SECTION REPORT
FAMILY LAW

http://www.sbotfam.org Volume 2010-2 (Spring)

MESSAGE FROM THE CHAIR

Happy New Year to all our Members! I sincerely hope that 2010 will be fruitful for you.

The Family Law Toolkit is coming. It has a newly redesigned metal binding that will keep it from falling apart on you after you have used and abused it like most of us do. Look for it in the mail around the end of April or early May. Toolkits are sent on the basis of last year's 2009 enrollment. **To insure timely delivery of the Toolkit, it is imperative that you check the State Bar site to determine that the Bar has your most current address and that you are shown to be a current member of the Section**. If not, you might consider paying your 2009 dues current to get on the Toolkit mailing list. You will also soon receive your 2010 dues statement from the Bar, so be sure to renew your membership in order that you continue to get the many benefits of membership: the Section Report (5-6 times a year); the annual Bibliography; the Family Law Toolkit each Spring; and the Legislative Report in odd-numbered years. Section membership also brings with it the fellowship, friendship, scholarship and camaraderie of 5000+ other lawyers in this state who practice Family Law armed with the most advanced education and practice tools in the Nation.

Marriage Dissolution Course. I also want to encourage you to attend the Marriage Dissolution Course hosted by Jimmy Vaught at the brand new JW Marriott Hill County Resort & Spa outside of **San Antonio on May 6-7**. In addition to timely and educational subjects dealing with subjects such as repeal of Equitable Contribution, Electronic Evidence, and repeal of the Child's Choice, you will be treated to a state of the art facility with spa, 2 TPC Championship Golf Courses, and fabulous rooms and reservations. You should have received the Brochure very recently. The Section Annual Meeting is also slated to take place at the Course, so plan to attend and hear about the many accomplishments we have made. We will be celebrating the 50th anniversary of the section. Please join us and get involved with the section.

----------Doug Woodburn, Chair

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2010 RECOMMENDED NOMINATIONS SLATE
STATE BAR OF TEXAS
FAMILY LAW SECTION

Pursuant to Article VI, Section 1 of the Bylaws of the State Bar of Texas, Family Law Section, the Nominating Committee of the Section hereby forwards the following names for the following positions on the Family Law Council:

Officers

CHAIR: **CHARLIE HODGES**
CHAIR-ELECT: **RANDY WILHITE**
VICE-CHAIR: **THOMAS L. AUSLEY**
TREASURER: **DIANA FRIEDMAN**
SECRETARY: **SHERRI EVANS**
IMMEDIATE PAST CHAIR: **DOUG WOODBURN**

Nominations to the Class of 2015

1. **CINDI BARELA (Amarillo)**
2. **SCOTT DOWNING (Dallas)**
3. **THEODORE ("TIP") HARGROVE (San Angelo)**
4. **CHRIS NICKELSON (Fort Worth)**
5. **YVONNE GONZALEZ-TOUREILLES (Alice)**

Bob Sullivan nominated to fill the vacancy in the Class of 2014.

NEWEST BOARD CERTIFIED
FAMILY LAWYERS

The Texas Academy of Family Law Specialists is proud to commend Texas's newest Board Certified Family Lawyers:

Amber Liddell Alwais-San Antonio
Steven C. Benke, IV-San Antonio
Kristal Cordova Thomson-San Antonio
Jeff Vincent Domen-Plano
Jonathan Philip Friday-Austin
Joel A. Grandstaff-Houston
Stephanie Imbrie-Bryan
Mary Evelyn Mcnamara-Austin

EDITOR'S NOTE

I hope all of you like the new look of the section report. Please let me know whether you like the look and any suggestions for further changes or further features that you would like to see in the Section Report. Given the fact that the courts are issuing fewer and fewer non-memorandum opinions, I have decided to includ more memorandum opinions in the Section Report. I have discovered that sometimes there are hidden gems. Even though these opinions are classified as memorandum opinions, pursuant to Texas Rule of Appellate Procedure 47, they have precedential value and should be called to a court's attention. I also want to thank Doug Woodburn for doing a wonderful job this last year and for all of his support.

FAMILY LAW COUNCIL RESOLUTION

On February 19, 2009, The Family Law Council of the Family Law Section approved the following resolution:

Resolved, that the State Bar of Texas Family Law Section opposes any amendment of Section 1.15(b)(5) of the Rules of Professional Conduct which removes language that specifically permits withdrawal or termination of representation due to a client's failure to pay legal fees. It is the position of the Section that the language is necessary to ensure protection of the financial interests of attorneys practicing in this state, and to operate as a restraint on clients who might make excessive demands if they were not required to pay for the services they request. The Family Law Section also believes that the ability of lawyers to condition their employment on withdrawal for non-payment of fees is a constitutionally-protected right, and that the proposed change would be construed by some to impair that right. The ability of lawyers to withdraw for non-payment of fees also encourages lawyers to undertake the representation of persons of modest means, since without a right to withdraw for non-payment of fees lawyers might be unwilling to agree to represent persons whose wealth is limited.

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ASK THE EDITOR

Dear Editor: I filed a motion for new trial based on newly discovered evidence and attached proper affidavits. The trial court set the hearing on the 100th day after the judgment was signed. The other side is now arguing that I am not entitled to the hearing. Do I have an absolute right to a hearing? *Muddling through in Muleshoe.*

Dear Muddling through in Muldshoe: Yes, because the trial court still has plenary power to grant the motion until the 105th day after the signing of the judgment, it has the same obligation to hear evidence as if the hearing had been conducted within the seventy five-day period. When a motion for new trial presents a question of fact upon which evidence must be heard, the trial court is obligated to hear such evidence if the facts alleged by the movant would entitle him to a new trial. *Anderson v. Anderson*, 282 S.W.3d 150, 154 (Tex. App. – El Paso 2009, no pet. h.). *G.L.S.*

If you have a question, please submit via email to the Editor at glslaw@gte.net.

IN BRIEF

Family Law From Around the Nation

by
Jimmy L. Verner, Jr.

Agreements: The Utah Supreme Court held that a husband's verbal promise to support his wife "at a certain level with the income he would earn as the holder of a medical degree" if she would support the two of them while he attended medical school constituted an enforceable "student support contract" and not mere "pillow talk." *Ashby v. Ashby*, 191 P.3d 35 (Utah 2010). A Virginia appellate court refused to enforce a postmarital agreement as unconscionable because it granted the husband virtually 100% of the marital property despite the wife's third-grade education, total disability and numerous health problems. *Sims v. Sims*, 685 S.W.2d 869 (Va. App. 2009). A Kentucky appellate court sua sponte reversed a trial court that incorporated an arbitrator's findings in its divorce decree, even though the parties signed an agreed order vesting the arbitrator with authority to resolve all issues in their divorce, because the arbitration agreement unconstitutionally displaced the role of the trial court. *Campbell v. Campbell*, ___ S.W.3d ___, 2010 WL 391841 (Ky. App. 2010).

Alimony: When a 58-year-old former husband retired after 34 years on the job, an Ohio appellate court agreed with the trial court that no change of circumstances had taken place because the trial court found that one reason the former husband retired was to lower his alimony payments. *Chepp v. Chepp*, 2009 WL 4546626 (Ohio App. 2009). When a 65-year-old former husband retired after many years on the job, the Massachusetts Supreme Judicial Court affirmed the trial court's decision to lower his alimony but would not terminate it despite a statutory presumption "that any alimony obligation owed by the retiring spouse should be terminated." *Pierce v. Pierce*, 455 Mass. 286, 916 N.E.2d 330 (2009). The Minnesota Supreme Court held that a trial court cannot consider pension payments to a former husband from a pension awarded to him upon divorce as income for alimony purposes to the extent that the benefits were earned during marriage because that would be "akin to putting money into Raymond's left pocket while simultaneously removing money from his right pocket, in effect modifying the prior property division." *Lee v. Lee*, 775 N.W.2d 631 (Minn. 2009).

Child support: The Nevada Supreme Court refused to recognize, as against the children's best interests, a stipulation between the parties that neither would seek a modification of child support. *Fernandez v. Fernandez*, 222 P.3d 1031 (Nev. 2010). In Connecticut, parties may, by statute, "agree to make unallocated periodic alimony and child support nonmodifiable" although the courts may modify such agreed orders when "the needs of the parties' children warrant modification." *Tomlinson v. Tomlinson*, 119 Conn. App. 194 , 986 A.2d 119 (2010). Rejecting other evidence of a husband's income, a Florida appellate court reversed a trial court's imputation of income to a husband based solely on what monthly household expenses had totaled prior to divorce. *Sallaberry v. Sallaberry*, ___ So. 3d ___, 2010 WL 532793 (Fla. App. 2010).

Lump sums: An Arizona trial court erred when it considered a $168,000 lawsuit settlement as income for child support purposes when the settlement compensated the former husband for mold damage to the house he purchased post-divorce. *Strait v. Strait*, ___ P.3d ___, 2010 WL 475282 (Ariz. App. 2010). The Maryland Court of Appeals held that a $30,000 payment to settle an obligor's personal injury lawsuit was "exempt from execution on a judgment for child support arrearages." *Rosemann v. Salsbury, Clements, Bekman, Marder & Adkins, LLC*, 412 Md. 308, 987 A.2d 48 (Md. App. 2010). Georgia trial court did not abuse its discretion by requiring an obligor to fund a $250,000 trust to secure payment of child support when the obligor had been behind on his child support before and encountered financial problems despite earning millions of dollars during the course of his career as an NFL player. *Henry v. Beacham*, 686 S.E.2d 892 (Ga. App. 2009).

Relocation: A Massachusetts appellate court allowed a custodial mother to move to New Hampshire - 90 minues away from the father - even though the mother purchased a house and accepted employment in New Hampshire prior to the divorce judgment and moved to modify the judgment within days of its entry.

Tammaro v. O'Brien, 917 N.E.2d 260 (Mass. App. 2009). The Florida Supreme Court reversed a trial court for failing to utilize a "present-based" analysis of a child's best interests when the trial court granted the mother custody of a 16-month-old child but simultaneously allowed the mother to move the child to Michigan once the child turned three years old. *Arthur v. Arthur*, ___ So.3d ___, 2010 WL 114532 (Fla. 2010). The North Dakota Supreme Court found no abuse of discretion in a trial court's decision not to change joint custody to primary custody for a mother who remarried, moved to Arizona with her new husband for better jobs, bought a home in a gated community, traveled to North Dakota every other two weeks to live with the children in a rented apartment and took the children to Arizona for visits. *Fleck v. Fleck*, ___ N.W.2d ___ 2010 WL 536902 (N.D. 2010).

Retirement: When a former husband transferred ""service credits"" in the California Public Employees' Retirement System (CalPERS) to his former wife per their divorce decree, then later redeposited them after his former wife waived her interest in them in exchange for a refund from CalPERS, the service credits could not be community property of the former husband's second marriage because the husband earned the service credits during his first marriage. *Sonne v. Sonne*, ___ Cal. Rptr.3d ___, 2010 WL 597225 (Cal. 2010). A Connecticut appellate court held that a former husband who divorced in 1993 and retired in 2005 could be required to disgorge the former wife's share of his pension benefits when the retirement plan administrators never processed the QDROs that the trial court had signed. *Cifaldi v. Cifaldi*, 983 A.2d 293 (Conn. 2009).

Social abandonment? In a blow to those who seek recognition of de facto no-fault divorce in New York, a New York appellate court declined to recognize "social abandonment" as constituting abandonment for purposes of divorce when the parties lived in the same residence but the husband failed to acknowledge or celebrate holidays or his wife's birthday; would not eat meals with his wife; refused "to attend family functions or accompany the wife to movies, shopping, restaurants, and church services;" once left his wife in a hospital emergency room; removed his wife's things from their bedroom; "and by otherwise ignoring her." *Davis v. Davis*, 889 N.Y.S.2d 611 (N.Y. App. 2009).

COLUMNS

MAKING SENSE OF COMPUTER-BASED TEST REPORTS

by John A. Zervopoulos, Ph.D., J.D., ABPP[1]

Ms. Smith, defendant's lawyer preparing to depose opposing counsel's psychologist expert, expressed concern as she read the detailed psychological descriptions in the plaintiff's evaluation report. She noted that the psychologist interviewed the plaintiff twice, administered the MMPI-2, and also talked with the plaintiff's spouse. No one else was interviewed, and no relevant records were reviewed. Nevertheless, the report's descriptions of the plaintiff seemed both too specific and too generic—and too artfully phrased. Ms. Smith's consulting expert agreed and suspected the problem's source. When reviewing the subpoenaed records, the consulting expert confirmed his suspicion: the psychologist had essentially copied, without attribution, several statements into her evaluation report from a computer-based test interpretation (CBTI) of the plaintiff's MMPI-2 test results. When told of this finding, Ms. Smith suspected that the psychologist had cherry-picked and plagiarized CBTI statements—a professional, if not ethical, indiscretion. Then Ms. Smith asked her consulting expert two questions: First, may a psychologist rely on a CBTI as the primary tool in a

[1] *John A. Zervopoulos, Ph.D., J.D., ABPP is a forensic psychologist and lawyer who directs PSYCHOLOGYLAW PARTNERS, a forensic consulting service to attorneys on psychology-related issues, materials, and testimony. He also authored an ABA-published book, Confronting Mental Health Evidence: A Practical Guide to Reliability and Experts in Family Law. Dr. Zervopoulos is online at www.psychologylawpartners.com and can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com.*

psychological evaluation? Second, is a CBTI report valid and reliable just because it was computer-generated?

Ms. Smith's first question addresses the role of tests in generally accepted forensic psychological evaluations. Such evaluations reflect contributions from three primary sources: examinee interviews; psychological testing of the examinee; and collateral information about the examinee from other people and from record reviews. While each source contributes to valid evaluation conclusions, evaluation conclusions may be compromised if the evaluator overemphasizes one source at the expense of the other two. For example, an evaluator who depends solely on examinee interviews cannot gauge whether the examinee has offered reliable statements, self-interested pronouncements, or a combination of both.

Likewise, evaluators misuse testing when they depend solely on test results to establish their expert opinions, even if they interpret the tests correctly. At best, psychological test interpretations compare examinees' answers with answers from selected groups of people studied during and after the test's development. For evaluation conclusions, experts still must connect the litigant's test profile with her life circumstances—information gathered from the other evaluation components. The court's concern centers on this litigant and her capacities and circumstances in this case, not on unnamed research subjects. Ms. Smith's first concern is well-placed: a psychologist cannot rely on a CBTI as the primary tool in a psychological evaluation at the expense of good interviews or adequate information from collateral sources.

Ms. Smith's second question about whether a CBTI is valid and reliable just because it was computer-generated raises another concern. Computers are useful tools to score and interpret psychological tests. Computers enable more accurate scoring than hand-scoring methods. Computers also may draw from research literature databases to develop more descriptive profiles than psychologists, only using textbooks and journal articles, may generate on their own. Further, computers may produce more consistent test interpretations because the same results, time after time, will generate the same profiles unaffected by a psychologist's biases toward a particular examinee or case issue.

But CBTIs do not, by themselves, provide legally relevant and reliable psychological profiles of examinees. CBTIs, camouflaged by digital auras of precision and accuracy, may present evidentiary problems of which lawyers should be aware. For example, a psychologist may obtain a CBTI report of an MMPI-2 profile from one of several companies. Some companies produce reports that are more research-based than others, and some meld clinical impressions with research findings without noting the differences in the interpretive narrative. In addition, these companies may treat the algorithms that produce their profile interpretations as proprietary information that they will resist disclosing—a possible *Daubert-Robinson* concern if experts are challenged to show the quality of the sources of their opinions. *See* General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997) ("nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* [unproven assertion] of the expert").

Further, CBTI reports, often several pages long, consist of descriptive narratives that purport to compare an examinee's test answers and profile with group profiles of research subjects who scored similarly. But a CBTI report's narrative, at best, only raises hypotheses about the examinee, not definitive statements. For example, while an examinee with an elevated depression score may share characteristics with research subjects who earned a similar score, the examinee may be depressed for different reasons; as a result, some computer report statements will fit the examinee, others may not. Or the examinee, despite the score, may not actually be depressed—a false positive classification.

Finally, an expert invoking certain CBTI narrative statements to support her opinion must show why those statements fit the litigant in the litigant's life situation, and why other unchosen narrative statements do not. The competent evaluator will reference information from the examinee interviews, from collateral information, and from relevant research or professional writings to address this issue. An expert's failure to

show such fit may be grounds for a relevance objection or for a *Daubert-Robinson* motion to exclude testimony based on the expert's unsupported selective reliance on the CBTI narrative.

Ms. Smith has asked the right questions, and her consulting expert has prepared her for a thorough deposition. Will opposing counsel be as prepared?

TAX LAWS of 2010

by Christy Adamcik Gammill, CDFA[1]

Traditionally Roth IRA conversions are limited to those who have a modified adjusted gross income of $100k or less, however, beginning in 2010 the income restriction is removed. Because tax has never been paid on a Traditional IRA or Rollover IRA, ordinary income tax must be paid on the funds upon conversion. However, as an added benefit of converting this year, the income tax from the conversion is able to be spread over two years, 2010 and 2011. This means you have two years from October 2010 until all income tax has to be paid on the conversion. The advantage of this is two-fold -- potentially keeping less tax from being paid at a higher marginal tax rate because of the division of income being spread over two years as well as having another year to pay the entire tax bill.

What does a Roth IRA have in comparison to other retirement accounts? Once qualified distributions begin by having being funded for at least 5 years and withdrawals beginning at age 59 ½ or later, the advantages are tax-deferral, no Required Minimum Distributions, contributions at any age, and no income tax.

The Roth IRA has no Required Minimum Distributions. The IRS requires Traditional IRAs have mandatory distributions taken at least annually by April 1st the year after you reach Age 70 ½. The amount of the distribution is based on your life expectancy and the IRA value as of December 31st the prior year. So the larger the account and older the person, the greater the mandatory distribution and ordinary income tax paid.

To take advantage of the Roth IRA coming from other retirement plan assets such as a 401(k), 403(b), Profit Sharing, Pension or other qualified plan you may convert directly to a Roth. Once you have established your new Roth IRA account, you will want to select an investment platform and create a portfolio that meets your Risk Profile, Time Horizon and Income needs. Consult with your financial advisor to determine if a Roth IRA conversion this year is right for you.

Estate Tax

In December 2009, congress voted to permanently extend the 45% rate and $3.5 million, per person estate tax exclusion, however, the Senate did not vote in time to pass the act. Making the law retroactive to January of 2010, currently the estate tax is repealed for this year, which means there is no estate tax.

In spite of the annual gifting limit increasing to $13,000 per year per beneficiary, the federal gift tax exclusion of $1 million over his or her lifetime did not increase. If gifting exceeds these limits, the gift tax rate will be 35% in 2010.

If no estate tax seems too good to be true it probably is. Although there may be no estate tax, there will be a limited step-up in basis. Typically this amount is set at the value as of date of death that eliminates capital gains tax at time of sale up to the amount valued in the estate. For example, if $2.0 Million of ABC company stock is declared in the estate at valuation and an heir liquidates the stock 10 years later with a value of $3.0 million, there is a capital gain only of $1.0 million ($3.0 million - $2.0 million). For 2010 the step-up

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in basis amount is limited to $1.3 million for the overall estate, plus $3 million for assets transferred to a surviving spouse.

Paralegal Study Guide for the Texas Board of Legal Specialization Exam

by Natalie Turner[1]

Let me first congratulate you for making the decision to take the Board Certification Exam. It is my goal in writing this article to assist you so that you may develop a practical and systematic plan to achieve your desire in passing the board certification exam.

I have divided the article into three sections. The first section will outline the application process and the requirements to even be selected to sit for the exam. The second part consists of the contents of the exam, and the third is an outline on how I prepared and studied for the exam.

I. The Application

Since the TBLS Certification Exam is offered once a year, you can never begin to gather information too early. The application is approximately 17 pages long, and can be found on the website at www.tbls.org. I would advise setting aside at least eight to twelve hours to complete the process.

Your contact information is very important. TBLS requires an office address, office phone and fax, and e-mail for contact purposes. In addition to personal information, you will need to submit three names and addresses of personal references. I would suggest Judges, Associate Judges, Prosecutors, or other lawyers who know you and can attest your knowledge in the field in which you are testing.

You must meet a minimum of 5 years actual experience as a paralegal by December 31st of the year you submit your application. In addition to meeting the 5 years of actual experience, you must meet one of the following by the application filing deadline:

- Successful completion of the NALA (National Association of Legal Assistants) Certification examination;
- A baccalaureate or higher degree in any field;
- An ABA approved program of education and training for paralegals;
- A paralegal program that consists of a minimum of 60 semester credit hours of which at least 18 such credit hours are in substantive legal courses plus at least 45 semester credit hours of general college curriculum courses; or
- 4 additional years of actual experience working as a paralegal under the direct supervision of a licensed attorney, for a total of 9 years actual experience.

You must also complete 30 hours of CLE in the field in which you are testing within **3 years immediately preceding the application** through December 31st of the year your application is submitted. You may have 10 self-study hours in area you are testing, and you must submit your course attendance information. If you are a member of the Paralegal Division State Bar of Texas, there is a very useful tool they have that will aid you in keeping track of your CLE hours.

You must also answer questions concerning your character, reputation, knowledge and active responsibility to follow the provision of the attorneys' Texas Disciplinary Rules of Professional Conduct.

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[1] Natalie Turner is a board-certified paralegal with Glasgow, Taylor, Isham & Glasgow in Granbury, Texas. She is also a member of the paralegal division of the State Bar of Texas and can be reached at 817-578-8700 or nturner@gtiglaw.com.

You must also demonstrate your substantial involvement and special competence in the area in which you are testing. You must have devoted a minimum of 50% of your paralegal activities to the field in which you are testing during the **3 years immediately preceding application**. You must also describe your participation and responsibilities, and the frequency of activities you have performed in the area in which you are testing. This is where I found it helpful to enlist my supervising lawyer's assistance to aid me in answering these questions.

Finally you will confirm the application by signing that all information you are submitting is truthful and that you agree to abide by the TBLS paralegal Rules and Regulations. Your supervising attorney must complete the last section to verify that you are currently employed and supervised by them, and affirm that they have reviewed the Standards for Paralegal Certification and confirm that you are performing the various paralegal activities and responsibilities as set forth in your application process. Send in the appropriate fee along with your application and wait to hear from TBLS. I submitted my application in May, and I received notification in August that my application was approved and the test would be conducted in October.

