. That means, generally, that any separate property of the spouses remains separate property. Any property accumulated during the marriage is part of the community estate, which must be divided equitably by agreement, or court order. Usually, this means gathering an inventory of the marital assets. You should be prepared to gather the following inventory of items:

- Sworn inventories completed by each party to the divorce that include a listing of all the community and separate property assets and debts, with up to date and accurate values.
- Copies of statements or appraisals that reflect the current value of community and separate property and debt amounts.
- If there is a dispute regarding the character of an asset, documentation to prove that the asset or debt is separate or community property, or what portions are community property versus separate property.
- A copy of any appraisals that have been done on any assets in dispute.
- A listing of all personal items owned by the parties that they would like specifically awarded in the final Decree of Divorce.

Texas courts start with the presumption that the marital assets should be divided equally, this is particularly true in a case of "No Fault" divorce, in which neither party has committed acts which would be grounds for an "At Fault" divorce: adultery, cruelty, felony conviction and abandonment. These "At Fault" grounds can be considered by a judge in dividing the community property.

### Child Custody and Support

Texas courts divide child custody issues into two related categories: conservatorship, and possession/access.

**Conservatorship** deals with the rights and duties of the parents (i.e. to make decisions for the child regarding schooling, medical decisions, and psychiatric decisions, among many other things). Conservatorship can be ordered in different ways, one parent can make all the decisions (Sole Managing Conservatorship) or the court can allow both parents to jointly make the decisions (Joint Managing Conservatorship). The court will decide what is in the "best interest" of the child, taking many different factors into account. Under Texas law, there is a preference for parents to share as equally as practically possible in the custody of a child in a divorce case.

**Possession/access** refers to when parents have physical custody of or can visit with the child. Texas has two statutory possession and access schedules: standard and extended standard. These schedules dictate the time each parent spends with the child. However, if you are awarded primary possession of the children, the court can restrict the state and counties where you are able to live.

Whether or not a parent will be ordered to pay **child support** depends on what the court determines to be in the "best interest" of the child. Usually, the parent who is awarded primary custody will receive child support, as this parent will have possession and access to the child *a majority of the time*. Primary residence is determined by the court, based on the "best interest" of the child. This involves the analysis of a number of factors, including: physical and emotional needs; physical and emotional danger; stability of home; proximity to schools; cooperation between parents; parenting skills; who was the child's primary caregiver; geographic proximity; keeping siblings together; the child's preferences when the child is 12 or older; real or false reports of child abuse; and parental fitness.

### Alimony or Spousal Maintenance

In Texas, a court order for alimony is called "**spousal maintenance**." The court must decide three issues: (1) whether to award maintenance, (2) the amount to be awarded, and (3) the duration of the payments. Except where there is a conviction of family violence, the court will start by assuming that an order for spousal maintenance is not appropriate. The presumption can be overcome by a finding of family violence against a spouse or child within two years before the filing of the divorce, if one spouse is unable to earn enough income because of a physical or mental disability, if the marriage lasted ten years or longer, if the spouse is unable to earn enough income for basic needs, or if a spouse can't work because a child requires special care and supervision because of a mental or physical disability.

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### **Ownership Interest and Title to Assets**

When a person holds an asset in their name, it is typically within the reach of a creditor in a lawsuit unless the asset is recognized as "exempt" under a particular state's law. The goal of effective asset protection planning should be to have as few assets of any consequence in one's name, in order to be less appealing to a creditor who may be in pursuit of such a person.

The form of holding the title to assets and state law remain the critical factors in determining creditor or debtor rights. Assets protected by bankruptcy laws are exempt, at least temporarily, from creditor claims. Moreover, even when a bankruptcy has not been filed, certain assets are protected under state exemptions. In the State of Texas, for instance, the following primary asset categories exist and are treated as exempt, under state law, from the reach of a creditor.

