SECTION REPORT

FAMILY LAW

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Message from the Chair

The Advanced Family Law Seminar in San Antonio last month was, once again, hugely successful. The Section celebrated its 50th Anniversary and thanks to all of you who attended and made it special. Also thanks go to your Immediate Past Chair Judge Doug Woodburn, Course Directors Judge Dean Rucker and Steve Naylor, to all the speakers and to JoAl Cannon Sheridan and Kathy Kinser for their work in helping to preserve the history of the Section.

Those of you who attended got to examine the newly published Ultimate Checklist, complete with disc and thumb drive, as well as view the two new DVDs for educating your client on deposition testimony and trial testimony. Judging by the comments and the number sold, they were a big hit. Thanks to Coye Conner and his hard working checklist committee for their effort in producing an incredible book in record time and to Charla Conner, Heather King and Charles Hardy for exhibiting their best "Hollywood" skills in producing the DVDs.

Approximately 25 members of the Section met for the first time during Advanced as a "planning team" to begin development of a Long Range Plan for the Section. The all-day session produced drafts of our mission, our vision and our values, all necessary elements of the planning process. The team will meet again in December to hopefully complete the process so that the Plan can be presented to the Section at our annual meeting during the Marriage Dissolution Seminar in Austin in April, 2011.

Also, don't forget the upcoming CLE: **New Frontiers in Marital Property Law** will take place **October 28 and 29, 2010** at the Hyatt Regency Resort at Gainey Ranch in Scottsdale, Arizona under the able direction of Kathryn Murphy and Chris Wrampelmeier. The Houston Four Seasons Hotel will host **Advanced Family Law Drafting**, **December 9 and 10, 2010** with Course Director Rick Flowers.

Plan to attend.

Finally, BEWARE, a new session of the Texas Legislature convenes in January, 2011. More on that later. Probably lots more.

----------Charlie Hodges, Chair

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EDITOR'S NOTE

The courts of appeal have been very busy this last quarter addressing such issues of whether same-sex partners married in another state can obtain a divorce in Texas (No); whether inheritances should be included in net resources for the purpose of calculating child support (Yes); and whether in response to discovery regarding persons with knowledge of facts you need to put more than sister, mother, etc. (No). Additionally, we now have a cases regarding on what basis an amicus attorney may be sued and the chilling effect of doing so.

Table of contents

Table of cases

In the law reviews And legal publications

TEXAS ARTICLES

Robert G. Alexander & Dallas E. Klemmer, *Creative Wealth Planning With Grantor Trusts, Family Limited Partnerships, and Family Limited Liability Companies*, 2 Est. Plan. & Community Prop. L.J. 307, (2010).

Glenn H. Devlin, *Family Court System: A Specialized Practice for a Special Area of the Law*, 47-DEC Hous. Law. 10, (2009).

John W. Ellis, *Yours, Mine, Ours?--Why the Texas Legislature Should Simplify Caretaker Consent Capabilities for Minor Children and the Implications of the Addition of Chapter 34 to the Texas Family Code*, 42 Tex. Tech L. Rev. 987 (2010).

Tom Featherston & Allison Dickson, *Marital Property Liabilities: Dispelling the Myth of Community Debt*, 73 Tex. B.J. 16, (2010).

Christopher Hildreth, *Street V. Skipper & Martin V. Moran: Resolving a Split in Authority in Texas Regarding the Disposition of Proceeds from a Community-Property Life Insurance Policy Payable to The insured Spouse's Estate*, 61 Baylor L. Rev. 973, (2009).

Kelly McClure, *Top 10 Things Every Woman (And Her Husband) Should Know Before Filing for Divorce*, 49 The Advoc. (Texas) 55, (2009).

Willy E. Rice, *Destroyed Community Property, Damaged Persons, and Insurers' Duty to Indemnify Innocent Spouses and Other Co-Insured Fiduciaries: An Attempt to Harmonize Conflicting Federal and State Courts' Declaratory Judgments*, 2 Est. Plan. & Community Prop. L.J. 63, (2009).

J. Thomas Oldham, *Texas Abolishes Economic Contribution in Divorce Cases Now What?*, 47-OCT Hous. Law. 14, (2009).

J. Thomas Oldham, *Divorce, Homestead and Bankruptcy After The 2005 Amendments: Can a Divorce Property Settlement Constitute an "Acquisition" of a Homestead?*, 13 J. Consumer & Com. L. 2 (2009).

LEAD ARTICLES

Carol S. Bruch & Margaret M. Durkin, *The Hague's Online Child Abduction Materials: A Trap for the Unwary*, 44 Fam. L.Q. 65, (2010).

Alain Cornec & Julie Losson, *French Supreme Court Restates Rules on Jurisdiction, Recognition and Enforcement of Foreign Decisions in Matrimonial Matters: A New Chance for Old Cases*, 44 Fam. L.Q. 83, (2010).

John DeWitt Gregory, *Pet Custody: Distorting Language and the Law*, 44 Fam. L.Q. 35, (2010).

Patrick Parkinson et al., *The Need for Reality Testing in Relocation Cases*, 44 Fam. L.Q. 1, (2010).

Ask the editor

Dear Editor: I recently took over a case and discovered that the prior attorney had not timely responded to Requests for Admission. The other side is now seeking to have the admissions deemed. Is there anything that I can do? *Baffled in Boerne*

Dear Baffled in Boerne: Yes, a court may permit a party to withdraw an admission if a court finds that the party shows good cause for the withdrawal, that the parties relying on the admission will not be unduly prejudiced, and that the withdrawal will subserve the presentation of the action's merits. TEX. R. CIV. P. 198.3. A party can establish good cause by showing that its failure to answer was accidental or the result of mistake, rather than intentional or the result of conscious indifference. *Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996). Even a slight excuse will suffice, especially where delay or prejudice will not result against the opposing party. *Webb v. Ray*, 944 S.W.2d 458, 460 (Tex. App. – Houston [14th Dist.] 1997, no writ). The actions of the parties and counsel are significant when a court is reviewing the record to determine if good cause has been established. *Id.* at 461. "Undue prejudice depends on whether withdrawing an admission or filing a late response will delay trial or significantly hamper the opposing party's ability to prepare for it." *Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005). Furthermore, the supreme court has explained that "presentation of the merits will suffer (1) if the requesting party *cannot* prepare for trial, and also (2) if the requestor *can* prepare but the case is decided on deemed (but perhaps untrue) facts anyway." *Id.* at 443 n. 2. With respect to discovery violations, the supreme court has made clear that "absent flagrant bad faith or callous disregard for the rules, due process bars merits-preclusive sanctions." *Id.* at 444.

THERAPY TO GO

Quick and useful advice from a real, live, licensed professional counselor and licensed marriage and family therapist—Melanie Wells, LPT, LMFT

Dear TTG,

I love kids and I know divorce is hard on them. But I also know that sometimes divorce is inevitable. What age is optimal for kids to go through a divorce? Is it better to do it when they're little and don't know the difference? Or do like so many of my clients and wait until they're in high school or college and then pull the plug?

Thanks – Sensitivity Sally

Well, first of all, Sally, honey, I'd like to point out that the words "optimal," "kids" and "divorce" do not belong in the same sentence. Divorce is a rip-off for the kids. Growing up with parents who stay in a bad marriage is a rip-off for the kids. ***Optimally***, the grown-ups should get their act together and stop ripping off their kids. But that's just me.

As professionals who deal with disastrous marriages, it's easy for us to become inured (look it up) to the pain and loss inevitable in any divorce. But as you well know, divorce is a violent act. It's just not a death. It's a murder. And no matter how old the kids are when their parents pull the trigger, they're going to spend the rest of their lives toggling between mom and dad, living out of two houses, and trying to figure out whom to tick off at Thanksgiving.

Having said that, I'll run through a few milestones for you.
Small children – infants through age 3 or so – are in the attachment phase of their emotional development. They need to feel safe and connected in their families. Their sense of abandonment may not be evident to parents -- especially if kids are too young to verbalize their distress. Kids up to age 5 or so are at risk for attachment issues later in life. They are also likely to regress developmentally during the divorce and quite often will feel the loss of the non-custodial parent profoundly.

Kids ages 5-10 are old enough to understand what is happening and will ask logistical questions like, "where will my room be?" and "who will take me to school?" They will often fantasize about their parents reuniting. Family roles can become evident at this age: the peacemaker, the troubled kid, the invisible kid.

Kids ages 10-13: Kids' sadness at this age can manifest as anger or as under-achievement in areas in which they previously excelled. They are also likely to choose sides. Very often, they will exhibit hostility and rage toward one parent because they need to blame someone to make sense of their situation.

At ages 13 and up, kids sometimes respond with acute depression, anger, and acting out episodes. They can become self-destructive or hostile (even more than the standard-issue teen) and may surprise even themselves with their capacity for rage or sadness. They may also feel responsible for one or both parents' happiness and take on emotional responsibilities that are not appropriately theirs. If they can right themselves, they adjust to their situation and get used to a life with two toothbrushes. But they often maintain a cynicism about relationships that follows them into adulthood.

The crucial thing is this: Parents should parent their kids through a divorce. This may seem obvious, but most parents I deal with who live in marital disaster zones or are entering Defcon 4, seem to substitute worry for

parenting. They obsess about their kids. They call their teachers. They manage their homework and take away their cell phones and sign them up for camp. They send them to therapy. But they don't guide their kids through it.

Kids aren't idiots. Even an infant can differentiate between an angry face and a happy one. Parents need to lead their kids through the rubble and stop pretending like it's not there. They should never triangle the kids, never pit them against the other parent, never undermine one another to the kids and never, ever pretend like their kids aren't in pain.

Divorce is a necessary evil. Those of us who deal with it should remember this. Or we'll be ripping off the kids too. I personally think they get ripped-off enough already. Don't you?

Melanie Wells saw her first therapy client when Ronald Reagan was President. She holds two masters degrees and is a licensed psychotherapist and licensed marriage and family therapist, as well as an LPC supervisor and LMFT supervisor. She is a clinical member of AAMFT and has taught counseling at the graduate level at Our Lady of the Lake University and Dallas Theological Seminary. Melanie is the founder and director of The LifeWorks Group, P.A., a collaborative community of psychotherapists with offices in Dallas and Ft. Worth (www.wefixbrains.com). Her clinical specialties are family therapy and last-ditch marital therapy. You can contact her at mwells@wefixbrains.com

In brief

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Child support modification: The New Hampshire Supreme Court held that an order that father pay $3,000 per year for his daughter's college expenses remained in effect even though in 2004, New Hampshire amended its child support statute to preclude a trial court from ordering a parent to contribute to an adult child's college expenses. *In re: Scott*, ___ A.2d ___, 2010 WL 2196476 (N.H. 2010). The Illinois Supreme Court held that committing crimes resulting in a three-year prison sentence could not, by itself, result in a child's self-emancipation such that child support no longer would be payable. *In re: Baumgartner*, 237 Ill. 2d 468, 930 N.E.2d 1024 (2010). The North Dakota Supreme Court affirmed a trial court's consideration of a lump-sum personal injury award when modifying child support because the obligor reduced his monthly living expenses by (among other things) buying a house outright and paying off debt with the award. *Dupay v. Dupay*, 782 N.W.2d 42 (N.D. 2010).

Credit cards: A Connecticut ex-wife who ignored process from a credit card company because her incarcerated ex-husband had been ordered to pay the debt did not succeed when requesting her ex-husband to indemnify her after the credit card company obtained a default judgment against her. *Musolino v. Musolino*, 997 A.2d 599 (Conn. App. 2010). The Colorado Supreme Court reversed a contempt finding against an ex-wife who gave the proceeds from the sale of the marital home to her new husband instead of paying off credit card debt as agreed because the contempt proceeding was barred by the ex-wife's bankruptcy filing. *In re: Weis & Bergeron*, 232 P.3d 789 (Colo. 2010).

First Amendment: Acknowledging that the First Amendment ordinarily would prevent a court from enjoining a parent from discussing religion with his or her children, a New York appellate court allowed exactly that upon a finding that a father "consistently used his religion in an attempt to alienate the mother from the children." *Matthews v. Matthews*, 72 A.D.3d 1631, 899 N.Y.S.2d 496 (N.Y.A.D. 4 Dept. 2010). A Kansas appellate court affirmed a trial court's grant of custody to a Jehovah's Witness mother against the Muslim fa-

ther's claim that the mother's religious practices were not in the child's best interest, observing that "Kansas law provides that a parent's religious beliefs and practices may not be considered by the trial court as a basis to deprive that parent of custody unless there is a showing of actual harm to the health or welfare of the child caused by those religious beliefs and practices." *Harrison v. Tauheed*, 235 P.3d 547 (Kan. App. 2010). An Indiana appellate court struck down a trial court's injunction that a mother not speak to the media about ongoing litigation against a child's father, holding that the mother could be enjoined only from disclosing information learned exclusively through the court proceedings involving the child. *In re Paternity of K.D.*, 929 N.E.2d 863 (Ind. App. 2010).

Intangibles: Citing our own J. Thomas Oldham, *What if the Beckhams Move to L.A. and Divorce?*, 42 Fam. L.Q. 263 (2008), the First Circuit applied the doctrine of immutability (law of domicile of marriage governs characterization) rather than the doctrine of mutability (law of spouses' domicile when property acquired governs characterization) to characterize Citigroup stock held by the decedent, a United Kingdom citizen living in Belgium, as his separate property rather than as the community property of himself and his widow. The court also observed: "In the United States, courts have tended to favor the doctrine of mutability." *Estate of Charania v. Commissioner*, 608 F.3d 67 (1st Cir. 2010). In a far less exotic case, the Idaho Supreme Court reiterated that contingent property interests such as convertible notes and stock allocations that vest post-divorce are community property, but in the particular case before that court, they were awarded to the ex-husband under the parties' Property Settlement Agreement. *Borley v. Smith*, 233 P.3d 102 (Idaho 2010). An Indiana appellate court approved a trial court's application of minority and marketability discounts when valuing a wife's limited partnership interest in a land-holding, family-owned limited partnership when limited partners could not force a partition of the realty, the wife's parents were the general partners, the other partners enjoyed a right of first refusal upon sale, modifying the limited partnership agreement required a 90% vote, and new limited partners had no right "to inspect the books, vote or obtain any information about the partnership." *Alexander v. Alexander*, 927 N.E.2d 926 (Ind. App. 2010).

Military: A California trial court abused its discretion when it denied a father's request to stay proceedings under the Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501-596, because the father's commanding officer submitted a letter to the court "that he was currently under orders to deploy to Iraq, with an estimated return date of February 2010." *In re: Amber M.*, 184 Cal.App.4th 1223, 110 Cal. Rptr. 3d 25 (Cal. App. 2010). Following *Thomas v. Piorkowski*, 286 S.W.3d 662 (Tex. App. - Corpus Christi-Edinburg 2009, no pet.), an Arizona appellate court held that a military member's Temporary Disability Retired List (TDRL) payments were not part of his retirement and therefore not apportionable upon divorce but instead constituted income received after divorce and therefore were the ex-husband's separate property. *Davies v. Beres*, 233 P.3d 1139 (Ariz. App. 2010). The Maryland Court of Special Appeals reminds us that an ex-spouse's share of military retired pay can be paid directly by the military to the ex-spouse only if the marriage lasted at least ten years. *Dziamko v. Chuhaj*, 996 A.2d 893 (Md. App. 2010) (citing 10 U.S.C. § 1408(d)(2)).

Prenuptial agreements: In North Dakota, all the parties' property, "including premarital 'separate' property and appreciation in value of premarital property," is included in the marital estate, but separate property and the increase in value thereof can be excluded by premarital agreement. *Brummond v. Brummond*, 785 N.W.2d 182 (N.D. 2010). A Louisiana appellate court held that a provision in a premarital agreement waiving final spousal support should be severed from a provision that unlawfully waived temporary spousal support so that the wife could seek an award of final spousal support on remand. *Barber v. Barber*, 38 So.3d 1046 (La. App. 2010).

Stretching a dollar: A Florida trial court properly concluded that a husband was "underemployed or concealing his true income" given that the husband claimed he earned only $1,449 per month (yet charged $85 per hour for his labor) and, while the divorce was pending, paid the monthly mortgage on the marital home, additional household expenses of $1,300 per month, $500 in monthly expenses for the parties' children and credit card bills ranging from $3,000 to $15,000 per month. *Child v. Child*, 34 So.3d 159 (Fla. App. 2010).

columns

INFERENCES AND OPINIONS: BRIDGE THE GAP

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

Inferences comprise all expert opinions—reliable or not. Many psychologists, authoritatively asserting scientific bases for their testimony, deny or ignore this "inconvenient truth." They directly apply relevant research—even good research—to litigants as if the litigants' characteristics perfectly correspond to those of the research study subjects. In contrast, discerning experts understand that expert opinions are the best reasonable inferences among several considered—informed by good research and professional writings—that explain litigant-related data and case facts developed from reliable methods. Courts decide cases of litigants, not of research subjects.

Courts recognize that scientific conclusions are inference-based—"[T]rained experts commonly extrapolate from existing data." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). An expert trying to find a cause of something should carefully consider alternative causes before settling on a explanation upon which to support a reliable opinion. *See E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). But the expert's opinion should not arise from random subjective inferences. Rather, it should have a "reliable basis in the knowledge and experience of the discipline." *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 726 (Tex. 1998).

Among the several tests in caselaw that assess the reliability of expert opinions, the "analytical gap test" offers a graphic metaphor of how the court may address expert opinions: "[A] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S. at 146. Inferences bridge the gap between the data and the expert opinions. If those inferential links are too tenuous, the trial court may rule, on a timely and specific objection, that the opinion is unreliable, and, thus, inadmissible. *Id.* In short, "science [and reliable opinions] lies in the rigor of the inference." (Taleb, 1997).

The analytical gap concept may be used to picture the quality of inferences in two ways: when questioning experts' opinions and when gauging the manner by which experts interpret data from their methods. When questioning experts' opinions, lawyers on either side of the case may use the analytical gap metaphor to frame their examinations. For example, on direct, make sure your questions reflect the data-to-opinions links as tightly as possible. On cross, enlarge the data-to-opinions gap to show how tenuous the expert's links or inferences are.

Lawyers may also use the analytical gap test to gauge the manner by which experts interpret data from their methods. A Texas trial court may gauge the reliability of expert testimony by "the extent to which the technique [from which the data arises] relies upon the subjective interpretation of the expert." *Robinson*, 923 S.W.2d at 557. The more the technique requires subjective interpretation to produce data, the more tenuous will be the links between the data developed from the technique and the expert's interpretation of that data (the analytical gap test).

Psychological testing, a commonly used evaluation technique, illustrates *Robinson*'s subjective interpretation concern. For instance, the MMPI-2 is the most researched psychology test; documentation of the

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statistical and interpretive strengths and weaknesses of each clinical scale in a profile are available in numerous books and professional journals. Nevertheless, an examinee's profile still must be interpreted in light of the examinee's condition and life context. For example, an elevation on the depression scale may mean different things for different examinees. The evaluator must consider several issues: Did the examinee who was not depressed try to feign depression in her responses because of a possible benefit in the legal case? Is the measured depression the same kind as the depressions of research study subjects? Is the examinee's measured depression less debilitating than that of other research study subjects because she relies on support systems to which the others may not have had access? Or did the MMPI-2 simply misclassify the examinee as depressed even though her responses matched those of research study subjects—a false positive? Answers to these questions should combine with the research-based MMPI-2 results to inform inferences that the evaluator will consider when developing her expert opinions about the litigant.

Some psychologists also use techniques to develop opinions that rely even more extensively on "subjective interpretation." For example, techniques, using drawings or a sandbox, that purport to measure the quality of a parent-child relationship by relative placement of figures representing family members illustrate the point. No credible research supports such inferences. The *Robinson* factor which would gauge "the extent to which the technique relies upon the subjective interpretation of the expert" leaps out in this example. The gap between the data (the relative distance between family members) and the interpretations (the quality of the parent-child relationship) is "too wide," unable to be bridged by inferences that reflect "a reliable basis in the knowledge and experience of the discipline." No scientific rigor is reflected in these inferences.

Because inferences comprise all expert opinions and test interpretations, have the fact-finder picture the gap crossed by the expert's inferences. The picture will make your point.

ESTATE PLANNING FOR BUSINESS OWNERS

by Christy Adamcik Gammill, CDFA[2]

Abstract: **Plan for your and your family's future security.**

If your business is a primary source of your family's income, you need to develop a plan that will help you maintain it — for yourself during retirement and for your family in case anything happens to you. A sound estate plan will help you to maintain your lifestyle and provide for your family.

Having a plan in place can help:

- preserve and potentially increase your assets
- ensure a smooth succession of your business to your heirs or desired successor
- reduce your taxes
- ensure that your assets are distributed among your beneficiaries according to your wishes
- provide sound financial management and orderly administration in the event of your death or incapacitation
- provide financial independence for your loved ones

The cornerstone of your estate plan is your will. This legal document outlines your personal bequests, specifies the financial arrangements to be made upon your death for the benefit of your heirs and can be used to appoint guardians for minor children. Your will is a flexible tool that should be revised as your financial circumstances change.

In addition to a will, estate planning involves other critical steps and decisions. These may include:

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- assessing the current value and nature of your assets (including business valuations)
- implementing tax-saving strategies through the proper use of gifts and trusts
- deciding on the best forms of property ownership
- periodically reviewing life insurance policies
- naming a personal representative or executor for your estate.

Many people mean to draw up a will or estate plan, but somehow they never get around to it. If this is you, don't put it off any longer. Do it now—for your family, your business, all that you value, and your own peace of mind.

AXA Advisors, LLC does not provide legal or tax advice. Please consult your tax or legal advisor regarding your individual situation.

Editor's Comment: *I am always shocked by attorneys that do not have a Will given the severe consequences for failing to do so. Please take the time and spend the money to protect your estate and your families, in the long run you will save a lot of heart break and anguous. G.L.S.*

TOP TEN WAYS TO SHOW THE CLIENT YOU CARE AND TO AVOID A GRIEVANCE

By Kay Redburn[3]

10. Don't lie to them about anything. Honesty may be painful, but it IS the best policy.

9. Make sure client's expectations are realistic. Don't promise what you can't deliver. And don't succumb to their unrealistic expectations.

8. Don't get emotionally involved in their case. Maintain your professional detachment (which is why it's called "professional").

7. Give them something for free every once in a while. A "no charge" phone call for example can go a long way toward keeping clients happy. And make sure you know they know you're doing it. A big "NO CHARGE" on their bill is always welcome by clients.

6. Be up front (and do it in writing) about fees and costs.

5. A busy client is a happy client. Give them work to do. Remind them that whatever they can do to help saves them money (and you time).

4. Copy the client in everything that comes in or goes out on their case. Everything.

3. Return client calls.

2. Return client calls.

1. Most importantly: RETURN CLIENT CALLS.

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The "failure to keep the client informed", Rule 103(a) is the most frequent violation by attorneys of the Texas Disciplinary Rules of Professional Conduct.

And if you show the client you care but still can't avoid a grievance:

1. If it didn't happen in writing, IT DIDN'T HAPPEN. Document everything. Keep copies.

2. If they won't follow your advice and you don't withdraw, get them to sign "I'm a Dumbass" Affidavit acknowledging that they are proceeding against your advice.

3. Put reminders about client's duty to supplement discovery in each monthly billing statement.

4. Watch for red flags before taking a case. Examples:

- "I don't care how much it costs...."
- "I didn't have any confidence in my four prior attorneys..."
- "The trial starts next week. You can be ready, right?"
- "I just know he's hiding money somewhere"
- "I want my kids half the time so I don't have to pay any child support"
- "What countries are not signatories to the Hague Convention on International Child Abduction?"

articles

THE LEGAL STATUS OF SAME-SEX ADOPTION IN TEXAS

By Michael J. Ritter[*]

I. Introduction

Like many other states, Texas' laws are unclear as to whether a child is adoptable by two members of the same sex. They lack both an express permission for and an express denial of the recognition of such an adoption.[1] This article argues that this ambiguity creates disparate burdens on same-sex couples that do not exist for opposite-sex couples or for same-sex couples in other states. It contends that though Texas neither expressly prohibits nor permits same-sex adoption, state statutory and administrative laws bestow a considerable amount of discretion on judges and officials of the Department of Family and Protective Services ("DFPS"). Because the public policy goals of the Texas' adoption process do not support categorically prohibiting same-sex couples from obtaining a joint or second-parent adoption, Texas courts and DFPS officials should resolve statutory ambiguities in favor of permitting same-sex adoption.

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[*] J.D., The University of Texas School of Law, 2010; B.A. Trinity University, 2007. The full version of this article was published as a Note in the spring issue of the next volume of the Texas Journal on Civil Liberties and Civil Rights.

[1] *See generally* Human Rights Campaign, Where Are Second-Parent and Joint Adoption for Same-Sex Couples Available?, http://www.hrc.org/ issues/parenting/2397.htm (listing "Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, . . . and Washington" as states where second parent adoptions have been permitted in some areas, but where state law neither expressly permits nor prohibits same-sex adoption).

II. The Same-Sex Adoption Options

When seeking an adoption, same-sex couples can attempt to adopt either jointly or individually. For a same-sex couple in Texas, problems can arise in either situation: when the couple attempts to jointly adopt a child ("joint adoption"), or when the partner of a child's biological or adoptive parent adopts the child as a second parent ("second-parent adoption").

The benefits of joint adoptions and second-parent adoptions—regardless of the sexes of the individuals in a couple—are somewhat distinct. Joint adoptions potentially benefit several parties: the adopted child, the adoptive parents, and the state. The advantages to the adopted child are not only to provide for the stability and care of being raised in a home with two caring parents, but also to give the child additional financial and legal security.[2] This additionally gives the would-be adoptive parents the option of starting a family that may not have been otherwise available due to reproductive disabilities or incapacities. Couples that foster/adopt through the Department of Family and Protective Services (DFPS) benefit the state of Texas by lifting burdens on taxpayers for having to fund a social system to care for kids who have no parents.[3]

Each child in foster care costs Texas taxpayers approximately $40,000 per year, and over 15,000 children were in the care of DFPS as of 2003.

Second-parent adoptions provide similar benefits. Though a child adopted by a second parent has a pre-established parent–child relationship with one member of the couple (unlike those adopted through joint adoptions by married or unmarried couples), the net benefits that second-parent adoptions provide to children are at least threefold. A second-parent adoption affords a child additional financial and legal security through the second parent, such as healthcare coverage from that parent's employer; workers' compensation; Social Security; and child support in the event of a separation or divorce. Moreover, a second-parent adoption reduces or removes the risk of removing a child from its home if the biological parent becomes sick or dies. As a related result, the adoption benefits the current parent by minimizing the potentially crippling financial burdens of serious illness of the parent or child. The second parent also benefits by the state's recognition of his or her membership in the family.

III. Recognition of Same-Sex Adoption in Texas

A. A Brief History of Adoption in Texas

Prior to the mid-1800s, Texas officially recognized no adoption mechanism by which adults could acquire rights relative to the biological children of others.[4] As one of the first states to recognize adoption,[5] Texas passed a statute in 1850 that provided for adoption by deed.[6] Under the statute, which remained in effect until 1931, children were transferred between and among adults similar to the way title to real property is transferred.[7]

In providing methods of recording adoptions, this statute did not explicitly link adoption to the welfare of children, but instead emphasized the right of the adoptive parent over the adopted child.[8] It "was intended to benefit the adopting male parent by providing the necessary heirs to mourn, inherit, or carry on the family

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[2] Timothy F. Brewer, Benefits of Second Parent Adoption, www.tfbrewer.com/pdfs/benefits_second-parent_ adoption.pdf.
[3] Texas Network of Youth Services, Services to At-Risk Youth ("STAR") Program, Fact Sheet, Feb. 11, 2009, *available at* http://www.tnoys.org/advocacy/documents/Fact%20Sheet%20-%20STAR.pdf.
[4] Peter N. Fowler, Comment, *Adult Adoption: A "New" Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE U. L. REV. 667, 671 (1984).
[5] Thanda A. Fields, Note, *Declaring a Policy of Truth: Recognizing the Wrongful Adoption Claim*, 37 B.C. L. REV. 975, 977 n.12 (1996).
[6] ROBERT HAMLETT BREMNER, CHILDREN AND YOUTH IN AMERICA: 1600–1865, 369 (1974).
[7] *Id.*
[8] Fowler, *supra* note 24, at 672 n.20.

line."[9] In 1931, the Texas Legislature passed a law that permitted the legal recognition of adoptive parents' rights only through court order, exclusive of deed recordings, laying the groundwork for the basic statutory scheme that exists today.[10] The current system emphasizes the welfare of children rather than the property right of adoptive parents over their adoptive children, which is now the primary goal of the current adoption process.[11]

B. Current Texas Laws On Same-Sex Adoption

States vary in their approaches to same-sex adoption. Eight states and the District of Columbia explicitly permit same-sex couples to adopt using the same statutory procedures as opposite-sex couples.[12] Certain courts in counties in eighteen other states grant second-parent adoptions.[13] "Four states—Colorado, Ohio, Nebraska and Wisconsin—have court rulings that prohibit same-sex couples from using the state adoption laws for second-parent adoptions."[14] Florida is the only state that prohibits any homosexual from becoming a parent through the state's adoption procedure,[15] which would sometimes preclude two people of the same-sex from adopting a child.[16]

In Texas, the Family Code, Health and Safety Code, and Administrative Code, as well as decisions issued by courts throughout the state, do not directly address the exact issue of the permissibility of same-sex adoption.[17] Because its statutes neither expressly permit nor deny adoptive rights to a same-sex couple, Texas falls into the category of states in which trial courts and DFPS officials have some discretion over whether to permit same-sex adoptions.

1. The Texas Family Code.

Chapter 162 of the Texas Family Code provides who may adopt a child and which children may be adopted.[18] The Chapter places three limitations on an individual filing an adoption petition: the adopting party (1) must be "an adult," who (2) seeks to adopt "a child who may be adopted," and (3) has standing to sue in state court.[19]

An adoptable child must meet at least one of four requirements.[20] First, the parent–child relationship of the child's living parents must be either terminated or in the process of being terminated. Second, a child may be adopted if the petitioner seeks a stepparent adoption and is the spouse of an individual that still has parental rights with the child. Third, a child may be adopted if it is at least two years of age and its parent–child relationship with one parent has been terminated and its other parent consents to the adoption by another indi-

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[9] Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 441 (1996).
[10] Grant v. Marshall, 280 S.W.2d 559, 563 (Tex. 1955).
[11] TEX. FAM. CODE ANN. § 153.002 (Vernon 2008).
[12] Where Are Second-Parent and Joint Adoption for Same-Sex Couples Available?, Human Rights Campaign, http://www.hrc.org/issues/parenting/2397.htm (listing California, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont).
[13] *Id.* (listing Alabama, Alaska, Delaware, Hawaii, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, Texas and Washington).
[14] *Id.*
[15] FLA. STAT. § 63.042(3) (2003) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."); Carol Marbin Miller & Gabriela Gonzalez, *Florida's Ban on Gay Adoptions Heads to Makeshift Appeals Court at FIU Law School*, The Miami Herald Blog, Aug. 26, 2009, http://miamiherald.typepad.com/ gaysouthflorida/2009/08/floridas-ban-on-gay-adoptions-heads-to-makeshift-appeals-court-at-fiu-law-school.html.
[16] Because the Florida statute only prohibits "homosexuals" from adopting, FLA. STAT. § 63.042(3), a same-sex couple might be able to adopt if both partners were bisexual.
[17] *See infra* Part III.B. However, when these provisions were enacted, they did not contemplate permitting two individuals of the same sex to adopt the same child. Personal Interview with John J. Sampson, Professor of Law, The University of Texas School of Law, (Oct. 27, 2009); Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009).
[18] TEX. FAM. CODE ANN. § 162.001(a)–(c) (Vernon 2003).
[19] *Id.* § 162.001(a). This Note only discusses these limitations briefly as none categorically impacts the ability of same-sex couples to adopt.
[20] *See id.* § 162.001(b)(1)–(4) (listing four disjunctive conditions under which children may be adopted).

vidual who has had a managing conservatorship or "actual care, possession, and control of the child" for at least six months before adoption. Or fourth, a child of at least two years of age is adoptable without the consent of a parent if the child's parent–child relationship with the other parent has been terminated and the petitioner "is the child's former stepparent *and* has been a managing conservator or has had actual care, possession, and control of the child for . . . one year" prior to the adoption.[21] If a court considering an adoption petition finds that the requirements for adoption have been met and that adoption is in the best interest of the child, it *must* grant the petition.[22] Once issued, a court's adoption decree establishes a parent–child relationship between the new adoptive parent and the child.[23]

Chapter 162 appears to permit a same-sex couple to adopt children only through the first and third options. Because couples may jointly petition for an adoption,[24] the first requirement is a possible route if courts have terminated—or are in the process of terminating—the right of a child's living parents.[25] Under the third requirement, a same-sex couple may also adopt when one member of the couple has a parent–child relationship with the child,[26] which may be established through a biological relationship or an individual adoption through the first requirement. The other member of the same-sex couple seeking the second-parent adoption must not only obtain the consent of the child's current parent, but also wait until the child is at least two years old and either have a managing conservatorship or actual care, control, and possession of the child for at least six months.[27] Because the Texas Constitution and Family Code do not recognize same-sex marriage,[28] a same-sex couple may not adopt under the second or fourth provisions because of their spousal and stepparent requirements.[29] Opposite sex couples need not meet these requirements because they may marry[30] and thus may sooner adopt under the second option.[31]

Though the adoption procedures in the Family Code neither expressly prohibit nor permit same-sex adoptions, those challenging the validity of same-sex adoption in court have highlighted other statutes that may conflict with permitting such adoptions. They have pointed to Chapter 101 of the Family Code,[32] which defines "[p]arent" as "the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father."[33] A Texas court rejected an argument that this provision precluded same-sex adoption because it provides that adoptive mothers and fathers are considered "parents" for the purposes of a suit affecting the parent–child relationship (SAPCR) and fails to imply that two members of the same sex cannot be adoptive parents.[34]

Challengers have also drawn courts' attention to Section 101.025 of the Family Code, which defines "parent–child relationship [as] the legal relationship between a child and the child's parents . . . including the

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[21] *Id.* § 162.001(b) (emphasis added).
[22] *Id.* § 162.016(b). Thus, one reasonable interpretation of Chapter 162 is that a Texas court is *required* to grant an adoption by a same-sex couple when a couple meets the statutory requirements, if the court finds that such an adoption will be in the child's best interests. *See id.* ("If the court finds that the requirements for adoption have been met and the adoption is in the best interest of the child, the court *shall* grant the adoption.") (emphasis added).
[23] *Id.* § 162.017.
[24] *See id.* §§ 162.002 & 162.010; TEX. GOV'T CODE ANN. § 312.003(b) (Vernon 2007) ("The singular includes the plural and the plural includes the singular unless expressly provided otherwise."). *See also* Goodson v. Castellanos, 214 S.W.3d 741 (Tex. App.—Austin, 2007); Hobbs v. Van Stavern, 249 S.W.3d 1 (Tex. App.—Houston, 2006) (indicating that joint petitions are permissible).
[25] TEX. FAM. CODE ANN. § 162.001(b)(1). The text of this provision provides no statutory basis for an exclusion based on sex or marital status.
[26] *Id.* § 162.001(b)(1).
[27] *Id.* § 162.001(b)(3).
[28] TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. §§ 2.001(b), 6.204, *cf.* 2.401.
[29] *See* TEX. FAM. CODE ANN. § 162.001(b)(2), (b)(4).
[30] *Id.* §§ 2.001(a) & 162.001(b)(2).
[31] *Id.* § 162.001(b)(2).
[32] *E.g.*, Goodson v. Castellanos, 214 S.W.3d 741 (Tex. App.—Austin, 2007); Hobbs v. Van Stavern, 249 S.W.3d 1 (Tex. App.—Houston, 2006).
[33] § 101.024. The opinion that notes that this argument was made did not elaborate to any extent on the argument. *Goodson*, 214 S.W.3d at 746.
[34] *Hobbs*, 249 S.W.3d at 3–4. The facts of this case are discussed *infra* text accompanying notes 93–100.

mother and child relationship and the father and child relationship."[35] However, this definition does not preclude the possibility of two mother–child or two father–child relationships for a single child. While Texas courts have not reached the merits of such arguments, these arguments require a far stretch to be interpreted as prohibiting same-sex adoption.

2. Texas Health & Safety Code

Section 192.008 of the Health and Safety Code stipulates that the supplementary birth records of adopted children "must be in the names of adoptive parents, one of whom must be a female . . . and the other of whom must be a male . . . . This subsection does not prohibit a single individual, male or female, from adopting a child."[36] This provision has given rise to another argument that Texas law disfavors same-sex adoption because of its ambiguous concluding statement—"This subsection does not prohibit a single individual, man or woman, from adopting a child."[37] A court or agency official could possibly read the subsection together as requiring a supplemental birth certificate to be in the name of one man and one woman *if there is more than one adoptive parent* and not prohibiting supplemental birth certificates in the name of one single parent.[38] A court or agency official could alternatively interpret this provision as not affecting the rights of a non-married ("single") individual to adopt under Chapter 152.

Though a court could possibly understand this provision to preclude same-sex adoption, such a construction is contrary to statutorily mandated modes of construction. In deciphering the meaning of civil statutes, Texas courts construe words consistent with their ordinary meaning,[39] "diligently attempt to ascertain legislative intent,"[40] and give all words effect as to avoid surplusage.[41] Because Texas does not recognize same-sex marriages, the individuals comprising a same-sex couple are necessarily "single" due to the lack of marriage recognition.[42] To deny both members of a same-sex couple the ability to adopt under this statute would seem to deny a "single individual" from adopting a child under the ordinary meaning of the statute.[43]

Moreover, an interpretation that restricted an adoption by a same-sex couple would not serve the purposes of the statute, as indicated by its legislative history. In 1997, the Texas bill that added the requirement that a supplementary birth certificate be in the name of two opposite-sex individuals, created the state's paternity registry rather than placing restrictions on who could adopt or which children could be adopted.[44] The place-

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[35] § 101.025.

[36] TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon 2005). In addition to Texas, several other states permit supplementary birth certificates to be granted after an adoption, which entails changing the names of the birth parent(s) to the name of the adoptive parent(s). *E.g.*, OKLA. STAT. tit. 10, § 7505-6.6 (2009); N.Y. PUB. HEALTH LAW § 4138 (2009); 35 PA. STAT. ANN. § 450.603 (2009). States have offered supplementary birth certificates after adoption to conceal from children that they were adopted and as a way to protect birth parents' privacy. 1 JOAN HOLLINGER, ADOPTION LAW AND PRACTICE § 1.04 (1997) (noting that adoption records were "sealed . . . to prevent disclosure their contents . . . ."). When being adopted was much more stigmatizing, states permitted much more information on birth certificates to be fabricated to further conceal the adoption. *See id.* at § 13.01[1][b] (noting that these policies were designed to further the "exclusivity" of the new adoptive parents and that the stigma associated with being adopted has declined). Thus, in the context of same-sex adoption, listing both parents' names on a supplementary birth certificate would not seem to achieve the goal of concealing the fact of adoption. *See supra* Part II. Personal Interview with John J. Sampson, Professor of Law, The University of Texas School of Law, (Oct. 27, 2009). Thus, this Note argues that the supplementary birth certificates could not be understood to accomplish the same goals context of same-sex adoption, whereby the mere presence of the names of two persons of the same sex would do nothing to cover up an adoption.