II. Contents of the Exam

Since there is no preparatory course provided by TBLS, and past exams are not available for review, there are a number of obstacles in your way to succeed. It is important to work your way up to the full challenge.

The first part of the exam is the essay. TBLS will give you a packet with three or more essay questions, depending on which specialty area you are testing. Since I can type quicker than I can write, I elected to take the exam on my laptop. I was nervous about the software not working, or crashing in the middle of my exam, but that didn't happen, and all my answers were legible. This is a wonderful tool, and I highly recommend you take the essay part by using this method. Once approved to take the test, you will be sent all the information on setting this up on your PC. This software is very simple to use, and I believe you will find it practical since you only have 2 ½ hours to complete this part of the exam.

The second part of the exam consists of 90 multiple-choice questions. This will be taken on a scantron. You will have 1 ½ hours to complete this part of the exam.

III. Preparing for the Exam

In order to maximize the likelihood of success, you have got to prepare in advance. When I started studying for the exam, I realized just how much material was "fair game." It was a little overwhelming to me. I am not a gifted test-taker so I was pretty intimidated by the daunting task that loomed before me. The first thing I did was prepare notebooks. The majority of my binder material was taken from Advanced Family Law Seminars that I attended and case summaries. I used all articles dealing with legislative changes and since this was a year for legislative changes, I had to study both the old and new law. The other study guide was the Texas Family Code. I tabbed the whole book and read it almost from cover to cover and made notes as I read. By the time I completed reading the Family Code, I was even more intimidated. The amount of information was staggering, and I had not even begun looking at other study materials. (Texas Disciplinary Rules of Professional Conduct, Texas Lawyer's Creed, State Bar of Texas Paralegal Division Cannons of Ethics, Texas Rules of Evidence, Rules of Appellate Procedure).

You may want to consider taking a day or two off before the exam. If you live out of town, I suggest you find a hotel close to the exam site, and drive by the testing site the night before so you are familiar with the area and parking.

The board certification exam is undoubtedly one of the most intimidating and stressful academic experiences that I have ever been through. There is no sure feel for what will be on the exam, especially with the essay and multiple choice questions.

Different approaches work for different people. When taking the test I suggest that if you are forced to speed up, do it efficiently. Don't panic, pace yourself and continually monitor your progress since this is a timed test. Don't dwell on problem questions. It is better to end with more time that you need than to run out of time. Lastly, sometimes it is beneficial to slow down if you are constantly getting ahead of time. You are always more likely to catch a careless mistake by working more slowly than quickly, and careless errors affect the score more than the mastery of material.

ARTICLES

EVIDENTLY MARRIED:
PROVING MARRIAGE IN CIVIL AND CRIMINAL CASES

By Kate Semmler[1]

I. Introduction

In the spring of 2008, the Texas Department of Family and Protective Services and local sheriffs raided the Yearning for Zion (YFZ) Ranch located in Eldorado, Texas removing over 400 children on a false report.[2] The inhabitants of the ranch are members of the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS), a religious sect notorious for its belief in and practice of polygamy.[3] After widespread national attention and criticism, over a year has passed and the children have been returned. All that remains of the incident are indictments accusing twelve men of crimes of sexual assault and bigamy.[4] The first trial started in late October in Schleicher County[5] in West Texas and ended in a conviction for sexual assault.[6] This is an unfamiliar occurrence for the state, but certainly not unprecedented. In 2007, Yisrayl Hawkins, an Elder of the religious sect House of Yahweh, was arrested for sexual assault of a minor and again in 2008, for bigamy, accused of having over twenty wives.[7]

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[1] Kate Semmler is a J.D. candidate, The University of Texas School of Law, 2011 and may be reached at ksemmler@alum.trinity.edu.
[2] Katy Vine, *With God on Their Side*, TEXAS MONTHLY, Oct. 2009.
[3] *Id.*
[4] *Id.*
[5] Schleicher County encompasses 1310.61 square miles, with a population of 2819, or 2.2 people per square mile. US Census, population in 2008, county lines in 2000. U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/48/48413.html (last visited Oct. 12, 2009). The county seat, Eldorado, has 1,951 residents. Local Census, http://www.localcensus.com/city/Eldorado/Texas (last visited Nov. 12, 2009).
[6] Trish Choate, *FLDS Trial: Jessop Guilty of Sexual Assault*, Standard-Times Washington Bureau, Nov. 5, 2009. As of December 15, the second FLDS member was convicted of sexual assault of a child. Matthew Waller, *FLDS: Keate guilty of child sex assault*, http://www.gosanangelo.com/news/2009/dec/15/keate-jury-to-hear-closings-today (last visited Dec. 17, 2009).
[7] Hawkins was sentenced to 30 years for sexual assault in 2008. The bigamy trial is set to start in Callahan County and Hawkins recently filed for a change in venue in September during a pretrial hearing. Celinda Emison, *Hawkins Seeking Change of Venue*, Reporter News, http://www.reporternews.com/news/2009/sep/16/hawkins/ (last visited Oct. 15, 2009).

Although these recent events may make it appear otherwise, bigamy is a crime rarely prosecuted in Texas and nationwide,[8] although all states have adopted a bigamy statute. The lack of bigamy prosecutions is a result of one or more of the following logical conclusions: (1) few people violate the law; (2) few people are caught violating the law; or (3) the state has little interest in investigating and prosecuting the crime.[9] If the last option is an accurate reason for the lack of bigamy prosecutions in the past, it is reasonable to conclude that the state has decided to prosecute the accused for bigamy under these circumstances because of the negative publicity garnered over the YFZ raid and the reversal and return of the children to the YFZ ranch.[10]

In an article discussing the upcoming bigamy trial for Hawkins, the director of governmental relations for the Texas District and County Attorneys Association stated, "[bigamy cases] can be very difficult cases to prove because there is no CSI-type evidence. There's no blood. There's no DNA."[11] This statement aligns with the idea that marriage is an abstract element to prove in a crime. Given this idea and the fact that marriage is a civil law creation, the meaning of marriage is incorporated into the crime of bigamy. However, not all of the constructions and standards relating to proving marriage in a civil case should be integrated into the criminal case. As the Utah Supreme Court stated, "[b]oth the statutes that define and regulate legal marriages and the statute that proscribes bigamy concern marriage, but the differing objectives of each make risky the interchange of concepts and definitions between the statutory provisions that relate to each."[12]

The county attorney prosecuting Hawkins weighed in by commenting, "[i]f we thought the worst thing [Mr. Hawkins] had done is to have however many wives he's got, it might not be such a terribly big deal. But he's destroyed the lives of hundreds if not thousands of people, and so that makes the criminal conduct we can prove a bit more serious."[13] With these two statements, it seems that although bigamy might seem theoretically hard to prove, the prosecution believes that it is relatively easy to prosecute.

One thing seems certain, bigamy prosecutions have drastically decreased since the mid 1900s, leaving only scholarly discussions of the constitutional issues surrounding the crime. The only rustling in the law has come from the legislature, responding to the FLDS-type controversies. The legislature has also moved on the civil side to amend the Family Code to account for these controversies, ultimately affecting the crime of bigamy.

This article focuses on the intricacies of proving marriage, particularly when multiple marriages exist or are alleged. Part II describes how Texas "defines" a marriage and the different ways to enter a marriage. Part III focuses on how to prove marriages in civil cases when the question of multiple marriages is asserted, and also incorporates relevant case law regarding proving marriage in general when needed. Part IV delves into the criminal law in examining the bigamy statute, what the state must prove, and what the defendant must assert in order to establish a defense. Part V concludes with a summary of the paper and final thoughts regarding the upcoming FLDS trials.[14]

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[8] *See* Michael Myers, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . is Polygamy next?*, 42 HOUS. L. REV. 1451, 1456 (2006).

[9] One explanation for the lack of prosecutions is that polygamist groups live in isolation. *See* Myers, *supra* note 7, at 1456.

[10] See Martin Guggenheim, *Child-Centered Jurisprudence and Feminist Jurisprudence: Exploring the Connections and Tensions Article*, 46 HOUS. L. REV. 759, 762 (2009) (arguing that the criminal system, not the child welfare system, should be used to protect the state's interest in preventing polygamy).

[11] Peter Meyer, *Texas Laws: House of Yahweh polygamy test case? Filings involving sect nearby may signal what's next in Eldorado*, Dallas Morning News, May 11, 2008.

[12] State v. Holm, 137 P.3d 726, 754 (Utah 2006).

[13] The county attorney also made the comparison stating that "[t]hey didn't get Al Capone because of all the people he murdered and all the organized crime. They got him for tax evasion." *Id.*

[14] Throughout this note, the author will occasionally reference the YFZ or FLDS cases to provide an illustration of possible issues with prosecuting bigamy.

For purposes of this paper, the author assumes that the husband is the spouse entering into multiple marriages. Although the civil cases seem to be more evenly spread among the husband and wife regarding a party entering multiple marriages, the strong majority of Texas bigamy cases involve the husband.[15]

II. Marriage Defined

In Texas law, no definition exists for the term "marriage"; it is a status or more appropriately, a legal conclusion. The Texas Family Code provides two processes in which marriage may be contracted.

A. Ceremonial Marriage

A man and woman seeking a "ceremonial marriage" in Texas may do so by following the explicit provisions in Chapter 2 of the Texas Family Code.[16] This consists of filing an application for a license,[17] presenting proof of identity,[18] acceptance of the application by the clerk,[19] issuance of the license,[20] a ceremony,[21] and the return of the license.[22] In addition to the procedure, the code requires that the parties be 18 years of age to obtain a license,[23] but an applicant 16 years or older may receive a license with parental consent.[24] A parent may consent (or a person with the "court ordered right to consent") to a marriage of their child by signing and having the county clerk acknowledge an affidavit.[25] If a parent is unable to consent in front of the county clerk, the parent's "consent may be acknowledged before any officer authorized," but the consent must be accompanied by a physician's affidavit.[26] In addition, a minor of any age may petition the court to receive permission to marry.[27]

B. "Common-Law" Marriage

Texas is one of only a few states that still recognizes a common-law marriage.[28] In Texas, known officially as "a marriage without formalities or an informal marriage," a "common-law marriage,"[29] may be

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[15] After much research, the author found only two Texas cases where the defendant was a woman. Hilton v. State, 191 S.W.2d 875 (Tex. 1945), McAfee v. State, 41 S.W. 627 (Tex. 1897).
[16] TEX. FAM. CODE ANN. § 2.001 (2009).
[17] TEX. FAM. CODE ANN. §§ 2.002, 2.004 (2009). The application to receive a license from the clerk requires the parties to attest to the fact that neither is currently married to a different party.
[18] *Id.* at § 2.005. In case of an absent applicant, §§ 2.006-2.007 provides an alternative route.
[19] *Id.* at § 2.008.
[20] *Id.* at § 2.009.
[21] *Id.* at §§ 2.202 – 2.203. Section 2.202 provides a list of persons authorized to conduct the ceremony.
[22] *Id.* at § 2.206.
[23] *Id.* at § 2.101.
[24] *Id.* at § 2.102.
[25] *Id.*
[26] *Id.*
[27] *Id.* at § 2.103.
[28] Common-law marriages are currently recognized in nine states and the District of Columbia. However, some states only recognize the marriage if it was entered into prior to a given date. Piel v. Brown, 361 So. 2d 90, 93 (Ala. 1978); Deter v. Deter, 484 P.2d 805, 806 (Colo. Ct. App. 1971); GA. CODE ANN. § 19-3-1(prior to Jan. 1, 1997); IDAHO CODE ANN. § 32-201 (prior to Jan.1 1996); IND. CODE § 31-11-8-5 (prior to Jan. 11958); IOWA CODE ANN. § 595.11; KAN. STAT. ANN § 23-101; MONT. CODE. ANN. § 40-1-403; N.H. Rev. Stat. Ann. § 457:39 (at death for inheritance purposes only); Lyons v. Lyons 621 N.E. 2d 718 (Ohio App. 1993) (prior to Oct. 10, 1991); OKLA. STAT. ANN. tit. 43, § 1 (prior to Nov. 1, 1998); 23 PA. CONS. STAT. § 1103 (prior to Jan. 1, 2005); DeMelo v. Zompa,

established if "the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married." The agreement must be a present intent, not an agreement to be married in the future.[30] The last element, the "holding out" requirement, considers "a couple's reputation in the community as being married… a significant factor."[31] Alternatively, a couple may declare and register an informal marriage with the county clerk to be sufficient as evidence of a marriage.[32] Unlike a ceremonial marriage, a party to an informal marriage must be 18 years of age or older. A party, who is presently married, may not be a party to a valid informal marriage.[33] If one of the parties does not initiate a proceeding to prove the informal marriage after two years of separation and cessation of living together, there is a rebuttable presumption that the parties did not enter into an agreement to be married.[34] Finally, in both a formal and informal marriage, a marriage is deemed void if the parties are related as specified in § 6.210.[35]

In the case of a ceremonial marriage, these provisions are sufficient to inform a couple seeking a marriage how to proceed. In a controversy, it will be up to the court to determine if there was a valid marriage after the fact. The question of who has the burden to prove the marriage, as well as the standard of proof will be examined in the following section.

Part III. Proving Marriage in a Civil Case

There are several reasons why a party would attempt to prove a marriage in a civil case. A wide variety of rights and benefits arise from the marriage relationship, especially if a child or property is concerned. A party may be involved in one of the following legal proceedings: divorce, child custody and support, parentage, probate, wrongful death, social security benefits, workers' compensation, life insurance or other legal action.[36] Commonly an issue arises if the "spouse" of the party asserting the marriage has entered into a subsequent "marriage."[37] Proving the continuing validity of a marriage, if one spouse has married again, is more difficult than if the spouse had not remarried.

A. Presumptions Involving Marriage

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844 A.2d 174, 177 (R.I. 2004); S.C. CODE ANN. § 20-1-30; TEX. FAM. CODE ANN. § 2.401; UTAH CODE ANN.§ 30-1-4.5); Hoage v. Murch Bros. Constr. Co., 50 F.2d 983 (D.C. Cir. 1931).

[29] The Family Code refers to this type of marriage in the heading as a marriage without formalities, but then refers to it as an informal marriage in the text of the statutes. The courts and the general public refer to the marriage as a common-law marriage, which is the colloquial form.

[30] Rosetta v. Rosetta, 525 S.W.2d 255, 261 (Tex. Civ. App. 1975, no writ).

[31] Smith v. Deneve, 285 S.W.3d 904, 910 (Tex. App.—Dallas, 2009, no pet.).

[32] TEX. FAM. CODE ANN. § 2.402 (2009).

[33] TEX. FAM. CODE ANN. § 2.401(d) (2009).

[34] TEX. FAM. CODE ANN. § 2.401(b).

[35] *See id.* at § 6.201 (voiding a marriage if the relationship if one party is related to the other as ancestors or descendants, by blood or adoption; a brother or sister, of the whole or half blood or by adoption; a parent's brother or sister, of the whole or half blood or by adoption; or a son or daughter of a brother or sister, of the whole or half blood or by adoption). In 2005 the Texas Legislature amended the section declaring a marriage void on the grounds of consanguinity by adding the relationship of cousins based on reports of a polygamist cult that had moved to Texas and were marrying children off to close family members. Rosanne Piatt, *Overcorrecting the Purported Problem of Taking Child Brides in Polygamist Marriages: The Texas Legislature unconstitutionally voids all marriages by Texas younger than sixteen and criminalizes parental consent*, 37 ST. MARY'S L.J. 753, 765 (2006).

[36] Peter N. Swisher & Melanie D. Jones, *The Last-In-Time Marriage Presumption*, 29 FAM. L.Q. 409, 409 (1995).

[37] "Spouse" and "marriage" are in quotations because these words carry legal meaning and in this case they have not been proven.

First, it is important to supplement the provisions on establishing a marriage relationship with the statutory presumptions in place. First, every marriage in this state is presumed to be valid unless expressly made void by dissolving the marriage.[38] Also, § 1.102 states that:

> [w]hen two or more marriages of a person to different spouses are alleged, the most recent marriage is presumed to be valid as against each marriage that precedes the most recent marriage until one who asserts the validity of a prior marriage proves the validity of the prior marriage.

These presumptions play a major role in litigating the existence of a marriage.

The presumption of a valid marriage is "one of the strongest, if, indeed, not the strongest, known to law."[39] It is considered evidence "and may even outweigh evidence to the contrary."[40] "The strength of the presumption increases with the lapse of time, acknowledgments by the parties to the marriage, and the birth of children . . . ."[41]

With these presumptions in place, a party contesting the validity of the most recent marriage has "the burden of proof . . . to establish 1) the prior marriage and 2) its continuing validity at the time of the subsequent marriage."[42] There must be "sufficient evidence, standing alone, to negate the dissolution of the prior marriage."[43] "However . . . in order to rebut the presumption of legality of the second marriage such need not be established absolutely or to a moral certainty . . . ."[44]

This brings us to the question of what is "sufficient evidence." There is an abundance of case law in Texas dealing with proving an informal marriage. However, if the party has participated in a "ceremonial marriage," what evidence is "sufficient" to disprove the validity of the most recent marriage is less frequently handled.

B. Proof of Marriage

1. The Formation of the Marriage

a. Ceremonial Marriage

If a marriage license is properly admitted into evidence according to the Texas Rules of Evidence, "all reasonable presumptions will be indulged in favor of the validity of the marriage."[45] However, the lack of a license admitted into evidence is not conclusive because a license could have been issued in another county in

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[38] TEX. FAM. CODE ANN. § 1.101 (2009). This includes any instance of fraud or mistake in obtaining a license. TEX. FAM. CODE ANN. § 2.301 (2009).
[39] Texas Emp. Ins. Ass'n v. Elder, 282 S.W.2d 371, 373 (Tex. 1955). *But see* Matter of Marriage of Collins, 870 S.W.2d 682, 685 (Tex. App.—Amarillo 1995, writ denied) (A man is presumed to be the biological father of a child if he and the child's mother were married at the time the child was born . . . This presumption is one of the strongest known to our law.")
[40] *Id.*
[41] *Id.*
[42] Loera v. Loera, 815 S.W.2d 910, 911 (Tex. App.—Corpus Christi 1991, no writ).
[43] Wood v. Paulus, 524 S.W.2d 749, 758 (Tex. App.—Corpus Christi 1975, writ ref'd n.r.e.).
[44] Schacht v. Schacht, 435 S.W.2d 197, 201 (Tex. App.—Dallas 1968, no writ).
[45] Black v. Shell, 397 S.W.2d 877, 881 (Tex. Civ. App.—Texarkana 1965, writ ref'd n.r.e.).

Texas.[46] If there is evidence of a marriage ceremony, there is a presumption "that all the proceedings necessary to its validity were regular and valid."[47]

b. Foreign Marriages

Foreign law regarding marriage must be "pleaded and proved by the party relying on such foreign law."[48] If the party fails to prove the foreign law, it is assumed that the law of the foreign country is the same as in Texas.[49] This rule is consistent with the law of other states.[50] Therefore, if a party is asserting a marriage that was established in another state or foreign country is valid, then the proponent must present evidence of the marriage and evidence to prove that the marriage complied with the law of that state or foreign country. As is the case with a license from Texas,[51] if a party presents a government issued certificate of marriage, the court will presume that the parties complied with the law of the country.[52]

c. Common-law Marriage

The three elements—agreement, cohabitation, and holding out—may be proved by direct or circumstantial evidence.[53] The second two elements may be relatively easy to present to the jury because they can be shown by physical evidence. The elements are usually proven through the conduct or acts of the parties. For example, testimony from neighbors, friends, and family members can be presented to prove that the couple held themselves out as husband and wife.[54] Other proof of holding out includes signing documents as husband and wife,[55] filing joint taxes,[56] and obtaining joint insurance coverage.[57] Although the agreement can no longer be inferred by proving cohabitation and holding out,[58] evidence proving these two elements may provide circumstantial evidence to prove an agreement.[59] In accordance with the law regarding marriages established in other states or foreign jurisdictions, elements established in Texas law of a common-law marriage that were fulfilled in a state that does not recognize such a marriage is not a valid marriage in Texas.[60]

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[46] Dixon v. Dixon, 348 S.W.2d 210, 214 (Tex. Civ. App.—Austin 1961, no writ).
[47] Clayton v. Haywood, 133 S.W. 1082, 1084 (Tex. Civ. App. 1911, no writ) (holding that even though no license was admitted into evidence, proof that the courthouse was burned and a marriage ceremony, was sufficient to prove a valid marriage).
[48] Franklin v. Smalldridge, 616 S.W.2d 655, 657-58 (Tex. App.—Corpus Christi 1981, no writ).
[49] *Id.*
[50] Dockery v. Brown, 209 S.W.2d 801, 803 (Tex. Civ. App.—El Paso 1947, no writ).
[51] *See supra* Part III.B.1.a.
[52] In re Estate of Loveless, 64 S.W.3d 564, 575 (Tex. App.—Texarkana 2001, no pet.) (Honduras); Osojie v. Osojie, No. 03-08-00688-CV, 2009 WL 2902743, at *4 (Tex. App.—Austin Aug. 27, 2009, no pet.) (Nigeria).
[53] Russell v. Russell, 865 S.W.2d 929, 931 (Tex. 1993).
[54] However, the evidence does not *have* to show that the parties introduced each other as husband and wife, other actions of the parties can be proof of the marriage. Rosales v. Rosales, 377 S.W.2d 661, 664 (Tex. Civ. App.—Corpus Christi 1964, no writ).
[55] Jackson v. Smith, 703 S.W.2d 791, 795 (Tex. App.—Dallas 1985, no writ).
[56] Osojie v. Osojie, No. 03-08-00688-CV, 2009 WL 2902743, at *4 (Tex. App.—Austin Aug. 27, 2009, no pet.).
[57] Omodele v. Adams, No. 14-01-00999-CV, 2003 WL 133602 (Tex. App.—Houston [14th Dist.] Jan. 16, 2003, no pet.) (mem. op.).
[58] *See* In re Glasco, 619 S.W.2d 567, 570 (Tex. Civ. App.—San Antonio 1981, no writ) ("an agreement may ordinarily be inferred from the evidence that establishes the other two constituent elements"). After the amendment to the Family Code in 1989, each element has to be proved independently. Russell v. Russell, 865 S.W.2d 929, 931-32 (Tex. 1993).
[59] Lewis v. Anderson, 173 S.W.3d 556, 559 (Tex. App.—Dallas 2005, no pet.).
[60] Braddock v. Taylor, 592 S.W.2d 40, 41 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.); Bobbitt v. Bobbitt, 223 S.W. 478, 480 (Tex. Civ. App.—Amarillo 1920, writ dism'd w.o.j.). However, the laws of the state must be proved before the court will conclude the marriage is invalid. *See* Bell v. Southern Cas. Co., 267 S.W. 531, 532 (Tex. Civ. App.—Beaumont 1924, writ ref'd n.r.e).