#### **Homestead Exemption (two different types) - Section 41.001 of the TEXAS PROPERTY CODE:**

- Urban Homestead – not more than 10 acres of land if located within the limits of a municipality (with improvements) if land is used or intended to be used as a homestead by the family or a single adult person;
- Rural Homestead – not more than 200 acres of land (with improvements) if the land is used or intended to be used by a family as a homestead (100 acres for a single adult person).

#### **Personal Property Exemptions - Section 42.001 of the TEXAS PROPERTY CODE:**

- A family is entitled to personal property exemptions, provided that the total aggregate fair market value of the property does not exceed \$100,000; a single adult is entitled to a personal property exemption of \$50,000;
- Also exempt from seizure and not included in the aggregate limitations are the following: (i) current wages for personal services; (ii) professionally prescribed health aids; or (iii) alimony, support or separate maintenance for the support of a debtor.

#### **Exemptions for Certain Savings Plans - Section 42.0021 of the TEXAS PROPERTY CODE:**

- Qualified retirement plans (pension, profit-sharing, individual retirement accounts, individual retirement annuities) and death benefit plans;
- Life Insurance and annuities benefits.

Under Texas law, those assets not listed above are considered "non-exempt" and can be pursued by creditors or attached in a lawsuit. Non-exempt assets are the usual types of assets transferred into a limited liability company to facilitate one's asset protection planning goals.

So, by way of example, in the event an individual owns a piece of real estate and someone is injured on that property, the injured party can assert a claim and sue the owner of the property in question. Should the injured party be successful in obtaining a judgment for damages against the owner of the real estate, the injured party can then pursue collection actions. If the cash value of the liability insurance on the real estate, coupled with the value of the real estate, is insufficient to satisfy the injured party's judgment for damages, the injured party can then pursue the collection of other non-exempt assets in order to satisfy the judgment.

Under these circumstances, a sophisticated real estate owner will seek the protection of setting up a business entity such as a limited liability company ("LLC") to hold any real property interests. Then, in the event a third party is injured on the property, liability will fall on the LLC, not on the individual real estate owner. If the court awards judgment, the injured party or judgment creditor can then execute their judgment against the assets owned by the responsible LLC. Thus, an individual real estate owner utilizing an LLC to hold real property interests is insulated from claims since no personal liability exists. A real estate owner might otherwise be held personally liable if the individual real estate owner entered into a personal guaranty in connection with a loan on the subject property, or if a judgment creditor were successful in "piercing the veil" of the LLC, that is, showing that the LLC is a sham.

Let's look at another scenario where the individual real estate owner sets up an LLC and contributes real estate to it. Subsequently, the individual real estate owner is involved in a car accident and the injured third party sues the real estate owner, obtaining a judgment for damages. Let's assume further that the automobile liability insurance policy held by the real estate owner is insufficient to satisfy the amount of the judgment. The injured third party can then look to other non-exempt assets held by the owner of the car to satisfy the judgment. However, since real estate is held in an LLC, the third party creditor has no right to levy against the LLC.

### **Personal Asset Protection Afforded by an LLC**

One of the advantages in the use of setting up an LLC is that an individual owner of an LLC can protect one's assets from the reach of a judgment creditor. When a judgment is entered against an owner individually, the judgment creditor generally cannot seize the assets of the individual's LLC. The only recourse available to the judgment creditor to be able to collect a judgment for damages would be to seek a "charging order." A charging order allows the creditor to seize LLC distributions when and if distributions are actually made to the owner of the LLC. But, there is no way the creditor can force a distribution (not management fees or loans) under such circumstances. For this purpose, the creditor, in effect, becomes an assignee of the LLC owner's interest, and, thus, becomes the recipient of a K-1 Statement showing the assignee's share of LLC income—even if no cash distributions are made from the LLC. Because the LLC is a "pass-through entity" for income tax purposes, the LLC owner's share of undistributed income may be taxed to the judgment creditor even though the judgment creditor did not receive the LLC income. This type of income is sometimes referred to as "phantom income," and can become a disincentive for a judgment creditor who decides to sue a person owning an interest in an LLC. For additional information, please contact Robert Feiger via email at: RFeiger@FFLawOffice.com.