[37] *Id.* (emphasis added).

[38] This interpretation would express tension with same sex adoption by precluding same-sex couples from procuring a supplementary birth certificate as an additional memorial of the adoption.

[39] TEX. GOV'T CODE ANN. § 312.002 (Vernon 2007).

[40] *Id.* § 312.005.

[41] Marks v. St. Luke's Episcopal Hospital, ___S.W.3d___ 2010 WL 3373407, *4 (Tex. 2010).

[42] TEX. CONST. art. I, § 32; TEX. FAM. CODE § 2.001(b).

[43] TEX. HEALTH & SAFETY CODE § 192.008. *See also* TEX. GOV'T CODE § 312.003(b) ("The singular includes the plural and the plural includes the singular unless expressly provided otherwise.").

[44] H.B. 1091, 75th Leg., Reg. Sess. (Tx. 1997).

ment of the language in the Health and Safety Code rather than the Family Code further attests to the absence of legislative intent to restrict adoption rights.[45]

The author of the bill, Representative Toby Goodman, did not refer to same-sex adoption when supporting his bill. He offered it as a way "to streamline adoption processes by amending the Family Code provisions relating to terminating parental rights, contesting adoption proceedings and preferential settings, as well as eliminating duplicative paperwork clarifies current law as to affidavits of relinquishment."[46] In fact, the changes to the Health and Safety Code prompted no floor debate about same-sex adoption; it was instead focused solely on paternity registration.

Moreover, construing this statute unfavorably to a same-sex couple would, at most, only prohibit the granting of a supplementary birth certificate, which is not a prerequisite to a valid adoption.[47] Contrary to the ordinary meaning and legislative intent canons, a court in its discretion might nevertheless stretch this provision to deny a same-sex couple's adoption petition.

3. The Texas Administrative Code.

The rules contained within the Texas Administrative Code govern the processing of inquiries into and applications for placement of children in foster/adoptive homes. These rules place no explicit prohibition on either the consideration of homosexual applicants or the discrimination against homosexual applicants. Applicants must be, among other things, at least twenty-one years old; sufficiently healthy, both mentally and physically; and financially capable of caring for the child's basic needs. The Texas Administrative Code rules are somewhat restrictive as to the marital status of an applicant. If an applicant is married, both husband and wife must apply for the placement and show that they have been married for at least two years, unless they "cohabited for two years prior to the marriage or obtained a civil registration of common law marriage for the length of time required . . . ."[48] If an applicant is married but seeking a divorce, the couple must finalize the divorce before DFPS may approve either for adoption Despite the two-year requirement for married couples, single parents may apply to adopt, but "are evaluated in terms of their ability to nurture and provide for a child without the assistance of a spouse,"[49] which has no strict time requirement.

The Texas Administrative Code is unclear as to whether an unmarried couple may foster/adopt regardless of the partners' sexes. Because unmarried couples are legally single, they may be considered "single parent" applicants. However, this understanding of the rules seems at tension with the State's public policy, which promotes the marriage relationship[50] because it would make it easier for unmarried couples to jointly apply as "single parents." As noted above, married couples must meet the additional time requirements before DFPS

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[45] TEX. HEALTH & SAFETY CODE Ann. § 192.008.

[46] Audio tape: Introduction of H.B. 1091 by Representative Goodman, Second Reading, Texas House of Representatives (Apr. 29, 1997) (on file with the House of Representatives Video/Audio Services).

[47] *See* TEX. HEALTH & SAFETY CODE Ann. § 192.006 ("A supplementary birth certificate *may* be filed . . . .") (emphasis added). Furthermore, as interpreted by state agencies, this provision does not preclude a same-sex adoption. Instead, a birth certificate may be issued in the name of one of the adoptive parents with no other parent listed. Texas Department of State Health Services, Adoption: Frequently Asked Questions, http://www.dshs.state. tx.us/vs/reqproc/faq/adoption.shtm ("To meet this statutory requirement, when a child is adopted by a same-sex couple, one of the adoptive parents must choose to be designated on the birth certificate as the father, in the case of a male couple, or the mother, in the case of a female couple. The other adoptive parent is not listed.").

[48] *Id.* § 700.1502(2)(C).

[49] *Id.*

[50] TEX. FAM. CODE ANN. §1.101 (Vernon 2007) (presuming the validity of marriage against attack "to promote the public health and welfare . . . ."). *See* Cox v. Cox, 1998 Tex. App. LEXIS 6852, No. 04-97-00951-CV (Tex. App.—San Antonio, Oct. 30, 1998) ("A general restraint on marriage is unenforceable whether the restraint results from a promise not to marry or from enforcement of a condition providing for forfeiture of rights in case of marriage."); Coulter v. Melady, 489 S.W.2d 156 (Tex. App.—6th Dist., 1972) ("Public policy favors the relationship and preserves and upholds the validity of marriage is articulated therein.").

will approve the couple for an adoption.[51] Ultimately though, whether this consideration is sufficient to preclude a same-sex couple from foster/adopting a child is a decision left to DFPS.[52]

4. State Court Decisions.

Texas court decisions have been inconsistent with regard to the ability of same-sex couples to adopt. Some courts generously grant adoption petitions by same-sex couples,[53] while others are more hesitant.[54] Some courts have imposed barriers to the full benefits of a same-sex adoption, such as putting both adoptive parents' names on birth certificates.[55] One Dallas judge overseeing a legal procedure to change an adopted child's name to reflect a second-parent adoption by a same-sex couple purportedly threw the couple out of her courtroom indicating that she would never accommodate such a request by a same-sex couple.[56] Courts addressing the legal validity of particular adoptions by two individuals of the same sex have shied away from attempting to clarify whether or not Texas law prohibits or permits same-sex adoption.[57]

Three state courts of appeals have declined to consider the merits of challenges to adoption. The court in *Hobbs v. Van Stavern*[58] addressed a collateral attack on an adoption decree issued to Kathleen Van Stavern and Julie Hobbs. After starting a romantic relationship, Hobbs was artificially inseminated when the couple decided to have a child. In June 1998, Hobbs gave birth to T.L.H., who Hobbs and Van Stavern jointly cared for through August 2001, when they jointly petitioned a county court for the termination of the donor–father's rights and establishment of Van Stavern as a second parent to T.L.H.[59]

When the couple separated almost three years later, Van Stavern filed a SAPCR requesting to have joint managing conservatorship over T.L.H. Hobbs defended against this suit by collaterally asserting the impropriety of the county court's adoption decree. After Hobbs lost at the trial level, she appealed the decision citing various provisions of the Texas Family and Health and Safety Codes for the argument that same-sex parents may not adopt. The appellate court "express[ed] no opinion on the validity of [Hobbs'] claim," and instead held that Hobbs' collateral attack was untimely under Section 162.012, which forecloses attacks on adoption decrees after the six months following the adoption order.[60]

The court in *Goodson v. Castellanos*[61] also considered a collateral attack contesting the validity of an adoption decree in similar circumstances. Elizabeth Goodson and her girlfriend Adelina Castellanos decided to adopt a baby. Goodson traveled to Kazakhstan, applied with the appropriate authorities for an adoption, and returned with a three-year-old child, K.G., who Goodson and Castellanos sought to adopt by filing a joint petition in a Bexar County court. The trial court granted the petition and issued an adoption decree.[62]

After Goodson and Castellanos ended their relationship two years later, Castellanos filed a SAPCR for temporary joint managing conservatorship for K.G. Goodson collaterally attacked the trial court's adoption decree as a defense in the SAPCR, contending that the decree was void. The court proceeded "[a]ssuming

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[51] TEX. ADMIN. CODE § 700.1502(2)(B).
[52] Whether or not to place a child with a particular family is usually up to the particular district or regional office or particular caseworkers. Telephone Interview with Heidi Brugel-Cox, Executive Vice President and General Counsel for the Gladney Center for Adoption (Dec. 14, 2009).
[53] *See, e.g.*, Goodson v. Castellanos, 214 S.W.3d 741 (Tex. App.—Austin 2007, pet. denied); Hobbs v. Van Stavern, 249 S.W.3d 1 (Tex. App.—Houston, 2006) (both cases appealed trial courts' grant of adoption decrees to same-sex couples).
[54] Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009).
[55] Which States Permit Same-Sex Parents to Be Listed on a Birth Certificate, Human Rights Campaign, http://www.hrc.org/issues/1627.htm.
[56] Taylor Gandossy, *Gay Adoption A New Take on the American Family*, CNN.com, June 27, 2007, http://www.cnn.com/2007/US/06/25/gay.adoption/index.html.
[57] *See, e.g.*, *Hobbs*, 249 S.W.3d at 4 n.2 ("We express no opinion on the validity of [Hobbs'] claim.").
[58] 249 S.W.3d 1 (Tex. App.—Houston, [1st Dist.] 2006).
[59] *Id.* at 2–3.
[60] *Id.* at 4.
[61] 214 S.W.3d 741 (Tex. App.—Austin 2007, pet. denied).
[62] *Id.* at 745.

without deciding that the lower court erred in issuing the adoption decree" and dismissed Goodson's attack on the grounds that "[she] did not attack the validity of the adoption within the deadline mandated by statute."[63] The appellate court explained the policy rationale behind the six-month deadline:

> To encourage adoptions, adoptive parents should be assured that, after a reasonable amount of time, their parental claims may not be brutally revoked due to a procedural error, birth parents changing their mind years later, or a change in relationship with another parent. The destruction of a parent–child relationship is a traumatic experience that can lead to emotional devastation for all the parties involved, and all reasonable efforts to prevent this outcome must be invoked when there is no indication that the destruction of the existing parent–child relationship is in the best interest of the child.[64]

These considerations counseled strict adherence to the six-! month rule and against permitting parties thereafter to challenge courts' adoption decrees.[65]

More recently, the court in *In re S.D.S.-C*[66]addressed a similar situation. In June 2003, Shirlinda Casey and her partner, Sonya Sanders, successfully petitioned a trial court to establish a parent–child relationship between Sanders and Casey's biological child, S.D.S.-C. In 2008, Casey sought a declaration that the adoption decree was void on the grounds that the trial court lacked jurisdiction to issue the adoption order because it failed to terminate the sperm donor father's rights. Just as in the prior decisions, the appellate court also upheld the adoption decree because the collateral attack fell outside of the six-month period permitted to challenge adoption decrees.[67]

Yet another Texas court of appeals recently reached the merits of a similar adoption case. *In re M.K.S.-V.*[68] involved an appeal from a trial court's denial of an adoption petition to a woman, T.S., who sought to adopt her former partner's biological child, for whom T.S. had cared. The trial court dismissed T.S.'s petition on the grounds that she lacked standing. On appeal, the court looked beyond the standing issue into the elements of adoption. It first noted that consent was an element under both avenues of achieving state recognition of an adoption and then held that T.S. failed to provide sufficient evidence that her former partner ever consented or would consent to the adoption.[69] Although the petition sought to name an individual as a second, same-sex parent of a child, neither the trial court nor the appellate court rejected the adoption petition on the grounds that the current parent was the same sex as the petitioner. This case could be read as showing, at the very least, that some courts exercise discretion to not bar same-sex couples from adopting children under Chapter 162.

C. Barriers to Same-Sex Adoption in Texas

Given the lack of clarity regarding the law on same-sex adoption, same-sex couples can face at least five different issues in the adoption process. First, because the Family Code—and Texas law generally—is not clear either way as to the permissibility of same-sex adoptions, some courts may not be inclined to grant an adult's adoption petition for otherwise-qualifying children. A second related difficulty is that this lack of clarity may result in inconsistency in the granting of adoption petitions based on the views of a particular judge in any given county.[70] Third, though not prohibiting single, homosexual individuals from adopting, DFPS rules seem to be at tension with joint foster/adoptions by same-sex couples because they may not marry un-

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[63] *Id.* at 748.
[64] *Id.* at 749.
[65]. *Id.* at 745, 748.
[66] 2009 WL 702777 (Tex. App.—San Antonio 2009, pet. denied).
[67] *Id.*
[68] In re M.S.K.-V., 301 S.W.3d 460 (Tex. App.—Dallas 2009, pet. denied).
[69] *Id.* at 466.
[70] *See* Green v. Remling, 608 S.W.2d 905, 908 (Tex. 1980) (noting that trial courts are invested with great discretionary authority over whether or not to issue adoption orders). Ms. Yarrell explains that whether an adoption petition is granted can frequently depends on the particular judge. Because Texas judges are elected, they might decide to avoid the issue to avoid hurting their chances of reelection. Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009).

der state law. Fourth, the DFPS's counterparts—private child placing agencies in the state—sometimes impose similar marriage prerequisite on an applicant seeking adoption, as do many foreign countries. Finally, a same-sex adoptive couple may experience difficulties in obtaining a supplemental birth certificate or name change for an adopted child. Overall, seeking a second-parent adoption—rather than seeking a joint adoption through DFPS, some private agencies, and foreign countries—seems to be the path of least resistan! ce for an adoption by a same-sex couple.[71]

IV. The Public Policy Debate Over Same-Sex Adoption

A. Statements of Public Policy

Both the Texas Family Code and decisions from the Texas Supreme Court articulate public policy goals that implicate the State's adoption procedures. In *Green v. Remling*,[72] the Texas Supreme Court noted that "[t]he paramount considerations in adoption proceedings are the rights and welfare of the children involved and these statutes are to be [so] construed . . . ."[73] In a less broad statement of public policy, the Texas Family Code outlines a statement with regard to conservatorship, possession, and access to children. It provides that the public policy of the state is to "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child [and] provide a safe, stable, and nonviolent environment for the child."[74]

B. Legislative Proposals and Debate

Due to the ambiguity of Texas law regarding same-sex adoption, state legislators have introduced bills answering same-sex adoption question in the negative by proposing express prohibition of homosexuals from becoming foster parents, which would consequently preclude same-sex couples from foster/adoption. In the regular session of the Seventy-Sixth Texas Legislature (1999), both Representatives Robert Talton and Warren Chisum introduced separate bills that would disqualify homosexuals from becoming foster parents.

Representative Talton's bill, H.B. 415, proposed that DFPS inquire into the sexuality of foster parent applicants and foster parents it was evaluating.[75] If a foster parent or applicant confirmed being homosexual or bisexual, or if the DFPS determined that the foster parent or applicant was homosexual or bisexual, the bill would have prohibited DFPS from allowing the applicant to become a foster parent and placing or a leaving a child in foster care.[76] Representative Talton's bill would have thus prohibited those who were forthright about their sexuality from being foster/adopt parents. Because the bill would have only affected DFPS, it would have not required private adoption agencies to do the same or prohibited courts from issuing adoption decrees to same-sex couples. The State Affairs Committee took no action on the bill.[77] Though Representative Talton reintroduced this same bill in the Seventy-Eighth Regular Session (2005),[78] it met the same fate as his previous effort.[79]

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[71] Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009). Ms. Yarrell also recommends seeking to establish a parent–child relationship with one parent and petitioning a court to make the other parent the joint-managing conservator.
[72] 608 S.W.2d 905 (Tex. 1980).
[73] *Id.* at 907.
[74] TEX. FAM. CODE ANN. § 153.001 (Vernon 1999). This provision also states that the public policy is to "encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage." *Id.*
[75] 76(R) HB 415 Introduced Version – Bill Text, Texas Legislature Online, http://www.legis.state.tx.us/tlodocs/76R/billtext/html/HB00415I.htm.
[76] *Id.*
[77] 76(R) History for HB 415, Texas Legislature Online, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=76R&Bill=HB415.
[78] 78(R) HB 194 - Introduced Version - Bill Text http://www.legis.state.tx.us/tlodocs/78R/billtext/html/ HB00194I .htm.
[79] 78(R) History for HB 194, Texas Legislature Online, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=78R&Bill=HB194.

Representative Chisum introduced a bill that attempted to achieve the same effect. House Bill 382 sought to investigate not only the sexuality of the foster parent, but also whether "homosexual conduct occurs or is likely to occur."[80] The bill would have required DFPS to investigate into whether homosexual conduct—defined as "deviate sexual intercourse with another individual of the same sex"—was occurring or was likely to occur in the particular adoptive home. After testimony was taken on the bill, it was left pending in committee.[81]

As the testimony on Representative Chisum's H.B. 382 suggests, these bills were supported on multiple grounds. First, members of the public testified that homosexuals were categorically unfit to foster/adopt children from DFPS.[82] One particular proponent stated that this unfitness resulted from the inherent guilt held by all homosexuals about their sinfulness; from homosexual men's disproportionately low life expectancy; and the possibility that they have diseases. As a result, the proponent believed that children would be better left "in orphanages" than with two same-sex parents or with one homosexual adoptive parent. Second, the same proponent contended that homosexuality was conduct that should be regulated and was not an inherent attack on "those that practice homosexual conduct." Other proponents argued a third justification, that children should not be placed with those who frequently commit sex-related crimes.[83] Finally, they also argued that it was in the best interests of children to have one mother and one father because having a homosexual parent or two would result in bullying of the child at school, increased risk of sexual abuse by adoptive parents, higher incidence of sexual promiscuity, and sexual and gender confusion resulting in the child being a homosexual as an adult.[84]

Opponents of the proposed bill countered these contentions by arguing that generalizations and stereotypes should not be used to preclude a category of people from serving as adoptive parents. First, some witnesses argued that sexual orientation is irrelevant as to whether a person is able to act in the best interest of children. Second, some provided personal narratives about being homosexual and not having diseases, and testified that their children never experienced harassment or bullying because of the sexual orientations of their parents. Third, opponents argued that reducing the pool of qualified applicants willing to take the "tougher to adopt" kids would leave more children in institutional care and heighten the burden on taxpayers. Finally, Representative Debra Danburg testified that when keeping the background of a child as a constant, the children's outcomes do not significantly vary when comparing foster/adoption between opposite-sex and same-sex couples. She also cited an American Psychological Association study that concluded that ninety percent of sexual abuse of children is perpetrated by heterosexuals and that most homosexual individuals are raised by opposite-sex parents.[85]

C. Analysis of the Debate

Though the previously discussed legislative debate concerned proposed bills on foster/adoption through DFPS, many arguments logically implicate the public policy goals outlined in Chapter 153 of the Texas Fami-

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[80] 76(R) H.B. 382 Introduced Version – Bill Text, Texas Legislature Online, http://www.legis.state.tx.us/tlodocs/76R/billtext/html/HB00382I.htm.

[81] 76(R) History for HB 382, Texas Legislature Online, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=76R&Bill=HB382.

[82] Audio tape: Public Hearing before the Texas State Affairs Committee (May 3, 1999) (on file with the House of Representatives Video/Audio Services) [hereinafter Public Hearing].

[83] Public Hearing *supra* note 136. The second and third proponents advancing this argument were Rebecca Bledsoe and her attorney, Roger Evans. Ms. Bledsoe had been demoted from her position in the Dallas CPS branch for removing a child from a lesbian couple's custody after determining that the couple was unfit based on the sexual orientation of the members of the couple. Public Hearing *supra* note 136. However, at the time of this debate, the Supreme Court of the United States had not declared Texas' sodomy law to be unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003).

[84] Public Hearing *supra* note 80.

[85] *Id.* Since 2005, no bills have been introduced in the Texas Legislature relating to same-sex adoption.

ly Code and the "best interest of the child" factors regarding same-sex adoption generally.[86] This section analyzes the merits of those arguments in the specific framework of the public policy goals that Texas adoption law attempts to achieve. Though subjectively formulated to particular parents and particular children, the goals implicit within the public policy statements of Chapter 153 can be generalized into objective aspirations that would apply across the board to all adoptable children in the State of Texas.[87]

Chapter 153's first goal is to "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child."[88] Categorically excluding classes of potentially adoptive couples from consideration seems antithetical to the goal of providing children with access to parents who have shown the ability to act in the best interests of children. On this issue, the opponents of attempts to exclude homosexuals from foster/adopting have a more persuasive argument because even if some homosexual individuals or same-sex couples are unfit parents, these characteristics are neither inherent to the sex composition of couples or to sexual orientation.[89] The preference against categorical exclusion is further demonstrated by the Family Code's exclusion of race, ethnicity, sex, and marital status as factors in determining adoption and conservatorship of children.[90] Excluding same-sex couples from joint foster/adoption would give children less access to parents who would be capable of acting in the best interests of those children, and would thereby undermine the first goal. Where second-parent adoptions are concerned, this first goal is subverted where a child's parent's partner, who might have demonstrated the ability to act in the best interest of the child, would have no rights regarding the child if Texas law prohibited same-sex second-parent adoptions.

The other relevant goal of the Family Code is to "provide a safe, stable, and nonviolent environment for [children]."[91] The debate over H.B. 382 also implicates this goal, as the bill's proponents argued that providing an environment of opposite-sex couples provides a safer, more stable, and less violent environment for children.[92] Supporters of joint same-sex adoption argue that same-sex couples can offer safe and loving homes for older children in need of adoption. Regarding joint same-sex adoptions, it is difficult to objectively measure and weigh the risks of harms a child would experience as a result of having two parents of the same sex—most notably, experiencing increased harassment—especially given the mixed results of studies on the issue. These risks would vary based on the predominant attitudes of the particular community in which the child was raised. Nevertheless, Texas' laws' openness to a single parent adoption provides a formalistic procedure to bypass opposition to joint same-sex adoption because second parent adoptions are always available after a single-parent adoption: one person in a same-sex couple could foster/adopt a child as a single parent, and then the other person in the couple could seek a second parent adoption. Thus, as long as single parent adoption is permitted, any advantages or disadvantages of joint same-sex adoptions can be actualized through a single-parent adoption followed by a second-parent adoption.

Recognizing same-sex second-parent adoptions, on the other hand, would leave little question as to this issue of public policy. The potential adoptive child would already have a home in which two adult figures play parental roles in the child's life, but only one had a legally-established parent–child relationship with the child. Thus, establishing a legal relationship with a second parent would not necessarily affect the safety or stability of the child's environment itself. The public policy goals of the Texas Family Code appear to strongly support the recognition of same-sex second-parent adoptions. While the support for joint same-sex adoptions may be less clear about providing, on balance, safer and more stable environments, the availability of single parent adoption makes these concerns irrelevant. In conclusion, failing to recognize same-sex adop-

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[86] Many of the arguments that do not directly implicate the public policy goals particular to children that are outlined in the Texas Family Code, but rather reflect other legislative judgments concerning the improving administrative efficiency and reducing taxpayer burdens, which are outside the scope of the three-pronged statement of public policy. TEX. FAM. CODE ANN. § 153.001 (Vernon 1999).

[87] *See, e.g.*, Goodson v. Castellanos, 214 S.W.3d 741 (Tex. App.—Austin 2007, pet. denied) (applying the subjective test to justify application of the strict six-month limitation on attacking adoption decrees).

[88] § 153.001.

[89] Public Hearing, *supra* note 136.

[90] §§ 153.003 & 162.015.

[91] *Id.* § 153.001.

[92] Public Hearing *supra* note 136.

tions would seem to inhibit access to individuals that were capable of acting in the best interest of children and offer fewer stable homes to children in need of safe and loving homes.

V. Conclusion

A same-sex couple generally has two options to establish a parent-child relationship with each member of the couple and the child: a joint adoption or a second-parent adoption of biological or adopted child of one of the partners. Texas law is currently unclear as to whether it recognizes or prohibits either of these two options because it contains no express permission or prohibition. Chapter 162 of the Texas Family Code does not seem to preclude a same-sex couple from jointly adopting as two single individuals or a second-parent adoption by one member of the same-sex couple of the other member's biological or adopted child if the child is at least two years old and the non-parent has a managing conservatorship or actual care, control, and possession of the child for at least six months. While challenges fashioned from other statutory provisions on adoptions granted under Chapter 162 ultimately have not been successful, Texas appellate courts have not addressed the merits of attacks based on the provisions of other Texas statutes. Rather, appellate courts have uniformly upheld adoptions under a strict application of the statute of limitations for challenging adoptions. This result is based on public policy considerations of maintaining a stable environment for adopted children.

Despite the general tendency of courts to uphold these adoptions after they are granted, a particular district court may decide to not grant adoption petitions and a DFPS official may decide to not place children in the homes of same-sex couples. A judge or DFPS official might attempt to justify a denial of an adoption petition based on provisions in the state statutes that could be read to express tension with the idea of same-sex adoption. However, Texas' appellate courts should follow the lead of district courts that have granted same-sex couples' adoption petitions. Such categorical exclusions of potential parents based on their sexes cannot be justified under subjective inquiries as to what is in the best interest of a particular child. Rather, such exclusion would only minimize the chances for a child to be jointly adopted by a couple that could provide a safe, stable, and nonviolent environment, and preclude a child from receiving healthcare coverage, child support, and other benefits of recognizing a second-parent adoption.

Guest Editors this month include Jimmy Verner (*J.V.*), Christopher Nickelson (*C.N.)*, Jimmy A. Vaught (*J.A.V.*), Sallee S. Smyth (*S.S.S.*), Rebecca Tillery (*R.T.)*

DIVORCE

GROUNDS AND PROCEDURE

TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING IMPRISONED HUSBAND'S DIVORCE PETITION FOR WANT OF PROSECUTION WHEN HUSBAND MADE GOOD FAITH ATTEMPT TO APPEAR BY UNSWORN DECLARATION.

¶10-4-01. ***Parnell v. Parnell***, 2010 WL 2331411 (Tex. App.—Fort Worth 2010, no pet. h.) (mem. op.) (6/10/10).

Facts: In February 2009, husband, who was confined in prison, filed an original petition for divorce with trial court. Husband attempted to serve citation on wife by certified mail, but the certified letter was returned unclaimed. In May 2009, trial court notified husband that pursuant to TRCP 165a, trial court placed husband's case on the dismissal docket for want of prosecution and that his case would be dismissed on July 29, 2009.

In June 2009, husband filed an unsworn declaration stating that the facts contained in his petition were true, and he also filed a motion asking the court to accept the declaration to support his petition. Additionally, in an attempt to comply with trial court's dismissal notice, husband sent a letter to trial court urging it to proceed with his divorce suit in his absence. The letter titled "MOTION FOR ACCEPTANCE OF AFFIDAVIT OF TESTIMONY" stated that "the Texas Department of Criminal Justice does not bench warrant prisoners to a civil matter/suit … [t]he motion affidavit self explains my presence in this suit." One month after husband attempted to appear in the proceeding by his declaration, the trial court dismissed his case for want of prosecution.

Holding: Reversed and remanded

Opinion: Under TRCP 165a, a trial court may dismiss a case for want of prosecution on the failure of a party seeking affirmative relief to appear for a hearing or trial if the party had notice that dismissal could result from the party's failure to appear. However, it is well established in Texas that litigants cannot be denied access to the courts simply because they are inmates. If a court determines that a pro se inmate in a civil action is not entitled to leave prison to appear personally in court, the inmate should be allowed to proceed by affidavit, deposition, telephone, or other means. A trial court's refusal to consider and rule upon a prisoner's request to appear in a civil proceeding personally or by other means, such that the inmate has been effectively barred from presenting his case, constitutes an abuse of discretion.

Here, trial court's dismissal order reveals that it dismissed husband's case only because he failed to appear at the July 29, 2009 hearing. However, the record shows that husband had explained to the court that he could not appear in person because he believed that he could not secure a bench warrant and had asked to appear and present testimony by his unsworn declaration. This court recognizes that husband could have filed a motion explicitly asking trial court to issue a bench warrant so that he could have traveled to court to appear in person at the dismissal hearing. But inmates do not have an absolute right to appear personally at civil proceedings, and they must justify the need for their appearance at such proceedings under factors that include the cost and convenience of transportation. This court has not found authority indicating that husband's decision to not specifically request a bench warrant to allow for his personal appearance waives his right of access

to court when he made a good faith request to appear by other means. Accordingly, trial court abused its discretion by dismissing husband's divorce petition for want of prosecution.

TRIAL COURT ERRED IN DIVIDING MARITAL PROPERTY BECAUSE THE COURT LACKED PERSONAL JURISDICTION OR QUASI-IN-REM JURISDICTION OVER NON-RESIDENT WIFE.

¶10-4-02. ***Mason v. Mason***, -- S.W.3d --, 2010 WL 2545688 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (6/24/10).

Facts: Husband and wife separated in Virginia in 1994. The couple remained married but no longer had contact with one another. In 2004, husband moved to Texas and filed for divorce. Husband pleaded no jurisdictional facts indicating that trial court had personal jurisdiction over wife. After attempting unsuccessfully to serve wife in California, husband obtained the trial court's permission to serve her by publication. In June 2005, trial court conducted a hearing on husband's divorce petition. Husband appeared, and an attorney ad litem appeared for wife, who did not appear. Following trial, trial court rendered judgment granting husband a divorce from wife and divided the marital estate—awarding each party the property in that party's possession and for each to be responsible for the debts incurred by that party.

In 2007, wife became aware of the divorce and the property division. Wife filed a special appearance alleging that, because it lacked personal jurisdiction over her, the trial court erred by dividing the marital estate. After conducting a hearing, trial court denied wife's special appearance. Wife appealed challenging only the division of the property.

Holding: Trial court's marital property division reversed

Opinion: A Texas trial court may grant a divorce to a Texas resident, even though it lacks personal jurisdiction over the non-resident spouse. Stated differently, a court may have jurisdiction to grant a divorce, which is an adjudication of the parties' status, but not have jurisdiction to divide their property, which is an adjudication of parties' rights.

Here, husband did not plead any jurisdictional facts with respect to wife. Any property in Texas that is part of the marital estate in this case cannot, by itself, supply the requisite minimum contacts for trial court to exercise personal jurisdiction over wife or quasi in rem jurisdiction to adjudicate the parties' property interests. There is no indication in the record that wife resided in Texas or conducted business in Texas. Moreover, the record does not indicate that wife consented to husband's transference of property to Texas or participated in the acquisition of property in Texas. Husband's unilateral conduct cannot create the requisite minimum contacts between wife, Texas, the property, and the litigation necessary for trial court to divide the marital estate. Accordingly, trial court erred when it denied wife's special appearance and divided the couple's marital property.

Editor's Comment: *This case includes a succinct but helpful review of the Dawson-Austin case, a must-read case for anyone grappling with personal jurisdiction/special appearance questions. (R.T.)*

Editor's Comment: *If you fail to plead facts that show why the court has jurisdiction over a non-resident defendant, you lose. Further, in the family law context the fact that a spouse moves to Texas and unilaterally moves community property to the state does not give the court personal jurisdiction over the non-resident spouse. All the court can do is grant a divorce. Someone in Houston actually read Dawson-Austin v. Austin. Keep reading Houston! Your ahead of the rest of the class. (C.N.)*

Editor's Comment: *In effect, the First Court of Appeals holds that if you want a court to divide your community property - after ten years of separation - you must sue for divorce where your spouse lives. Also of note:*

Last year, the same court held that an ad litem could consent to personal jurisdiction. Velasco v. Ayala, 312 S.W.3d 783 (Tex. App.—Houston [1st Dist.] 2009, no pet.). (J.V.)

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PLACING DIVORCE CASE ON NON-CONTESTED DOCKET BECAUSE INMATE HUSBAND FAILED TO NOTIFY TRIAL COURT THAT HE DESIRED TO APPEAR AT PRE-TRIAL HEARING.

¶10-4-03. ***In re Marriage of Crosby***, -- S.W.3d --, 2010 WL 2773637 (Tex. App.—El Paso 2010, no pet. h.) (7/14/10).

Facts: Wife filed a petition for divorce on February 20, 2009. Husband, an inmate, filed his original answer on March 19, 2009. The answer contained a request for jury trial, however the record contained no evidence that husband paid the jury fee. Wife notified husband of pre-trial hearing set for May 4, 2009. Husband did not attend the May 4, 2009 hearing. As a result, trial court entered and signed the final divorce decree. The decree recited that "[b]ecause a jury was not demanded by either party, the Court tried the cause." Husband appealed.

Holding: Affirmed

Opinion: Husband argued that the decree should be reversed because he filed an answer before judgment was granted. Although a litigant cannot be denied access to civil courts merely because of inmate status, the litigant does not have an unqualified right to appear personally at every court proceeding. An incarcerated inmate wishing to appear at a hearing must provide the trial court with sufficient information to allow the court to assess the necessity of the litigant's appearance. The trial court then must weigh the inmate's need for access against the need to protect the integrity of the judicial system. It is the inmate litigant's burden to show the trial court why the inmate litigant's presence, either personally or by alternative means, is warranted.

Here, husband admitted that wife notified him of a pretrial hearing date of May 4, 2009. The record reflected no attempt by husband to appear at this hearing either by motion for bench warrant or to appeal by alternative means such as affidavit, deposition or telephone. Husband's first issue is overruled.

Husband argued that wife's divorce petition was defective on its face because trial court never gave him proper notice of setting in which it entered the final divorce decree. Under TRCP 245, "noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time."

Here, husband admits he had notice of the May 4, 2009 pretrial hearing. Husband, however, did not appear, nor did he file any motion or request with the court that would have given the court notice he desired to appear. When trial court held the pretrial hearing without any word from husband other than his answer, trial court was within its discretion to place the case on the noncontested docket and proceed with a final hearing under TRCP 245.

Although husband requested a jury trial, he did not pay the jury fee and therefore was not entitled to a trial by jury. This conclusion was certainly reasonable under the circumstances, as the pleadings indicate that the parties had no minor children, no community property other than personal effects, and had actually only lived together for five months during 2005. Thus, the only issue before trial court was insupportability. Husband presented no affirmative grounds indicating the marriage was supportable. Accordingly, husband's final issue is overruled.

TRIAL COURT ERRED BY FAILING TO TRANSFER CASE TO JEFFERSON COUNTY UPON GRANDMOTHER'S UNCONTRAVERTED MOTION.

¶10-4-04. ***In re R.M.B.,*** 2010 WL 2788290 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (mem. op.) (7/15/10).

Facts: Mother gave birth to child in 2002. In 2003, the 253rd District Court of Chambers County entered an agreed final order in a suit affecting the parent child relationship, giving the court continuing and exclusive jurisdiction. In 2007, mother and child moved into the home of paternal grandmother. Afterward, mother left grandmother's home to live with a boyfriend but left child in grandmother's care the majority of the time. In 2008, grandmother filed suit in the 253rd District Court seeking to be named a joint managing conservator with the right to designate child's primary residence. At the same time, grandmother motioned trial court to transfer the case to Jefferson County, asserting child had resided in Jefferson County for six months prior to grandmother filing suit. Trial court denied grandmother's transfer motion. Following trial, the 253rd District Court named grandmother a joint managing conservator with mother, but awarded mother the exclusive right to designate child's primary residence. Grandmother appealed arguing trial court erred by failing to transfer the case to Jefferson County pursuant TFC 155.201(b) and 155.204.

Holding: Reversed and remanded

Opinion: Under TFC 155.001(a), when a court renders a final order in a suit affecting the parent-child relationship, it acquires continuing, exclusive jurisdiction over the child and suits affecting the parent-child relationship. The trial court retains continuing, exclusive jurisdiction over the child unless jurisdiction has been transferred under TFC 155.201-207. TFC 155.201(b) provides that if a suit to modify or a motion to enforce an order is filed in the court having continuing, exclusive jurisdiction of a suit, on the timely motion of a party the court shall ... transfer the proceeding to another county in this state if the child has resided in the other county for six months or longer. Under TFC 155.204, if a motion to transfer is not timely controverted, then the trial court has a mandatory, ministerial duty to promptly, without a hearing, transfer a proceeding to the county where the child at issue has resided for more than six months.

Here, at the time grandmother filed her petition in the 253rd District Court, she also filed a motion to transfer asserting the child had resided in Jefferson County for more than six months. Mother did not file a controverting affidavit. Thus, trial court had a mandatory ministerial duty to transfer the case to Jefferson County. Accordingly, the 253rd District Court erred by failing to transfer the case to Jefferson County.

Editor's Comment: *The court correctly applied the law in reaching its decision. But the hard facts of the case highlight the bad law on which the court was required to rely. After living for a year or more with grandmother, 8-year-old R.M.B. must now return to live with mother, whose house (per grandmother) "was 'filthy' and 'deplorable'' littered with cigarette butts and garbage." Should denial of a motion to transfer mandate this result? (J.V.)*

TRIAL COURT'S DEFAULT DIVORCE DECREE REVERSED BECAUSE FATHER FAILED TO SERVE MOTHER WITH A MORE ONEROUS AMENDED DIVORCE PETITION.

¶10-4-05. ***Rios v. Rios***, 2010 WL 2784035 (Tex. App.—Corpus Christi 2010, no pet. h.) (mem. op.) (7/15/10).

Facts: Father filed a divorce petition with trial court seeking to be named the principle conservator of the couple's children. Pursuant to father's petition, trial court clerk issued a citation for service of the original petition for divorce at mother's most recent address. Afterward, but before mother was served with father's

original petition, father filed an amended petition seeking not only to be named the principle conservator, but also to have the exclusive right to designate the residence of the children. Father served mother the original petition via U.S. mail, however, there was no evidence in the record indicating father served mother with the amended petition. Mother did not answer the original petition for divorce and did not participate in any of the proceedings or in the trial.

Following trial, trial court issued a default divorce decree in favor of father. Mother filed a restricted appeal arguing that father did not serve her with the more onerous amended petition for divorce as required under TRCP 21(a).

Holding: Reversed and remanded

Opinion: For a default judgment to stand, when a plaintiff files an amended petition that is "more onerous" than the original petition, TRCP 21(a) requires the plaintiff to serve it on a non-answering defendant. "More onerous" means anything that exposes the defendant to additional liability. When an amended petition seeks a more onerous judgment than the original petition, a new citation and service of the amended petition is necessary.

Here, the record demonstrates that trial court clerk did not issue a new citation after father filed the more onerous amended petition with the trial court. Additionally, there is no indication that father served mother with the amended petition. Accordingly, there is error on the face of the record. Trial court's default judgment is reversed and remanded.

Editor's Comment: *Default judgments continue to be a trap for the unwary family lawyer from failing (1) to serve a more onerous amended petition, (2) to make a record in a parent-child case or (3) to put on real evidence at a default judgment hearing. (J.A.V.)*

Editor's Comment: *Someone take a pair of reading glass down to the Corpus Christi Court of Appeals and politely ask them to re-read the Texas Supreme Court case it cites in its own opinion. In In re E.A. & D.A., 287 S.W.3d 1, 6 (Tex. 2009), the Texas Supreme Court held that a new citation is not needed when an amended petition seeking more onerous relief is filed after the original petition and citation are properly served on the respondent. The court explained that this new rule was required by the revision of Rule 21a and it overruled several cases which did not recognize the rule change. The Corpus Christi Court of Appeals correctly states that an amended petition seeking more onerous relief must be "served" on the respondent before a default judgment may be entered on the new relief requested din the amended petition, but their opinion is in direct conflict with In re E.A. & D.A. to the degree it states that "new citation" was required. You can lead a horse to water . . . (C.N.)*

Editor's Comment: *The court relies on a distinction without a difference in reversing this case: Isn't pleading that one should be appointed the "principal conservator" of a child the same as requesting the right to determine the child's domicile? (J.V.)*

EVIDENCE WAS LEGALLY SUFFICIENT TO SHOW THAT HUSBAND ACTED INTENTIONALLY OR WITH CONSCIOUS INDIFFERENCE IN FAILING TO RESPOND TO CITATION.