2. Dissolution of the Marriage

The failure to dissolve a marriage has proven to be the most crucial issue in contesting the most recent marriage. Proving the existence of a prior marriage alone is not effective in establishing the latter marriage was void. The party contesting the subsequent marriage must prove that the former marriage has not been dissolved by either divorce or annulment.[61]

Unlike the formation of a marriage, the dissolution of a marriage requires either court action or the death of the spouse.[62] Therefore, proving a failure of dissolution seems as if it would be black or white. However, examining the case law, it is obvious that this is not the case. The difficulty arises when a party must prove the nonexistence of an element. The court has established that a party must prove, in order to overcome the presumption of validity of the subsequent marriage, that there is no record of a divorce or annulment in any jurisdiction where the parties "might reasonably have been expected to pursue them."[63] To prove a lack of dissolution, a certificate from the county or other jurisdiction stating there has been no divorce or any other judgments involving the parties is sufficient.[64] Testimony that a search had been conducted revealing no record of a divorce or annulment may also prove the fact.[65] In addition, testimony from both spouses of the prior marriage that neither sought a dissolution of the marriage would rebut the presumption that the second marriage is valid.[66]

Part IV. Proving Marriage in a Trial for Bigamy

Unlike the civil side of the law, there are only a few instances in which a marriage must be proved in a criminal case. Some situations include trials for bigamy, husband-wife testimony privileges,[67] and sexual assault.[68] This analysis will focus on the issues surrounding a trial for bigamy, with some guidance from courts discussing the latter instances.

A. Bigamy Defined

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[61] Mullinax v. Mullinax, 447 S.W.2d 428, 429 (Tex. Civ. App.—Waco 1969, no writ).
[62] Villegas v. Griffin Indus., 975 S.W.2d 745, 750 (Tex. App.—Corpus Christi 1998, pet. denied).
[63] Davis v. Davis, 521 S.W.2d 603, 605 (Tex. 1975) (proving the nonexistence of a divorce in two counties and Australia was sufficient to rebut the presumption). *See* Mullinax, 447 S.W.2d at 429 ("Proof that the former marriage has not been dissolved by divorce is not sufficient. There must likewise be proof it has not been annulled . . . .").
[64] *See* Romano v. Newell Recycling of San Antonio, LP, No. 04-07-00084-CV, 2008 WL 227974, at *6 (Tex. App.—San Antonio Jan. 30, 2008, no pet.) (mem. op.).
[65] *See* Pike v. Estate of Pike, No. 2-04-301-CV, 2005 WL 2248347, at * 3 (Tex. App.—Fort Worth Sep.15, 2005, no pet.) (mem. op.) (suggesting that testimony from a party conducting the search for a record of dissolution may be sufficient to rebut the presumption of the validity of the subsequent marriage).
[66] *See* Texas Emp. Ins. Ass'n v. Gomez, 313 S.W.2d 956, 958 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.) (indicating that if testimony from both spouses of the prior marriage that neither obtained a divorce or annulment, this would be sufficient to rebut the presumption).
[67] TEX. JUR. CRIMINAL LAW § 3221.
[68] TEX. PENAL CODE ANN. § 22.011 (2009) ("It is an affirmative defense to prosecution under Subsection . . . that the actor was the spouse of the child at the time of the offense").

After the landmark Supreme Court case upholding Utah's criminal statute prohibiting bigamy in 1878,[69] every state adopted a statute outlawing bigamy.[70] In 1879, Texas enacted a statute criminalizing bigamy.[71]

The current statute provides:

> (a) An individual commits an offense if:
>
> (1) he is legally married and he:
>
> (A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage: or
> (B) lives with a person other than his spouse in this state under the appearance of being married; or
>
> (2) he knows that a married person other than his spouse is married and he:
>
> (A) purports to marry or does marry that person in this state, or any other state or foreign country, under circumstances that would, but for the person's prior marriage, constitute a marriage: or
> (B) lives with that person in this state under the appearance of being married.
>
> (b) For purposes of this section, "under the appearance of being married" means holding out that the parties are married with cohabitation and an intent to be married by either party.
>
> (c) *It is a defense to prosecution under Subsection (a)(1) that the actor reasonably believed at the time of the commission of the offense that the actor and the person whom the actor married or purported to marry or with whom the actor lived under the appearance of being married were legally eligible to be married because the actor's prior marriage was void or had been dissolved by death, divorce, or annulment. For purposes of this subsection, an actor's belief is reasonable if the belief is substantiated by a certified copy of a death certificate or other signed document issued by a court.*
>
> (d) For the purposes of this section, the lawful wife or husband of the actor may testify both for or against the actor concerning proof of the original marriage.
>
> (e) An offense under this section is a *felony of the third degree, except that if at the time of the commission of the offense, the person whom the actor marries or purports to marry or with whom the actor lives under the appearance of being married is:*
>
> *(1) 16 years of age or older, the offense is a felony of the second degree; or*
> *(2) younger than 16 years of age, the offense is a felony of the first degree.* [72]

In 1993, the 73rd Legislature altered the punishment from a "felony of the third degree" to a "Class A misdemeanor." In 2005, the 79th Legislature readopted the punishment of a felony of the third degree and provided an increased punishment if the defendant marries or purports to marry a person under the age of 16.

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[69] Reynolds v. United States, 98 U.S. 145 (1878).
[70] Utah v. Green, 99 P.3d 820, 828 n.13 (Utah 2004).
[71] REV.P.C. 1879, arts. 324, 325, 328. Prior to the enactment of the statute, bigamy was being prosecuted as a common law crime.
[72] TEX. PENAL CODE ANN. § 25.01 (2009). The 2005 amendments are italicized.

The punishment provisions enacted in 2005 are flawed. The statute provides that bigamy is a felony of the third degree but if the person that the defendant marries or purports to marry is "16 years of age or older, the offense is a felony of the second degree." If the person is younger than the age of 16, the offense is a felony of the first degree. There is no situation that will render the offense being labeled as a felony of the third degree as the statute is written. This drafting error may cause defendants to challenge the statute for undue vagueness. However, the court has wide authority in determining whether it is vague,[73] and will most likely not uphold the argument based on this apparent drafting error.[74]

In each of the situations provided in the statute, a prior lawful marriage is "one of the conditions required to render the subsequent marriage a criminal act."[75] It is important to note that the word "marry" in sections 1(A) and 2(A) "does not mean a valid marriage" because "[a]ll bigamous marriages are void."[76] Bigamy can be predicated upon either a ceremonial or a common-law marriage.[77] Regarding the FLDS cases, the prosecution will most likely base the crime on the first marriage, which typically is a ceremonial marriage, and one of the subsequent common law marriages.

By using the "appearance of marriage" language to mean the elements of a common-law marriage, the legislature has apparently provided a route to prosecute parties where there is a legal impediment that would void the second "marriage" apart from the prior marriage. Because the Penal Code does not provide an explanation or a definition for "marriage," the Code has incorporated the meanings from the Family Code.

Also evident from the statute is that the second spouse of a bigamist can be charged with bigamy as a principal.[78] This is rarely prosecuted, and the Texas Attorney General has not arrested any of the FLDS wives under this statute. Although the wife may technically be a principal or accomplice in the crime, the state may consider the wife or wives victims in the situation.[79]

In proving a marriage in a bigamy prosecution, the civil side's standard of proof is superseded by the criminal standard of proof. The state has the burden of proving, beyond a reasonable doubt, that the defendant was legally married and that the defendant entered a second "marriage" while the prior marriage was still in existence.[80] The state also must establish the identity of the accused.[81] Although the state must prove these four elements, this still does not account for what exactly must be proved to establish a valid marriage or subsequent illegal marriage. As discussed above, the term "marriage" is a conclusion. But the Texas Court of Criminal Appeals has stated that "[m]arriage is a contract, and it must be shown by the evidence, whenever it becomes an issue."[82] There are "legal requisites to a valid marriage in this State, and

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[73] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.3(a) (2d. ed. 2009).
[74] *See* United States v. Batchelder, 442 U.S. 114 (1979) (holding that where two statutes created two different penalties for the same crime was not unconstitutional because although the defendant may be uncertain about the penalty, he knew the maximum possible penalty).
[75] TEX. JUR. *Criminal Law* § 493.
[76] Stevens v. State, 243 S.W.2d 162, 163 (Tex. Crim. App. 1951).
[77] *Id.*
[78] TEX. PENAL CODE ANN. § 25.01(a)(2) (2009).
[79] *See* Melinda Rogers, *Current number of cases against FLDS is unknown: A lawyer for the church particularly wonders about bigamy charges*, SALT LAKE TRIBUNE, Aug. 13, 2008.
[80] Parker v. State, 53 S.W.2d 473, 474 (Tex. Crim. App. 1932); Jones v. State, 165 S.W. 144, 146 (Tex. Crim. App. 1914); TEX. PENAL CODE ANN. § 2.101 (2009).
[81] Goad v. State, 102 S.W. 121, 121 (Tex. Crim. App. 1907).
[82] McCombs v. State, 99 S.W. 1017 (Tex. Crim. App. 1906).

any other form, not in conformity with these requirements of the law, would be illegal and void in prosecutions for unlawful marriage."[83] These requisites for a marriage are found in the civil law.[84]

Additionally, the Family Code contains provisions that establish capacity to marry, age requirements, and sex requirements. If the state must prove each element of bigamy beyond a reasonable doubt, one issue is whether these "elements" are necessary to prove in order to perfect the conviction. On the civil side, the presumption that the marriage is valid shifts the burden to the party contesting the marriage. The presumption of innocence which favors the defendant may shift the burden to the state, meaning the marriage is presumed void. If so, the issue then is whether the state must prove that the first spouse was of the legal age, the parties were competent to marry, or even whether the parties were of the opposite sex.

In the alternative, if the burden is not on the state to prove these "elements," this would open the door for the defendant to present evidence to negate these elements as an affirmative defense. Here, the defendant could present enough evidence to disprove an element and create doubt in the minds of the jury, possibly enough to produce a reasonable doubt. Only then would the state need to offer evidence that these requirements for obtaining a legal marriage have been met. There are some major uncertainties as to how marriage works in the bigamy statute. These issues will be explored below.

B. Burden of Proof

There are multiple presumptions on the civil side of the docket in favor of a valid marriage. As the courts state, the presumption of marriage may be one of the strongest known to law. There is one presumption that arguably should outweigh this presumption, the presumption of innocence.[85] In civil cases discussing the presumption that the latest marriage is valid, the courts reason that "[t]he basis for [the presumption] . . . is a well established one, founded in the principle that the law will presume morality and innocence rather than immorality and guilt."[86] The criminal law has the presumption of innocent built in through the stringent standard of proof of "beyond a reasonable doubt."[87] Although both presumptions have the ultimate goal of innocence, they contradict each other in a bigamy trial.

Already there may be a conflict between the understanding of a marriage in a civil case and what will be applied in a criminal case. There are two potentially competing implications to presuming the second marriage is valid in a criminal trial—one favoring the state and one favoring the defendant. First, the evidentiary support required to prove the subsequent marriage could be relaxed in light of the presumption that the marriage is valid, therefore creating tension with the requirement to prove each element beyond a reasonable doubt. On the other hand, it could elevate the evidentiary standard for the state in proving that the first marriage was valid because the second marriage can only be presumptively valid if the first marriage is not.[88] If the first marriage is not valid, then there is not a crime. There is limited case law discussing the aforementioned issues. Below are different ways that courts have applied the presumption of a valid marriage in the criminal context.

In *Medrano v. State*,[89] the court examined whether a prior marriage was valid to determine if the spouse should have been immune from testifying against the defendant. The court applied the law from the civil side

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[83] Dumas v. State, 1883 WL 8941, at *6 (Tex. Ct. App. 1883).
[84] *See* Waldrop v. State, 53 S.W. 130, 131 (Tex. Crim. App. 1899) ("Marriage is a civil contract…").
[85] TEX. PENAL CODE ANN. § 2.01 (2009).
[86] Schacht v. Schacht, 435 S.W.2d 197 (Tex. App.—Dallas, 1968, no writ).
[87] TEX. PENAL CODE ANN. § 2.01 (2009).
[88] There must exist a valid marriage before there can be a bigamous marriage. Parker v. State, 53 S.W.2d at 474.
[89] Medrano v. State, 701 S.W.2d 337 (Tex. App.—El Paso 1985, writ ref'd).

including the "statutory presumption that the most recent marriage is a valid one."[90] Here, the state was attacking the validity of the marriage to prove that the testimony of the alleged spouse of the defendant was not an error. Therefore, this case can be distinguished from the appropriate standard in a bigamy trial on two grounds. First, the issue in *Medrano* was determining if a rule of evidence applied. In a trial for bigamy, the prosecution is proving the marriage to secure a conviction and punishment. Therefore, the standard for proving the marriage should be stricter. Second, in Medrano the role of the state was reversed. The state was attacking the validity of the marriage in *Medrano*. In a trial for bigamy, the state is seeking to prove the marriage is valid. The presumption of a valid marriage on these facts was in accordance with the presumption of innocence because the state had to prove a divorce, whereas in bigamy the two presumptions will be in opposition.

In *McCombs v. State*,[91] the defendant was convicted of bigamy where he allegedly entered into three marriages by virtue of a marriage license with three separate women. However, the state's indictment was predicated on the second and third marriages.[92] McCombs argued that the second marriage was bigamous and therefore void. If this argument was succesful, there was not a valid prior marriage that would make the third marriage bigamous.[93] During the trial, the court's charge instructed the jury that the law presumed that the marriage to the alleged second wife was valid.[94] The Court of Criminal Appeals found that the law does not presume against the innocence of a party.[95] The court continued,

> Whatever may be the rule in civil cases in regard to legitimacy of children or the rights of property under doubtful marital relations, in criminal cases there must be a prior marriage valid in law to constitute a second marriage bigamous. The presumption of innocence and reasonable doubt does not arise in a civil case as in a criminal prosecution, and an attempted marriage, which is void and one that cannot exist in law, cannot form the basis of a prosecution for bigamy on a subsequent marriage that is legal.[96]

This language seems as if it goes to the heart of the argument that there is no presumption of a valid marriage in the criminal law.

Other states have taken the opposite stance on this issue by finding that once the marriage is proved, it is presumed valid.[97] This shifts the burden to the defendant to prove that he obtained a divorce. As an illustration, the Court of Appeals in Maryland held that "[t]he State is not required to make a general search of all the court records to prove a negative fact that ought to be peculiarly within the knowledge of the accused."[98] Although in this case the presumption has carried over from the civil law, it is applied in the

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[90] *Id.* at 341("We apply the reasoning of those civil cases in this criminal setting.").
[91] 99 S.W. 1017 (Tex. Crim. App. 1906).
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *See* Fuquay v. State, 114 So. 898 (Ala. 1926); Wright v. State, 81 A.2d 602, 607 (Md. 1951); State v. Crosby, 420 P.2d 431, 432-33 (Mont. 1966). *But see* State v. Rivera, 977 P.2d 1247, 1249 (Wash. Ct. App. 1999) (A necessary element of the crime of bigamy is the continued existence of a prior valid marriage. . . .We begin by noting that the State may not benefit from any presumption against the accused in a criminal case. It has the burden of proving beyond a reasonable doubt every fact necessary to constitute the crime charged.").
[98] Wright v. State, 81 A.2d 602, 607 (Md. 1951).

opposite way. The State was attempting to prove the prior marriage was valid, but the burden was on the defendant.

Trying to apply the presumption of a valid marriage as Maryland and other states above have is flawed in reasoning. First, it does not conform to the principle of presuming the defendant is innocent. Second, proving the lack of a dissolution of the prior marriage is an element to the offense because of the term "legally married." There is no legal marriage if the parties have received a divorce or annulment. Therefore, forcing the defendant to prove there has been a dissolution should not be an affirmative defense.[99] Finally, the court takes the civil presumption, which is based off the idea of innocence, and applies it in a way that disadvantages the defendant. The state should have the burden to prove both the prior marriage, its continuance, and the second marriage with no presumptions in its favor.[100] These are the fundamental elements of the crime of bigamy.

C. Proving the Marriage

There are four available combinations regarding the types of marriages for which the state can prove the crime of bigamy. Both the first and second marriage can be predicated on either a ceremonial marriage or an informal marriage.[101] It seems when the first marriage is ceremonial, the state will have an easier case to prove. However, where the first marriage is predicated on an informal marriage, not only is proving the three elements much more difficult, but the existence of the rebuttable presumption associated with the informal marriage[102] may present another hurdle for the prosecution. The following sections provide examples of bigamy cases that show how the marriage was proved.

1. The Formation of the Marriage

a. Ceremonial Marriage

A prior marriage can be proved in a criminal case just as it is in a civil case. An original license and return thereon is sufficient to prove the prior marriage if the state admits evidence to prove the identity of the parties named and there is proof to the instrument's originality.[103] The record of the license and return or a certified copy of the license and return may be admissible to prove a valid marriage.[104] Any discrepancies on the license do not prohibit the record to be admitted. In *Bell v. State*, one license named "Walter Bell" while the other license listed a "W.H. Bell."[105] The defendant argued that the State did not show that the two

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[99] Even though affirmative defenses always put the burden on the presumptively innocent defendant, the elements of a crime must be proved by the state. LAFAVE, *supra* note 72, § 1.8(c) ("It is everywhere agreed that the prosecution has the burden of proving each of the various elements of the offense."). LAFAVE continues by discussing affirmative defenses which can either "negative guilt by cancelling out the existence of some required element of the crime," "show some justification or excuse which is a bar to the imposition of criminal liability," or be a defense to an individual crimes which is provided for in the statute. *Id.* As an example, LAFAVE lays out a defense to an example bigamy statute that provides "that it is not bigamy if his second marriage occurs after his first spouse has been absent for seven years and is not known by him to be living." *Id.* Since the Texas courts have averred that the state must prove the second marriage while the first is in existence, this is an element and should not be an affirmative defense. *See* MCCORMICK, EVIDENCE § 347 (6th ed. 2009) ("courts have . . . [held] invalid allocations of the burden of persuasion thought to involve nothing more than the rebuttal of an element of the offense . . .").

[100] *See* Hull v. State, 7 Tex. App. 593 (Tex. Ct. App. 1880) (invalidating the presumption of the continuance of life finding that the burden stays with the state to prove beyond a reasonable doubt).

[101] In regards to the FLDS cases, the men indicted allegedly have multiple wives. It is unknown whether the prosecution will try to prove all of the marriages or choose two to prove to obtain the conviction.

[102] *See supra* Part II.B.

[103] Parker v. Parker, 53 S.W.2d 473, 474 (Tex. Crim. App. 1932).

[104] *Id.*

[105] 184 S.W.2d 635, 635 (Tex. Crim. App. 1945).

named parties were the same person, but the court rejected this stating, "[t]he middle name, as well as 'junior,' can be rejected as surplusage" after a witness from the ceremony of the prior marriage and the subsequent "spouse" testified to his identity.[106] Moreover, serious defects in the application and its filing, or in the ceremony are not fatal to the resulting marriage by statutory mandate.[107]

The state must prove that the defendant is the party listed on the license.[108] This can be accomplished "by the testimony of witnesses, by other direct proof, or by circumstances from which the jury may draw the inference of identity."[109] One way to prove the identity of the names on the license is to have the minister or officiant testify. In *Dumas v. State*, the minister who performed the marriage testified identifying the defendant in addition to a witness at the ceremony.[110]

Even without the introduction of a license, "the fact [of a valid marriage] may be fully and completely established by the testimony of eye-witnesses who were present when the rites were solemnized."[111] Parol evidence may be used because a prosecutor may be unable to obtain the records where "[s]uch avenues of information are generally endeavored to be concealed by the guilty party."[112] In *Dumas*, the court determined that "general reputation, cohabitation, and admissions or confessions of the party are all admissible evidence of the fact of the first marriage."

In addition, testimony of the lawful spouse of the defendant can be used to prove the original marriage.[113] The privilege of a spouse not to be called to testify against the person's spouse is not available when testifying to events prior to marriage.[114] It is logical that a spousal privilege would not exist in bigamy because the "spouse" is merely an alleged "spouse" until proven otherwise.

b. Foreign Marriages

To prove an alleged marriage established in another state or foreign jurisdiction, the procedures mirror that of the civil side. The state can present a license or certificate issued from the jurisdiction and must prove the laws of the state.[115]

c. Common-law Marriage

An informal marriage can be established if the parties agree to be husband and wife, live together, and represent to the community that they are husband and wife.[116] In examining some criminal cases predicated

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[106] *Id.*
[107] TEX. FAM. CODE ANN. §§ 2.301-2.302.
[108] Parker, 53 S.W.2d 473, 474 (Tex. Crim. App. 1932).
[109] *Id.*
[110] Dumas v. State, 14 Tex. Ct. App. 464, (Tex. Ct. App. 1883).
[111] *Id.*
[112] *Id.*
[113] TEX. PENAL CODE ANN. § 25.01(d) (2009).
[114] TEX. R. EVID. 504 (b)(4)(B).
[115] *See* Patterson v. State, 17 Tex. App. 102, (Tex. Ct. App. 1884) (holding the certificate from Michigan and proof of the Michigan laws regarding marriage was sufficient); Waldrop v. State, 53 S.W. 130, 130 (Tex. 1899) ("A valid marriage is one which has been solemnized according to the mode and manner, and in accordance with the prerequisites, which the law of the place where solemnized has required.").
[116] *See supra* Section II.B.

on a common law marriage, it is shown that the analysis and results from the cases are identical to those on the civil side. The main issue to be decided is usually identifying the evidence supporting the allegation that the parties had an agreement to be married.[117] In the case that the parties have a ceremony but do not follow any other statutory procedures, such as applying and obtaining a license, the state can present evidence from the officer/official or any witness.[118] This should be sufficient to show an agreement.[119] However, outside of an informal ceremony, an agreement may take place in the most private of times and places. If the subsequent marriage is being proved and the party not on trial knew about the prior marriage, their testimony could incriminate themselves as a principal in the crime.