## **DIVORCE IS DEVASTATING. DON'T GO IT ALONE!**

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The amount and duration of spousal maintenance payments is limited by statute. Texas law employs a formula for setting the amount, and a sliding scale for duration, which takes into account a number of factors including: income, length of marriage, whether either spouse spent community property funds excessively or destroyed, concealed, or fraudulently disposed of joint property.

Divorce is complicated, but you are not alone. The experienced divorce attorneys at Friedman & Feiger are here to help. We will listen to you, assess your needs, discuss your options, and develop a plan of action that we will then vigorously pursue. For additional information, please contact Larry Friedman via email at LFriedman@FFLawOffice.com.

Sincerely,

## SORTING OUT THE BUY-SELL AGREEMENT

By: RICHARD BOBOWSKI



Anytime there is more than one original owner of an entity, the owners should consider including in, or as a part of, their governing documents, provisions for the purchase and sale of ownership interests upon the occurrence of certain events. Typically, owners will form an entity because they want to work together, but do not want “outsiders” becoming involved in their business venture. Similarly, these owners have an interest in assuring a smooth transition in the event one of the owners dies, becomes disabled, or is otherwise no longer able to actively participate in the entity.

One way to control the disposition of ownership interests is to simply prohibit transfers without the consent of the governing authority and/or other owners. However, many factors cause owners to want more certainty in what happens with an owner’s interests when the owner dies, divorces, or no longer actively participates in the business of the entity. There are innumerable means to this end, so the owners must give serious thought to how ownership is to be restricted, when an owner should be required to sell the owner’s interest, what will be paid for each interest, as well as other business considerations.

A “buy-sell agreement” should not just be pulled off of the shelf and applied to each and every entity. Entity owners typically have differing goals, financial situations and concerns regarding ownership interests in the entity. Owners might very well disagree on the circumstances that should trigger the sale and purchase of ownership interests, how such interests should be valued, and how the purchase price should be paid. Fortunately, the Texas Business Organizations Code (“TBOC”) allows great latitude in drafting the governing documents of an entity, allowing the owners to negotiate an agreement that can include all of the terms and conditions of their working (and hopefully profiting) together in their enterprise.

The “non-waivable” provisions of the TBOC essentially relate to “changing the rules” after everyone has signed an agreement regarding the management of an entity and the “ground rules” for their business relationship as owners of an entity, particularly regarding the admission of new owners. However, there are ways of drafting around those provisions if such provisions are addressed with sufficient specificity and tailored to the client’s wishes.

The death or disability of an owner automatically brings an outside party into the entity — often an executor of an estate, multiple heirs or the guardian of the now-disabled owner. On one hand, the entity wants to limit these parties’ involvement in business dealings; on the other hand, the deceased or disabled owner likely wanted his or her family to be able to realize a benefit from the owner’s investment in the entity. This is only the first area where the entity’s governing documents can take varying directions. Death or disability can require the entity and/or its other owners to purchase the deceased or disabled owner’s interests or merely provide for purchase options, exercisable by the entity, the remaining owners, or both. Conversely, no purchase and sale requirement or option might apply, with the distributees of the interests becoming mere assignees of the ownership interest, with limited rights.

Another event that often triggers the purchase and sale of ownership interests is when an owner no longer actively contributes to the operation and success of the entity. This can range from being clear-cut, where the owner is employed by the entity and is terminated, to being more ambiguous, where some owners find an owner is no longer “pulling his weight.” Drafting provisions to address these situations can be sensitive, particularly for minority owners who could be terminated by majority owners. However, this dynamic can be resolved by all owners agreeing in advance on how a terminated owner’s interest will be valued, which might be determined differently depending on the reasons for termination. A different (lower) purchase price for the interest of an owner who is terminated “for cause” leads to the owners having to agree on what will constitute “cause” under the agreement.