¶10-4-06. ***Coston v. Coston,*** No. 2010 WL 3249856 (Tex. App.—Tyler 2010, no pet. h.) (mem. op.) (8/18/10).

Facts: Wife filed for divorce and served husband with citation. Husband failed to timely file an answer or make an appearance. The trial court entered a default judgment in wife's favor. Three days later, husband filed Motion for New Trial with affidavits stating that he did not answer or appear because (i) he was injured

from a racecar accident, and (ii) he believed he would receive further notice regarding a date to appear. Wife responded in an affidavit that she spoke with husband between the time he was served and the trial date and that husband was uncooperative and showed no signs of being mentally or physically unable to file an answer. The court held an evidentiary hearing. Husband testified that he did not file an answer because, in addition to the points raised in his affidavits, he thought he and wife might reconcile. The trial court denied husband's Motion for New Trial. Husband appealed.

Holding: Affirmed.

Opinion: Under *Craddock* conscious indifference is the failure to take action that a person of reasonable sensibilities under the same or similar circumstances would have taken. Conscious indifference requires more than negligence. "Some excuse, but not necessarily a good excuse, is enough to show a lack of intentional conduct or conscious indifference." The court rejected husband's argument that injury caused him not to respond, finding that the evidence of physical or mental inability demonstrated his desire to reconcile more than any debilitating condition.

The Court of Appeals found husband's mistaken belief that he would receive further notice to be an issue of fact that the trial court had sufficient evidence to rule on. The trial court could have found that husband did not meet the reasonable person standard because (i) he did not seek help in understanding the citation, and (ii) the citation was presumed to comply with Rule 99. The trial court could also have found that husband's expectation of reconciliation discounted his argument that he expected further notice. Husband's hopes of reconciliation provided no basis for failing to answer and did nothing to rebut the trial court's finding of conscious indifference.

Editor's Comment: *Tex. R. Civ. P. 99(c) is not equivocal: "You have been sued. You may employ an attorney. If you or your attorney does not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you." (J.V.)*

TRIAL COURT ABUSED ITS DISCRETION BY ORDERING DISCOVERY OF NON-RESIDENT DEFENDANT WITHOUT A SHOWING THAT DISCOVERY WAS RELEVANT TO TEXAS'S PERSONAL JURISDICTION OVER DEFENDANT OR THAT DISCOVERY WAS ESSENTIAL TO DEFENDANT'S OPPOSITION TO HIS SPECIAL APPEARANCE.

¶10-4-07. ***In re Stern***, -- S.W.3d --, 2010 WL 3365856 (Tex. App.—Houston [1st Dist.] 2010) (8/19/10) (orig. proceeding).

Facts: In 2008, grandmother filed the underlying proceeding against defendant and eight co-defendant's alleging defendants engaged in a conspiracy and defamed her and harmed her efforts to seek custody and visitation of her granddaughter, who is the child of Vickie Lynn Marshall, also known as Anna Nicole Smith. Defendant is Marshall's former attorney and companion. In her petition, grandmother alleged that Texas had specific personal jurisdiction over defendant because he used a co-defendant, a Texas resident, as his agent to defame grandmother through his sister (not a Texas resident), who sent emails to agent in Texas allegedly informing sister of defendant's allegedly conspiratorial orders and other work being done on his behalf to defame grandmother.

In August 2008, grandmother served defendant with requests for production including email and other electronic communications between defendant and 39 listed email addresses. Grandmother alleged the 39 individuals or entities related to grandmother's claims against defendant and co-defendant's in the case, including several parties' attorneys. Defendant filed a special appearance on August 4, 2008, in which he denied all bases for personal jurisdiction in Texas.

On November 19, 2008, defendant filed a brief in support of his special appearance arguing that his special appearance should be sustained because grandmother had failed to plead allegations that would satisfy Texas's long-arm statute. On December 3, 2008, grandmother motioned trial court to compel production from defendant, asserting that defendant had failed to produce relevant documents. On January 23, 2009, grandmother supplemented her motion to compel requesting trial court to order defendant to submit his computers and other electronic hardware to a forensic examiner appointed by trial court. On May 11, 2009, trial court issued an order requiring defendant to respond to grandmother's requests for production. Additionally, trial court appointed a master and a forensic expert. Defendant subsequently filed this petition for writ of mandamus.

Holding: Mandamus granted

Opinion: (Personal Jurisdiction Objection) Defendant argued that trial court abused its discretion by ordering him to deliver his computer hard drive, located outside of Texas, to a forensic examiner located in Texas while his special appearance was pending and that trial court's discovery order exceeded the scope of discovery relevant to establish trial court's personal jurisdiction over him.

TRCP 120a governs special appearances. TRCP 120a(3) governs jurisdictional discovery. TRCP 120a(3) provides, "The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony." TRCP 120a(3) further provides that if it appears from the affidavits of a party opposing the special appearance "that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

The Texas Supreme Court has indicated, without deciding, that discovery sought during the pendency of a special appearance but not directed to the discovery of jurisdictional facts may not be properly had before the special appearance is decided. *See Dawson-Austin v. Austin*, 968 S.W.2d 319, 321, 323 (Tex.1998). However, prior to *Dawson-Austin*, several Texas COAs had held that nothing in TRCP 120a specifically limited discovery to matters relating to the special appearance, and a number of courts, including this Court, continued to so hold. These cases, however, dealt with waiver of the special appearance by the taking of discovery pertaining to the merits of the case.

In 2004, the Texas Supreme Court held that a trial court's resolution of discovery matters related to a special appearance does not amount to a general appearance that waives the special appearance by a party contesting personal jurisdiction and that a non-resident defendant's participation in the trial court's resolution of such discovery matters does not amount to a recognition that the action is properly pending or to a request for affirmative relief inconsistent with the jurisdictional challenge. *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 307 (Tex.2004). But the Court also noted that the discovery in that case had concerned only the non-resident defendant's special appearance, and it pointedly expressed "no opinion on the effect of parties' participation in discovery that is unrelated to the special appearance before its resolution."

Subsequently, the Eastland COA has held that a trial court abuses its discretion if it fails to hold a hearing on a defendant's special appearance before granting a plaintiff's motion to compel discovery that is not limited to jurisdictional discovery. The Eastland COA pointed out that TRCP 120a "specifically provides for the means to obtain a continuance of the special appearance so that a deposition may be conducted: affidavits of the party opposing the special appearance." In the opposite situation, in which jurisdictional discovery was denied, this court held that a trial court abuses its discretion if it denies jurisdictional discovery that a plaintiff properly supports with affidavits in accordance with the procedure set out in TRCP 120a(3).

This court now concludes, that TRCP 120a(3) by its plain language authorizes discovery by a party prior to a ruling on a special appearance only with respect to facts "essential to justify his opposition" to the special appearance. The trial court may permit a continuance so that the opposing party may obtain the necessary

jurisdictional discovery. However, TRCP 120a(3) does not authorize postponement of a special appearance hearing to allow a party to obtain discovery prior to the court's ruling on the special appearance that is unnecessary or irrelevant to the establishment of jurisdictional facts. This court further concludes that those cases holding that "nothing in TRCP 120a specifically limits discovery to matters relating to the special appearance" are limited to those situations in which the issue is whether a defendant waives a special appearance by participating in discovery and that they do not apply when the issue is, as here, whether a trial court abuses its discretion by ordering or failing to order discovery at the request of a party opposing a special appearance. Those cases are controlled by the plain language of TRCP 120a(3) and by *Dawson-Austin*.

Here, grandmother filed a motion to compel discovery that far exceeded discovery of jurisdictional facts, including all emails on defendant's computer hard drive to or from 39 email addresses. Although grandmother argued that she needed the discovery sought in order to establish jurisdiction over defendant, grandmother asserted no meritorious argument that would support the contention that the discovery she sought was jurisdictional on any theory other than a broad-based conspiracy theory.

In Texas, with respect to a conspiracy theory of personal jurisdiction, the jurisdictional inquiry is restricted to whether the defendant purposefully established minimum contacts such as would satisfy due process. Here, defendant's emails to the alleged co-conspirator defendants, none of whom are Texas residents, are not relevant to the establishment of the Texas courts' jurisdiction over defendant and cannot be essential to justify grandmother's opposition to defendant's special appearance. In conclusion, on the basis of the plain language of TRCP 120a, the mandamus record, and the foregoing authorities, trial court clearly abused its discretion by ordering the discovery from defendant sought by plaintiff's motion to compel discovery without a showing that the discovery ordered was relevant to the jurisdictional facts and essential to justify defendant's opposition to the special appearance.

TRIAL COURT ERRED BY CONCLUDING IT HAD JURISDICTION TO ADJUDICATE APPELLEE'S SAME-SEX DIVORCE AND BY CONCLUDING THAT TEXAS CONST. ART. I SEC. 32(A) AND TFC 6.204 VIOLATE THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

¶10-4-08. ***In re Marriage of J.B. and H.B.,*** -- S.W.3d --, 2010 WL 3399074 (Tex. App.—Dallas 2010, no pet. h.) (orig. proceeding) (8/31/10).

Facts: Appellee and his same-sex partner legally married in Massachusetts in September 2006 and moved to Texas in 2008. Afterward, appellee filed a petition for divorce in which he sought a divorce from his husband. A few days after appellee filed suit, the State intervened alleging that appellee was not a party to a "marriage" under Texas law, and that he was therefore not eligible for the remedy of divorce, and that trial court could not grant a divorce without violating Texas law. The State then filed a plea to the jurisdiction asserting that trial court lacked subject-matter jurisdiction because appellee's petition demonstrated on its face that he and his husband were not "married" as a matter of Texas law. The State asserted that TFC 6.204(c) "strips courts of jurisdiction" to confer the legal status of marriage upon any relationship besides the union of one man and one woman, even if only for the purpose of granting a divorce.

Trial court denied the Texas's plea to the jurisdiction without a hearing. In its order, trial court concluded that article I, section 32(a) of the Texas Constitution and TFC 6.204 violate the Equal Protection Clause of the Fourteenth Amendment. Trial court further concluded that it had jurisdiction to hear a suit for divorce filed by persons legally married in another jurisdiction and who meet the residency and other prerequisites required to file for divorce in Dallas County. Afterward, the State filed an interlocutory appeal and a petition for writ of mandamus.

Holding: Reversed and remanded. Mandamus granted.

Opinion: (Subject-Matter Jurisdiction). The State argues that TFC 6.204(c) and Texas Const. art. I sec. 32(b) strip Texas trial courts of jurisdiction in same-sex-divorce cases because adjudicating the merits of such a case would recognize or give effect to a right or claim based on a same-sex marriage. Appellee, on the other hand, argues that a trial court does not adjudicate or establish the validity of a marriage in a divorce case, and thus a divorce case does not recognize or give effect to a same-sex marriage formed in another jurisdiction. Appellee also urges this court to apply the "place-of-celebration test" and conclude that he and his husband are validly married for the limited purpose of adjudicating his divorce petition.

Under Texas Const. art. I sec. 32(b), the state cannot "create or recognize" marriages other than between one man and one woman. Additionally, under TFC 6.204(c), the state cannot "give effect to a ... right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex." TFC 6.204(b) declares same-sex marriages void and against Texas public policy. Texas courts define "void" as having no legal effect. Thus, TFC 6.204(b) means that same-sex marriages have no legal effect in Texas.

Next, TFC 6.204(c)(1) provides that Texas and its agencies and subdivisions may not give any effect to any public act, record, or judicial proceeding that creates, recognizes, or validates a same-sex marriage "in this state or in any other jurisdiction." Thus, TFC 6.204(c)(1) amplifies TFC 6.204(b) by providing explicitly that the rule of voidness applies even to same-sex marriages that have been recognized by another jurisdiction. Further, TFC 6.204(c)(1) mandates that Texas courts may not give any legal effect whatsoever to a public act, record, or judicial proceeding that validates a same-sex marriage. Here, appellee attached his Massachusetts marriage certificate to his divorce petition. TFC 6.204(c)1) provides the trial court may not give any legal effect to this type of document. Thus, TFC 6.204(c)(1) precludes any use of appelee's marriage certificate in this case.

Next, TFC 6.204(c)(2) forbids the state from giving any effect to a right or claim to any legal protection, benefit, or responsibility asserted as a result of a same-sex marriage. Thus, Texas may not give any legal effect even to a claim to a protection or benefit predicated on a same-sex marriage. A petition for divorce is a claim that is a demand of a right or supposed right, to legal protections, benefits, or responsibilities asserted as a result of a marriage. If a trial court were to exercise subject-matter jurisdiction over a same-sex divorce petition, even if only to deny the petition, it would give that petition some legal effect in violation of TFC 6.204(c)(2). Here, in order to comply with TFC 6.204(c)(2) and accord appellee's same-sex divorce petition no legal effect at all, trial court must not address the merits. In other words, trial court must dismiss for lack of subject-matter jurisdiction.

Appellee next argues that adjudicating a same-sex divorce does not "give effect" to a same-sex marriage because a divorce decree does not establish the validity of the marriage as against third parties. The Texas Constitution and TFC 6.204, however, forbid Texas and its agencies from giving any effect whatsoever to a same-sex marriage. Appellee cannot show that a same-sex divorce gives no effect at all to the purported same-sex marriage. A same-sex divorce proceeding would give effect to the purported same-sex marriage in several ways. For one, it would establish the validity of that marriage as to the parties involved under principles of res judicata and collateral estoppel. Moreover, as here, appellee seeks to "give effect" to his marriage by seeking a division of the parties' community property in the event they are unable to agree on a property division. Community property is a paradigmatic legal benefit that is associated intimately and solely with marriage. Furthermore, a divorce proceeding would "give effect" to a same-sex marriage. An obvious purpose and function of a divorce proceeding is to determine and resolve legal obligations of the parties arising from or affected by their marriage. Here, appellee cannot seek a divorce from his husband without simultaneously asserting the existence and validity of a lawful marriage. The Texas Constitution and Texas statutes require that a valid marriage must be a union of one man and one woman, and only when a union comprises one man and one woman can there be a divorce under Texas law.

Appellee argues in the alternative that if the adjudication of his divorce "gives effect" to a same-sex marriage, then the adjudication of a suit to declare his marriage void under TFC 6.307 would as well. TFC 6.501

and 45.105 authorize the trial court to grant various forms of relief, such as temporary restraining orders and name changes, in any kind of suit for dissolution of marriage, whether the ultimate relief sought is a divorce, an annulment, or a declaration of voidness. However, a decree of voidness does not "give effect" to the void marriage but simply establishes that the parties to the ostensible but void marriage were never married for purposes of Texas law. Accordingly, Texas courts have no subject-matter jurisdiction to adjudicate a divorce petition in the context of a same-sex marriage. As a result, trial court had no subject-matter jurisdiction to adjudicate appellee's petition for divorce.

Appellee next argues that trial court possessed subject-matter jurisdiction based on principles of comity because he was legally married in Massachusetts. Appellee further contends that Texas courts have long employed the comity-based "place-of-celebration rule" to determine whether a foreign marriage is valid for purposes of hearing a divorce and that this court should continue to apply that rule. Comity is a principle under which the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign not as a rule of law, but rather out of deference or respect. Because comity is grounded in cooperation and mutuality, Texas should extend comity by recognizing the laws and judicial decisions of other states unless the foreign statute produces a result in violation of Texas public policy.

The principle of comity does not apply here because the legislature has declared that same-sex marriages are contrary to Texas public policy. Furthermore, as discussed, the Texas Constitution provides that "[m]arriage in this state shall consist only of the union of one man and one woman." The rule contains no exceptions for marriages performed in other jurisdictions nor is its application limited to marriages performed in this state. Any common-law principle recognizing same-sex marriages performed in other jurisdictions must yield to the constitution. Accordingly, we conclude that neither comity nor the place-of-celebration rule overcome the TFC 6.204(c)(2)'s jurisdictional bar.

In conclusion, Texas courts lack subject-matter jurisdiction to entertain a suit for a same-sex divorce, even if the parties entered into marriage in a state that recognizes the validity of same-sex marriages.

(Constitutionality - Equal Protection). Appellee argues that Texas law proscribing the adjudication of a petition for a same-sex violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." It is essentially a direction that all persons similarly situated should be treated alike. On the other hand equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. Consequently, disparate treatment of different but similarly situated groups does not automatically violate equal protection. To reconcile the equal-protection principle with practical necessity, the Court has developed differing levels of judicial scrutiny depending on the kind of classification at issue.

An equal-protection challenge is examined under one of two tests: the strict-scrutiny test or the rational-basis test. Appellee argues that strict scrutiny should apply here because Texas Const. art. I sec. 32(b) and TFC 6.204 discriminate against a suspect class (homosexuals) or interferes with a fundamental right (same-sex divorce).

The United States Supreme Court has described a "suspect class" as one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. The Court has recognized suspect classes as generally defined by race, alienage, and ancestry. However, the Court has never ruled that sexual orientation is a suspect classification for equal protection purposes. Moreover, appellee cites no authority from Texas's two highest courts on point, and this court has found none. Alternatively, many courts in other jurisdictions have addressed the issue and held that homosexuals are not a suspect class for equal-protection purposes. Although appellee poses several arguments in support of his position that homosexuals should be designated a suspect class, appellee failed to show that Texas generally excludes homosexuals from the protections of its laws. Accordingly, neither homosexuals nor persons who choose to marry

persons of the same sex are a suspect class, and the Texas law at issue in this case does not discriminate against a suspect class.

Fundamental rights are rights that are deeply rooted in this Nation's history and tradition and are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Plainly, same-sex marriages are not deeply rooted in this Nation's history and tradition. Until 2003, no state recognized same-sex marriages. In fact, Congress and most states have adopted legislation or constitutional amendments explicitly limiting the institution of marriage to opposite-sex unions. Furthermore, numerous courts that have held that the right to legal recognition of a same-sex marriage is not a fundamental right for equal-protection purposes. This court concludes that TFC 6.204 does not interfere with a fundamental right. Because Texas's laws stripping courts of jurisdiction to adjudicate a same-sex divorce do not discriminate against a suspect class or burden a fundamental right, this court will evaluate the law under the rational-basis test.

Under the rational relationship test, this court will sustain a law as long as it will advance a *legitimate government interest*, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. The rational-relationship test, ensures that the classification is not drawn with the express purpose of disadvantaging any group burdened by the law. In short, *a law must bear a rational relationship to a legitimate governmental purpose*.

Here, Texas has a legitimate interest in promoting the raising of children in the optimal familial setting. It is reasonable for Texas to conclude that the optimal familial setting for the raising of children is a household headed by an opposite-sex couple. Supporters of Texas Constitution art. I, sec. 32 argued, "A traditional marriage consisting of a man and a woman is the basis for a healthy, successful, stable environment for children. It is the surest way for a family to enjoy good health, avoid poverty, and contribute to their community."

Furthermore, Texas's marriage laws are rationally related to the goal of promoting the raising of children in households headed by opposite-sex couples. Because only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage. In enacting Texas's marriage laws, the legislature could reasonably conclude that the institution of civil marriage as it has existed in this country from the beginning has successfully provided this desirable social structure and should be preserved. The legislature also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship.

In conclusion, trial court erred by ruling that Texas Constitution art. I, sec. 32(a) and TFC 6.204 violate the Fourteenth Amendment's Equal Protection Clause. Texas's laws providing that its courts have no subject-matter jurisdiction to adjudicate a petition for divorce by a party to a same-sex marriage do not violate the Equal Protection Clause of the Fourteenth Amendment, a provision never before construed as a charter for restructuring the traditional institution of marriage by judicial legislation.

Editor's Comment: *The Dallas Court of Appeals has determined that the Equal Protection Clause and the Full Faith and Credit Clause of the United States Constitution take a back seat to Texas' determination that its judicial resources are closed to addressing same-sex marriages even if recognized in other states. Hear no equal protection and full faith and credit clause, see no equal protection and full faith and credit clause, speak no equal protection and full faith and credit clause. It's time to walk across the street to the federal courts. (C.N.)*

Editor's Comment: *Article I, section 32 is part of the Texas Constitution's Bill of Rights. The preamble to the Bill of Rights reads: "That the general, great and essential principles of liberty and free government may be recognized and established, we declare: . . ." (J.V.)*

DIVORCE

ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT ABUSED ITS DISCRETION BY ATTEMPTING TO MODIFY A MEDIATED SETTLEMENT AGREEMENT IN THE DIVORCE DECREE.

¶10-4-09. ***Milner v. Milner***, 2010 WL 2243558 (Tex. App.—Fort Worth 2010, no pet. h.) (mem. op.) (6/03/10).

Facts: During marriage, husband, husband's brother and a third investor established a limited partnership of which husband owned a 44.055% interest. The three limited partners additionally established a management company to act as the partnership's general partner. Husband owned a 44.5% interest in the management company. Under the partnership agreement, any transfer of record title or beneficial ownership of a partnership interest required the unanimous consent of all the partners. The partnership agreement also made clear that an assignee did not have the right to become a limited partner except as provided in the partnership agreement.

The couple separated and the wife filed for divorce. The couple then entered into a mediated settlement agreement (MSA). As part of the MSA, husband transferred all of his interest in the partnership and the management company to wife. Pursuant to the MSA, husband and wife executed a transfer of ownership agreement. The documents contained spaces for all three limited partners to sign and consent to the transfer of husband's ownership interests to wife. However, neither husband's brother nor the third investor signed the transfer documents. Later, before trial court finalized the divorce, brother sold his interest to the third investor.

The proposed divorce decree assigned husband's interest in the partnership and management company to wife. Unlike the MSA transfer of interest documents, the proposed divorce decree contained no blanks or references to the other partners or the required consent of the other partners. At hearing, wife objected, arguing that the decree was not contingent on the other partners consent to a transfer of ownership. Trial court signed the divorce decree assigning husband's interest in the partnership and the management company to wife. Wife appealed, arguing that trial court abused its discretion by not setting aside the MSA and rendering judgment based upon contingencies that were not performable. Wife additionally contended that there was no meeting of the minds.

Holding: Reversed and remanded

Opinion: TFC 6.602 provides the requirements for mediated settlement agreements. Additionally, settlement agreements are governed by contract law. This court has held that a trial court may properly refuse to enforce an MSA that otherwise complies with TFC 6.602 if a party procures the agreement by intentionally failing to disclose material information. Other courts have held that a trial court need not enforce an MSA that is illegal or that was obtained through fraud, duress, coercion or other dishonest methods. Additionally, the Dallas Court of Appeals has recognized that the absence of a meeting of the minds would justify a trial court's rejection of an MSA, which is logical, given that a meeting of the minds is a required element of a valid contract.

Here, under the partnership agreement, unanimous consent of all partners was required before husband could transfer his interest to wife. In the MSA, husband and wife agreed to execute the required consents to transfer ownership pursuant to the partnership agreement. In contrast to the MSA, the divorce decree omits any discussion of the required consents. Because the MSA contemplated unanimous consent and therefore a limited partnership interest for wife, but the divorce decree contemplated only an assignment, and because the

rights of a limited partner are greater than those of an assignee under the partnership agreement, there was no meeting of the minds regarding the transfer of the partnership interest. Consequently, trial court abused its discretion in not setting aside the MSA.

Concurring Opinion: When it is impossible to enforce the terms of an MSA, a trial court may not add terms, significantly alter terms, or undermine the intent of the parties in an effort to remedy the problem. Here, the record reflects the impossibility of ever obtaining the required consents as stated by the MSA. Because brother sold his interest to third investor, the required unanimous consent of all three limited partners could not possibly be obtained. Accordingly, in addition to the reason articulated in the majority opinion, trial court abused its discretion by attempting to modify the MSA.

Editor's Comment: *This case reminds us all to spend the time prior to mediation, with the help of the accountant or business attorney, to carefully draft the exact documents necessary to effectuate the transfer of the business interests, and then attach those to the MSA. If a transfer of business interests requires the consent of individuals not a party to the case, it is imperative to include in the MSA a "contingency plan" if those individuals refuse to consent to the transfer, whether it be an alternative division of property, or simply a provision that voids the entire MSA based on those circumstances. On a side note, the facts of this case were even more inequitable than what is apparent from reading the opinion. Since the entry of the decree some 20 months prior to the appellate decision, the remaining limited partner of the entity, who now had a controlling interest in the partnership due to the last-minute secret sale of the third partner's interest, refused to distribute any of the business's proceeds to the appellant but passed on to her an enormous tax liability based upon the partnership's pass-through tax liability. Lastly, this case must be read in conjunction with Loehr v. Loehr, No. 13-08-00380-CV, 2009 WL 2645025 (Tex. App. – Corpus Christi August 28, 2009, no pet.) (mem. op.), which came out after the briefing of the instant case, and holds that the contractual doctrine of mutual mistake cannot be applied to MSAs. (R.T.)*

Editor's Comment: *Keep an eye on this case regarding enforceability of an MSA. The Justices of the Fort Worth Court of Appeals agreed that the MSA was not enforceable but they could not agree on the reason why it was unenforceable. (C.N.)*

TRIAL COURT UPHELD "COOPERATIVE LAW AGREEMENT" FINDING IT NOT IN VIOLATION OF TFC COLLABORATIVE LAW STATUTE AND UPHELD PROVISION ALLOWING ATTORNEYS TO CONTINUE REPRESENTING CLIENTS IN ARBITRATION.

¶10-4-10. ***In re Mabray,*** -- S.W.3d --, 2010 WL 3448198 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) (8/31/10).

Facts: Wife filed for divorce in September 2008. In February 2009, the parties signed a "Cooperative Law Dispute Resolution Agreement." The Agreement forbids formal discovery unless agreed upon, relying instead on "good faith" informal discovery. The Agreement also provided that the *cooperative law process* would cease and the parties would submit to binding arbitration if the divorce was not settled by April 30, 2009. The parties signed a "Joint Motion for Referral to Arbitration," which was filed on March 11, 2009, asking the trial court to submit their case to arbitration on or before July 3, 2009 if the case was not resolved by agreement by April 30, 2009. An agreed final decree was not submitted to the court by April 30, 2009. In May, the appointed arbitrator notified the parties that he was conflicted out. The parties agreed to a new arbitrator and submitted an agreed order to the court on July 2. Wife filed motion to substitute counsel after the parties submitted the agreed order, but before the order was signed. Wife's new counsel was appointed five days before the order was signed. The trial court signed an agreed order on August 12, 2009 ordering the parties to submit to arbitration before the new arbitrator on August 26, 2009. Two days after the order was signed, wife filed a motion to revoke her consent to arbitration, alleging that her prior counsel "forced" her to sign the Agreement while she was "emotionally distraught" over the divorce and under the influence of tranquilizers. Six days later, she filed a motion to disqualify husband's counsel on the grounds that the Agree-

ment sought to "contract around" Texas's collaborative law statute. Wife further contended that husband's counsel must be disqualified because the *cooperative* process failed, and under the Agreement, he is not allowed to continue in litigation once the *collaborative* process failed. Husband's attorney moved to enforce the Agreement and compel arbitration, noting that the Texas collaborative law statute is inapplicable to cooperative law agreements. The trial court denied mother's motion to disqualify husband's counsel. Wife additionally argued that husband concealed assets. The trial court found that the arbitrator, not the trial court, should determine whether husband breached the Agreement. On October 30, 2009, the trial court signed an order compelling arbitration. Wife filed petition for writ of mandamus arguing that the trial court abused its discretion in failing to disqualify husband's counsel and in ordering the parties to arbitration. Wife contends that cooperative law is an illegitimate aberration of collaborative law and asks that the Agreement be interpreted under collaborative law rules.

Holding: Mandamus denied

Opinion: This case concerns the legitimacy of cooperative law, a matter of first impression in Texas. Cooperative law is a "cousin" of collaborative law. Collaborative law is codified in TFC section 6.603. Lawyers in collaborative law agreements prospectively agree to terminate their representations in the event that settlement is unsuccessful and the matter proceeds to litigation. The presence of a disqualification agreement is widely held to be the minimum qualification for calling a practice collaborative law. In some jurisdictions, collaborative law attorneys may continue to represent their clients in arbitration if the parties agree to arbitration in the collaborative law agreement. Texas has not expressly addressed the issue, but appears to preclude a collaborative-law attorney's subsequent representation of a client in arbitration. Cooperative law agreements mirror collaborative law agreements in spirit and objective, but lack the disqualification clause unique to collaborative law agreements.

Cooperative law has benefits and detriments. Cooperative law clients are less likely to feel mired in the cooperative process because they need not hire and educate new lawyers should litigation ensue. However, cooperative law threatens to "taint the negotiation by undermining a problem-solving atmosphere." No other state has codified or prohibited cooperative law. Cooperative law agreements do not violate the collaborative law statute because the statute does not mandate the use of collaborative law agreements or forbid the use of cooperative law agreements. Nothing in the legislative history indicates that the statute forbids parties from entering cooperative law agreements. Furthermore, the statute is deliberately silent as to the procedures that can be used in informal settlement conferences. This shows that the legislature meant to cast a wide net and give parties wide latitude in deciding how to structure them. Furthermore, the statute specifically states that collaborative law agreements can contain "other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter."

Additionally, the collaborative law statute is elective, not mandatory. In order to obtain the benefit of the collaborative law statute, the parties must expressly provide for "withdrawal of all counsel in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute." Here, husband and wife did not require the withdrawal of counsel if settlement is not obtained. Accordingly, the collaborative law procedures and resulting benefits do not apply to the Agreement.

Cooperative law agreements do not violate Texas public policy. The appropriate test for determining whether a contract violates public policy "is whether the tendency of the agreement is injurious to the public good, not whether its application in a particular case results in actual injury." Texas public policy encourages parties to enter into agreements to submit disputes to various forms of alternative dispute resolution. Texas public policy also strongly favors "preserving the freedom to contract."

Dissent: The parties' cooperative law agreement is void because it is an illegal contract whose enforcement is contrary to public policy. Texas's public policy regarding marriage is that, "every marriage entered . . . is presumed to be valid unless expressly made void . . . or voidable by Chapter 6." Chapter 6 expressly makes voidable marriages dissolved by collaborative law agreements, but does not make voidable marriages dis-

solved by "cooperative law" agreements. Therefore, a private "cooperative law" agreement has no power to dissolve a marriage under Texas law.

The final House Bill Analysis of the collaborative law statute states under the "Background and Purpose" heading: "If a settlement is not reached, the attorneys must withdraw and the parties then employ trial counsel." The cooperative law agreement here contravenes the statute's safeguards while taking advantage of its benefits. The statute requires that parties notify the trial court of any *settlement* but exempts collaborative law settlement *agreements* from mandatory court filing. In the absence of settlement, the statute requires the parties to notify the trial court periodically of their progress through status reports, as per TRCP Rule 11. Here, the parties did not file the cooperative law agreement with the court, nor did the parties file status reports. Thus the Agreement is unenforceable under Rule 11. Furthermore, the statute's safeguard to return the case to the trial docket if settlement is not reached within 2 years was "pointedly skirted" by the cooperative law agreements provision that the case be sent to binding arbitration.

By providing for binding arbitration in advance of collaborative settlement negotiations should those negotiations fail and by failing to permit voluntary withdrawal from the cooperative law agreement, the Agreement directly contravenes the intent of the Legislature that such proceedings shall be voluntary and withdrawal shall be permitted at any time. The clause also contravenes the collaborative law statute that requires (i) parties to file a status report with the court not later than the 180th day after the date of the written agreement to use the procedures, and (ii) the suit to be set for trial if the parties do not settle by the 2nd anniversary of the date suit was filed.

In summary, a private marriage dissolution contract not authorized by Chapter 6 of the TFC is unenforceable when it contradicts both the plain language and the intent of the TFC sections 1.101, 6.601, and 6.603. Parties may not intertwine valid procedures for voiding a marriage, such as arbitration clauses, into illegal marriage dissolution contracts, validating the illegal provisions. It is a violation of public policy to recognize as valid a method of dissolving a marriage that Chapter 6 of the TFC does not recognize. Both the Agreement and the arbitration provisions in it are contrary to public policy and void. Therefore the court should grant the petition for writ of mandamus and remand the case to the trial court.

Editor's Comment: *The "Cooperative Law Dispute Resolution Agreement" encompassed two central provisions: (1) Informal, rather than formal, discovery; and (2) arbitration if the case could not be settled. Neither provision is unusual: Many divorces are settled without formal discovery; many divorce decrees contain ADR requirements before filing suit. Although efforts at ADR are to be applauded, perhaps the name of this technique is overly portentous. (J.V.)*

DIVORCE

DIVISION OF PROPERTY

HUSBAND'S SALE OF COMMUNITY ASSETS AND PURCHASE OF NEW HOME AND CAR DID NOT DEPLETE OR WASTE THE COMMUNITY ESTATE.

¶10-4-11. ***Giesler v. Giesler***, 2010 WL 2330362 (Tex. App.—Austin 2010, no pet. h.) (mem. op.) (6/10/10).

Facts: Wife and husband married in 1990 and had two children over the course of the couple's seventeen year marriage. In 1992, using some of husband's separate property, the couple purchased a family home in Austin. For over fourteen years during the marriage, wife stayed home to care for the children. In 2006, wife and children fled the family home alleging family violence by husband. Wife obtained a protective order against husband, forcing his removal from the family home. The couple filed for divorce in 2007. During

divorce proceedings, husband sold community property and used those assets to pay community debts and to purchase a home and an automobile for his personal use. Following trial, trial court awarded wife a disproportionate share of the community estate due to husband's "wasting of community assets" in violation of a court order. Husband appealed on multiple grounds including that trial court abused its discretion in finding that he wasted community assets and making a disproportionate property division and money damages award based on that finding. Husband additionally argued that the award of the family home to wife had the effect of divesting him of a separate property interest in the family home.

Holding: Affirmed in part, modified in part, reversed and remanded in part.

Opinion: Under TFC 7.001, a trial court in a divorce proceeding is charged with ordering a division of the community estate in a manner that the court deems "just and right," having due regard for the rights of each. In dividing the community estate, the trial court can consider several nonexclusive factors including whether one party wastes community property. Waste occurs when one spouse, dishonestly or purposefully with the intent to deceive, deprives the community estate of assets to the detriment of the other spouse. Waste requires disposal of community assets for non-community purposes or transfer of assets outside of the community.

Here, husband testified that he used the proceeds from selling community assets to pay community bills, including attorney's fees for the divorce, to buy a new car, and to buy and furnish the new house. While husband's actions may have been in violation of trial court's orders and may have been done without wife's knowledge, the evidence conclusively shows that husband's actions either were done for community purposes or did not deplete the community assets. In fact, the evidence shows that the net balance of the community remained the same because the community debt was reduced and the community assets were simply transmuted, not lost. Thus, no waste occurred. Accordingly, trial court abused its discretion in finding husband wasted community assets and then basing its division of community property on that finding.

Under Texas law, a court cannot divest a spouse of title to separate property, no matter how small, by awarding it to the other spouse. Here, trial court found that husband had a six-percent separate property interest in the family home, which it valued at $10,500, but that this interest was dissipated by his misappropriation of insurance proceeds that were to be used toward repairs of the family home and these wrongful actions reduced the value of the family home by at least that amount. However, wife presented no evidence of husband's failure to make the repairs on the fair-market value of the home. Even if such evidence existed, however, his percentage interest could only be completely dissipated if the house had no value, which was not the case here. Consequently, the district court abused its discretion in awarding husband's separate-property share in the family home to wife.

Editor's Comment: *The court holds that while paying community debts with community property might violate temporary orders, it will not justify a disproportionate division of property. Has the court given a green light to a divorcing spouse who would use community property he expected the court to award to the other spouse to pay off community debts he anticipated the court would order him to pay? (J.V.)*

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING WIFE A DISPROPORTIONATE SHARE OF THE COMMUNITY ESTATE

¶10-4-12. ***Taylor v. Taylor***, 2010 WL 2542549 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (mem. op.) (6/24/10).

Facts: Husband and wife married in 1998. In 2001, the couple took out a home equity loan to purchase husband's lease-purchase home. The couple and wife's daughter lived in the home. In February 2005, husband was incarcerated on charges of sexual misconduct involving wife's daughter. Wife continued to live in the home and paid the monthly expenses associated with upkeep of the home in order to avoid foreclosure. These expenses, when tallied, amounted to roughly $737 each month. While incarcerated, husband filed for divorce.

Following trial, trial court found that the home was husband's separate property and that the home equity loan was community debt. Trial court awarded wife reimbursement of $425 for each month from February 2005, when husband was incarcerated, to May 2008, the time of trial.

Husband appealed challenging trial court's property division as well as its award of community-estate reimbursement to wife. Husband also argued that trial court failed to offset the reimbursement.

Holding: Trial decision affirmed

Opinion: Under TFC 7.001, in a divorce decree, the trial court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage. The trial court's ultimate division need not be equal, so long as it is equitable and so long as the court has some reasonable basis for an unequal division of the property. A trial court does not abuse its discretion if the trial court bases its property division decision on conflicting evidence or when there exists some evidence of a substantial and probative character to support the trial court's division. In exercising its discretion, the trial court may consider many factors including a spouse's fault, benefits which the party-not-at-fault would have derived from continuation of the marriage, relative financial conditions and the nature of the property.

Here, trial court's findings indicate that the property division was disproportionate based on the parties' conduct. Trial court had evidence and testimony that wife paid for the home, expenses for the home, and property taxes with money taken from her 401(k) account and sold personal property to make payments on the home during the entire time husband was incarcerated. Moreover, trial court indicated that husband was at fault for the dissolution of the marriage as a result of his conviction for sexual assault against wife's child. Furthermore, trial court did not award wife any ownership interest in, or future benefits from husband's separate property (the home) for which some of the community funds were expended during his incarceration. Husband has not demonstrated that the trial court's evaluation of the evidence resulted in an abuse of discretion as required to overturn its property division.

Reimbursement is an equitable right that arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit. TFC 3.408(b)(1) provides that a party may bring a claim for reimbursement of payments by one marital estate to satisfy unsecured debt liabilities of another marital estate. A claim for reimbursement may be offset as the trial court deems appropriate by considering the benefits and detriments to each estate.

Here, the record reflects that for a period of three years and three months following husband's incarceration, wife paid $515.25 for the home equity loan and $80.00 for home insurance on a monthly basis. Wife also paid annual taxes of approximately $1,600 to $1,700 during this time. When tallied, these expenses for the home totaled about $737 each month. Wife testified that she made these payments on the home and paid property taxes with money taken from her 401(k) account and sold personal property to maintain payments on the home when husband was incarcerated. It is undisputed that husband did not make any payments towards the home during his incarceration. Because reimbursement is an equitable remedy within the trial court's discretion, sufficient evidence exists to support the reimbursement award to wife. Regarding husband's claim that trial court failed to offset the reimbursement to wife by the benefits she actually received; trial court awarded wife reimbursement amounts less than the monthly payments for the home equity loan and annual taxes on the property. It is not clear how the trial court determined the reimbursement amount; however, it is clear that the trial court reasonably concluded that there was some offsetting benefit to husband. Accordingly, trial court could have determined that the reimbursement awarded to wife was fair, just, and equitable.

