

REPORT
of the Rules 15-165a Subcommittee
of the Texas Supreme Court Advisory Committee
on Proposed Divorce-Related Forms

April 11, 2012

*(Click the endnote number to go to the endnote; all URLs in endnotes
are Web enabled; click the URL to go to the underlying document)*

OVERALL CONTEXT

1. The set of ten divorce-related forms "(Divorce Forms)" presently under consideration were developed by the Texas Supreme Court's Uniform Forms Task Force ("the Task Force"), since its creation by order of the Texas Supreme Court on March 15, 2011.¹ These Divorce Forms were forwarded by the Task Force to the Texas Supreme Court on January 11, 2012. These Divorce Forms were referred by the Supreme Court to the Supreme Court Advisory Committee (SCAC) on January 25, 2012. The Divorce Forms were assigned for review to the SCAC's Rules 15-165a Subcommittee ("the Subcommittee") during the SCAC's meeting on January 27, 2012.
2. The Divorce Forms resulted from impetus provided by the Texas Office of Court Administration and the Texas Access to Justice Commission, and the efforts of the Task Force. The Task Force held its first meeting on March 18, 2011. The Divorce Forms were developed over a period of approximately ten months, culminating in January 2012. The Divorce Forms came to the forefront of the attention of the State Bar of Texas leadership shortly before they were referred by the Task Force to the Supreme Court.
3. On January 5, 2012, the President of the State Bar of Texas, Bob Black, sent a letter² to Wallace B. Jefferson, Chief Justice of the Texas Supreme Court, indicating that the Executive Committee of the State Bar of Texas had voted to request that the Supreme Court of Texas "suspend the work of its Uniform Forms Task Force and direct the State Bar of Texas to review the issue of indigent self-represented litigants in the State's courts, including collecting data demonstrating the numbers of these litigants, gathering information about how these cases are handled by Courts throughout the state, and reviewing possible solutions." On January 9, 2012, the Chairman of the State Bar of Texas Family Law Section, Tom Ausley, sent a letter to Chief Justice Jefferson expressing support for President Black's suggestion that the State Bar take the lead in addressing the problems of pro se litigants.
4. On January 25, 2012, Chief Justice Jefferson sent a letter³ to President Black, setting out the unmet needs of the State's poorest citizens to have access to the rule of law and noting that officially sanctioned forms have been adopted in most states. Chief Justice Jefferson noted the Supreme Court's March 15, 2011 Order in Misc. Docket No. 11-9046, creating the Uniform Forms Task Force, which said that "developing pleading and order forms approved by the Court for statewide use would increase access to justice and reduce the strain on courts posed by pro se litigants." Chief

Justice Jefferson noted that the Supreme Court had decided to refer the Task Force report to the SCAC. The Chief Justice said: “We expect the Advisory Committee members to engage in the careful critique they have always given on matters of profound importance to the administration of justice.” The Chief Justice said: “We instruct the Committee to consider input from all sectors, including the judiciary, the legal profession, representatives of the Legislature, and the public.” The Chief Justice went on to say:

I anticipate that the Court will receive the Committee’s recommendations in April and will begin to review them in May. Considering the importance of this enterprise, we encourage the State Bar to present recommendations to the Advisory Committee and to the Court. This should allow all who wish to participate to be heard.

The Chief Justice indicated that “[w]e will approve forms only if they are substantively correct and are reasonably calculated to accomplish the goal of greater access to the courts.” The Chief Justice noted that “[u]niform forms are but one means of addressing the problems presented by pro se litigation. The State Bar may develop other recommendations.” In the concluding paragraph, Chief Justice Jefferson wrote:

The Constitution requires the Court to administer justice. This occurs not only by deciding cases, but also by establishing a judicial climate in which people who lack money to hire a lawyer have a reasonable chance to vindicate their rights in a court of law. We are pleased to have the Bar’s full participation toward that end.

Also on January 25, 2012, the Supreme Court’s liaison to the SCAC, Justice Nathan Hecht, referred the Task Force’s proposed Divorce Forms to the SCAC for consideration. Justice Hecht wrote: “The Supreme Court requests the Advisory Committee to review the report and make recommendations regarding the forms and their use.” Justice Hecht concluded: “The Court requests the Committee’s recommendations following the April 13 meeting.”

5. On January 20, 2012, President Black formed the Solutions 2012 Committee to consider the Divorce Forms, and to examine the larger issues surrounding self-represented litigants (“SRLs”) in Texas courts.⁴ One Co-Chair of the Solutions 2012 Committee is Weatherford attorney Tom Vick. The other Co-Chair of the Committee is Tim Belton, a lay member of the Board of Directors of the State Bar of Texas. The Subcommittee received the Solutions 2012 Committee Report mid-afternoon on April 9, 2012, 3-1/2 days prior to the SCAC meeting on April 13, 2012. The Report is 88 pages long, and raises many policy questions and questions directed to officially-approved forms generally. The Solutions 2012 Report did not address the specific Divorce Forms that were referred to the Subcommittee.

6. The Texas Family Law Foundation has recently become active in exploring the history of the movement to develop official forms to be used by SRLs in litigation, both nationwide and in Texas. The Foundation has provided to the Subcommittee the Foundation’s input on the many policy issues implicated by the adoption of official divorce-related forms. The Subcommittee received the Family Law Section’s criticisms of the proposed Divorce Forms mid-day on April 10, 2012. The

Subcommittee did not have the ability to evaluate these criticisms in the 2-1/2 days prior to the meeting on April 13.