In *Ahlberg v. State*,[120] the court held that evidence that the parties lived together for an extended period, and held out to the community as husband and wife, was sufficient to prove the marriage relationship. However, the court does note that the "proof requisite to establish the existence of the relationship of husband and wife has been the subject of frequent comment, and proof considered in civil cases sufficient has been held inadequate in criminal prosecution."[121] This aligns with the civil cases prior to 1989, where courts could infer an agreement if there was cohabitation and holding out. However, since 1989, all three elements must be proved to establish a common-law marriage.[122]

One issue arising with proving the element of agreement through an informal ceremony unaccompanied by the proper license—particularly relevant in the FLDS trials—is criminal liability under the Family Code for knowingly conducting a marriage "of a person who by marrying commits an offense under Section 25.01, Penal Code."[123] Any testimony from the officer or minister conducting the ceremony may lead to self-incrimination.[124]

A second issue arising with proving a common-law marriage is if proceedings have not been initiated to prove the marriage within two years of the parties separating and ceasing to live together, it is rebuttably presumed that the parties did not enter into an agreement.[125] Without the "agreement" element, a common-law marriage was never established. This is relevant in the case of bigamy if the state is predicating the second marriage on a common law marriage. This presumption parallels a presumption of innocence in that it presumes the marriage was never created. However, the state already has the burden of overcoming the "agreement" presumption, so this does not affect the allocation of the burden of proof. Although there is no case law dealing with the presumption that there was never an agreement, because of reasons stated above, it likely will not affect a bigamy trial.

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[117] *See* State v. Bates, 17 Ohio Dec. 301 (Ohio Misc. 1906) (calling common-law marriages "clandestine and secret agreements" with an obvious antagonist view to recognizing the arrangement).

[118] *See* Burks v. State , 94 W.W. 1040. "The doctrine that an invalid marriage contracted in good faith, followed by cohabitation as husband and wife after the removal of the impediment to the marriage, constitutes a valid common-law marriage." Curtin v. State, 238 S.W.2d 187, 192 (Tex. Crim. App. 1951) (quoting C.J.S. Marriage § 36).

[119] *Id.*

[120] 225 S.W. 253 (Tex. Crim. App. 1920).

[121] *Id. See* Stevens v. State , 243 S.W.2d 162, 163 (Tex. Crim. App. 1951) (facts showing that defendant introduced others to his common law wife, the couple lived together, and that the wife became pregnant was enough to establish common-law marriage).

[122] *See supra* Part III.B.1.

[123] TEX. FAM. CODE ANN. § 2.202(d) (2009).

[124] For an interesting discussion of liability for officiants, see Tessa Cluck, *Avoiding Over-prosecution of Wedding Ceremony Officiants: Alternatives to the Warren Jeffs Prosecution*, 54 LOY. L. REV. 738 (2008).

[125] TEX. FAM. CODE ANN. § 2.401(b) (2009).

An additional difficulty facing the prosecutors in Eldorado is the defense's claim that all the wives except the legal wife are "celestial wives." This may rebut the holding out element if the community, the YFZ Ranch, knew that the couple were in a spiritual union but did not recognize them as husband and wife in the legal sense. At least one case in Utah has upheld a conviction of a man who entered a "spiritual union" while still being legally marriage.[126] It is unknown how this defense will affect the trial and the interpretation of the law. However, if the evidence shows that the defendant treated the spiritual wife as he would a legal wife, including having children, it will be hard to convince a jury that this is not bigamy.

2. Death and dissolution of the marriage

Whether the prior marriage was dissolved may be the decisive issue in a trial for bigamy seeing how relatively "easy" it is to prove the establishment of the marriages. Determining who has the burden of presenting evidence to either negate or prove the existence of dissolution is no easy task given the case law. As discussed in Part III, a presumption of a valid subsequent marriage on the civil side puts the burden on the one attempting to prove there was no dissolution of the prior marriage. As seen in *Medrano*, the court used this logic and put the burden on the state who was trying to prove the prior marriage was valid.[127] The *Medrano* court cited *Parker*, a bigamy case, in support of this action.[128] However, in *Hayes v. State* and *Hull v. State*, the court acknowledged that the matter of divorce is a defense for the defendant to raise.[129]

A court in a jurisdiction that favors using the presumption in bigamy cases and therefore puts the burden on the defendant to prove a divorce existed came to this reasoning in the following statement:

> The law then follows the right, no matter where it leads, or what the consequence. But the reason for this rule of law does not apply to the guilty party, where he stands before the court on a charge of bigamy, and the law seeks to have him punished for the reprehensible crime he has committed. The reason of the law ceasing, the law itself ceases. With what justice can the guilty party ask that this rule of the law, that has its application only to innocence, that designs only to protect innocence, shall be used as a guard to protect him in his guilt? The very thought shows the fallacy of the undertaking. Who knows better than the guilty party where the evidence is that will show his innocence?[130]

This reasoning is flawed from the onset and gives force to the argument that the defendant should not have to assert this defense. A defendant is not a "guilty party" and the law of bigamy should respect this.

It is well settled law that the state has to prove that the prior spouse was alive while the second marriage was contracted.[131] The court will not presume a prior wife was alive without proof. In *Hull v. State*, the court determined that the presumption of innocence "neutralized" the presumption of continuance of life for seven years, "though in general way the law prefers the presumption of innocence."[132]

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[126] *See* State v. Holm, 137 P.3d 726, 754 (Utah 2006) (citing State v. Green, 99 P.3d 820 (Utah 2004).
[127] *See supra* Part IV.B.
[128] Medrano v. State, 701 S.W.2d 337, 341 (Tex. App.—El Paso 1985, writ ref'd).
[129] Hayes v. State, 29 S.W.2d 381, 381 (Tex. Crim. App. 1930); Hull v. State, 1880 WL 8943 (Tex. Ct. App. 1880) ("This defense should arise once it has been proven that no divorce took place. Divorce, or absence for five years, the party marrying not knowing that the other was alive, would seem to be matters of defence [sic].").
[130] Bennett v. State, 56 So. 777, 781 (Miss. 1911).
[131] Clinnard v. State, 192 S.W.2d 282 (Tex. Crim. App. 1946); Rogers v. State, 204 S.W. 222, 222 (Tex. Crim. App. 1918).
[132] 1880 WL 8943 (Tex. Ct. App. 1880); *See* Dawson v. Garcia, 666 S.W.2d 254, 266 (Tex. App.—Dallas 1984, no writ) (presumption of the continuance of life if witnesses testify that the last time they saw the person they were alive).

With both dissolution and death, the point of proving these facts is to show there was a continuance of the first marriage while the second marriage was contracted. This is an essential element to proving bigamy. If the state has the burden of proving the first spouse was alive, then the state should have the same burden to prove there was no dissolution. Of course, the argument is that the facts to prove a dissolution are solely within the defendant's knowledge.[133] However, there are two rebuttals to this argument. First, the facts to prove a dissolution of a marriage is not solely within the defendant's knowledge. There are two people in the marriage relationship, and either have the power to dissolve the marriage. The other spouse could have obtained a marriage in an unknown jurisdiction that changed the defendant's status. Secondly, the *Medrano* court had no problem applying the civil standard to the criminal trial. If the standard is "reasonableness," the state could present evidence that there was no dissolution in the jurisdictions where the parties lived. If the defendant attacks these jurisdictions, he will have to present evidence and positive proof that dissolution was sought elsewhere. In effect, proof of no dissolution has shifted the burden. This process seems more appropriate than initially shifting the burden of the continuance of marriage that is crucial to proving bigamy. A valid defense recognized by the courts is a reasonable belief by the defendant that a dissolution of the first marriage occurred.[134] This defense should arise only once it has been proven that no divorce took place.

In either case, evidence needs to be presented to prove there was or was not a divorce. If the state has the burden, *Medrano* found that the state had to search "reasonable jurisdictions" for a divorce or annulment decree. Again, this standard is taken from the civil side of the docket. Reasonable jurisdictions include counties where the defendant lived or reasonably pursued a dissolution.[135] However, in the criminal context, the issue is whether searching "reasonable jurisdictions" is sufficient to prove the fact that there wasn't a divorce beyond a reasonable doubt. If the burden lies on the government to prove a lack of dissolution, beyond a reasonable doubt could include more than reasonable jurisdictions. If the defendant had the burden to show a dissolution, reasonable jurisdictions is not relevant. Testimony from the defendant and/or the prior spouse would probably not be enough to prove a dissolution. A court's decree granting a divorce or annulment would most likely be needed.

3. Possible "legal impediments" to marriage

a. "Between a man and a woman"

In Texas, a marriage relationship can only be established between a man and a woman. This requirement is stated in the provisions for a ceremonial and an informal marriage, as well as the Texas Constitution.[136] Additionally, Chapter 6 provides that "a marriage between persons of the same sex . . . is contrary to the public policy of this state and is void in this state."[137] Here, the state can provide a birth certificate of the spouse or the marriage certificate (if a formal marriage) to prove this element. Although no cases have discussed proving this fact of opposite sexes as an element, it seems the burden is on the defendant to conjure up evidence to put just enough doubt in the jurors' minds that the marriage was void.

b. Age and Consanguinity

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[133] *See supra* Part IV.B.
[134] TEX. PENAL CODE ANN. §25.01(c) (2009).
[135] Medrano, 701 S.W.2d at 341.
[136] TEX. FAM. CODE ANN. §§ 2.001, 2.401,6.204 (2009), Tex. Const. art. I, §32.
[137] *Id.* at § 6.204.

The age requirements are provided in the discussion of the definition of a marriage.[138] A marriage is considered void if the age requirements are not met.[139] Again, it can be assumed that the invalidity of the marriage based on age is an affirmative defense because of the lack of cases addressing the issue that the age of the spouse without consent or court order prevented a valid marriage.[140] This defense would only be available for the first marriage and the marriage predicated on subsection (A) of the bigamy statute. It seems that the age obstacle may not release the defendant from culpability if the state relies on subsection (B) for the subsequent act because a marriage is not required—only the "appearances" of marriage.[141]

If the parties establishing the marriage relationship are related, this will most likely be a defense to the marriage. According to the Family Code, marriage between certain familial relationships is void.[142] This issue may be relevant in the FLDS cases in the event of an alleged marriage between first cousins after September 1, 2005. This defense would most likely void the first marriage. If the first marriage is valid and the second marriage is with a cousin, it is unknown if this will be an impediment to the bigamous marriage. Again, the phrase "under the appearance of being married" may be the path the state will take if this becomes an issue because it does not require a legal marriage or an attempt at a legal marriage.

V. Conclusion

Although the director of governmental relations for the Texas District and County Attorneys Association may claim that bigamy is hard to prove, the courts have made it relatively easy. In comparing proving a marriage in a civil case and a criminal case, there are very few differences. This alone, given the stark differences in standards of proof, should provide support that the crime of bigamy is not hard to prove. There are still some lingering questions regarding where the burden truly sits in proving certain elements of bigamy. It will be interesting to see if the upcoming trials for bigamy—Hawkins and the FLDS men indicted—resolve these issues, or whether the issues will even surface. It is also unclear whether the Attorney General and prosecution will proceed with the bigamy charges if the all the indicted members are convicted of sexual assault.

In conclusion, the state is in favor of protecting and encouraging marriage. The state has made it hard for those on the civil side to allege multiple marriages by putting in place a presumption that the most recent marriage is valid. While in the context of bigamy, the state has made it easy to prosecute those who enter multiple marriages and threaten the state's views of marriage.

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[138] *See supra* Part II.A-B.
[139] *Id.* at § 6.205.
[140] Because no cases address the State's burden of proving age, this is assumed.
[141] TEX. PENAL CODE ANN. § 25.01 (2009).
[142] TEX. FAM. CODE ANN. § 6.201 (2009).

Statutory Probate Courts and their Jurisdiction Over Family Law Matters

By Nathan Anderson[1]

Dallas, Collin, and Tarrant Counties each have specialized probate courts. Although estate administration is typically the first thing that comes to mind when mentioning the probate courts, probate courts also have jurisdiction over guardianship proceedings. As family law practitioners, it is important to understand the overlap in jurisdiction that can occur between district courts and the statutory probate courts. This article addresses when a probate court can exercise jurisdiction over a family law matter.

I. *Appertaining or Incident to – Getting it Transferred*

Texas Probate Code Section 608 authorizes a statutory probate court to transfer to itself a matter appertaining to or incident to a pending guardianship estate:

> A judge of a statutory probate court on the motion of a party to the action or of a person interested in a guardianship, may transfer to the judge's court from a district, county, or statutory court a cause of action appertaining to or incident to a guardianship estate that is pending in the statutory probate court and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to the guardianship estate.

TEX. PROB. CODE § 608.

"A cause of action is appertaining or incident to an estate if section 607 [of the Code] explicitly defines it as such *or if the controlling issue in the suit is the settlement, partition, or distribution of an estate*." *In re Graham*, 971 S.W.2d 56, 58 (Tex. 1998) (emphasis added). Section 607 of the Code provides, in pertinent part, that "appertaining to or incident to an estate" includes, "all actions for trial of the right of property incident to a guardianship estate, and generally all matters relating to the settlement, partition, and distribution of a guardianship estate." TEX. PROB. CODE § 607(a).

In *Graham*, the Supreme Court of Texas examined when a family law matter is appertaining to or incident to a guardianship matter. *Graham*, 971 S.W.2d at 58. In *Graham*, the wife sought divorce from her husband who was declared incapacitated after attempting suicide. *Id.* The *Graham* court noted that several Texas cases had determined that a variety of matters are appertaining or incident to an estate. *See Lucik v. Taylor*, 596 S.W.2d 514, 516 (Tex. 1980) (holding that suits "incident to an estate" include determining whether property was part of a marital estate); *Potter v. Potter*, 545 S.W.2d 43, 44 (Tex. Civ. App. – Houston [1st Dist.] 1976, writ ref'd n.r.e.) (concluding that probate court has jurisdiction to determine whether shares of stock were part of community estate or separate property).

The *Graham* court noted that the following facts surrounding wife's claims in the divorce action were determinative of whether the divorce action was appertaining to or incident to the guardianship proceeding: in her original petition, the wife requested (1) a disproportionate share of the parties' community estate; (2) reimbursement to the community estate for funds used to benefit husband's separate estate; (3) reimbursement to wife's separate estate for funds used to benefit husband's estate; (4) and reimbursement to wife's separate estate for funds used to benefit the community estate. *Graham*, 971 S.W.2d at 59. Additionally, the wife in *Graham*, sought temporary orders: (1) awarding her exclusive control of all community property; (2) enjoining husband's guardian from entering, operating, or exercising control over the community property;

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(3) ordering the guardianship estate to pay child support; and (4) ordering husband's separate estate to pay interim attorneys' fees. *Id.*

In assessing the wife's pleadings and requests for relief, the *Graham* court held the divorce appertained or was incident to the guardianship proceeding because "[i]t directly impacts the assimilation, distribution, and settlement of [husband's] estate. *Id.* Accordingly, jurisdiction over the divorce proceeding was appropriate in the statutory probate court.

What the *Graham* case illustrates is that the probate courts have broad jurisdiction over many matters so long as they are appertaining to or incident to a guardianship case. There are, however, other authorities that permit the transfer of a family law matter to a probate court.

II. Adult Disabled Child Support and Probate Court Jurisdiction

In addition to the appertaining or incident to language, there is additional authority providing for the transfer of certain child support questions to the statutory probate court. As an example, in cases involving adult disabled child support, it is entirely possible for the statutory probate court to transfer to itself the underlying divorce proceeding because such a matter falls within the scope of Probate Code Section 606(d).

Section 606(d) of the Code provides:

> In those counties in which there is a statutory probate court, all applications, petitions, and motions regarding guardianships, mental health matters, or other matters addressed by this chapter **shall** be filed and heard in the statutory probate court.

TEX. PROB. CODE § 606(d) (emphasis added). Court's interpreting this language have held it is "clear and unambiguous." *Garland v.* Garland, 868 S.W.2d 847, 849-50 (Tex. App. – Dallas 1993, no writ); *Saldarriaga v. Saldarriaga*, 121 S.W.3d 493, 500 (Tex. App. – Austin 2003, no pet.). Commentators have stated that the "statutory probate court, in the exercise of its jurisdiction and notwithstanding any other provision of the [guardianship chapter of the Code], may hear all suits, actions, and applications filed against or on behalf of any guardianship." Spencer, R. Kevin, *Family vs. Probate with Regard to Children*, p. 10, State Bar of Texas Advanced Family Law Course (2007) (citing TEX. PROB. CODE § 607(b)).

In addition to the language in the Probate Code, Texas Family Code Section 154.309 is also guiding. Section 154.309(c) provides that, "notwithstanding this subsection and any other law, a probate court may exercise jurisdiction in a guardianship proceeding for the person after the person is an adult." TEX. FAM. CODE § 154.309(c). Therefore, if a family law matter involves an adult disabled child who has been appointed a guardian by the probate court, the probate court likely has jurisdiction over the family law proceeding.

In *Garland v. Garland*, the Dallas Court of Appeals examined the issue of which court had jurisdiction over a ward who had reached the age of majority. *Garland v. Garland*, 868 S.W.2d 847, 849 (Tex. App. – Dallas 1993, no writ). In *Garland*, there was a prior order in the district court that ordered the father to pay adult disabled child support. *Id.* After the trial court entered its order, and after the child in question reached majority, the father filed guardianship proceedings in the Dallas Probate Court. *Id.* The *Garland* court held that because the child had reached the age of majority, the Dallas Probate Court had the exclusive jurisdiction to determine issues regarding his incapacity. *Id.* (holding that because Dallas as a statutory probate court, the probate court has exclusive jurisdiction regarding guardianship proceedings). The *Garland* court then concluded that a "family district court's continuing jurisdiction over support over a disabled adult child does not vest that court with jurisdiction to grant or deny a guardianship of that child's estate." *Id.* at 850 (citing TEX. PROB. CODE § 606).

The *Garland* case illustrates that, if a child has reached the age of majority after the divorce action was filed and if there is the adult-child has been appointed a guardian in the probate court, then the probate court has jurisdiction to determine the adult disabled child support matter.

In sum, the family law practitioner should be aware that statutory probate courts are permitted jurisdiction over family law matters under the Texas Probate Code and under Texas case law. Although some of the jurisdictional requirements are quite narrow, it appears that so long as the family law matter at least in *some* way pertains to the administration of a guardianship estate the probate court has jurisdiction over the underlying family law matter.

Helping clients to love their children more than they hate their ex.
Good for kids and good for business

By Christina McGhee, MSW[1]

As a divorce coach and parent educator, I view family lawyers as a critical point of influence for parents. Although the landscape of divorce has changed considerably over the past decade, the legal system is still a gateway through which most separating parents must pass. When relationships begin to unravel, parents' first thoughts rarely turn to seeking the support of a coach, therapist or counselor. Rather, they typically think about securing representation and seek a lawyer to guide them through what is often viewed as a confusing and treacherous system.

In addition to working with divorcing parents for over a decade, I've had the opportunity to train literally hundreds of family lawyers about the impact divorce has on children and families. During those trainings, I've challenged lawyers to rethink their roles with clients and to consider the potential they have to help parents make meaningful long-lasting changes for themselves and their children.

Because of the crisis nature of divorce, most parents feel alone, unprepared and incredibly vulnerable. While you may be very clear about the fact that you are an expert regarding the law, your clients may view you as more. For many, a family lawyer is the "first port of call," which means you are likely to be the first professional that parents encounter. This also puts you in the position of "trusted guide." As such, the influence you have to impact how your client manages the journey and the changes ahead cannot be underestimated. You have the ability to shape your client's divorce experience and more importantly the lives of children.

Child-centered perspective

While I'm not suggesting that lawyers become counselors or therapist, I do believe legal professionals have a unique opportunity to leverage their influence and help clients adopt a "child-centered" perspective. Without a doubt, uncoupling changes life for families in almost every conceivable way. It involves a series of significant transitions for both parents and children, many of which extend well beyond the family's involvement with the legal process.

When parents are married, transition and change are typically viewed as a normal part of family life. Johnny signs up to play football and now has practice every Wednesday night. Sally gets a fever and needs to be picked up from school and taken to the doctor. Yet, for separated parents, many of these normal everyday issues quickly become a source of great anguish and increased conflict. For others, it's an opportunity for

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existing conflicts to be played out one more time. As research has pointed to time and time again, it is the quality of the ongoing relationship between Mom and Dad that will make or break children's ability to successfully adjust. The value of your guidance as a resource to address these issues from a child-centered perspective cannot be overestimated.

In short, **a child-centered perspective involves:**

- **Encouraging parents to "divorce with integrity"**

  There are a multitude of things parents cannot fix or change about divorce for themselves or their children. As a result, some parents may get caught in the trap of seeing themselves as helpless or at the mercy of their ex. Although a parent may not have control over their ex spouse's actions, parents should be reminded that they do have control over how they respond to any given situation. While a parent may not be able to make things better, they can avoid making things worse for their children.

- **Keeping the focus on the needs of children throughout process**

  When parents are operating out of a "crisis mentality" their focus is on surviving the experience, not planning for the future. Most parents need support thinking through the long-term consequences of their decisions. When parents are able to use their children as the lens through which they view their divorce, arrangements, regarding issues such as finances and parenting schedules, are often much easier to achieve.

- **Supporting the principle of "loving your children more than you hate your ex"**

  Just because a person didn't make a good spouse, doesn't mean they can't be a great parent. While the relationship as husband and wife has ended, parents' independent roles as Mom and Dad will last a lifetime. Parents should be encouraged to place a higher value on the love they have for their children than the feelings they have towards one another.

Practice implications

In addition to making a significant difference in the lives of children, there are other benefits to incorporating a child-centered perspective to your work with clients.

Benefits of a child-centered perspective for lawyers:

- Higher levels of client satisfaction
- Happier clients and increased referrals
- Less stress and more efficient use of your time
- Distinguishes your practice or firm by putting you on the cutting edge

In the midst of a dwindling economy buzz words such as " value-driven practice", "solution focused", "dedication" and "exceptional client value", are certainly becoming more commonplace among legal circles here and abroad. Professionals in every industry, including family law, are facing the challenges of a more educated, cost conscious and apprehensive consumer. Being an expert in your area of practice is no longer enough.