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DIVIDING COMMUNITY ESTATE BASED ON WIFE'S EXPERT TESTIMONY OVER HUSBAND'S EXPERT TESTIMONY.

¶10-4-13. ***Gupta v. Gupta***, 2010 WL 2540487 (Tex. App.—Austin 2010, no pet. h.) (mem. op.) (6/24/10).

Facts: Wife filed a petition for divorce alleging cruel treatment and fraud on the marriage seeking a disproportionate share of the community estate. At trial, wife's expert concluded that husband's medical practice was worth $780,000 including a marketability discount and a goodwill discount. Husband's expert alternatively assessed the fair market value of the practice at $359,000. Bound up in this dispute was a difference of opinion as to how to evaluate an associated imaging center and what effect its significant debt service and operating losses should have on the overall valuation of the medical practice.

Following trial, trial court granted a divorce on wife's cruelty grounds and disproportionately divided the estate in her favor. Husband appealed on several grounds including that the trial court erred by accepting the inflated valuation of his medical practice offered by wife's expert.

Holding: Trial court's judgment affirmed

Opinion: A trial court has broad discretion in dividing the marital estate, and is presumed to have exercised its discretion properly. The trial court's discretion to divide the community estate is broad, but it must have some reasonable basis for an unequal division of the property, including evidence of a party's fault in breaking up the marriage. In dividing a community estate, a trial court is free to accept or reject the parties' expert testimony in whole or in part and to resolve any inconsistencies in the testimony. There is no abuse of discretion if the trial court's decision is based on conflicting evidence.

Here, wife's expert testified extensively and without objection regarding her valuation of husband's medical practice, providing a detailed analysis of her methods and the figures on which she relied. In addition to her primary report explaining her valuation of husband's medical practice, wife's expert submitted a separate report explaining her analysis of the imaging center and dedicated a section of her rebuttal to the report of husband's expert, highlighting the errors that he had made in evaluating the imaging center.

Moreover, although husband argued that his medical practice should have been valued at less than $780,000, he has not demonstrated that this allegedly inflated value resulted in a manifestly unjust division of the marital estate. Nor does husband challenge the substantial evidence supporting the trial court's decision to award a disproportionate share of the property in favor of wife. Thus, to the extent that trial court accepted wife's expert testimony and rejected husband's expert testimony, it acted within its discretion in making a just and right division of the marital estate. Because there is probative and substantive evidence in the record that supports trial court's order, trial court did not abuse its discretion in dividing the marital estate.

Editor's Comment: *This case reminds us that the appellate courts will not reverse the trial court's division of property due to an alleged valuation error unless it is proven that the valuation error was so egregious that it resulted in an* ***overall*** *division that is unfair and unjust. (R.T.)*

THE TRIAL COURT ABUSED ITS DISCERTION BY CLASSIFYING DEBT SECURED BY A "CONTRACT FOR DEED" AS UNSECURED DEBT AND BY FINDING THAT HUSBAND DID NOT TRACE HIS SEPARATE PROPERTY FUNDS WHEN HUSBAND PROVIDED PRIMA FACIE EVIDENCE OF TRACING.

¶10-4-14. ***Norton v. Norton***, 2010 WL 2816212 (Tex. App.—Amarillo 2010, no pet. h.) (mem. op.) (7/19/10).

Facts: Husband and wife married in 1994. They purchased a home in 2005 for $153,000 by paying $5,000 down and financing the balance with the owner. Husband and wife signed a "Contract for Deed" as the in-

strument for security. Husband and wife separated shortly before wife filed for divorce in May 2007. Husband remained in the home and continued to make payments on the contract for deed. In June 2007, husband sold a farm he had inherited from his mother for approximately $246,000, deposited the proceeds from the sale into a newly opened account, wrote a check on that account to pay off the balance of the marital residence, and received a warranty deed from the seller. Husband filed a counter-petition seeking reimbursement and economic contribution based on this payment. Wife contended that the bank account lost its separate property character due to commingling of community funds. The trial court found that the economic contribution statute did not apply because the contract for deed was not a debt secured by a lien and that husband failed to trace his separate property funds. The trial court awarded each party an undivided one-half interest in the home and granted husband a right to purchase wife's interest for $79,463.50 (one-half the equity value of the marital residence). Husband appealed and requested findings of fact, which the trial court filed.

Holding: Reverse in part, reform the judgment, and affirm the reformed judgment.

Opinion: The economic contribution statute in effect at the time of the filing of the petition for divorce imposed an equitable lien on property of a marital estate for economic contribution in that property by another marital estate arising from a reduction of the principal amount of a debt "secured by a lien" on that property. The trial court found that the contract of deed here was not a "lien" as contemplated by the statute. However, a contract for deed entered into for the purchase of a marital residence is an instrument for security for debts on real property akin to a lien. A contract for deed is an agreement by a seller to deliver a deed to property once certain conditions are met. The seller is not obliged to deliver legal title to the property until the purchaser pays the purchase price in full. The legal effect of the contract is the same as that of a deed with a retained vendor's lien. The record here indicates that the seller retained a vendor's lien in the marital property as a matter of law. Therefore, the trial court abused its discretion in finding that the debt was unsecured and that the economic contribution statute did not apply.

The court next looked to whether husband adequately traced his separate property funds. When separate and community property are commingled in a single bank account, there is a presumption that the community funds are drawn out first, and where there are sufficient funds at all times to cover the separate property balance in the account at the time of the divorce, there is a presumption that the balance remains separate property.

It is undisputed that husband's separate property included the farm he inherited from his mother in 2001. Husband provided documentation that he opened a new account and deposited the exact sum received from selling the farm into the new account. The new account was designated as a "single party account with 'P.O.D.' (payable on death)." Husband also provided evidence of a check written on that account for $136,917.31 made out to the seller as payoff on the balance of the marital residence. Those two facts alone establish prima facie evidence that the payoff was made, at least in part, from husband's separate property funds. Husband testified that approximately $6,000 of community funds from employment and from payment on a note owed to him were deposited into the new bank account. Wife does not claim additional deposits. She merely complains that the commingled funds defy resegregation and identification. The fact that $6,000 of community funds were deposited into that account does not defy resegregation and identification. Providing the community with the full benefit of the presumption that community funds were withdrawn as part of that payoff, we conclude husband provided clear and convincing evidence that not less than $130,917.31 ($136,917.31 - $6,000) was from his separate property funds. Thus, the trial court abused its discretion in finding that husband did not trace his separate funds.

TRIAL COURT DID NOT ERR BY CONCLUDING THAT ALL OF HUSBAND'S PERSONAL INJURY SETTLEMENT WAS COMMUNITY PROPERTY.

¶10-4-15. ***Henslee v. Henslee,*** 2010 WL 2982928 (Tex. App.—Tyler 2010, no pet. h.) (mem. op.) (7/30/10).

Facts: Husband and wife married in 1996. Afterward, husband was injured while working for railway company. Husband filed personal injury suit against railway company and ultimately settled the suit for $465,000. Husband deposited settlement funds in the couple's joint tenancy bank accounts. Husband did not withdraw any money from the bank accounts, however, wife occasionally wrote checks on the accounts to buy items for the house. Wife filed for divorce in 2003. In the final divorce decree, trial court awarded one-half portion of the bank account to husband, including the proceeds from his personal injury settlement, and one-half portion of the bank account to wife. Husband appealed, arguing the entire settlement was intended to compensate him for his personal injury; hence it was all his separate property.

Holding: Affirmed

Opinion: TFC 3.001(3) defines separate property to include "the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage." Portions of a personal injury award belonging to the community estate include damages for lost wages, medical expenses, and other expenses associated with injury to the community estate. When a spouse receives a settlement from a lawsuit during marriage, some of which could be separate property and some of which could be community property, it is that spouse's burden to demonstrate which portion of the settlement is his or her separate property.

Here, husband relies on a release that he signed during the settlement proceedings of his personal injury action against the railway company. The release specifically stated, "For Railroad Retirement Act purposes, I agree the entire amount of this payment is apportioned to factors other than *time lost*; nevertheless, I understand this is a final payment and complete release and includes any claim I may have for *time lost*." Husband argues that references to "*time lost*" in the release supports his contention that the entire settlement was compensation for personal injury, and none of the money was for lost earnings or earning capacity. Read in its entirety, however, the release and other documents husband signed show that "*time lost*" refers to the special meaning the term has in the calculation of the employee's retirement annuity and disability eligibility under the Railroad Retirement Act. Consequently, the allocation of the settlement to "other than time lost" was meant only to avoid the consequences of an award for "*time lost*" under the Railroad Retirement Act.

Part of the settlement husband received was in consideration of his release of community claims such as lost wages, diminished earning capacity, and medical expenses. Since the settlement included compensation for both community and separate claims, it was husband's burden to establish, by clear and convincing evidence, what portion of the proceeds were separate property. Husband failed to sustain his burden of demonstrating what part of the proceeds was community and what was separate. Accordingly, without clear and convincing evidence establishing what part of the settlement was separate property, trial court correctly concluded that all of the settlement must be presumed to be community property.

Editor's Comment: *Does it follow from the court's opinion that a personal injury lawyer who settles a case for a married client must anticipate that the spouses might someday divorce? J.V.*

TRIAL COURT ERRED BY INCLUDING PROVISIONS IN A FINAL DIVORCE DECREE THAT HUSBAND AND WIFE DID NOT INCLUDE IN THEIR RULE 11 AGREEMENT.

¶10-4-16. ***Snider v. Snider***, -- S.W.3d --, 2010 WL 3030987 (Tex. App.—El Paso 2010, no pet. h.) (8/04/10).

Facts: Husband and wife filed for divorce in 2006. The parties agreed to mediate and set a mediation date and provisional trial date. The parties cancelled the mediation date and never reset a new date. Afterward, during what was originally scheduled as a continuance hearing, the parties negotiated a settlement and then signed and filed an agreement with trial court.

At the final judgment hearing, wife objected that the proposed decree limited the amount of military retirement benefits she was to receive pursuant to the agreement. Wife complained that the written agreement awarded her "retirement from military retirement" without any percentage limitation. Wife argued that the agreement awarded her 100 percent husband's military benefits. Trial court overruled wife's objection and signed a final decree awarding wife 50 percent of the community estate's interest in husband's military retirement. Wife appealed contending that trial court erred by ordering language in a final decree that departed from the express terms of the written settlement agreement.

Holding: Reversed and remanded

Opinion: Recently, in *In re Hallman*, the Texarkana Court of Appeals held that if a Rule 11 agreement fails to dispose of all issues, it is appropriate for the trial court to honor the Rule 11 agreement as to all matters it covered and to address the remaining issues in dispute. *In re Hallman*, No. 06-09-00089-CV, 2010 WL 619290 at *1 (Tex. App.—Texarkana 2010, pet. denied) (mem. op.). This ruling expressly rejects the holding issued in *In re Hallman*.

When a trial court renders judgment on the parties' settlement agreement, the judgment must be in strict compliance with the terms of the agreement. The trial court has no power to supply terms, provisions, or conditions not previously agreed to by the parties. Here, the final divorce decree contained terms and provisions to which the parties did not agree. On remand, the trial court will have an opportunity to either accept the agreement as stipulated, set aside the agreement to consider the military retirement dispute, or reject the agreement on the ground that it does not constitute a just and right division of the parties' estates.

Editor's Comment: *Keep an eye on this one. This is the latest salvo in the on-going war over what a trial court is supposed to do when the parties reach a Rule 11 settlement agreement to end their divorce but it fails to address certain issues the parties raised in their pleadings. Some courts hold the trial court should resolve the unaddressed issues. Others hold that the trial court can either: (1) adopt the agreement and only enter judgment on the agreement as written, or (2) set the agreement aside and proceed to trial. The El Paso Court of Appeals follows the former rather than the latter. (C.N.)*

EVIDENCE WAS LEGALLY SUFFICIENT TO SHOW THAT A DOG PURCHASED PRIOR TO MARRIAGE WAS PURCHASED WITH MOTHER'S SEPARATE PROPERTY FUNDS, EVEN THOUGH THE FUNDS CAME FROM HUSBAND'S CHECKING ACCOUNT.

¶10-4-17. ***Calder v. Calder,*** 2010 WL 3370766 (Tex. App.—Austin 2010, no pet. h.) (mem. op.) (8/25/10).

Facts: Husband and wife purchased a dog three weeks prior to marrying in 2006. Husband and wife divorced in 2009. The only contested issue in husband and wife's divorce was ownership of the dog. At trial, husband testified that he managed wife's finances at the time the dog was purchased, and that there was never any discussion that the dog would be purchased by or for wife. Husband admitted that wife deposited $948 into husband's bank account a few days before the dog was purchased. Wife testified that husband was aller-

gic to dogs and only allowed wife to get a hypoallergenic dog on the condition that the money came from wife's paycheck. Wife testified that husband told her the dog was purchased with her money. Wife testified that she alone took care of the dog. After hearing testimony, the trial court determined that neither party had conclusively demonstrated whose funds had been used to purchase the dog, and, based on the circumstantial evidence presented, awarded the dog to mother. Husband appealed on three grounds: (i) the money used to purchase the dog was presumed husband's separate property because it came from his bank account; (ii) wife failed to meet her burden of tracing funds; and (iii) the evidence was not legally sufficient to support the finding because there was no evidence that the money in husband's account was held for wife's benefit.

Holding: Affirmed

Opinion: The Court of Appeals found that husband's first argument was based on a mistake of law. The statute that he relied on for the proposition that the funds in his account were presumed his separate property was repealed in 1969. Furthermore, the court found that, even if the presumption did exist, the testimony at trial was sufficient to rebut it.

The Court of Appeals found that husband's second argument was also based on a mistake of law. Wife did not have the burden to trace the funds. Tracing is only required to rebut the community presumption, and here the dog was separate property.

Husband's third argument was rejected because the Court of Appeals found the evidence legally sufficient to show that the funds in husband's account were wife's separate property. First, both parties testified that husband deposited wife's paychecks into his account and that he either withdrew the money for her or held it in his account until she requested it. Second, there was no dispute that wife deposited at least $948 into husband's account several days before the dog was purchased. Third wife testified that husband agreed to let her buy a dog if she used her own money to pay for it.

Although the only evidence presented to clarify the source of funds was the parties' testimony, the disputed fact issue turned on the credibility of the witnesses and the weight to be given their testimony. Consequently, the Court of Appeals deferred to the trial court's resolution of the evidentiary conflicts, and awarded mother the dog.

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING RETIREMENT ACCOUNTS TO WIFE AND FOREIGN HOME TO HUSBAND BECAUSE TRIAL COURT HAD SUFFICIENT EVIDENCE TO DETERMINE THE VALUE OF THE FOREIGN HOME.

¶10-4-18. ***Neyland v. Raymond,*** -- S.W.3d --, 2010 WL 3432796 (Tex. App.—Fort Worth 2010, no pet. h.) (8/31/10).

Facts: Husband and wife married in 1987. In 2008, husband filed for divorce. The parties stipulated that they had resolved most of the issues between them and that the only matter remaining for the court's adjudication was the division of the parties' retirement accounts and their home in Burundi, Africa. The parties both represented to the court that there was no dispute concerning the values of the retirement accounts. After hearing testimony from the parties regarding the value of the Burundi home, trial court awarded the retirement accounts to wife and the Burundi home to husband. Afterward, husband filed a motion for new trial, attaching new evidence that he claimed would show that the Burundi home was nearly valueless and that the property division was therefore manifestly unjust. Trial court denied husband's motion for new trial. Husband appealed.

Holding: Affirmed

Opinion: Husband argued that trial court had insufficient evidence of the Burundi home's value. TFC 7.001 charges a trial court in a divorce proceeding with dividing the community estate in a "just and right" manner, considering the rights of both parties. Trial courts are afforded wide discretion in dividing marital property upon divorce. To determine whether trial court has abuses its discretion when the evidence is legally or factually insufficient to support the its decision, the appellate court engages a two-pronged inquiry: (1) did the trial court have sufficient evidence upon which to exercise its discretion, and (2) did the trial court err in its application of that discretion? Anything more than a scintilla of evidence is legally sufficient to support a trial court's implied finding.

Here, husband addresses the first prong of this inquiry by arguing that trial court had insufficient evidence of the Burundi home's value. The record does not set forth the specific dollar amount that the trial court found the Burundi home to be worth. However, trial court's judgment implies that it found the home to be sufficiently valuable that its decision to award husband the home and wife a total of $30,553.08 in the parties' three retirement accounts was a just and right division of property. Wife's inventory listed the current fair market value of the Burundi home as approximately $50,000 to $70,000. Husband's inventory, on the other hand, listed the current fair market value as "unknown." At trial, wife testified that the home was a good and high quality house. Husband, for his part, testified that the home was worth only $150. Husband said that he had built the house himself twenty years ago but that it now had a "big crack." Husband claimed that he was ready to tear down the house, but he also testified that his mother and other family members were living in the house and had been there "for a long time."

Here, trial court had evidence of wife's testimony that husband had rented out the house and that his sister had used rental income from the home. It also had husband's testimony of the nature of the home, that he had built the home himself, that his family had lived in the Burundi home "for a long time," and that his mother had stayed in the home. In light of trial court's implied finding that the Burundi home had a sufficient monetary value to render the property division just and right, and in light of the testimony regarding husband's family's longtime use of the home without any evidence of reimbursement to the community estate, husband has not shown that the that the division was so unjust and unfair as to constitute an abuse of discretion.

Husband argued that trial court abused its discretion by failing by denying his motion for a new trial in spite of the new evidence submitted with it. A party seeking a new trial on the ground of newly discovered evidence must show that (1) the evidence has come to light after trial, (2) it was not owing to want of due diligence that the evidence did not come to light sooner, (3) the new evidence is not cumulative, and (4) the evidence is so material that it would likely produce a different result if a new trial were granted. The due diligence requirement has not been met if the same diligence used to obtain the evidence after trial would have had the same result if exercised before trial.

Here, husband's motion for new trial attached printouts from various internet websites regarding Burundi's financial condition, gross national product, and per capita income, as well as a currency converter with the exchange rate between the Burundi franc and the United States dollar. Husband's motion, however, did not contain any contention that these printouts were unavailable at the time of trial. Additionally, husband attached the deed to the Burundi property, a real estate appraisal of the property, and photographs of the home. Husband claimed in his motion for new trial that the deed had become available only after the trial court had heard the evidence and that the real estate appraisal had been unobtainable prior to trial. However, husband provided no further explanation regarding why the evidence was not available before trial, and he offer offered no evidence showing that he exercised due diligence in attempting to procure this evidence sooner. Accordingly, trial court did not abuse its discretion by denying husband's motion for new trial.

Editor's Comment: *Husband's inventory listed the value of the home as "unknown." It could have also been argued that Husband was judicially estopped from offering evidence contrary to what he put in his sworn inventory because filed, admitted, sworn inventories are considered judicial admissions under a line of cases beginning with Roosevelt v. Roosevelt, 699 S.W.2d 372, 374 (Tex. App. - El Paso 1985, writ dism'd). (R.T.)*

HUSBAND SUCCESSFULLY REBUTTED PRESUMPTION THAT REAL PROPERTY PURCHASED WITH HIS SEPARATE PROPERTY WAS NOT INTENDED AS A GIFT, BUT FAILED TO OVERCOME EVIDENCE SUPPORTING THAT HE GIFTED REAL PROPERTY TO WIFE.

¶10-4-19. ***Harrison v. Harrison,*** -- S.W.3d --, 2010 WL 3409450 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (8/31/10).

Facts: Husband and wife married in 2006. During their marriage, husband used funds he received from a personal injury settlement to purchase two pieces of real property. During divorce proceedings, wife testified that husband gifted a one-half interest in one of the pieces of property to her as a birthday gift. The warranty deed on the alleged gifted property listed both husband and wife as grantees. The warranty deed on the second property, however, listed husband as the sole grantee. Following trial, trial court awarded wife a one-half separate property interest in the allegedly gifted property to both parties and that wife retained her one-half interest. Husband appealed challenging the sufficiency of the evidence supporting trial court's findings.

Holding: Affirmed

Opinion: Under TFC 3.003(a), all property possessed by either spouse during or on the dissolution of the marriage is presumed community property. TFC 3.003(b) provides that this is a rebuttable presumption, requiring a spouse claiming assets as separate property to establish his or her separate character by clear and convincing evidence. Where an asset is purchased during marriage with monies traceable to a spouse's separate estate, the asset may appropriately be characterized as separate property.

Additionally, a second presumption arises where one spouse uses separate funds to purchase property during marriage and takes title to the property in joint names, we presume a gift to the spouse is intended. This second presumption may be rebutted by evidence establishing no gift was intended. A rebuttable presumption shifts the burden of producing evidence to the party against whom it operates. Once the burden is discharged and evidence contradicting the presumption has been offered, the presumption disappears and is not weighed or treated as evidence. The Texas Supreme Court as well as several Texas Courts of Appeal have applied this presumption to differing fact patterns and are inconsistent as to what it takes to rebut the presumption.

Here, testimony from the parties is conflicting: (1) wife testified husband gave her the property as a birthday gift; and (2) husband testified he purchased the property to start a horse training business. Accordingly, husband rebutted the presumption by testifying he did not intend to make a gift and by providing an alternative reason for purchasing the property. This conclusion, however, is not dispositive of the appeal. As stated above, after the burden is discharged and evidence contradicting the presumption has been offered, the presumption disappears and is not weighed or treated as evidence.

Wife testified husband gave her the Burton property as a gift so she could reside there the rest of her life and raise her children. During cross-examination, wife described in detail the circumstances surrounding husband's alleged gift of the property to her. Husband presented contradictory evidence. Additionally, the evidence shows two pieces of property were bought during the marriage. The cash warranty deed for the allegedly gifted property listed both parties as grantees, while the second property only listed husband as the grantee. The evidence, taken as a whole, supports trial court's finding that husband intended to gift the property to wife. Accordingly, trial court did not err in awarding a one-half interest in the property to wife as her separate property

Concurrence: This court correctly holds that trial court did not err in awarding a one-half interest in the property to wife as her separate property; however, the court need not and should not discuss what evidence is necessary to rebut the presumption that husband intended to gift this property interest to wife. The majority

states that the Texas cases are inconsistent as to what constitutes evidence clearly establishing there was no intention to make a gift such that the presumption is rebutted. To the extent cases from other courts of appeals conflict with cases from the Supreme Court of Texas and this court, this court must follow the latter binding precedent. If rebuttal of the presumption were necessary to the disposition of this appeal, a discussion of any conflicting opinions from other courts of appeals might be warranted. However, given the diverse fact patterns and types of testimony with which parties might try to rebut the presumption and given that this issue is not necessary to determine the appeal, the better course is to leave this issue for another day.

TRIAL COURT ERRED BY AWARDING WIFE A FIFTY PERCENT INTEREST IN HUSBAND'S REAL PROPERTY REMAINDER BECAUSE HUSBAND'S AMBIGUOUS STATEMENTS REGARDING WHETHER HIS REMAINDER WAS SEPARATE OR COMMUNITY PROPERTY DID NOT AMOUNT TO AN UNEQUIVOCAL JUDICIAL ADMISSION THAT HIS REMAINDER WAS COMMUNITY PROPERTY.

¶10-4-20. ***Dickinson v. Dickinson,*** -- S.W.3d --, 2010 WL 3432838 (Tex. App.—Fort Worth 2010, no pet. h.) (8/31/10).

Facts: After filing for divorce, husband filed a chapter 13 bankruptcy petition in Bankruptcy Court. Bankruptcy Court ordered that the automatic stay be modified to allow the divorce to be finalized with respect to matters concerning use of property. The order further directed trial court to make recommendations to Bankruptcy Court regarding the division of community property. Trial evidence revealed the parties had only personal property to divide, with the exception of husband, who was a co-beneficiary of a trust set up by his father before his death. The corpus of the trust consisted of real property located in California. The trust provided that a Dorothy M. Cawley owned a life estate in this real property; and that upon her death, the trustee was to distribute the property in equal fifty percent shares to husband and his sister.

At trial wife argued that husband had judicially admitted that his remainder interest in the California real property was community property because he asked only for community property to be divided in his pleadings. Wife argued further that husband judicially admitted his remainder was community property because he responded to discovery inquiring into the possible existence of separate property with, "There is no separate property....There is a trust." Following trial, trial court granted the divorce and found husband at fault for the dissolution of the marriage. Additionally, trial court recommended to Bankruptcy Court that wife should receive half of husband's remainder interest in the real property in California. Husband appealed.

Holding: Affirmed in part, reversed and remanded in part

Opinion: Husband argued that the trial court erred by divesting him of his separate property remainder interest in the real property in California. Wife argued husband judicially admitted his separate property remainder was community property. Assertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions. A judicial admission is a formal waiver of proof that dispenses with the production of evidence on an issue. A judicially admitted fact is established as a matter of law, and the admitting party may not dispute it or introduce evidence contrary to it. Five conditions must have occurred for a party's admission to be conclusive against him: (1) the declaration relied upon must have been made in the course of a judicial proceeding; (2) the declaration was contrary to an essential fact embraced in the theory of recovery or defense asserted by the party; (3) *the statement was deliberate, clear, and unequivocal*; (4) giving conclusive effect to the declaration would not run contrary to public policy; and (5) the declaration related to a fact upon which a judgment for the opposing party was based.

Here, husband's statements in his pleadings and discovery were not unequivocal; they were, at best, ambiguous. Although his pleadings do not mention the division of separate property, separate property cannot be divided; it must be awarded to the party who holds the separate property interest. In addition, husband's statement in response to discovery that there is no separate property, there is a trust, could be interpreted as

referring to appellant's interest being subject to Cawley's life estate in the property and not yet being ready for distribution to the remaindermen. Thus, husband's statements in his pleadings and in discovery were not judicial admissions that would prevent him from alleging that his remainder interest in the trust property was separate property and from introducing evidence to prove its character as separate.

Property possessed by either spouse during or on the dissolution of the marriage is presumed to be community property. Whether property is community or separate is determined by the facts that give the property its character, and the party who asserts that property is his or her separate property must prove its separate character with clear and convincing evidence. To overcome the presumption of community property, the burden is on the spouse claiming certain property as separate to trace and clearly identify the claimed separate property. Importantly, Tex. Const. art. XVI, sec. 15 and TFC 3.001(2) provide that property a spouse acquires after marriage by gift or devise is that spouse's separate property.

Here, trial evidence showed that husband's father was the settlor, trustee, and initial beneficiary of the trust, which was fully revocable before his death. But when husband's father died, Cawley's life estate vested, as did husband remainder interest. Thus, husband's remainder interest in the real property trust corpus was obtained by devise.

Wife argued that the economic interest in the increase in value of the trust real property constitutes community property. Generally, when separate property produces income that is acquired by a spouse, the income is community property. However, an increase in value of an item of separate property is an inherent part of the item, which cannot be separated from it. Here, there was no evidence that husband was entitled to receive, or that he did receive, any income from the trust during the marriage; his only interest is the remainder interest in the real property, which he was not entitled to until his father's death and which was subject to Cawley's life estate.

DIVORCE

SPOUSAL MAINTENANCE

WIFE'S DISABILITY AND MONTHLY EXPENSES SUPPORTED TRIAL COURT'S AWARD OF SPOUSAL MAINTENANCE.

¶10-4-21. ***Owen v. Owen***, 2010 WL 2293465 (Tex. App.—Dallas 2010, no pet. h.) (mem. op.) (6/09/10).

Facts: Following trial for divorce, trial court awarded wife the couple's home and $1000 per month in spousal maintenance for two years. At trial, wife testified that in 2004, she was involved in a head-on automobile collision that caused disabling injuries. Wife testified that, since that time, she had been unable to maintain regular employment. Wife testified further that she had applied for disability insurance but was denied because husband made too much money. Wife presented evidence showing that the monthly mortgage on the home totaled nearly $750 per month and that she had a monthly automobile payment. Wife additionally testified that, at the time of trial, she had less than one dollar in her bank account, that the power company had turned off the home's electricity, and that she had applied to receive food stamps. Husband argued that wife was exaggerating her disability. Following trial, husband appealed trial court's award of spousal maintenance.

Holding: Trial decision affirmed

Opinion: Under TFC 8.051, in a suit for the dissolution of a marriage lasting ten years or longer, a trial court may order maintenance for a spouse who lacks sufficient property, including property distributed to the

spouse under the code, to provide for the spouse's minimum reasonable needs. To qualify, the spouse seeking maintenance must be unable to support himself or herself through appropriate employment because of an incapacitating physical or mental disability or clearly lack earning ability in the labor market adequate to provide support for the spouse's minimum reasonable needs, as limited by TFC 8.054.

Here, although husband contends the trial court abused its discretion in ordering spousal maintenance, the record shows wife had no liquid assets, had no income, and had monthly debt of at least $750. Furthermore, wife testified she was disabled. Although husband believed she exaggerated her condition, there is nevertheless probative evidence to support the trial court's finding that wife has an incapacitating disability. Accordingly, trial court did not abuse its discretion in awarding wife spousal maintenance.

DIVORCE

POST-DECREE ENFORCEMENT

A MOTION TO CLARIFY A DIVORCE DECREE CANNOT AMEND, MODIFY OR CHANGE THE TRIAL COURT'S SUBSTANTIVE PROPERTY DIVISION ONCE THE DECREE BECOMES FINAL.

¶10-4-22. ***Borbon v. Rodrigue***, 2010 WL 2723167 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (mem. op.) (7/8/10).

Facts: On June 9, 2008, trial court entered a final divorce decree dissolving the marriage between husband and wife. The decree ordered wife to pay husband's attorney's fees and cited that, "this judgment is a lien against the property awarded [to wife] and [that she waives her] homestead right as to said judgment. Afterward, wife motioned trial court to clarify the decree. In her motion to clarify, wife contended that the provision in the final divorce decree awarding husband's attorney a lien against wife's property and providing that wife waived her homestead right was an unlawful provision. Husband responded to wife's clarification motion and requested attorney's fees to defend against the motion.

Trial court denied wife's motion to clarify. Additionally, trial court granted husband's request for attorney's fees as a sanction under TRCP 13. Trial court found that wife's attorney signed and filed a motion to clarify that was frivolous and groundless in violation of TRCP 13 and TCPR 10.001(2).

Wife appealed arguing that trial court erred in denying her motion to clarify. Wife and her attorney appealed on additional grounds that trial courts imposition of sanctions was improper because she relied on the advice her attorney, who was advised by two experienced family attorney's that a motion to clarify was appropriate and, thus, her motion was filed "in good faith and was not frivolous."

Holding: Trial decision affirmed.

Opinion: After a trial court's plenary power has expired, the proper way for a party to directly attack a decree is to file a bill of review in the trial court. Under TFC 9.006, however, a trial court retains continuing jurisdiction to clarify the prior order. A proper clarification must be consistent with the prior divorce decree and merely serves to enforce the prior judgment or settlement agreement. However, under TFC 9.007, a clarification order cannot amend, modify, alter, or change the actual, substantive division of property made or approved in a final divorce decree because the order is beyond the power of the trial court.

Here, wife motioned trial court to strike the language and to clarify that it would never have knowingly entered an unlawful provision in a decree that violates Texas homestead rights protection under the Texas

Constitution and declare the language "null and void." For trial court to grant wife's requested relief, it would have been required to issue an order inconsistent with its prior decree, striking a substantive provision of the decree. TFC 9.007 does not allow this kind of post-decree modification. Although trial court's award of a lien in the decree against wife's homestead was impermissible, once trial court lost plenary power, it had no power to correct any substantive legal error in the decree. Wife's proper remedy for challenging the constitutionality of the homestead waiver clause was through either a direct appeal or a bill of review, not a motion to clarify. Accordingly, trial court did not err in denying wife's motion to clarify.

Under TRCP 13, the signature of an attorney on pleadings, motions, or other court papers certifies that the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Additionally, TRCP 13 provides that if a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative shall impose an appropriate sanction. Furthermore, TCPR 10.001(2) provides that an attorney's signature on a pleading certifies that that the attorney made "reasonable inquiry" that each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Generally, a pleading is "frivolous" if it has "no basis in law or fact.

Here, trial court made no finding that wife's attorney manifested an intent to harass husband. Therefore, trial court's sanction cannot be sustained as to wife's attorney under TRCP 13, which requires a finding that a pleading is groundless and made for the purpose of harassment. To sustain trial court's order, this court must determine whether the evidence supports an implied finding that wife's attorney filed the motion to clarify with claims that were not warranted by either existing law or by a nonfrivolous argument for a change in the law or factual allegations that had no or were unlikely to have evidentiary support after further investigation.

Mother's attorney testified that he made inquiry regarding the legal bases for a motion to clarify, which he was advised was an "appropriate" method to address wife's complaints regarding the divorce decree's homestead waiver provision. However, during his inquiry, wife's attorney was also advised that the time for appeal had passed and that he needed to file bill of review if he and wife pursued more relief than could be sought with a motion to clarify. After receiving this counsel, wife's attorney sought an order limiting the enforcement of the decree, rather than a motion to clarify or enforce the decree. A reasonable review of the law regarding motions to clarify would have revealed to wife's attorney that the Family Code provided no authority for trial court to issue orders inconsistent with its prior decree.

Because the Family Code prohibited trial court from entering an order that was inconsistent with its prior decree, wife's motion to clarify had no arguable basis in law and was not "a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" as required under TCPR 10.001(2). Accordingly, trial court did not err in awarding husband attorney's fees as sanctions against wife's attorney.

TRIAL COURT ERRED IN FINDING HUSBAND IN COMPLIANCE WITH DIVORCE DECREE WHEN THE DECREE'S CONTRACTUAL ALIMONY PROVISION SPECIFICALLY REQUIRED HUSBAND TO PAY MONTHLY MORTGAGE TO WIFE EVEN IF WIFE SOLD HOUSE.

¶10-4-23. ***Sanderson v. Smith***, 2010 WL 2784302 (Tex. App.—Tyler 2010, no pet. h.) (mem. op.) (7/14/10).

Facts: Husband and wife entered into agreed divorce decree containing a contractual alimony obligation. The contractual alimony obligation required husband to pay the mortgage on the couple's home "in monthly installments of $674.26 until such time that the sum is paid in full, the home is sold, or upon the expiration of ten (10) years." The decree recited further that "[I]n the event [wife] elects to sell the residence prior to expiration of the full ten-year term, [husband] is obligated to pay the remaining balance in monthly installments of $674.26 to [wife]."

Husband made payments according to the alimony agreement until November 30, 2000 when wife sold the home. On November 15, 2005, wife filed a motion for enforcement of the judgment, alleging that husband breached the contractual alimony obligation by failing to pay her the balance of the alimony obligation. Following a hearing, trial court denied wife's motion of enforcement finding husband fully complied with the divorce decree because he made monthly mortgage payments until wife sold the house. Trial court determined, therefore, that wife was not entitled to further alimony. Wife appealed arguing that trial court erred in finding husband in compliance with the divorce decree.

Holding: Reversed and remanded

Opinion: An agreed divorce decree is a contract subject to the usual rules of contract interpretation. In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument.

Here, the agreement states that the balance of the mortgage, or $62,674.34, is awarded to wife "as and for alimony." The balance of the mortgage at the time of the agreement was $62,674.34, and the trial court awarded wife the same amount as contractual alimony. The agreement specifically states that, in the event wife elected to sell the residence prior to the expiration of the full ten year term, husband was "obligated to pay the remaining balance" to wife in the same monthly installments of $674.26 under the terms of the mortgage during the ten year alimony obligation. The agreement is clear and unambiguous that husband had a ten-year alimony obligation whether wife sold the residence or not. Nothing in the agreement indicates that the parties intended wife should be penalized if she sold the residence before the end of husband's ten-year alimony obligation. Accordingly, trial court erred in determining that husband was in compliance with the terms of the divorce decree.

APPELLATE COURT GRANTED WIFE'S HABEAS CORPUS RELIEF BECAUSE SHE NEVER RECEIVED NOTICE OF TRIAL COURT'S RESCHEDULED HEARING.

¶10-4-24. ***In re Wixom,*** -- S.W.3d --, 2010 WL 3275788 (Tex. App.—Dallas 2010) (orig. proceeding) (8/19/10).

Facts: In the underlying divorce proceeding, husband filed a petition for enforcement of property division alleging wife violated terms of final decree regarding wife's delivery of personal property to husband. On January 8, 2009, trial court conducted a hearing and found wife in contempt for each violation husband alleged in his petition. Trial court sentenced wife to 180 days in jail but suspended the sentence conditioned on wife's compliance with delivery of the personal property to husband. As ordered by trial court, wife returned to court on January 22, 2009 for a progress report but was told by court personnel that the matter would be rescheduled. On February 5, 2009, trial court held another hearing, found wife in contempt and committed her to 180 days in jail. Wife petitioned this court for habeas corpus relief arguing that she never received notice of the February 5, 2009 hearing.

Holding: Habeas corpus relief granted

Opinion: Alleged contemnors are entitled to adequate notice before being adjudged guilty of contempt. Here, the record does not reflect that wife received notice of the February 5, 2009 hearing. Accordingly, wife is granted habeas corpus relief and trial court's commitment order is vacated.

HUSBAND'S CLAIM THAT TRIAL COURT IMPROPERLY DIVESTED HIM OF PROPERTY BARRED BY RES JUDICATA.

¶10-4-25. ***Deacetis v. Wiseman***, 2010 WL 2731040 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (mem. op.) (7/13/10).

Facts: Prior to their divorce, husband and wife held beneficial title to their marital home, while legal title was held by a corporation owned by their two children. Following divorce, trial court awarded the home to wife. Husband did not appeal the decision, but he refused to vacate the property. Wife therefore retained an attorney and assigned him a portion of the property's sales proceeds in an amount equal to the fees for his representation. Ultimately, by a Rule 11 agreement, husband agreed to vacate the premises and execute appropriate documents to clear wife's title to the property. Afterward wife conveyed the property to a third party.

Later, husband sued wife and her attorney asserting various claims including a declaratory judgment that all real estate transactions since the divorce were void. Attorney moved for summary judgment on grounds that husband's claims were barred by res judicata. Trial court granted attorney's summary judgment motion. Husband appealed arguing that the divorce proceeding could not be a "prior suit" for the purposes of res judicata because the trial court in that action did not and could not divest the children's corporation of legal title to the property and award such title to wife.

Holding: Affirmed

Opinion: Res judicata precludes re-litigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. Thus, a defendant who moves for summary judgment based on the affirmative defense of res judicata must prove (1) a prior final judgment on the merits by a court of competent jurisdiction, (2) identity of parties or those in privity with them, and (3) a second action based on the same claims that were or could have been raised in the first action.

It is a well-established principle that equitable title can pass even when legal title has not. For example, a resulting trust arises by operation of law when title is conveyed to one person but the purchase price or a portion thereof is paid by another. Under such circumstances, parties are presumed to have intended that the grantee hold title to the use of him who paid the purchase price and whom equity deems to be the true owner.

Here, husband represented to trial court that his children's corporation purchased the property in 1997, but that he provided the down payment for the property as well as money for improvements. Husband did not contend that these funds were his separate property. Husband asserts that the money paid for the down payment and improvements to the property were consideration for this exchange, but that his children failed to convey his interests as promised. Based on this alleged promise, husband claims that he "equitably has been granted a superior title" to the property.