7. In the ten weeks since receiving its assignment, different members of the Subcommittee have engaged in various activities relating to the proposed Divorce Forms. These activities include: attending the initial meeting of the Solutions 2012 Committee; communications with Carl Reynolds, Director of the Office of Court Administration; communications with Patricia McAllister, Executive Director of the Texas Access to Justice Commission; communications with Tom Ausley, Chair of the State Bar's Family Law Section; communications with Tom Vick, Co-Chair of the Solutions 2012 Committee; communications with Steve Bresnan, an Austin attorney who is spokesman for the Texas Family Law Foundation; communications with persons involved in SRLs at the local level in Texas. The Subcommittee held a telephone conference in which Carl Reynolds, Patricia McAllister, Tom Vick, Tim Belton, Ray Cantu (of the State Bar of Texas), Steve Bresnan, and Stewart Gagnon participated. The Subcommittee held a subsequent telephone conference involving solely Subcommittee members. The Subcommittee has also reviewed correspondence and reports from various sources, and reviewed materials submitted to the Subcommittee for consideration by interested persons. This has been a lot of information to digest in a relatively short period of time. And there has been information received shortly before the SCAC meeting that could not be discussed by Subcommittee members at all.

POLICY ISSUES

8. By far the greater amount of information received by the Subcommittee has related to the policy issues implicated by the large number of SRLs, and on the use of official forms to assist them in more effectively navigating their way through the complexities of adjudicating their claims without the assistance of a lawyer. The policy issues are wide-ranging, and extend beyond the specific content of the proposed Divorce Forms. The Subcommittee Report will address some of these policy issues, with no illusion that the different perspectives on these policy issues are fully identified or that solutions to these difficult questions have been reached.

9. According to both statewide data and data from major and mid-size metropolitan counties presented to the Subcommittee, there are large numbers of SRLs in Texas courts, especially in family law cases, especially divorces.

10. There are many forms, including family law forms, presently available to SRLs, some free, some for pay, some on-line and some in county courthouse libraries. The State Bar of Texas Family Law Practice Manual is available in many county law libraries. That form book is designed for cases that range from simple to complex, and in some respects informed discretion is required to know which paragraphs to include and which to excluded. The Texas Young Lawyers Association provides forms and information booklets for use by SRLs.⁵ Texaslawhelp.org⁶ is a web site established by the Texas Access to Justice Commission and the Texas Equal Access to Justice Foundation that is an easy-to-navigate Web portal that provides free information about a wide range of civil legal issues facing low-income individuals and families. The texaslawhelp.org website provides free divorce forms for use in Texas, and has an on-line document assembly process that

asks a series of questions and then assembles a divorce petition ready for filing. With so many forms already available to SRLs in Texas, the Subcommittee confined its focus to the potential effects of the Texas Supreme Court's approval of one set of forms, both in the cases for which they are intended and in cases for which they are not intended.

11. Most other states have implemented state-wide strategies to address the problems of SRLs, both in affording them access to the courts and in disposing of their claims in a safe and fair way. Texas has not, and is therefore to a degree "writing on a clean slate." The Subcommittee is not aware of a comprehensive assessment of the different approaches that have been implemented in other states. The Subcommittee believes that such a study would be extremely useful and should be undertaken by a committee of the Supreme Court, the Legislature, or the State Bar, or some combination of the three. Several members of the Subcommittee favored making the foregoing statement a recommendation from the Subcommittee to the SCAC and to the Supreme Court.

12. Some counties in Texas have implemented local procedures to accommodate SRLs in their county and district courts. The Subcommittee is not aware of a comprehensive assessment of the different approaches that have been implemented at the local level in Texas, and the Subcommittee's investigation on this has by necessity been ad hoc. The Subcommittee believes that such a study would be extremely useful and should be undertaken by a committee of the Supreme Court, the Legislature, or the State Bar, or some combination of the three. Several members of the Subcommittee favored making the foregoing statement a recommendation from the Subcommittee to the SCAC and to the Supreme Court. The Subcommittee recommends that care be taken, if officially-approved forms are promulgated on a statewide basis, not to disrupt functioning local solutions to the problems of SRLs.

13. SRLs with no education in substantive law, legal procures, and evidence law, present challenges to the proper functioning of the court system. Our court system is founded on the adversary process, which assumes that litigants will appear in court as witnesses, with the assistance of legally-educated, licensed professional advocates, who will manage their cases and who will advocate their interests before an impartial judge. The court system relies on lawyers' familiarity with legal procedure and evidence rules in order to function smoothly. When a lawsuit, hearing, or trial is conducted by a litigant who is both a witness and an advocate, and who has no education in the law and no training in procedure or evidence, the smooth functioning can break down. The burden then falls upon the court clerks, staff attorneys (if there are any), or judges, to shore up the litigation process where it breaks down. Some of the national literature on the subject of SRLs suggests a paradigm shift toward an inquisitorial model of litigation, where the judges assume responsibility for bringing out the evidence that is needed for the judge to make a decision. Adopting official form pleadings, orders, and judgments, does not require such a paradigm shift, but forms leave the issue of SRLs' presentation of evidence largely unsolved, especially if the case is contested.

14. There are reports that SRLs are appearing in Texas courts with forms from other states, and forms that they purchase on the Internet, and that some SRLs have paid for assistance in filling out the forms by persons who are not licensed to practice law in Texas. The promulgation of officially-

approved forms, available at no cost, may have the effect of driving out unofficial forms. If the officially-approved forms are substantively correct, and not used by SRLs for purposes for which they were not designed, officially-approved forms may reduce the risks that a SRL might inadvertently injure his/her rights or the rights of respondents and--in the case of family law-related forms--the rights of children. However, if officially-approved forms encourage litigants with complicated legal problems to undertake self-representation, or if the officially-approved forms are used for purposes beyond what they were designed to handle, then the danger exists that the officially-approved forms may themselves cause unintended harm. This last concern supports both the position that there should be no officially-approved forms, and the position that officially-approved forms should not only be well-designed and substantively correct, but also that safeguards should be implemented to ensure that the forms are not used for a purpose which they were not designed to handle.