Recently the New York Times published an article by two chief justices entitled " A Nation of Do- It - Yourself Lawyers." It addresses the ever-expanding ranks of the self-represented due to a strained financial climate. However, others suggest that it's not just a downward economy that's turning the tide,

According to Jordon Furlong, of Law 21:

> *Whether we're ready for it or not, we're entering the Decade of the Client, probably the first of many. So it really matters now what clients want: personalized help and guidance to arrange their legal affairs and to anticipate and minimize their legal troubles, from a trustworthy advisor who communicates frequently and is truly concerned with their best interests, delivered as quickly as possible at an affordable, predictable price.*

Moreover, in a 2009 study by Clark Cunningham, he notes the most significant predictors of overall client satisfaction are *rapport* and *the quality of the lawyer-client relationship*. His work reinforces that what clients want from their lawyer is to feel heard and to be provided with clear explanations. He also asserts that valuing these needs actually outweighs outcome for the majority of clients. To wit, today's clients are not just looking for someone to get them through the process at any cost. What they want, is a lawyer who cares about getting them through the process well.

Getting clients through the process well involves:

- Creating outcomes that take the realities of family life and children needs into consideration
- Developing workable agreements that last beyond the legal process
- Placing value on client's priorities and
- Acknowledging the potential for growth in the parenting relationship versus focusing on the flaws of each parent
- Helping clients to feel in control of the process

It's been said, "When all you have is a hammer, every problem begins to look like a nail." Using your influence to help clients place their children first provides them with an opportunity to see problems differently. It also allows parents the chance to gain a sense of perspective they might otherwise never achieve. Further, arriving at better long-term arrangements not only leads to better practice, it also gives you and your practice a distinct advantage.

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Guest Editors this month include Michelle May O'Neil (*M.M.O.*), Jimmy Verner (*J.V.*), Christopher Nickelson (*C.N.)*, Jeremy C. Martin (*J.C.M.)*, Jimmy A. Vaught (*J.A.V.*)

DIVORCE
GROUNDS AND PROCEDURE

TRIAL COURT ABUSED ITS DISCRETION BY SETTING A TRIAL DATE CONDITIONED ON HUSBAND PAYING SANCTIONS.

¶10-2-01. ***In re Gawlikowski***, ___ S.W.3d ___, 2010 WL 11175 (Tex. App.—Houston[14th Dist.] 2010, original proceeding) (1/4/10) (memo op.)

Facts: Trial court imposed sanctions requiring husband to pay $45,000 in attorney's fees and his attorney to pay $5,000 in attorney's fees. Trial court set a trial date of 06/07/10 or the next available trial date following payment of the fees in full.

Held: Mandamus granted in part and denied in part.

Opinion: Since husband did not contend that pre-judgment payment of a sanction would prevent him from continuing the litigation, mandamus is not an appropriate remedy to challenge the sanctions. Trial court should not have made a sanctions award that impedes the prosecution of a case. Mandamus is granted in part, and trial court is ordered to delete the language in its order making the setting of the next trial date conditional on husband paying fees.

TRIAL COURT ABUSED ITS DISCRETION BY DENYING INCARCERATED HUSBAND'S MOTION TO APPEAR AT DIVORCE HEARING.

¶10-2-02. ***In re A.W.*** ___ S.W.3d ___, 2010 WL 22797 (Tex. App.—Dallas 2010, no pet. h.) (1/06/10)

Facts: Wife notified incarcerated husband she was seeking a divorce. On 03/10/08, husband filed an answer, a request for appointment of attorney ad litem and a motion for issuance of a bench warrant. Husband requested, in the alternative, that trial court grant a continuance until his release or permit him to participate from prison by telephone conference or other means of participation. Husband claimed he wanted to appear to contest child custody and community property issues. Trial court scheduled the case for pretrial hearing on 10/31. Trial court's notice required attorneys and pro se litigants to appear and be prepared to discuss all issues. Before the setting, husband filed a second motion to appear by bench warrant, teleconference or alternative means. Husband also asked to be appointed counsel if wife was represented. On 10/31/08, trial court signed final divorce decree and held that father failed to appear. Father appealed.

Held: Reversed and remanded.

Opinion: Trial court implicitly denied husband's motions to appear by signing the final divorce decree without addressing them. Husband has a constitutional right to access the courts despite his status as an inmate, but that does not mean husband has an unqualified right to appear in person at every court proceedings. Instead, husband has the burden of showing trial court why his presence was warranted. Husband's motions established specific and substantial issues raising the question of the need for his presence. Furthermore, because of the contested issues of fact in the case, husband could not effectively present his case by deposition or affidavit. Husband did not, however, make a factual showing that he could

be safely and practically transported to trial court from prison for the proceeding. Thus trial court did not abuse its discretion by denying husband's motion for a bench warrant. On the other hand, husband specifically requested alternative means of participation. By denying that motion without providing an alternative means of appearance, trial court abused its discretion.

FAILURE TO ADEQUATELY RESPOND TO DISCOVERY RESULTS IN AUTOMATIC PENALTY UNDER TCRP 193.6 AT TIME OF TRIAL, MOTION TO COMPEL NOT REQUIRED.

¶10-2-03. ***White v. Perez***, 2010 WL 87469 (Tex. App.—Fort Worth 2010, no pet. h.) (mem. op.) (01/07/10)

Facts: John sued Toni for divorce, alleging that the two had been common law married. Toni served John with interrogatories, two of which sought a list of "all times, dates and places that you claim or allege that you and Respondent agreed to be married" and of "all times, dates and places that you claim or allege that you or Respondent represented to others that you were married." When John failed to timely respond to the interrogatories, Toni's attorney called John's attorney to remind him of the due date and to inquire when answers might be forthcoming. Three days before the case was set for trial and three months after the interrogatory answers were due, John served on Toni unsworn, unsigned answers to the interrogatories.

At trial, John attempted to offer information into evidence concerning the parties' alleged common law marriage that would have been disclosed had he answered the interrogatories, and Toni objected to the evidence on this basis. John did not attempt to show good cause for his failure to respond to the interrogatories. The trial court sustained Toni's objection to the common law marriage evidence; on Toni's motion, the trial court granted a directed verdict for her because no admissible evidence existed that the couple was common law married.

Held: Affirmed.

Opinion: TRCP 193.6 provides that a party failing to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed unless the court finds good cause for the failure to timely make, amend, or supplement the discovery response or that the failure will not unfairly surprise or prejudice the other parties. Because rule 193.6's exclusion provision is automatic, no motion for sanctions or motion to compel is required to trigger its application. *See* *F & H Invs., Inc. v. State*, 55 S.W.3d 663, 670 (Tex. App. – Waco 2001, no pet.) (holding rule 193.6's exclusionary sanction is automatic and does not require motion to compel). Because rule 193.6's sanction is automatic in the absence of a showing of good cause or lack of prejudice and is not discretionary with the trial court, the trial court's imposition of the required sanction is not reviewed under a *TransAmerican* death penalty sanction analysis. *See, e.g.*, *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (explaining that discretionary sanctions imposed by trial court to punish discovery abuse must be just; the sanction imposed must be directed against the abuse and toward remedying the prejudice caused to the innocent party, and the sanction must be no more severe than to satisfy its legitimate purposes).

Editor's Comments: *This should be in everyone's trial briefcase. A significant number of lawyers still believe that a motion to compel is a prerequisite to excluding evidence. And, it works both ways: (1) you don't have to move to compel to exclude, and (2) you can't rely on the other side's failure to move to compel as grounds for admissibility. J.C.M.*

TRIAL COURT MAY IMPOSE REASONABLE LIMITATIONS UPON PARTIES' PRESENTATION OF EVIDENCE IN A TEMPORARY INJUNCTION HEARING, HOWEVER, A PARTY MAY NOT BE DEPRIVED OF THE RIGHT TO OFFER ANY EVIDENCE. PARTY MUST BE GIVEN AN ADEQUATE OPPORTUNITY TO BE HEARD.

¶10-2-04. ***In re Vitol, Inc.,*** 2010 WL 308792 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (mem. op.) (1/28/10)

Facts: The underlying suit is a divorce proceeding between Husband and Wife. Wife requested a temporary injunction against Husband, which the trial court granted.

Held: Granted.

Opinion: Husband claims the trial court abused its discretion in entering a temporary injunction because it failed to conduct a proper hearing. The record reflects that after Husband testified he did not know how many shares he owns, the trial court granted the injunction and refused to allow presentation of any further evidence. The applicable statute requires notice and a hearing. "The opportunity to be heard and present evidence must amount to more than the mere right to cross-examine the other party's witnesses." "[T]he trial court may impose reasonable limitations upon the parties' presentation of evidence in a temporary injunction hearing; however, a party may not be deprived of the right to offer any evidence." If the trial court's limitation is arbitrary in its nature, it will be considered an abuse of discretion on the part of the trial judge. The trial court's refusal to allow Husband to present any evidence deprived him of an adequate opportunity to be heard and thus constituted an abuse of discretion.

MOTION TO TRANSFER MUST BE CONTROVERTED "ON OR BEFORE THE FIRST MONDAY AFTER THE 20TH DAY AFTER THE NOTICE OF A MOTION TO TRANSFER IS SERVED."

¶10-2-05. ***In re Rivera***, 2010 WL 376948 (Tex. App. – Corpus Christi 2010, orig. proceeding) (mem. op.) (2/02/10)

Facts: Father filed a petition to modify parent-child relationship on June 23, 2009 in Cameron County. On that same date, Father also filed a motion to transfer venue from Cameron County to Harris County. He alleged that the two children had resided continuously in Harris County beginning December 18, 2008. His motion to transfer venue was supported by his affidavit averring that the children had resided in Harris county with him since December 18, 2008. Mother was served with the petition on July 10, 2009 and filed a general denial on July 30, 2009. However, she did not file a response in opposition to the motion to transfer until October 15, 2009, claiming that the children have been kept by Father against Mother's will. The trial court denied the motion to transfer on November 19, 2009. There is no record from any hearing that might have taken place with respect to the motion to transfer venue. Father filed a Petition for Writ of Mandamus.

Held: Granted.

Opinion: Here, Mother was served with the petition seeking modification and motion to transfer venue on July 10, 2009. It remained uncontroverted until she filed an affidavit on October 19, 2009. The statute required her to controvert "on or before the first Monday after the 20th day after the date of notice of a motion to transfer is served." The motion to transfer was served on July 10, 2009. Mother had until August 4, 2009 to file a controverting affidavit, but she did not. Accordingly, the trial court had a ministerial duty to transfer the case to Harris County.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING MEDICAL EXAMINER AS AN EXPERT WHEN HE WAS NOT BOARD CERTIFIED IN FORENSIC PATHOLOGY.

¶10-2-06. ***In re D.J.R.***, ___ S.W.3d ___, 2010 WL 543591 (Tex. App.—El Paso 2010, no pet. h.) (2/17/10) (op. on motion for rehearing)

Facts: Mother had one child with first father and four children with second father. Second youngest child of second father died on 03/15/06. In 06/06, TDFPS sought conservatorship of four remaining children and to terminate mother and both fathers' parental rights. During the trial, the El Paso County Chief Medical Examiner testified about the autopsy of deceased child. While being qualified as an expert witness, medical examiner testified that he had passed his forensic pathology boards and was eligible for certification in surgical pathology. Although his testimony did not explicitly state that he was certified in forensic pathology, it did strongly imply that he was. Consequently, although medical examiner was not board certified, court of appeals inferred that he was in its original opinion. After trial court accepted medical examiner as an expert witness, he testified that, although not yet certified, he was in the process of being becoming board certified. Father appealed, arguing that trial court abused its discretion by accepting medical examiner as an expert. Court of appeals affirmed trial court's judgment on 01/06/10. El Paso media reported in 02/2010 that medical examiner had failed his board exams in 2003 and had ceased to be board eligible in 2008. Father filed a motion for rehearing.

Held: Motion denied.

Opinion: The Texas Legislature does not require a county medical examiner to be board certified in forensic pathology. Furthermore, the reporting by El Paso media is not part of the appellate record. The question presented to court of appeals was whether trial court abused its discretion by admitting medical examiner as an expert, not a de novo review of medical examiner's qualifications. Trial court heard testimony about medical examiner's training and experience along with uncontroverted testimony that medical examiners are not required to be board certified. Trial court, therefore, did not abuse its discretion.

TRIAL COURT ABUSED ITS DISCRETION BY AWARDING SANCTIONS WITHOUT EXPLAINING THE ACTUAL BASIS FOR DOING SO.

¶10-2-07. ***In re T.K.W.***, 2010 WL 546584 (Tex. App.—San Antonio 2010, no pet. h.) (mem. op.) (2/17/10)

Facts: Mother and father divorced in 2005. The agreed final decree of divorce required father to pay mother $2,000 a month in child support, an amount calculated without reference to the TFC guidelines. In 2007, after suffering a slowdown in business, father filed a SAPCR seeking to reduce his child support obligation due to his loss in income. At a bench trial on 07/28/08, father testified that his 2007 income was 1/3 of his 2005 income. Trial court also heard evidence that mother had gone from no income at the time of the divorce to monthly income between $100 and $800. Trial court held that this was a material and substantial change in circumstances that warranted a modification and lowered father's child support obligation to $1,500 per month, an amount slightly higher than the TFC guidelines. After the bench trial, father filed a motion for sanctions, which trial court granted. Trial court awarded father $10,000 against mother and her attorney.

Held: Affirmed in part as to child support. Reversed and rendered in part as to sanctions.

Opinion: Trial court's order granting sanctions fails to set out specifics justifying the imposition of sanctions, and only included a general statement that mother's attorney violated TRCP 13 and "abused the legal process in general." Although trial court did enter findings of fact and conclusions of law supporting its sanctions, they do not explain the actual basis for the sanction imposed. Furthermore, the record shows that father knew that mother's attorney had made numerous discovery requests before trial and had procrastinated in reviewing the documents father produced, but father never sought a pretrial hearing and ruling on this pretrial conduct.

Consequently, father waived any claim for sanctions based upon this conduct. Father's other two grounds for sanctions, TRCP 13 and TRCP 10, are punishments for groundless pleadings or motions. Since trial court did not identify any such baseless pleadings, it abused its discretion by awarding sanctions.

Editor's Comment: This holding appears to require the filing of a motion to compel prior to being able to secure sanctions at the time of trial, which is in direct conflict with White v. Perez cited above. G.L.S.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING WIFE'S PETITION FOR BILL OF REVIEW WHEN RETURN OF SERVICE SHOWED SHE HAD BEEN SERVED

¶10-2-08. ***Alexander v. Alexander***, ___ S.W.3d ___, 2010 WL 567297 (Tex. App.—Austin 2010, no pet. h.) (2/19/10)

Facts: On 10/02/06, trial court signed a final decree finalizing husband and wife's divorce. On 02/13/08, wife filed a petition for bill of review claiming she had not been served and had no notice of the divorce action. At the bill of review hearing, husband offered into evidence a return of service from a New York process server claiming that the process server had served wife at her mother's home in New York on 08/26/06. The document was signed and sworn to by the process server. Wife admitted living at the mother's house during 2006, but said she moved out in 07/06. She also denied ever receiving service. After the hearing, trial court denied wife's petition.

Held: Affirmed.

Opinion: TRCP 107 requires a return of service to state when the citation was served and the manner of service. It also requires that the return be signed by the officer officially. Since the return meets all of the requirements for personal service, it can be taken as prima facie evidence for the fact of service. Trial court did not abuse its discretions by believing the return of service rather than wife's testimony.

DIVORCE

DIVISION OF PROPERTY

TRIAL COURT ERRED BY ORDERING HUSBAND NOT TO REDUCE HIS MILITARY RETIRED PAY BY WAIVING IT FOR DISABILITY BENEFITS.

¶10-2-09. ***Gillin v. Gillin***, ___ S.W.3d ___, 2009 WL 4339164 (Tex. App.—San Antonio 2009, no pet. h.) (12/02/09)

Facts: Husband and wife married in 2004. Husband served four years and one month of military service while married out of a total of twenty-five years and one month. After husband retired from the military, husband and wife divorced. Trial court's entered a final divorce decree which incorporated a separate domestic relations order by reference. The separate domestic relations order decreed that any election of benefits by husband not reduce the retired pay awarded to wife, and that husband not pursue any course of action that would "defeat, reduce, or limit" wife's full separate property share of husband's retired pay. The order also set a minimum payment of $227.00 per month as wife's share of husband's disposable monthly retired pay.

Held: Affirmed as modified.

Opinion: State courts are bound by the Uniformed Services Former Spouses' Protection Act when dividing military retired pay. Accordingly, trial court may only apportion "disposable retired pay" which excludes disability benefits. Trial court also cannot restrict husband's future right to waive retirement pay in exchange for VA disability benefits. Since a divorce decree cannot prohibit a military retiree from exercising a right granted by federal law, trial court erred in precluding husband from exercising his right to waive retirement pay and choose disability benefits. Consequently, that provision must be deleted from the divorce decree.

Although the divorce decree purports to set a floor of $227 per month, it represents wife's share only of disposable retired pay. She can only receive what is available. If husband's retired pay is reduced to zero because he elects to receive disability pay, wife will receive nothing. The language setting a minimum payment therefore does not restrict husband's ability to elect disability pay.

Editor's Comment: *Military retirement pay and other benefits have become a hot topic in the past several months. Hagen v. Hagen, 282 S.W.3d 899, 903 (Tex. 2009); Sharp v. Sharp, ___ S.W.3d ___, 2009 WL 3298131 (Tex. App.—San Antonio 2009, no pet. h.). Because of disability benefits and the newly created combat related special compensation, ex-spouses can no longer reliably count on receiving their share of retirement benefits negotiated at the time of divorce. It might behoove practitioners to try and get other assets for their client or perhaps a money judgment payable at the time of the military spouse's retirement, rather than a share of the retirement benefits. Your client might have to settle for less and not get COLA adjustments, but if the judgment bears interest that would offset some of the potential loss. Unfortunately, there may be nothing to secure the judgment and the retirement pay may be the only asset of any significant value. In any case, it would be better for your client to get something tangible upon which he or she can rely. It is certainly highly advisable to visit with someone that specializes in these types of benefits. G.L.S.*

WIFE'S APPEAL OF DECLARATORY JUDGMENT WAS MOOT WHEN SHE SIGNED A MEDIATED SETTLEMENT AGREEMENT GIVING UP HER INTEREST IN THE DISPUTED ASSET.

¶10-2-10. ***Beltran v. Beltran*** ___ S.W.3d ___, 2010 WL 176347 (Tex. App.—El Paso 2010, no pet. h.) (1/20/10)

Facts: Husband filed for divorce in 07/04. Wife filed a counter-petition. On 6/20/06, wife amended her counter-petition to allege breach of fiduciary duty, actual fraud, alter ego, fraudulent transfer and civil conspiracy based on husband transfer of a 50% interest in his construction company to his brother. In response, husband's brother filed a plea in intervention denying wife's allegation and requesting a declaratory judgment. Husband's brother claimed husband had created an express trust in 1986 that held 50% of the company's stock for his brother until 1999 when his brother received legal title to the stock. On 07/16/07, husband and wife signed a Mediated Settlement Agreement, which granted 100% ownership in the construction company to husband. In the agreement, wife agreed to give up any community or separate property she had in the construction company. On 08/15/07, trial court granted husband brother's plea in intervention and entered a declaratory judgment finding that husband had not defrauded the community by transferring the shares. On 12/07/07, trial court entered Final Decree of Divorce, which incorporated the terms of the settlement agreement. Wife appealed trial court's declaratory judgment.

Held: Affirmed.

Opinion: A case is considered moot when there is no longer an actual controversy between the two parties. Since the MSA granted husband all of the community estate's interest in the construction company, it divested wife of any interest she had in the business. The agreement in this case meets TFC 6.602's statutory requirements for a binding MSA in a divorce proceeding and was not subject to revocation. Since wife has no interest in the construction company, any decision the appellate court would make would be purely advisory.

Since the case was moot, the appeal must be dismissed.

OFFSETS, WHICH ARE EQUITABLY DETERMINED, CANNOT BE APPLIED TO CLAIMS FOR ECONOMIC CONTRIBUTION. WHEREAS BENEFITS FOR USE AND ENJOYMENT OF PROPERTY CAN OFFSET CLAIMS FOR REIMBURSEMENT, THEY ARE SPECIFICALLY DISALLOWED AS OFFSETS FOR ECONOMIC CONTRIBUTION.

¶10-2-11. ***In re Marriage of Cigainero***, ___ S.W.3d ___, 2010 WL 346453 (Tex. App. –Texarkana 2010, no pet. h.) (2/02/10)

Facts: Husband purchased three duplexes in 1983 that generated rental income. That rental income continued during his marriage to Wife, which began in 1987. Husband and Wife have now divorced. Husband appeals from the decree of dissolution, which awarded economic contribution to Wife for mortgage payments on the duplexes made by the community estate because they benefitted Husband's separate property. Income from the rental properties was kept in a separate business account and was used to pay the duplex mortgages. The account was also used to pay for a family vehicle, mortgage on the family home, and other community household needs. Here, when the community duplex-rental-income account was used to pay down mortgages on Husband's separate property duplexes, his estate was benefitted by the reduction in debt. Accordingly, the trial court awarded $127,111.86 to the community estate, which translated into a judgment against Husband for half of that amount, or $63,555.93. Husband argued that the evidence was insufficient to calculate economic contribution and that the trial court abused its discretion in denying his claim for offset. Specifically, Husband claims that he is entitled to the offset because he "provided the parties' income tax records showing that they had benefitted from the tax deductions taken each year as a result of depreciation, along with documentation and testimony that the community estate benefitted greatly from the rental income from the properties in the sum of over $500,000."

Held: Affirmed.