Father has offered no evidence to support this allegation. But evidence that father made such payments would also be evidence that a resulting trust arose in favor of the marital estate when the title was conveyed to the children's corporation. The corporation would be considered to hold legal title to the property, while the marital estate would be considered to hold beneficial or equitable title. Thus, proof of husband's factual allegations would have established only that the marital estate was "the true owner," even though legal title was held by another. Because the characterization of property and the division of the marital estate were matters to be resolved in the divorce proceedings, husband's claimed interest in the property was an issue that could have been raised in the earlier action. Accordingly, trial court did not err in granting traditional summary judgment based on attorney's res judicata defense.

ANNULMENT

TRIAL COURT PROPERLY ANNULLED MARRIAGE BECAUSE HUSBAND PROVIDED SUFFICIENT EVIDENCE TO SHOW THAT WIFE FRAUDULENTLY INDUCED HIM INTO MARRIAGE

¶10-4-26. ***Villarreal v. Villarreal***, 2010 WL 2854250 (Tex. App.—Beaumont 2010, no pet. h.) (mem. op.) (7/22/10).

Facts: Husband and wife met on a social website. In 2004, after communicating with wife over the internet for six months, husband traveled to Russia to meet her. As the relationship progressed, wife applied for a fiancé visa and joined husband in Conroe, Texas in 2006. The couple married on July 3, 2006. Shortly after marriage, the relationship began to sour and the parties argued frequently about money, property transfers, and wife's immigration status. Husband eventually moved out of his house and filed for divorce on May 14, 2007.

After moving back into the house, husband noticed Russian icons on his computer that were links to what appeared to be five or six Russian dating websites. He also found various dating profiles created by wife. One of her profiles contained a photograph of her taken about two weeks after she and husband had married. Based on the new information, husband filed an amended petition seeking an annulment of the marriage. At trial, husband's witness, a licensed investigator and computer examiner, testified that he examined husband's computer and definitively determined that the Russian files and pictures created on the computer were created by wife.

Husband's witness created a timeline that demonstrated that, shortly after arriving in Texas, there were 19 "hits" to dating websites by wife. Additionally, the timeline showed 32 "hits" of wife viewing pictures of men downloaded to the computer from July 2, 2006 through July 4, 2006, the day prior to the wedding through the day after the wedding. Furthermore, the timeline showed as many as 521 "hits" to dating websites by wife during one occasion when husband was out of town on business. She also created several profiles of herself for the websites. One profile listed her sexual preference as bisexual. Husband testified that he stopped living with wife on April 27, 2007. After he ceased living with her, he learned of her computer activity, and suspected the fraud. He testified he would never have married her if he had known she was bisexual. Trial court found that wife used fraud to induce husband into the marriage, and that husband had not voluntarily cohabitated with wife since learning of the fraud and accordingly annulled the marriage. Wife appealed challenging the factual and legal sufficiency of trial court's findings.

Holding: Affirmed

Opinion: Under TFC 6.107, a trial court may grant a petitioner an annulment of a marriage if (1) the other party used fraud, duress, or force to induce the petitioner to enter into the marriage; and (2) the petitioner has not voluntarily cohabited with the other party since learning of the fraud or since being released from the duress or force.

Here, as factfinder in this case, trial court could have reasonably believed husband's testimony, and that of his witnesses, and reject wife's testimony, and that of her witnesses, and conclude wife fraudulently induced husband to enter into the marriage. The court could reasonably find wife made representations and promises she intended husband to rely on, and as a result, he married her and transferred property to her. The

evidence indicates that husband did not cohabitate with wife after learning of the computer activity and discovering the fraud. Accordingly, there is legally and factually sufficient evidence in the record to support the trial court's findings of fraud and to support the trial court's annulment of the marriage based on fraud.

SAPCR

JURISDICTION

DESPITE GENETIC EVIDENCE PURPORTEDLY PROVING APPELLANT WAS NOT THE BIOLOGICAL FATHER OF CHILD, APPELLANT FAILED TO ESTABLISH SUFFICIENT FACTS TO INVOKE TRIAL COURT'S JURISDICTION FOR A BILL OF REVIEW.

¶10-4-27. ***In re M.I.V.*** 2010 WL 2205069 (Tex. App.—Corpus Christi 2010, no pet. h.) (mem. op.) (6/03/10).

Facts: In 2007, OAG issued a non-agreed child support review order (CSRO) asserting appellant was the biological father of child, designating appellant and mother as joint managing conservators, and assessing child support against appellant. OAG filed a petition with trial court to confirm the CRSO. The trial record contained a verified return of service in which the sheriff stated that he personally served appellant. Appellant did not answer or contest the CRSO nor did appellant appear at trial. Consequently, trial court entered default order confirming the CRSO and assessing child support against appellant.

In February 2009, appellant filed a petition for bill of review with the trial court asserting that he had no notice of the trial. Additionally, appellant presented evidence of a genetic analysis that allegedly established that he was not the father of child. Trial court dismissed appellant's bill of review petition. Appellant filed this appeal arguing the trial court erred in dismissing his bill of review because an "adjudicated-by-default" parent should not be prohibited from requesting genetic testing under the four-year challenging period provided to "acknowledged" parents under TFC § 160.308.

Holding: Trial court order dismissing appellant's bill of review petition affirmed

Opinion: A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. Because the procedure conflicts with the fundamental policy that judgments must become final at some point, the grounds upon which a bill of review can be obtained are narrow. Consequently, a bill of review movant must plead and prove; (1) a meritorious defense to the underlying cause of action; (2) which the movant was prevented from making by the fraud, accident or wrongful act of the opposing party or official mistake; and that was (3) unmixed with any fault or negligence on their own part.

Here, even assuming appellant alleged a meritorious defense by implying the adjudication of his parentage was erroneous based on later discovered genetic information, appellant failed to allege any facts in his bill of review petition that the default judgment rendered against him was the result of fraud, accident, wrongful act of the OAG, or an official mistake. As a result, appellant's pleading was insufficient to invoke the equitable powers (jurisdiction) of the trial court. Because the trial court lacked jurisdiction, appellate court need not address appellant's argument under TFC § 160.308. Accordingly, trial court did not abuse its discretion in dismissing appellant's bill of review.

Editor's Comment: *If the appellant had been able to prove lack of service of citation, he would not need to prove that he was prevented from making a meritorious claim or defense because of fraud, accident, or wrongful act of the other party. Texas Industries, Inc. v. Sanchez, 525 S.W.2d 870, 871 (Tex. 1975). (S.S.S.)*

SAPCR

STANDING AND PROCEDURE

EVIDENCE OF NEGLECT AND MOTHER'S DRUG USE SUFFICIENT TO GIVE GRANDPARENTS STANDING TO PETITION FOR CONSERVATORSHIP OF CHILD.

¶10-4-28. ***In re Moore***, 2010 WL 966204 (Tex. App.—Waco 2010, original proceeding) (mem. op.) (7/07/10).

Facts: Paternal grandparents filed an original SAPCR seeking conservatorship of child. Parents motioned trial court to dismiss the case for lack of subject-matter jurisdiction arguing that paternal grandparents lacked standing. Paternal grandparents argued that they had standing under TFC 102.004(a)(1) because they were the paternal grandparents of child and that the present circumstances of child being left with parents would significantly impair and risk the child's physical health and/or emotional development. Following a hearing, trial court denied parent's motion to dismiss for lack of jurisdiction. Parents then petitioned appellate court for a writ of mandamus arguing that trial court lacked jurisdiction because grandparent's lacked standing.

Holding: Petition for writ of mandamus denied

Opinion: Opinion: Under TFC 102.004(a)(1), a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development

Here, at the hearing for temporary orders on the grandparent's petition, there was evidence that CPS investigated the parent's on allegations of neglect, that child was underweight and had diaper rash. Trial court heard additional evidence that mother used marijuana, that mother cared for child while under the influence of marijuana, and that mother had been arrested for marijuana possession. Evidence additionally showed that CPS voluntarily placed child with maternal grandfather and that mother and father were living in a travel trailer behind maternal grandfather's home. Based on the evidence, trial court reasonably could have found that child's circumstances would significantly impair child's physical health or emotional development. Accordingly, paternal grandparents have standing to pursue the SAPCR.

TFC 155.001, PROVIDING THAT A TRIAL COURT ACQUIRES CONTINUING AND EXCLUSIVE JURISDICTION IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP, IS A MATTER OF TRUE JURISDICTION.

¶10-4-29. ***Celestine v. DFPS***, -- S.W.3d --, 2010 WL 2789411 (Tex. App.— Houston [1st Dist.] 2010, no pet. h.) (7/15/10).

Facts: In 2006, the 313th District Court issued a final decree terminating the parental rights of the children's biological parents and appointing the DFPS as the children's sole managing conservator. While the termination was pending, DFPS placed the children with the children's maternal aunt. In December 2006, after the

children had resided with Aunt for only five months, DFPS removed the children from Aunt's home after a caseworker learned that Aunt had left the children alone with their biological mother.

On May 17, 2007, Aunt filed a petition in the 313th District Court to terminate DFPS's conservatorship and adopt all four children. For unknown reasons, Aunt's petition came before 309th District Court rather than the 313th District Court. On August 25, 2008, the 309th District Court signed an order dismissing Aunt's petition for want of prosecution. Despite the 309th District Court's dismissal, the 313th District Court held a hearing on Aunt's petition for adoption on October 1, 2008. After the hearing, the 313th District Court signed an order dismissing Aunt's petition with prejudice and without explanation. Aunt appealed.

Holding: Affirmed

Opinion: As an initial matter, it must be determined whether the 313th District Court had jurisdiction to enter the October 1, 2008 order dismissing Aunt's adoption petition. Under the Texas Constitution art. V § 11 and Gov't Code 74.094(a), trial courts have broad discretion to exchange benches and enter orders on other cases in the same county, even without a formal order memorializing the exchange or transfer. Under Gov't Code 24.303(a), the judge may sign a judgment or order in any of the courts regardless of whether the case is transferred and the judgment, order, or action is valid and binding as if the case were pending in the court of the judge who acts in the matter. Although TFC 155.001 contains a unique provision giving a court continuing and exclusive jurisdiction over matters involving the welfare of a child upon the rendition of a final order in an original suit affecting a parent-child relationship, this does not preclude the application of the exchange-of-benches doctrine in such cases. The exchange of benches doctrine applies in SAPCR cases so long as the record is clear that the exchanged trial court is acting on behalf of the trial court having continuing and exclusive jurisdiction.

Here, it is undisputed that the 313th District Court had exclusive and continuing jurisdiction over Aunt's adoption petition. Therefore, the issue is whether the judge in the 309th District Court was acting on behalf of the 309th District Court or the 313th District Court. The issue turns not on the 309th Court's actions, but on the 313th District Court's actions taking place after the 309th District Court issued the August 25, 2008 order dismissing aunt's petition. First, the 313th District Court scheduled aunt's petition for a trial on merits on October 1, 2008, over a month after the 309th District Court issued its order of dismissal. Second, neither the parties nor the 313th District Court made any mention of the 309th District Court's dismissal order or of the April 2008 trial at which Aunt and her counsel failed to appear, providing the grounds for the 309th Court's dismissal. Finally, neither the parties nor the 313th Court made any mention of the 309th Court's order of dismissal when the 313th Court held a hearing on Aunt's motion for new trial almost a month later on October 29, 2008. Under these circumstances, it is not clear from the record that on August 25, 2008, that the 309th Court was acting on behalf of the 313th Court.

Having determined that the 309th Court was not acting on behalf of the 313th Court, it must be determined whether the 309th Court had jurisdiction over the matter. Texas courts of appeal are split over whether TFC 155.001's continuing and exclusive jurisdiction provision is truly jurisdictional or merely a matter of dominant jurisdiction, more closely akin to the rules of venue. The legislative history of the enactment of TFC 155.001 suggests that the Legislature preferred a scheme for handling parent-child matters in a manner that avoids forum shopping, races to the courthouse, child snatching, and the harassment of a parent by the other parent's filing suits in random courts. This court holds that TFC 155.001's provision is a matter of true jurisdiction. Thus, when one court has continuing and exclusive jurisdiction over a matter, any order or judgment issued by another court pertaining to the same matter is void. Accordingly, the August 25, 2008 order issued by the 309th District, attempting to dismiss Aunt's petition is void. Aunt's appeal, therefore, is pursuant to the 313th District Court's dismissal.

Aunt argued that the 313th District committed reversible error because the court failed to provide her an opportunity to present evidence whether waiver of the six month requirement under TFC 162.009(b) was in the children's best interest. Here, the 313th District issued no findings of fact or conclusions of law. In such

a case, the trial court's judgment implies all the necessary findings in support of its judgment, and an appellate court may affirm the judgment on any legal theory that finds support in the evidence.

Under TFC 162.016(b), a trial court must grant an adoption if it finds that the requirements for adoption have been met and the adoption is in the best interests of the child. TFC 162.009 is one such statutory prerequisite. Pursuant to TFC 162.009(a), a court may not grant an adoption until the child has resided with the petitioner for at least six months. However, under TFC 162.009(b), on the request of the petitioner, the court may waive this six-month requirement if it finds that waiver is in the child's best interest.

Here, the 313th District Court issued the final decree terminating the parental rights of the children's biological parents and appointing the DFPS as the children's sole managing conservator. During the course of the termination trial, the trial court heard evidence of the biological mother's long history of drug abuse, as well as her history related to the previous parental termination of her three oldest children. The record also shows that DFPS removed the children from Aunt's home in December 2006. During that hearing, a caseworker testified that she removed the children after she visited Aunt's home and found that Aunt was missing but that the biological mother was there with the children. According to the caseworker, she had previously told Aunt that the biological mother could not have contact with the children. Accordingly, the trial record contains evidence of a substantive and probative character that supports the trial court's implicit finding that waiver of the six-month requirement was not in the children's best interest.

IF TRANSFER MANDATORY UNDER TFC 155.001, TRANSFERRING OURT MAY ONLY MAKE TEMPORARY ORDERS. THEREFORE, ORDER OF DISMISSAL VOID.

¶10-4-30. ***Silverman v. Johnson***, -- S.W.3d --, 2010 WL 2789863 (Tex. App.—Austin 2010, no pet. h.) (7/15/10).

Facts: Mother and father divorced in 2006. The divorce decree ordered that before father could initiate a suit affecting the parent-child relationship, father must pay mother $5,000 for initial attorney's fees, otherwise the trial court must dismiss father's suit with prejudice. In 2009, father filed a petition to modify the parent-child relationship. However, father did not make the $5,000 payment as required by the divorce decree. Father also filed a motion to transfer the proceeding from Comal County to Harris County because mother and child had relocated to Harris County. Mother filed a motion in the Comal trial court to dismiss and for sanctions. Following a hearing, Comal trial court granted mother's motion, dismissed father's petition with prejudice, and imposed sanctions against father and his attorneys. Father appealed, arguing that trial court erred in ruling on wife's motion to dismiss and for sanctions instead of transferring venue of the case in accordance with father's motion to transfer.

Holding: Reverse and remand.

Opinion: Under TFC 155.001, after entering a final divorce decree, a trial court generally retains continuing, exclusive jurisdiction in a suit affecting the parent-child relationship. However, TFC 155.201(b) provides that if a suit to modify an order is filed in the court having continuing, exclusive jurisdiction and the child has resided in another county in Texas for six months or longer, the court "shall" transfer the proceeding on the timely motion of a party.

Under TCPRC 15.064(b), improper venue, when timely challenged, is reversible error. Furthermore, under TFC 155.005, "[d]uring the transfer of a suit from a court with continuing, exclusive jurisdiction, the transferring court retains jurisdiction to render temporary orders." While TFC 155.005 does not expressly state that the transferring court cannot render permanent orders, the more reasonable construction is that when transfer is to occur-particularly when mandatory venue lies in a different court, the transferring court's actions should be limited to temporary matters so that the court with continuing jurisdiction can make the permanent decisions. Moreover, the transferring court's abstaining from enforcing its prior order due to a pending man-

datory transfer will not nullify the effect of such order. TFC 155.206(c) provides that the transferee court shall enforce a judgment or order of the transferring court by contempt or by any other means by which the transferring court could have enforced its judgment or order.

Here, transfer of venue of this matter from Comal County trial court to Harris County trial court was mandatory under TFC 155.201(b). Therefore, after transfer, Harris County trial court would have had the authority to rule on wife's motion to dismiss and for sanctions. Because Comal County trial court's dismissal order was not a temporary order, it abused its discretion in dismissing father's suit when his timely filed motion to transfer was pending and such transfer was mandatory.

STEP GRANDPARENTS FAILED TO ESTABLISH STANDING, UNDER TFC 102.003(A), TO INTERVENE IN FATHER'S PENDING SAPCR.

¶10-4-31. ***In re Russell,*** -- S.W.3d --, 2010 WL 3377780 (Tex. App.—Fort Worth 2010, orig. proceeding) (8/25/10).

Facts: Mother and stepfather married in February 2000. On March 15, 2000, mother gave birth to child. Child's biological father is an individual with whom mother was involved prior to her marriage to stepfather. Mother and stepfather divorced in 2002. Under the terms of the divorce decree, mother and stepfather were named joint managing conservators of child. Trial court granted stepfather standard visitation and designated mother as the managing conservator with the right to designate child's primary residence. In June 2006, stepfather filed a SAPCR requesting that provisions be made for the surrender of child to stepfather's parents (step grandparents) for visitation in accordance with TFC 153.3161. (TFC 153.3161 provides visitation rights to grandparents when parent is on military deployment).

Despite the fact that the step grandparents were not parties to the modification proceeding, the trial court issued temporary orders on August 3, 2006 and October 19, 2006, granting the step-grandparents possession of child on the alternating weekends unless a counselor determined that such possession was not in child's best interest. Trial court's temporary orders additionally ordered mother, step grandparents, and child to counseling. In December 2006, step grandparents filed a motion of enforcement of trial court's temporary orders arguing that mother violated trial court's temporary orders by failing to release child to them at school. During a series of hearings, a court-appointed counselor accused mother of committing "grandparent alienation." After a hearing on January 30, 2007, trial court's associate judge ruled that child's then-current living environment in the primary care of the mother, significantly impaired child's emotional development. Based on counselor's recommendations, trial court named step grandparents as primary joint managing conservators.

On June 13, 2007, step grandparents filed their first petition to modify the parent-child relationship in which they asked to be named joint managing conservators and asked for mother to receive only supervised visitation with child. On September 28, 2009, while step grandparents' petition was pending, mother filed this original proceeding challenging trial court's August 3, 2006 and October 19, 2006 temporary orders.

Holding: Petition for writ of mandamus granted

Opinion: Mother argued that there was no basis for trial court to award step grandparents possession and access in the August 3, 2006 and October 19, 2006 temporary orders because step grandparents had not filed any pleading to intervene in the suit at the time the trial court rendered those orders. TFC 153.432(a) allows a biological or adoptive grandparent to request possession of or access to a grandchild by filing: (1) an original suit; or (2) a suit for modification. A trial court abuses its discretion by awarding relief to a person who has not requested such relief in a live pleading. Under TFC 102.008(b)(10), parties to a suit must include in their pleadings a "statement describing what action the court is requested to take concerning the child and the statutory grounds on which the request is made." Moreover, under TRCP 60, interveners may intervene only by filing a pleading.

Here, step grandparents did not file any pleadings seeking access to or possession of child, and had nothing on file until January 26, 2007, well after trial court's August and October 2006 temporary orders granting step grandparents possession. Accordingly, trial court abused its discretion by rendering the August and October 2006 orders granting step grandparents possession of child.

Mother argued that trial court abused its discretion by awarding access and possession to the step grandparents after they filed their January 26, 2007 pleading requesting possession because the step grandparents lacked standing under TFC 102.003(a). Under TFC 102.003(a):

> [A] grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:
>
> > (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development …

Specifically, mother contends step grandparents are not "grandparents" under the statute and that they fail to meet the requirements of TFC102.003(a)(1).

Here, the legislature chose the words, "a grandparent, or another relative of the child related within the third degree by consanguinity." Thus, the 2007 version of the statute applicable here, conferred standing upon a grandparent, or another relative of the child related within the third degree by consanguinity. TFC 573.023 provides that "[t]wo individuals are related to each other by consanguinity if: (1) one is a descendant of the other; or (2) they share a common ancestor." By the inclusion of the word "another," the legislature made it clear that it intended for grandparents or other relatives to be limited to those individuals related to the child within the third degree of consanguinity. Had the legislature not intended to limit the term "grandparent" to individuals related within the third degree by consanguinity, it would not have needed to include the word "another." Instead, the legislature could have phrased the section to read, "a grandparent or relative of the child related within the third degree by consanguinity." Because there is no evidence that step grandparents were related to child within three degrees of consanguinity, they lack standing under TFC 102.004(a).

Even if step grandparents could be considered "grandparents" under section 102.004(a), they still failed to overcome their burden to demonstrate that child's then-present circumstances would significantly impair child's physical health or emotional development under TFC 102.004(a)(1). Step grandparents' primary witness, the court appointed counselor, based all of her conclusions on mother's refusing access and possession to the step grandparents, who were never legally entitled to such. There was no evidence as to the effect of the supposed grandparent alienation on child other than that she missed her mother when she was with step grandparents. In this case, all of the focus was on the effect on the step grandparents, which is not the intent of the statute, which focuses on the child and the child's best interest. Accordingly, trial court abused its discretion by determining that step grandparents had standing under TFC 102.004(a)(1) of the family code.

SAPCR

ALTERNATIVE DISPUTE RESOLUTION

BECAUSE A MEDIATED SETTLEMENT AGREEMENT BETWEEN MOTHER AND FATHER FAILED TO MEET THE STATUTORY REQUIREMENTS UNDER TFC 153.0071, FATHER COULD REPUDIATE THE AGREEMENT BEFORE TRIAL COURT RENDERED JUDGMENT.

¶10-4-32. ***Streety v. Hue Thi***, 2010 WL 2278617 (Tex. App.—Dallas 2010, no pet. h.) (mem. op.) (6/08/10).

Facts: Mother and father divorced in 2004. In 2008, father petitioned trial court to modify the parent-child relationship. The parties participated in mediation and signed a mediation settlement agreement (MSA). Pursuant to the MSA, the parties agreed to a modification in father's possession of the couple's child as well as dismissal of prior contempt motions upon payment of past due child support. Immediately above the parties' signatures, the MSA recited:

> [THE PARTIES] INTEND FOR THE AGREEMENT TO BE ENFORCEABLE ACCORDING TO ITS TERMS IN ANY COURT OF COMPETENT JURISDICTION. FURTHER, THE PARTIES AGREE THAT SHOULD ANY DISPUTE ARISE OUT OF THE PERFORMANCE OR INTERPRETATION OF THIS AGREEMENT, THEY WILL APPEAR AT [DISPUTE MEDIATION SERVICES, INC .], EACH AT THE REQUEST OF THE OTHER PARTY, FOR AN ADDITIONAL MEDIATION SESSION, BEFORE SEEKING JUDICIAL REVIEW.

The MSA further instructed that the final order was to be entered no later than January 5, 2009. The parties agreed that husband's attorney would draft an order reflecting the MSA by a certain date. On January 23, 2009, wife motioned court for entry of the MSA. At hearing, mother argued that husband's attorney failed to meet the specified deadline and failed to draft an order reflecting the MSA, forcing her to correct the order. Father argued that mothers "corrected order" contained numerous errors and inaccuracies. After the hearing, trial court signed the order reflecting the MSA. Father appealed arguing that: (1) the trial court erred in signing the order based on the MSA because the agreement did not comply with TFC 153.0071; and (2) that mother was not entitled to judgment on the MSA because he withdrew his consent to the agreement before the trial court signed the order.

Holding: Reversed and remanded

Opinion: Under TFC 153.0071(c), (d)(1)-(3), a trial court may refer a suit affecting the parent-child relationship to mediation, and a mediated settlement agreement is binding on the parties if the agreement provides *inter alia*, a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement *is not subject to revocation*. A trial court must render a judgment based on the mediated settlement agreement if the statutory requirements are met. However, if a mediated settlement agreement does not strictly comply with the requirements of section 153.0071(d)(1), a party can repudiate the agreement before rendition of the judgment.

Here, nowhere in the MSA is there a prominently displayed statement that the agreement is not subject to revocation. Despite the language of the agreement indicating the parties intended for their agreement to be "enforceable," there is no language signaling the parties could not otherwise repudiate the agreement. To the contrary, the mediated settlement agreement states "the parties agree that should any dispute arise out of the performance or interpretation of this agreement, they will appear ... for an additional mediation session...."

This language implies the door remains open for the parties to go back to mediation should a dispute arise out of the agreement. Consequently the MSA fails to meet the statutory requirements under 153.0071(d)(1). Accordingly, father was free to repudiate the MSA before trial court entered judgment.

Under TCPRC 154.071(a), a settlement agreement generally is enforceable in the same manner as other written contracts. But if one party withdraws his consent before rendition of the judgment on the agreement, a separate claim for contract enforcement is required. An action to enforce a settlement agreement, where consent is withdrawn, must be based on proper pleading and proof. Here, father withdrew his consent to the MSA before the trial court signed the order based on the agreement. At the hearing on the motion to enter, father informed the trial court he thought there were errors and inaccuracies in the order, that the order did not agree with the MSA and that he wanted to make changes. Because father withdrew his consent, mother was required to present and prove the MSA as a contract. Mother failed to meet this burden. Accordingly, the trial court erred in rendering a judgment on the MSA.

TRIAL COURT ERRED BY ADDING AN IMPAIRMENT FINDING TO A MEDIATED SETTLEMENT AGREEMENT BETWEEN MOTHER AND TDFPS BECAUSE TFC 153.131 REQUIRES NO SUCH FINDING.

¶10-4-33. ***In re S.A.D.S.***, -- S.W.3d --, 2010 WL 3193520 (Tex. App.—Fort Worth 2010, no pet. h.) (8/12/10).

Facts: TDFPS removed child from mother's custody upon his birth based on prior terminations of parental rights involving mother and her other children. After child's removal, TDFPS provided mother with a service plan that mother completed, but mother failed to demonstrate the ability to provide child with a stable living environment. Eventually, trial court ordered TDFPS and mother to mediation.

At mediation, TDFPS and mother entered into a mediated settlement agreement (MSA) appointing child's maternal grandfather as managing conservator and mother as possessory conservator. Afterward, TDFPS asked trial court to sign an order that included a finding that appointing mother as managing conservator would not be in child's best interest because it would significantly impair child's physical health or emotional development. This provision was not found anywhere within the MSA. Over mother's objection, trial court entered an order containing TDFPS's requested impairment finding. Mother appealed arguing trial court erred in adding an impairment finding because TFC 153.131 does not require such a finding whenever parties enter into an MSA.

Holding: Affirmed as modified

Opinion: As long as a MSA complies with section TFC 153.0071, its failure to address the parental presumption or a trial court's finding of significant impairment under section 153.131 does not render it void. Furthermore, as long as an MSA complies with section 153.0071, the trial court must comply with the specific edicts of the statute. Therefore, a trial court does not need to add a finding of significant impairment to an MSA. Here, the trial court erred when it placed such a finding that was contrary to parties' agreement in an order.

SAPCR

CONSERVATORSHIP

BECAUSE MOTHER WAS JAILED FOR CONTEMPT AND FAILED TO REGAIN PRIMARY POSSESSION OF CHILDREN, TRIAL COURT DID NOT ERR IN MODIFYING CUSTODY TO GRANT FATHER EXCLUSIVE RIGHT TO DETERMINE CHILDREN'S PRIMARY RESIDENCE.

¶10-4-34. ***In re S.L.T.*** 2010 WL 2314776 (Tex. App.—Eastland 2010, no pet. h.) (mem. op.) (6/10/10).

Facts: Trial court appointed mother and father as joint managing conservators of their two children and granted mother the exclusive right to determine the children's primary residence. Father was granted possession and access in accordance with a standard possession order. In April 2006, a trial court confined mother for thirty days on contempt charges related to her non-payment of child support related to another child from a subsequent marriage. As a result, father motioned trial court to modify the parent-child relationship due to a material and substantial change in the circumstances of mother and children. The parties agreed to temporary orders granting father the exclusive right to designate children's primary residence. Two years later in September 2008, trial court held a final hearing and granted father the exclusive right to designate children's primary residence. Additionally, trial court granted mother possession and access in accordance with a standard possession order. Mother appealed arguing there was no evidence of a substantial and material change.

Holding: Trial decision affirmed

Opinion: A court may modify a conservatorship order if the modification would be in the child's best interest and (1) the circumstances of the child or the parties have materially and substantially changed since the date of the original order; (2) if the child is at least twelve years of age and has expressed to the court the name of the person the child prefers to have the exclusive right to designate the child's primary residence; or (3) if the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months.

Here, mother was in jail for thirty days for contempt of court for failing to pay child support for another child not subject to this suit. During this time, she was unable to care for the children. Mother voluntarily relinquished primary care to father by agreeing to the temporary orders that gave father the exclusive right to designate the primary residence of the children. Even after she was released from jail, mother did not seek to have the children live with her. Father cared for children for two years after trial court entered its temporary orders. Therefore, the evidence supports the trial courts finding that there was a substantial change in mother's circumstances. Moreover, mother voluntarily relinquished possession of the children for more than six months.

One of the public policies of this state is to provide a stable environment for children. Here, since father took primary possession of the children, they have been enrolled in school and preschool and attend a daycare after school. Father has family in the area that can help care for the children if an emergency arises. Father has provided for the children's healthcare needs. Trial court did not abuse its discretion in finding that it was in the children's best interest to grant father the exclusive right to determine children's primary residence. As a result, trial court did not err in granting father's motion to modify custody of the children.

TRIAL COURT DID NOT ERR BY SUBMITTING THE CONSERVATORSHIP ISSUE TO THE JURY EVEN IF TRIAL COURT PREVIOUSLY FOUND FATHER HAD ENGAGED IN FAMILY VIOLENCE AGAINST MOTHER.

¶10-4-35. ***Winters v. Winters***, 2010 WL 3190598 (Tex. App.—Austin 2010, no pet. h.) (mem. op.) (8/13/10).

Facts: After an alleged incident of family violence, mother filed for divorce and requested a protective order against father. At the subsequent hearing, mother testified that father had committed several incidents of domestic violence against her and the couple's child. After the hearing, trial court entered a permanent protective order, finding that father committed family violence against mother. Trial court, however, specifically noted in the order that it did not find that father committed family violence against the couple's child. Father counter-sued for divorce, requested custody of the children and demanded a jury trial on the issue of conservatorship. During trial, the court admitted the protective order into evidence. The jury appointed both parents joint managing conservators and awarded father the exclusive right to designate the children's permanent residence. Trial court rendered a divorce decree on the jury's verdict. Mother appealed.

Holding: Affirmed

Opinion: Mother argued that trial court erred in allowing a jury trial on the issue of conservatorship and in submitting the conservatorship question to the jury in light of the court's prior finding in the protective order that father had committed family violence against her. Mother asserts that, in light of such a finding, TFC 153.004 (a)-(c) prohibits father from being appointed as a joint managing conservator.

Although TFC 153.004 prohibits the appointment of joint managing conservators if there is credible evidence of a history or pattern of physical abuse, that section does not affect a party's right to demand a jury trial on the issue of conservatorship. In fact TFC 105.002 of the family code requires the court to hold a jury trial on issues of conservatorship and to submit those issues to a jury if one party properly demands a jury trial.

Mother has provided no support, for her contention that trial court's finding of family violence in a protective order effectively trumps a party's right to a jury trial on conservatorship issues under the plain language of TFC 105.002. This conclusion is bolstered by TFC 153.004(f), which contemplates another use for the protective order—that the fact-finder must consider the protective order in deciding whether there is credible evidence of a history or pattern of abuse. Thus, while a protective order must be considered by the fact-finder in making its conservatorship decision, it is not dispositive of that issue. Accordingly, trial court did not err in allowing a jury trial on the question of conservatorship or in submitting that issue to the jury.

Mother argued that trial court and the jury ignored trial court's protective order and its finding of family violence. Mother does not, however, challenge the factual or legal sufficiency supporting the jury's verdict. As discussed above, however, TFC 153.004(f) requires only that the fact-finder *consider* whether a protective order was rendered in determining if there is credible evidence of a history or pattern of family violence. Here, trial court admitted the protective order into evidence. Trial court also properly charged the jury on its duty to consider credible evidence of intentional physical abuse by one parent against the other. As the sole judge of the weight and credibility of the evidence, the jury could have concluded that the findings of family violence in the protective order here, as well as the other testimony and evidence adduced at trial, did not constitute credible evidence of a history or pattern of physical abuse. The record, therefore, demonstrates that trial court and jury considered the protective order as required by TFC 153.004(f).

SAPCR

POSSESSION AND ACCESS

WHEN DETERMINING POSSESSION OF AND ACCESS TO CHILDREN IN A DIVORCE PROCEEDING, TRIAL COURT IS THE BEST POSITION TO WEIGH CONFLICTING TESTIMONY AND JUDGE WITNESSES' CREDIBILITY.

¶10-4-36. ***Vasquez v. Vasque***, 2010 WL 2243581 (Tex. App.—Fort Worth 2010, no pet. h.) (mem. op.) (6/03/10).

Facts: Mother and father filed for divorce. At trial, mother testified that father suffered from depression and that he was potentially dangerous to himself. Mother additionally testified that father would go into fits of rage and at times would become physically abusive toward the couple's children. Similarly, father testified that it was the mother who became violent at times although father admitted biting mother twice but only in self defense after she attacked him.

In addition, trial court heard testimony from two psychiatric doctors. Dr. Flynn, who interviewed mother, father, and the children in 2007 and 2008, testified that mother displayed impaired thinking that caused her to be unpredictable and erratic. Dr. Flynn testified further that he did not believe mother required supervised visits with the children, but cautioned the court that problems could arise if mother had possession of the children for more than one night and that a full thirty-day summer would be "asking for trouble."

Dr. Cook on the other hand, who conducted psychological tests on mother in 2005, testified that mother appeared to be a confident, socially outgoing, and reasonably well-adjusted person. Dr. Cook testified further that it was highly unlikely that mother would engage in serious distortions of her social environment or develop full-blown delusional thinking, so he did not believe that mother should be denied access to her children or be required to have supervised visitation.

Following trial, trial court entered a divorce decree appointing father managing conservator and mother as possessory conservator. The divorce decree contained a modified possession order limiting mother's possession of the children. Mother appealed.

Holding: Trial decision affirmed

Opinion: TFC 153.256 allows a trial court to deviate from the standard possession order. When deviating from the standard possession order, a trial court may consider: (1) the age, developmental status, circumstances, needs, and best interest of the child; (2) the circumstances of the managing conservator and of the parent named possessory conservator; and (3) any other relevant factor. In determining the issues of conservatorship and possession of and access to the child, the trial court is given wide latitude in determining the best interest of the child. This is, in part, because the trial court is in a better position to determine the credibility of the witnesses and to evaluate the claims made by each parent.

Here, the trial court stated in its findings of fact that it found the testimony of Dr. Flynn to be more credible and more persuasive than the testimony of Dr. Cook because it was based on more recent interviews. Trial court additionally found that Dr. Flynn's report was more extensive in that it included interviews with both parties and the children, whereas Dr. Cook only interviewed mother. Although the witnesses' testimonies were contradictory at times, the trial court was in the best position to judge the witnesses' credibility. Thus, the record supported the trial court's decision to vary from the standard possession order. Accordingly,

the trial court did not abuse its discretion by entering a modified possession and access order that was in the child's best interest.

EVIDENCE AT TRIAL SUPPORTED TRIAL COURT'S DEVIATION FROM A STANDARD POSSESSION ORDER.

¶10-4-37. ***In re R.H.H.***, 2010 WL 2842905 (Tex. App.—San Antonio 2010, no pet. h.) (mem. op.) (7/21/10).

Facts: Mother and father divorced in 1998. Trial court appointed both as joint managing conservators of the couple's two children. Trial court issued a standard possession order that provided mother the right to designate the children's residence and make educational decisions. In 2004, mother and father agreed to modify the standard possession order so father would have possession of the children on alternating weekdays every other week.

In 2006, father unilaterally withdrew one of the children from the child's private school, and attempted to enroll him in a public school. In response, mother filed a petition to modify the parent-child relationship and obtained a temporary restraining order preventing father from withdrawing either of the children from private school and enrolling them in any other school. After hearing the testimony of mother, father, and a court appointed psychologist, trial court determined a standard possession order was not in the best interest of the children. Trial court's order granted mother the exclusive right to make educational decisions for the children, including all decisions regarding the children's extracurricular activities. Trial court modified father's possession from alternating days during the week to just first, third, and fifth weekends of the month and reduced his summer possession to fourteen days each summer. Father appealed.

Holding: Affirmed

Opinion: Father argued trial court abused its discretion because removing weeknight visits and shortening his summer time possession is not in the children's best interest. Here, trial court entered a standard possession order when father and mother divorced in 1998. In 2004, mother agreed to amend the order to allow visitation on alternate days each week. However, mother testified that by 2008, the alternating weekday possession no longer worked. Mother testified father refused to cooperate with taking the children to after-school activities on father's days of possession. Mother testified further that father refused to take the children to their summer activities during his summer possession. Further, evidence at trial showed that in contravention trial court's order giving mother the right to make educational decisions, father unilaterally removed one child from the child's private school and enrolled him in a public school. In response, mother obtained a temporary restraining order to prevent father from withdrawing the children from the private school.

Furthermore, a court-appointed psychologist stated she had numerous concerns regarding the children after interviewing the children, father, mother, and school personnel. Psychologist testified that both children reported being uncomfortable with alternating days each week between father's and mother's homes. The boys told the psychologist that the weekday visitation schedule interfered with having time with either parent. The psychologist testified further that although the children enjoyed spending time with father when he was in a good mood, they felt his good moods were rare. The evidence demonstrates that weekday possession and month-long summer possession interferes with the children's school and extracurricular activities because father does not cooperate and is not flexible. Accordingly, trial court did not abuse its discretion in deviating from a standard possession order.

BEFORE THE 2009 AMENDMENT, TFC 153.317(2) REQUIRED A TRIAL COURT TO AWARD EXTENDED STANDARD POSSESSION SO LONG AS THE COURT FOUND THAT STANDARD POSSESSION WAS IN A CHILD'S BEST INTEREST.

¶10-4-38. ***Mason-Murphy v. Grabowski***, -- S.W.3d --, 2010 WL 3059379 (Tex. App.—Austin 2010, no pet. h.) (8/06/10).

Facts: Mother and father signed custody decree in 2001 when child was ten months old. Later, in 2008, father filed a SAPCR, requesting "extended" standard possession under which his weekend periods of possession during the school year would begin at the end of the school day rather than at 6 p.m., and would end with him returning child to school the next school day. Trial court's oral decree incorporated father's request to begin weekend visitations with pickup from school, however trial court ordered father to return child on Sunday evenings. After trial court announced its order, but before the hearing adjourned and before any written order was signed, father orally elected to have the fully extended standard possession. After considering briefs, the trial court incorporated into its written order father's election that his weekend possession periods during the school year end when child's school resumes.