15. It has been suggested that another effect of officially-approved forms is to encourage lawyers who are unfamiliar with family law practice to undertake pro bono representation, where the lawyers' responsibility is limited to helping the litigant fill out the forms, present the evidence in court, and draft a decree that disposes of the legal dispute. The Subcommittee has very little information on whether this has proved to be true in other states or in locales in Texas that have adopted forms for SRLs.

16. A frequent justification for adopting court-approved and court-mandated forms is based on the need to allow persons who cannot afford a lawyer to have access to the courts. The current set of proposed Divorce Forms are designed to allow those proficient in English, and who can understand the terminology used in the forms, to conduct their own divorce proceedings, from start to finish, without the assistance of a lawyer, provided they have no minor children and no real property. It is said that the potential for unintended harm to legal rights is curtailed by limiting the use of the forms to divorces that do not involve minor children and do not involve real property. The main purpose of such a case is to dissolve the marital bonds, and the property division usually amounts to nothing more than each party receiving the property in his or her possession or held in his or her name. If there are no children and the property is de minimis, it is presumed that little harm can come from a lack of legal representation. Some members of the Subcommittee feel that certain intangible rights, such as retirement pensions or other forms of deferred compensation, are as deserving of protection as title to real property. The Subcommittee recommends that serious consideration be given to how to ensure that the officially-approved forms are not used in divorces that do involve minor children, real property, and personalty of substantial value. A mere warning against using the forms in such situations is not as effective as requiring that the petitioner swear that the prohibitions do not apply to the case. The Subcommittee was divided (4-to-3) on the question of whether the Divorce Forms should have a means-related standard for the use of the forms, such as aggregate wealth of \$50,000 or less, to reduce the risk that significant property rights might unintentionally be harmed. Some favored a \$50,000 cap, while one favored a lower ceiling, and others would not have a limitation but would warn against using the form decree to divide pensions, by including a caveat in the warning box in the *Instructions* for the Divorce Forms.

17. The Supreme Court's adoption of court-approved forms that must be accepted by trial courts

invites inquiry into the basis for the Supreme Court's authority to issue such forms. The sources of Supreme Court authority are constitutional and statutory. Supreme Court case law recognizes the Court's powers as being express, implied, and inherent. On April 6, 2012, the Texas Access to Justice Commission filed a Brief in the Supreme Court "Regarding the Supreme Court's Authority to Promulgate Pleading Forms."⁷ The Subcommittee has not had an opportunity to discuss this Brief. It does not appear that there is an established constitutional entitlement to self-representation in a civil court proceeding.

18. The Subcommittee did not consider it part of the SCAC's charge to examine other ways of helping those who are unable, with present indigent legal services funding and present levels of pro bono volunteers, to get a lawyer to help them with a divorce. It is the Subcommittee's understanding that the Texas Access of Justice Commission has been doing that for some time, and that the State Bar of Texas' Solutions 2012 Committee is doing that, as well.

GENERAL OBSERVATIONS ABOUT HAVING OFFICIAL FORMS

19. The Subcommittee puts forward the following recommendations regarding the Supreme Court's adoption of forms.

GENERAL RECOMMENDATION 1

Some Texas counties are more advanced in the use of local forms, and needs vary in different local communities. By a vote of 6-to-0, the Subcommittee recommends that any forms that the Supreme Court may promulgate for statewide use should be implemented in such a way that they do not preclude the use of locally-developed forms and practices.

FAILED GENERAL RECOMMENDATION 2

Five members of the Subcommittee support the following recommendation, while one opposes and one wants SCAC discussion on the question. If the Supreme Court decides to promulgate a rule requiring the acceptance of court-approved forms, then the Supreme Court should distinguish the requirements placed upon clerks to accept officially-approved forms and the requirements placed upon judges to rest their adjudications upon officially-approved forms. The Subcommittee believes that the court clerk must, upon payment of the required fee, accept pleadings and motions that are filed by a SRL regardless of whether they are hand-written, fill-in-the-blank, or fully word-processed, provided that the operative portions of the pleadings are in English. The Subcommittee believe that judges have the duty to determine the content of their orders and judgments. If the Supreme Court adopts a rule mandating the acceptance of officially-approved form orders and decrees, the Subcommittee suggests that the rule should only proscribe a trial courts' refusal to render a judgment based solely on the fact that the proposed judgment is a court-approved form. The Subcommittee believe that all orders and decrees should be supported by consent or by pleadings, and by evidence, and should apply the law correctly, and should be based on the judge's conclusion

that the order or judgment is substantively correct under the law applied to the facts of the case.

GENERAL RECOMMENDATION 3

Four members of the Subcommittee support the following recommendation, while one opposes it. Assuming that a rule is adopted requiring the acceptance of officially-approved forms in Texas courts, some members of the Subcommittee think that judges should be allowed to reject non-official fill-in-the-blank forms, on the theory that rejection of competing forms might hasten the demise of the use of forms from other states or forms from particular providers that may not be substantively correct. One member of the Subcommittee feels that judges should not be allowed to reject any forms just because they are forms. Another member of the Subcommittee would like to hear the SCAC's discussion on this point.