Opinion: Evidence sufficient to support trial court calculation of economic contribution. Whereas a claim for equitable contribution is a statutory remedy designed to compensate a contributing estate for reduction in principal amount of debt secured by a lien on property owned by the benefitting estate, the recovery for reimbursement-expenditures of a contributing estate used to improve property of the benefitting estate-is based only in equity. Thus, reimbursement is not available as a matter of law, but lies within the trial court's discretion. "The party claiming the right of reimbursement has the burden of pleading and proving that the expenditures and improvements were made and that they are reimbursable." "The party seeking an offset to a claim for reimbursement has the burden of proof with respect to the offset." The post-nuptial rental income from Husband's separate property was community property. Naturally, the community estate benefitted from rental income, but it was not due to contributions by Husband's separate estate. Thus, Husband was not entitled to an offset for the community rental income that benefitted the community estate. Moreover, there is no authority in the Texas Family Code suggesting that offsets, which are equitably determined, can be applied to claims for economic contribution. Whereas benefits for use and enjoyment of property can offset claims for reimbursement, they are specifically disallowed as offsets for economic contribution.

TRIAL COURT ABUSED ITS DISCRETION BY AWARDING SPOUSAL MAINTENANCE WITHOUT SUFFICIENT EVIDENCE THAT WIFE COULD NOT MEET REASONABLE EXPENSES.

¶10-2-12. ***Petra v. Petra***, ___ S.W.3d ___, 2010 WL 374388 (Tex. App.—San Antonio 2010, no pet. h.) (mem. op.) (02/3/10)

Facts: Wife filed for divorce after 17 years of marriage. After a bench trial, trial court awarded wife

$700 per month for 3 years as spousal maintenance. In addition, trial court awarded wife 50% of the proceeds from the sale of a home as well as the property, jewelry, cash and accounts in her possession, but the record has no evidence of the value of that property. Trial court also awarded wife a judgment of $12,000 against husband. The record also shows that wife received $50,000 while the divorce was pending as her share of the sale of some community property. Neither party requested and trial court did not file findings of fact or conclusions of law. Husband appealed.

Held: Reversed and rendered.

Opinion: Wife claimed she was eligible for spousal maintenance under TFC 8.051(2)(C), which permits trial court to award spousal maintenance if (1) the marriage lasted 10 years of longer; (2) The spouse seeking maintenance lacks sufficient property to provide for the spouse's minimum needs; and (3) the spouse seeking maintenance clearly lacks earning ability in the labor market adequate to provide support for the spouse's minimum reasonable needs. The only evidence in the record to support such a claim is wife's testimony that she can't meet her bills unless she receives $700 per month in spousal maintenance. This is insufficient to support a conclusion that wife's expenses were reasonable or that they represent wife's minimum needs. Since there is not sufficient probative evidence that wife's minimum reasonable needs cannot be provided for with her income and property, trial court abused its discretion by awarding spousal maintenance.

IF RULE 11 DOES NOT ADDRESS THE ENTIRE MARITAL ESTATE, THE TRIAL COURT NOT ONLY AUTHORIZED TO DIVIDE THE REMAINING ESTATE, IT IS OBLIGATED TO DO SO.

¶10-2-13. ***In re Marriage of Hallman,*** 2010 WL 619290 (Tex. App.—Texarkana 2010, no pet. h.) (mem. op.) (2/23/10)

Facts: On July 15, 2008, Wife filed for divorce from Husband. After having discussed matters between themselves, Wife and Husband reached an agreement on property division and temporary support. Wife's attorney drafted a Rule 11 agreement that embodied the parties' oral agreement. The agreement was signed and filed among the papers of record. Later, after additional negotiations, Wife and Husband signed an agreed final decree of divorce to be submitted for approval upon obtaining the divorce. At the time he signed the proposed final decree, Husband was working as an oil field consultant and was earning in excess of $100,000.00 per year. When Husband lost his job, he notified Wife of that fact and that as a result, he would not be able to fulfill the obligations set forth in the proposed final decree of divorce. Consequently, the agreed final decree was never submitted to the court. Instead, a final contested hearing was scheduled.

At the hearing, Wife testified that she wanted the terms of the Rule 11 agreement enforced. The agreement divided the parties' real and personal property and provided for temporary support for Wife in the amount of $4,000.00 per month from August 1, 2008, and the first day of each month thereafter until entry of the final decree. At the time of the hearing, Wife had received only $15,100.00 in temporary support payments.

There is no indication in the record that either party revoked the Rule 11 agreement. Husband testified that he could not fulfill the terms as set out in the proposed final decree and that he was currently working in Louisiana making approximately one-seventh the amount of money he made at the time he signed that document. Wife testified that she did not pursue the proposed agreed decree because Husband represented that he could not fulfill its terms.

After a contested hearing, the trial court enforced the Rule 11 agreement as a contract and incorporated the agreement into the final decree of divorce. The final decree also (1) awarded judgment against David for an arrearage of temporary spousal support in the amount of $36,900.00; (2) awarded judgment against David for spousal maintenance in the amount of $36,000.00, to be paid at a rate of $1,000.00 per month; and (3) ordered Kandy to pay twenty percent and David to pay eighty percent of the IRS debt. Husband appealed claiming

that the Decree varied from the Rule 11 Agreement
Held: Affirmed.

Opinion: Because the Rule 11 did not address the entire marital estate, the trial court was not only authorized to divide the remaining estate, but in fact was obligated to do so. Here, there was no revocation of the Rule 11 agreement, and a consent judgment was not entered. The trial court entered judgment after a contested hearing on issues not addressed in the Rule 11 agreement. The Rule 11 agreement was set forth at length in the final decree. Additional provisions in the decree were not addressed in the Rule 11 agreement, and were supported by the evidence.

DIVORCE
POST-DECREE ENFORCEMENT

TRIAL COURT ERRED BY REFUSING TO COMPEL ARBITRATION AGREEMENT INCORPORATED IN DIVORCE DECREE.

¶10-2-14. ***Provine v. Provine***, ___ S.W.3d ___, 2009 WL 4967245 (Tex. App.—Houston [1st Dist.] 2009, no pet. h.) (12/10/09)

Facts: Husband and wife divorced 01/20/09. Trial court incorporated a mediated settlement agreement for the division of the community estate, and found that the agreement was a just and right division. The mediated settlement agreement provided that any and all disputes be decided by binding arbitration. On 03/25/09, wife petitioned for enforcement of the agreement, arguing that husband had failed to surrender some of her assets. On 06/25/09, husband moved to compel arbitration. On 09/03/09, trial court entered an order denying husband's motion and found that it had no plenary power to compel arbitration. Husband filed an interlocutory appeal and a petition for writ of mandamus.

Held: Reversed and remanded.

Opinion: Appellate court has jurisdiction under the Texas Arbitration Act, therefore husband's petition for mandamus is dismissed. Once husband proved the existence of a valid arbitration agreement governing the dispute, wife had the burden of establishing a defense to the arbitration agreement. Unless wife established such a defense, trial court had no discretion but to compel arbitration. While trial court did lack plenary power when the husband moved to compel arbitration, it did have continuing jurisdiction to enforce the divorce decree. Because wife's motion did not ask trial court to modify the division of property but only sought to enforce the decree, trial court had jurisdiction to compel arbitration since it was the parties' agreed mechanism to enforce the divorce decree. Trial court therefore erred in refusing to compel arbitration.

Editor's Comment: *This is an intriguing case. The MSA stated that "Any disputes arising from the drafting of the decree, closing documents, the interpretation, omitted issues, and/or performance of this agreement or any of its provisions...shall be decided by binding arbitration..." Apparently the arbitration agreement was enforceable because the decree "incorporated" the MSA. It is unclear if the arbitration agreement would be enforceable if it had not been "incorporated" into the decree. The better practice would be to include an arbitration agreement in the decree. Occasionally I will include an arbitration provision in a decree providing that if the parties are unable to agree on the division of personal property, their disputes will be submitted to binding arbitration with a specific individual. J.A.V.*

Editor's Comment: *Notice here that once husband proved the existence of a valid arbitration agreement and wife failed to establish a valid defense to the same, the trial court had no discretion but to compel arbitration. Every family law attorney participating in mediations needs to familiarize themselves with the Texas Arbitration Act. The vast majority of MSAs I have seen provide that all disputes arising from the agreement will be resolved via binding arbitration. Keep this case in mind, it will likely be relevant to each of us in a post-divorce enforcement situation at some point. M.M.O.*

CONTRACTUAL, NON-CHAPTER 8 ALIMONY PAYMENT, NOTHING MORE THAN A DEBT THAT IS NOT ENFORCEABLE BY CONTEMPT OR SUBJECT TO WITHHOLDING ORDER.

¶10-2-15. ***Kee v. Kee,*** ___ S.W.3d ___, 2010 WL 377031 (Tex. App.—Dallas 2010, no pet. h.) (2/04/10)

Facts: In June 2005, Husband and Wife entered into a Partition and Exchange Agreement. That Agreement included a provision that, if the parties separated, Husband would provide monthly financial support for Wife and their two children in the amount of $3,400. The Agreement also provided that Husband would pay alimony in accordance with the support provision if the parties divorced. The parties were divorced on January 5, 2006. The divorce decree ordered Husband to pay child support and alimony for a combined total of $3,400.

On September 7, 2006, Wife filed a notice of application for writ of withholding with regard to the alimony payments. The writ of withholding issued and Husband moved to abate it. The trial court terminated the writ of withholding. Wife appealed.

Held: Affirmed.

Opinion: The alimony payments under the divorce decree were not ordered pursuant to chapter eight. In the final divorce decree, the parties stipulated that it was a contract. Chapter eight does not apply to an alimony provision in a divorce decree that restates a parties' contractual agreement for alimony. The alimony provision in the divorce decree was consistent with the parties' Agreement. In the parties' 2005 Agreement, Husband agreed to provide support to his family in the amount of $3,400 monthly if the parties separated. Husband further agreed in the Agreement to continue that support upon divorce. The trial court set child support at $1,500 per month. Alimony payments were set at $1,900. Together, those two amounts equal $3,400, the amount of support the parties contractually agreed to. Moreover, the decree provided that the alimony payments would continue not in accordance with the limitations of chapter eight, but pursuant to the terms in the parties' Agreement, Although there is a general reference to the family code in the decree's alimony provision, there is no specific reference to chapter eight which contains the requirements for spousal maintenance. There is no finding in the decree that Wife was disabled or lacked sufficient earning capacity. Although Husband does not contest the assertion in Wife's appellate brief that she is physically disabled, there is nothing in the record before this Court to support that assertion. The decree failed to set forth any of the criteria of chapter eight and failed to follow that chapter's guidelines with respect to the amount of support and the duration of the support payments. The spousal support provision in the divorce decree in this case falls outside of chapter eight and does not create a legal duty under chapter eight on the part of Husband to support Wife. A court order to pay spousal support is unenforceable by contempt if it merely "restates a private debt rather than a legal duty imposed by Texas law." The alimony provision in this case is nothing more than a debt. Husband did not have a legal duty under chapter eight of the family code to support Wife. The parties' Agreement did not provide for enforcement by income withholding. Accordingly, such remedy is not available to Wife.

Editor's Comment: *The Kee opinion extends the well-established case law prohibiting the enforcement of contractual alimony by contempt, including In re Green, 221 S.W.3d 645 (Tex. 2007) and McCollough v. McCollough, 212 S.W.3d 638 (Tex. App. – Austin 2006, no pet.) to prohibit enforcement of contractual alimony via garnishment of the obligor spouse's wages absent a specific provision in the decree allowing for such a remedy. The moral of this case is be conscious of your drafting – if you intend for a maintenance obligation to be statutory under Chapter 8 of the Texas Family Code, make sure the decree includes the necessary findings. Also, if you intend for contractual alimony to be enforceable via garnishment of the obligor spouse's wages, this must also be apparent from the terms of the decree. M.M.O.*

TRIAL COURT ERRED BY ISSUING A MONEY JUDGMENT AGAINST WIFE FOR FAILURE TO PAY A 3RD PARTY CREDITOR UNDER AN INDEMNITY AGREEMENT SINCE HUSBAND HAS SUFFERED NO OUT-OF-POCKET LOSSES.

¶10-2-16. ***Thomas v. Thomas***, ___ S.W.3d ___, 2010 WL 543592 (Tex. App.—El Paso 2010, no pet. h.) (2/17/10)

Facts: Husband and wife divorced on 10/11/06. Trial court awarded wife the marital residence and a car, and ordered wife to pay the mortgage on the house and the balance due on the promissory note for the car. It further ordered that wife's obligation on the car note was to be secured by husband retaining the power of attorney to transfer the vehicle until the loan was paid in full and also required wife to execute a deed of assumption to secure title to the home.

On 03/20/07, husband filed a petition for enforcement of the property division by contempt. He alleged wife had failed to make the car payments for nine months and had not executed the deed of assumption. Husband asked trial court to (1) order that wife either pay the arrearages or return title to him;(2) order she sign and deliver the deed of trust; (3) order she be held in contempt, jailed and fined for eighteen mother or until she complied with the order; (4) issue a clarifying order if the divorce decree were not sufficiently sufficient to enforce contempt; (5) award husband a money judgment of $5000 for damage to his credit rating; and (6) award husband attorney's fees. After a hearing, trial court found wife in contempt. It ordered wife to (1) deliver the car to husband; (2) pay $1,917 to husband in missed car payments; and (3) pay husband $787.50 in attorney's fees. Wife appealed.

Held: Affirmed in part. Reversed in part.

Opinion: Trial court did not have subject matter jurisdiction to order wife to turn over the car. The divorce decree awarded the car to wife, and the trial court's plenary power had expired. An enforcement order can only aid and clarify the prior order, it cannot change it. While husband could and did execute his power of attorney to transfer trial, trial court could not issue a turnover order to wife.
Trial court also erred by awarding a money judgment based on the indemnity agreement. Under an indemnity agreement, the right to indemnity does not arise until the judgment is either rendered or paid. Since husband made no payments on the car, he suffered no out-of-pocket losses. Consequently, husband was not entitled to a money judgment from wife.

Editor's Comment: *This case illustrates the problems inherent in dividing jointly held debt – or dividing a debt to a spouse not legally responsible for payment to the creditor. Lesson 1: if you don't pay the arrearage owed on the debt, you can't collect a money judgment for it. Lesson 2: you can't request turnover of the asset secured by the debt because that would constitute a redivision of the estate. Lesson 3: (reminder) the division of property only addresses the obligation between the spouses and does not affect the rights of third party creditors. Lesson 4: if you are going to challenge a contempt finding, do so through mandamus or habeas corpus, not direct appeal. The court of appeals gives a road map for addressing the debt collection issue. They say, first pay the arrearage, then sue for money judgment, then ask for turnover to satisfy the*

money judgment. M.M.O.

SAPCR
STANDING AND PROCEDURE

TRIAL COURT CORRECTLY DISMISSED CASE FOR LACK OF JURISDICTION WHEN IT FOUND THAT NON-RESIDENT FATHER HAD NOT PROVIDED FOR MOTHER'S PRENATAL EXPENSES OR HELPED SUPPORT CHILD.

¶10-2-17. ***In re E.S.*** ___ S.W.3d ___, 2010 WL 108188 (Tex. App.—El Paso 2010, no pet. h.) (1/13/10)

Facts: Mother met alleged father in Juarez, Mexico in 1983 and began a relationship. When mother became pregnant, mother enrolled in a prenatal care program. Mother claimed that alleged father gave her money to pay her medical expenses both while pregnant and after child was born. According to mother, alleged father continued the payments until father moved to San Antonio when child was two. Mother filed a petition to establish alleged father as father. Alleged father filed a special appearance, noting the he was a nonresident of Texas, and claiming that sexual relations occurred only once in Juarez. Alleged father also denied mother's claim that he had paid for prenatal and other expenses. Associate judge recommended that the case be dismissed for lack of jurisdiction. After a hearing, trial court adopted associate judge's recommendations and dismissed the case. Mother appealed.

Held: Affirmed.

Opinion: TFC 159.201 permits trial court to exercise personal jurisdiction over a non-resident if (1) that person resided in Texas; and (2) that individual provided prenatal expenses or support for child. Although father admitted previously residing in Texas, alleged father denied providing prenatal expenses or child support. It was within trial court's jurisdiction to believe alleged father's claims and disbelieve mother's claims.

Editor's Comment: *The trial court is "the sole judge of the credibility and demeanor of the witnesses." In this case, an affidavit proved more convincing than a live witness. J.V.*

OKLAHOMA COURT'S NUNC PRO TUNC ORDER WAS VOID WHEN IT CORRECTED JUDICIAL RATHER THAN CLERICAL ERROR.

¶10-2-18. ***In re P.L.H.***, ___ S.W.3d ___, 2010 WL 636944 (Tex. App.—El Paso 2010, no pet. h.) (2/24/10)

Facts: Mother and father divorced in Oklahoma in 07/00. Oklahoma trial court awarded mother custody of children and ordered father to pay child support in accordance with Oklahoma Child Support Guidelines that were supposed to be attached to the decree but were omitted due to clerical error. Beginning in 08/99, an "Order of Income Assignment" garnished father's income up to $1,072 per month in accordance with Oklahoma law. Statutory limits on withholding limited father's actual payments to $981.46 per month.

In 02/04, trial court issued a nunc pro tunc judgment that included the Oklahoma Child Support Guidelines and a child support computation sheet created at the time of the divorce. That computation sheet showed father's child support obligation as $481.20 per month, and allocated 40% of children's other medical expenses. It did not allocate the cost of health insurance premiums or child's care.

On 03/08/05, father filed a petition to modify the terms of the Oklahoma Decree in Dallas County and sought a credit for overpayment. On 05/03/05, Oklahoma trial court signed an order declining continuing jurisdiction over child support and custody in favor of Dallas County trial court. On 06/06/06, mother filed this Oklahoma decree for registration in Texas. In 09/06, Oklahoma trial court issued a second nunc pro tunc order. This nunc pro tunc order added a finding of mother and father's income, and ordered father to pay mother for children's insurance premiums.

After a bench trial, Dallas trial court entered a modification order on 12/06/06 awarding father a $32,016.64 credit for prior overpayment to be applied to future support payments as a $500 per month deduction for sixty-four months. Trial court also awarded father attorney's fees. Wife appealed

Held: Affirmed.

Opinion: A judgment nunc pro tunc may only be used to correct clerical, not judicial errors. The second nunc pro tunc order went beyond correcting errors by altering the support obligation. The second order was therefore void, and Dallas County trial court did not err by refusing to enforce it.

Editor's Comment: *Here, in addition to the jurisdictional issue regarding the second nunc pro tunc, mother also presented six other issues on appeal, all dismissed by the El Paso Court of Appeals. These issues included the appeal of death penalty sanctions entered against mother, denial of mother's request for a continuance of trial, the award of attorney's fees against mother and in favor of father, and waiver of mother's affirmative defense of discharge in bankruptcy. Although the facts of this case are somewhat complex, the principles we can take away from it are simple. Review orders carefully either before or as soon as you possibly can after entry, especially divorce decrees and child support orders, because you might not have jurisdiction to correct substantive mistakes later on. Be careful what you ask for, like mother's request here that the Oklahoma court decline jurisdiction, because you just might get it. Also, play by the rules, the rules of civil procedure and the orders of the court, failing to do so could result in stiff penalties, like the death penalty sanctions entered here against mother. Along those same lines, while legal representation may seem expensive to pro se litigants, the price they can end up paying in the long run for representing themselves could be much greater. M.M.O.*

SAPCR
CONSERVATORSHIP

GRANDMOTHER LACKED STANDING TO FILE PETITION TO INTERVENE IN SAPCR WHEN THERE WAS NO EVIDENCE THAT FATHER'S CONDUCT WOULD PROBABLY HARM CHILD.

¶10-2-19. ***In re S.M.D.***, ___ S.W.3d ___, 2010 WL 647876 (Tex. App.—San Antonio 2010, no pet. h.) (2/24/10)

Facts: Child born on 07/06/05 to unmarried mother and father. In 10/06, trial court appointed mother and father JMC with mother having the exclusive right to designate child's primary residence. Mother and child traveled to Colorado before father exercised any possession. On 11/19/06, mother disappeared. Maternal grandmother took child to her home in California. In 12/06, father filed a motion to modify asking to be appointed SMC. In 01/07, grandmother filed a petition in intervention, seeking to be appointed JMC with the right to determine child's residence. Father contested grandmother's standing. Trial court appointed grandmother temporary SMC and father PC. After jury trial, trial court appointed father SMC and grandmother a nonparent PC with standard possession. Trial court also restricted child's residence to within

50 miles of Bexar County. Father appealed.

Held: Reversed and rendered in part, affirmed in part.

Opinion: TFC 102.004(b) allows trial court to allow grandmother to intervene if there is proof that appointment of a parent as SMC would significantly impair child's physical health or emotional development. A grandparent must make the same showing to establish standing as a nonparent must make to overcome the presumption that a parent is to be named managing conservator pursuant to TFC 153.131. Grandmother, therefore, had to present evidence of specific, identifiable behavior or conduct of father that an award of custody to father would result in probable harm to the child. While trial court heard evidence from two court-appointed psychologists that child had emotionally bonded with grandmother and would be emotionally harmed if removed from her, the psychologists also testified that they had no concerns about father being a fit parent. Even though father had no contact with child before 01/07, grandmother produced no evidence of specific, identifiable conduct that father would probably cause harm to child. Consequently, there is no evidence in the record to support trial court's implied finding that appointing father SMC would substantially impair child's physical health or emotional development. Trial court, therefore, should have dismissed her pleadings for lack of standing. Grandmother pleaded alternatively for grandparental possession and access under TFC 153.432 but did not meet any of the statutory requirements

Father challenged the geographic restriction on appeal. The purpose of imposing a geographic residency restriction is to ensure those who have rights to possession of the child can effectively exercise such rights. Although trial court could impose a residency restriction on father as a SMC, it cannot do so unless there is a person other than father with a court-ordered right to possession of child. Since no other person holds such a right, the restriction unreasonably interferes with father's rights as SMC.