In its findings of fact and conclusions of law, trial court concluded that former TFC 153.317(2) gave father the right to elect extended standard possession "regardless of any ruling by the Court to the contrary, if the Court finds the Standard Possession order is in the child's best interest." The court found that father timely made his election, and ordered that father's weekend possession periods end at the beginning of the next school day. Mother appealed.

Holding: Affirmed

Opinion: Mother argued that having initially found that a Sunday evening return was in child's best interest, trial court should not have ordered Sunday overnight possession. Former TFC 153.317(2) provided that a possessory conservator could elect for extended periods of possession by allowing the possessory conservator to end a weekend period of possession when the child's school resumed on the first school day following the weekend. Former TFC 153.317(2) did not require an additional showing or finding of changed circumstances before the trial court could incorporate the extended possession election. The legislatively determined process of rendering a custody decree involving standard possession included the possibility of the election of extended standard possession.

Here, father made his election at the time trial court was rendering the modification order. The court's choice to request briefing and study whether it would incorporate father's election suspended rendition of the order as to the elements affected by the election. Ultimately, trial court found that circumstances had changed sufficiently since the 2001 order to merit revisiting the terms of possession. Trial court did not err by failing to find that circumstances had changed again either in the time between the court's oral announcement of its decision and father's election or in the days before the court's incorporation of father's election into its written order.

Mother argued trial court erred by granting father's election without finding a sufficient showing of material and substantial change in circumstances. Former TFC 153.137(2) did not require a separate showing or finding that the extended possession elected is in the child's best interest before the trial court could incorporate the election. That finding was implicitly rebuttably presumed to have been incorporated in the finding that the standard possession order was a child's best interest.

Here, trial court heard evidence that the extended possession would enable child to more fully engage in activities with father on those alternate Sundays, including longer visits with father's family in Chicago. Trial court did not err by failing to make an additional best interest finding, and did not abuse its discretion by failing to find that extended alternate Sunday visitation was not in child's best interest.

Mother argued trial court erred in concluding that father's election made Sunday overnight possession mandatory. Former TFC 153.137(2) did not leave a trial court discretion to reject a possessory conservator's extended election so long as it found the standard possession order to be in the child's best interest. The election was binding unless the trial court withdrew its finding that the standard possession order was in the child's best interest. The legislature amended TFC 153.137 in 2009. The statute now expressly requires the trial court to incorporate the conservator's election of extended standard possession "unless the court finds that the election is not in the best interest of the child." TFC 153.137 as amended does not trigger the need for an additional finding that extended possession is in the child's best interest, but the statute now allows the court to reject the election if it affirmatively finds that the extended possession is not in the child's best interest. This amendment is consistent with this court's interpretation of the former statute.

Here, father's timely election for extended possession coupled with trial court's undisturbed finding that the standard possession order was in child's best interest made incorporation of the election mandatory. Accordingly, trial court did not err in incorporating father's extended standard possession election into its final written order.

SAPCR

CHILD SUPPORT

THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING AN ORDER THAT MADE PARTIES RESPONSIBLE FOR ONE-HALF OF COLLEGE TUITION ENFORCEABLE AS A CONTRACT WHEN THERE WAS NO AGREEMENT THAT THE ORDER COULD BE ENFORCED AS A CONTRACT.

¶10-4-39. ***Huffines v. McMahill***, 2010 WL 2836980 (Tex. App.—Amarillo 2010, no pet. h.) (mem. op.) (7/20/10).

Facts: Mother and father divorced in 1989. The divorce decree named mother sole managing conservator of child and required father to pay child support. In 1998, the trial court signed an agreed motion to modify which included provisions that neither party will pay child support, father will provide health insurance, father will provide for the child's clothing needs, sports activity fees, school fees, and future vehicle needs, and that *each parent will be responsible for one-half the cost of the child's college tuition.* By 2006, the child was enrolled in college. Mother failed to pay her half of college tuition. Father filed a breach of contract suit in trial court seeking damages for mother's failure to pay tuition in accordance with the 1998 agreement. The trial court granted father $8,712.14 for breach of contract. Mother appealed.

Holding: Reverse and Rendered

Opinion: TFC 154.001 prohibits court-ordered child support for children past the age of 18. At the time of this appeal, TFC 154.124(c) provided contractual enforcement of child support past a child's eighteenth birthday. To utilize the exception, the parties to an order for child support had to agree that the terms would be enforced contractually, or the order had to expressly incorporate a contractual agreement. The order here did not provide for contractual enforcement and there was no contract that was expressly incorporated into the 1998 agreement. Therefore, the trial court misapplied TFC 154.124(c) in finding the agreement enforceable as a contract.

Father relies on the trial court's finding of fact that the agreement for payment of college tuition was a contract and not an agreement concerning child support. However, this is a conclusion of law, not a finding of fact. A trial court's incorrect conclusions of law are not binding on an appellate court. Evidence was suf-

ficient to prove that the agreement for payment of tuition was an agreement concerning child support and not a contract. First, the applicable provision of the 1998 order is labeled "support." Second, the tuition provision is surrounded by language of support obligations. Third, child support payments may include a specific expense, such as tuition. Therefore, the only reasonable interpretation of the 1998 order is that the tuition provision was intended as support of the child.

TRIAL COURT ERRED BY FAILING TO INCLUDE FATHER'S INHERITANCE AS A RESOURCE IN ITS CALCULATION OF HIS CHILD SUPPORT OBLIGATION AS REQUIRED UNDER TFC 154.062(B)(5).

¶10-4-40. ***In re P.C.S.***, -- S.W.3d --, 2010 WL 3171767 (Tex. App.—Dallas 2010, no pet. h.) (8/12/10).

Facts: Mother and father divorced in 2003. At the time of the divorce, the couple had two children with developmental and psychological issues, including Asperger's syndrome, and bi-polar disorder. At trial, witnesses testified that the children would require medication and counseling all their lives. Under the decree, both parents were designated as joint managing conservators, and mother had the right to establish the children's primary residence. The decree required Father to pay regular child support for both children, provide them with health insurance, and pay half of the children's school tuition and sports-club charges.

At the time of the divorce, father was employed as a mechanical engineer, earning about $110,000 per year. In 2005, father was laid off from his job and given a severance package of six-months' salary and benefits. Despite applying for many positions, father was unable to obtain employment. Consequently, father filed a motion to modify his child support. Trial court issued temporary orders in August 2005 reducing father's monthly child support obligation and suspended his obligation to pay a portion of the children's tuition and sports-club charges.

In late 2005 and early 2006, Father received, in at least two installments, a cash inheritance of approximately $400,000. Because he was unable to find employment, father spent much of the inheritance covering expenses and investing in a new business. After father's business began to earn profit, he filed a motion to modify his child support obligation. Following trial, trial court concluded that father's inheritance was not included in the statutory definition of "net resources" for the purpose of setting his child support obligation. Mother appealed, arguing trial court erred by not finding father's inheritance as part of father's net resources in its determination of father's child support obligation.

Holding: Affirmed in part, reversed in part and remanded in part

Opinion: Under TFC 154.061(a), 154.062, and 154.125, child support is generally determined by calculating the child support obligor's monthly "net resources" and applying statutory guidelines to that amount. TFC 154.062(b)(1)-(4) provides that an obligor's net resources include, among others, wage and salary income, interest dividends and royalty income. Moreover, TFC 154.062(b)(5) provides that an obligor's net resources include:

> all other income actually being received, including severance pay, retirement benefits, pensions, trust income, annuities, capital gains, social security benefits other than supplemental security income, unemployment benefits, disability and workers' compensation benefits, interest income from notes regardless of the source, gifts and prizes, spousal maintenance, and alimony.

TFC 154.062(c), on the other hand, excludes return of principle or capital, and accounts receivable among others from an obligor's net resources.

None of these key terms (i.e., "income" and enumerated types of "income") is defined in the family code for purposes of TFC 154. While several of the types of income listed could be categorized as involving regular, periodic receipts of money (e.g., retirement benefits, social security benefits, unemployment benefits, disability and workers' compensation benefits, interest income, spousal maintenance, alimony), others are likely to involve nonrecurring payments (e.g., gifts, prizes, capital gains). Thus, section TFC 154.062(b)(5) indicates no intent to exclude from "resources" income involving nonrecurring payments and include only "periodic" payments, or to include only sums paid to the obligor respecting his capital or labor.

Additionally, the general rules of code construction provide that "includes" and "including" are terms of enlargement and not of limitation or exclusive enumeration, and use of those terms does not create a presumption that components not expressed are excluded. Accordingly, the legislature's intent is that all receipts of money that are not specifically excluded by the statute under TFC 154.062(c), whether nonrecurring or periodic, whether derived from the obligor's capital or labor or from that of others, must be included in the definition of "resources." Thus, a cash inheritance from a third party paid to the obligor of child support in two payments, as in this case, is a "resource" under the inclusive language of TFC 154.062(b)(5). Consequently, trial court erred, as a matter of law, in determining that father's inheritance was not included in the definition of net resources.

Dissent: The majority's strained interpretation of TFC 154.062(b)(5) ignores the plain language of that section that intends to include "all other income" as a resource. An inheritance is not commonly or legally considered income. TFC 154.062(b)(5) specifically characterizes "gifts and prizes" as income for child support purposes; it fails to treat "inheritances" as income for that purpose. In straining to convert an inheritance into a resource, the majority overlooks how naturally an inheritance fits the definition of "any other financial resources available for the support of the child under TFC 154.123(b)(3). Rather than a resource, an inheritance is an additional factor that allows the trial court to vary the child support calculated under the guidelines.

Reading the two sections together, this Court should hold that the legislature has determined that an inheritance is an "additional factor" under 154.123(b)(3) that allows the trial court to adjust the child support calculated under the guidelines, not a resource under section 154.062(b)(5) to which the guidelines are initially applied. Accordingly, trial court correctly held that an inheritance is not income but an asset, and thus cannot be included as a resource under the family code as it is now written. Mother's argument should be overruled and trial court's ruling should be affirmed.

Editor's Comment: *Wow … I certainly hope someone files a petition for review and then I really hope that the Supreme Court decides to consider this one. I have so many questions! Under the majority opinion, should there be any time limitations on the "inheritances" we are to include in the child support calculation (i.e. only ones received within the last 5 years)? How are we to convert a lump sum cash inheritance into a reasonable monthly amount? What divisor are we to use? Are we only to consider the balance of any cash inheritance at the time of trial or do we use the original principal amount regardless of how it has been spent? Will the trial court be asked to decide whether dissipation of a person's inheritance is reasonable when considering it for child support purposes? And if so, doesn't this fly in the face of our policy which allows a spouse the exclusive use and management of their separate property inheritance, precluding reimbursement or other remedy for the other spouse, even if the property is squandered? Stay tuned … (S.S.S.)*

Editor's Comment: *How is this any different from a one-time gift from grandma, a lump-sum lottery prize, or a lump-sum personal injury award (as discussed above in In Brief regarding the North Dakota case of Dupay v. Dupay)? Here, the appellate court gave some guidance to the trial court on how to handle—average over several years, etc. In the interest of full disclosure, I represented the appellant in this matter – appellee used the monies to pay down divorce debt, fund a retirement account, and start a business (that hired his new wife at a higher salary than she had currently been making), and he wanted to decrease child support for his mentally disabled children. Why shouldn't inheritance be considered when it has to do with support of the children, irrelevant that it is separate property, after the divorce everything is separate property. (G.L.S.)*

A SPOUSE'S INCARCERATION PRIOR TO A CHILD SUPPORT AWARD CANNOT EVIDENCE VOLUNTARY UNEMPLOYMENT OR UNDEREMPLOYMENT.

¶10-4-41. ***In re Marriage of Lassmann,*** 2010 WL 3377773 (Tex. App.—Corpus Christi 2010, no pet h.) (mem. op.) (8/25/10).

Facts: Husband and wife married in 2004. During marriage, husband adopted wife's daughter from a prior relationship. In January of 2009, husband was jailed for assaulting wife. The assault triggered husband's parole (for offenses committed prior to the marriage) to be revoked. Husband is not scheduled to be released from prison until 2013. Wife filed for divorce in June of 2009. At trial, wife asked the court to base child support on husband's wage prior to incarceration - $26 per hour. Wife argued that husband's assault and subsequent jailing constituted voluntary underemployment. Husband's attorney argued that child support should be based on the federal minimum wage because husband had no income-earning ability in jail. The trial court based the divorce on the $26 per hour wage. Husband appealed.

Holding: Affirmed, but no finding of voluntary underemployment.

Opinion: To find intentional underemployment or unemployment, there must evidence that a parent reduced his income for the purpose of decreasing his child support payment. Numerous appellate courts have discussed whether incarceration may be characterized as voluntary unemployment, but none have decided the issue.

Here, the assault occurred prior to the child support order. Therefore, the assault cannot be considered evidence of husband's intentional underemployment or unemployment for the purpose of decreasing the child support award. The trial court erred in considering voluntary unemployment a factor in determining husband's child support obligation. However, the trial court considered other evidence upon which they could have based the child support award.

Dissent: The majority correctly ruled on the trial court's error in finding husband voluntarily unemployed. However, the majority should not have considered husband's earning potential and there was no other evidence before the trial court.

The majority relied on two cases for the proposition that child support could be based on husband's earning potential. Both cases are distinguishable because they involved awards based on actual income, not merely earning potential. Net resources should be based on income actually being received. Earning potential may only be considered when an obligor is intentionally unemployed or underemployed. Husband was not intentionally unemployed or underemployed. Thus, his earning potential should not have been considered. The only evidence of husband's income at trial was husband's earning potential. As a result, child support should have been based on the federal minimum wage.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RETROACTIVE CHILD SUPPORT, DEVIATING FROM THE STATUTORY GUIDELINES, AND DENYING ATTORNEY'S FEES WHEN FATHER SHOWED EVIDENCE OF PROVIDING PRIOR SUPPORT, ANTICIPATED TRAVEL EXPENSES, AND MOTHER'S NON-COOPERATION IN PROVIDING FATHER ACCESS TO CHILD.

¶10-4-42. ***In re J.M.C.,*** 2010 WL 2889671 (Tex. App.—Fort Worth 2010, no pet h.) (mem. op.) (7/22/10).

Facts: Mother and father never married. Mother lives in Romania. Child was conceived in the U.S. in 2002 and born in Romania in 2003. Father voluntarily provided financial assistance to mother during her pregnancy and for the first year after child's birth. Father visited mother and child in Romania in 2004. Father did

not see child from 2004 to 2008. Mother filed a Petition to Adjudicate Parentage in 2008, requesting retroactive child support. Father denied paternity. The trial court ordered DNA testing, which revealed that father was child's biological father. The trial court held a bench trial on mother's petition in 2009. The trial court designated mother and father as joint managing conservators, ordered father to pay $500 per month, denied retroactive support, and denied attorney's fees. Mother appeals: (i) denial of retroactive support; (ii) deviation from the child support guidelines; and (iii) denial of attorney's fees.

Holding: Affirmed

Opinion: The trial court has discretion in deciding whether to award retroactive child support. In ordering retroactive child support, the trial court must consider whether the obligor has provided actual support before the filing of the action. Father showed at trial that he provided nearly $10,000 of support in 2003 and 2004. Father testified that he ceased providing support because mother refused to bring child to the U.S. and mother failed to provide phone numbers to confirm that child was still living with her. Although there was conflicting testimony, the trial court might have resolved the conflict in favor of father because it anticipated that mother would not cooperate with facilitating future visits between father and child. There was at least some evidence of substantive and probative character to support the trial court's denial of retroactive support. Thus, the trial court did not abuse its discretion in denying retroactive support.

The trial court also did not abuse its discretion by ordering father to pay $500 per month in support, even though the statutory guidelines would have established support at approximately $950. The court may deviate from the statutory guidelines if the evidence rebuts the presumption that application of the guidelines is in the best interest of the child and justifies a variance from the guidelines. The court may consider the cost of travel in order to exercise possession of and access to a child. The trial court specifically relied on father's expenses to visit child as the reason to vary from the guidelines. There is evidence to support the trial court's deviation from the guidelines based on father's travel expenses. The trial court also could have considered mother's financial resources, which included almost $1,000 of unreported monthly income and joint ownership of an industrial investment property worth approximately $140,000 euros.

In light of the trial court's denial of retroactive child support and finding that mother is unlikely to comply with the court's order to bring child to Texas, the trial court did not abuse its discretion in denying mother's attorney's fees.

SAPCR

CHILD SUPPORT ENFORCEMENT

AGREEMENT BETWEEN MOTHER AND FATHER TO DISCONTINUE FATHER'S CHILD SUPPORT WAS INSUFFICIENT TO TRANSFER TEXAS' CHILD SUPPORT ENFORCEMENT JURISDICTION TO LOUISIANA.

¶10-4-43. ***In re T.L.,*** -- S.W.3d --, 2010 WL 2301329 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (6/10/10).

Facts: In 1992, following divorce of mother and father, Texas trial court ordered father to pay child support. Afterward, father moved to Louisiana with one child. Mother remained in Texas with the couple's other two children. In July 1998, a Louisiana court issued an order recognizing the 1992 Texas support order, and confirmed father's outstanding arrears. In 1999, when the youngest of the couple's three children turned eighteen years of age, pursuant to an agreement between father and mother, mother executed a written request to the Texas OAG to stop the agency's support-collection services and to close the child support case. The OAG

forwarded the written request to Louisiana. On September 8, 1999, the Louisiana court issued an order "amending" its July 1998 judgment by suspending father's child support obligation and canceling the arrears owed mother.

In February, 2007, OAG filed a motion to enforce the 1992 Texas support order in Texas trial court alleging father was $46,956 in arrears. In January 2008, trial court granted father's motion to dismiss. Afterward, OAG requested a motion for a new trial and a motion to confirm arrears. In response, trial court confirmed father's arrears. Correspondingly, OAG issued an administrative writ garnishing father's income. Father then motioned for a new trial, which trial court granted. In light of trial court's granting of a new trial, father requested OAG withdraw the administrative writ. The OAG refused, contending that an administrative writ did not require trial court's approval. Upon father's motion, trial court ordered OAG to withdraw the administrative writ and sanctioned OAG for refusing to withdraw the writ.

In 2009, trial commenced. Afterward, trial court found that Louisiana had exclusive jurisdiction to modify the 1992 Texas support order because mother and father had mutually agreed to modify support, therefore father owed no arrearage. OAG appealed arguing trial court erred in denying OAG's motion to confirm arrears, and in assessing sanctions against OAG.

Holding: Reversed and remanded

Opinion: A party seeking to modify a child support order from another state must establish jurisdiction pursuant to TFC 156.408(a), the Texas Uniform Interstate Family Support Act ("UIFSA"). Under TFC 155.002–0.003, TFC 159.205–0.206, once a court having jurisdiction enters a support decree, that tribunal is the only one entitled to modify the decree so long as that tribunal retains continuing, exclusive jurisdiction under the UIFSA. Additionally, under TFC 159.611, only if the issuing state no longer has a sufficient interest in the modification of its order may the responding state assume the power to modify it. Finally, under TFC 159.205(a)–(c), a Texas court can lose its continuing exclusive jurisdiction if: (1) father, and mother, and any children who were the subject of the support order ceased to reside in Texas; or (2) father and mother each filed a consent "with the tribunal" of Texas reflecting their consent to another state's assuming jurisdiction to modify the a Texas support order; or (3) the order was modified by a tribunal of another state under a law substantially similar TFC 159.

Here, Texas did not lose its continuing, exclusive jurisdiction to enforce the 1992 Texas support order under any of the three TFC 159.205 provisions. First, Texas did not lose its continuing, exclusive jurisdiction because the record clearly reflects that mother and at least one child continued to live in Texas following the 1992 support order. Additionally, Texas did not lose its continuing, exclusive jurisdiction because neither mother nor father filed a document with a Texas court reflecting the consent of each to allow Louisiana to assume jurisdiction to modify the 1992 support order. Even if Mother filed a written request with OAG to stop the agency's support-collection services and to close the child support case, the OAG is a "support enforcement agency" and is not a Texas tribunal as defined under TFC 159. Moreover, this court necessarily rejects father's argument that his and mother's agreement to settle the arrears transferred Texas' jurisdiction to Louisiana. Jurisdiction may only be transferred pursuant to TFC 159.

Finally, Texas did not lose its continuing, exclusive jurisdiction to enforce the 1992 Texas support order because both the Texas and Louisiana versions of the UIFSA in effect in 1999 provided that either state could modify an out-of-state support order if (1) all parties, including the child, do not live in the issuing state, the petitioner-a nonresident-seeks modification, and the respondent is subject to the personal jurisdiction of the modifying state; or (2) all parties file written consent for another tribunal to assume jurisdiction to modify. Here, mother and at least one child lived in Texas, the issuing state, following the support order. Furthermore, as discussed above, there is no evidence of written consent having been filed by both Mother and Father for Louisiana to assume jurisdiction.

Because the statutory requirements for Texas to lose continuing, exclusive jurisdiction were not satisfied, any purported modification of the 1992 Texas support order by the September 1999 Louisiana court order is void. Accordingly, because Texas had jurisdiction to enforce the 1992 support order, trial court erred in denying OAG's motion to confirm arrears.

Under TFC 158.501–502(a), an OAG's administrative writ of withholding may be issued at any time until the obligor pays all authorized child support fees. The administrative writ statute specifically allows a writ to issue at any time until all child support arrears are paid, its application is not limited to uncontested child support arrears. Here, just because father contested arrearages without a determination in his favor, does not invalidate the administrative writ statute. Accordingly, trial court abused its discretion in assessing sanctions against OAG for issuing the withholding writs.

TRIAL COURT ERRED IN CONCLUDING THAT OAG VIOLATED TFC 157.312(G) BY ATTACHING A CHILD-SUPPORT LIEN AGAINST SELF-EMPLOYED FATHER'S BANK ACCOUNT WHERE HE DEPOSITED DISPOSABLE EARNINGS.

¶10-4-44. ***In re C.A.T.***, -- S.W.3d --, 2010 WL 2491013 (Tex. App.—Dallas 2010, no pet. h.) (6/22/10).

Facts: In January 2006, trial court rendered judgment against father for child support arrears and required father to make $500 per month payments. Nearly two years later, OAG placed a lien against father's bank account. Father filed a motion to dissolve the notice of lien arguing that the OAG violated TFC 157.312(g). At a hearing on father's motion, father testified he was self-employed and that the levied account was his only checking account, which he used to pay personal bills and business related expenses. Following the hearing, trial court found that father was a self-employed carpenter and that father's "employer" was father. Trial court further found that the funds seized were proceeds from father's work as a self-employed carpenter and that as a result of OAG's seizure, father lacked funds to pay his child support arrearage and his business suppliers. Trial court determined that OAG should have known that father's account contained only the disposable earnings of father from his carpentry business when it seized the funds. Based on its factual findings, trial court concluded that no child-support lien attached to the money seized from father's account; that OAG's actions violated TFC 157.312(g); and OAG "knew or should have known TFC 157.312(g) prohibited the attachment of father's disposable earnings.

Holding: Reversed and remanded

Opinion: Whether section TFC 157.312(g) prohibits service of a notice of child-support lien on a financial institution in which a self-employed obligor deposits disposable earnings is an issue of first impression in Texas requiring this court to construe the legislature's intent.

Under TFC 157.312(a), (d), a party may enforce a child-support order by lien for all amounts of child support due including interest, regardless of whether the amounts have been adjudicated or otherwise determined. Additionally, under TFC 157.317(a)(1), a child-support lien attaches to all nonexempt real and personal property of the obligor on or after the date the lien notice or abstract of judgment is filed. TFC 157.312(g), however, prohibits directing child-support liens to an employer to attach to the disposable earnings of an obligor paid by the employer. An Employer's withholding obligation of an employee's disposable earnings are properly governed under the provisions of TFC 158.

TFC 101.012 defines "employer" to mean "a person, corporation, partnership, workers' compensation insurance carrier, governmental entity ... or any other entity that pays or owes earnings to an individual." An "employee" is commonly defined as one employed by another and usually for wages. In contrast, someone who is "self-employed" earns income directly from one's own business, trade, or profession, not as a specified salary or wages from an employer. Similarly, TFC 154.065(a) defines "self-employment income" to include benefits allocated to an individual from a business or undertaking in the form of a proprietorship, partnership,

joint venture, close corporation, agency, or independent contractor. Thus, by definition, an individual who works for himself is not employed by another. Similarly, the employer pays wages, while the self-employed individual allocates earnings from the business he directs himself. This distinction makes a difference in comparing the lien provisions of chapter 157 with the withholding obligations of employers covered by chapter 158.

By the express language of TFC 157.312(g), when a child-support lien is directed to a self-employed obligor's personal bank account, the lien is not directed to an "employer" for purposes of attachment. Nor does the lien attach to the disposable earnings of the obligor paid or owed by an employer. Rather, the lien attaches to the disposable earnings allocated by the obligor directly from his own business and subject to his control. Given the plain language of the statute, this court concludes that TFC 157.312(g) does not prohibit service of a child-support lien on the financial institution in which an obligor deposits all earnings and from which the obligor pays all expenses, both personal and business.

Here, father's evidence showed he used one, non-segregated account for all purposes. He offered no evidence of whether he established a separate entity for business purposes, whether he ever paid himself a salary or wage, or whether he believed he "owed" himself any money as earnings from his self-employment. Because self-employed father in this case cannot be both an employer and employee-obligor under the family code, trial court's finding that father's employer was father is not supported by legally sufficient evidence. Consequently, the trial court erred when it concluded (1) no child-support lien attached to the funds in father's bank account; (2) the OAG violated section 157.312(g); (3) self-employed persons are entitled to the protection of section 157.312(g); and (4) the OAG knew or should have known that attaching a lien to Father's disposable earnings was prohibited by section 157.312(g).

CONTEMPT ORDERS ARE VOID WHERE RELATOR WAS PREVIOUSLY RELEASED FROM THE OBLIGATION FOR WHICH CONTEMPT ORDERS ARE SOUGHT.

¶10-4-45. ***In re Stinson,*** 2010 WL 3341468 (Tex. App.—Tyler 2010, orig. proceeding) (memo op.) (8/25/10).

Facts: A trial court order from September 2009 required relator to pay $0 after September 2009. The Attorney General filed a motion for enforcement finding relator in contempt for not paying $165 in October, November, and December 2009. The trial court found relator in contempt, ordered her confined, suspended her sentence, and placed her on community supervision. Relator seeks a writ of habeas corpus alleging that she is illegally restrained.

Holding: Petition granted; Relator released from community supervision.

Opinion: A motion for enforcement must identify the provision of the order allegedly violated. The motion here specifically stated that relator had no child support obligation after September 2009. The enforcement order also must state the provisions of the order for which enforcement has been requested, the acts or omissions that are the subject of the order, and the manner of noncompliance. Here, the trial court found violations of a support obligation that it had previously released. Accordingly, the contempt order, and the commitment and community supervision orders founded on it, are void.

SAPCR

MODIFICATION

TRIAL COURT MAY CONSIDER EVIDENCE OF MILITARY DEPLOYMENT AS A FACTOR IN DETERMINING WHETHER CIRCUMSTANCES OF CHILDREN HAVE MATERIALLY AND SUBSTANTIALLY CHANGED.

¶10-4-46. ***In re L.L.***, 2010 WL 2403579 (Tex. App.—San Antonio 2010, no pet. h.) (mem. op.) (6/16/10).

Facts: Mother and father divorced in 2002. In 2007, mother filed a petition to modify conservatorship seeking to be appointed as the person with the right to designate the primary residence the couple's two children, LL and TL. Mother alleged that the circumstances of the children had materially and substantially changed since the date of trial court's previous conservatorship order.

Evidence presented at trial revealed that immediately after the divorce, LL lived with paternal grandparents in Ohio while the TL lived with mother. Beginning in October 2002, both children lived with father in Kentucky, but TL spent the summer of 2003 with mother. Upon father's military deployment in 2003, both children resided with paternal grandparents in Ohio. Later, both children moved to Texas to live with mother. From June 2004 to October 2004, the children lived with father in Kentucky. Father was again deployed in late 2004; children's maternal grandmother and aunt moved to Kentucky to care for the children. In the middle of 2005, both children moved to Texas to live with mother. Following trial, trial court modified conservatorship designating mother as the person with the right to designate the primary residence of TL, and allowed father to continue as the person with the right to designate the primary residence LL.

Father appealed arguing that trial court abused its discretion in modifying his right to designate the primary residence of TL because the trial court penalized him for his military service.

Holding: Affirmed in part, reversed in part

Opinion: Some of the factors a trial court can consider in evaluating whether circumstances have materially and substantially changed include the remarriage of one of the parties, *repeated changes in the child's home environment*, and poisoning of a child's mind by one of the parties. Under recently amended TFC 156.101, a trial court is precluded from modifying a conservatorship order based on voluntary relinquishment when the relinquishment is due to military deployment. However, the amended statute does not preclude a trial court from considering evidence of a parent's military deployment in determining whether circumstances have materially and substantially changed. Instead, the amended statute provides only that military deployment does not "by itself" constitute a material and substantial change of circumstances.

Here, evidence was presented regarding father's three deployments since the 2002 divorce; however, nothing in the record suggests that the trial court placed greater emphasis on this evidence than other evidence of changes in circumstances. Moreover, the record indicates that the children had changed residences approximately nine times in five years. As previously noted, repeated changes in the child's home environment is a factor a trial court may consider in finding a material and substantial change in circumstances. Accordingly, trial court did not abuse its discretion in finding that a material and substantial change in circumstances had occurred since the 2002 divorce decree.

TRIAL COURT ERRED BY DISMISSING APPELLANT'S MODIFICATION SUIT BECAUSE, AS AN INTERVENOR IN AN ORIGINAL SAPCR, SHE WAS A "PARTY AFFECTED" BY TRIAL COURTS ORDER UNDER TFC 156.002.

¶10-4-47. ***In re S.A.M.,*** -- S.W.3d --, 2010 WL 3230621 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (8/17/10).

Facts: After mother of three children at issue died, TDFPS filed a SAPCR. TDFPS did not name appellant in the original suit and appellant was not related to the children. However, after a hearing, trial court found that appellant enjoyed substantial past contact with the children and granted appellant leave to intervene in the original suit. In a final agreed order, trial court appointed children's paternal uncle as the children's sole managing conservator and two maternal aunts as possessory conservators. Trial court did not grant appellant conservatorship, but gave appellant the right to talk to the children daily by telephone, and the court prohibited other parties from interfering with that telephone access.

Afterward, appellant filed suit asking trial court to remove paternal uncle as sole managing conservator and to appoint her in his place. Trial concluded, among other things, that appellant lacked standing under TFC 156.002(a) and as a result dismissed appellant's petition for lack of subject matter jurisdiction.

Holding: Reversed and remanded

Opinion: Under TFC 156.002(a), modification suits may be brought by "a party affected by an order." To date no COA has addressed the precise meaning of "party" or "affected" within the context of TFC 156.002(a). The Seventh and Eleventh Courts of Appeal, however, have addressed the term "party" under a predecessor statute containing the same language. These courts have held that to be a "party," a person must be a party to the order the person seeks to modify. According to Black's Law Dictionary, the term "party" has two possible meanings in the legal context: (1) "one who takes part in a transaction," and (2) "one by or against whom a lawsuit is brought." Moreover, once a person intervenes in a suit, the person becomes a party for all purposes and continues to be a party unless the trial court strikes the intervention. Accordingly, the plain meaning of the word "party" requires that the person have been a party to the order that the person seeks to modify.

Here, trial court found that appellant had enjoyed substantial past contact with the children and granted appellant leave to intervene in the original suit. Trial court's order states that appellant made an appearance, that she was a party to the order, and that she agreed to the terms of the order. Moreover, appellant signed the agreed order as an intervenor. Under the unambiguous language of the order, appellant was a party to the order.

To have standing under TFC 156.002(a) to seek modification, appellant must not only be a party to trial court's order, but also must be "affected" by the order. Although "affected" is not defined in the statute, the term is not ambiguous. The plain and ordinary meaning of "affect," as defined by Webster's Dictionary, is to "produce an effect upon." Here, under trial court's order, appellant receives important rights regarding telephone access to the children, and she is burdened with the duty of giving notice if her personal contact information changes. Without question, trial court's order produced an effect upon appellant. Accordingly, under the plain meaning of TFC 156.002(a), appellant is a "party affected" by trial court's order, and therefore she has standing to seek modification of the order. Trial court erred by dismissing appellant's suit for lack of standing.

Editor's Comment: *This opinion offers one more example of how the concept of "standing" continues to evolve. If future standing is a concern, lawyers should carefully evaluate the situation before giving away valuable rights to any third person in final orders. I wonder if this result could have been avoided if the original parties had merely agreed to provide Susan telephone access in the final order without the necessity of naming her as an Intervenor? In hindsight, maybe that would have been a better strategic choice. (S.S.S.)*

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO APPLY TFC 153.131(A)'S "PARENTAL PRESUMPTION" TO STEPMOTHER'S MODIFICATION SUIT.

¶10-4-48. ***In re R.T.K.,*** -- S.W.3d --, 2010 WL 3409658 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (8/31/10).

Facts: Child at issue was born in January 1998. Due to the volatile nature of mother and father's relationship, the couple separated three months after child's birth. In October 1999, trial court granted father's request for a divorce finding mother engaged in cruel treatment of father. By agreement of the parties, trial court appointed father as child's sole managing conservator and named mother as a possessory conservator. In 2001, father married stepmother. Child continued to live with father and stepmother and, over the next several years, child bonded with stepmother and came to regard her as his mom.

For the next few years, mother did not take much of an active role in child's early life. She frequently failed to exercise her visitation rights and, when she did, she reportedly spent much of that time on the computer, leaving grandmother to care for the child. At one point, mother had not seen child in more than two years.

In 2006, father suddenly died of a heart attack. Afterward, stepmother filed a suit to modify the previous custody order, asking trial court to designate her child's managing conservator, either solely or jointly with mother. Mother counterclaimed, also seeking modification of the earlier custody order, but asking to be named child's sole managing conservator. Following trial, trial court appointed stepmother as child's sole managing conservator, and mother as possessory conservator. In support, trial court issued findings of fact and conclusions of law in which it found that removing stepmother as a managing conservator would significantly impair child's physical health and emotional development. Mother appealed.

Holding: Affirmed

Opinion: Mother argued that trial court did not properly give effect to the "parental presumption" contained in TFC 153.131(a). Mother's argument turns on her claim that the trial court was required, but failed, to apply the rebuttable statutory presumption that a child's interests would be best served by appointment of a parent as sole managing conservator. Mother's assumption is flawed, however, because the presumption found in TFC 153.131(a) does not apply when, as here, a party seeks only to modify a previous custody order.

The differences between an original conservatorship suit and a subsequent modification action are more than procedural or semantic. Each proceeding is governed by a distinct statutory scheme designed to address different policy concerns. The provisions of TFC 153 control suits for original custody. TFC 153 contains a "parental presumption" codifying the common-law notion that a child's best interest is usually served by awarding custody to a parent. After custody has been established by court order, however, any subsequent proceeding seeking to alter that arrangement is a "modification suit" governed by TFC 156.

Both chapters share one overriding concern: the best interest of the child. However, a modification suit introduces additional policy concerns not present in an original custody action, such as stability for the child and the need to prevent constant litigation in child custody cases. Those concerns apparently prompted the legislature to remove any statutory presumption that would favor a parent over a nonparent in a custody-modification proceeding.

Here, initial custody of child was established by the final divorce decree, dated October 20, 1999, that appointed father as sole managing conservator and mother as possessory conservator. Thus, the parental presumption would not properly apply to any subsequent proceeding that, as here, sought only to alter that initial custody determination. Mother argued, however, that at trial, stepmother offered to assume a higher burden

of introducing evidence to overcome the parental presumption. Mother argues that stepmother "stipulated" to the erroneous presumption or, alternatively, tried the issue "by consent," and she urges us to reverse in the absence of evidence overcoming the statutory presumption.

This court concludes, however, that trial court did not abuse its discretion by appointing stepmother as sole managing conservator. This conclusion applies regardless of whether the evidence is assessed in light of section 153.131(a)'s parental presumption or under section 156.101, which imposes no parental presumption. Because both routes lead to the same destination on this record, this court need not and decide whether a party could hypothetically waive the child's right to have his best interests decided under the correct legal standard.

TFC 153.131(a) provides that unless the court finds that appointment of the parent would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed as the child's sole managing conservator. TFC 131(a) on its face, does not necessarily require proof of a parent's blameworthy conduct as a prerequisite to appointment of a nonparent as managing conservator. Instead, the statute plainly addresses only the effect of a parent's appointment on the child, as opposed to the myriad of circumstances, such as the parent's conduct-that might have produced that result. This court must presume the Legislature did not intend to always require proof of specific acts of wrongdoing by a parent simply to overcome the statutory presumption.

To be clear, evidence of a parent's blameworthy prior behavior, by itself, may be sufficient to overcome the presumption in some cases. However, such proof may not be necessary in all cases if the record otherwise demonstrates that appointment of the parent would produce the statutorily required negative effect on the child.

Here, the record contains ample evidence supporting trial court's bottom-line conclusion that removing child from stepmother's home would significantly impair child's emotional development. Mother has been unable or unwilling to provide the stable home environment crucial to child's emotional development. Mother was incarcerated during his very early life, and ceased to have joint custody of him when he was only one year old. Mother was absent from child's life for more than two years, and repeatedly failed to exercise her rights to visit with, much less actively participate in child's early life.

In mother's absence, stepmother has provided a steady influence in child's life since she came to live with him in 2001. Over the years, they have bonded. He now refers to stepmother as his "mom," and has repeatedly expressed his desire to live with her, rather than with mother. With stepmother's help, child has begun to cope with the loss of his father. Stepmother has arranged for child to receive counseling, and he reportedly has begun to "open up" about his father's death. Child enjoys strong support from his community and, according to several witnesses stepmother has provided a child a safe and stable environment.

A review of the evidence under the TFC 156, the correct legal standard, leads to the same outcome. Under TFC 156.101(a), a party seeking modification of a previous custody order must prove, in relevant part, that (1) modification would be in the child's best interest, and (2) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the previous custody order.

Here, as to the first element, the evidence highlighted above adequately demonstrates that modification of the earlier custody order, so as to appoint stepmother as sole managing conservator, would be in the child's best interests because it would help promote child's need for stability. As to the second element, trial court specifically found, that father, who was child's sole managing conservator, suddenly died on June 23, 2006. The death of a child's parent-and sole managing conservator-represents a "material and substantial change" supporting modification of a custody order.

In conclusion, under either legal standard, the record sufficiently supports trial court's decision to appoint stepmother, rather than mother, as child's sole managing conservator. Accordingly, trial court did not abuse its discretion.

SAPCR

TERMINATION OF PARENTAL RIGHTS

TESTIMONY AT TRIAL SUPPORTED JURY'S FINDING THAT TERMINATION OF MOTHER'S PARENTAL RIGHTS IN HER TWO CHILDREN WAS IN THE CHILDREN'S BEST INTEREST.

¶10-4-49. ***In re T.M.J.***, -- S.W.3d --, 2010 WL 2542938 (Tex. App.—Beaumont 2010, no pet. h.) (6/24/10).