GENERAL RECOMMENDATION 4

If the Supreme Court decides to issue an order requiring the acceptance of officially-approved forms in Texas courts, the Subcommittee (6-to-0) suggests that the Court consider whether changes would be appropriate to Tex. R. Civ. P. 7, which establishes the right of litigants to have lawyers or to represent themselves in litigation, and/or whether to alter or add a rule to Part 1, Section 4 of the Texas Rules of Civil Procedure, that governs pleadings and/or Part 2, Subpart H, relating to judgments. The Order requiring the acceptance of court-approved protective order forms in 2005⁸ was not reviewed by the SCAC in advance of its issuance. Since a mandate to accept officially-approved divorce forms would have a greater impact than the form protective orders have had, a majority of the voting Subcommittee members favors having such a rule vetted through the SCAC and exposed to public comment before it is promulgated. A minority of Subcommittee members would prefer to say that we stand ready to assist the Court if it decides to refer such an order to the SCAC.

GENERAL RECOMMENDATION 5

By a vote of 4-to-2, the Subcommittee believe that the promulgation of officially-approved forms for use in Texas courts extends beyond procedure and into the domain of determinations of substantive law to a greater extent than Rules of Procedure and Rules of Evidence. This is particularly true of instructions accompanying the forms, that state substantive law or have the effect of making outcome-determinative distinctions based on information provided by the pro se litigant. To date, the Supreme Court has refrained from editing Pattern Jury Charge instructions or definitions, or officially promulgating them, probably in recognition that the better context for such decisions is through the litigation process. The Subcommittee is divided on the question of whether to recommend that the Supreme Court should ensure that officially-approved forms do not misstate or misapply the law, and do not fail to inquire about important factual matters and that should in fairness be revealed to the court when either the petitioner or respondent is self-represented.

GENERAL RECOMMENDATION 6

The Subcommittee unanimously supports the following recommendation. The natural focus of the forms debate has been on giving petitioners better access to the court system. It is also important to consider the rights of self-represented respondents, who may decide whether to waive rights or allow a default judgment to be taken without legal advice and without being informed of the consequences of such a waiver or default. In order that the forms process not be biased in favor of petitioners, officially-approved forms that are designed to be used by self-representing respondents should contain reasonable warnings about the consequences of waiving rights.

GENERAL RECOMMENDATION 7

If forms are adopted to assist a specific class of litigants, and acceptance of such forms is mandated for the courts, it may be desirable to establish some feature or some mechanism to ensure that the forms are not used for purposes for which they were not designed. By a vote of 4-to-2, the Subcommittee believes that, if the forms are being used outside their intended scope, courts should be free to refuse to hear the case and to refuse to sign a form-based order or decree. One member of the Subcommittee thinks that judges should not ever be free to reject a pleading just because it is a form.

SPECIFIC RECOMMENDATIONS ABOUT THESE FORMS

20. When asked to vote “up or down” on whether the Texas Supreme Court should officially endorse these specific proposed Divorce Forms, the Subcommittee members voted 5 in favor and 4 against the Court officially endorsing these Divorce Forms. One Subcommittee member said that his/her vote was for forms “for use by pro se's, pro bono lawyers, etc. in no children, no or minimal property cases.”

21. The Subcommittee makes the following specific suggestions about the Divorce Forms packet that was referred to the Subcommittee, after changes agreed to by the Task Force representative in discussion with the Subcommittee.

SPECIFIC RECOMMENDATION 1--Only these forms were considered

The Subcommittee supports the following recommendation by a vote of 6-to-0. The Subcommittee has reviewed nine forms forwarded to the Supreme Court by the Uniform Forms Task Force: Instructions, Affidavit of Inability to Pay Costs, Original Petition of Divorce, Answer, Waiver, Final Decree of Divorce, Certificate of Last Known Address, Notice of Change of Address, and Affidavit of Military Status. These forms have undergone some changes since they were forwarded to the Supreme Court, as a result of a discussions with the Subcommittee. There are suggestions made in the writings of some proponents of increased use of forms that, if implemented, could reshape the litigation process and the

traditional roles of courts and lawyers in Texas. There has been some concern expressed that the currently-proposed Divorce Forms are the first wave in a planned succession of forms that would cover increasingly broad areas of Texas law. There is apparently ongoing work to develop other forms to be proposed to the Supreme Court for official approval at a later time. The Subcommittee is not in a position to assess the impact of forms that have not been presented for review, so the Subcommittee's views about the currently-proposed forms should not be taken as a comment on the advisability of adopting other forms that may be proposed at a later date. The Subcommittee recommends that the SCAC state a position that any forms submitted in the future should be analyzed in the context of the policies that are implicated by those particular forms, and by any changes in the resources that become available to SRLs in Texas between now and then.

SPECIFIC RECOMMENDATION 2--For Uncontested Divorces Only

In discussions it has often been said that these proposed Divorce Forms are for use in uncontested cases. The instructions at the start of the Divorce Kit say: "These forms are intended for use in an uncontested divorce" The instructions also say: "You can use these forms when: Your case is uncontested, meaning: It is 'agreed' – you and your spouse agree about EVERY ISSUE in your divorce. -or- It is a 'default' – your spouse does not file (turn in) an answer with the court after being served (given) your divorce paperwork. -or- Your spouse signs the waiver in this Divorce Kit." The instructions also say not to use these forms if: "You and your spouse do not agree about every issue in your divorce." And yet Paragraph 7 of the form Petition for Divorce contains the sentences: "My spouse and I will try to make an agreement about how to divide the personal property and debts we acquired during our marriage. *If we cannot agree, I ask the Court to divide our personal property and debts according to Texas law.*" [Emphasis added.] Page 6 of the information packet poses the question: "Is it difficult to handle a contested case without a lawyer?," and then proceeds to say "yes" and give the reasons why. By a vote of 5-to-1, the Subcommittee recommends that officially-approved form pleadings, orders, and decrees should be limited to uncontested divorces. If the Divorce Forms are for use only in uncontested cases, then the instructions, pleadings, and decree should be adjusted to reflect that fact. The Subcommittee suggests that providing court-approved forms that SRLs can use in a contested divorce may encourage self-representation in contested cases, which would be potentially disruptive to dockets and would create an increased risk of unintended harm. One member of the Subcommittee would like to hear the SCAC's discussion on this point before deciding.