Editor's Comment: *Another case on non-parent/grandparent standing. A grandparent is held to the same standard of the parental presumption as a nonparent in seeking to be named managing conservator. There must be a showing of emotional/physical harm to the child by appointment of the parent as conservator for the non-parent/grandparent to have standing. The showing must be as to the parent's present parenting abilities, not prior conduct. However, the evidence may be speculative as to the possible harm. Here, the mother/primary custodian of the child "disappeared." Nothing in the case says whether she was presumed dead or just ran away from home, so maternal grandmother had no standing for grandparent access. M.M.O.*

Editor's Comment: *The expert testimony in this case is reminiscent of In re: Derzapf, 219 S.W.3d 327 (Tex. 2007, orig. proceeding), in which a psychologist testified that cutting off grandparent access would be "harmful" to one of the children and would cause the children "sadness." But the psychologist conceded that the feelings of sadness did not rise to the level of a significant emotional impairment. J.V.*

SAPCR
CHILD SUPPORT

TRIAL COURT DID NOT ERR BY REFUSING TO REIMBURSE FATHER FOR "OVERPAYMENTS" RESULTING FROM SOCIAL SECURITY DISABILITY PAYMENTS

¶10-2-20. ***In re H.J.W.*** ___ S.W.3d ___, 2009 WL 4725301 (Tex. App.—Dallas 2009, no pet. h.) (12/11/09)

Facts: Father and mother divorced 07/19/06. Trial court ordered father to pay $606 in monthly child support, $67.79 per month for children's health insurance and some unreimbursed medical expenses. Father petitioned

to modify on 11/22/06 seeking to terminate child support payments due to a change in possession. In 03/07, father filed a second petition to modify requesting termination or abatement of the child support order after being diagnosed with Stage 4 Cancer. Mother filed a motion to modify on 06/14/07 requesting that father be limited to supervised visitation with children. Trial court heard all three motions over several days beginning 09/06/07. While the hearings were in progress, Social Security Administration informed father his illness entitled him to disability benefits and supplemental social security income payments. On 10/20/07, Social Security Administration notified father that his illness also entitled children to benefits beginning 08/06, and awarding each child a lump sum payment for monthly benefits for benefits already due and monthly payments of $593 per child from that point forward. Trial court hearings ended 11/30/08. On 01/15/08, trial court abated father's child support obligation beginning 10/01/07 but ordered him to continue paying for children's medical insurance and other medical expenses. Father appealed.

Held: Affirmed.

Opinion: Father argued that trial court erred by allowing mother to keep both the lump sum Social Security payments children received and father's monthly child support payments. TFC 154.132 requires trial court to subtract from the total child support father owes the amount of benefits paid to or for the child as a result of father's disability. The statute does not, however, require trial court to reimburse father for payments already made. TFC 156.401(b) generally prohibits the retroactive modification of child support.

Father argued that trial court erred by requiring father to continue paying for children's medical expenses when social security payments amounted to almost double his child support obligations. Since child support guidelines assume trial court will order father to pay medical support in addition to child support, the amount of medical support is separate and distinct from the amount required by the guidelines. There is no provision in TFC that requires trial court to take disability payments into account when calculating medical support.

Editor's Comment: *The outcome in this case appears to be especially harsh given the Father's medical condition. Although the Legislature partially addressed the issue of social security benefits in 1999, it did not take into consideration the effect of the payment of a lump sum for child support that had already been paid and whether the child support paid for that period of time should be returned to the obligor, it also did not take into consideration if the children's monthly social security payment exceeds what the obligor is required to pay under the guidelines and whether those amounts should ar can be used as an offset against the children's medical support. See TFC 154.132. Hopefully, the Legislative Committee and/or the Texas Family Law Foundation will look at this and include something in next the family section's legislative package. G.L.S.*

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT APPLYING INCREASED SUPPORT PAYMENTS TOWARDS FUTURE OBLIGATIONS.

¶10-2-21. ***In re B.S.H.***, ___ S.W.3d ___, 2009 WL 5064773 (Tex. App.—Fort Worth 2009, no pet. h.) (12/23/09)

Facts: Mother and father divorced in 01/93. Trial court ordered father to pay $180 per month in child support. In 1997, father started making payments to mother instead of through the county child support office. From 1999 to 2002 he increased his payments four times. From 10/02 to 07/05, he paid $450 per month. In 04/07, father filed a petition to modify asking that his direct payments to mother be credited to his child support amount, that the amount of child support be increased to meet family code guidelines, and that the amounts paid over his court ordered obligations be credited to his future child support obligation. The AG intervened in the case, and mother filed an answer seeking increased support and an arrearage judgment of three months of missed payments. Trial court held a bench trial in 02/08. Father claimed he had increased his child support payments to "get ahead" on his child support while mother claimed that father had told her he was increasing the payments to save her the cost of modifying the child support order. Trial court modified father's child

support obligation to $594 per month, found that father owed no arrears and found that father's overpayments should not be credited towards his future obligations. Father requested, and trial court filed findings of fact and conclusions of law. Trial court found that father had voluntarily increased his payments in agreement with mother to avoid the costs of going to court. Father appealed.

Held: Affirmed.

Opinion: In a case where an individual oblige receives from an obligor who is not in arrears a child support payment in excess of a court ordered amount, trial court shall give effect to any expressed intent of the obligor. Trial court found that father intended to pay the excess amount in part to avoid the cost of modifying the decree. Thus trial court did not err by finding that father's excess child support payments should not be applied to his future obligations.

Editor's Comment: *This case illustrates the absolute necessity for child support obligors to get an order entered with the court, instead of relying on informal agreements with their ex. The penalties for failing to comply with a child support order are too great to rely on a he-said she-said evidence of an informal agreement or intent. If the obligor's desire is to stay out of court and save himself those costs, he ended up incurring more expenses than if he had just gotten a modification order entered in the first place. Again, as I said before in the P.L.H. opinion, while it might seem like a good idea at the time for pro se litigants to represent themselves in legal transactions, the consequences that arise from a pro se litigants lack of familiarity with the law and the legal system can be very costly. M.M.O.*

TRIAL COURT DID NOT ERR BY RENDERING A CUMULATIVE MONEY JUDGMENT FOR CHILD SUPPORT OBLIGATION THAT ENDED IN 1981.

¶10-2-22. ***Taylor v. Speck***, ___ S.W.3d ___, 2010 WL 26240 (Tex. App.—San Antonio 2010, no pet. h.) (1/6/10)

Facts: Father and mother divorced in 1967. Court of Domestic Relations No. 2 ordered father to pay $30 per week in child support until youngest child turned 18. In 2004, mother filed a Motion for Cumulative Judgment of child Support Arrears and Petition for Suspension of Licenses for Failure to Pay Child Support alleging that father failed to pay child support. In 2008, 302nd Judicial District Court granted mother's motion to transfer case to Bexar County with husband's consent. After a hearing, trial court in Bexar County awarded mother a cumulative money judgment of $237,248 for arrearages in interest and $7,024 in attorney's fees. Trial court also awarded mother appellate attorney's fees in the event of an unsuccessful appeal and $6,000 in attorney's fees in the event father filed bankruptcy and child support had to be collected through bankruptcy process. Father appealed.

Held: Affirmed.

Opinion: Father argued that Bexar County trial court lacked subject matter jurisdiction because the case had been transferred from a different court than had granted the original divorce. In 1977, Family District Court Act replaced Court of Domestic Relations No. 2 with 302nd Judicial District Court. This replacement automatically transferred all cases pending in the former court to the letter. Thus 302nd Judicial District had jurisdiction to transfer the case to Bexar County trial court.

Although TFC 157.005(b) limits trial court's jurisdiction to confirm arrearages to 10 years after the child support obligation terminates or child becomes an adult, the effective date of that limitation is April 5, 2005. Since mother initiated the action prior to that effective date and the prior version of TFC 157.005(b) had no such limit, the current provision does not bar mother's claim.

TCPRC 34.001 provides that a judgment becomes dormant if a writ is not issued within ten years after the rendition of a judgment. TFC 34.001(c), enacted in 2009, excludes child support judgments, regardless of when judgment was rendered, from TFC 34.001. Dormancy, therefore, does not apply in this case. Even before legislature passed TCPRC 34.001(c), appellate court had held 34.001 did not apply in a similar situation.

Given that the trial court is mandated to award attorney's fees by TFC 157.167, and a conditional award of post-judgment attorney's fees is recognized in Texas (see TFC 6.709 and 109.001), no error in the trial court's award of additional attorney's fees in the event of a bankruptcy filing by father.

Editor's Comment: *Someone please raise an "unconstitutionally-retroactive" challenge to the 2009 amendment to CPRC's dormancy clause excepting judgments in family law cases from dormancy. This father's $30-per-week obligation ballooned to a quarter million dollars over 40 years, and the couple's children are 41 and 42 when mother files this motion for cumulative judgment. I am not in favor of dead beat dads, but this isn't right. J.C.M.*

TRIAL COURT DID NOT ERR BY EXTENDING FATHER'S CHILD SUPPORT OBLIGATION INDEFINITELY WHEN THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT CHILD REQUIRED SUBSTANTIAL CARE DUE TO HIS DISABILITY.

¶10-2-23. ***In re T.A.N.***, ___ S.W.3d ___, 2010 WL 58334 (Tex. App.—Amarillo 2010, no pet. h.) (1/8/10)

Facts: Mother and father divorced in 1991. Trial court awarded mother primary conservatorship of children. After the divorce, youngest child was diagnosed with cancer. Child was recovering until he suffered an accident at a Wal-Mart when he was 11. After the accident, Wal-Mart settled child's personal injury claims with a lump sum payment of $478,000. Mother used money to pay attorney's fees, medical bills and to buy child a house that was held in trust. Additionally, child received an annuity that paid him $540 per month starting 09/01/06. Child also received eight biennial payments of $10,000 starting on 07/01/07, after which he will receive $12,000 every five years for the rest of his life. Father paid child support as ordered until child turned 18. After child turned 18, the AG ceased child support withholding, and husband ended child's health insurance coverage. Wife filed a petition to modify requesting trial court order husband to continue paying child support and providing insurance coverage beyond child's 18th birthday due to child's disability. After a hearing, trial court found that child required substantial care and personal supervision because of his physical disability, that child was not capable of self-support, and that the disability existed on or before child's 18th birthday. Trial court ruled that husband was responsible for retroactive child support between child's 18th birthday and when child obtained his GED. Trial court also ordered that current support would start in 07/08 and would be $300/month until child entered college at which point it would increase to the normal child support for one child. In addition to child support, trial court ordered husband to maintain child on his health insurance as long as he could carry him, after which, if child obtained health insurance, father and mother would each pay 1/3 of the premium. Although the trial court entered an order reflecting these rulings, the order also stated that, once child entered college, husband's child support obligation would increase to 20% of his net income calculated as of his wages on 07/01/08. Husband appealed.

Held: Affirmed in part; Reversed and remanded in part.

Opinion: TFC 152.302(a) provides that trial court can order a parent to provide child support for an indefinite period if 1) child requires substantial care and personal supervision because of his physical disability; 2) child is not capable of self-support; and (3) the disability existed on or before child's 18th birthday. Father challenged the sufficiency of the evidence to support the first two prongs. The evidence at the hearing established that child was severely limited in his ability to care for himself in the periods after his surgeries,

and that child is likely to have between three and ten surgeries during the remainder of this life. The evidence also established that child could not drive when on the pain medication he took as needed. Experts also testified child could not walk great distances without assistance, that the atrophy in his muscles prevented him from doing many things, that his overall ability to walk was limited because one leg was much shorter than the other, and that the only work the child could do was sedentary which he could not do for long periods. This evidence is factually and legally sufficient to establish the first prong.
At the hearing, evidence was also introduced to support the second prong. Child had a surgery in 01/07 that cost $223,548.31. Each pair of shoes costs child $1,000. Child's uninsured medical expense, even when on father's health insurance, cost between $60,000 and $70,000 per year. This evidence is sufficient to support trial court's ruling that child is incapable of self-support.

An uncertain child support order will not support a judgment for arrearages and is unenforceable by contempt. Trial court should have set husband's child support obligation at a specific dollar amount rather than 20% of his wages on a particular date. This portion of the order is reversed and remanded for trial court to set an exact dollar amount of child support.

SAPCR
ENFORCEMENT

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO HOLD MOTHER IN CONTEMPT TO ENFORCE FATHER'S VISITATION RIGHTS WHEN THERE WAS DISPUTED EVIDENCE OVER WHETHER PARENTS AGREED TO MODIFICATION. APPELLATE ATTORNEY'S FEES FOR SAFETY AND WELFARE OF THE CHILD BECAUSE MOTHER "HAS PRIMARY RESPONSIBILITY OF THE CHILREN AND FOR THE CARE AND UPKEEP OF AND THE DEBT ON THE CHILDREN'S PRIMARY HOME."

¶10-2-24. ***Marcus v. Smith***, ___ S.W.3d ___, 2009 WL 4854755 (Tex. App.—Houston [1st Dist.] 2009, no pet. h.) (12/17/09)

Facts: Father and mother are JMC of child. In 2008, mother planned a trip to Mexico with child. Father approved the trip after mother told him it would not affect his visitation. Mother was mistaken as the trip actually fell on two of father's days, the first two days of Hanukah. Mother attempted to swap days with father but was unable to reach a compromise. Mother took child on trip despite not reaching an agreement. In 01/09, father asked trial court to hold mother in contempt. Mother answered, counterclaimed for sanctions and moved to dismiss. Trial court dismissed father's motion because father believed mother had scheduled the trip as a mistake rather than as an intentional act. Trial court granted mother's request for sanctions, and assessed mother's attorney's fees against father. Father filed a notice of appeal on 03/25/09, and trial court granted mother appellate attorney's fees on 04/16/09. Father petitioned for a writ of mandamus challenging the award of appellate attorney's fees and trial court's failure to hold mother in contempt.

Held: Affirmed as modified; Mandamus denied.

Opinion: Although appellate court does not have jurisdiction to address trial court's refusal to hold mother in contempt on direct appeal, it does have jurisdiction to consider trial court's award of trial attorney fees. Father, however, failed to object to the award of trial attorney fees and thus has waived that argument.

Trial court had sufficient evidence to justify its award of attorney appellate fees under TFC 109.001(a)(5). The expenses mother would incur in defending an appeal would affect child's saferty and welfare because mother "has primary responsibility of the children and for the care and upkeep of and the debt on the children's principal home." Trial court did incorrectly award mother the funds unconditionally rather than conditioned upon father's unsuccessful appeal.

Trial court did not abuse its discretion by failing to find mother in contempt. There was a dispute over whether mother and father actually agreed to modify their agreement to allow mother to take child on trip so trial court did not act arbitrarily by not holding her in contempt.

Editor's Comment: *Houston, we have a problem. The portion of this case that involved appellate attorney's fees holds that a mere showing that the appellant has primary custody of the children and is responsible for the debt on the children's principal home supports a finding that the attorney's fees are for the safety and welfare of the child. This case relies upon In re Garza, 153 S.W.3d 97, 101 (Tex. App. – San Antonio 2004, no pet.), which states this proposition without any support. Unfortunately, the Dallas Court of Appeals has now used Marcus and its interpretation of TFC 109.001(a)(5) as a basis for awarding interim attorney's fees under TFC 105.001(a)(5) to a mother in a case involving a SAPCR between unmarried parties where the father has paid guideline or above-guideline child support since birth, paid all medical expenses, and purchased mother a car without complaint. Nevertheless, the trial court awarded mother $70,000 in interim attorney's fees without stating they were for the safety and welfare of the child. Mother is unemployed and living with her mother in Maryland. See In re C.B., 2010 WL 93475 (Tex. App. – Dallas 2010, orig. proceeding). Marcus and it progeny In re C.B. leaves the door wide open for interim attorney's fees in SAPCR actions based upon the most minimal of evidence when the obligor can afford to pay. G.L.S.*

TRIAL COURT VIOLATED DUE PROCESS BY HAVING FATHER CONFINED 8 DAYS BEFORE SIGNING CONTEMPT JUDGMENT.

¶10-2-25. ***In re Broughton*** ___ S.W.3d ___, 2009 WL 5276756 (Tex. App.—Beaumont 2010, no pet. h.) (1/14/10)

Facts: On 08/12/09 father was taken into custody, and trial court signed a document saying that father was taken into custody for contempt of court regarding non-payment of child support. Trial court, however, did not sign an actual contempt judgment until 08/20/09. That judgment held father in contempt for failing to pay eight installments of child support from 01/09 to 08/09 and committed father to jail for 180 days. The 08/20/09 judgment also granted mother a judgment for the unpaid child support. Father paid the money owed to mother. On 08/31/09, trial court released father on the condition that he pay his current child support and appear for a compliance hearing. On 11/13/09, father was again placed into custody. On 11/30/09, trial court signed a revocation order.

Held: Habeas Granted.

Opinion: Due process requires trial court to sign a written judgment or order of contempt and a written commitment order before imprisoning a person for violating an earlier order. This requirement applies to both civil and criminal constructive contempt orders. While father can be detained while trial court prepared the written order, trial court has no authority to verbally order a person confined for contempt committed outside the presence of the court. The delay between 8/12/09 and 8/20/09 was an unconstitutional restraint on father's liberty. Trial court's denial of father's due process could not be cured by the 8/20/09 signing of the judgment or the 8/31/09 release of father because the delay itself was the violation. Since the original judgment violated due process, father must be released from custody.

Editor's Comment: *The real party in interest argued "that requiring a detailed formal order within five days*

of ordering the relator to be taken into custody 'is bad public policy.'" J.V.

REVOCATION ORDER VOID IF CONTEMPTOR DOES NOT HAVE NOTICE OF SUBJECT MATTER, POSSIBLE CONSEQUENCES, OR ALLEGATIONS THAT WOULD BE CONSIDERED AT COMPLIANCE HEARING. REQUIREMENT THAT CONTEMPNOR ATTEND COMPLIANCE HEARING, NOT SUFFICIENT.

¶10-2-26. ***In re Bishop,*** 2010 WL 374573 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (mem. op.) (2/04/10)

Facts: Mother filed a motion for enforcement of child support order, and order to appear. On June 29, 2009, the Court signed the order holding Father in contempt for failure to pay child support, granting judgment for arrearages, and suspending commitment. The Court further found Father guilty of seven separate acts of contempt for failure to pay child support. Father was sentenced to 60 days in the County jail. However, the 60-day sentence was suspended and Father was placed on probation for two years on the condition that he pay (1) $4,533.41 through the state disbursement unit as child support arrearage; (2) $2,941.50 through the state disbursement unit as child support, which amount was incurred by Mother as attorney's fees and costs; and (3) all child support as ordered by the court on March 24, 2009.

After holding a compliance hearing, the Court signed an order revoking suspension and for commitment to county jail. The Court found that Father had failed to comply with the terms and conditions of the June 29, 2009 order suspending commitment by failing to pay: (1) current child support although Father was able to comply on those dates; (2) child support not confirmed and reduced to a money judgment; and (3) child support confirmed and reduced to a money judgment. The Court awarded attorney's fees and costs for this proceeding in addition to the attorney's fees and costs assessed in the June 29, 2009 order, and revoked the suspension of commitment.

Father asserted in a petition for writ habeas corpus that both the contempt order and revocation order are void.

Held: Habeas Granted.

Opinion: Contempt order void because the record does not demonstrate that Father knowingly and intelligently waived his right to counsel. A revocation order is void if the contempnor does not have notice of the subject matter, possible consequences, or allegations that would be considered at the compliance hearing. A party affected by the order may file a verified motion alleging specifically that certain conduct of the respondent constitutes a violation of the terms and conditions of community supervision." Mother did not file a motion to revoke the suspension of commitment. The requirement that relator appear at a compliance hearing does not provide notice that allegations of noncompliance will be made or what they will be. Therefore, the revocation order is void.

SAPCR
TERMINATION OF PARENTAL RIGHTS

★★★ TEXAS SUPREME COURT ★★★

APPELLATE COURT ERRED BY ADDRESSING ISSUE NOT INCLUDED IN MOTHER'S STATEMENT OF POINTS ON APPEAL.

¶10-2-27. ***In re J.H.G.***, ___ S.W.3d ___, 2010 WL 199882 (Tex. 2010) (1/22/10)

Facts: Mother failed to include in her statement of points for appeal her complaint that trial court unlawfully extended statutory deadline for dismissing the case. On appeal, mother raised that complaint for the first time. Court of appeals sustained mother's issues and held that mother's complaint went to trial court's subject-matter jurisdiction to enter a final order.

Held: Reversed and remanded.

Opinion: TFC 263.405(i) precludes appellate court from addressing an issue that is not included in a timely statement of points. Supreme Court has already held that TFC 263.401(a) statutory dismissal date is procedural, not jurisdiction. Appellate court therefore erred by addressing the issue.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING MOTHER'S MOTION FOR NEW TRIAL CHALLENGING AN AFFIDAVIT OF RELINQUISHMENT.

¶10-2-28. ***In re D.E.H.***, ___ S.W.3d ___, 2009 WL 4547024 (Tex.App.—Fort Worth 2009, no pet. h.) (12/03/09) (En Banc)

Facts: Child born 02/06. TDFPS received a referral in 09/06 based on concern of physical abuse. Father admitted abusing child to a TDFPS investigator, saying that he shook and punched child on three separate occasions when child cried at night. After also interviewing family and friends, TDFPS found receive to believe that child had been physically abused and medically neglected by both parents, and negligently supervised by mother. In 09/06, TDFPS filed a petition seeking termination of the parent0child relationship between child and both parents. On 09/10/07, mother along with her attorney participated in a mediation with child's foster parents. Mother executed an affidavit relinquishing her parental rights during that mediation, and entered into a mediated settlement agreement which provided for a post-termination contact schedule. Trial court terminated mother's parental rights on 09/19/07 based on her affidavit. Trial court appointed TDFPS as MC of child and foster parents as PC. Mother filed a motion for new trial on 10/04/07. She listed her points of appeal as coercion, duress and fraud in the inducement in her execution of the affidavit. Trial court denied mother's motion on 10/18/07. Mother appealed, and argued that she did not voluntarily execute the affidavit of relinquishment because the post-termination contact schedule was unenforceable, and she would not have signed the waiver of parental rights but for the visitation agreement.

Held: Affirmed.

Opinion: Mother's argument that her waiver was not voluntarily because the mediated post-termination contact agreement does not fall into one the points she listed in her notice of appeal, and she has therefore failed to preserve her new argument for review.
Even if she had preserved that complaint for review, trial court did not abuse its discretion by denying her motion for new trial. Under TFC 161.211, once an affidavit of relinquishment has been shown to comply with TFC 161.103, the affidavit may only be set aside by proof of fraud, duress or coercion. Although mother experienced a great deal of pressure at the mediation from the threat of losing her children, that pressure does not meet the standard of duress or coercion.