Facts: Mother appeals from trial court's termination of her parental rights in her two children. Testimony at trial revealed that mother and children lived in a small one bedroom apartment with husband. (Husband was not the biological father of children.) At trial, a CPS representative testified that the apartment was unkempt with maggot infested food on the kitchen counter and numerous used condoms lying on the floor in the bedroom. Mother testified that she had engaged in sexual relations with her current stepfather twenty to thirty times, and that she accepted money from him for sex on one occasion. Mother also testified that during an argument, husband threatened her with a knife and that police responded to her call for assistance and arrested husband. Mother's counselor stated that mother expressed little concern about the children, and that he felt mother's priorities were her work and her husband. When asked whether she agreed that termination was in her children's best interest, mother responded, "[s]ort of."

A CPS investigator testified that mother worked at night and slept during the day leaving the children at home unsupervised. The CPS investigator testified further that on one occasion, police officers responded to a call that children were outside and unsupervised at three o'clock in the morning, and that one child had on only a t-shirt and no underclothes or pants. The foregoing facts and numerous other instances compelled CPS to remove children from mother's care. Afterward CPS created a family service plan requiring mother to visit and maintain contact with the children, attend counseling sessions and a twelve-step program, however, mother failed to complete any of these tasks.

Following a jury trial, trial court terminated mother's parental rights in the two children. Mother appealed arguing that the evidence was legally and factually insufficient to support the jury's finding that termination was in the best interest of the children.

Holding: Trial court affirmed.

Opinion: Before parental rights may be involuntarily terminated, a trial court must find by clear and convincing evidence: (1) that the parent committed one of the statutory grounds found in TFC 161.001(1), and (2) that termination is in the children's best interest. In determining whether termination is in a child's best interest, the Supreme Court has set forth a non-exhaustive list of several factors. *See* *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex.1976).

Here, trial court heard evidence that children were outside and unsupervised at mother's apartment complex on multiple occasions, sometimes in the middle of the night and partially nude. Trial court additionally heard evidence that the children were very dirty, and that one of the child's diapers was heavily soiled. The record also contains evidence that mother's counselor believed mother expressed little concern about children, lacked interest in them, lacked motivation to help herself or the children and that, at one time, mother expressed the belief that the children should not be returned to her. Accordingly, the evidence was legally and

factually sufficient for trial court to form a firm belief that it was in the best interest of the children for mother's parental rights to be terminated.

TRIAL COURT'S FINDING THAT TERMINATION OF INCARCERATED FATHER'S PARENTAL RIGHTS WAS IN THE BEST INTEREST OF THE CHILDREN SUPPORTED BY LEGALLY AND FACTUALLY SUFFICIENT EVIDENCE.

¶10-4-50. ***In re C.P.V.Y.***, -- S.W.3d --, 2010 WL 2542869 (Tex. App.—Beaumont 2010, no pet. h.) (6/24/10).

Facts: CPS filed a petition to terminate father's parental rights in his three children. Because father was incarcerated in Kentucky for felony possession of a firearm, trial court granted father a writ of habeas corpus ad testificandum so that he could be physically present for trial. However, trial court lacked the authority to compel father's attendance, and the federal government refused to honor trial court's order. Consequently, father attended and participated in the trial telephonically. On the second day of trial, father was unable to attend the trial telephonically due to a "lockdown" at father's prison. Father's counsel orally requested a continuance. Trial court denied counsel's request. Following trial, trial court found that termination of father's parental rights was in the best interest of the children. Father appealed on several grounds including, (1) the evidence supporting trial court's findings was legally and factually insufficient; (2) trial court violated his constitutional rights by terminating his parental rights when he was unable to be physically present during the trial; and (3) trial court violated his constitutional rights by denying his motion to continue the trial until he could participate.

Holding: Affirmed

Opinion: TFC 161.001(1)(Q) provides that the court may order termination of the parent-child relationship if the court finds by clear and convincing evidence; (1) that the parent has knowingly engaged in criminal conduct that has resulted in the parent's conviction; and (2) confinement or imprisonment results in the parent's inability to care for the child for not less than two years from the date of filing the petition.

Here, father knowingly engaged in criminal conduct that had led to his conviction, imprisonment, and resultant inability to care for the children for not less than two years from the date the petition was filed. Father does not challenge the legal or factual sufficiency of the evidence supporting the trial court's finding under TFC 161.001(1)(Q); therefore, he has waived any complaint concerning the sufficiency of the evidence to support that finding. Accordingly, trial court's termination order is supported by sufficient evidence

In considering the need for an inmate's physical presence at trial, a court may evaluate a number of factors including: the cost and inconvenience of transporting the prisoner to the courtroom; the security risk the prisoner presents to the court and public; whether the prisoner's claims are substantial; whether the matter's resolution can reasonably be delayed until the prisoner's release; whether the prisoner can and will offer admissible, noncumulative testimony that, cannot be effectively presented by deposition, telephone, or some other means; whether the prisoner's presence is important in judging his demeanor and credibility; whether the trial is to the court or a jury; and the prisoner's probability of success on the merits.

Here, when father's counsel objected to father's unavailability by telephone on the second day of trial, counsel did not offer any evidence or argument concerning the above factors, nor did he explain why father's presence was necessary. Father's counsel did not argue at trial or on appeal that father's inability to participate by telephone left counsel unable to adequately represent father. Accordingly, father's argument that trial court violated his rights under the U.S. and Texas Constitutions are overruled.

To assess what constitutional process is due, courts weigh three factors: (1) the private interest affected by the proceeding or official action; (2) the countervailing governmental interest supporting use of the challenged proceeding; and (3) the risk of an erroneous deprivation of that interest due to the procedures used.

Here, father's motion for continuance did not explain why father's telephonic presence on the second day of trial was necessary, nor did father's counsel explain when father might again be available to participate in the proceedings by telephone. Father participated telephonically on the first day of trial without objection, and he testified as a witness. Additionally, although father was unable to participate telephonically on the second day of trial due to a lockdown at the prison, father's counsel was present to mount a defense on father's behalf, and father's counsel cross-examined the witnesses and presented argument. Accordingly, trial court did not abuse its discretion by denying father's motion for continuance, nor did it violate father's rights to due process and due course of law.

★★★ TEXAS SUPREME COURT ★★★

TRIAL COURT IMPROPERLY DENIED INDIGENT FATHER AN APPELLATE RECORD ON THE BASIS THAT HE FAILED TO TIMELY FILE A STATEMENT OF APPELLATE POINTS UNDER TFC 263.405.

¶10-4-51. ***In re B.G.***, -- S.W.3d --, 2010 WL 2636050 (Tex. 2010) (7/2/10).

Facts: On July 18, 2006, trial court signed an order terminating father's parental rights in his four children. On July 20, trial court appointed counsel for father's appeal. Twenty-two days later, on August 9, trial court appointed new counsel for father following original counsel's request for withdrawal. On September 11, father's counsel filed a statement of appellate points, forty days after the deadline provided under TFC 263.405.

Following a hearing, trial court determined that because father had not filed a statement of appellate points by the statutory deadline, an appellate record was not needed to decide any issue presented for the appeal. Trial court additionally found that father presented no substantial question for appellate review. Father appealed arguing that by precluding his appeal, TFC 263.405 violated his due process.

Holding: Reversed and remanded to the intermediate appellate court.

Opinion: TFC 263.405(a) provides that an appeal from a judgment in a parental rights termination case brought by the government is to be accelerated under the Texas Rules of Appellate Procedure. Additionally, TFC 263.405(i) provides that an appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of appellate points or in a statement combined with a motion for new trial. TFC 263.405(b) requires the parent-appellant to file the statement of appellate points within fifteen days from the date the trial court signs the termination judgment.

Under TFC 107.013(a), an indigent parent is entitled to appointed counsel in parental rights termination cases. This statutory right embodies the right to effective counsel. This court has previously held that an indigent parent's counsel's failure to timely file the required statement of appellate points, cannot, consistent with due process, preclude an appeal complaining of ineffective assistance of counsel. Similarly, due process does not allow an indigent parent's failure to timely file a statement of appellate points to be the basis for denying the parent an appellate record.

Here, trial court determined that father presented no substantial question for appellate review, not because the issues he presented in his statement of appellate points were frivolous, but because the statement was not timely filed. On this basis, trial court determined no appellate record was necessary. It is unclear whether father was represented by counsel in the fifteen days he had to file a statement of appellate points. Nevertheless, whether father failed to file the statement of appellate points because he had no counsel or ineffective counsel, he is still entitled to complain on appeal of ineffective assistance of counsel.

Father has not asserted ineffective assistance of counsel, but given that the assertion would fail as a matter of law without an appellate record, he need not do so to complain that TFC 263.405 has operated to deprive him of an appeal. That deprivation is a denial of due process even if it results indirectly from the lack of an appellate record. The unavailability of a record to show whether an indigent parent was denied effective assistance of counsel and precluded from appeal without regard to the merits of his arguments serves no legitimate interest. Accordingly, trial court must prepare an appellate record and the case must be remanded to the appropriate appellate court for review.

Editor's Comment: *The courts continue to whittle away at the onerous requirements of TFC 263.405, which frequently deny a meaningful appeal to parents who have had their parental rights terminated. Hopefully, the Legislature will remove the onerous requirements in the next session. (J.A.V.)*

EVIDENCE PRESENTED AT TRIAL WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT TRIAL COURT'S TERMINATION OF FATHER'S PARENTAL RIGHTS.

¶10-4-52. ***In re M.P.***, -- S.W.3d --, 2010 WL 2841857 (Tex. App.—San Antonio 2010, no pet. h.) (7/21/10).

Facts: Following trial, trial court terminated father's parental rights based upon findings that (1) father failed to complete his court-ordered family service plan; (2) father failed to regularly visit the child during the pendency of the case; (3) father was unable to provide the child with a safe environment; and (4) termination was in the child's best interest. Father appealed challenging the sufficiency of the evidence.

Holding: Affirmed

Opinion: At trial, trial court heard evidence that father was unable to complete portions of the court ordered family plan because he was using Methadone. Although father ultimately stopped using Methadone, father had continued to fail drug tests. Trial court also heard evidence that father had not completed a parenting course, an empowerment course, or a drug assessment. Furthermore, father only visited the child four times over a ten-month period. Further evidence revealed that father, who lived with his mother, had been told his current living situation with his mother, who herself was a convicted felon, was not an appropriate environment and he needed to find an alternative place to live. Father did not find an alternative place to live. Moreover, father continued a relationship with the child's mother while she was using heroin and while he used heroin with her. Finally, father failed to prove at trial that he had acquired and maintained steady employment. Accordingly the evidence presented at trial was legally and factually sufficient to support at least one of the statutory grounds of termination found by trial court.

ADOPTION

GREAT-GRANDPARENTS FAILED TO MEET THE STANDING REQUIREMENTS UNDER TFC 102.006(C) BECAUSE THEY FILED AN ORIGINAL ADOPTION PETITION MORE THAN 90 DAYS AFTER TRIAL COURT TERMINATED PARENT'S PARENTAL RIGHTS.

¶10-4-53. ***In re M.G.***, 2010 WL 2776566 (Tex. App.—Corpus Christi 2010, no pet. h.) (mem. op.) (7/15/10).

Facts: On May 28, 2008, trial court terminated the parental rights of parents in their two children and appointed TDFPS as permanent managing conservators. On June 4, 2008, the children's maternal great-grandparents filed an original SAPCR requesting trial court to appoint them as temporary joint managing conservators. Following a hearing, trial court found great-grandparents lacked standing to sue because they failed

to establish that the children's present circumstances would impair their physical health or emotional development. Afterward, trial court dismissed great-grandparents' petition without prejudice.

On November 21, 2008, great-grandparents filed a petition entitled "Amended Petition for Adoption of Children," seeking to gain managing conservatorship and adopt the children. On February 18, 2009, trial court dismissed great-grandparents' petition stating that great-grandparents lacked standing under TFC 102.005 because as "great-grandparents," they are excluded from filing for standing under TFC 102.006(c). Great-grandparents appealed arguing that trial court erred in dismissing their petition because their standing under TFC 102.005 is not limited by TFC 102.006.

Holding: Affirmed

Opinion: Under TFC 102.005, an original suit requesting adoption may be filed by an adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so. However, under TFC 102.006(a), relatives of terminated parents generally do not have standing to file an original suit concerning the child. But under TFC 102.006(c), the limitations imposed by TFC 102.006(a) do not apply to a grandparent of the child if the grandparent files an original suit or a modification requesting managing conservatorship of the child no more than 90 days after the parental relationship is terminated.

Here, trial court terminated the parental rights of the children's parents on May 28, 2008. Afterward, great-grandparents filed an original SAPCR on June 4, 2008, seeking joint managing conservatorship of the children. Although great-grandparents filed this suit well within the ninety-day statutory period set out in TFC 102.006(c), trial court dismissed the suit without prejudice on September 19, 2008. Almost six months later, on November 21, 2008, great-grandparents filed a petition in which they sought, for the first time, to adopt their great-grandchildren. Through this petition, great-grandparents sought to establish standing to file suit to adopt, rather than serve as managing conservators of their great-grandchildren. Although entitled "Amended Petition for Adoption of Children," great-grandparents' petition actually constitutes an original petition, rather than an "amended" petition. Accordingly, even assuming without deciding that great-grandparents meet the "grandparents" requirement under TFC 102.006(c), they filed their original petition almost six months after the termination of the parent-child relationship, well outside of the ninety-day time period set forth in TFC 102.006(c). As a result great-grandparents lacked standing to initiate a suit for adoption by filing after the ninetieth day after the date of parental termination.

FAMILY VIOLENCE

EVIDENCE OF SON-IN-LAW'S ALLEGED THREATS AGAINST MOTHER-IN-LAW CONCERNING POTENTIAL FUTURE VIOLENCE SUFFICIENT TO SUPPORT TRIAL COURT'S ISSUANCE OF A FAMILY VIOLENCE PROTECTIVE ORDER.

¶10-4-54. ***Wilkerson v. Wilkerson***, -- S.W.3d --, 2010 WL 2221791 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (6/03/10).

Facts: Father and mother were married for sixteen years and had four children before father passed away in 2003. In 2004, mother sued son-in-law for breach of fiduciary duty related to the family-owned golf course business. In 2009, mother filed an application for a family violence protective order against son-in-law alleging that he, in "an attempt to coerce" her into abandoning her underlying lawsuit, had made threats of bodily injury and death against her four children

At trial, mother testified that shortly after father's death, son-in-law came to mother's house to discuss mother's future plans. Mother testified that she stated to son-in-law, she intended to learn about the family's golf course business. Son-in-law became furious at mother's plans. Son-in-law instructed mother to follow him outside where he brandished a gun and took several cans from a refrigerator. Son-in-law then told mother that he was "a good shot" and that he "never missed." Afterward, son-in-law tossed the cans on the ground and shot each can with the gun. Son-in-law then displayed additional ammunition to mother and told her "See, I always have plenty of ammunition." Son-in-law hotly contested mother's testimony. Both parties testified, however, that mother and the four children spent the Christmas holiday at son-in-law's home following the alleged "can shooting" event.

Mother testified further that she began working at the family-owned golf course to become involved in the business, gather financial information, and audit the family-owned business entities. Mother testified that on at least nine separate occasions, son-in-law threatened her. Mother testified further, that on one particular occasion, son-in-law stated that if mother got in his way, "something would happen" to her. After son-in-law refused mother access to the business's financial information, mother filed the underlying breach of fiduciary duty action.

Mother testified that after she filed suit against son-in-law, son-in-law's friend (friend) visited mother on several occasions. On the second occasion, mother testified that after she filed a TRO to obtain the financial records, friend offered her 4 million dollars to never return to the golf course. Mother also testified that friend told her, "You do realize anything can happen to you? You can disappear and nobody will know. We can take your children hunting and there can be an accident and nobody will know what happened." Mother testified further, that in 2009, following a breakdown in mediation, the friend arrived at her house one evening intoxicated, with a gun, looking for her. Although, mother was not home, mother's son answered the door. Son's testimony corroborated friend's visit.

Following friend's alleged 2009 visit to mother's home, she initiated motion for protective order. After trial, trial court entered protective order prohibiting son-in-law, or anyone acting on his behalf, from committing family violence on or going near mother or her four children. Son-in-law appealed challenging the sufficiency of the evidence supporting the trial court's order.

Holding: Trial court's family violence protective order affirmed

Opinion: Under TFC 85.001(b), a trial court shall render a family violence protective order "if the court finds that family violence has occurred and is likely to occur in the future." TFC 71.004(1) defines "family violence" as "an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or *that is a threat that reasonably places the member in fear of* ***imminent*** *physical harm, bodily injury, assault, or sexual assault.* Here, the issue is whether the evidence of threats by son-in-law or friend placed mother or children "in fear of imminent physical harm" and whether these threats, if made would reoccur in the future.

Regarding son-in-law's 2003 statements, "I never miss" and "[s]ee, I always have plenty of ammunition" at mother's home, trial court, as the trier of fact, was entitled to believe mother's testimony and find that son-in-law threatened to shoot her with a gun if she pursued involvement in the family businesses. Furthermore, mother's testimony regarding alleged threats by son-in-law to exclude her from the office, could be considered non-physical threats and standing alone, might be fairly considered as "non-violent" statements. However, trial court could have considered the alleged threats at the family-owned golf course in context and determined, based upon the evidence of son-in-law's threats with a gun in 2003, that these additional threats reasonably placed mother in fear of imminent physical harm, bodily injury, and assault.

Regarding threats friend made against mother, trial court was presented with sufficient evidence to conclude that beginning in 2004 through 2009 friend continued to communicate with mother regarding the lawsuit on behalf of and with the knowledge of father. In sum, based upon the history of the threats made by son-

in-law and by friend on son-in-law's behalf, spanning from 2003 to 2009, that there is legally sufficient evidence to support the trial court's finding that family violence is likely to occur in the future as the underlying lawsuit proceeds.

Dissent: Here, under TFC 71.004(1) and 81.001, the focus should be on evidence of any threats made by son-in-law or anyone acting on his behalf that "reasonably" placed mother and her children "in fear of ***imminent*** physical harm, bodily injury, [or] assault" and the likelihood that such threats, if made, would reoccur in the future. The Texas Court of Criminal Appeals has construed the term "imminent" to refer to "a present threat, not a future threat of bodily injury or death." "Imminent" means "ready to take place, near at hand, impending, hanging threateningly over one's head, menacingly near."

Although in 2003, son-in-law expressed his anger about mother's intention to learn about the family business by making menacing statements and shooting at cans, there is no evidence that son-in-law pointed his firearm at mother or said anything to imply that she or her children were in imminent danger. Mother's testimony is diminished by the fact the she and her children spent Christmas day at son-in law's home following his alleged threats with a gun. Furthermore, nothing in mother's testimony regarding son-in-law's repeated threats against her at the golf course established that anything son-in-law said to her demonstrated that he reasonably placed her in fear of imminent physical harm. In fact, mother's own testimony establishes that she returned to the golf course on numerous occasions.

Moreover, regarding any perceived threats made by friend, such as "You do realize anything can happen to you?…" concerned future, not imminent physical harm. Additionally, mother's son testified that although friend arrived at mother's home in 2009 intoxicated and carrying a gun, son testified further that he did not feel threatened by friend or that friend would hurt him. It is also notable, that between 2004 and 2009, mother never called law enforcement authorities for emergency assistance.

In sum there is no evidence that son-in-law, either acting alone or through friend, did anything to reasonably place mother or her children in fear of imminent physical harm, bodily injury, or assault. At most, to the extent that the actions of son-in-law and friend may be interpreted as threats, they concerned threats of future harm, not "present" and "immediate" harm. Accordingly, appellate court should hold that the evidence is legally insufficient to support issuance of a family violence protective order against son-in-law.

TRIAL COURT ABUSED ITS DISCRETION BY ENTERING A PROTECTIVE ORDER WHICH PROHIBITED CONTACT BETWEEN FATHER AND DAUGHTER WHEN ONLY ONE INCIDENT OF SEXUAL ABUSE WAS ALLEGED AND NO EVIDENCE OF FUTURE HARM WAS ALLEGED.

¶10-4-55. ***In re I.E.W.,*** 2010 WL 3418276 (Tex. App.—Corpus Christi 2010, no pet. h.) (mem. op.) (8/27/10).

Facts: Mother and Father never married. Daughter was born in 2003. Father acknowledged paternity. Mother and father consented to final decree in 2005 establishing father's parentage, awarding mother exclusive right to establish daughter's residence and granting father visitation "as mutually agreed." In 2007, father filed 2 petitions to modify, requesting standard visitation and appointment as joint managing conservator. The trial court granted both of father's requests. After daughter's second visit with father, mother filed a report of child abuse with the police and had daughter interviewed and physically examined at a child victim center. Daughter initially said that nobody had touched her private parts, but then changed her answer and said that father touched her private parts with his finger. The examining nurse testified that findings were "nonspecific," and "could be consistent with sexual assault or sexual abuse, but [are] also seen in nonabused children." Father denied ever touching daughter in an inappropriate way. Prosecuting attorneys sought charges against father for indecency with a child, a second-degree felony. Mother applied for a family violence protective order. The court set hearing for December 2007 and entered a temporary ex parte protective order that prohibited father from having any contact with daughter. At the December hearing, on the advice

of his criminal attorney, father consented to a temporary protective order that tracked the language of section 85.022 (requirements of order applying to person who committed family violence). In 2008, a grand jury declined to indict father on the charge. Father filed a motion to vacate the temporary protective order, which the trial court denied after a full evidentiary hearing. The trial court entered findings of fact and conclusions of law. Father appealed.

Holding: Reverse denial of motion and render judgment vacating temporary protective order. Affirm in part and reverse in part trial court's findings of fact and conclusions of law.

Opinion: The Court of Appeals first analyzed *sua sponte* whether the appeal was moot. An expired temporary protective order is generally considered moot. The protective order expired in December 2009, before father's appeal. However, the "collateral consequences" exception to the mootness doctrine applies to a protective order containing a finding of family violence because such a finding carries a social stigma, as well as legal consequences, even after the order has expired. Thus, father's appeal is not moot.

The trial court wrongly concluded that father's consent to the protective order "estopped [him] from challenging the [order's] validity." Father's consent to the 2007 order does not imply consent to the 2008 finding that he committed family violence. Furthermore, judicial estoppel is inapplicable because the order did not contain a "deliberate, clear, [or] unequivocal" admission that family violence occurred or was likely to occur in the future. Finally, judicial admissions do not apply to contradictory positions taken in the same proceeding. Thus, the Court of Appeals reviewed each of father's arguments.

Father first argues that the court erred in denying his motion because there was no evidence of events occurring since the order that would justify continuation of the order. A protective order under section 85.022 may not be issued unless the trial court finds that family violence (1) has occurred and (2) is likely to occur in the future. If there is a "continuing need" for the protective order, the order will remain in effect until the statutory two-year period expires. The December 2007 order does not contain any finding of family violence. The 2008 order made no finding as to a likelihood of future violence. However, the fact that no family violence has occurred since the order does not necessarily mean that there is no continuing need for the order. The trial court could have found that the order itself was the reason that no violence occurred or that the order was necessary to protect daughter from potential violence. Thus, father's first issue was overruled.

Father next argues that the original protective order was overly broad. An order that denies or restricts possession or access of a child to a parent may not exceed those that are required to protect the best interests of the child. The order here far exceeded what was in daughter's best interest. The trial court approved an agreed order that prohibited contact between father and daughter even though only one instance of family violence had been alleged, and no facts had been alleged to support a finding of a likelihood of future violence. The trial court could have ordered supervised visitation. Consequently, all findings of fact and conclusions of law alleging to be in the best interest of daughter are reversed. Furthermore, the trial court may not have had authority to approve the protective order because it prohibited father from doing or refraining from doing an act under section 85.022, in direct violation of section 85.005(b). The Court of Appeals sustained father's second issue, finding that the trial court abused its discretion in denying father's motion.

The findings of fact stating that father committed family violence against and engaged in sexual conduct with daughter are reviewed for legal and factual sufficiency. Here, the evidence that daughter made an outcry of one instance of sexual abuse to three people constitutes more than a mere scintilla. Father did not establish conclusively that the outcry statements were false, coached, or coerced. Therefore, father's argument that there was no evidence of family violence or sexual conduct is overruled.

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A FINAL PROTECTIVE ORDER WHEN THERE WAS NO EVIDENCE OF FAMILY VIOLENCE OR SEXUAL ABUSE OTHER

THAN SPANKING ON THE CHILDREN'S BUTTOCKS, USING A WOODEN KITCHEN SPOON AND WITHOUT EXHIBITING ANGER.

¶10-4-56. ***In re Wean,*** 2010 WL 3431708 (Tex. App.—Austin 2010, orig. proceeding) (mem. op.) (8/31/10).

Facts: Mother and father have three children: J.W., a son born in 2004; J.M.W., a son born in 2006; and M.E.W., a daughter born in 2008. Mother filed petition for divorce in 2009. Prior to mediation, mother accused father of excessive corporal punishment of the children and sexual abuse against M.E.W. CPS commenced an investigation in April 2010. An application for protective order was filed. After hearings, the trial court signed a final protective order finding that father committed family violence against his children and that family violence is likely to occur in the future. Father filed a petition for writ of mandamus to compel the trial court to vacate its final protective order.

Holding: Mandamus granted

Opinion: The trial court abused its discretion in entering a protective order against father because the evidence did not show family violence or sexual abuse. Neither the SANE exam results, the interviews of J.W. and J.M.W., nor the CPS investigator's testimony support the finding of family violence. The nurse practitioner that conducted the SANE exam on M.E.W. concluded that sexual assault was neither proved nor disproved. Interviews with J.W. and J.M.W. do not present evidence of anything more than parental discipline in the form of corporal punishment and provide no evidence regarding sexual abuse of M.E.W. The CPS investigator stated that M.E.W. was being "groomed" for sexual behavior and that corporal punishment is not appropriate for children under 6 years old. However, the CPS officer provided no evidence of said grooming, and ignored testimony that mother also used corporal punishment. It is abundantly clear that the CPS investigator based her opinions solely on mother's allegations.

The fact that a child is spanked, on its own, does not evidence family violence. For corporal punishment to constitute family violence, there must be some evidence—such as severity of injury, type of instrument used, or mental or emotional state of the perpetrator—that would transcend a reasonable level of parental discretion regarding discipline. The photographs presented at trial are not indicative of family violence. Father's religious beliefs are not evidence of family violence. Eyewitness testimony did not support a finding of family violence. Even mother conceded that father never got angry or lost his temper when he spanked. Mother's testimony as to the severity of father's spankings was not supported with other testimony or evidence. The only reasonable decision was to make a finding of no family violence under TFC 85.001. Consequently, it was an abuse of discretion for the trial court to issue its final protective order.

miscellaneous

HUSBAND'S FRAUDULENT BUSINESS TRANSFERS PRIOR TO DIVORCE WERE "INTRINSIC IN NATURE" AND, THEREFORE, NOT THE PROPER SUBJECT FOR A BILL OF REVIEW.

¶10-4-57. ***Sanchez v. Sanchez***, 2010 WL 3249905 (Tex. App.—San Antonio 2010, no pet. h.) (mem. op.) (6/02/10).

Facts: During their marriage, husband and wife founded several music companies including the two at issue. In May 2002, wife filed for divorce. During the divorce proceeding, wife was represented by her attorney and a business appraiser. Following trial, trial court awarded one music company to wife and the other music company to husband. After the divorce became final, wife discovered that before divorce, husband fraudulently transferred valuable song catalogues from wife's music company to his music company. In 2007, wife

filed bill of review with the trial court claiming husband's fraud adversely impacted her music company, and that she would not have entered into the divorce agreement had she known of husband's fraud. Trial court denied wife's bill of review determining that the bill of review contained a matter of intrinsic fraud.

Holding: Trial court's denial of bill of review affirmed

Opinion: Fraud in relation to attacks on final judgments is either extrinsic or intrinsic. Only extrinsic fraud will support a bill of review. Extrinsic fraud is fraud that denied a party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted. Extrinsic fraud includes wrongful conduct practiced outside of the trial such as keeping a party away from court, or making false promises of compromise that affects the manner in which the judgment is procured.

By contrast, intrinsic fraud relates to the merits of the issues that were presented and presumably were or should have been settled in the former action. Intrinsic fraud includes such matters as fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed. It is well settled that the "misrepresentation of the value of known community assets, without more, does not constitute extrinsic fraud."

Here, wife, aided by her lawyer and appraiser, should have known about the financial conditions of both music companies because she was afforded the opportunity to conduct an independent investigation of the assets and their values prior to the entry of the final divorce decree. Every relevant piece of information regarding the true value of the businesses was available to wife during the original divorce proceeding through normal discovery procedures. Accordingly, husband's fraud was intrinsic in nature and not the proper subject for a bill of review. As a result, trial court did not abuse its discretion in denying wife's petition for bill of review.

Wife urged the court to reverse trial court's judgment in light of *Morrison v. Rathmell*, 650 S.W.2d 145 (Tex. App.—Tyler 1983, writ dism'd). In *Morrison*, the wife alleged her former husband had grossly undervalued his two businesses during their property settlement negotiations and forced her into the agreement by threatening to abandon the businesses and render them worthless if she persisted in her attempts to have the businesses appraised. The court concluded that the wife raised a genuine issue of material fact that the husband induced wife to agree to the property settlement by false representations and coercion that prevented the wife from fully presenting her case in the divorce.

Morrison, however, is factually distinguishable from this case. Here, wife was afforded the opportunity to conduct an independent investigation of the couples' assets and their values prior to the entry of the final divorce decree. Absent from the record is any evidence that husband coerced wife to enter into their divorce agreement. Unlike *Morrison*, wife was not prevented from fully exercising all her rights to determine and receive what she considered a fair value for her interest by an adverse party.

Accordingly, because husband's fraud was intrinsic in nature and not the proper subject for a bill of review, trial court did not abuse its discretion in denying wife's petition for bill of review.

Editor's Comment: *Can you say malpractice? (S.S.S.)*

Editor's Comment: *It's no surprise that the court wasn't persuaded by Wife's reliance on the 1984 Morrison v. Rathmell decision. The Morrison case seems to be cited in every bill of review case that deals with a couple's business interests and allegations of fraudulent acts within the business entity, but is rarely followed since the Morrison case turned on very specific facts where the husband essentially barred the wife from any attempts to investigate or value the business. (R.T.)*

TRIAL COURT ERRED BY DOMESTICATING A FOREIGN DIVORCE DECREE UNDER THE TEXAS UNIFORM FOREIGN COUNTRY MONEY-JUDGMENTS RECOGNITION ACT.

¶10-4-58. ***Sanchez v. Palau***, -- S.W.3d --, 2010 WL 2306126 (Tex. App.— Houston [1st Dist.] 2010, no pet. h.) (6/10/10).

Facts: Husband and wife married in Mexico in 1950. In 2003, wife filed for divorce in Mexico. The Mexican court denied wife's request for divorce. Afterward, wife relocated to Austin, Texas and filed for divorce in Travis County trial court. Parallel to the proceedings in Travis County, husband filed for divorce in Mexico. On April 29, 2008, while proceedings in Travis County court were ongoing, Mexican court granted husband's request for divorce. The Mexican court did not order any division of property nor did it assign any payment of cost and expenses.

On April 30, 2008, husband filed the Mexican divorce decree with the Harris County trial court for domestication pursuant to TCPRC 36.001 – 36.008, the Texas Uniform Foreign Country Money-Judgments Recognition Act (UFCMJRA). On August 20, 2008, Harris County trial court domesticated husband's Mexican divorce decree. Wife appealed arguing that the Mexican divorce judgment was not subject to domestication pursuant to the UFCMJRA.

Holding: Trial court's domestication of Mexican divorce decree vacated and dismissed

Opinion: Under TCPRC 36.0041 – 42, a judgment creditor may seek recognition of a foreign country judgment in Texas by filing a final, authenticated copy of the foreign judgment in the judgment debtor's county of residence. TCPRC 36.002 defines a foreign country judgment as a judgment of a foreign country granting or denying a sum of money other than a judgment for support in a matrimonial or family matter. The UFCMJRA expressly states that it applies only to "a judgment of a foreign country granting or denying a sum of money," and it further excludes "a judgment for support in a matrimonial or family matter. Here, husband's 2008 Mexican divorce judgment is in fact a matrimonial or family matter, and the decree neither grants nor denies a sum of money. Thus the plain language of the UFCMJRA does not authorize Harris County trial court to recognize the 2008 Mexican divorce decree.

TRIAL COURT ABUSED ITS DISCRETION BY AWARDING WIFE ATTORNEYS FEES FOR HER MOTION TO ENTER QUALIFIED DOMESTIC RELATIONS ORDERS BEFORE TFC 9.106 BECAME EFFECTIVE.

¶10-4-59. ***In re Marriage of Spahn***, 2010 WL 2432089 (Tex. App.—Waco 2010, no pet. h.) (mem. op.) (6/16/10).

Facts: On July 1, 2009, based on an agreed final divorce decree, trial court entered a qualified domestic relations order awarding wife attorney's fees. Additionally, trial court denied husband's motion for nunc pro tunc to correct the date of the parties' marriage in the final divorce decree. Husband appealed arguing trial court abused its discretion in awarding wife attorney's fees and that trial court erred in denying his motion for a judgment nunc pro tunc.

Holding: Affirmed as modified

Opinion: TFC 9.106, effective as of September 1, 2009, authorizes the award of attorney's fees in proceedings regarding post-decree qualified domestic relations orders. Prior to this time, the only section that granted the authority for a trial court to award attorney's fees was TFC 9.014. However, TFC 9.014 is specifically limited to proceedings related to a request for clarification or enforcement of a divorce decree. TFC 9.014 does not include awards for attorney's fees related to the entry of a qualified domestic relations order. Here,

wife's pleading before the trial court was a motion to sign qualified domestic relations orders. Wife did not make a request for clarification or enforcement of the divorce decree contained within those pleadings. Therefore, TFC 9.014 did not apply and wife has provided no other authority to support trial court's award of attorney's fees. Accordingly, trial court abused its discretion in awarding wife attorney's fees.

The denial of a motion to correct a judgment nunc pro tunc is not a final judgment and not subject to appeal. Accordingly, this court lacks subject matter jurisdiction and must dismiss husband's appeal related to trial court's denial of his motion for a judgment nunc pro tunc.

MOTHER FAILED TO PRESERVE ERROR THAT SHE WAS NOT PROPERLY NOTIFIED WHEN TRIAL COURT CONVERTED PRE-TRIAL HEARING DATE INTO A TRIAL DATE RESULTING IN DEFAULT JUDGMENT AGAINST HER.

¶10-4-60. ***In re S.G.,*** 2010 WL 2541919 (Tex. App.—Beaumont 2010, no pet. h.) (mem. op.) (6/24/10).

Facts: In July 2006, father filed petition with trial court to modify SAPCR order. Trial court issued an order setting dates and deadlines including a pre-trial conference on March 20, 2009 and a March 23, 2009 trial date. Mother failed to attend the March 20, 2009 pre-trial conference. At the pre-trial conference, the trial court struck mother's pleadings and heard the merits of father's petition to modify. Afterward, trial court granted father's motion to modify the prior SAPCR order and awarded father the right to designate the child's primary residence.

On March 23, 2009, mother filed a pro se motion to set aside the default judgment stating that her failure to appear at the pre-trial conference was the result of accident and mistake, rather than her intentional or conscious indifference. Subsequently, mother filed a motion for a new trial and second motion to set aside the default judgment. All of mother's post-judgment motions were unsworn and not accompanied by an affidavit or other evidence. Trial court denied all of mother's motions.

Mother appealed on several grounds including the trial court: (1) violated her due process rights, and (2) abused its discretion, by striking her pleadings and rendering a post-answer default judgment.

Holding: Default judgment affirmed

Opinion: Once a defendant has made an appearance in a case, defendant is entitled to notice of a trial setting as a matter of due process. Therefore, it is a denial of due process to convert a pre-trial conference into a trial setting or a default judgment hearing without notice to the defendant of that possibility. However, to preserve an issue for appeal, including constitutional error, the party must present to trial court a timely request, motion, or objection, and obtain a ruling. Here, mother failed to present her constitutional arguments to the trial court. Accordingly, her appeal on constitutional grounds was overruled.

A trial court abuses its discretion when it converts a pre-trial conference into a default judgment hearing without notice to the defendant of that possibility. The law presumes that a trial court will hear a case only after proper notice to the parties. To rebut this presumption, the objecting party has the burden to affirmatively show a lack of notice by affidavit or other competent evidence. This burden is not discharged by mere allegations in a motion for new trial, unsupported by affidavits or other competent evidence, that proper notice was not received. Here, mother failed to attach competent evidence to her post-trial motions to meet her burden of proof. Accordingly, trial court did not abuse its discretion in striking mother's pleadings and rendering default judgment.

Dissent: A trial court should not strike a party's pleadings as a sanction and render a default judgment without providing the party notice and an opportunity to be heard. Here, trial court struck appellant's pleadings and held a default judgment hearing on Friday, March 20, the date of the scheduled pre-trial conference. The

record is clear, mother had no notice and no opportunity to be heard before her pleadings were struck and a dispositive ruling was made. Mother subsequently filed a motion for new trial and two motions to set aside default judgment. In these motions, she stated that she understood the trial was set to begin on March 23. Mother adequately preserved her complaint for appeal. Accordingly, the trial court's judgment should be reversed and the case remanded for a new sanctions hearing or a new trial.

BECAUSE DIVORCE ACTION WAS NOT LIMITED OR SEVERED FROM OTHER ISSUES, TRIAL COURT PROPERLY DISMISSED WIFE'S DIVORCE SUIT FOLLOWING HER DEATH.

¶10-4-61. ***Pollard v. Pollard***, -- S.W.3d --, 2010 WL 2542286 (Tex. App.— Dallas 2010, no pet. h.) (6/25/10).

Facts: Wife filed for divorce from husband in 1992. Trial court signed a final divorce decree and husband appealed. Appellate court reversed and remanded the case back to trial court (*Pollard I*). Neither husband nor wife filed a motion for rehearing with appellate court or a petitioned for review with the Texas Supreme Court regarding the opinion in *Pollard I*. Following the remand of *Pollard I*, wife filed an amended petition for divorce asserting fault-based grounds for divorce. Husband appealed that judgment and the appellate court once again reversed and remanded (*Pollard II*).

Before the litigation proceeded on remand, wife died in October 2004. Unaware of wife's death, trial court dismissed wife's divorce suit for want of prosecution on February 23, 2005. The couple's son was appointed as wife's executor. Executor filed a notice of appearance in the trial court on September 28, 2007. Afterward, on September 12, 2008, pursuant to husband's motion, trial court vacated its February 23, 2005 order of dismissal for want of prosecution and, in light of wife's death, dismissed wife's divorce suit for want of jurisdiction.

Executor appealed arguing that trial court erred in dismissing the divorce action for lack of jurisdiction. Executor asserted that although husband did not file a notice of limitation of appeal pursuant to TRAP 40(a)(4), husband limited his first appeal by admitting in his appellate brief in *Pollard I* that he did not contest the dissolution of the marriage.