SPECIFIC RECOMMENDATION 3--Divorce Kit – No Minor Children, No Real Property, Instruction Forms²

--The instructions for the Divorce Kit contain the following warnings:

Do not use these forms if:

- “You and your spouse do not agree about every issue in your divorce.
- “The wife is pregnant (even if the husband is not the father).

“A child was born during this marriage who is under 18 years old, regardless of who the father is.

“A child was born during this marriage who is 18 years old or older and who is still in high school, regardless of who the father is.

“You have a disabled child of any age.

“You have an ongoing bankruptcy case. If this applies to you, talk to a bankruptcy lawyer before filing your divorce.

“You and your spouse are not residents of Texas.

“You or your spouse has a pension, retirement plan or 401(k) you want to divide.

“You or your spouse owns or is buying a house, piece of land or other real property.”

These warnings, which are an important safeguard to curtail unintended harm, can be ignored by SRLs, with no consequence. A majority of the Subcommittee member who voted suggest that the petitioner be required to swear that none of the disqualifying conditions exist, such as by an affidavit that is attached to the Petition, swearing that they are not aware of any opposition to the requested relief, and that the wife is not pregnant, that there are no minor children, that neither spouse owns or is buying real estate, etc. This would discourage the forms from being used for a purpose for which they were not intended. One member of the Subcommittee opposes requiring such an affidavit. Five members favored such a requirement.

–The current language in the instructions says not to use the forms if “you or your spouse has a pension, retirement plan or 401(k) you want to divide.” The Subcommittee recommends that the instructions should preclude the use of forms if either party has a defined benefit retirement plan or other deferred compensation. Determining the community property portion of such benefits is more than we can expect an unrepresented petitioner and respondent to accomplish, and awarding such benefits to the employed spouse may award this potentially important benefit to the financially-advantaged spouse. By a vote of 4-to-0, the Subcommittee recommends that a judge make that decision.

–The Subcommittee is evenly divided (3-to-3) on whether the Supreme Court should consider a means-related standard for the use of these Divorce Forms, such as a cap on total value of the estate of \$50,000.

–Post-divorce spousal maintenance--Even where the divorce involves no children and no real estate, a court can award post-divorce spousal maintenance under Chapter 8 of the Texas Family Code. This prospect is not adequately addressed in the current version of the Divorce Forms. The Subcommittee recommends that the SCAC and the Supreme Court consider what statements or warnings or orders to include in the Instruction Forms, the form petition, the form waiver, the form answer, and form decree of divorce, regarding post-divorce spousal maintenance.

–Step 7 should contain the instruction that, if the judgment is by default, the petitioner should file with the clerk a Military Status Affidavit and a Certificate of Last Known

Address.

–References to filing the divorce in county court should say “county court at law.”

SPECIFIC RECOMMENDATION 4--The Affidavit of Indigency¹⁰

–The Subcommittee (3-to-0) has no suggestions regarding the Affidavit of Indigency. The form provides a space for the listing of “Real estate (house and land),” and the people using this form are not supposed to own real estate, but requesting information on real estate may be a safeguard to signal to the clerk of the court or to the court that the form is being misused by someone who does own real estate.

SPECIFIC RECOMMENDATION 5--The Form Petition for Divorce¹¹

–The *Warning*, provides: “Do not use this form if you or your spouse has a pension, retirement plan, or 401(k) that the other spouse wants a part of. If each of you wants to keep your own retirement, you can still use this form.” The rules governing the characterization of retirement pensions are complicated, and certain applications are not understood well even by lawyers. The Subcommittee expects that lay persons cannot reasonably be expected to know about community property rights in defined benefit pensions and other forms of deferred compensation and that they will make an ill-informed decision about such benefits if they have no legal advice. Five members voted (with no negative votes) to recommend that the SCAC discuss whether it is advisable to allow the form divorce petition and decree to be used by spouses who have a community property interest in a defined benefit pension plan and other forms of deferred compensation. If not, then the form should be disallowed for such cases, and pensions and deferred compensation should be listed in the “Do not use” box in the Instructions form and should be included in the affidavit if the requirement of an affidavit is adopted.

–By a vote of 6-to-0, the Subcommittee recommend that Paragraph 3, *Jurisdiction*, should be altered to request information that reveals whether a non-resident respondent has minimum contacts with Texas. If not, the court can only dissolve marital bonds but cannot adjudicate property rights or grant monetary claims against the non-resident respondent. Some members of the Subcommittee would like to hear the SCAC discuss this issue.

–Children in other states–the proposed Divorce Forms are not supposed to be used by persons with minor children, but a concern exists that they will be, if they are officially approved by the Texas Supreme Court. If the parties’ children reside in another state, the Texas court’s jurisdiction to adjudicate parental rights (other than child support which is based on minimum contacts) does not rest on the long-arm jurisdiction and minimum contacts analysis inquired about in the form petition, but rather rests upon subject matter jurisdiction under Texas’ Uniform Child Custody Jurisdiction and Enforcement Act, Chapter 152 of the Family Code. That jurisdictional scheme involves home state jurisdiction, or if there is no home state then whether the forum state has a significant connection and

substantial evidence. *See* Tex. Fam. Code § 152.201. There are more complications to this elaborate statutory scheme than can be discussed here. The question the Subcommittee poses is whether the proposed Divorce Forms should include caveats about nonresident children, to ward off parties inadvertently securing a divorce decree that arguably is void as to the children.