Dissent (J. Livingston): Mother repeatedly testified during the motion for new trial that she would not have executed the affidavit of relinquishment if she knew that the promised visitation would not continue. Although appellate court has previously recognized that an opponent of an affidavit may only set it aside upon proof of fraud, duress, or coercion, there has been a shift in the way the Texas Supreme Court would handle reviews of terminations based upon a challenge to the voluntariness of an affidavit of relinquishment. In *In re L.M.I.*, 119 S.W.3d 707, 715-716 (Tex. 2003), the plurality noted that due process requires that the proponent of an affidavit of relinquishment prove by clear and convincing evidence that it was executed voluntarily. Appellate court should adopt the *L.M.I.* standard to protect all parents' due process rights.

Mother did preserve her complaint that the affidavit was voluntary. She did not know that the post-termination contact schedule until she saw that the Order of Termination failed to include the terms of the mediated settlement agreement. Furthermore her attacks on the affidavit of relinquishment, although couched in terms fraud, coercion and duress, were sufficiently clear to preserve her objection to its voluntariness. Furthermore, mother submitted sufficient evidence for trial court to conclude that her affidavit was involuntary. Mother's testimony clearly demonstrated that she only signed the affidavit because she believed she would continue to have a right to see child in the future. Futhermore, mother is non-English speaking. The record reflects that mother did not have an interpreter at the hearing on the motion for a new trial, although her counsel spoke her language. The biggest problem is the TDFPS caseworker who testified during the termination proceeding in response to a question of whether the department promised mother anything in exchange for executing the affidavit that "no promises were made." TDFPS was unreasonable in failing to recognize that mother was misled about the permanence of her visitation rights.

It should be noted appellate court's opinion is not really a majority of even a plurality opinion, merely a majority judgment. Four justices believe that mother preserved error and four believe that she did not. It is only because three judges also believe that mother has other remedies to enforce her rights that seven justices join in the judgment. Appellate court should have held that trial court abused its discretion in denying appellant's motion for new trial because mother raised sufficient evidence to show that she did not voluntarily execute the affidavit. I respectfully dissent to the result in this case, and because there is no majority or even plurality opinion in this en banc case.

Concurrence and Dissent (J. Walker)

Mother did preserve her appellate complaint. Mother's complaint that she did not voluntarily sign the affidavit of relinquishment is an argument that she involuntarily signed the affidavit because of fraud. I respectfully dissent from appellate court's holding that mother failed to preserve this error.

However, since the mediated settlement agreement is enforceable, trial court did not abuse its discretion by denying mother's motion for new trial. The mediated settlement agreement complies with TFC 153.0071(d) making it binding on the parties to the agreement. Under TFC 153.0071(e), mother is entitled to judgment on the agreement nonwithstanding TRCP 11 or another rule of law. TFC 153.0071(e) on its face, therefore, means that the agreement is enforceable even though it does not comply with TFC 161.206(b) and TFC 161.2062 which divest parent and child of all legal rights and duties with respect to each other except inheritance and forbid termination orders from including terms regarding post-termination contact

respectively. A fundamental principal of statutory construction is that a more specific statute controls over a more general one. Since TFC 153.0071(e) specifically addresses mediated settlement agreements, it should control. Moreover, the mediated settlement agreement is not even inconsistent with TFC 161.206(b) and TFC 161.2062. First does not affect child's right to inherit. Second, TFC 161.2062 merely prohibits a termination order from requiring post-termination visitation, it does not prohibit an agreement between biologic and adoptive parents regarding visitation. Because I would hold that the parties' mediated settlement agreement is enforceable, I concur that trial court did not abuse its discretion by denying mother's motion for new trial.

FATHER'S CRIMINAL RECORD WAS NOT SUFFICIENT EVIDENCE TO SUPPORT TRIAL COURT'S FINDING THAT FATHER HAD ENDANGERED CHILD.

¶10-2-29. ***Valencia v. T.D.F.P.S.***, ___ S.W.3d ___, 2010 WL 457494 (Tex. App.—Houston[1st Dist.] 2010, no pet. h.) (2/11/10)

Facts: Child born on 11/07/06. At time of birth, mother and child both tested positive for opiates while father was in quarantine at Harris County Jail. TDFPS filed a petition to terminate parental rights in which it alleged that one man was child's father, that father was child's alleged father, and that an unknown man was child's "alleged father." On 11/16/06, TDFPS served father with citation in jail but did not obtain a bench warrant to secure his presence at the adversary hearing that day. On 05/08/07, trial court appointed an attorney ad litem for the unknown father of child. On 09/06/07, mother executed an affidavit of voluntary relinquishment. Also on 09/06/07, attorney ad litem, acting as father's trial counsel, filed a motion for continuance in order to obtain a bench warrant to bring father to trial court. On 01/03/08, father's trial counsel filed an answer on behalf of father, and father offered to take a paternity test. Before a bench trial on 04/09/08, father's trial counsel asked for a continuance "for a couple of weeks" because father was in county jail but trial court denied the motion. Trial court took judicial notice of TDFPS's case file without father's trial counsel objecting. After a bench trial, trial court granted TDFPS's petition and terminated father's parental rights under TFC 161.001(1)(E). On 04/24/08, father's trial counsel filed a motion for new trial and a statement of appellate points. While trial counsel did file a request for findings of fact and conclusions of law, trial court never issued such findings, and trial counsel never filed a notice of past due findings. On 05/06/08, trial court denied father's motion for new trial and found the appeal frivolous. Trial court appointed father's trial counsel as his appellate counsel. Appellate counsel filed an appellate brief arguing, as his only issue, that trial court had erred in determining father's appeal to be frivolous. Appellate court concluded that trial court did err in doing so. Appellate court struck the brief of father's appellate counsel, abated the appeal and remanded the case to trial court for the appointment of new appellate counsel. Father's new appeal argued constructive denial of counsel and insufficient evidence and challenged trial court's best interest finding.

Held: Reversed and rendered.

Opinion: The Texas Supreme Court has held that an ineffective assistance of counsel claim can be raised on appeal despite the failure to include it a statement of points. TFC requires the appointment of counsel to represent an indigent parent contesting a termination suit. The right to counsel is the right to effective counsel. Although a defendant is required to establish prejudice is a counsel's performance was ineffective, ineffectiveness that rises to the level of constructive denial of counsel is legally presumed to result in prejudice. In support of the argument that father received no meaningful assistance of counsel, father pointed out that the transcript of the hearing was only six pages and that trial counsel repeatedly failed to challenge to the state's case. Moreover, trial court repeatedly failed to secure father's presence in the courtroom or even convey to the court the father's location. Trial counsel's performance was passive at best and simple acquiescence at worst. This case reaches the narrow exception to the standard requirement of prejudice in ineffective assistance of counsel cases.

Father also challenged the sufficiency of the evidence to support termination. In order to terminate the

parent-child relationship on the ground that a parent has knowingly engaged in criminal conduct, TDFPS must prove that the criminal conduct has resulted in the parent's (1) conviction of an offense; and (2) confinement or imprisonment and inability to care for the child for not less than two years from the date of TDFPS filing its petition. Trial court found, however, that father had engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or emotional well-being of the child. The only evidence used to support these findings was a packet of copies, mostly uncertified, of criminal complaints, judgments and sentences against father. Mere imprisonment alone does not establish a course of conduct that endangered the child. Furthermore, the charge that father was incarcerated for during child's birth was dismissed.

ADOPTION

UNDER TFC 102.006, ORIGINAL PETITION FOR ADOPTION MUST BE FILED WITHIN 90 DAYS OF TERMINATION.

¶10-2-30. ***In re A.M.***, ___ S.W.3d ___, 2010 WL 653746 (Tex. App.—San Antonio 2010, no pet. h.) (2/24/10)

Facts: Children lived with aunt from 2005 until 2007. In 03/07, TDFPS removed children from aunt's home on allegations that later investigation showed were unsubstantiated. On 10/18/07, trial court terminated parent's rights to children. Children continued to visit aunt with the permission of TDFPS after the termination. On 07/12/08, aunt filed an original petition for adoption of the children. In 12/08, aunt filed a petition to be appointed temporary SMC of children. On 01/20/09, grandmother filed a plea in intervention requesting to adopt children if trial court denied aunt's petition. TDFPS moved to dismiss both aunt and grandmother's petitions. At a hearing on TDFPS's motion to dismiss, aunt and grandmother argued both that TDFPS should be estopped from claiming that aunt and grandmother lack standing because TDFPS made representations that aunt relied upon. They also argued that TDFPS wrongfully withheld their consent to aunt and grandmother's suit for adoption. Finally, aunt and grandmother claimed that TFC 102.006 unconstitutionally violated due process. Trial court limited testimony to the question of estoppel and granted TDFPS's motion. Aunt and grandmother appealed.

Held: Affirmed.

Opinion: TFC 102.006 limits the standing of family members to file an original adoption suit when the parental rights of all living parents have been terminated. Under TFC 102.006, aunt and grandmother did not have standing to file an original petition for adoption unless they did so within 90 days of trial court terminating parental rights or the managing conservator of children consents. Furthermore, unlike TFC 162.010 which allows trial court to waive the requirement of consent from managing conservator if it finds that managing conservator refuses consent without good cause, TFC 102.006 contains no relief if managing conservator withholds consent to an original petition for adoption without good cause. Consequently, trial court did not err by refusing to hear evidence on whether TDFPS withheld consent without good cause. Trial court did, however, hear evidence that suggested aunt believed she was on track to adopt children as a result of TDFPS's actions. But no matter how unreasonable TDFPS's actions were, trial court lacked jurisdiction to grant equitable relief by stopping TDFPS from challenging aunt and grandmother's standing. Although the situation cries out for an equitable situation, the law does not provide one.

While it is true that aunt and grandmother have a fundamental liberty interest in their association with children, that must be balanced against the State's compelling interest in promoting the welfare of children by stabling a stable, permanent home for a child. TFC 102.006 does create some risk that the private interest

could be erroneously deprived, but that risk is absent in cases where its 90-day deadline is absent. As a result, the statue is not facially unconstitutional. Moreover, since the 90-day deadline is published law, and the law does not require TDFPS to notify aunt and grandmother of that requirement, aunt and grandmother's as applied challenge also fails.

Concurrence (J. Marion): Although I agree with the outcome, I urge the Legislature to amend TFC to avoid unfair outcomes such as the one that occurred in that case. The State's interest in keeping families together should be protected by amending TFC 102.006(b) to include a good cause requirement similar to TFC 162.010.

FAMILY VIOLENCE

SPECIAL CIRCUMSTANCES JUSTIFY HOLDINGS THAT NOT ALL ADVERSARY PROCEEDINGS REQUIRE A JURY TRIAL UNDER ARTICLE 5 OF THE TEXAS CONSTITUTION. TRIAL COURT ERRED BY FINDING THAT MOTHER AND FATHER WERE INTIMATE PARTNERS WHEN NEITHER PARTY REQUESTED SUCH A FINDING IN THEIR PLEADINGS.

¶10-2-31. ***Teel v. Shifflet***, ___ S.W.3d ___, 2010 WL 605328 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (2/23/10)

Facts: Father and mother started dating in 04/07. After mother learned she was pregnant, the couple planned to marry each other on 07/07/07. On 07/05/07, mother and father fought, leading to father calling the police and mother locking herself in a bedroom with a knife until police officers tazed her. On 03/08/08, mother hit father in the head after encountering him in a bar. On 04/18/08, father filed an application for a protective order. Trial court issued a temporary protective order on 04/23/08. Mother requested a jury trial, which trial court denied based on TFC 85.001 requirement that it make the determination of a family violence protective order instead of a jury. After a hearing, trial court found that mother and father formed a household, that mother committed family violence on two occasions, and that mother was likely to commit family violence in the future. Trial court entered a protective order that included a written finding that mother and father were intimate partners under 18 USC 922(g)(8). Mother appealed.
Held: Affirmed as modified.

Opinion: Mother argued that TFC's requirement of a bench trial in family protective order cases is unconstitutional. TRCP 216 requires that a jury trial be requested not less than 30 days in advance of trial for a civil suit. Mother did not request a jury trial until 15 days before trial. Trial court therefore had discretion to deny mother's request for jury trial. TFC 85.001 did not, therefore, deprive mother of a right to a jury trial.

Mother argued that trial court erred in its finding that she and father were intimate parties when neither party pled that they were. Trial court erred by issuing a finding that was neither in the pleading nor tried by consent. The order is modified to delete the finding that mother and father were intimate partners.

Concurrence (J. Yates): Special circumstances justify holdings that not all adversary proceedings require a jury trial under Article 5 of the Texas Constitution. The Texas Legislature's requirement of a hearing not less than 14 days after an application for a protective order is incompatible with TRCP 216(a)'s requirement of 30-day advance notice for a jury request. The Legislature has the right to protect applicants for protective orders and did so without violating any constitutional guarantee to mother.

Editor's Comment: *18 U.S.C. § 922(g)(8) is the statute that forbids a person subject to a family violence protective order from possessing a gun. In this case, the trial court erred by finding that the parties were*

"intimate partners" because Shifflet did not so allege. But would it really have mattered? To be intimate partners, the parties must have "cohabited" under 18 U.S.C. § 921(a)(32) because the other definitions of "intimate partners" did not apply. In fact, Teel moved her belongings into Shifflet's house the day before the following morning's knife attack. Is one night enough for cohabitation? J.V.

MISCELLANEOUS

TRIAL COURT'S AWARD OF ADDITIONAL ATTORNEY'S FEES IN A TEMPORARY ORDER PENDING APPEAL WAS VOID WHEN MOTHER DID NOT FILE MOTION REQUESTING THAT ORDER WITHIN 30 DAYS OF FATHER PERFECTING APPEAL.

¶10-2-32. ***Brejon v. Johnson***, ___ S.W.3d ___, 2009 WL 5174256 (Tex. App.—Houston [1st Dist.] 2009, no pet. h.) (12/31/09)

Facts: Mother and father divorced on 04/03/07. Trial court granted mother and father shared custody. In 01/08, mother petitioned to modify the parent-child relationship, seeking an increase in father's child support payments from $1,200 per month to $1,500 per month. At trial, mother testified that father did not consistently exercise his possession rights, and that she had longer working hours after being promoted leading to increased child care costs. Mother also noted that the Texas legislature changed the child support guidelines after the divorce. On 07/15/08, trial court granted mother's petition to modify and awarded mother attorney's fees. Father filed notice of appeal. Trial court filed findings of fact and conclusions of law stating that there had been a material changes in circumstances including mother's promotion and father's unused visitation.

On 08/08/08, mother filed a motion to enforce the 07/15/08 award of attorney's fees as father had not yet remitted payment. Mother filed a second motion to enforce on 09/30/08 which requested that trial court enter temporary orders while the appeal was pending and award additional attorneys fees incurred by mother enforcing the 07/15/08 order. On 10/13/08, trial court heard both motions, and ordered father to pay directly to mother's lawyers the attorney's fees plus post-judgment interest awarded by the 07/15/08 order. Trail court also ordered father to pay additional incurred attorney's fees to be held in trust during the pendency of the appeal. Father filed a second notice of appeal challenging trial court's 07/15/08 order.
Held: Affirmed as modified.

Opinion: T.F.C. 156.401(a) provides that trial court may modify a child-support order if the circumstances of the child or a person affected by the order have materially and substantially changed or if it has been three years since the order was rendered or last modified and the monthly child support obligations differs from the statutory guidelines. A change in the statutory guidelines does not automatically establish a material and substantial change in circumstances. Consequently, mother was required to prove such a change. Because mother provided evidence besides the change in statutory guidelines to support the modification, there is no need to consider whether that change was a material and substantial change in circumstances. The evidence of mother's increased responsibilities and father's unused visitation was factually and legally sufficient to support the modification by itself.

T.F.C. 109.001(a) provides that a motion for temporary orders pending appeal must be filed not later than the 30th day after the date an appeal is perfected. Mother did not request temporary orders in her 08/08/08 motion, but only in her motion filed on 09/30/08. Since mother filed the second motion after 30 days elapsed, trial court had no authority to enter temporary orders. Trial court did have authority, however, to enforce its own order. Therefore, while trial court's order awarding additional attorney's fees is void, the portion of the 10/13/07 order requiring father to comply with the 07/15/08 order is valid.

Editor's Note: *Not only must the request for temporary orders be filed within 30 days of the filing of the*

notice of appeal, the temporary order must be signed within that 30-day period also. Love v. Bailey-Love, 217 S.W.3d 33, 36–37 (Tex. App.—Houston [1st Dist.] 2006, no pet.). G.L.S.

Editor's Comment: *Here is an example of why every family lawyer must know their appellate deadlines, not just the standard deadlines provided by the Rule of Civil Procedure and Rules of Appellate Procedure, but also the rules specific to family law cases, like Texas Family Code §109.001 here. M.M.O,*

WIFE'S LEGAL MALPRACTICE CLAIM WAS TIME BARRED WHEN SHE FILED SUIT MORE THAN 2 YEARS AFTER SHE DISCOVERED THE INJURY – ATTORNEY'S FAILURE TO TRANSMIT QDRO TO HUSBAND'S EMPLOYER.

¶10-2-33. ***Hicks v. Rodriguez,*** 2010 WL 532394 (Tex. App.—Austin 2010, no pet. h.) (mem. op.) (2/10/10)

Facts: Wife hired attorney to represent her in her divorce from husband. On 02/22/96, divorce proceeding ended in a settlement and divorce decree that awarded wife a portion of husband's future retirement and 401(k) benefits. The divorce decree contained a Qualified Domestic Relations Order instructing husband's employer to pay a portion of husband's benefits directly to wife. Wife's attorney failed to property transmit the order to husband's employer causing the employer to remit the entirety of the retirement benefits to husband when he retired in 2003.

After wife learned what happened, she notified attorney in 12/03. Attorney admitted his mistake and agreed to represent wife to recover her portion of the benefits. He filed suit on her behalf and obtained a $215,000 judgment in12/05 against husband that husband never paid. Wife filed a malpractice suit against attorney on 12/04/06. At trial on 08/20/07, attorney admitted malpractice but argued wife's claim was time barred because it was brought more than two years after wife learned of attorney's malpractice. Wife claimed she did not learn about the malpractice until she consulted another attorney on 06/01/06. Jury found wife discovered the malpractice on 06/01/06, and trial court rendered judgment for wife. Attorney appealed.

Held: Reversed and rendered.

Opinion: The two year statute of limitations on a legal malpractice claim begins to run when the claim accrues. A legal-practice claim normally accrues when the client sustains a legal injury. When the malpractice takes a form that is inherently difficult to discover, however, the statute of limitations is tolled until the client discovers or reasonably should have discovered the facts establishing the elements of the claim. The statute of limitations on wife's claim, therefore, was tolled until wife learned that husband's employer had not transmitted her portion of husband's benefits to her. Once wife knew she was harmed, the statute of limitations started running regardless of whether she knew the specific cause of the injury or whether she could mitigate the harm. To maintain her cause of action, wife should have filed a malpractice suit against attorney during the limitations period and asked trial court to abate it while she attempted to recover from husband. Since wife learned of her injury in 2003, her legal malpractice accrued then. Thus the jury's finding that wife's claim accrued on 06/01/06 was not supported by legally sufficient evidence. Wife's claim is time barred as a matter of law.

Editor's Comment: *Keep your eye on this case since it has the potential if appealed to further refine the scope of the tolling rule laid down in Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 156 (Tex. 1991). Ordinarily, the statute of limitations for legal malpractice is tolled until all appeals are exhausted when an attorney commits malpractice in prosecuting or defending a claim that results in litigation. The rationale for the rule is to avoid having the client take inconsistent positions about the attorney's representation. See Hughes, S.W.2d at 156. Several courts of appeals have held that malpractice committed while doing transactional work does not fall within the rule announced in Hughes. Here, the attorney failed to forward a copy of the decree to husband's employer. The attorney's lapse resulted in litigation. Does the legal injury in this case fall within or outside the Hughes rule (was it an error that related to the prosecution of a claim or defense or was it simply a transactional matter)? C.N.*

TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO IDENTIFY SPECIFIC REASONS FOR GRANTING A NEW TRIAL IN CONTRAVENTION OF JURY'S VERDICT

¶10-2-34. ***In re C.R.S.***, ___ S.W.3d ___, 2010 WL 454965 (Tex. App.—San Antonio 2010, orig. proceeding) (2/10/10)

Facts: After a child custody trial from 10/05/09 to 10/07/09, jury returned a verdict designating father as the parent with the exclusive right to designate child's residence. After dismissing the jury, trial court announced it was *sua sponte* granting a new trial in the case but did not sign a order granting a new trial. Father filed a motion for reconsideration, and trial court entered a judgment consistent with the jury's verdict. Mother filed a motion for new trial. After a hearing, trial court signed an order granting a new trial on 12/16/09 "in the interest of justice and fairness and in the child's best interest." Father then filed a petition for writ of mandamus, arguing that trial court abused its discretion for failing to state its reasons for disregarding the jury's verdict and granting a new trial in contravention of the jury's verdict.

Held: Granted in part; denied in part.

Opinion: Trial court must specify the reasons its disregarded the jury's verdict by granting a new trial. It cannot simply use broad statements such as "in the interests of justice." *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 213 (Tex. 2009). Trial court therefore abused its discretion by failing to clearly identify and reasonable specify the reasons the new trial was granted. Since trial court failed to identify such reasons, court of appeals cannot consider whether trial court's granting of a new trial violated TFC 105.002(c)(1)(D). Father's request to reinstate the jury's verdict is denied without prejudice. Mandamus conditionally granted, and trial court directed to specify its reasons for granting the new trial.

Editor's Comment: *One of the biggest shifts, in the past few years, in post-trial motions practice occurred last year when the Texas Supreme Court determined that a trial court must specify the reasons it granted a new trial. If the trial court fails to do so, then mandamus is available to force the trial court to explain why a new trial was granted. Looming on the horizon is the day when an appellate court announces the standard for when a trial court can and cannot grant a new trial in the interests of justice. For those who are keeping track, first the Texas Supreme Court redefined legal sufficiency in a manner that gave themselves greater authority to reverse jury verdicts the Justices don't like. Now the Justices have declared their intention to start reviewing whether or not new trials have been properly granted. Is there any limit to what these superhuman judges can do? C.N.*

Editor's Comment: *A question that is still open is whether a trial court must explain its reasons for granting a new trial after a bench trial. J.C.M.*