Holding: Trial decision affirmed, appeal dismissed for lack of jurisdiction

Opinion: The central issue in determination of the trial court's jurisdiction is whether wife and husband were divorced at the time of wife's death. Under TRAP 40(a)(4) (repealed Sept. 1, 1997), for an attempt to limit the scope of an appeal to be effective, the severable portion of the trial court's judgment from which the appeal is taken must be noticed and served on all other parties within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after judgment is signed. Here, because the appeal in *Pollard I* was perfected prior to September 1, 1997, former TRAP 40(a)(4) was applicable to that appeal. Accordingly, the only way husband could have limited the scope of his appeal in *Pollard I* was by filing the notice under former TRAP 40(a)(4). Because husband did not file a TRAP 40(a)(4) notice of limitation of his appeal in *Pollard I*, the appeal was not limited to the division of marital property, and statements in husband's appellate brief did not restrict this Court's jurisdiction over the trial court's judgment.

This Court recognizes that some Texas cases support the premise that an appellate court has the authority to sever and affirm a divorce and remand for re-division of the property alone. However, opinions supporting that premise are reversals explicitly affirming divorces while remanding the property divisions or other issues. Here, *Pollard I* did not affirm the divorce decree and remand the property division to the trial court. Instead, this Court reversed the trial court's judgment and remanded the entire cause for further proceedings. Therefore, husband and wife were not divorced when *Pollard I* was remanded to the trial court. After *Pollard I* remanded the divorce case to trial court for further proceedings, the case was tried before a jury and the trial court signed the second divorce decree. Husband appealed again, and this Court reversed the judgment and

remanded the cause to the trial court. Because no divorce decree had been rendered between the time of the reversal of the second decree and wife's death, husband and wife were not divorced when wife died.

Generally, when a party to a suit dies, the suit will not abate if the cause of action survives the death of that party. However, in Texas, it is well settled that a cause of action for a divorce is purely personal and that the cause of action for a divorce terminates on the death of either spouse prior to the rendition of a judgment granting a divorce. When one of the parties to a divorce action dies prior to a divorce being rendered, the proper procedural disposition is dismissal of the divorce action. Here, wife's death in October 2004, while she was still married to husband, relieved trial court of its jurisdiction over the couple's divorce action. Accordingly, the trial court properly dismissed wife's divorce suit in September 2008.

★★★ TEXAS SUPREME COURT ★★★

HUSBAND DID NOT BREACH A SECURITY AGREEMENT WITH WIFE BY CONVERTING THE AGREEMENT'S COLLATERAL, CORPORATE SHARES IN HIS COMPANIES, INTO PARTNERSHIP UNITS BECAUSE THE CONVERSION DID NOT DESTROY HIS BUSINESS INTEREST IN THE COMPANIES.

¶10-4-62. ***Grohman v. Kahlig***, -- S.W.3d --, 2010 WL 2635879 (Tex. 2010) (7/02/10).

Facts: Husband and wife divorced in 2001. As part of a settlement agreement, husband agreed to pay wife $22 million. Husband paid wife $12.5 million in cash and executed a promissory note for the remainder to be paid off in $1 million annual installments. As collateral, husband pledged a majority of stock in his two corporations that totaled 70% of the shares outstanding in each corporation. The parties entered into a security agreement providing wife a security interest in husband's stock including "all replacements, additions and substitutions therefore." The security agreement also provided that "[husband] will not sell, transfer, lease, or otherwise dispose of the collateral or any interest therein except in compliance with the release provisions herein."

In 1999, IRS issued a favorable letter ruling to husband indicating significant tax savings if husband converted his two corporations to partnerships. Afterward, husband converted each corporation to a limited partnership and exchanged the shares of corporate stock for equal units of limited partnership interest with the newly formed limited partnership. The conversions had no effect on wife's security interest other than replacing corporate stock with units of limited partnership, and husband's equity in the entities actually increased in value due to the more beneficial tax treatment.

After she discovered the conversions, wife sued husband for breach of contract alleging that the conversions breached the security agreement because husband agreed not to sell, transfer, lease or otherwise dispose of the collateral. Wife contended that husband's alleged breach accelerated his remaining debt. Wife later amended her complaint to include fraud and negligence claims. Husband counterclaimed seeking a declaratory judgment that the security agreement did not preclude him from continuing to unilaterally determine the business form under which his businesses operated. Trial court dismissed wife's tort claims for lack of evidence. However, trial court held the breach of contract claim was a fact question and submitted it to a jury. The jury found husband did not breach the security agreement and trial court entered a take-nothing judgment as to wife's claims. Additionally, trial court granted husband's declaratory relief and awarded him attorney's fees.

Wife appealed contending trial court erred by submitting the breach of contract claim to the jury and for failing to grant JNOV because she established husband's breach as a matter of law and in refusing to submit her tort claims to the jury. Appellate court affirmed trial court's take-nothing judgment on wife's tort claims

but reversed, holding the security agreement stated unambiguously that the secured collateral could only be in the form of shares of corporate stock. Thus, appellate held court held that whether husband breached the security agreement was a question of law that should not have been submitted to the jury. The San Antonio Court of Appeals affirmed in part and reversed in part finding that the submission of the issue to the jury was not harmless error because the conversion of business entities "disposed of" the collateral, and husband had indeed breached as a matter of law. Both parties petitioned for review.

Holding: Reversed and remanded

Opinion: Husband argued he did not breach the security agreement because it did not prohibit converting his corporations to limited partnerships. Contract language should be interpreted by a court as a matter of law if it can be given a certain or definite meaning. However, if the contract is ambiguous, the party's intent is a question of fact for the jury. Whether a party has breached a contract is a question of law for the court, not a question of fact for the jury, when the facts of the parties' conduct are undisputed or conclusively established. Courts must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.

Here, appellate court held that husband breached the security agreement because he destroyed the corporate stock when he converted it to units of limited partnership and thus "disposed of" the collateral. Appellate court reasoned that as a result of the conversion the shares were canceled and retired and ceased to exist. Because the shares of stock ceased to exist, appellate court held they were destroyed. But the security agreement defines the collateral more expansively than merely shares of stock. Husband breached only if the conversion of his corporations to partnerships allowed his stock and "such shares and all replacements, additions, and substitutions" to be destroyed. Husband's shares were inevitably canceled, but first they were replaced with partnership units that represented the same interest in the businesses. Husband remained the sole owner of his business interest throughout the business conversions, and at no point in the conversions was his interest in the business entities destroyed. The collateral may have changed form, but it was not destroyed. In fact, the collateral's value actually increased. Accordingly, husband did not breach the security agreement as a matter of law. Thus, trial court committed harmless error by submitting the question to the jury because the jury answered it as trial court should have.

Wife argued trial court erred in refusing to submit her fraud claims to the jury. To prove a fraud cause of action, plaintiff must establish that defendant made a material misrepresentation. Here, wife alleged husband misrepresented to her in the security agreement that he would refrain from converting his businesses from corporations to limited liability entities. However, as already discussed, the security agreement did not prohibit conversion of the business entities. Accordingly, wife has provided no evidence that husband made a material misrepresentation.

Wife argued trial court erred in refusing to submit her negligence claims to the jury. Wife claims husband breached a duty not to injure her secured interest in the collateral. The nature of an injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone. Here, wife's action for breach of the security agreement was in contract alone. Thus, the trial court was correct to refuse submission of the tort claims to the jury.

HUSBAND'S COULD NOT ASSERT THE NONEXISTENCE OF A COMMON-LAW MARRIAGE BECAUSE IT CONSTITUTED A COLLATERAL ATTACK ON TRIAL COURT'S AGREED JUDGMENT.

¶10-4-63. ***Johnson v. Ventling***, 2010 WL 2784040 (Tex. App.—Corpus Christi 2010, no pet. h.) (mem. op.) (7/15/10).

Facts: Husband and wife never formally married but cohabitated from 1982 to 1995. On the advice of his counsel, husband stipulated that a common-law marriage existed, filed for divorce, and requested trial court to divide the community property. In the final decree, husband agreed to pay alimony to wife in monthly installments for 84 months. The decree included an acceleration clause in the event of husband's default. The decree also provided that husband's alimony obligation was contractual in nature and not imposed by order of the court.

In 1997, wife filed an enforcement action against husband alleging husband failed to make alimony payments and seeking acceleration of husband's alimony obligation. In response husband argued that the parties had in fact never been married and contended that wife had deceived him into believing that they were in a common-law marriage. Additionally, husband asked trial court to vacate the 1995 decree. In 2001, trial court found that because the parties were not formally married, the 1995 agreed judgment remained interlocutory. Accordingly, trial court vacated the 1995 decree "pursuant to the Court's plenary power." Wife appealed and this court concluded that the 1995 decree was a final divorce judgment, therefore trial court lacked jurisdiction to vacate the order. This court further concluded that the decree was not void and not subject to collateral attack.

In 2007, wife again initiated enforcement action against husband seeking acceleration of his alimony obligation. In response husband asserted various affirmative defenses including defenses of fraud, accident, mistake, estoppel, illegality, res judicata, statute of limitations, failure of consideration, and statute of frauds. In 2009, trial court rendered judgment in favor of husband finding that among other things, the 1995 judicial order imposing payment of alimony was void because alimony requires the existence of a marriage. Wife appealed.

Holding: Reversed and remanded

Opinion: Wife argued that this court's 2004 decision is the "law of the case" and that trial court's decision contradicts the law of the case. Under the "law of the case" doctrine, questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. By narrowing the issues in successive stages of the litigation, the doctrine is intended to achieve uniformity of decision as well as judicial economy and efficiency. Here, this court concluded in 2004 that the 1995 decree was a final divorce judgment, was not void and could not be collaterally attacked. Accordingly, that decision is the "law of the case" and governs this case throughout its subsequent stages. The 2004 decision precludes this court from reconsidering the issue.

Wife argued husband's affirmative defenses to her enforcement action amounted to an impermissible collateral attack on the 1995 decree. An assumed obligation for spousal support is properly characterized as a contractual duty having whatever legal force the law of contracts will give to it. When an agreement for the payment of alimony is executed by the parties and incorporated into the judgment of divorce, it is binding on the parties and is interpreted under general contract law. As with any other contract, absent consent of the parties, the provisions of a contractual alimony agreement will not be modified or set aside except for fraud, accident or mutual mistake of fact. Generally, a judgment rendered by consent has the same force as a judgment entered after protracted litigation. Thus, in suits to enforce agreed judgments, parties may not raise contractual defenses because such defenses constitute impermissible collateral attacks on the prior judgments.

Here, husband asserted that "the non-existence of a marriage prevents a party from filing a motion to enforce contractual alimony because there is no division of a marital estate to enforce." However, this court's 2004 opinion compels the conclusion that contractual defense are now unavailable to husband because the instant proceeding is a collateral attack on the 1995 decree. However, the fact that both parties now claim that they were never married is immaterial. Husband's original petition for divorce asserted that the parties "have a common law marriage" and the final decree dissolved that purported marriage under terms consented to by both parties with advice of counsel. Both parties signed the final decree, acknowledging that they "approved and consented to" the terms "as to both form and substance." Neither party appealed the decree, which was a final divorce judgment. Regardless of whether the parties now deny that they were ever married, the 1995 decree clearly implied that they were and that a common-law marriage was the "relationship" between them that was being terminated.

Just as trial court in 2001 lacked the plenary power to vacate the 1995 decree, trial court in 2009 was without the authority to refuse to enforce the decree's alimony provisions based on husband's contractual defenses. However, a final agreed judgment may be attacked in a collateral proceeding if it is shown that the consent given to the judgment was the result of extrinsic fraud, accident, or mutual mistake of fact. Trial court failed to determine these facts in 2001 and in 2009. Thus, on remand, trial court must determine whether wife fraudulently induced husband to agree to the terms of the 1995 decree, or whether husband's affirmative defenses of accident or mutual mistake of fact are meritorious.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANTS' MOTION OF DISCLOSURE UNDER TFC 261.201.

¶10-4-64. ***S.C.S. v. TDFPS***, 2010 WL 2889664 (Tex. App.—Fort Worth 2010, no pet. h.) (mem. op.) (7/22/10).

Facts: Father, a self-employed family physician, and his fiancé, a self-employed, board-certified nurse practitioner (hereinafter referred to as appellants), filed separate motions for disclosure of information from a CPS investigation. The CPS investigation concerned allegations of sexual abuse of father's daughter and fiancé's five-year-old son by appellants, as well as allegations that fiancé negligently supervised her son. CPS determined the allegations of abuse and negligent supervision by appellants to be "ruled out."

At the hearing, appellants testified that they sought the release of confidential information to determine whether criminal action, civil action, or both should be taken against the person making these "false reports." Both testified that if the allegations became public, it would damage their medical practices. Appellants also stated they believed the release of the information was essential to the administration of justice and was not likely to endanger anyone involved. Following the hearing, trial court conducted an in camera review of the CPS records and denied both motions. Additionally, trial court found that disclosure of the report and the identity of the person making report was not essential to the administration of justice. On appeal, appellants argued that trial court (1) erred by not finding the disclosure of CPS records essential to the administration of justice and, thereby, (2) abused its discretion by denying their motions.

Holding: Affirmed

Opinion: TFC 261.201(a) designates the following information as confidential:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation [of alleged abuse or neglect].

TFC 261.201(b) provides that a court may order the disclosure of confidential information if (1) a motion has been filed with the court requesting the release of the information; (2) a notice of hearing has been served on all parties; and (3) "after hearing and an in camera review of the requested information, the court determines that the disclosure of the requested information is … essential to the administration of justice." The exception allowing the trial court to disclose confidential information under section 261.201(b) is discretionary. If after a hearing, the court determines that the disclosure of the information is essential to the administration of justice and there is no danger to the child or another person, a court may order the disclosure at its discretion.

Appellants contend that disclosure is essential to determine if civil or criminal action should be taken against the person who made these allegedly "false reports." However, appellants point to no case law or statute providing that dismissed or "ruled out" complaints of child abuse are automatically deemed false and without merit. Moreover, the family code merely requires that suspected, not confirmed, child abuse be reported.

Citing *Frost v. State*, 2 S.W.3d 625, 631 (Tex.App.-Houston [14th Dist.] 1999, pet. ref'd), appellants argue that this information should be disclosed because this is a false report, making a false report is a crime, and "CPS does not want to be used as a tool for false and vindictive actions." In *Frost*, CPS conducted an investigation and concluded the report to be false. The person accused of making a false report in *Frost* ultimately faced criminal prosecution. However, record here does not support appellants' contention that this case involves a false report. CPS conducted an investigation and, unlike in *Frost*, evidently determined that a basis for the report existed because the record is devoid of evidence of pending criminal prosecution.

Here, after holding a hearing and conducting an in camera review of the confidential information, as required by TFC 261.201(b) trial court made a finding of fact that "[d]isclosure of the report and the identity of the person making the report is not essential to the administration of justice." Based on the record, and the materials from the CPS investigation, trial court could have reasonably determined that the disclosure of the CPS records was not essential to the administration of justice. Accordingly, trial court did not abused its discretion in denying appellants's motion for disclosure of the CPS records under TFC 261.201.

***PRO SE* FATHER'S APPELLATE BRIEF INSUFFICIENT TO SUPPORT ARGUMENT ON APPEAL BECAUSE IT CONTAINED NO CITATIONS TO RECORD OR AUTHORITY.**

¶10-4-65. ***In re Y.C.F.,*** -- S.W.3d --, 2010 WL 3313452 (Tex. App.—El Paso 2010, no pet. h.) (8/24/10).

Facts: In 2004, trial court entered an order establishing a parent-child relationship with respect to father and child. Trial court's order additionally set conservatorship and father's child support obligation. Following unsuccessful motions for new trial, bill of exception, and bill of review, father appealed.

Holding: Affirmed

Opinion: A litigant proceeding *pro se* must comply with all applicable procedural rules. Otherwise, *pro se* litigants would be granted an unfair advantage over litigants represented by counsel. Moreover, a *pro se* litigant must properly present his case on appeal. TRAP 38.1(i) requires that an appellant's brief contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. Nothing is presented for review when the appellate issue is unsupported by argument or lacks citation to the record or legal authority.

Here, father failed to provide record references and proper citations to authority. As a result, father presented no argument or explanation in support of his contentions. Accordingly, trial court's judgment is affirmed.

TRIAL COURT PROPERLY GRANTED APPELLEE'S NO-EVIDENCE SUMMARY JUDGMENT MOTION BECAUSE APPELLANT FAILED TO RESPOND TO THE MOTION BY THE STATUTORY DEADLINE.

¶10-4-66. ***Long v. Yurrick*, --** S.W.3d ---, 2010 WL 3370984 (Tex. App.—Austin 2010, no pet. h.) (8/25/10).

Facts: Appellant and appellee were involved in a domestic relationship that did not end well and left in its wake disputes regarding ownership of various assets. Appellant sued appellee under various claims including breach of contract, breach of fiduciary duties, unjust enrichment, and intentional infliction of emotional distress. After these claims had been pending almost three years appellee filed a no-evidence summary-judgment motion challenging whether appellant's evidence supported appellant's claims. Appellee's certificate of service reflects that appellee served the motion on appellant by certified mail on September 3, 2009.

On October 28, 2009, trial court set a hearing date on appellee's motion for November 18, 2009. Appellant failed to respond to appellee's motion by the November 12, 2009 deadline. On November 17, 2009, the day before the scheduled summary judgment hearing, appellee faxed a letter to trial court pointing out that appellant had neither responded nor objected to appellee's motion by the response deadline. Later that day, trial court scheduled a conference call "hearing" between the parties. Appellee urged that appellant's failure to file a response made it mandatory for trial court to grant her no-evidence summary-judgment motion.

Appellant did not dispute that he had not filed a response nor objected to appellee's motion by the deadline. Instead, appellant attempted to justify his failure to file a response by asserting that there had been a trial setting in the case scheduled on the same day as the summary-judgment hearing, but at an earlier hour. Relying on those notices and those settings, appellant reasoned that it was unnecessary to file a response to appellee's motion because trial would have started and concluded before trial court heard the summary judgment. After the hearing, trial court granted appelee's no-evidence summary judgment motion. Appellant appealed.

Holding: Affirmed

Opinion: Appellant argued that he did not receive proper notice of the November 17, 2009 summary-judgment hearing and that this asserted failure violated TRCP 166a. Under TRCP 166a, except on leave of court, the adverse party to a summary judgment motion, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. TRCP 166a(i) provides that the trial court must grant the motion unless the adverse party produces summary judgment evidence raising a genuine issue of material fact.

Here, assuming without deciding trial court's decision to grant appellee's motion one day early violated TRCP 166a, appellant has not shown any harm from the error. TRCP 166a(i) placed the burden on appellant to file and serve a response not later than seven days prior to the summary judgment hearing. He undisputedly did not do so nor has he preserved any complaint that he should have been entitled to do so after that deadline. In short, as matters stood as of the November 17, 2009 conference or hearing, the trial court was already obligated to grant appellee's motion. Appellant failed to show how the result would have been any different if the district court had only waited until the following day to rule. Accordingly, trial court did not err in granting appellee's summary judgment motion.

Appellant argued lack of timely notice deprived him of his procedural due-process rights "to be heard." Due process requires, at a minimum, notice and an opportunity to be heard at a meaningful time and in a meaningful manner. The reason that notice of hearing or submission of the motion is mandatory is because the hearing date determines the time for response to the motion.

Here, as of the trial court's November 17, 2009 ruling, appellant had twenty days from the date of the trial court's hearing notice to file a response to a no-evidence motion with which he had been served over seventy days earlier. Appellant had a reasonable opportunity to respond to appellee's motion and was not deprived of notice and an opportunity to be heard at a meaningful time and in a meaningful manner. The record reflects that any injury to appellant resulted not from the lack of a reasonable opportunity to respond, but from a calculated decision not to respond in the view that a response was unnecessary. Accordingly, appellant was not deprived of his procedural due process rights.

ALTHOUGH TRIAL COURT DECLARED WIFE TO BE GENERALLY LEGALLY INCAPACITATED, UNDER TEXAS PROBATE CODE 675, SHE RETAINED CAPACITY TO HIRE HER ATTORNEY.

¶10-4-67. ***Daves v. Daniels***, -- S.W.3d --, 2010 WL 3370759 (Tex. App.—Austin 2010, no pet. h.) (8/25/10).

Facts: Trial court declared wife to be legally incapacitated in 2000 and signed an order appointing her father as her guardian. Attorney (defendant in this case) represented wife's father in that proceeding. In 2005, trial court removed wife's father as guardian because he failed to file statutorily required periodic reports. In June 2007, wife hired attorney to sue husband to enforce the couple's divorce decree. Aware that trial court had previously found wife to be legally incapacitated and that trial court removed wife's father as guardian, husband filed a motion for attorney to demonstrate his authority to represent wife and file suit on her behalf. Husband also sought sanctions against attorney for attorney's fees husband incurred as a result of the proceeding.

Following trial, trial court found that wife had been declared incapacitated in 2000 and had not had her capacity restored since then. Trial court therefore concluded that wife remained incapacitated and thus could not have legally entered into a fee agreement with attorney. The court also found that attorney had knowledge of wife's incapacity due to his past representation of her father in both the guardianship proceeding and the divorce. Accordingly, trial court dismissed wife's suit and imposed sanctions against attorney for knowingly filing a suit without authority to do so. Additionally, trial court ordered attorney to pay husband's attorney's fees for initiating the action. Attorney appealed, arguing that trial court abused its discretion in awarding sanctions because wife had the capacity to hire him.

Holding: Reversed

Opinion: To appoint a guardian, Texas Probate Code (TPC) 684(b)(4) requires the court to find, by a preponderance of the evidence, either that (1) the proposed ward is totally without capacity to care for himself and manage his property, or (2) the proposed ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself and manage his property. The former finding, under TPC 693(a)-(b), supports a "full-authority" guardianship, and the latter a "limited" guardianship. Under TPC 693(a), a full-authority guardianship is a broad, general grant of powers and rights to the guardian "with full authority over the incapacitated person except as provided by law." To create a full-authority guardianship, TPC 693(a)(2) requires that the court's order must specifically state "that the guardian has full authority over the incapacitated person." Under 693(b), on the other hand, a limited guardianship is created when the court grants only specific, limited powers to the guardian. To create a limited guardianship, TPC 693(b)(2) requires the court to specify in its order "the specific powers, limitations, or duties of the guardian with respect to the care of the person or the management of the person's property by the guardian." Importantly, under TPC 675, an incapacitated person retains all legal and civil rights and powers not specifically granted to the guardian.

Here, trial court found that wife lacked the capacity to do some, but not all, of the tasks necessary to care for herself or to manage her property, a finding that would support a limited guardianship. Trial court's order did not list "the specific powers, limitations, or duties of the guardian with respect to the care of the person or the management of the person's property by the guardian" required to create a limited guardianship. Nor did

it state "that the guardian has full authority over the incapacitated person," which arguably could have created a full-authority guardianship even in the face of a finding that her incapacity was not total. Trial court's order, however, was silent as to which, if any, powers were being granted to wife's guardian.

Because the trial court's order did not define the scope, either full or limited, of the guardian's powers and did not specify the powers granted, as required by the TPC, TPC 675's presumption that a ward retains all powers not specifically granted to her guardian fills the void. In light of that presumption, and because the trial court's order was not effective to vest any power in wife's guardian, wife retained capacity to hire attorney to file suit on her behalf.

Husband argued that because trial court previously deemed wife to be incapacitated and no court subsequently found that she had regained her capacity, the presumption of incapacity remains in effect. Operating under that presumption, husband argues, trial court did not err in imposing sanctions against attorney. However, TPC 601(14)(b) plainly states that a finding of incapacity may be based on an inability to manage one's food, clothing, shelter, health, or finances, or-importantly-an inability to do one, some, or any combination of those things. It does not follow, therefore, that a general finding that wife was an incapacitated person, without more, means that she specifically lacked the capacity to hire counsel and prosecute a lawsuit. Accordingly, because wife retained capacity to hire attorney, trial court abused its discretion in finding wife lacked capacity to hire an attorney and in imposing sanctions against attorney.

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(1) MANDAMUS RELIEF NOT WARRANTED FOR PROTECTIVE ORDER GRANTED MORE THAN 14 DAYS AFTER APPLICATION; (2) WRIT OF PROHIBITION NOT APPROPRIATE TO PROHIBIT TEMPORARY ORDERS THAT DO NOT INTERFERE WITH APPELLATE JURSIDICTION; (3) WRIT OF INJUNCTION NOT AN APPROPRIATE REMEDY TO PREVENT ACTION THAT WAS NOT IMPLICATED IN THE PENDING APPEAL

¶10-4-68. ***In re Barbee,*** 2010 WL 3341518 (Tex. App.—Tyler 2010, orig. proceeding) (mem. op.) (08/25/10).

Facts: Husband is incapacitated. Wife was guardian of husband's person and estate during marriage. Wife filed for divorce in July of 2008. Three months later, wife filed for a protective order, alleging family violence. The trial court entered an ex parte protective order and appointed husband's son as husband's guardian. Six months later, the trial court signed a final divorce decree and a separate final protective order. Son appealed both the decree and the final protective order. Wife filed a motion for temporary orders pending appeal. Son filed a petition requesting (1) a writ of mandamus directing the trial court to vacate the protective order, (2) a writ of prohibition preventing the trial court from proceeding on wife's motion for temporary orders pending appeal, and (3) a writ of injunction both enjoining wife from spending funds released to her from her attorney's trust account and requiring her to deposit those funds into the appellate court's registry.

Holding: Mandamus denied.

Opinion: Mandamus relief is not warranted because the protective order is not void. Section 84.002 requires the court to set a date and time for hearing a protective order within 14 days of application. Here, six months transpired between the application and the order. Son's argument rests on the premise that the court's jurisdiction expired when the court did not hear the protective order within 14 days. However, son did not cite any authority for the proposition that the court lost its jurisdiction when the 14 days elapsed. The Court of Appeals noted that not all time limitations imposed on judicial action are jurisdictional, and consequently, denied son's mandamus relief.

The Court of Appeals denied son's writ of prohibition because proceeding on wife's motion for temporary orders pending appeal would not interfere with the Court of Appeals' jurisdiction. A writ of prohibition will issue to prevent a lower court from interfering with a higher court in deciding a pending appeal. A trial

court may render temporary orders necessary for the preservation of property and for the protection of the parties during appeal so long as those orders do not interfere with appellate jurisdiction. Here, the temporary orders were valid because they did not interfere with appellate jurisdiction.

The Court of Appeals denied son's writ of injunction because son did not raise the issue in his appeal. Furthermore, son did not present any evidence that wife would dissipate the cash. The court does not have jurisdiction to issue a writ of injunction merely to preserve the status quo or prevent loss or damage to one of the parties during the appeal. The court's authority to issue a writ of injunction is limited to enforcing its jurisdiction or preserving the subject matter of the pending appeal. Because son did not raise the issue in his appeal, the trust account money could not be considered the subject matter of the pending appeal.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SETTING BOND TO SUSPEND ENFORCEMENT OF DIVORCE DECREE AT $220,000 WHEN THE VALUE OF PROPERTY AWARDED TO SPOUSE IN THE DECREE WAS MORE THAN $220,000.

¶10-4-69. ***Griffith v. Griffith,*** 2010 WL 3332139 (Tex. App.—San Antonio 2010, no pet. h.) (mem. op.) (8/25/10).

Facts: Husband and wife divorced in 2009. Part of their marital estate included two closely held businesses. The divorce decree divided the parties' interests in the businesses and gave husband an option to purchase wife's interest for $220,000. Two-and-a-half months later, the trial court signed temporary orders requiring husband to return personal property valued between $15,000 and $17,500 to wife in accordance with the decree. Wife filed a motion to enforce the decree and temporary orders. Husband requested the trial court set bond to suspend enforcement of the decree. At hearing, husband filed an affidavit alleging that he had a negative net worth. Husband did not offer any evidence to support his affidavit and wife contested the affidavit. Wife asked the trial court to set bond at $220,000, the value of her interest in the businesses, plus the value of the property mentioned in the temporary orders. The trial court set the bond amount at $220,000 and denied husband's motion to supersede the temporary orders. Husband filed an interlocutory appeal requesting that the bond amount be reduced to $5,000. Husband also requested that the appellate court set bond for suspension of the temporary orders.

Holding: Affirmed.

Opinion: When judgment is for recovery of an interest in property, the trial court determines the amount of security with reference to the value of the property. The trial court did not abuse its discretion here because bond was set at an amount less than the value of property awarded to wife in the decree.

Further, husband did not properly pursue bond reduction in the manner required by Texas Rule of Appellate Procedure 24.2(b). Husband made no effort to prove the contents of his contested affidavit. Husband did not plead or attempt to prove that posting $220,000 bond would cause him substantial economic harm.

The Court of Appeals set bond for the temporary orders on the same conditions as the divorce degree. If father posts $220,000, enforcement of both the divorce decree and the temporary orders will be suspended.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING SUMMARY JUDGMENT IN APPELLEE AMICUS ATTORNEY'S FAVOR BECAUSE SHE HAD STATUTORY IMMUNITY FROM FATHER'S FRAUD AND GROSS NEGLIGENCE CLAIMS.

¶10-4-70. ***Zeifman v. Nowlin,*** -- S.W.3d --, 2010 WL 3370522 (Tex. App.—Austin 2010, no pet. h.) (8/27/10).

Facts: Father and mother divorced in 1998. In 2005, mother filed a petition to modify parent-child relationship, raising issues as to who would act as their son's guardian and what school he would attend. Trial court appointed appellee to act as an amicus attorney for father's child in these proceedings. The parties ultimately reached an agreed settlement over the motion to modify. Afterward, father filed this action against appellee, alleging causes of action for fraud and "gross negligence" and complaining of appellee's performance of her duties as amicus attorney. Appellee filed a motion for summary judgment on father's claims of fraud and gross negligence and a motion for sanctions. Trial court granted appellee's motion for summary judgment and ordered father to pay sanctions. Father appealed.

Holding: Affirmed

Opinion: Father argued that trial court erred by granting summary judgment in appellee's favor on his fraud claim. TFC 107.009(a) provides that "a guardian ad litem, an attorney ad litem, or an amicus attorney appointed under this chapter is not liable for civil damages arising from an action taken, a recommendation made, or an opinion given in the capacity of guardian ad litem, attorney ad litem, or amicus attorney." TFC 107.009(b) provides for certain exceptions to this immunity. Under 107.009(b), "[t]he statutory immunity does not apply to an action taken, recommendation made, or opinion given (1) with conscious indifference or reckless disregard to the safety of another; (2) in bad faith or with malice; or (3) that is grossly negligent or willfully wrongful. There is no exception to this statutory immunity for a claim that the amicus attorney committed fraud with respect to one of the parents of a child the attorney is assisting.

Here, the summary judgment evidence conclusively proves trial court appointed appellee to serve as an amicus attorney in the underlying suit. All of the allegations supporting father's causes of action pertain to appellee's performance of her duties as amicus attorney and actions taken in that capacity. Appellee demonstrated that father's claims for damages in this lawsuit derive from and challenge the service she provided as amicus attorney, a fact that is not disputed-and, therefore, conclusively established that she was entitled to immunity for any claim not covered by an exception. The immunity statute recognizes no exception for allegations of fraud as to the parents. Accordingly, trial court properly granted summary judgment on father's fraud claim.

Moreover, even if father's fraud claim could be construed to allege a cause of action for conduct that could fit within an exception to immunity, summary judgment is still proper. Once appellee conclusively established as an affirmative defense that she was entitled to the statutory immunity afforded an amicus attorney, the burden of production shifted to father to present evidence sufficient to create a fact issue on at least one element of either the affirmative defense or an exception to the affirmative defense. Father did not produce or file any summary judgment evidence at all in response to appellee's motion, relying instead solely on the allegations contained in his pleading. It is well-settled that pleadings are not competent summary judgment evidence.

Father argued that trial court erred by granting judgment in appellee's favor on his "gross negligence" claim. TFC 107.001(1) defines an "amicus attorney" as "an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child." The amicus attorney is appointed to assist the court, not to represent the child or either of the parents. Therefore, it is the trial court, not the parties, to whom the amicus attorney is responsible for the limited purposes delineated in the statute. The amicus attorney owes a duty of competent representation to the trial court, not to the parents. This court

holds that an amicus attorney appointed by the court in a suit affecting the parent-child relationship has no duty of care to either parent. Accordingly, trial court properly granted appellee's motion for summary judgment on father's "gross negligence" claim.

Concurrence: An amicus attorney's role in a family law case is "to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child. The policy underlying immunity for amicus attorneys in family law cases is to prevent the harassment and intimidation that might otherwise result if disgruntled litigants could vent their anger by suing either the person who presented the decision maker with adverse information, or the person or persons who rendered an adverse opinion.

Here, after bringing this suit, father filed a motion to modify a prior order in the underlying SAPCR; appellee refrained from acting as the amicus attorney going forward. In its order sanctioning father, trial court found that "the filing of Plaintiff's Original Petition in this matter was intended to and actually did cause appellee to refrain from acting as amicus attorney in future proceedings in the underlying SAPCR. Trial court concluded that father's pleadings and conduct effectively caused appellee to refrain from acting as amicus attorney in not only in the underlying SAPCR, but also to refrain to act as amicus attorney in other cases because of the threat of suit. At the hearing on the motion for sanctions, appellee testified that she no longer takes amicus attorney appointments at all because "I am just going to be a target." Because of this suit, the availability of a qualified amicus attorneys in the underlying SAPCR, as well as other family law cases, may have been affected.

TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING MOTHER'S FACT WITNESSES WHEN MOTHER DISCLOSED THE IDENTITY OF HER FACT WITNESSES UNDER TRCP 194.3(E).

¶10-4-71. ***Van Heerden v. Van Heerden***, -- S.W.3d --, 2010 WL 3406631 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (8/31/10).

Facts: Mother and father met in 1986 and were married on March 24, 1990. During the nineteen-year marriage, the couple had three children. In 2008, mother filed for divorce. During divorce proceedings, trial court determined mother failed to sufficiently responded to husband's request for disclosure relating to her three fact witnesses (her father and two sisters), under the requirements of TRCP 194.2(e). As a discovery sanction, trial court excluded mother's fact witnesses. After a three-day bench trial, trial court rendered a judgment dissolving the couple's marriage, and named father as the primary joint managing conservator of the children.

Holding: Reversed in part and remanded in part.

Opinion: Mother argued trial court erred in striking the testimony of her three fact witnesses on the basis that her disclosure responses did not conform with TRCP 194.2(e). TRCP 192.4 provides that during written discovery, a party may request disclosure of the name, address, and telephone number of persons having knowledge of relevant facts, and *a brief statement of each identified person's connection with the case.* TRCP 193.1 requires a party to make a complete response when responding to written discovery. TRCP 193.5(a) requires a party to amend or supplement the response if the party later learns that its response is incomplete and no longer correct. A party who fails to disclose information concerning a nonparty witness in response to a discovery request may not offer that witness's testimony unless the court finds there was good cause for the failure or the failure did not unfairly surprise or unfairly prejudice the other parties.

It is not clear what information is needed to satisfy TRCP 194.2(e)'s requirement of a "brief statement of each identified person's connection with the case." The comment to TRCP 192.3(c), which discusses the scope of discovery in relation to "persons with knowledge of relevant facts," states the "provision does not contemplate a narrative statement of the facts the person knows, but at most a few words describing the per-

son's identity as relevant to the lawsuit." The comment then provides examples such as "treating physician," "chief financial officer," "director," and "plaintiff's mother and eyewitness to accident." Additionally, courts have held that "social worker" and "eyewitness" are sufficient to describe a person's connection to a case.

Under TRCP 194.2(e), the only requirement beyond a person's name, address, and telephone number, is a brief statement describing that person's connection with the case. Trial court's interpretation of the requirements of TRCP 192.3(e) is unnecessarily onerous. Based on the facts of this case, the relationship of the parties, and the nature of the trial, mother's disclosure responses of "Petitioner's father" and "Petitioner's sister" adequately identify those witnesses' connection to the case or identity as relevant to the lawsuit.

To demonstrate that a trial court has abused its discretion, an appellant must not only show the court erred in excluding the evidence, but must also show that the excluded evidence was controlling on a material issue dispositive of the case and that the evidence was not cumulative. Although Texas courts often correctly exclude evidence because it is cumulative, the fact that another witness may have given substantially the same testimony is not the decisive factor. Rather, the proper consideration is whether the stricken testimony would have added substantial weight to the case. Here, to defend her parental rights, mother may require several witnesses addressing the same material issue because the testimony may come from witnesses with different vantage points. Because mother's three fact witnesses based their testimony on their own peculiar observations, their testimony was unique and not cumulative. After reviewing the stricken testimony, we conclude that the testimony of Ann's fact witnesses is material to the conservatorship issues such as the welfare of the children; the duty to support them; the duty of care, control, protection, and reasonable discipline of the children; and the duty to provide for them.

Finally, to show a trial court abused its discretion an appellant must demonstrate the error probably caused rendition of an improper judgment in the case. Mother contends that the sanction the trial court imposed was "in essence a death-penalty sanction against her," and the sanction precluded the introduction of evidence and right to adjudicate her claim. A trial court has discretion in sanctioning a party. A sanction that adjudicates a claim and precludes the presentation of the merits of the case constitutes a death-penalty sanction. The refusal to permit a parent to call any fact witnesses in a termination proceeding eviscerates that parent's ability to present the merits of his or her defense. The exclusion of witnesses is properly characterized as a death-penalty sanction when it means that a parent has no testimony, other than the witness's own, to defend his or her parental rights.

The Texas Supreme Court has set out limitation on a trial court's ability to impose sanctions for discovery abuses. *See* *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex.1991). The test requires a reviewing court to consider (1) whether a direct relationship exists between the offensive conduct and the sanctions imposed, and (2) whether the sanctions are excessive. Here, in applying the first part of the two-part test, this court must consider whether the sanctions imposed were directly related to the party's abusive conduct. However, because we concluded above that mother's disclosure responses were sufficient, there was no abusive conduct to punish. In the absence of sanctionable conduct, sanctions are unwarranted. Thus, trial court's sanctions do not pass the first part of *TransAmerican's* two-part test.

Furthermore, this court and other courts have long recognized the best interest of the child may be a factor influencing a trial court's decision on procedural issues. A decision on custody, possession, or access can rarely be well-informed without consideration of the evidence and perspectives of both parties. Because the exclusion of any important evidence as a discovery sanction can only produce a less-informed decision, contrary to the best interest of the child, we believe that it should be resorted to only where lesser sanctions are either impracticable or have been attempted and proven unsuccessful.

Here, trial court erred in striking the testimony of mother's fact witnesses because her disclosure responses were sufficient under TRCP 194.2(e). The trial court, therefore, should not have imposed sanctions, especially sanctions that foreclosed mother's opportunity to present the merits of her case. The harm these sanctions caused is apparent. By barring mother from presenting any evidence at trial, other than her own

testimony, the trial court stifled her ability to present the merits of her case. Accordingly, trial court abused its discretion in striking the testimony of mother's fact witnesses, improperly imposing a death-penalty sanction, and unjustifiably prohibiting mother from presenting a defense.

Editor's Comment: *An example of how important it is to do your offers of proof to make sure the stricken testimony or excluded evidence is in the record for the appellate court's review. (R.T.)*