–Paragraph 7, *Separate Personal Property*, asks the petitioner to identify the petitioner’s separate personal property. It does not ask the petitioner to identify the respondent’s separate property. A Texas court is not allowed to divest a spouse of separate property in connection with a divorce. The proposed form Final Decree of Divorce provides for findings as to each spouse’s separate property. By a vote of 8-to-0, the Subcommittee recommends that the petitioner should be required to inform the court about the respondent’s separate property.

–Paragraph 7, Subpart 2, *Other Money or Personal Property*, says “I received the following money damages from a lawsuit during my marriage. These damages are not compensation for lost wages:” In *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972), the Court said: “To the extent that the marital partnership has incurred medical or other expenses and has lost wages, both spouses have been damaged by the injury to the spouse; and both spouses have a claim against the wrongdoer. The recovery, therefore, is community in character.” Additionally, only lost wages during marriage are community property. By a vote of 7-to-0, the Subcommittee recommends that the form say: “ These damages are not compensation for lost wages during marriage and are not a recovery for medical and other expenses incurred during marriage as a result of the injury:” Additionally, the SCAC and Supreme Court should determine whether to make the same inquiry about the other spouse’s separate property personal injury recovery.

–Omission of Standing Orders. Many counties have adopted so-called “standing orders” that automatically spring into place when a divorce is filed. These orders typically are drawn from the Texas Family Code or the State Bar of Texas’ Family Law Section TEXAS FAMILY LAW PRACTICE MANUAL. These standing orders typically require that a copy of the standing order must be attached to the divorce petition when it is filed. The form Petition for Divorce should anticipate such a requirement and provide for how a SRL should handle such standing orders. The forms adopted for use in Travis County contain such language.¹² By a vote of 5-to-1, the Subcommittee recommends that such language be included in the Divorce Forms. One member of the Subcommittee says the form petition should ask that Standing Orders not be issued. One member of the Subcommittee would like to hear SCAC discussion on this point before deciding.

–As courts rely upon the accuracy of pleadings, and back that expectation with the ability to impose sanctions of which an SRL is likely unaware, the Court should consider requiring that the form Petition for Divorce be sworn under oath. This might partially offset the fact that no officer of the court is vouching for the accuracy of the pleadings. By a vote of 5-to-1, the Subcommittee supports the requirement of an oath.

SPECIFIC RECOMMENDATION 6–Respondent’s Answer to Divorce

--The form Answer does not provide for the respondent to plead separate property. As appellate cases require that separate property be pled in order to be proved and support a judgment, and in order to give a respondent an opportunity to advance such a claim, the Answer should provide for disclosure of the respondent’s separate property in a manner similar to the way the form Petition discloses the petitioner’s separate property. The Subcommittee supports this recommendation by a vote of 8-to-0.

SPECIFIC RECOMMENDATION 7–Waiver of Service¹³

–The form Waiver of Service contains a warning: “By signing this form you give up all of your legal rights in this case.” This warning is so broad that it does not inform the respondent of the practical consequences of signing the waiver. It might be more meaningful to someone not educated in the legal process to spell out the rights that are being waived, more in the manner of a guilty plea in a criminal case. By a vote of 7-to-0, the Subcommittee supports this recommendation.

–The Waiver of Service provides a check box that waives not only service of process but also waives all the protections of due process of law without expressly saying what rights that are waived. All of the voting Subcommittee members (8-to-0) favor changing the title to “Waiver of Rights” or “Waiver of Constitutional Rights” or something similar.

–The Waiver should be constructed to list the individual rights that are being waived, like a checklist that says: “I waive the right to a jury trial; I waive the right to subpoena witnesses; I waive the right to call witnesses on my behalf; I waive the right to testify on my own behalf; I waive the right to object to inadmissible evidence; I waive the right to notice of hearings or trial. I understand that—if I do not object--the court may award property in my possession or control to my spouse; I understand that the court may take my separate property and award it to my spouse; I understand that the court may require me to pay monthly spousal maintenance payments to my spouse for a period of time after the divorce.” By a vote of 8-to-0, the Subcommittee supports this recommendation.

SPECIFIC RECOMMENDATION 8–Final Decree of Divorce

–Under Paragraph 1, *Appearances*, the option for a default judgment reads: “The Respondent was not present and has defaulted.” The conditions for default are not specified. A majority of the voting members of the Subcommittee make the following recommendations:

- (1) the recital for default should require a representation that citation was served on a date to be disclosed in the form, and that the Respondent failed to file an Answer, or, having received notice of trial, failed to appear for trial. [By a vote of 4-to-0.]
- (2) the Subcommittee is divided on whether the form decree should say that the trial is being held no sooner than 10am on the first Monday following the twentieth day

after the citation was served. [By a vote of 3-to-1.]

(3) The Subcommittee is divided on whether the form decree should say that the return of service has been on file for at least 10 days exclusive of the day of filing and the day of trial. See Tex. R. Civ. P. 99(b) & (c) (appearance day) and Rules 107 & 239 (requirement that return of service be on file for ten days exclusive of the day of filing and the day of judgment). The form Decree uses “12 days.” One member of the Subcommittee thinks “10 days” should be used. [By a vote of 4-to-1.]

(4) where the petitioner is a SRL, the clerk or the court or the court itself should verify whether the conditions for a default judgment have been met, and that 60 days have elapsed since the divorce petition was filed.

(5) Additionally, if the pleadings are amended after service and the amended pleading is not also served on the respondent, then due process of law is violated. Where there has been no waiver of service, the Subcommittee is divided on the question of whether the Decree should contain a finding that the pleadings have not been amended after service upon the Respondent. Three members of the Subcommittee favor such a requirement. Three oppose it. One member of the Subcommittee would like to hear discussion by the SCAC on this point before deciding.

