

## PUBLICATION UPDATE

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# Texas Family Law Practice and Procedure

Publication 705

Release 85

May 2022

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### HIGHLIGHTS

#### TEXAS FAMILY LAW RELEASE 85

- This release updates the set to incorporate recent case law developments and amendments to Texas Rule of Civil Procedure 145.

**Restrictions on possessory conservator's access to child.** The Texas Supreme Court has held that, when faced with a case involving extreme circumstances, a trial court may give the managing conservator the sole discretion to decide whether and when visitation will take place. Read together, Family Code Sections 153.006(c) and 153.193 permit this kind of "as agreed" order in the narrow circumstance where necessary to protect the child's best interest. The appointment of a parent as a possessory conservator does not en-

title the parent to a certain level of access without regard to what is in the child's best interest [In Interest of J.J.R.S., 627 S.W.3d 211, 218–222 (Tex. 2021)]. *See* Task B2, Determining Custody of Children, §§ B2.03[6][a], B2.05[2][b].

**Characterization.** To qualify as a retirement benefit that can be apportioned between a spouse's separate estate and the community estate, a severance payment must be either (1) an earned property right that accrued by reason of years of service, or (2) a form of deferred compensation that is earned during each month of service [Kelly v. Kelly, 634 S.W.3d 335, 353 (Tex. App.—Houston [1st Dist.] 2021, no pet. h.)]. *See* Task B5, Characterizing Property of Parties, § B5.05[1][a][xi].

**Property division.** A trial court may divide a community estate with-

out first calculating income tax liability [Markey v. Markey, 634 S.W.3d 293, 296 (Tex. App.—Amarillo 2021, no pet. h.) (mem. op.)]. See Task B7, Dividing Community Property, § B7.03[12].

**Grounds for divorce.** Silence, where a denial or rebuttal or other response would be expected, may serve as evidence of adultery [Escalante v. Escalante, 632 S.W.3d 573, 579–580 (Tex. App.—El Paso 2020, no pet.)]. See Task C2, Determining Grounds for Divorce, § C2.02[2][b].

**Statement of Inability to Afford Payment of Court Costs.** Recent amendments to Texas Rule of Civil Procedure 145 have been incorporated into the discussion of statements of inability to afford payment of court costs in Task C4, Filing and Serving the Petition. See §§ C4.01[3], C4.107.

**Enforcement of MSA.** A trial court is not required to enforce an otherwise binding mediated settlement agreement if it was procured by fraud, such as when one party induces the other into an agreement in reliance on an intentional nondisclosure of material information that the party has a duty to disclose [Cantillo

v. Cantillo, 627 S.W.3d 367, 370 (Tex. App.—El Paso 2021, no pet. h.)]. See Task E2, Settling the Case; Agreements Incident to Divorce, § E2.16[2][g][B].

**Child support enforcement.** To the extent a lump-sum disability payment received by an obligor exceeds the amount of the obligor’s child support arrearage, it may be applied as a credit toward the obligor’s future monthly child support obligations [In Interest of R.D.E., 627 S.W.3d 798, 801–803 (Tex. App.—Corpus Christi 2021, pet. denied)]. See Task J1, Choosing Which Remedies to Seek, § J1.03[1][a].

**Post-divorce property division.** The Texas Supreme Court has granted review in a case raising the question of whether the Legislature intended to vest exclusive jurisdiction in the divorce court when it enacted Family Code Sections 9.201 through 9.205, thus precluding a post-divorce partition suit under the Property Code [see M.B. v. S.C., 634 S.W.3d 102, 104–108 (Tex. App.—Fort Worth 2020, pet. granted) (mem. op.)]. See Task O1, Determining Right to Post-Dissolution Property Division, §§ O1.01[1], [5].

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Publication 705    Release 85

May 2022

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