Valuation of interests for purposes of a buy-sell agreement can also be determined through a wide-range of methods and formulas. The owners can agree that a valuation of the entity will be agreed upon on an annual basis, at an annual meeting. The owners might defer valuation until the purchase and sale are triggered, at which time they will either agree on a purchase price or, absent an agreement, proceed with an appraisal process. A specific formula for an objective determination of value can also be set forth in the buy-sell agreement, and such formula might depend on what is appropriate for the industry in which the entity operates. Outside appraisers may be used, with a description of the selection process of such appraisers set forth in the buy-sell agreement.

A buy-sell provision that allows an owner to unilaterally force the purchase and sale of ownership interests is commonly called a “shotgun buy-sell.” This process begins with an owner presenting an offer to buy another owner’s interests. The owner receiving the offer must then decide whether to sell his or her interests pursuant to the offer or buy the offering owner’s interests on the same value and terms. Theoretically, the offering owner is “kept honest” by the risk of having to sell the offering owner’s interests at the price offered. However, if the owners have disparate financial resources, the cash-rich owner can confidently make an offer with the knowledge that the offeree owner is unable to purchase the offeror’s interests and will be forced to sell. This is only one example of why individual owners should always consult with their own legal counsel in negotiating buy-sell provisions.

Many other components of a buy-sell agreement can be considered depending on the goals of the owners. Rights of first refusal, “tag along” rights, and “drag along” rights are additional provisions that might be included in a buy-sell agreement.

Friedman & Feiger, LLP’s corporate attorneys welcome the opportunity to discuss these topics with you. For additional information, please contact [RBobowski@FFLawOffice.com](mailto:RBobowski@FFLawOffice.com).

## FRIEDMAN & FEIGER, LLP PARTNERS WITH DALLAS CAN ACADEMIES



Friedman & Feiger has partnered with Dallas Can Academies to host student intern programs at our Dallas location. Friedman & Feiger’s employees will be lending their time and expertise to students thereby offering them a “real world” perspective of what to expect when choosing a career in law, information technology, human resources, accounting, and administrative support.

Dallas Can Academies is a non-profit organization that works with at-risk children in an effort to provide the highest quality education for all students, especially those who have struggled in a traditional high school setting, in order to ensure their economic independence.



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**NEW LAW OFFICE IN PUERTO RICO**

Friedman & Feiger has a new law office in Puerto Rico:

**FRIEDMAN, FEIGER, ALCALA, JIMENEZ & NISSMAN, LLC**  
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 San Juan, PR 00901  
 (787) 945-5055 or Toll Free (855) FFLAW60

**FRIEDMAN & FEIGER**  
 ● UPCOMING EVENTS ●

September 26, 2017 Friedman & Feiger sponsors the Kidney Texas Luncheon and Fashion Show at the Brook Hollow Golf Club located at 8301 Harry Hines Boulevard in Dallas, Texas, benefiting the Parkland Foundation, Baylor Health Care Foundation, UT Southwestern Medical Center, Children's Medical Center Foundation, Camp Reynal and Texas Health Resources Foundation. Honorary Chairs are Linda and Steve Ivy. Larry Friedman, Jason Friedman and Eric Friedman are members of The Men of Kidney Texas.

October 27, 2017 Janelle and Larry Friedman will be honored at the Cares For Kids Luncheon benefiting Dallas Can at the Ritz-Carlton Dallas located at 2121 McKinney Avenue in Dallas, Texas. For additional details concerning this event, please visit [www.texanscan.org](http://www.texanscan.org).

For additional information, please contact Janelle Friedman via email at: [JFriedman@FFLawOffice.com](mailto:JFriedman@FFLawOffice.com).



**CONGRATULATIONS, FORREST SMITH!**

Forrest Smith was recognized at the 30th Annual SMU Dedman School's Distinguished Alumni Awards, an invitation-only event held at the Belo Mansion & Pavilion in Dallas on April 6, 2017.

Forrest, a graduate of SMU and a Senior Partner at Friedman & Feiger, received the school's Distinguished Alumni Award for Private Practice.

Friedman & Feiger, competing amongst other top-ranking national law firms, has been recognized by the Dallas Business Journal as one of the

**Top 50 Leading Law Firms in North Texas!**