–Paragraph 2, *Record*, provides a box for the trial court to indicate whether a record was made of the proceedings. Three voting Subcommittee members believe that the name of the court reporter should also be included, to allow someone to more easily locate the record to have it transcribed should the need arise. Three oppose this suggestion. Some members of the Subcommittee would like to hear discussion by the SCAC on this point.

–Paragraph 6, *Property and Debts*, under Wife’s property, reference is made under “debts” to “[a]ll taxes, bills, liens, and other charges, present and future, for all personal **and real property** that are in Wife’s name alone or that this Order gives to Wife alone” This is an oversight. The form is not supposed to be used for parties who own real property. The Subcommittee is divided on whether to remove this reference to real estate. [By a vote of 4-to-2.]

SPECIFIC RECOMMENDATION 9--Certificate of Last Known Address¹⁴

–TRCP 239a requires that a certificate of last known address be filed “[a]t or immediately prior to the time an interlocutory or final default judgment is rendered.” By a vote of 5-to-2, the Subcommittee recommends that the form should contain an instruction to that effect. One member of the Subcommittee would like to hear SCAC discussion on this point.

–Although a certificate of address is not required when the Respondent signs an agreed Decree of Divorce, or participates in trial, for simplicity’s sake it may be better for the Divorce Kit to provide that a Certificate of Last Known Address be filed in every divorce. The Subcommittee members were divided on this recommendation: two support it, two oppose it, and two are neutral.

–TRCP 239a, *Notice of Default Judgment*, currently provides: “Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.” The Supreme Court should consider, either in SRL cases or in all cases, adding to the notice of judgment words to the effect: “You may file a motion for new trial within 30 days of the date the judgment was signed. If you fail to do so, the judgment becomes final and non-modifiable. If you have questions about this, you should consult a lawyer.” This warning might prompt a respondent to see a lawyer. If not, it might reduce the chance that the respondent can prove lack of negligence if s/he later brings a bill of review. The Subcommittee adopted this proposal by a vote of 5-to-1. Some members of the Subcommittee would like to hear SCAC discussion on this point before deciding.

SPECIFIC RECOMMENDATION 10--Notice of Change of Address¹⁵

–By a vote of 4-to-1, the Subcommittee members has no recommended changes. One member recommends further discussion.

SPECIFIC RECOMMENDATION 11--Military Status Affidavit¹⁶

–Five members of the Subcommittee offer no recommended changes. One member of the Subcommittee wishes to discuss changes.

PROPOSED RECOMMENDATIONS THAT FAILED TO GAIN MAJORITY SUPPORT OF THE SUBCOMMITTEE

22. Some members of the Subcommittee wished to make the following recommendations. Other members objected to them, or to the way are drafted. These proposals are therefore not part of the recommendations made by the Subcommittee. They are provided for information purposes in case the SCAC wishes to discuss them.

FAILED GENERAL RECOMMENDATION 1

A 4-to-2 majority of the Subcommittee endorsed this recommendation. However, three members preferred that the issue be articulated differently or be raised orally at the SCAC meeting and not in writing. Considering Chief Justice Jefferson’s indication that the Supreme Court is relying on the SCAC to fully vet proposed forms before they are forwarded to the Supreme Court for consideration, unless there are external deadlines that make it impractical to do so, proposed forms should be referred to the SCAC with sufficient lead time to permit the SCAC to assign the forms to a Subcommittee, and with adequate time for the

Subcommittee to assess the forms with input from interested outsiders familiar with the area of practice involved. In keeping with normal practice, if the forms have an institutional sponsor (such as a Supreme Court Task Force or State Bar Committee or Section), then the sponsors should present the proposed forms to the SCAC along with the Subcommittee's presentation of its analysis of the proposals. If important changes are suggested during the SCAC meeting then, subject to the judgment of the SCAC Chair and the Supreme Court Liaison Justice, the task of preparing revisions or alternative versions should be assigned to the Subcommittee to accomplish in collaboration with interested parties, and then brought back to the SCAC at a following meeting. Unlike many Supreme Court Task Forces, whose final report is also their final act, the Uniform Forms Task Force is a continuing Task Force, and collaboration between the SCAC and the Task Force in making revisions is both possible and desirable. Of course, there may be situations in which the SCAC's initial debate is deemed adequate for Supreme Court purposes, and if so then the task of whether and how to make alterations is something for the Supreme Court to accomplish internally.

FAILED SPECIFIC RECOMMENDATION 1

The Subcommittee was evenly divided, 3-to-3 with one abstention, on whether to make the following recommendation. The Supreme Court's use of its authority to regulate the court system should not be extended to providing officially-approved forms for private relationships between individuals. This would include items like form powers of attorney, or a form last will and testament, and the like. Some forms advocates have written that such forms are a legitimate goal, but the Subcommittee thinks that they are too far distant from regulating the court system and cross into the domain of legislation. Some members of the Subcommittee believe that the Supreme Court did not ask for a recommendation on this issue and that we should make none. Others feel that the issue of future forms has been brought into the debate and that the ultimate limit on Supreme Court-approved forms should be discussed at this time, when the attention of the Bench and Bar has become focused on the question. One Subcommittee member "abstains" on the issue.

(Endnotes are web-enabled; click a link to go to the underlying document)

1. [1. !\[\]\(c3d993ca47bfe2a953c700506ce31fa0_img.jpg\) Texas Supreme Court Order Creating Uniform Forms Task Force \(3-15-2011\)](http://www.supreme.courts.state.tx.us/miscdocket/11/11904600.pdf)
<<http://www.supreme.courts.state.tx.us/miscdocket/11/11904600.pdf>>.

2. [2. !\[\]\(d66ff64371a51729ac8c1cdaa685ba6f_img.jpg\) Letter from State Bar of Texas President Bob Black to Texas Supreme Court Chief Justice Wallace B. Jefferson](http://www.texasatj.org/files/file/14BarPresLettertoSupremeCourtJan52012.pdf)
<<http://www.texasatj.org/files/file/14BarPresLettertoSupremeCourtJan52012.pdf>>.

3. [3. !\[\]\(e3f8612927870f2e0f9f5989e6dd3064_img.jpg\) Letter from Chief Justice Wallace B. Jefferson to President Bob Black](http://www.texasatj.org/files/file/18CourtLettertoBarPresJan252011.pdf)
<<http://www.texasatj.org/files/file/18CourtLettertoBarPresJan252011.pdf>>.

4. [4. !\[\]\(71ac35c616fd8bfda805d579390e24d8_img.jpg\)](http://www.texasatj.org/files/file/21BarPresLettertoCourtBarTaskForceJan302012.pdf) <<http://www.texasatj.org/files/file/21BarPresLettertoCourtBarTaskForceJan302012.pdf>>.
5. [5. !\[\]\(b10a8b91056068472be58f587e00cb47_img.jpg\)](http://www.texasbar.com/Content/NavigationMenu/ForThePublic/FreeLegalInformation/FamilyLaw/ProSeDivorceBookEnglish.pdf) <<http://www.texasbar.com/Content/NavigationMenu/ForThePublic/FreeLegalInformation/FamilyLaw/ProSeDivorceBookEnglish.pdf>>
6. [6. !\[\]\(26a0aa65ffdf9b4c0922ec277970eeda_img.jpg\)](http://www.texaslawhelp.org) <<http://www.texaslawhelp.org>>.
7. [7. !\[\]\(94aeee9c39a3a3d10654831c4bdd6b76_img.jpg\)](http://www.supreme.courts.state.tx.us/rules/pdf/SCAC_Brief_Access_to_Justice_Commission_040612.pdf)
<http://www.supreme.courts.state.tx.us/rules/pdf/SCAC_Brief_Access_to_Justice_Commission_040612.pdf>.
8. [8. !\[\]\(3e6c1aedeeaa8d5deb59d3ee4ab46da3_img.jpg\)](#) The 2005 Order mandating acceptance of the protective order forms in read:

Misc. Docket No. 05-9059
ORDER APPROVING PROTECTIVE ORDER FORMS

ORDERED that:

The following protective order forms are approved for use in obtaining a protective order under Title IV of the Texas Family Code. Use of the approved forms is not required. However, if the approved forms are used, the court should attempt to rule on the application without regard to technical defects in the application. A trial court must not refuse to accept the approved forms simply because the applicant is not represented by counsel.

SIGNED AND ENTERED this 12th day of April, 2005.

See <<http://www.supreme.courts.state.tx.us/miscdocket/05/05905900.pdf>>.

9. [9. !\[\]\(b1b781be830eb908d845c527ab08d5f8_img.jpg\)](http://www.texasatj.org/files/file/1Instructions(1).pdf) Form Instructions (Divorce Kit – No Minor Children, No Real Property)
<[http://www.texasatj.org/files/file/1Instructions\(1\).pdf](http://www.texasatj.org/files/file/1Instructions(1).pdf)>
<<http://www.texasatj.org/SRL>>.
10. [10. !\[\]\(2176a4ba510fa27404d783166e891577_img.jpg\)](http://www.texasatj.org/files/file/2AffidavitofInabilitytoPayCosts.pdf) Form Affidavit of Inability to Pay Costs
<<http://www.texasatj.org/files/file/2AffidavitofInabilitytoPayCosts.pdf>>
<<http://www.texasatj.org/SRL>>.
11. [11. !\[\]\(a3b1c8d49688274496e55f2751cb8993_img.jpg\)](http://www.texasatj.org/files/file/3OriginalPetitionofDivorce(1).pdf) Form Petition for Divorce
<[http://www.texasatj.org/files/file/3OriginalPetitionofDivorce\(1\).pdf](http://www.texasatj.org/files/file/3OriginalPetitionofDivorce(1).pdf)>
<<http://www.texasatj.org/SRL>>.
12. [12. !\[\]\(428d7e9195be7f8a26074c24b6c91839_img.jpg\)](http://www.lawhelp.org/documents/377271Special_Instructions_Travis_County_Texas.pdf?sta teabbrev=TX)
<http://www.lawhelp.org/documents/377271Special_Instructions_Travis_County_Texas.pdf?sta teabbrev=TX>.
13. [13. !\[\]\(ed97b77223b22ee5f7630fce8232c643_img.jpg\)](http://www.texasatj.org/files/file/5Waiver(1).pdf) Form Waiver of Service <[http://www.texasatj.org/files/file/5Waiver\(1\).pdf](http://www.texasatj.org/files/file/5Waiver(1).pdf)>
<<http://www.texasatj.org/SRL>>.

14. [!\[\]\(50ba758255c5d7cec2761495a31c7c80_img.jpg\)](#) Certificate of Last Known Mailing Address
<<http://www.texasatj.org/files/file/7CertificateofLastKnownAddress.pdf>>
<<http://www.texasatj.org/SRL>>.

15. [!\[\]\(529949c2c3dadbaa4e538e8c643454bc_img.jpg\)](#) Notice of Change of Address
<<http://www.texasatj.org/files/file/8NoticeofChangeofAddress.pdf>>
<<http://www.texasatj.org/SRL>>.

16. [!\[\]\(3dfb8d66e81160ad61421a3452093d1b_img.jpg\)](#) Affidavit of Military Status
<<http://www.texasatj.org/files/file/9AffidavitofMilitaryStatus.pdf>>
<<http://www.texasatj.org/SRL>>.